

JPP

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

CRIMINAL APPEAL NO.250 OF 2012

Ansar Dastgir Aitawade

Age: 25 Yrs.

R/o. Ward No.3/362, Awadhoot Akhada

Ichalkaranji, Dist:Kolhapur

[At present lodged at Kolhapur

Central Prison, Kolhapur]

.. APPELLANT

[Orig. Accused No.5]

VERSUS

The State of Maharashtra

(At the instance of Ichalkaranji

Police Station at C R No.69/09)

...RESPONDENT

WITH

CRIMINAL APPEAL NO.281 OF 2012

1. Vijay alias Babalu Sanjay Javir
Age: 21 Yrs.
R/o.Karande Mala, Shahapur,
Ichalkaranji.
2. Pappu alias Popat Mallappa Pol
Age: 21 Yrs.
R/o.Galli No.5 Karande Mala Shahapur,
Ichalkaranji.
3. Pintu alias Dhanu Pandurang Jadhav
Age: 21 Yrs.
R/o. Galli No.5, Karande Mala, Shahapur,
Ichalkaranji.

4. Rahul Anand Mane
Age: 24 Yrs.
Galli No.1, Sai Nagar Colony, Shahapur,
Ichalkaranji.
5. Shankar Bhagwat Garad
Age: 20 Yrs.
R/o.Hanumannagar Tardal,
Taluka: Hatkanangle, Dist.Kolhapur
At present Kholapur Central Prison

...APPELLANTS

VERSUS

The State of Maharashtra
(At the instance of Ichalkaranji
Police Station at C R No.69/09)

...RESPONDENT

**WITH
CRIMINAL APPLICATION NO.939 OF 2018
IN
CRIMINAL APPEAL NO.281 OF 2012**

Pappu alias Popat Mallappa Pol

...APPLICANT

VERSUS

The State of Maharashtra

...RESPONDENT

...

Mr.Niteen Pradhan, Advocate a/w Mr.Anand
Patil, Advocate i/b. Anand Patil & Associates
for Appellant in Criminal Appeal No.250/2012.
Mr.Amin Solkar, Advocate for Appellant in
Criminal Appeal No.281/2012 & Criminal
Application No.939/2018
Mr.H.J.Dedhia, APP for Respondent-State

...

**CORAM: S.S. SHINDE AND
MRS.MRIDULA BHATKAR, JJ.**

DATE OF RESERVING JUDGMENT : 7TH SEPTEMBER,2018.

DATE OF PRONOUNCING JUDGMENT: 12TH SEPTEMBER,2018.

JUDGMENT [PER S.S. SHINDE, J.] :

1. As both these Criminal Appeals are arising out of one and the same Judgment and Order passed by the trial Court, both the Appeals are being decided by this common Judgment.

2. Both these Appeals are directed against the Judgment and Order dated 11th January, 2011, passed by the Additional Sessions Judge, Ichalkaranji in Sessions Case No.19/2010 thereby convicting accused no.1 – Vijay @ Babalu Sanjay Javir, accused no.2 – Pappu @ Popat Mallappa Pol, accused no.3 – Pintu @ Dhanaji Pandurang Jadhav, accused no.4 – Rahul Ananda Mane, accused no.5 – Ansar Dastgir Aitawade and accused no.6 Shankar

Bhagwat Garad for the offence punishable under Section 302 r/w. Section 149 of the Indian Penal Code [for short 'IPC'] and sentencing each of them to suffer imprisonment for life and to pay a fine of Rs.5,000/- each and in default of payment of fine to suffer rigorous imprisonment for a period of one month. The trial Court also convicted accused nos.1 to 6 for the offence punishable under Section 147 of the IPC and each of them sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.1,000/- each and in default of payment of fine to suffer rigorous imprisonment for a period of six months. The trial Court also convicted accused nos.1 to 6 for the offence punishable under Section 148 of the IPC and sentenced each of them to suffer rigorous imprisonment for three years and to pay a fine of Rs.1,000/- each and in default of payment of fine to suffer rigorous imprisonment for a period of six months. The trial Court also convicted accused

nos.1 to 6 for the offence punishable under Section 427 of the IPC and sentenced each of them to suffer rigorous imprisonment for two years and to pay a fine of Rs.1,000/- each and in default of payment of fine to suffer rigorous imprisonment for a period of six months. All the sentences were directed to be run concurrently. Hence Criminal Appeal No.250/2012 is filed by original accused no.5 – Ansar Dastgir Aitawade and Criminal Appeal No.281/2012 is filed by original accused no.1 – Vijay @ Babalu Sanjay Javir, original accused no.2 – Pappu @ Popat Mallappa Pol, original accused no.3 Pintu @ Dhanaji Pandurang Jadhav, original accused no. 4 – Rahul Ananda Mane and original accused no. 6 – Shankar Bhagwat Garad. Criminal Application No.939/2018 is filed by original accused no. 2 – Pappu @ Popat Mallappa Pol for releasing him on bail during the pendency of the Appeal.

3. The prosecution case, in brief, is as under:

A] Aslam Nurmohammad Solapure [informant], his parents, brothers and their families are residing jointly in the house owned by them in Karande Mala, Savitrinagar, Ichalkaranji. Previously, Aslam Solapure was residing in the rented house in front of the house of Imtiyaz Sayyad Shirgave [deceased] in Karande Mala because of which he was knowing to Imtiyaz Shirgave and both were friends of each other. Accused no.1 - Vijay, Accused no.2 - Pappu, Accused no.3 - Pintu, Accused no. 4 - Rahul and Accused no.6 - Shankar are also residing in Karande Mala. Accused no.5 - Ansar is residing in the area of Awdhoot Akhada, Gaonbhag, Ichalkaranji. Informant - Aslam Solapure is knowing to all of them. Dhondilal Shirgave is running country liquor shop in Vikram Nagar, Ichalkaranji. Imtiyaz Shirgave was managing the

said liquor shop and selling the liquor therein. Salim Shirgave is the son of the Dhondilal Shirgave.

B] On 14th June, 2009, Imtiyaz Shirgave celebrated his birth day near his C.D. Library shop and at the distance of 25 foot from the pan shop of accused no. 1 Vijay Javir. At the time of celebrating birth day of Imtiyaz, the fire crackers were bursted in front of the stage. At that time Vijay Javir, Pappu Pol, Ansar Aitawade asked Imtiyaz Shirgave as to why the fire crackers were bursted there. On that count the altercation was taken place amongst them. Imtiyaz Shirgave gave slap to accused Vijay Javir and Pppu Pol. Then accused Vijay Javir and Pappu Pol threatened to Imtiyaz to see him and since then the relations between Imtiyaz Shirgave and Vijay Javir, Pappu Pol, Ansar Aitawade became strained.

C] On 20th July, 2009, in the morning at about 8 a.m. Aslam Solapure went on the motorcycle of Imtiyaz Shirgave to the liquor shop to leave him there. Imtiyaz Shirgave parked his motorcycle in front of the liquor shop, opened the lock and entered into the liquor shop. Then Aslam Solapure started to proceed by walk to bring Gutkha from Shridhar pan shop towards the side of Shahapur. While going there Aslam Solapure heard the shouting of quarrel from his backside from the liquor shop. So he returned back to the liquor shop. From the open door of the liquor shop, Aslam saw that accused Vijay Javir and Ansar Aitawade having scythes in their hands, accused Pappu Pol and Pintu Jadhav having weapons like sword – sticks in their hands and accused Rahul Mane and Shankar Garad having swords in their hands, were assaulting to Imtiyaz Shirgave by the weapons in their hands inside the shop. Due to beating given by the accused, Imtiyaz Shirgave fell down on the

ground under the pool of blood in the liquor shop. Accused Vijay Javir and Ansar Aitawade assaulted on the head of Imtiyaz Shirgave by scythes and other accused assaulted by the weapons in their hands on other parts of the body of Imtiyaz in blind manner. The Informant Aslam Solapure tried to prevent the accused, but accused Ansar Aitawade threatened him of assault like Imtiyaz by raising scythe towards him. So Aslam Solapure became frightened and ran away toward the house of the owner of the liquor shop Salim Shirgave and narrated the incident to him. Then Salim Shirgave and Aslam Solapure returned in Qualis vehicle to the liquor shop and saw that many persons were gathered there. Aslam Solapure and Salim Shirgave entered into the shop and saw that Imtiyaz Shirgave was lying in the pool of blood. They also saw that the counter of the shop and liquor and Soda water bottles were damaged and broken pieces of bottles were lying there. They also saw that

chilly powder was lying on the counter and one sword stick was lying near Imtiyaz. Then Salim Shirgave took Imtiyaz Shirgave through the Qualis vehicle to Niramay Hospital, Ichalkaranji and Aslam Solapure went to Gaonbhag [Ichalkaranji] Police Station for giving the information of the incident.

D] In Gaonbhag Police Station, Ichalkaranji Aslam Solapure lodged the oral complaint with Police in respect of the above said incident. P.S.I. Vivek Bagekari got reduced the complaint of Aslam Solapure as per his say through the writer constable Ajay Londhe in his presence. The contents of the complaint were read over to Aslam Solapure and thereafter he put his signature thereon. P.S.I. Bagekari also put the signature on the complaint for his presence. On the basis of the complaint, P.S.I. Bagekari registered the Crime No.69/2009 for the offences punishable under

Sections 302, 120-B, 143, 147, 148, 149 and 427 of the IPC and under Section 135 of the Bombay Police Act in Gaonbhag Police Station and made its entry at Serial No.13 in the Police Station Diary. Thereafter, P.S.I. Bagekari and Aslam Solapure went to Niramay Hospital. In the Hospital the dead body of Imtiyaz Shirgave was found kept on the stretcher covered in white cloth. P.S.I. Bagekari started to prepare inquest panchanama of the dead body of Imtiyaz Shirgave in the presence of panch Satish Patil and Aslam Solapure. During the course of preparing the said panchanama Police Inspector Janardan Pandurang Tiwate came to Niramay Hospital. P.I. Janardan Tiwate took informant Aslam Solapure for inspecting the spot of the incident. In the presence of two panchas he inspected the spot of the incident shown by Aslam Solapure, and thereafter sent Aslam Solapure back to Niramay Hospital for completing the inquest panchnama with Police constable Nalawade with

direction to bring him back after completion of the inquest panchnama. P.S.I. Bagekari prepared the inquest panchanama of the dead body of Imtiyaz Shirgave in Niramay Hospital and referred the dead body for the post mortem examination to the Indira Gandhi Memorial Hospital, Inchalkaranji. The Medical Officer conducted the post mortem examination on the dead body of Imtiyaz Shirgave and opined that the probable cause of death of Imtiyaz Shirgave is shock due to Hemorrhage due to multiple injuries over the body and intra cranial Hemorrhage. The blood stained clothes which were on the body of Imtiyaz Shirgave came to be seized.

E] Police Inspector Janardan Tiwate prepared panchanama of the spot of the incident in the presence of panchas Prashant Sidharth Kamble and Sunil Vithal Raybage and seized the pieces of broken bottles having blood stains, chilly powder, sword stick having blood stains, its cover, belt,

pair of chappal, pair of shoes lying in the liquor shop and outside the liquor shop under the said panchnama. He also obtained sample of blood, collected mobile hand set lying in the liquor shop in presence of the panchas. Thereafter, on 20.07.2009 itself P.I. Janardan Tiwate recorded supplementary statement of Aslam Solapure and the statements of other witnesses. On the same day, the finger print expert Inspector Gunjal gave visit to the incident spot at about 1 to 1.15 p.m. He inspected the articles lying there by spreading the powder to know the finger prints impressions. At about 3.00 p.m. the dog squad and dog handler D.N. Patil gave visit to the spot of the incident. Smell of articles was given to the dog. Then the dog ran up to Mangalmurti theatre from the spot of the incident. Accordingly, the finger print inspector and dog handler have given their reports. On 20.07.2009 at about 23.55 hour Police Sub Inspector of Local Crime Branch, Kolhapur

[L.C.B.] Shri Pyar Jamadar caught hold accused Vijay Javir, Pintu Jadhav, Pappu Pol, Shankar Garad and Sunil Dongale [accused nos.1, 2, 3, 6 and 7] along with their vehicles at the bus stand of Ashta and brought them to the L.C.B. office, Kolhapur. In the presence of the panchas he arrested to above said accused in crime No.69/2009. All above said accused were got medically examined from the C.P.R. Hospital, Kolhapur. Thereafter, above said accused and seized muddemal have been handed over to Gaonbhag Police Station, Ichalkaranji. There were injuries on the hands of the accused Vijay Javir and Pintu Jadhav. So both of them were referred for the medical examination to I.G.M. Hospital, Ichalkaranji on 21.07.2009.

F] On 21.07.2009 in the Police custody accused Shankar Garad in the presence of the panchas Yunus Gous Soudagar and Farukh Shirole

made memorandum to show two swords concealed by him. Accordingly, P.I. Janardan Tiwate got recorded the memorandum of Shankar Garad as per his say on which he and panchas put their signatures. Thereafter, accused Shankar led the panchas, P.I. Janardan Tiwate and the Police staff to the place ahead of village Korochi where all of them got down from the jeep. Then accused Shankar took to all of them in the shrubs on the western side of the road from where he took out two swords having blood stains and the same were seized by preparing the panchanama.

G] On 22.07.2009 in the police station in the police custody accused Vijay Javir made memorandum in the presence of panchas Salim Mahaldar and Kalidas Bansode to show two scythes, concealed by him. P.I. Janardan Tiwate got recorded his memorandum into writing on which panchas and the accused have put their signatures.

Thereafter, accused vijay led above said panchas, P.I. Tiwate and the police on the road after railway crossing gate of Hatkanangale where all of them got down from the jeep. Then accused Vijay Javir took all of them in the shrubs on the western side of the road at the distance of 50 foot from where he took out two scythes having blood stains and the same were seized by preparing the panchanama in the presence of the panchas.

H] On 22.07.2009 dog squad was called in the police station and test identification parade of the accused was conducted by giving the smell of seized pair of chappal and shoes to the dog by the dog handler and accordingly he gave his report. On 29.07.2009 seized weapons were sent to the I.G.M. Hospital for giving the opinion by the Medical Officer. The Medical Officer inspected the weapons and gave letter that the injuries found on the person of Imtiyaz Shirgave are possible by the

said weapons. P.I. Tiwate took search of the absconded accused but they were not found. On 29.09.2009, P.I. Tiwate has been transferred to Kolhapur and further investigation was handed over to P.I. Vithal Dattatraya Nagargoje.

I] On 04.08.2009, P.I. Vithal Nagargoje sent seized muddemal and blood samples etc. to Forensic Science Laboratory Pune for the chemical analysis. As per the letter given by P.I. Tiwate the City Survey Officer, Ichalkaranji prepared the map of the spot of the incident. Accused no.4 Rahul Mane and accused no. 5 Ansar Aitawade, who were absconding were arrested on 05.10.2009 in the above said crime by P.S.I. A.N. Patil and Ashok Kore respectively. After completion of the investigation, P.S.I. Ashok Kore filed the charge sheet under Section 173 of the Criminal Procedure code against the accused nos. 1 to 7 for the offences punishable under Sections 302, 120-B,

143, 147, 148, 149, 427 of the IPC and under Section 135 of the Bombay Police Act in the court of the Judicial Magistrate First Class, Ichalkaranji. The Judicial Magistrate First Class, Ichalkaranji has committed the case to the Court of Sessions, Ichalkaranji in due course.

J] A charge for an offence punishable under Sections 147, 148, 120-B, 302, 149 and 427 of the IPC and under Section 135 of the Bombay Police Act was framed against all the accused and the same was explained to them. The accused persons pleaded not guilty and claimed to be tried, with the defence of total denial.

4. After recording the evidence and conducting full-fledged trial, the trial Court convicted the accused persons for the offences as afore-stated.

5. Heard learned counsel appearing for the respective appellants and learned APP appearing for the State, at length. With their able assistance, we have carefully perused the entire notes of evidence so as to find out whether the findings recorded by the trial court are in consonance with the evidence brought on record or otherwise.

6. In order to prove the case, the prosecution has examined in all 12 witnesses. The prosecution examined PW-1 Aslam Noormohammad Solapure. In his examination in chief he deposed that, he himself, his wife Reshma, his daughters Muskan, Shirin and Simran, his brothers Rahim and Salim, wife of Rahim and his mother Sayara, all are residing jointly in Karanda mala, Savitrinagar, Ichalkaranji. Vijay alias Babalu, Pappu Pol, Pintu Jadhav, Rahul Mane, Ansar

Aitawade, Sanjay @ Shankar are also residing in Karande mala and he is knowing to them. He again said that, Ansar Aitawade is residing in the area of Awadhoot Akhada Gaonbhag Ichalkaranji and Sanjay @ Shankar is residing in Tardal, Hanumannagar, Ichalkaranji. Deceased Sunil Dongale was residing in Karande mala.

7. He further deposed that, he knows Imtiyaz Sayyad Shirgave, who was residing in Karande Mala. He further deposed that previously he was residing in rented house in front of the house of Imtiyaz so he was knowing to Imtiyaz. Imtiyaz Shirgave was the social worker and he was also serving in country liquor shop, and also running C.D. shop. The accused Nos.1 to 6 are Gundas in nature. Imtiyaz Shirgave used to convince to accused Nos.1 to 6 not to do Gundaism so the accused Nos.1 to 6 were angry against him.

8. PW-1 deposed that on 14/06/2009 Imtiyaz Shirgave celebrated his birth day. After 15 days accused Ansar Aitawade celebrated his birth day. For celebrating birth day of Imtiyaz, stage was erected adjacent to C.D. library of Imtiyaz. They burst fire crackers in front of the said stage. Pan shop of Vijay Javir was at the distance of 20 to 25 feet from the said stage. Accused Pappu Pol, Vijay Javir and Ansar Aitawade asked Imtiyaz Shirgave as to why fire crackers were burst there. On that ground altercation was taken place between Amtihaj Shirgave and said three accused. At that time Imtiyaz Shirgave gave slaps to Vijay Javir and Pappu Pol. Then Vijay Javir and Pappu Pol threatened Imtiyaz Shirgave to see him and their relations were strained.

9. PW-1 deposed that, on 20/07/2009 in the morning at about 8 a.m. he went to country liquor shop in Vikramnagar with Imtiyaz Shirgave on his

motorcycle to leave him there. The country liquor shop in Vikramnagar is of Dhondilal Shirgave. Imtiyaz Shirgave parked his motorcycle in front of country liquor shop and entered into said shop. PW-1 was going to Shridhar pan shop towards Shahapur side to bring Gutkha. At that time he heard the shouting of the quarrel from his back side. So he returned back to the said country liquor shop. From the door of the said country liquor shop he saw that accused Vijay Javir, Pappu Pol, Ansar Aitwade, Rahul Mane, Pintu Jadhav, Sanjay @ Shankar Jadhav were beating to Imtiyaz by the weapons inside the shop. Vijay Javir was having sickle (Koyata) in his hand, Ansar Aitawade was also having sickle (Koyata) in his hand, Pappu Pol and Pintu Jadhav were having sword-stick in their hands, Rahul Mane and Sanjay @ Shankar Garad were having swords in their hands. By the said weapons they were beating to Imtiyaz, Imtiyaz Shirgave fell down on the ground and at that time

Vijay Javir and Ansar Aitawade assaulted on his head by scythe (Koyata) and other accused assaulted on other parts of his body. PW-1 deposed that by standing at the door he raised shouts saying as to, why they are beating Imtiyaz. Being frightened by the gesture of Ansar (A-5), Aslam (PW-1) ran away to the house of the owner of the shop Salim Shirgave and narrated the incident to him. Thereafter Salim Shirgave and Aslam (PW-1) returned to the said country liquor shop in his Qualis vehicle. He himself and Salim entered in to country liquor shop and saw that, Imtiyaz was lying in the pool of blood and was not making any movement. Broken pieces of soda bottles were also lying there. One sword-stick (Gupti) was lying near Imtiyaz. The counter which was on the table was broken and the red chilly powder (Chatani) was also lying there. Salim Shirgave who is also known as Bhai, lifted to Imtiyaz and kept him in Qualis vehicle. He told Aslam (PW-5) that, he will take

Imtiyaz in Niramay hospital and he should go to Gaonbhag police Station. He went to the said police station. In the police station he narrated the incident occurred to the police. The police reduced his information into writing as per his say and obtained his signature thereon. The first information report (Exh.42) dated 20.07.2009 was shown to him and he identified the same.

10. It is important to note that during the course of cross-examination by learned counsel appearing for accused No.5 – Ansar Aitawade, PW-1 was shown the affidavit dated 14th November, 2009 which was sworn in by Aslam (PW-1) before Notary Public, Ichalkaranji and then, on specific query by the Advocate for accused No.5, PW-1 stated that the said stamp was purchased by him on 6th November, 2009 and it is his affidavit. He further stated that photocopy of his election identity card is also attached to his affidavit. It appears

that the said affidavit was filed by Advocate for accused No.5 with list Exhibit-47 and the affidavit is at Exhibit-48. It is noteworthy to mention that, Aslam (PW-1) did not say a word in examination-in-chief about said affidavit at Exhibit 48. During the course of hearing, the learned counsel appearing for Appellants invited our attention to the contents of the said affidavit. It is stated in the said affidavit that there were six assailants who assailed Imtiyaz. It is further stated in the affidavit that there was mistaken identity so far accused No.5 - Ansar Aitawade is concerned, and in fact the said person was Sunil Dongle who was subsequently arrested by the police. Therefore, it clearly surfaced on record that PW-1 has changed his version which was stated in the F.I.R. and stated in cross examination that there were six accused and not seven as stated in the First Information Report. Since Aslam (PW-1) has admitted the contentions of

said affidavit. Said admission given by the Aslam (PW-1) has caused serious damage and prejudice to the prosecution case. Therefore, the counsel appearing for the Appellants are right in their submissions that, Aslam (PW-1) cannot be considered as a trustworthy witness and no reliance whatsoever can be placed on his testimony. It appears that, the counsel appearing for accused No.5 has brought on record admission of Aslam (PW-1) that, stamp of the said affidavit was purchased by him and the contents of the said affidavit were also admitted by Aslam (PW-1). It is relevant at this stage to mention that after aforesaid admission by Aslam (PW-1), learned Public Prosecutor did not re-examine him. Therefore, the version of PW-1 in cross examination that there was mistaken identity of accused No.5, and in fact accused No.5 was not present at the spot of incident, and said affidavit has been signed by him remained

unshattered and consequently unchallenged.

11. Upon further perusal of the cross-examination of PW-1, he has nowhere stated the presence of PW-6 Alam Rashid Pathan at the spot of incident. Aslam (PW-1) further stated in the cross-examination that, Imtiyaz Shirgave had many friends in the area of Karande Mala and its vicinity. However, importantly, except PW-1 nobody deposed about actual incident, and no independent witness/witnesses has/have been examined to tell that the accused persons arrived at the spot, they assaulted Imtiyaz and further witnesses saw accused persons leaving the place of the incident. Though PW-1 claims that he is close friend of Imtiyaz, nevertheless he stated that he does not know whether Imtiyaz was partner or was working on monthly salary in the said liquor shop. He also does not know that Dhondilal Shirgave i.e. owner of the liquor shop, is running Matka and illicit

liquor shop and money lending business. He also stated that before the incident, he used to talk on the mobile phone of Imtiyaz Shirgave through his mobile phone. He stated that last digits of mobile phone of Imtiyaz were 555 but, he does not know all digits of the mobile number of Imtiyaz. It appears that suggestion was also given to him that he is also part of illegal activities, and he has many friends who are involved in criminal activities. He has also admitted that when there was celebration of birth day of Imtiyaz, that time he himself and his friends were present. Therefore, reasonable inference can be drawn that he has close association with Imtiyaz.

. So far as location of the country liquor shop is concerned, PW-1 stated in Paragraph No.8 of his cross examination as under:-

"8. It is true to say that, country

liquor shop of Dhondilal Shirgave is on the western side of north to south road going from Shahapur to Ichalkaraji city. It is true to say that on the northern side of country liquor shop of Dhondilal Shirgave there is a road running east west. It is true to say that the colour photograph of the country liquor shop now shown to me is of country liquor shop of Dhondilal Shirgave (Shri. Patil advocate showed the photograph which was with him and produced the same with list Ex. 44). The photograph is at Ex. 45. It is true to say that on the southern side of country liquor shop of Dhondilal shirgave there are residential houses. It is true to say that adjacent to said country liquor shop, there are Aashirvad Pan Shop and mutton shop as shown in photograph Ex. 45. It is true to say that on the northern side road of the country liquor shop, there is Mangal Murti theatre after 7 to 8 houses on the western side of the said shop, and it is at the distance of about 2 to 3 minutes by walk from the liquor shop. It is true to say that the

timing of the show in said theatre were from 12 p.m. to 3, 3 to 6, 6 to 9 and 9 to 12 night. I do not know that after 5 p.m. the 6 to 7 carts of Bhel, ice-cream, cold-drink etc. used to do their business up to 1 a.m. in the night on the road in front of the country liquor shop."

12. PW-1 further deposed that in Ichalkaranji there is residential locality of labours of power loom. It appears that suggestion was given to him that labours used to come to the said liquor shop for drinking liquor in the evening. However, he showed his ignorance about said fact. It is clear from reading aforesaid portion of the cross examination of PW-1 that the locality in which said liquor shop is situate and alleged incident had taken place, is in a very crowded locality. Suggestion was also given to PW-1 that, nephew of Imtiyaz namely Salim Shirgave used to open the country liquor shop and used to look after the said shop. However, PW-1 stated that he is not

aware about the said fact. Aslam (PW-1) further stated that he along with deceased wanted to go to Kolhapur at 10.00 a.m. and therefore he accompanied him at 8.00 a.m. Learned counsel appearing for the appellants are right in their submission that in case PW-1 and Imtiyaz wanted to go at 10.00 a.m. then there was no question of Aslam (PW-1) accompanying Imtiyaz at 8.00 a.m. itself. It is also necessary to make reference to para 11 of his cross examination wherein he stated thus:

"11. It is true to say that the pan shop to which I wanted to go for Gutkha is situated on the corner of the road which goes to Mangalmurti theater. Said shop is of the hand cart. It is not true to say that we parked the motorcycle in front of the country liquor shop. The hand cart of the pan shop is at the distance of 30 to 40 feet from the country liquor shop. It is true to say that, said pan shop is

on the side of Shahapur. It is true to say that we had come from the road of Shahapur, and at that time firstly the pan shop comes and then the country liquor shop comes. I did not tell to Imtiyaz to take Gutkha first and then to go to the country liquor shop on the way. Imtiyaz opened the lock of the country liquor shop. In my presence he opened the lock. When I heard the shouting of quarrel, at that time I had crossed half distance towards the pan shop. Immediately I ran towards the country liquor shop."

13. Therefore, it is apparent that before going to the country liquor shop one pan shop is situate there, and therefore there was no reason for PW-1 to go to some other pan shop away from the liquor shop for purchasing Gutkha. It appears from his deposition that, at one place Aslam (PW-1) stated that, Imtiyaz removed the lock of the liquor shop and opened the door. However, in the

cross examination he stated that he heard the shouting of the quarrel and he saw back. However, he denied that Imtiyaz opened the lock of front iron door and was going inside when he saw there. He further stated that he did not see the assailants when Imtiyaz opened the lock of the front door and entered inside. Therefore, there is considerable force in the argument of the counsel appearing for the appellants that the prosecution has not led satisfactory evidence to prove arrival of the accused at the spot and they left the spot of incident after the alleged incident.

14. It is further stated by Aslam (PW-1) in the cross examination that he went to the Police Station in between 9.30 to 9.45 a.m. and did not accompany Salim (PW-2) to go to the Hospital in Qualis wherein Imtiyaz was being taken to the Hospital. He admitted in his cross examination

that inquest panchnama dated 20th July, 2009, bears his signature, however, he was not present at the time of inquest panchnama between 9.35 a.m. to 10.35 a.m. in Niramay Hospital. He further stated that, after the incident he went to Niramay Hospital and at that time his signature was obtained on inquest panchnama. He further stated in his cross examination that Imtiyaz was shouting when accused were beating him with the weapons in their hand. He did not go to Salim Shirgave on the motorcycle. Accused were beating for 4-5 minutes. Within 7 to 8 minutes, he went and brought Salim to the country liquor and at that time the accused were not present there. He further stated that Qualis vehicle was parked in front of the country liquor shop. However, nobody from the house of the Salim came with him and Salim. He himself and Salim entered into the country liquor shop, there was pool of blood where the Imtiyaz was lying. He admitted that

blood was also lying around the counter. He admits that there were severe injuries in the head, chest, stomach and other parts of the body of Imtiyaz when they saw him. The skull of head of Imtiyaz was broken. They did not try to give water to Imtiyaz and they did not talk with him.

15. Upon careful perusal of the aforesaid part of the cross examination, the conduct of Aslam(PW-1) does not appear to be natural, inasmuch as, he did not try to save Imtiyaz and rather he went to the house of Salim and even did not offer water to Imtiyaz. Therefore, it casts serious doubt about his presence on the spot at the time of alleged incident.

16. The contention of the counsel for the appellants needs to be considered at this juncture that the police did not seize the clothes of Aslam (PW-1), neither there was evidence showing that as

a matter of fact Aslam (PW-1) and Salim (PW-2), lifted the body of Imtiyaz and placed the same in Qualis. If PW-1 and PW-2 have really lifted the body of Imtiyaz and kept the same in Qualis vehicle, in that case, it is but quit natural that blood stains would appear on the clothes of Aslam (PW-1) and/or Salim (PW-2). Because according to his version Imtiyaz was lying in pool of blood and blood was spread near his body and also on other articles lying in the shop.

17. It is also stated by Aslam (PW-1) in his cross examination that, he was shouting when the accused were beating Imtiyaz. However, he was unable to assign the reason, why the said facts are not written in his FIR and supplementary statement. He further stated that at the time of lodging the FIR, he did not state to police that Imtiyaz was murdered but he was unable to assign any reason as to, why the said fact is written in

his FIR by the police. Therefore, the aforesaid part can be read as "omissions" which has direct bearing on the prosecution case. The suggestion was also given to him that Ashirwad Pan Shop is adjacent to the country liquor shop of Imtiyaz Shirgave and one can go to the said Pan Shop from inside country liquor shop. However, he showed ignorance about having such pan shop nearby the liquor shop. He further stated in his cross examination that, he was not aware that Imtiyaz Shirgave was in politics and he was President of Rashtrawadi Congress Party, Ichalkaranji and Imtiyaz was involved in social work. In para 17 of his cross examination by the counsel for accused no.5, he stated thus:

"17. While lodging the F.I.R. and making supplementary statement I stated that accused Ansar Aitawade and Vijay Javir beat on the head of Imtiyaj when he fell down on the

ground. I also stated that other accused were also beating on his body when he fell down. I cannot assign any reason as to why said facts are not mentioned in the F.I.R. and in the supplementary statement. I stated to the police that accused Ansar Aitawade told me that he will beat me by scythe. Blood was lying on the ground when Imityaz was lifted and taken into Qualis vehicle."

18. The aforementioned portion appears to be clear improvement since the same was not mentioned in the FIR. He further stated in para 19 of the cross examination, as under:

"19. I stated before police that I raised shouting saying as to why they are beating to Imtiyaz by standing at the door. I can not assign any reason as to why the said fact is not written in my F.I.R. and supplementary statement. It is true to say that in my

supplementary statement I stated to police that Sunil Dongale is also participated in the murder of this case. I do not know that accused Ansar Aitawade was arrested on 05.10.2009, but he was arrested by the police."

19. Upon careful perusal of the entire deposition of PW-1, it is abundantly clear that he has not stated about the presence of Alam Rashid Pathan (PW-6) at the spot of incident. The aforesaid discussion would make it clear that Aslam (PW-1) is not trustworthy witness, and he would fall in the category of an unreliable witness.

20. PW-2 Salim Dhondilal Shirgave, country liquor shop owner, deposed that he is running country liquor shop approved by the Government in rented premises of Kumar Bodage on Vikramnagar to Shahapur Road from last many years. Imtiyaz

Shirgave was selling the liquor and managing the country liquor shop and Bhimrao Shankar Kamble was helping to him. Shankar Virupaksh Parit and Babuji Alas were doing miscellaneous work in the said shop. Dhondilal Shirgave is his father and Samir is his younger brother. He deposed that he himself, his younger brother Samir and sometime his father Baburao used to do the work outside the shop such as to bring liquor and to look after the work of Excise Department. He himself, his father, his mother, his wife and Samir and wife of Samir are residing jointly.

21. PW-2 deposed that Imtiyaz Shirgave is the son of sister of his father [cousin] and he was residing in Karande Mala, Shahapur. Imtiyaz Shirgave was also doing social work and he used to give visit to the C.D. Library Shop being run by his brother. This witness is knowing to Vijay Javir, Pintu Jadhav, Pappu Pol, Rahul Mane and

Sunil Dongale and they were residing in Karande Mala and area of Shahapur. He deposed that there is terror of all the above said persons in the said area, so he knows them. The birthday of Imtiyaz Shirgave was celebrated near C.D. Library Shop in the month of June, 2009. There is pan shop of Vijay @ Babalu Javir in front of C.D. Library Shop. He deposed that, at the time of celebrating birthday of Imtiyaz Shirgave fire cracker burst in front of said pan shop. On that day in the evening Vijay @ Babalu Javir, Pappu Pol and Ansar Aitawade came to Imtiyaz Shirgave and asked him as to why fire cracker was burst, and on that count altercation was taken place between them and Imtiyaz Shirgave. At that time Imtiyaz Shirgave gave slap to Pappu Pol and Vijay @ Babalu Javir. At that time Vijay @ Babalu Javir and Pappu Pol threatened to see Imtiyaz Shirgave. He deposed that on next day Imtiyaz Shirgave disclosed the fact of above said altercation and threatening.

Due to the above said reason, Vijay @ Babalu Javir, Pappu Pol, Rahul Mane, Shankar Garad, Ansar Aitawade and Sunil Dongale were angry against Imtiyaz Shirgave.

22. PW-2 deposed that on 20th July, 2009, he was present in his house. On that day in the morning Aslam Nurmohammad Solapure came to his house by running. Aslam told him that Vijay Javir, Pappu Pol, Pintu Jadhav, Rahul Mane, Ansar Aitwade, Shankar Garad and Sunil Dongale were beating to Imtiyaz Shirgave by swords, sword-stick [Gupti], scythe in the country liquor shop. Immediately he took Aslam in his Qualis vehicle and went to country liquor shop. Many persons were gathered in front of country liquor shop. He got down from Qualis vehicle and entered into the country liquor shop and saw that Imtiyaz Shirgave was lying under the pool of blood near the counter. Weapon Sura like sword stick was lying

near Imtiyaz Shirgave. Pieces of liquor and Soda water bottles were also lying there and counter was broken. He gave call to Imtiyaz but Imtiyaz did not reply. With the help of persons gathered there, he lifted Imtiyaz Shirgave and kept him on the middle seat of his Qualis vehicle. He asked Aslam to go to Gaonbhag Police Station for giving the information of incident and he took Imtiyaz Shirgave to Niramay Hospital. In the Hospital, Imtiyaz Shirgave was taken on a stretcher by employees of the Hospital. Within 5 minutes Doctor told him that Imtiyaz Shirgave died. There were injuries on the head and body of Imtiyaz Shirgave and his skull was broken. This witness identified the Gupti i.e. article no.1 of G.M.R. No.6/11, which was lying near Imtiyaz Shirgave.

23. During the course of cross examination, PW-2 stated that, since last 8 to 10 years Imtiyaz was looking after the business in the said liquor

shop. He admits that, class of workers used to consume liquor in their country liquor shop. He further stated that, he did not disclose the alleged incident immediately, to his family members when Aslam (PW-1) told him the said fact. About 25-30 persons were gathered in front of their shop when he reached there. He did not enquire with those persons as to what happened. He admits that, he himself and Aslam (PW-1) were the first persons who entered into the country liquor shop on seeing Imtiyaz in pool of blood, however, he did not inform his father by calling on his mobile phone. Imtiyaz was lying on the ground. He does not remember as to, whether Aslam told him or not, that Imtiyaz was attacked when he was sitting at the counter. At the time of recording his statement by police, he stated that Imtiyaz was sitting at the counter when he was attacked. At the time of his statement recorded by police, he has not stated that Aslam told him that the

aforesaid persons beaten to Imtiyaz. He was unable to assign any reason as to, why the said fact is not written in his statement recorded by Police. He was also unable to assign any reason as to why it is not written in his statement that he gave call to Imtiyaz. He further stated that at the time of recording of his statement by police, he has not stated that he told Aslam to go to Gaonbhag Police Station for lodging the information of the incident. He does not remember as to, whether he stated or not that the employees of Niramay Hospital took Imtiyaz on stretcher in the Hospital. He does not remember whether he stated or not, that within 5 minutes Doctor told him that Imtiyaz died. He is unable to assign any reason as to why the above said facts are not written by the Police in his statement. At the time of recording of a statement he had not stated the police that, he told one person amongst the persons who were gathered in the Hospital, to go

to Gaonbhag Police Station where Aslam had gone and to tell him that Imtiyaz died. He has also not stated the police that, brother of Imtiyaz is running C.D. Library Shop. At the time of recording his statement, he stated before the Police that on next day Imtiyaz disclosed the fact of altercation and quarrel. He was unable to assign any reason as to why the said fact is not written in his statement. While recording his statement, he stated before the Police that Pappu Pol also threatened to see Imtiyaz. He was unable to assign any reason why the said fact is not written in his statement. He does not remember as to, whether photographs were snapped or not in the programme of birthday celebration. He further stated that he himself and other 2-3 persons have lifted Imtiyaz and kept him in Qualis vehicle. They carried Imtiyaz for 7 to 8 steps. Aslam was present there from the timing of lifting Imtiyaz till he was kept in Qualis Vehicle. He further

stated that his pant was stained with blood of a small size. He did not know whether clothes of Aslam were stained with blood or not. He further stated that Police did not demand his pant of blood stained and he did not produce the same. There were blood stains on the seat of Qualis vehicle. The Police did not ask to produce Qualis vehicle and he also did not produce the same.

24. The cross-examination of PW-2 clearly shows that, neither his clothes nor that of other 2 to 3 persons who lifted Imtiyaz and Aslam (PW-1) were seized. Therefore, it creates serious doubt about the prosecution case that, PW-2 Salim Shirgave and other 2 - 3 persons lifted Imtiyaz in presence of Aslam (PW-1) and kept him in Qualis vehicle.

25. PW-2, further stated that he did not show the blood on the seat in Qualis vehicle and blood

stains on his pant to the police. He further stated that he was in grief due to death of his cousin. He further stated that, he was in Niramay hospital for 2 to 2 ½ hours. He saw the police in Niramay hospital during the said period. Within 45 to 60 minutes of his reaching, he saw police in Niramay Hospital. He did not remember, whether doctor prepared the case paper or not in the said hospital. He did not remember that entry of taking to Imtiyaz Shirgave by him was made or not in Niramay hospital. He did not know the name of doctor and also what treatment the said doctor has given to said Imtiyaz. He did not know where Imtiyaz was taken on the stretcher in the hospital. He further stated in the cross examination that he did not know Sunil Dongale i.e. original accused no.7. He further stated that said Sunil Dongale was murdered. He was confronted with his statement recorded by the Police, and he stated that he is unable to assign the reason why

portion marked "B" was written in his statement recorded by the Police. He cannot say, whether Aslam was in frightened condition or not, when he came running to his house. The aforesaid admissions of Salim (PW-2), Dhondilal Shirgave, creates serious doubt about his assertion that, he went to the spot, lifted Imtiyaz and taken him to the hospital. Therefore, his testimony cannot be safely accepted.

26. Upon careful perusal of cross examination of Salim (PW-2), defence has succeeded in bringing on record contradictions, omissions and improvements creating severe dent to the prosecution case. Though Salim (PW-2) has stated that, he lifted the body of Imtiyaz and kept the same in the Qualis vehicle, his clothes were not seized by the police, which according to him were blood stained. He further deposed that there were blood stains on the seat of Qualis vehicle but the

said vehicle was also not seized by the police. As observed earlier, neither clothes of PW-2 are seized nor any incriminating material is collected to believe the prosecution case that dead body of Imtiyaz was taken by Salim (PW-2) in Qualis vehicle to Niramay Hospital. Except the bare words of Salim (PW-2), there is no corroboration to his said bare words that Imtiyaz was taken to the Hospital by him in his Qualis vehicle.

27. As observed earlier, PW-2 Salim Dhondilal Shirgave in his examination in chief stated that, many persons gathered in front of country liquor shop. However, the prosecution has not examined any other independent witness, who really saw Imtiyaz lying in injured condition or accused assaulting said Imtiyaz and leaving the place of occurrence.

28. Alam Rashid Pathan (PW-6) deposed that,

he is doing the business of manufacturing and sale of Gandhi caps. On Monday, he used to attend the Bazar at Karad. On 20.07.2009, there was Monday and he proceeded from his house at 7.45 a.m. in the morning on M-80 motorcycle, to go to S.T. stand, Ichalkaranji. He was proceeding towards Shahapur to Janata Bank Road. On the way in Vikramnagar, Shahapur, he heard the shouting from country liquor shop of Shirgave. So he went near the said country liquor shop. He saw that, Babalu Javir and his 5-6 friends were assaulting to Imtiyaz Shirgave by sword, sword stick and scythe in the country liquor shop. On seeing the same, he frightened and started shouting. Hearing his shouting, many persons gathered there. Within 2-3 minutes Babalu Javir and his 5-6 friends ran away towards Mangalmurti Talkies. Then he saw in the shop and found that Imtiyaz Shirgave was lying in the pool of blood and pieces of glass bottle were also lying there. Then Salim Shirgave and Aslam

Solapure came there in Qualis vehicle and got down from the said vehicle. Salim Shirgave took Imtiyaz Shirgave in Qualis vehicle to Niramay Hospital. He also went to Niramay Hospital on his Bajaj M-80 motor cycle.

29. During the course of cross examination, PW-6 admitted that he used to attend other bazar's i.e. Market places also. He further admits that there is no market on Monday in Karad. He further admits that, country liquor shop of Shirgave is at the distance of one and half kilo meters from his house. He admits that besides Shahapur Janata Bank Road, there are other roads which also goes to Ichalkaranji Bus stop. He further stated that he has no documentary evidence in respect of business of manufacturing caps. He stated that he does not know Dhondilal Shirgave and Salim Shirgave. He also does not know their relatives. He had not gone to the house of Dhondilal and Salim and their

relatives. He further stated that he does not know about the family members of the Dhondilal. He further stated that, he does not know that quarrel used to take place in country liquor shop. He stated before the police that, he heard the shouting from country liquor shop when his statement was recorded. He was unable to assign any reason as to why 'the country liquor shop' is not written in his statement by the police. He denied the suggestion that he witnessed the incident by standing on the road. He does not remember, whether he stated or not to the Police that Aslam Solapure also came in Qualis vehicle.

30. A perusal of entire evidence of PW-6 reveals that, nowhere he has stated that, when he witnessed the incident, Aslam (PW-1) was also present at the spot of incident. The evidence of Alam (PW-6) is not corroborated by the evidence of Aslam (PW-1). Further this witness is resident of

another village and he is not knowing the persons residing in the vicinity of Karande Mala. He has not named all the accused persons and only stated that Babalu Javir and his 5-6 friends were assaulting Imtiyaz. It appears that Alam (PW-6) was a chance witness to the alleged incident. Since Alam (PW-6) was resident of some other village and not the resident of area where an alleged incident has taken place, it was incumbent upon the Investigating Officer to arrange for an identification parade so as to provide an opportunity to Alam (PW-6) to identify the accused persons. However, no such identification was carried out in accordance with relevant procedure. Alam (PW-6) has identified only one accused that to in the Court room during the course of Trial.

31. On conjoint reading of the oral evidence of PW-1 and PW-6, it is crystal clear that both of them have not stated about the presence of each

other at the spot of incident. Several contradictions and omissions are brought on record by the defence in the evidence of both the witnesses during the course of Trial. As rightly submitted by the learned counsel appearing for the appellants that neither Aslam (PW-1) and Salim (PW-2) nor Alam (PW-6) are reliable and trustworthy witness and conviction cannot be based on such shaky and vague evidence. Learned counsel appearing for the appellants placed reliance upon the exposition of law by the Supreme Court in the case of Lallu Manjhi Vs. State of Jharkhand¹. The Apex Court in para 10 of the judgment, observed as under:

“10. The Law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony

¹[2003] 2 SCC 401

into three categories, namely (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness.

32. In the facts of the present case also, we are of the considered view that oral testimony of both these witnesses i.e. PW-1 and PW-6 falls in the category of "wholly unreliable" witnesses. Further both of them have not corroborated the presence of each other on the spot at the time of incident.

33. Kalidas Somnath Bansode (PW-3) is the witness on the memorandum of accused Vijay and recovery of two scythes at the instance of the said accused. However, the said recovery of the weapons is from the place which was accessible to the general public. Therefore, the evidence of this witness is not useful to the prosecution.

34. Sunil Vithal Raibage (PW-4) is a witness to the spot panchanama. PW-5 Yunus Gaus Saudagar is a witness to the memorandum of accused Shankar Garad and recovery of weapons at the instance of the said accused. The weapons i.e. two swords, recovered at the instance of accused Shankar from one agricultural land which was also accessible to the general public. In the case of Sujit Gulab Sohatre & others Vs. The State of Maharashtra², the Division Bench of the Bombay High Court held that recoveries from the places which are

² 1996 [3] All M.R. 439

accessible to all and sundry are not incriminating evidence. As observed earlier, in the present case also, the recoveries of weapons at the instance of the accused are from the places accessible to all and therefore the evidence of PW-3 and PW-5 is not useful to the prosecution case.

35. Janardan Pandurang Tiwate (PW-7), is the Investigating Officer. He deposed about the manner in which he has carried out the investigation of the crime. Vivek Sakharam Bagekari (PW-8), who carried out earlier investigation. Pyar Gulab Jamadar (PW-9) is the retired A.P.I. who arrested the accused persons. Ashok Shankarrao Mane (PW-10) and Tanaji Vishnu Kadam (PW-11) are the Driver Head Constables, who carried the accused persons in a jeep for recovery of weapons. PW-12 Vithal Dattatraya Nagargoje is the Police Personnel who earlier carried out part of the investigation.

36. The post mortem report is at Exh.98/C. The said document is admitted by the accused and therefore the same was exhibited. The cause of death as opined by the Medical Officer is "shock due to hemorrhage [bleeding] due to multiple injuries over body and intra cranial hemorrhage. However, the prosecution has not examined the Medical Officer to prove the cause of death. The post mortem report shows that the Medical Officer noticed as many as 35 internal and external injuries on the person of Imtiyaz. However, it is significant to note that the prosecution failed to examine the Medical Officer and therefore it cannot be conclusively stated that which injury was caused by which weapon and by whom. As the prosecution has not examined the Medical Officer, the prosecution has not brought on record that the injuries to the deceased were sufficient, in the ordinary course of nature, to cause death. The prosecution has not brought on record as to who

caused the fatal injury and by which weapon.

37. As per the prosecution case PW-1 and PW-6 had witnessed the incident. However, as observed earlier, both these witnesses are not reliable and trustworthy. Aslam (PW-1) and Alam (PW-6) have deposed about seeing the assault from the door of the country liquor shop, but both these witnesses do not speak about the presence of each other at the time of assault. Both these witnesses do not attribute any specific overt act to the appellants. The prosecution has not brought on record any corroborative evidence about the presence of these witnesses at the spot of incident. Therefore, it is highly doubtful whether these witnesses have really witnessed the incident. PW-1 Aslam Solapure admitted in his cross examination that he was one of the accused in murder case of accused no.7 Sunil Dongale. It is alleged that murder of accused no.7 Sunil took

place after his release on bail in the present case. Therefore, possibility cannot be ruled out that out of vengeance he could have deposed against the accused persons. It is pertinent to note that though PW-1 has stated in F.I.R. and his evidence in examination-in-chief that accused no.5 Ansar participated in the assault armed with a sickle, however he has sworn in the affidavit on 14.11.2009 [Exh.48] (which was presented by the learned Counsel appearing for the accused No.5 with list Exhibit - 47 during the course of cross examination of the PW-1), exonerating accused no.5 Ansar, stating that he has mistakenly named accused no.5 Ansar and in fact accused no.5 was not at all present at the spot of incident, and he wanted to name accused no.7 Sunil Dongale but mistakenly named accused no.5. In the said affidavit, PW-1 does not name the appellants as the assailants. Therefore, it is very unsafe to accept and rely upon evidence of PW-1 and uphold

the conviction of the appellants. If the evidence of these two witnesses is discarded, then the entire prosecution case rests upon circumstantial evidence. However the prosecution has not brought on record sufficient, cogent and clinching circumstantial evidence so as to uphold the conviction of the accused.

38. It is pertinent to note that the articles were seized between the period from 20th July, 2009, to 22nd July, 2009. The letter Exhibit 122/C shows that the seized articles were sent to the office of the Chemical Analyzer on 4th August, 2009 for Chemical Analysis. Thus, it is clear that from 22nd July, 2009 till 4th August, 2009 the seized material was in the custody of the investigating officer. The prosecution has not brought on record whether the said articles were properly sealed or otherwise. Further, the prosecution has not examined the carrier who carried the muddemal

articles to the Chemical Analyzer. The Rajasthan High Court in the case of **The State V. Motia and other Accused**³, in para no. 8 held that:

"8. Learned counsel for Motia accused has raised a number of objections about this evidence against Motia. In the first place, he points out that there is no evidence to show that after the various articles had been recovered from the possession of Motia, they were kept sealed so that it was not possible for any one to sprinkle blood stains on them while they were in the custody of the police and before they were, sent for examination by the Chemical Examiner. We must point out that this lacuna in the prosecution evidence is there. Whenever it is desired by the prosecution that certain articles, which have been recovered from accused persons are to be identified, or are to be sent to the Chemical Examiner for analysis, it is necessary that the officer recovering the articles should

3 A.I.R. 1955 RAJASTHAN 82 (Vol. 42 C.N. 27)

immediately take steps to seal them and evidence should be produced that the seals were not tampered with till the identification is over, or till the articles are sent to the Chemical Examiner for analysis. In the absence of such precautions it would always be open to the accused to say that the police later put human blood on the articles in order to implicate the accused. It is, therefore, necessary for the prosecution to produce evidence that steps were taken at once to seal the articles, and that from the time the articles came into possession of the police to the time they were sent for identification before a Magistrate or for examination to the chemical Examiner the seals remained intact. This evidence is missing in this case. It is, of course, not difficult to sprinkle a few human blood stains on articles recovered if somebody wants to do so. We do not say that this was done in the present case; but as precautions were not taken, the argument raised on

behalf of the accused that this might have been done remains unrefuted. Under these circumstances, we find that we cannot place the same reliance on the discovery of blood stains on these various articles as we would have done if necessary precautions had been taken."

. In the facts of the present case, we find considerable force in the argument advanced by learned counsel for the Appellants that muddemal articles were in the custody of the investigating officer for about 12 days and during the said period possibility of tampering with the muddemal articles cannot be ruled out. Considering the over all evidence and the circumstances brought on record, explicit reliance cannot be placed upon the chemical analysis report.

39. The Investigating Agency has not carried out the investigation in proper manner. The

motorcycle of deceased was not seized, the Qualis in which it is stated that deceased was carried to the Hospital was not seized, the clothes on the person of PW-2 Salim which were on his person when he allegedly lifted deceased to put him in the Qualis, were also not seized.

40. In the light of discussion in foregoing paragraphs, an inevitable conclusion is that the evidence of PW-1 and PW-6 is not at all reliable and the same deserves to be discarded. If the evidence of PW-1 and PW-6 is discarded, the entire prosecution case rests upon circumstantial evidence. The evidence brought on record by the prosecution is not cogent, sufficient and convincing so as to prove the offence against the Appellants beyond reasonable doubt. On the whole there is no cogent, clinching and sufficient evidence showing the involvement of the appellants. Under these circumstances, the

Appellants are entitled for the benefit of doubt.

Hence we pass the following order:

O R D E R

(I) Both Criminal Appeals i.e. Criminal Appeal No.250/2012 and Criminal Appeal No.281/2012 are allowed.

(II) The Judgment and order dated 11th January, 2012, passed by the Additional Sessions Judge, Ichalkaranji in Sessions Case No.19 of 2010, thereby convicting and sentencing the Appellants – accused no.1 Vijay @ Babalu Sanjay Javir, accused no.2 – Pappu @ Popat Mallappa Pol, accused no.3 – Pintu @ Dhanaji Pandurang Jadhav, accused no.4 – Rahul Ananda Mane, accused no.5 – Ansar Dastgir Aitawade and accused no.6 Shankar

Bhagwat Garad for the offence punishable under Sections 302 read with Section 149, 147, 148, 427 of the Indian Penal Code, is quashed and set aside.

(III) All the Appellants are acquitted of the offence punishable under Sections 302 read with Section 149, 147, 148, 427 of the Indian Penal Code. Fine amount, if deposited as per the impugned Judgment and order, be refunded to the Appellants.

(IV) The order passed by the trial Court to the extent of acquitting the accused-Appellants of the offence punishable under Section 120-B of the Indian Penal Code and under Section 135 of the Bombay Police Act, 1951, is hereby confirmed.

(V) The Appellants are in jail, they be set at liberty forthwith, if not required in any other case.

(VI) All the Appellants shall furnish Personal Bond of Rs.15,000/- each and surety in the like amount, under Section 437-A of the Code of Criminal Procedure, before the concerned trial Court at Ichalkaranji.

(VII) In view of the order passed in Criminal Appeals, Criminal Application No.939 of 2018 does not survive and the same stands disposed of, accordingly.

[MRS.MRIDULA BHATKAR, J.]

[S.S. SHINDE, J.]

Jyoti
Prakash
Pawar

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signed by Jyoti
Prakash Pawar
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