

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO. 18 OF 2015

State of Goa,
through Ponda Police Station,
Ponda, Goa.

..... Appellant.

Versus

1. Ramakant Fadte,
major of age, son of Shankar Fadte,
age 40 years, Indian National,
r/o. H.No.137,
Deulwada, Volvoi, Ponda, Goa.

2. Nitin Fadte,
major of age, son of Shankar Fadte,
age 33 years, Indian National,
r/o. H.No.137,
Deulwada, Volvoi, Ponda, Goa.

3. Mahadev Fadte,
major of age, son of Shankar Fadte,
age 29 years, Indian National,
r/o. H.No.137,
Deulwada, Volvoi, Ponda, Goa.

4. Sadhana Fadte,
major of age, daughter of Shankar Fadte,
age 25 years, Indian National,
r/o. H.No.137,
Deulwada, Volvoi, Ponda, Goa.

5. Manikbai @ Mali Fadte,
major of age, wife of Shankar Fadte,
age 65 years, Indian National,
r/o. H.No.137,
Deulwada, Volvoi, Ponda, Goa. Respondents.

Mr. Mahesh Amonkar, Additional Public Prosecutor for the
Appellant-State.

Mr. Menino Teles with Mr. K. Govekar, Advocate for Respondents
Nos. 1 to 5.

***Coram : N.M. Jamdar &
Prithviraj K. Chavan, JJ.***

Date : 12 April 2018.

ORAL JUDGMENT : (Per N.M. Jamdar, J.)

By this Criminal Appeal, the State is challenging the
Judgment and Order passed by the learned Sessions Judge, North,
Panaji dated 1 December 2014 in Sessions Case No.16/2007,
acquitting the Respondents-Accused from the offences under Sections
143, 147, 148, 324, 302, read with Section 149 of the Indian Penal
Code.

2. It is the case of the Prosecution that on 10 June 2007, at
around 23.45 hours, the Respondents-Accused formed an unlawful
assembly, armed themselves with deadly weapons such as iron rods,

glass bottles, with a common object of assaulting the complainant and during the assault on the complainant and his brothers, they also assaulted the father of the complainant Chandrakant Tari who received a blow on his head with the iron rod and he succumbed to these head injuries. Accordingly, the Charge-sheet was filed against the Respondents No.1 to 5. Charge was framed on 11 December 2007 and the case was tried. The Prosecution examined, in all 31 witnesses.

3. PW.1 Audumbar Sawant was examined as Pancha witness for the inquest panchanama which took place on 11 June 2007 in respect of the dead body of Chandrakant Tari. The Panchanama was exhibited at Exhibit 11. Dr. Sanjay Korgaonkar attached to Goa Medical College was examined as PW.2, since he had conducted the blood group tests of Accused No.1. The tests results were marked at Exhibits 14 and 15. Mohammad Sayyad was examined as PW.3, who acted as a Panch on 13 June 2007 at the time of arrest panchanama which was exhibited at Exhibit 17. Dr. Indrani Pal was examined as PW.4 in respect of Blood Group of Accused Nos. 2, 4 and 5 and the Blood Group Certificates were produced at Exhibits 20 to 29. PW.5 Venkatesh Naik was examined as Panch witness in respect of Arrest Panchanama of Accused No.4 which was marked at Exhibit 21. PW.6 Vinayak Vengurlekar was

the Sarpanch of the Village Panchayat Volvoi was examined and he has deposed that on 10 June 2007 at around 2 p.m. the Complainant came to his residence and he went to the residence of the Complainant in respect of certain grievances made by the Complainant regarding a dispute over a well. PW.7 Dr. E.J. Rodrigues was examined as he had collected scalp hair and nail clippings of accused Nos. 2 and 3 which were forwarded to the Laboratory at Hyderabad and the documents were produced at Exhibits 39 to 43. PW.8 Dr. Sidharth Banaulikar was also examined in respect of nail clippings and scalp hair and the reports were exhibited at Exhibit 45. PW. 9 Vijay Matkar was examined as another Pancha witness. PW.10 Saiesh Prabhu was examined since he took photographs of the scene of offence. PW.11 prepared the sketch of offence. PW.12, a Police Constable deposed that he received a telephonic call from one Ashok Fadte and he visited the spot upon receiving the information.

4. PW.13 Viraj Tari was examined and he deposed that he was neighbour of the Complainant and the Accused and on 10 June 2007 at around 11.45 p.m. he heard a commotion and he came out and saw Accused No.2 throwing empty glass bottles towards the family of the Complainant and also saw that Tukaram Tari trying to rescue Chandrakant Tari and his family members. PW.14 Vishal

Tari, another neighbour of the Complainant and the Accused who was working as a Police Constable was examined. He deposed that he also saw Accused No.4 Sadhana giving bad words to Chandrakant Tari some time around 4.15 p.m. and thereafter, at midnight he received a phone call from his brother that Chandrakant Tari was seriously injured due to assault by the Accused. He entered the same information in the diary, which was produced at Exhibit 63. Tukaram Tari was examined as PW.15 as he was stated to be a witness and resident of the Village Volvoi and he deposed that he had gone to the Village in his friend's car and that when he had gone to the Village and the Temple nearby on a casual visit, he heard a commotion and witnessed the incident that took place. PW.16 was examined since he acted as a Panch witness. PW.16, 17, 18 and 19 were examined as Panch witnesses. PW.19 acted as a Panch for the scene of offence panchanama drawn on 11 June 2007. PW.20 Vithal Naik acted as a Panch witness for the recovery panchanama Exhibit 100. PW.21 Dipu Naik was examined as Panch witness for the recovery panchanama for the clothes of the Accused. PW.22 Nandkumar Tari, and PW.24 Nilesh Tari, according to the Prosecution were witnesses who had sustained injuries at the hands of the Accused. They gave their version as to how the assault took place. PW.25 Dr. Rajendra Borkar was examined since he conducted medical examination of PW.22, 23 and 24 and the Certificates given

by him were exhibited. Ramesh Shet PW.26 was examined since he had brought the injured persons to the hospital and forwarded a letter to the Medical Officer. PW.27 conducted the Post-mortem in respect of the dead body of Chandrakant Tari and his report was exhibited at Exhibit 124. The Prosecution also examined Dr. Vishwanth Madkaikar PW. 28 who had examined Ratnakar Tari and other injured witness. The Investigating Officer PW.29 Manoj Mardolkar was examined, so also PW.30 and PW.31 who took part in the investigation.

5. The statements of the Respondents-Accused under Section 313 of the Code of Criminal Procedure were recorded. Their defence was that they were assaulted by PW.22, PW.23 and PW.24 and their family members. It was their case that Ratnakar PW.22 assaulted Accused No.4 with an iron rod. Ratnakar also assaulted Accused No.1 on his face, knee and hand due to which he sustained bleeding injuries. They stated that when Ratnakar was trying to hit Accused No.1, he moved on the side and the rod hit the father of Ratnakar i.e. Chandrakant. In the statements under Section 313 Cr.P.C., the Accused stated that the dispute had arisen in respect of sharing of well water and it was the PWs.22, 23 and 24 that assaulted the Accused persons. The Respondents-Accused examined three witnesses. Accused No.1 stepped in the witness-box

and examined himself as DW.1 and Accused No.4 Sadhana also examined as DW.2. DW.3 Dr. Dilip Kerkar who was working as Medical Officer, had examined Accused No.4 Sadhana and also Accused No.1 Ramakant in respect of the injuries suffered.

6. The learned Sessions Judge, in the light of the evidence adduced by the Prosecution and the defence witnesses, considered whether the Prosecution proved that Accused Nos.1 to 5 formed an unlawful assembly, armed with deadly weapons with an object to assault the Complainant and his family members. The learned Sessions Judge also considered whether the Accused Nos. 1 to 5, with common object to assault the Complainant and his family members, committed murder of Chandrakant Tari by assaulting him on his head with iron rod. The learned Sessions Judge, after examining the evidence on record, found that the two incidents took place on 10 June 2007, one of which took place in the afternoon and another at night. The learned Sessions Judge found that the location of well in front of the hut of the Accused was in the version of both, Prosecution and the defence and that the Sarpanch had visited the spot in respect of some incident in the afternoon, was also in the common version. The learned Sessions Judge, after detailed analysis of the evidence on record, came to the conclusion that the evidence of the eye witnesses, the injured eye witness i.e. PWs.22, 23 and 24,

was not reliable and there was a free-fight at that time and the witnesses examined as eye witnesses could not be believed as their version was not corroborated. The blood found on the staircase in the premises of the Accused, was contrary to the version of the Prosecution. The recovery of iron pipe and not an iron rod could not be said as a recovery under Section 27 of the Indian Evidence Act. The learned Sessions Judge concluded that the injuries on the Accused were not explained. There was admittedly an enmity between the parties. Thus, the version of the defence that in the free-fight the blow intended for the Accused hit Chandrakant Tari was probable and thus, proceeded to grant the benefit of doubt to the Respondent-Accused.

7. With the assistance of Mr. Mahesh Amonkar, learned Additional Public Prosecutor and Mr. M. Teles, learned Counsel for the Respondents-Accused, we have gone through the evidence of the witnesses and the depositions of both, Prosecution and the defence witnesses. We have gone through the Panchanamas and other documentary material on record. Oral arguments were advanced by the learned Counsel.

8. The scope of the Appellate Court, while dealing with the appeals against acquittal, is settled. Though there is no embargo on

the Appellate Court to reverse the decision based on the evidence upon which the acquittal is based, generally the order of acquittal based on presumption of innocence of the accused, is further strengthened by acquittal. The Appellate Court, while considering an appeal against acquittal, has to consider whether there are compelling and substantial reasons for reversing the order or acquittal. The Appellate Court can reverse the order of acquittal if the view taken by the Court is palpably erroneous and it could not have been taken by the Court of competent jurisdiction and is taken against well settled canon of criminal jurisprudence. Merely because the Appellate Court, on re-appreciation and re-evaluation of the evidence, is inclined to take a different view, interference with the Judgment of acquittal is not justified. If the view taken by the Trial Court is a possible view, even if two views are equally balanced, it need not result in interference by the Appellate Court in the Judgment of the Trial Court of acquittal. The Appellate Court will have to see whether there is perversity in the decision, if the conclusions are contrary to the evidence on record, or the Court's entire approach is patently illegal or it is based on erroneous understanding. If the order of acquittal is to be reversed, the Appellate Court must examine and discuss the grounds given by the Trial Court to acquit the accused and must give cogent reasons to overturn the findings. Thus, while considering the order against

acquittal, generally the Appellate Court should not interfere where view taken by the Trial Court is not unreasonable or perverse. With this legal position in mind, we have to consider whether the view taken by the Trial Court is a possible view, or it is perverse, so as to warrant interference in the impugned Judgment and order.

9. The case of the Prosecution primarily rests on two counts. Firstly, the ocular evidence of the witnesses and secondly, recovery under Section 27 of the India Evidence Act. According to the Prosecution, PWs. 22, 23 and 24 were injured eye witnesses. PWs.13, 14 and 15 were independent eye witnesses. The iron rod, which was used in the assault, was stated to be recovered and the recovery being under Section 27 of the Evidence Act, it is one of the incriminating circumstances against the Accused. The learned Trial Court has not believed the depositions of the witnesses and has also found that the recovery of the iron rod cannot be a so called recovery and cannot be held as an incriminating circumstance. The learned Trial Judge has accepted the evidence led by the Accused-defence.

10. Therefore, we will firstly examine whether the view taken by the learned Trial Judge in respect of the evidence of the witnesses, as adduced by the Prosecution, can be termed as perverse. Secondly, we will consider whether the Recovery can be considered as

incriminating evidence and whether the finding of the Trial Judge, on this count, is perverse. Thirdly, whether the learned Trial Judge was right in placing reliance on the evidence of the defence witnesses

11. It is the contention of Mr. Amonkar, learned Additional Public Prosecutor that while rejecting the evidence of the injured witnesses, the learned Trial Judge has overlooked various facets and consistent version of these witnesses has been discarded for no reason. His second argument is that PWs. 13, 14 and 15 were independent witnesses and without impeaching their credibility, the learned Trial Judge has simply discarded their evidence which is perverse view to be taken. Mr. Teles, learned Counsel appearing for the Respondent-Accused submitted that the learned Trial Judge has noticed serious flaws, contradictions and lacunae in the depositions of the witnesses.

12. As stated earlier, as per the Prosecution case and the defence version, there were two incidents that took place on 10 June 2007, one during afternoon and another during night. The learned Trial Judge, after considering the evidence of the Prosecution witnesses and the defence version, has observed that though there was contrary version regarding use of water well and washing clothes in the afternoon of 10 June 2007, the fact that there was an incident during the afternoon, was established. This finding is in consonance

with the record. As per both, the Prosecution as well as defence version, there was an incident relatable to the dispute between the accused and the Complainant and his family, has also been rightly held to be established by the learned Trial Judge. Therefore, the second incident which took place in the night was the main one to be considered.

13. The complaint lodged by PW.22 Ratnakar. According to him, some incident took place in the afternoon on 10 June 2007 when Accused No.4 Sadhana Fadte was washing clothes and she was keeping the same on the edge of the well. This led to a quarrel and the Complainant PW.22 called the Sarpanch and when the Sarpanch came, he did not see the clothes and he went back. As per the deposition of the Complainant PW.22, it was Accused No.4 – Sadhana Fadte who used abusive words. Nandkumar Tari PW.23 added that at around 1.30 p.m. he saw Accused No.4 and Accused No.5 near the well, abusing his father. He stated that his brother PW.22 went to the well at 2.00 p.m.. He saw Accused Nos.4 and 5 had kept clothes. PW.24 Nilesh Tari did not depose about the incident that took place in the afternoon time. The statement of PW.22 regarding presence of Accused No.4 is sought to be improvised by adding the presence of Accused Nos. 4 and 5. PW.22 Ratnakar never deposed that PW.23 Nandkumar was with him near

the well. PW.24 Nilesh did not disclose about the incident. The Sarpanch who was examined as PW.6 stated that he found no clothes. Therefore, there was variance on material particulars in the deposition of PW.22, PW.23 and PW.24 as regards the incident in the afternoon. The defence witness DW.1 stated that Accused Nos. 4 and 5 went to wash clothes, but since it was raining they had left the clothes near the well. It was their version that PW.22 Ratnakar and Chandrakant who were present abused them. PW.22 Ratnakar abused them and also slapped Accused No.4 and threatened that they will teach a lesson to Accused No.4. According to DW.2 Sadhana i.e. Accused No.4, PW.22 Ratnakar abused her and slapped her face. The conclusion of the learned Trial Judge that there was an incident in the afternoon when Accused No.4 was washing clothes near the well, is based on evidence.

14. As regards the main incident that took place in the night, it is the case of the Prosecution, as put forth by PW.22, the Complainant Ratnakar left for Mapusa at around 3.00p.m and returned home at around 10.30 p.m. He again left from his house to visit his friend at Volvoi and returned back at 11.45 p.m. When he was about to park his scooter, accused no.1 Ramakant started giving him abuses in filthy words and therefore he parked the scooter and

went to ask accused no.1 as to why he was giving abuses to him. At that time accused no.1 Ramakant was standing in his courtyard.

15. PW22 Ratnakar then deposed that accused no.1 Ramakant attacked him by catching hold of him and he started trying to relieve himself. At the same time accused No.4 Sadhana came with an iron rod in her hand and she assaulted him on his left forearm. Due to the assault he shouted for help saying “Vachaya re, vachaya” (save me). On hearing this, his father Chandrakant Tari came to the rescue. The accused No.3 Mahadev came running, snatched the iron rod from the hands of Accused No.4 Sadhana and hit on the head of Chandrakant as a result, blood started oozing out. PW22 Ratnakar then claimed that accused No.2 Nitin and accused No.5 Manikbai started throwing empty glass bottles on them. He along with his father Chandrakant were shouting for help. Then his brother Nandkumar and Nilesh came to their rescue. At the same time accused No.5 Manikbai and accused No.2 Nitin kept throwing empty glass bottles on them. He then deposed that the empty glass bottles hit him and his brothers, as well as his father Chandrakant and they sustained injuries on their head and other parts of the body. He then deposed that thereafter villagers i.e. Viraj Tari and Tukaram Tari arrived at the scene and rescued them from the accused persons and took them to their house. He then deposed that though the

incident took place at night, street lights on the road were on and the light in the verandah in the house of accused was also on. He further deposed that when they were rescued and were being brought to their house, the Accused were still throwing glass bottles on them and said glass bottles even reached near their house. After some time, police jeep came and took them to the Health Centre at Ponda where they were given first aid, including stitches and thereafter taken to GMC. However his father Chandrakant succumbed to the injuries at GMC. He then deposed that he lodged a Complaint on 11 June 2007 at Ponda Police Station against the accused persons which is at Exhibit 111. He further deposed that the police conducted Scene of Offence Panchanama on 11 June 2007 and he showed the scene to the police including the well and the other articles found at the scene.

16. Nandakumar Tari PW.23, another brother of the Complainant Ratnakar put forward his version of the incident that took place in the night. He stated that the Complainant Ratnakar is his elder brother and all of them are residing at Volvoi and accused are their neighbours. He deposed that on 10 June 2017, during morning hours, he left his house to come to Panaji and returned back at noon time at around 12.45 p.m.. He then deposed that at around 1.30 p.m., when he was at his residence, he heard accused no.4 and accused No.5, who were standing near the well, abusing his father.

At that time he went near the well and questioned accused no.4 and 5 as to why they were abusing Chandrakant. However his mother called him back. He then deposed that at around 2.00 p.m his brother Ratnakar PW22 went near the well on hearing the sound of washing clothes and he followed Ratnakar and they saw accused Nos.4 and 5 near the well who had kept washed clothes on the well. His brother Ratnakar requested accused No.4 Sadhana not to keep washed clothes on the well as they were using the well water for drinking purpose. However accused No.4 Sadhana started abusing his brother Ratnakar in filthy language and then she threw the washed clothes into the well. Thereafter his brother Ratnakar went to call the Sarpanch, however in the meantime accused Nos.4 and 5 removed the clothes from the well. After half an hour, his brother Ratnakar came with the Sarpanch and they inspected the well and the Sarpanch went away without saying anything.

17. PW23 Nandkumar then deposed that at about 11.15 p.m he alongwith Tukaram went near the Gajant Laxmi Temple and returned back after half an hour and at that time he saw his brother Nilesh running towards the house of accused No.1. He also heard the abuses given by accused No.1 Ramakant and his family members and also the sound of breaking of bottles. He also heard his brother Ratnakar saying “vachaya re vachaya re” (save us) and therefore he

went near the house of accused and saw accused No. 3 Mahadev having an iron rod in his hand and he assaulting his father Chandrakant on his head with the said iron rod, due to which blood started oozing out. He also saw accused No. 4 Sadhana lifted a broken bottled from the ground and was about to assault his father Chandrakant. On seeing this, he pushed accused No. 4 Sadhana in order to save his father due to which she fell on the ground. He then deposed that at that time, his father Chandrakant and brother Ratnakar started crying by saying “mele re mele re”. He also saw accused No. 2 Nitin and accused No. 5 Manikbai who were continuously throwing empty soda bottles towards them, and some bottles hit them and some bottles hit accused No. 4 Sadhana and accused no.1 Ramakant causing injuries to them. He then deposed that thereafter Tukaram and Viraj came over there and rescued them and they were taken to their house. He further deposed that his father Chandrakant and brother Ratnakar sustained injuries on their head and other parts of body due to assault by the accused, whereas he and Nilesh also sustained injuries. He deposed that he sustained injury on left eye, left elbow on account of the assault.

18. The third brother, PW.24 Nilesh Tari also stated about the incident. He stated that on 10.6.2007 he left his residence at 10.00 a.m. to go to Mapusa and returned at 6.45 p.m.. at around

11.30, he was having dinner at his residence when he heard Ramakant accused No. 1 and his family members abusing them. After about 10 minutes he heard cries of his brother Ratnakar Tari saying “vachaya re vachaya re”. On hearing the said sound of Ratnakar, his father Chandrakant went out of the house and at that time he heard the sound of breaking bottles and therefore he immediately rushed to the house of accused. On reaching there, he saw his brother Ratnakar lying on the road in front of the house of accused and accused No. 1 Ramakant assaulting his brother with fist blows and accused No. 4 Sadhana with an iron rod. Accused no. 5 Manikbai and accused No. 2 Nitin were throwing empty bottles on his brother Ratnakar and father Chandrakant from the verandah of their house. One such empty bottle hit him and he fell on the ground. While he was about to stand, accused No. 3 Mahadev came running and snatched iron rod from the hands of accused No. 4 Sadhana and hit the iron rod on the head of his father Chandrakant due to which blood started coming out. He then deposed that accused No. 5 Manikbai and accused No. 2 Nitin were continuously throwing empty bottles on them from the verandah and such bottles hit him, his father Chandrakant, his brother Ratnakar and also on the person of accused No. 1 Ramakant and accused no. 4 Sadhana. At the same time Nandkumar came running and at that time accused No. 4 Sadhana was about to assault his father Chandrakant with a

broken empty bottle. However Nandkumar pushed accused No. 4 Sadhana and she fell on the ground. His father Chandrakant and brother Ratnakar were crying and saying “mele re mele re” and they were requesting the accused not to assault. Tukaram and Viraj came to the spot, however they got frightened due to throwing of empty bottles, but finally managed to rescue them and brought them to their residence. He further deposed that accused No. 4 Sadhana fell on the ground, as his brother pushed her because she was trying to hit Chandrakant with empty bottle. She also sustained injuries being hit by empty bottles by accused Nos. 2 and 5. He thereafter deposed that the Police jeep came at the spot and then they were taken to Ponda Police Station and since they had sustained bleeding injuries, all of them were taken to ID Hospital Ponda and further to GMC Bambolim. Further his father Chandrakant was declared dead but the remaining were discharged. He specifically deposed that due to the assault, he sustained injury on his left hand finger and also on the back of his left hand shoulder.

19. According to the Complainant, Accused No.1 caught hold of him and he was trying to escape. Accused No.4 assaulted him on his left forearm with an iron rod. One of the glaring omissions noticed by the learned Trial Judge was the absence of corresponding injury on the left arm. Dr. Rajendra Borkar PW.25

who examined PW.22 Ratnakar did not mention any injury. No such injury was mentioned in the Hurt Certificate at Exhibit 118. PW.22 was categorical in his statement that he was assaulted with an iron rod. The fact that there was no injury found on his forearm falsifies his version.

20. Mr. Teles, learned Counsel for the Respondents-Accused pointed out that in his deposition, PW.22 Ratnakar did not specify as to where the incident took place in the verandah of the house of the accused. According to PW.22, Accused Nos.2, 3 and 5 started throwing empty glass bottles and some of the glass bottles hit his brother and the father due to which they got injured. PW.22 did not depose about entering the Courtyard or the house of the Accused. In the Prosecution evidence, it has come on record that there were blood stains on the staircase and verandah of the Accused. If PW.22 did not depose anything about entering the Courtyard or the house of the Accused, how the blood stains were found on the staircase and in the verandah of the Accused, was not explained and is one of the glaring lacunae in the case.

21. PW.22 Ratnakar had deposed that glass bottles were thrown on them even though PW.22 and others retreated to their own house, but had to admit that in the scene of offence panchanama

it is stated that some glass pieces were found only in the house of the Accused and no bottles or glass pieces were found in their house. This was the quality of evidence of PW.22 Complainant.

22. PW.23 Nandkumar had deposed that after the assault on his father took place, he reached the spot and also PW.23 gave a different version than PW.22, as PW.22 did not depose about the presence of Nandkumar neither PW.22 referred to the assault by Accused No.3 on the head of Chandrakant. PW.23 improved his version as PW.22 did not depose that Accused No.4 tried to hit his father Chandrakant with glass bottles and she was pushed away by Nandkumar. Even the injuries stated by him, were not found to be present by PW.25 Dr. Borkar.

23. PW.24 Nilesh gave a third version in respect of particulars, different from PW.22 Ratnakar or PW.23 Nandkumar. PW.24 deposed that PW.22 was lying on the ground and the Accused No.1 was assaulting him with fist blows and Accused No.3 was assaulting him with iron rod. However, this is not the version of PW.22. It is also the deposition of PW.23 Nandkumar, regarding falling down on the ground due to hitting of the bottles. Therefore, all three brothers gave different version and their depositions were full of contradictions and improvements. One glaring omission was

the complete inability of the Prosecution to explain the presence of blood stains on the staircase and the verandah of the accused when, according to the Prosecution the incident did not take place in verandah or the staircase. It is with this backdrop, the learned Trial Judge found that the evidence of PW.22, 23 and 24 who were admittedly on inimical terms with the Accused as not reliable.

24. It is one of the main contention of Mr. Amonkar, learned Additional Public Prosecutor that the evidence of three independent witnesses i.e. PW.13 Viraj Tari, PW.14 Vishal Tari and PW.15 Tukaram Tari, was discarded without any reason. PW.13 Viraj deposed that he is neighbour of the complainant and knows the Accused. He deposed that when he was watching Television, he heard the sound of breaking bottles and when he came out he heard shouts of PW.22 and when he rushed towards the house of the Accused he saw the Accused throwing bottles. He also saw injuries on Chandrakant and Ratnakar. PW.13 Viraj is the brother of PW.14 Vishal who is a Police Constable. He informed his brother Viraj PW.13 on telephone and thereafter, the Police Van came and took the injured persons to the hospital. Even though he stated to be present on the spot on 10 June 2007 and he immediately contacted his brother Police Constable on telephone, his statement was recorded on 17 June 2007 i.e. seven days after the incident. There is no

explanation as regards this delay. His house was 100 metres away from the house of the Accused and he was watching a film on Television. The view taken by the learned Trial Judge that due to distance and due to him watching the movie on Television, he could not have heard the shouts, is not an impossible view to be taken. He had also deposed that there were empty glass bottles between the house of the Complainant and the Accused. No such bottles were found. He deposed that Ratnakar shouted certain words, which is totally different from what other witnesses had stated. He admitted that the house is around 150 metres and it is not possible from his house to assess the hitting in the house of the accused. He admitted his relations with the family of the Complainant. According to Mr. Teles, learned Counsel for the Respondent-Accused there is no mention of the presence of either PWs.13, 14 and 15 or of the Complainant. According to him, their presence is nothing but an improvement which can be seen by the fact that their statements were recorded seven days after the incident. This point has been noted by the learned Trial Judge.

25. PW.14 Vishal Tari admitted that his family was related to the deceased Chandrakant. He has not seen the incident, but he was informed so by PW.13 Viraj, his brother. He stated that he received the information that a fight was going on in the house of

Chandrakant. PW.15 Tukaram stated that he had gone to Savoi-Verem to buy some items and when he returned at about 11 p.m. he parked the car near the house of Chandrakant and he and Nandkumar thereafter went near the temple to spend time. He heard sound of breaking bottles and bad words being used by Accused No.2 and his family members and he saw Accused No.3 with iron rod in his hand. This witness admitted that he had gone with PW.23 for spending sometime near the Temple for the first time and earlier they had never been together for spending free time. He did not disclose in his statement that he saw Accused Nos. 1 and 4 assaulting Ratnakar and Nilesh with bottles. He did not state that he took police to the house of the Complainant. In his statement, he stated that on hearing the sound of breaking bottles, he went to the house of Ratnakar, which he had stated due to mistake. This witness also deposed about the place of incident, but did not state about the incident taking place in the house of the Accused, in the verandah or on the staircase. Again, this is contrary to the scene of offence panchanama which found blood stains on the staircase and in the verandah.

26. PW.29 PI Mardolkar deposed about the investigation. He admitted that at the time of arrest of Accused No.4 she had an injury on her head, as well as on the left hand which was wrapped in

cotton bandage and she had disclosed that she had sustained those injuries in the course of assault made by Ratnakar PW.22. It is in the cross examination that this was brought out by the defence. It is the duty of the Investigating Officer to bring evidence on record, including the injuries sustained by the Accused. In the present case, PW.29 PI Mardolkar did not state so, neither any medical certificate of the Accused was brought on record. PW.29 Mardolkar admitted that he had noticed injuries on Accused No.1 on his forehead. There were stitch marks on the lips and bandage on the chin with abrasions on the left wrist, elbow, shoulder, right forearm and right elbow. He also admitted that there were bruise marks on his stomach, abrasion marks on the right thigh and right knee. PI Mardolkar did not collect the Hurt Certificate. He also admitted that his investigation revealed that there was a fight between two groups and that the injuries on Accused No.1 Ramakant had been caused during the said fight. He also admitted that the offence was registered vide Crime No.156/07 on the complaint lodge by Accused No.4 Sadhana for the offences punishable under Sections 323, 504, 325, 427 read with 34 IPC against PW.22 Ratnakar and his family members.

27. From these injuries, registration of the offences and the fact that they were not brought on record and the admission of PI Mardolkar, it appears to be a case of free-fight and not only an

assault by one group on the other. On the basis of the evidence, the learned Trial Judge rightly concluded that there were injuries on both members of the groups. It was a case of free-fight and that the police ought to have investigated the matter in that light, but had only sought to prosecute one side. PI Mardolkar also admitted that there were blood stains in the verandah of the Accused.

28. Though it is not necessary for the accused to state in their defence and they can point out lacunae, in the present case, the Accused have examined defence witnesses. It is their version that the Complainant and his family members assaulted them in their house and the blow meant for one of the Accused, in that free-fight fell on Chandrakant since the accused on whom the blow was meant, stepped on the side. They examined Dr. Dilip Kerkar which brought on record serious injuries on the accused. Nothing of this nature was brought forth by the Prosecution and this has been brought out in the cross examination. The defence witness has stated that the incident took place in the house of the accused and this defence, coupled with the fact that there is unexplained presence of blood stains in the verandah and the staircase of the Accused's residence, the scene of offence panchanama did not find any bottle on the position to the complainant's house or in the complainant's house. The complainant in the deposition also did not give any

specific location of the assault.

29. Mr. Teles, learned Counsel for the Respondents-Accused is right in contending that looking at the location of the blood stains in the house of the Accused and the defence version, it is clear that the Complainant and his family members were the aggressors. It was established that there were broken vessels etc., in the house of the Accused and, therefore, damages also took place in the house of the Accused. The theory of Accused No.4 pushing aside one of the prosecution witnesses, not corroborated by others, was only put forth to cover up the injuries sustained.

30. As regards the recovery of the iron rod, which was put forth as recovery under Section 27 of the Evidence Act is concerned, there are three points to be considered. Firstly what was recovered was an iron pipe and not an iron rod. According to Mr. Amonkar, learned Addl. Public Prosecutor, in the hit of the assault, one would not know what was used was an iron rod, or the iron pipe and both are more or less the same. This statement cannot be accepted. The recovery under Section 27 is found to be against the accused since, according to the Prosecution, it is the Accused No.3 who volunteered to show the weapon of offence i.e. the iron rod. According to the Prosecution, Accused No.3 led them to his house

and underneath a wooden box, he removed the iron rod. It was also deposed that one empty crate in the verandah which was produced by Accused No.3 was attached. However, no photographs were taken at the time of recovery panchanama. The *muddemal* property, the iron rod stated to have been recovered at the instance of Accused No.3, is hollow iron pipe and not a rod. In the cross examination, PW.29 PI Mardolkar admitted that what was found was a hollow pipe, and pipe is different than the iron rod. The scene of offence panchanama did not disclose about any crate in the verandah. However, when the recovery panchanama was drawn, Accused No.3 is stated to have shown a crate for the glass bottles. The crate which was not found in the scene of offence panchanama in the verandah was mentioned in the recovery panchanama from where the glass bottles were stated to have been stored.

31. The learned Trial Judge, therefore, was cautious in not accepting the recovery panchanama as an evidence under Section 27 of the Evidence Act. The learned Trial Judge, relying on the decisions in the cases of *Haribhau Bhalerao Vs State of Maharashtra*, (2002 ALL MR (Cri) 305), *Jackaran Singh Vs State of Punjab*, (AIR 1995 SC 2345) and *Vijay Gajbir V. State of Maharashtra*, (1993 (1) Maharashtra Law Reporter 710), held that it is necessary that the recovery panchanama needs to be signed by the Accused if it is to be

considered as a voluntary statement. Even otherwise, what was found was not an iron rod, but an iron pipe and the doubt expressed by the learned Trial Judge on the so called recovery in view of the sudden appearance of a crate in the verandah, cannot be said to be a perverse view.

32. As regards the charge of unlawful assembly, armed with deadly weapons, firstly the accused were in their house. There is no question of any unlawful assembly in their own house. As regards the deadly weapons, nothing has been shown that the iron rod was recovered at their instance and the recovery as stated earlier, was not believable. Only relatives of the complainant have been examined. Even though there were various houses nearby, no neighbour has been examined regarding the abuses.

33. In these circumstances, the learned Trial Judge had to decide whether the evidence led by the prosecution was reliable enough to convict the accused. The learned Trial Judge rightly found that the Investigating Officer tried to suppress the injuries on the accused. Though there were various material contradictions, the place where the incident took place, according to the prosecution witnesses is in complete variance with the scene of offence panchanama. The defence version was considered probable. There were serious flaws in

the prosecution case. There was inconsistency in the deposition of the witnesses of the Prosecution. The investigation was not proper and inspite of coming to the conclusion that there was a fight between two groups, the injuries on the Accused were tried to be suppressed. Therefore, the conclusion of the learned Trial Judge that the Prosecution had failed to prove the case beyond reasonable doubt was not only a possible point of view, but was the only view possible.

34. There is no case made out to set aside the impugned Judgment and Order, reversing the order of acquittal and to convict the Respondents-Accused.

35. The Appeal is dismissed.

Prithviraj K. Chavan, J.

N.M. Jamdar, J.