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

CRIMINAL APPEAL NO. 506 OF 2011

(Modified as per speaking to the minutes of the order dated 16/08/2018)

Sudhakar Rajgopal Harijan)
Aged 32 years, Indian inhabitant,)
Occ. Service, Permanent resident)
of Sanjeev Chawl, Room No.458,)
Anand-Nagar Zopadpatti,)
Dharavi, Mumbai No. 400017.)
(Presently lodged at Nasik Central)
Prison)) Appellant
(Org. accused No.4.)

V/s

The State of Maharashtra)
(at the instance of Shahu Nagar)
Police Station vide C.R. No.137)
of 2007))Respondent.

**ALONGWITH
CRIMINAL APPEAL NO.512 OF 2011**

Murgan @ Motha Murgan)
Abhimanyu Harijan)
Aged about 35 years, residing at)
Room No.202, 2nd Floor, Panchsheel)
Building, Jasmil Mill Road, Near)
Municipal School, Dharavi,)
Mumbai 400 017)
At present undergoing the sentence)
imposed upon him at Mumbai Central)
Prison, Mumbai) Appellant.
(Orig.Accused No.1)

V/s

The State of Maharashtra)

Bharat
Dasharath
Pandit

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(at the instance of Senior Inspector)
of Police, Shahu Nagar Police)
Station vide C.R. No.137 of 2007)) Respondents.

ALONGWITH
CRIMINAL APPEAL NO.514 OF 2011

1] Asaytambi @ Langda Satta Nadar)
Aged 31 Years, Indian Inhabitant,)
Occ. Service, Permanent resident of)
Bhartiyar Chawl, Room No.446/A,)
M.P. Nagar, Dhorwada, Dharavi.)
(Presently on Bail pursuance to the)
Bail order passed by the Ld. Trial Judge)
after the conviction of the Appellant)
in the aforesaid matter.)
)
2] Pakiraj Natrajan Nadar,)
Aged 27 Years, Indian Inhabitant,)
Occ. Service, Permanent resident)
of Bhariyar Chawl, Room No.446/A,)
M.P. Nagar, Dhorwada, Dharavi.)
(presently in custody as life convicted)
Prisoner in the aforesaid matter)) Appellants
(Org. accused Nos. 3 & 8)

V/s

The State of Maharashtra)
(at the instance of Shahu Nagar)
Police Station vide C.R. No.137 of 2007)) Respondent.

ALONGWITH
CRIMINAL APPEAL NO.889 OF 2012

1] Jaiganesh Silvraj Devendra)
Aged: Adult, R/o Ambedkar Chawl,)
R No.29B, Indiranagar, Dharavi,)
Mumbai 400 017.)
)
2] Kadirawan Silvaraj Devendra)
Aged : 29 years, Occ: Service,)
R/o. Ambedkar Chawl, R No.29B,)
Indiranagar, Dharavi,)
Mumbai 400 017)
)
3] Tangrajan Silvaraj Devendra)
Aged : Adult, Occ : Nil)
R/o Kakkan Nagar, At post Nagreshi)
Dist Tirunalveli, Tamil Nadu)
At present undergoing the sentence)
imposed upon them at Kalamba)
Central Prison, Kolhapur.) Appellants.
(Org. accused Nos.2, 7 & 9)

V/s

The State of Maharashtra)
(At the instance of Senior Inspector)
of Police, Shahu Nagar Police)
Station vide C.R. No.137 of 2007)) Respondent.

ALONGWITH
CRIMINAL APPLICATION NO.480 OF 2014
IN
CRIMINAL APPEAL NO.512 OF 2011

Murgan @ Motha Murgan
Abhimanyu Harijan
..... Applicant.
(Original Accused No.1)

V/s

The State of Maharashtra

..... Respondent.

ALONGWITH
CRIMINAL APPLICATION NO.792 OF 2016
IN
CRIMINAL APPEAL NO.889 OF 2012

1] Jaiganesh Silvraj Devendra & Ors.

....Applicants.
(Original Accused Nos.
2, 7 and 9)

V/s

The State of Maharashtra

....Respondent.

Mr. Khan Abdul Wahab, Advocate for the Appellant in Appeal No.506 of 2011 (Original Accused No.4)

Mr. Sudeep Pasbola with Mr. Bhavesh Thakur and Mr. Karl Rustomkhan i/by Mr. Rahul Arote, Advocates for the Appellant in Appeal No.512 of 2011 (Original Accused No.1)

Mr. Yug Mohit Chaudhry with Ms. Payoshi Roy, Advocates for the Appellant in Appeal No.514 of 2011 (Original accused Nos. 3 and 8)

Mr. Nitin Sejpai with Ms. Akshata B. Desai, Advocates for the Appellants in Appeal No.889 of 2012 (Original Accused Nos. 2, 7 and 9)

Mrs. M.M. Deshmukh, APP for the Respondent/State in all the appeals.

**CORAM: B. R. GAVAI &
SARANG V. KOTWAL, JJ.**

DATE: 2nd July, 2018

ORAL JUDGMENT: (Per B.R. Gavai, J.)

1] Being aggrieved by the common Judgment and Order dated 21/04/2011 passed by the learned Sessions Judge in Sessions Case No. 912 of 2017, Sessions Case No.956 of 2007 and Sessions Case No.480 of 2009 the Appellants have approached this Court through these appeals. The learned Sessions Judge by the said Judgment and Order has convicted the Appellants and sentenced them as under:

(1) Accused No.1 Murgan @ Motha Murgan Abhimanyu Harijan, accused No.2 Jaiganesh Silvraj Devendra, accused No.3 Asaytambi @ Langada Satta Nadar, accused No.4 Sudhakar Rajgopal Harijan, accused No.7 Kadirawan Silvaraj Devendra, accused No.8 Pakiraj Natrajan Nadar and accused No.9 Tangrajan Silvaraj Devendra are hereby convicted under section 235 (2) of Criminal Procedure Code for the offences punishable under Sections 143, 147, r.w. Section 149 of IPC, 307 r.w. Section 149 IPC, 302 r.w. Section 149 of IPC, 506 (II) r.w. Section 149 of IPC.

(2) Accused No.1 Murgan @ Motha Murgan Abhimanyu Harijan, accused No.2 Jaiganesh Silvraj Devendra, accused no.3 Asaytambi @ Langada Satta Nadar, accused No.4 Sudhakar Rajgopal Harijan, accused No.7 Kadirawan

Silvaraj Devendra, accused No.8 Pakiraj Natrajan Nadar and accused No.9 Tangrajan Silvaraj Devendra are hereby convicted under Section 143 r.w. Section 149 of IPC and sentenced to suffer RI for 3 (three) months and to pay a fine of Rs 1000/- (Rupees One thousand only) each, in default of payment of fine amount they have to suffer SI for 2 (two Months) each.

(3) Accused No.1 Murgan @ Motha Murgan Abhimanyu Harijan, accused No.2 Jaiganesh Silvraj Devendra, accused no.3 Asaytambi @ Langada Satta Nadar, accused No.4 Sudhakar Rajgopal Harijan, accused No.7 Kadirawan Silvaraj Devendra, accused No.8 Pakiraj Natrajan Nadar and accused No.9 Tangrajan Silvaraj Devendra are hereby convicted under Section 147 r.w. Section 149 of IPC and sentenced to suffer RI for 1 (one) year and to pay a fine of Rs. 1000/- (Rupees One thousand only) each, in default of payment of fine amount, they have to suffer SI for 6 (six) months each.

(4) Accused No.1 Murgan @ Motha Murgan Abhimanyu Harijan, accused No.2 Jaiganesh Silvraj Devendra, accused no.3 Asaytambi @ Langada Satta Nadar, accused No.4 Sudhakar Rajgopal Harijan, accused No.7 Kadirawan Silvaraj Devendra, accused No.8 Pakiraj Natrajan Nadar and accused No.9 Tangrajan Silvaraj Devendra are hereby

convicted under Section 307 r.w. Section 149 of IPC and sentenced to suffer RI for 7 (seven) years and to pay a fine of Rs. 2000/- (Rupees Two thousand only) each, in default of payment of fine amount they have to suffer SI for 1 (one) year each.

(5) Accused No.1 Murgan @ Motha Murgan Abhimanyu Harijan, accused No.2 Jaiganesh Silvraj Devendra, accused no.3 Asaytambi @ Langada Satta Nadar, accused No.4 Sudhakar Rajgopal Harijan, accused No.7 Kadirawan Silvaraj Devendra, accused No.8 Pakiraj Natrajan Nadar and accused No.9 Tangrajan Silvaraj Devendra are hereby convicted under Section 302 r.w. Section 149 of IPC and sentenced to suffer RI for life imprisonment and to pay a fine of Rs 3000/- (Rupees Three thousand only) each, in default of payment of fine amount they have to suffer SI for 1 (one) year each.

(6) Accused No.1 Murgan @ Motha Murgan Abhimanyu Harijan, accused No.2 Jaiganesh Silvraj Devendra, accused no.3 Asaytambi @ Langada Satta Nadar, accused No.4 Sudhakar Rajgopal Harijan, accused No.7 Kadirawan Silvaraj Devendra, accused No.8 Pakiraj Natrajan Nadar and accused No.9 Tangrajan Silvaraj Devendra are hereby convicted under Section 506 (II) r.w. Section 149 of IPC and they are sentenced to suffer RI for 3 (three) years and

to pay a fine of Rs 1000/-. (Rupees One thousand only) each, in default of payment of fine amount they have to suffer SI for 3 (three) months each.”

2] The prosecution case, in brief, as could be gathered from the First Information Report (“FIR”) lodged by P.W. 1 – BalKrishnan Devendra is thus:-

3] P.W. 1 – Balkrishnan Devendra is a resident of Dr. Ambedkar Chawl, Indira Nagar, Dharawi. His maternal uncle deceased Perumal Devendra, alongwith his wife and two sons viz. P.W 6 – Navinkumar and P.W. 8 – Shivkumar, was residing in Shrikrishna Housing Society. Some of the accused were also residing in the said locality. The elder son of deceased Perumal viz Navinkumar (P.W.6) was studying in the Second Year B.Com. in the College known as S.I.W.S. Cross College, Wadala. The accused No.9 – Tangrajan Devendra, though was not taking education in the said college, used to visit the said college and raise quarrel with Navinkumar (P.W.6). He was also having criminal record. On earlier occasion, he had abused Navinkumar and gave threats of taking his life and had also assaulted him.

4] As per the evidence of P.W. 6 – Navinkumar, there was also a quarrel between deceased Perumal on one hand and accused No.1 – Murgan @ Motha Murgan Abhimanyu Harijan, accused No.2 – Jaiganesh Silvraj Devendra accused No.7 – Kadirawan Silvaraj Devendra and accused No.3 – Asaytambi @ Langda Satta Nadar on the other hand and with regard to the same, Perumal had also filed report in the Shahu Nagar Police Station. P.W. 1 – Balkrishnan had also accompanied Perumal for lodging the report in the Police Station.

5] It is further the case of the first informant that, on the day of incident i.e. on 16/08/2007, at around 20.30 hours, he (P.W.1) along with his deceased uncle's son P.W.8 - Shivkumar, were chitchatting in front of Room No.22. At that time, accused No.1 – Murgan @ Motha Murgan accused No.2 – Jaiganesh, accused No.7 - Kadirawan, accused No.4 – Sudhakar , accused No.3 – Asaytambi and accused No. 8 – Pakiraj came from the lane adjacent to Nehru Chawl. Accused No.1 was having sword, accused No.2 and accused No.9 were having Tamilnadu Koyta (sickle). Accused Nos. 3 and 7 were also having

Tamilnadu Koyta. Accused Nos 4 and 8 were having swords. Accused No.1 gave threat to Perumal. The other 4-5 unknown persons also came there with sickle in their hands. Accused No.1 assaulted deceased Perumal with sword on his neck by using abusive language and by threatening him. Accused Nos. 2, 8 and 9 also assaulted deceased Perumal with weapons, which they were having. As per the version given by the first informant P.W. 1 – Balkrishnan in the FIR, he and P.W. 8 – Shivkumar were standing in the lane of Santosh Chawl. It is further averred by him that, Perumal was trying to save himself and was shouting for help. The first informant himself, P.W. 8 – Shivkumar and others went for help. However, accused No.1 – Murgan @ Motha Murgan and his associates had given threats that, they would cut those who would come forward to save Perumal. As such, people ran away from the spot and closed the doors of their house. Thereafter, the deceased Perumal was taken to Sion hospital. However, he was declared dead before he was admitted in the hospital.

6] It is further averred in the FIR that, when the first informant

P.W. 1 – Balkrishnan was in the hospital, his maternal aunt i.e. wife of Perumal, came along with P.W. 6 – Navinkumar in Sion hospital. On being inquired, P.W. 6 – Navinkumar disclosed that, at around 8.15 P.M., in front of Sahara Social Welfare Centre at Anna Nagar, accused No.1 – Motha Murgan, accused No.4 – Sudhakar, accused No.9 – Tangrajan, accused No.7 – Kadirawan, accused No.8 - Pakiraj and accused No. 3 – Asaytambi @ Langda Satta assaulted him with swords and sickles.

7] It is also stated in the complaint lodged by the first informant that, when he was in Sion hospital, P.W. 7 - Shivan Devendra had also come in Sion hospital in injured condition. On being inquired, he disclosed that, at around 8.40 P.M., when he was in Al Sahara Communication Centre situated in front of Rekada Masjid, accused No.1 – Motha Murgan, accused No.2 – Jaiganesh, accused No.9 – Tangrajan, accused No.8 – Pakiraj, accused No.3 - Asaytambi accused No.4 – Sudhakar and accused No.7 – Kadirawan assaulted him with sword and sickle.

8] On the basis of oral report lodged by P.W. 1 – Balkrishnan, Crime No.138/07 came to be registered by P.W. 26 – PSI Anand Yeshwant Rewandkar. The investigation of case was handed over to P.W. 27 – Sr. PI. Ms. Megha Jaiprakash Kadam. She carried out the further investigation. During investigation, the clothes, which were on the person of the accused at the time of incident, also came to be seized. Upon completion of investigation, initially, charge-sheet was filed against seven accused. Thereafter, accused No. 8 was arrested and subsequently accused No.9 was also arrested and charge-sheet was filed against the said accused. Since the case for major offences was exclusively triable by the learned Sessions Judge, all three charge-sheets came to be committed to the learned Sessions Judge. The learned Sessions Judge framed the charges against accused Nos. 1 to 8 on 29/08/2008. The accused pleaded not guilty and claimed to be tried. Subsequently, a charge also came to be framed against accused No. 9 on 18/11/2009. He also pleaded not guilty and claimed to be tried. At the conclusion of the trial, learned Trial Judge passed the order of conviction and sentence as aforesaid. However, learned Trial Judge acquitted accused No.5 – Pandiyan Jagannath

Harijan and accused No.6 – Arulraj Armanaygam Harijan for the offences punishable under Sections 143, 147, r/w section 149, 307 r/w section 149 and 302 r/w section 149 of the IPC and 506(II) r/w Section 149 IPC. The learned Trial Judge also acquitted accused No.9 – Tangrajan Silvaraj Devendra for the offence punishable under Section 4 r/w Section 25 of the Arms Act and for offence punishable under section 37(1) r/w Section 135 of the Bombay Police Act.

9] The incident as per the prosecution, has taken place in three parts. First part is with regard to assault on deceased Perumal Devendra, as a result of which, he has died. Second part is assault on Navinkumar (P.W.6), son of deceased Perumal and third part is assault on Shivan (P .W.7).

10] Insofar as first part is concerned, prosecution has relied on the evidence of three eye witnesses viz P.W. 1 – Balkrishnan, P.W. 8 – Shivkumar, son of the deceased Perumal and P.W. 17 – Rajesh David. Insofar as second part is concerned i.e the assault on P.W. 6 – Navinkumar, prosecution has relied on the testimony of injured witnesses, as well as P.W. 8 – Shivkumar, son of the deceased and

P.W. 14 Rajmani Devendra. Insofar as third part is concerned i.e. the assault on P.W. 7 – Shivan, prosecution has relied on the testimony of the said injured witness.

11] Before referring to the ocular testimony of the eye witnesses, we find it appropriate to reproduce the injuries suffered by the deceased as well as the witnesses. P.W 25 – Dr. Rajesh Dere has conducted autopsy on the deceased Perumal. From the postmortem report as well as evidence of P.W. 25, it can be seen that the deceased Perumal had suffered the following six external injuries:

“i) Incised wound of 5 x 1 x bone deep over right parietal bone 2 cm lateral to midline of skull.

ii) Stab of 3 x ½' x 4 c.m. Over back of neck fracturing C4 vertebrae.

iii) Traumatic amputation of right 4th and 5th finger with edges sharp.

iv) Cut laceration of 3 x 1 x underling bone

fracture over 3rd and 4th finger (left).

v) CLW of 2 x ½ x ½ c.m. Over right upper back below tip of right scapulae.

vi) CLW of 2 x 1 c.m. On right thigh 10 c.m. Above knee joint.

vi) Scratch abrasion 4 in number over right side of shoulder.”

He had also suffered the following internal injuries:

“i) Bleeding under scalp over right parietal area.

ii) Fracture of cervical fourth vertebrae.”

12] Perusal of para 2 of the examination-in-chief of P.W. 25 - Dr Rajesh, would reveal that out of the aforesaid six external injuries, injury Nos. 1 and 2 with its internal corresponding injuries, were on the vital part of the body. In his cross-examination, this witness has also admitted that, injury Nos 3 to 6 can be possible by hard and blunt object. Insofar as injuries on P.W. 6 – Navinkumar and P.W. 7

– Shivan are concerned, it would be relevant to refer to the evidence of P.W. 20 – Dr. Navin Ukande. The injuries suffered by P.W. 6 – Navinkumar are as under:-

- “1) Incised wound on right side chest of 2cm x 1 cm
- 2) Incised wound on right leg admeasuring 4 x 1 cm
bone deep injury.
- 3) Incised wound on left thigh admeasuring 3 x 1 cm
and muscle deep.”

Insofar as injuries suffered by P.W. 7 - Shivan are concerned, they are thus :

- “1) Incised wound on left hand admeasuring 6 x ½
cm skin deep.
- 2) Incised wound on left knee admeasuring 4 x 1 cm
and
- 3) another incised wound on the said knee
admeasuring 5 x 1 cm.”

13] We will first examine ocular testimony of eye witnesses to the incident relating to the assault on the deceased Perumal. P.W. 1 – Balkrishnan, who is the first informant, has narrated in his evidence

about the earlier incident with regard to dispute between P.W. 6 – Navinkumar and accused No. 9 – Tangrajan in the college. He has also narrated about earlier assault by accused No. 9 – Tangrajan on P.W. 6 – Navinkumar. He states that, thereafter, nothing has happened for three months. Again, Tangrajan had gone to the house of Navinkumar. At that time, he himself (P.W.1) caught hold of Tangrajan and had rescued their quarrel. At that time, Tangrajan told him that he would again assault Navinkumar. He states that, thereafter, after two days, murder of his maternal uncle Perumal was committed. He states that, on the day on which the incident had taken place, he was at his house, so also his maternal uncle was in the house. On that date, his maternal uncle told him that, he had sustained injuries on his person due to assault before one week. He gave names of Motha Murgan, Jayganesh and Selvraj. On being asked as to whether he had lodged report against them, he replied that he had lodged report against them. Thereafter P.W.1 took him to Sion hospital for treatment. Thereafter, they returned at the house. In the evening, there was a message from the A.C.P. that his maternal uncle's son Shivkumar (P.W.8) was called in the Police Station. He

states that, thereafter, they went to Police Station at 4.00 P.M. and they were in the Police Station until 8.00 P.M. Thereafter, they returned to their house. He further states that, at around 8.20 P.M., he and his maternal uncle Perumal were sitting near his house. At that time, near about 20 persons came running towards them. He saw them and realized that, they came towards them to assault his maternal uncle Perumal. He further states that, they were accused No.1 – Motha Murgan, accused No. 2 – Jayganesh, accused No.3 – Asaitambi @ Satta, accused No.4 – Sudhakar, accused No.7 – Kadiravan and accused No.9 – Tangrajan. They were armed with swords. He further states that, he asked his uncle that, they should run away to save their life. However, his maternal uncle told him that, he would see the persons who came to assault him. Thereafter, he left his maternal uncle at the said place and fled away from that spot in the lane. He entered one of the room and stepped up above the loft of the said room and witnessed the incident from that place. He states that, accused Motha Murgan abused his maternal uncle Perumal and asked him as to why he had lodged report against him in the Police Station. He told him that nothing would happen by

lodging the report. Thereafter, he inflicted sickle blow on the neck of his maternal uncle Perumal. The other persons also assaulted him with sickles and swords. At that time, he resisted inflicting of sickle and sword blows. His fingers were cut. Thereafter, all those persons fled away, presuming that he died. Thereafter, he himself and his other friends lifted his maternal uncle Perumal to Sion hospital.

14] P.W. 1 – Balkrishnan further states that, when he was standing outside the Sion hospital, the elder son of Perumal was brought to the hospital as he had sustained injuries. Thereafter, Shivan (P.W.7) was also brought by police for medical treatment as he had sustained injuries. He states that, he saw Shivan, in the hospital. He further states that, thereafter, Police came in the hospital. The wife of his maternal uncle had come in the hospital alongwith son Navinkumar. On being asked, she told him as to how Navinkumar sustained injuries. She told that, Motha Murgan and other persons assaulted him. Police asked him about the incident. He narrated the incident to the police. Police recorded his statement as per his say. He signed his statement. The witness had identified the accused. The witness had

also identified swords and sickles which were used by the accused in the crime.

15] In his cross-examination, P.W.1 – Balkrishnan states that, when he had taken the deceased Perumal to the hospital, he was accompanied by his friend Jennu and one another friend. He further states that, his maternal aunt and other relatives reached the hospital five to ten minutes after his arrival in the hospital. He further admits that, though police officer was present in the hospital and though he asked him and his friends as to how the incident had occurred, he did not narrate him the incident. He states that, his friend Jennu narrated the incident to the police officer who was on duty in the Sion hospital. He states that, he recorded the statement of Jennu as per his say on a small paper.

16] P.W. 1 – Balkrishnan further states in his cross-examination that, at the time of lifting of Perumal, his clothes had stained with blood. However, he did not handover his blood stained clothes to the police. The police officer did not ask him to handover the clothes.

He further states that, he had changed his blood stained clothes in the hospital before arrival of the police. He states that, he had phoned to his friend to bring another shirt in the hospital and changed the same in the hospital. He further states that, he did not inform the police that his shirt was oozed with blood.

17] Perusal of para 9 of cross-examination of P.W. 1 – Balkrishnan, would reveal that, the entire portion with regard to earlier quarrel between P.W. 6 – Navinkumar and accused No.9 - Tangrajan as well as earlier assault on the deceased and the deceased and this witness going to police, is an omission in the police statement. The part of his deposition with regard to he going in one of the room, stepping up on the loft of the room and witnessing the incident from that loft in the said room, is also an omission in the police statement. He has further admitted in his cross-examination that, it is only after the occurrence of the incident that he came to know the names of accused persons. He further states that, when, at the first time, he had seen mob of 20 to 25 persons coming towards him and his uncle, the distance between him and the said mob was approximately 100 ft.

He further admits that, before the said mob reached to the place where his maternal uncle was sitting, he had fled away from the said place. Though he denies that, the lane in which he ran away was a dark lane, he admits that, he had narrated to the police while recording his statement that, he ran away in the lane where there was darkness.

18] As stated hereinabove, P.W.1 has stated that he had changed his clothes in the hospital. He states that, he came out of hospital, changed the shirt and threw his blood stained shirt out of casualty ward. He has admitted that, there was no electric lamp of Municipality in the lane between two chawls. In para 15 again, material omissions in his police statement have been brought on record. In para 19 of his cross-examination, he states that when he had gone to see his injured maternal uncle, at that time, he saw his friend Jenu Peter and one another friend. He admits that both of his friend were at the house of his maternal uncle before he went there.

19] In para 20 of his cross-examination, P.W.1 – Balkrishnan states

that, he went to Police Station on second day after the incident for signing. He further states that, he went to Police Station at around noon hour. He further admits that, police obtained his signature on the complainant at Exhibit-32 on the second day i.e on 17/08/2007.

20] P.W. 8 – Shivkumar is the son of the deceased Perumal. He is the second eye witness to the said incident. He states that, on the date of incident, at around 8.00 P.M. to 8.30 P.M., his father was chitchatting with Pushparani Devendra and Mutukani Devendra in Ambedkar Chawl, adjacent to public latrine. He states that, he was also standing at that place adjacent to his father. At that time, all the accused persons came from direction of Ganesh temple and abruptly started assaulting his father with swords and Tamilnadu Koyta (sickle). Accused No.1 – Motha Murgan was armed with sword, accused No.4 – Sudhakar was also armed with sword, accused No.8 Pakiraj was also armed with sword, accused No.2 – Jaiganesh and accused No.3 Asaytambi were armed with Tamilnadu sickle. All the accused assaulted his father with these weapons. At that time, 10 to 15 persons had gathered there. They were attempting to rescue his

father from clutches of the accused. At that time, accused No.1 – Motha Murgan and accused No.2 – Jayganesh, threatened and abused the people that whoever would come forward to rescue, would be cut down. He states that, at that time, he was standing in the lane of Santosh Chawl. He had hidden himself from them in the said Chawl. He further states that, due to assault with the weapons in the hands of the accused, his father fell on the road. After his father fell on the ground, accused persons fled away from the spot of incident. His neighbours Pushparani, Mutukani and Balkrishnan lifted his father upto the road and thereafter moved him in a taxi to Sion hospital. He states that, he had also followed them in another taxi in Sion hospital. Doctor examined his father and declared him as dead. He further states that, his brother Navinkumar and Shivan disclosed him in the Sion hospital that, accused persons assaulted them and they both had sustained injuries. He states that, on 17/08/2007, he was called in Arthur road jail for identification of accused and at that time, he identified accused No.8 – Pakiraj. Though he states that, he can identify the clothes of his deceased father, if shown to him, he could not identify the clothes of his deceased father out of the clothes

which were shown to him. He states that, according him, there were no clothes of his father in clothes shown to him and produced before the Court. In para 8 of his cross-examination, material omissions in his police statement have been brought on record. He has admitted in his cross-examination that, he had neither lifted his father nor assisted in keeping him in taxi. He states that, after his father was taken to hospital in taxi, he took another taxi to go to the hospital. He further states that, in the hospital, 2 to 3 police officers made inquiry with him. He states that, police inquired with him for about 15 to 20 minutes. He states that, the police officer, who reduced his statement in handwriting, had read over to him its contents. He states that, he does not remember as to whether police obtained his signature on the statement. He states that, the police officer reduced into writing his statement on a sheet of paper on both sides. It is pertinent to note that, at this stage, learned Advocate for the Appellants had requested the learned APP to produce the statement in handwriting before the Court. The learned APP submitted that, there was no such handwritten statement of the present witness recorded by the police. He further states that, he did not narrate any incident to the police

who was on duty in casualty ward of the Sion hospital, nor in his presence any relative made any statement to the said police officer. He states that, 10 to 15 persons were assaulting and inflicting blows on his father. After sustaining two to three blows, his father fell on the ground. The inflicting of blows continued, even after his father had fallen on the ground.

21] Though in examination-in-chief this witness (P.W.8) states that, he was acquainted with the accused, he admits that he did not narrate to the police that he was acquainted with the present accused persons since last 4-5 years at the time of recording of his statement. The reason given by him was that, police did not ask about it.

22] It is further pertinent to note that, in para 20 of his cross-examination, this witness (P.W.8) admits that, police officer had shown him all the accused persons in the lock up when he went to Police Station. He further admits that, police officer had shown him all the accused persons except Tangrajan and Pakiraj on 17/08/2007 in the Police Station. He further admits that, on 17/08/2007, when

police had shown him accused persons, they did not record his statement. He further admits that, since he had seen accused No.5 – Pandian Harijan in the Police Station lock up room, he had identified him before the Court.

23] The next eye witness to the incident is P.W. 17 – Rajesh David. In his examination-in-chief, he states that he knows all the accused persons and that they are his relatives. He states that, on the date of the incident, at around 8.30 P.M., he went for ease in a toilet adjacent to his house. He heard noise on the road. He turned in that direction. The accused persons were coming there, armed with weapons. Out of these persons, there were Motha Murgan, Pandian, Sudhakar, Ganesh, Satta and Pakiraj. Out of them, one abused Perumal. He also heard noise that, if somebody came in front, he would be cut down. After public saw the arms in their hands, they fled away. He came at the side of the road and stood there. Those persons were inflicting blows of weapons on the deceased Perumal. After those persons fled away from the spot of the incident, he went at the place of incident. He found that, Perumal was lying at the spot

of incident. He had sustained injuries on his person. He saw the cut little finger of deceased Perumal at that spot. Thereafter, a person viz Bala came there alongwith some other person. They lifted deceased Perumal to the hospital. On the second day, he came to know that he was taken to Sion hospital. He also states that, on 07/12/2007, he was called for identification parade in Central Arthur Road Jail. Various contradictions and omissions have been brought on record in his cross-examination. In para 15 of his cross-examination, he admits that until recording of his statement, he did not disclose the incident, which he had seen to any other person. He states that, after hearing noise, he turned to see the incident. At that time, Perumal was at a distance of 50 to 60 feet from the steps of the toilet from which he had seen him. He admits that, all the persons at that time had encircled the deceased Perumal. Though he states in his examination-in-chief that, the accused were his relatives, he admits that he was not knowing Satta (Accused No.3) and Pakiraj (Accused No.8). He further admits that, both of them were not his relatives.

24] Insofar as the second incident with regard to assault on P.W. 6 –

Navinkumar is concerned, prosecution has relied on testimony of P.W. 6 himself as well as P.W. 4 – Vinodkumar Durai and P.W. 14 – Rajmani. P.W. 6 states that on 16/08/2007, he was sitting near common latrine in front of his house. At that time, Rajmani and Vinodkumar were also present alongwith him at common latrine. He states that, at that time, 10 to 15 persons came from his opposite direction in front of him. He was knowing them. They were accused No.1 – Motha Murgan, accused No.2 – Jaiganesh, accused No.3 – Satta @ Asaytambi, accused No.9 – Tangrajan, accused No.8 – Pakiraj, accused No. 4 – Sudhakar, accused No.6 – Arunraj and accused No.7 Kadirawan. He states that, accused No.2 – Jaiganesh caught hold of him. Jaiganesh told to accused No.1 – Motha Murgan that, he (P.W.6) was the son of Perumal. Jaiganesh also told to Motha Murgan that they should murder him (P.W.6). He was resisting and trying to escape from the clutches of accused No. 2 – Jaiganesh. At that time, he fell on the ground. Accused No.1 – Motha Murgan was armed with sword. He inflicted a sword blow on his right leg under the knee. As such, he sustained bleeding injury on his right leg. Accused No.2 – Jaiganesh inflicted a blow of Tamilnadu sickle

on his left thigh due to which he sustained bleeding injuries on his left thigh. He states that , accused No. 3 – Satta @ Asaytambi was armed with Tamilnadu sickle, accused No.9 – Tangrajan was also armed with Tamilnadu sickle, accused No.6 – Arunraj was armed with Tamilnadu sickle, accused No. 4 – Sudhakar and accused No.8 - Pakiraj were armed with swords. He states that, all these persons assaulted him with the weapons in their hands. At that time, he gave call to the people to save him. People came towards him to save him. However, nobody came forward to save him because accused No. 1 – Motha Murgan brandished the sword in air and gave threat to them that, if somebody would dare to come forward, he would be cut down. Therefore, people dispersed from the spot of incident. At that time, accused No. 2 – Jaiganesh told to accused No.1 – Motha Murgan that now they should murder Bhuminathan and Perumal. He states that, there was previous enmity between his father – Perumal and accused No.1 – Motha Murgan and accused No.2 – Jaiganesh with regard to running of Nursery school in their society.

25] P.W. 6 – Navinkumar further states that, thereafter, all the

accused went in direction of Indira Nagar. After sometime, his mother came where he was lying. Rajmani and Vinod also came on the same spot. They took him to Sion hospital. He further states that, he was admitted in Sion hospital for about 4-5 days and thereafter he was admitted in private hospital for 10-12 days for treatment of his injuries. He states that, after his admission in Sion hospital, police came to the hospital. They asked him about the incident and he narrated the incident to the police.

26] In his cross-examination, P.W. 6 – Navinkumar has admitted that, though Doctor had asked him as to how he had sustained injuries, at that time he did not disclose to Doctor the names of accused persons as assailants. He further admits that, he did not disclose to the Medical Officer that assailants were acquainted with him. He has further admitted in his cross-examination that, he knows the person viz Bhuminathan. He further admits that, there was a dispute with regard to Nursery school between accused No.1 – Motha Murgan, accused No.2 – Jaiganesh on the one hand and Bhuminathan and his father – Perumal on the other hand. He states that his

mother, who had come within 5 to 10 minutes after assault, did not ask him at the spot of incident as to how he had sustained the injuries and who had assaulted him. He further admits that, neither did he disclose the names of assailants to his mother on the spot, nor in the taxi while he was being taken to the hospital. Various omissions and contradictions in his evidence have been brought on record in paras 10 and 11. Though he states in his examination-in-chief that Rajmani and Vinod were with him, in para 14 of his cross-examination, he states that Rajmani and Vinod were not at the place where he fell down and was assaulted.

27] P.W. 4 – Vinodkumar also states that, on the date of incident i.e on 16/08/2007, at around 8.30 P.M. to 9.30 P.M., he alongwith his friend Navinkumar and Rajmani were sitting in the ground in front of public toilet adjacent to Nehru Chawl. At that time, group of 8-15 people came there. He states that, accused No. 8 – Pakiraj and accused No. 4 – Sudhakar, both were armed with sword. The other persons were armed with Tamilnadu sickle. At that time, accused No.1 – Motha Murgan, by raising his voice, told Navinkumar

that the said boy was the son of Perumal and they had to kill him. He states that, as soon as all accused persons started to make hue and cry, Navin started running away from the spot to save his life. When he was running away, he could not run properly and fell on the ground. At that time accused No.1 – Motha Murgan went near him and he inflicted a sword blow on his leg. At that time, Jaiganesh, who came behind Motha Murgan, inflicted sickle blows on the stomach of Navinkumar. Tangrajan and Asaytambi also inflicted sickle blows on the person of Navinkumar. He states that, at that time, he only watched the incident and did not take any effort to save Navin. He states that, after assault, the assaulting party fled away. Thereafter, he himself, his friend Rajmani and other people and his mother had lifted Navinkumar to Sion hospital. His statement was recorded on the next day. He states that, he went for identification parade thrice. In the first identification parade, he identified accused No.1 – Murgan @ Motha Murgan and accused No.2 – Jaiganesh. In the second identification parade, he identified accused No. 3 – Asaytambi and accused No.4 – Sudhakar and thereafter in third identification parade, he identified accused Nos. 5 and 6.

28] In his cross-examination, P.W. 4 – Vinodkumar states that, he used to meet with Navinkumar in the evening. He further states that, they used to meet each other in college and also out of college. However, he did not come to know about the incident of earlier attack on Navinkumar. He further states that, Navinkumar had also not told him about the incident dated 12/08/2007 when they had gone to Police Station to lodge the report. He also admits that, there was dispute between father of accused No.2 and 7 on one hand and the father of Navinkumar on the other hand. He admits that, he had taken Navinkumar to Sion hospital and Bhuminathan had come in Sion hospital to see him. He further states that, he himself, mother of Navinkumar viz. Kannama and Rajmani had taken Navinkumar to Sion hospital. He also admits that, at the time of lifting Navinkumar, their clothes were stained with blood. However, they did not produce these clothes before the police. He further states that, police did not ask them to produce the clothes. He further states that, prior to recording of his statement by PI Smt. M.J. Kadam, he had changed his blood stained clothes. He also states that, he had called clothes from

his house through his friend. He further admits that, he did not disclose incident of assault of Navin to anybody on his own accord before recording of his statement by police. This witness also states that, he had told his friend Arvind to bring the clothes from the house in the hospital and threw away the blood stained clothes in the hospital. He admits that, though he was in the hospital throughout the night and though police personnel were present in the hospital, he did not narrate anything to the police. Various omissions and contradictions have been brought on record in para 26 of his evidence.

29] The next witness is P.W. 14 – Rajmani. His version is also similar. He states that, all the accused, who were armed with sword and Tamilnadu sickle, inflicted blows on the person of Navinkumar. At that time, Navinkumar raised cry to save him. He states that, at that time, he was standing at the side of the place of the said incident. He also states about the threat given by accused No.1 – Motha Murgan to other people. He states that, thereafter, after assaulting P.W. 6 – Navinkumar, all of them went to the direction of

residence of Perumal. He states that, thereafter, mother of Navinkumar came there. They lifted Navinkumar to Sion hospital for treatment. The statement of this witness was recorded after two days. He states that, on 26/08/2007, he was called for identification parade and he had identified accused No.7 – Kadiravan. Various omissions and contradictions have been brought on record in para 4 of his cross-examination. He also states that, when they had gone to Sion hospital in a taxi, he himself, Vinodkumar, Ganesh and injured Navinkumar and his mother Tangamma were in the taxi. He also states that, he did not narrate the incident to police officer to whom he had seen in the hospital. He states that, at that time he did not feel it necessary to tell the police about the incident of assault. He also stated that though they were meeting regularly, Navinkumar did not disclose him about any quarrel or dispute, which had taken place earlier. The statement of this witness is recorded on 26/08/2007. In para 16 of his cross-examination, he admits that 15 persons who arrived at the spot of incident were unknown to him.

30] Insofar as third incident is concerned, prosecution has relied on

the evidence of P.W. 7 – Shivan. He states in his evidence that, on 16/08/2007, at around 8.30 P.M., he returned to his house. He states that, there is STD booth adjacent to his house viz. “Al-sahara Communication”. He had to make telephone to his friend Joseph. He was sitting in the said STD shop. At that time, he had seen some persons fleeing away from the road. He saw the persons namely Motha Murgan, Satta, Ganeshan. He states that, Motha Murgan was armed with sword. As soon as he saw him, he raised his sword to assault him. In order to save the sword blow, he had hidden himself behind the table by raising the said table in his direction. Again, he raised sword to assault him. He therefore tried with his hand to catch hold of the sword, which resulted in he sustaining bleeding injuries on his left hand. Thereafter, he tried to enter in the cabin of STD Booth to save himself. At that time, accused No.2 – Jaiganesh inflicted blows of sickle on his left leg. When he had hidden himself in the cabin of STD Booth, Satta was armed with sickle. He was asking others to kill him. At that time, Motha Murgan asked him to come out of STD Booth and he would kill him. P.W. 7 states that he raised hue and cry to save himself. At that time, accused No.1 – Motha

Murgan raised his sword and threatened to public that if anybody would dare to come to save him, he would be killed. Listening to this, people started to run away from the spot of incident. Thereafter, accused persons fled away from the spot of incident. Thereafter, he went to Sion hospital for treatment of his injuries.

31] P.W.7 – Shivan also states that, prior to the said incident, on 12/08/2007, he came to know about accused Ganesh, Tangrajan and Silvaraj assaulting Perumal. He states that, he had gone to Police Station alongwith Perumal to lodge report against them. He states that, immediately he went to hospital. At around 9.05 to 9.10 P.M., he met police personnel. He states that, two police officers met him at 9.05 P.M. on the night of the occurrence of the incident. His statement was recorded between 6.00 A.M. to 6.30 A.M. He states that, he had gone to Police Station at around 3.00 A.M. However, he did not narrate the incident on his own accord to the lady police officer. There are material contradictions and omissions in his evidence.

32] It will be relevant to note that, though P.W. 1 – Balkrishnan in

his evidence states that, on 12/08/2007, he had gone along with the deceased Perumal to the Police Station with regard to the incident that had taken place on that date, this witness states that, at that time, Perumal was not accompanied by other persons. He specifically denies that, P.W. 1 – Balkrishnan had accompanied Perumal to the Police Station on the said date. He has stated in his examination-in-chief that, Navinkumar was his friend. However, in cross-examination, he states that, though he had seen relatives of the deceased Perumal gathered in the hospital from the casualty ward, he did not go near them and speak with them. He further states that, he even did not go and meet Navinkumar.

33] Though the incident is in three parts and though, according to the prosecution, all the accused have taken part in three parts and though the spot of incident is different in all the three parts, prosecution has not explained as to what is the distance between the three spots. It is also not explained by the prosecution that out of three incidents, which was the first in point of time, which was the second and which was the third. However, we may get some clue

from the evidence of P.W. 20 – Dr. Navin Ukande. According to him, P.W. 6 – Navinkumar came to the hospital at around 8.50 P.M. At around 8.55 P.M., deceased Perumal was brought to the hospital. At around 9.10 P.M., P.W. 7 – Shivan was brought to the hospital. It could thus be seen that, all the three assaults have taken place within narrow gaps.

34] In the present case, prosecution has mainly relied on ocular testimony of eye witnesses. As such, fate of the case will have to be decided on the basis of testimony of the eye witnesses. If their evidence is found to be trustworthy and reliable, the order of conviction will have to be sustained. However, if their evidence is found to be doubtful and not trustworthy, the order of conviction would not sustain. Most of the eye witnesses are interested witnesses inasmuch as either they are close relatives of the deceased or friends of the deceased or his sons. No doubt that, merely because witnesses are interested witnesses, that cannot be a ground to discard their testimony. However, evidence of such witnesses will have to be scrutinized with greater caution and circumspection. It is further to be noted that, most of the witnesses have admitted about

longstanding enmity between deceased family and accused Nos. 1 and 2.

35] In the present case, we will also have to compare ocular testimony of the witnesses with medical evidence. P.W. 1 – Balkrishnan states that, when mob of 20-25 people, including accused came there, he got frightened and he also advised deceased Perumal to flee away. However, deceased Perumal refused to do so. He states that therefore, he fled away and hidden himself in a house on a loft. He also admits that, there was no Municipal electric lamp. Even, Investigating Officer admits that, as per spot panchanama, there was no electric pole in the vicinity. According to P.W.1, after the incident, he alongwith his friend Jennu and one another friend, lifted the deceased Perumal to Sion hospital. However, as per the version of P.W. 8 – Shivkumar, P.W. 1 – Balkrishnan, alongwith Pushparani and Mutukani lifted his father to the road and thereafter in a taxi to the Sion hospital. P.W. 1 – Balkrishnan, during examination-in-chief, initially states that he was acquainted with the accused but later on admits in para 10 of his cross-examination that he came to know names of accused persons after occurrence of the incident. He further

admits that, he was at a distance of approximately 100 feet before the said mob reached to the place where his uncle was seen to be assaulted. He further admits that, though he went to the hospital and though Police Officer asked him and his friends as to how the incident had occurred, he did not narrate the incident to the police. He further states, that his friend Jennu narrated to the police about the incident. He states that, police officer interrogated Jennu for 10-15 minutes and recorded statement of Jennu as per his say on a small paper. The very presence of the said witness, when deceased Perumal was attacked, is in doubt. Whereas, according to him, he was chitchatting with the deceased, when the accused came, according to P.W. 8 – Shivkumar, who is a son of the deceased, his father was chitchatting with residents namely Pushparani and Mutukani. P.W. 8 states that, he was standing adjacent to his father. According to P.W. 1 – Balkrishna, after he reached the Sion hospital and when he was standing outside the hospital, P.W. 6 – Navinkumar was brought to the hospital. However, as per evidence of P.W. 20 – Dr. Navin, it is P.W. 6 – Navinkumar who had come to the hospital earlier and thereafter the deceased Perumal was brought to the hospital. It is

pertinent to note that neither Pushparani nor Mutukani, who, according to P.W. 8, were chitchatting with deceased Perumal when assailants came, have been examined. The said Jennu, whose statement is said to have been recorded in the hospital according to P.W.1 – Balkrishna, has been examined as P.W.2. However, his evidence would show that, he has not been examined as eye witness. He has been examined as panch on inquest panchanama. Though P.W. 1 – Balkrishnan states that, Jennu was his friend, P.W. 2 – Jeno (Jennu) denies the same. P.W. 2 categorically states in his deposition that, he met Balkrishnan when he was taking the body to the hospital. He states that, Balkrishnan and Perumal did not disclose any fact to him from the time he boarded the taxi until arrival in the hospital.

36] The main interesting part of testimony of P.W. 1 – Balkrishnan is that, though he states that he had lifted the deceased and taken him in taxi and though his clothes were stained with blood, neither he gave the said clothes to the police, nor police asked him to handover the clothes. He states that, he had changed the blood stained clothes in the hospital before arrival of the police. He states that, he had

given a call on phone to his friend Murgan to bring another shirt in the hospital and prior to arrival of the police, he had changed his blood stained shirt. He states that he had thrown the blood stained shirt from the casualty ward and worn a new shirt, which he had called from his house. Their Lordship of the Hon'ble Apex Court in the case of *Khima Vikamshi and Others vs. State of Gujarat*¹ has observed in para 6 as under :-

“6.....While discussing this aspect of the case, the most important omission that we find in the prosecution case is the absence of any bloodstain either on the clothes or on the person of PWs 4 and 5. It is the prosecution case that PW 4 actually fell on the body of the victim to prevent further assault and later on she and PW 5 lifted the victim and put him in a bullock cart and travelled with the victim right through up to the time when the victim breathed his last. In such circumstances, we find it difficult that if really PWs 4 and 5 were at the place of the incident, as stated by the prosecution, then their clothes would not have been bloodstained. Failure on the part of the investigating agency to recover any such

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bloodstained clothes from PWs 4 and 5 creates serious doubts in our minds as to the presence of these witnesses at the time of the incident in question.” (Emphasis supplied)

As held by Their Lordships of the Apex Court, if the witness claims that, he has carried the deceased to the hospital and his clothes were stained with blood, then non-recovery of the blood stained clothes would create a doubt with regard to veracity of that witness. In the present case, P.W. 1 states that his clothes were stained with blood in the hospital where police were present. However, he calls for the fresh shirt from his house, throws the blood stained shirt from the casualty ward and wears a new shirt.

37] In the present case, it is also doubtful as to whether FIR Exhibit-32 is genuine or not. Perusal of evidence of P.W. 1 – Balkrishnan, would reveal that his statement was recorded in the hospital. P.W. 1 admits in his evidence that he had gone to Police Station for signing on the second day after the incident. He went to Police Station at noon hours to sign on the paper. He states that, police obtained his signature on the complaint at Exhibit-32 on 17/08/2007. However,

perusal of Exhibit-143 (printed FIR) would reveal that FIR was registered at 22.50 hours on the same day i.e. on 16/08/2007. The complainant is shown to be P.W. 1 – Balkrishnan. Seven accused have been shown in the FIR. The endorsement states that, statement of P.W. 1 – Balkrishnan has been recorded in Sion hospital on a separate paper and the same was treated as FIR. A million dollar question is, when P.W. 1 himself states that his statement was not recorded by the police in the hospital and his statement was recorded on the second day and that too in the noon then on what basis the printed FIR below Exhibit-143 shows P.W.1 to be the first informant. The possibility of the FIR being antedated cannot therefore be ruled out.

38] The next is the testimony of P.W. 8 – Shivkumar. Perusal of evidence of P.W. 1 would show that, according to him, at the time of incident, he was chitchatting with the deceased. If P.W. 8, who is the son of the deceased, was also with him, there is no reason as to why he could not have been noticed. However, P.W. 1 does not state about presence of P.W. 8. The conduct of P.W. 8 – Shivkumar also appears to be unnatural. Though he was present on the spot and saw

the assaulting party coming nearby, he did not make any attempt to save his father. There is no doubt that, as held by the Hon'ble Apex Court, in many cases response to the situation may differ from person to person. May be out of fear P.W. 8 had chosen to run away rather than help his father. However, his subsequent conduct is also very abnormal. He states that, after the incident it is P.W. 1 – Balkrishnan, Pushparani and Mutukani lifted the deceased in a taxi to hospital. He did not find it necessary to lift his injured father. Not only that, even after his father was kept in taxi, he did not go in taxi alongwith his injured father. However, according to him, he followed his father in another taxi. Though, according to him, he was in the hospital immediately and police were making inquiries, his statement was recorded in the Police Station in the morning at 6.00 A.M. It is further to be noted that this witness (P.W.8) was unable to recognize/identify the clothes worn by the deceased. However, he had identified the weapons wielded by the accused. From the perusal of the evidence of this witness (P.W.8) and when it is compared with the evidence of P.W. 1 – Balkrishnan, it creates a great deal of suspicion as to whether this witness was actually present there and

witnessed the incident or not.

39] The next evidence on this point is of P.W. 17 – Rajesh David. This witness is a chance witness. According to him, when he had gone for answering the nature's call in the toilet, he heard noise on the road and therefore he turned in that direction. He saw the persons coming there armed with weapons. However, he does not know which weapons were with the accused. Though in his examination-in-chief, he states that he knows all the accused as they are his relatives, in cross-examination in para 16 he admits that, accused No. 3 – Satta and accused No. 8 – Pakiraj were not his relatives. He admits in his cross-examination that, he did not know from which direction persons came on the spot of incident. His statement is recorded in the evening of the next day. He further admits that, until recording of his statement, he had not disclosed about the incident to any one. He also states that, he does not remember whether he had seen Perumal at the spot of incident till he heard noise of the people. Though the versions given by P.W. 1 – Balkrishnan and P.W. 8 – Shivkumar are contrary, as to who were

standing and talking with the deceased but according to both of them the deceased was standing and chitchatting. In the light of admission of P.W. 1 – Balkrishnan that there was no street light and also admission of the I.O. to the same effect, it is doubtful as to whether this witness (P.W.17) has witnessed the incident.

40] However, the most glaring aspect in the present case would be ocular testimony being in contrast with the medical evidence. We have already reproduced hereinabove, the injuries sustained by the deceased. As per the evidence of P.W. 25 – Dr. Rajesh Dere, injury Nos.1 and 2 with its internal corresponding injuries are on vital parts of the body. He has stated that, injury No.2 may be possible by Art. B, E, N, Y and D. He further states that, injury Nos. 1 to 3 may be possible by all sharp edge seized weapons. However, injury Nos. 4, 5 and 6 are possible by blunt edge weapon. According to prosecution witnesses, all the accused - three of them were armed with sword and rest of them were armed with Tamilnadu koyta (sickle), brutally assaulted the deceased. If that be so, then there would have been multiple incised wounds. Three of the injuries are possible by hard

and blunt object. However, it is not the case of any of the witnesses that, any of the accused was armed with hard and blunt weapon. We are therefore of the considered view that medical evidence also does not corroborate the ocular testimony of the eye witnesses, apart from the fact that testimony of witnesses itself is not found to be trustworthy.

41] The said incident had taken place between 8.00 P.M to 8.30 P.M. on 16/08/2007 and though P.W. 6 – Navinkumar was immediately brought to the hospital and though police were immediately available in the hospital, the statement of this witness is recorded on second day between 3.00 A.M. to 4.00 A.M. From the perusal of para 6 of his cross-examination, it would reveal that, he had not disclosed to his mother the names of assailants in taxi while he was being taken to the hospital, though his mother had asked him as to who had assaulted him. As we have discussed hereinabove with regard to incident of assault on the deceased Perumal, possibility of Investigating Agency cooking up a story to implicate all the accused and fabricating FIR and possibility of making incident of assault on

P.W.6 - Navinkumar, a part of the same story to implicate all the accused, also cannot be ruled out. There is no explanation as to why, when P.W. 6 – Navinkumar though was in a position to give statement immediately upon he being admitted to the hospital, his statement was not recorded for such a long period. Apart from that, as already discussed hereinabove, the medical evidence also does not corroborate ocular testimony of this witness. We have already reproduced hereinabove the injuries which are sustained by him. According to him, all the accused persons armed with swords and Tamilnadu koyta (sickle) had come to assault him. From his evidence, it appears that they had also made their intention clear i.e to kill son of Perumal. According to him, while escaping from the clutches of accused No.2 – Jaiganesh, he had fallen on the ground. According to him, all the accused persons assaulted him. If that be so, then only three injuries that too of size of 2 cm X 1 cm, 4 cm X 1 cm and 3 cm x 1 cm contradict his ocular testimony. The other two witnesses P.W. 4 -Vinodkumar and P.W. 14 – Rajmani are his friends. Again, statement of these witnesses were recorded only in the evening of 17/08/2007 even though as could be seen from para 23 of the

cross-examination of P.W. 4 that he was in the hospital for whole night on that date till morning. In para 35, P.W. 4 admits that, he did not disclose about the incident to any person until he went to Police Station. Again, even in respect of this witness also, the same story as that of P.W. 1 – Balkrishnan with regard to blood stained clothes, has been repeated. He also states that, though his clothes were stained with blood, he changed the same in the hospital. He has telephoned his friend Arvind to bring the clothes from the house in the hospital. He threw away his blood stained clothes in the hospital. It is further to be noted that as per this witness (P.W.4), accused No.2 gave a blow on the stomach of P.W. 6 – Navinkumar. However, as per medial evidence, which we have already reproduced hereinabove, there is no injury on the stomach of P.W. 6.

42] The next witness for this incident is P.W. 14 – Rajmani. Even in the case of this witness, though he has accompanied deceased in the hospital and though police were present in the hospital, his statement came to be recorded after two days of the incident. Para 3 of his examination-in-chief itself would reveal that, he states that after two

days of the incident, he was called in the Police Station. He states that, though he was at his house on 17/08/2007 and 18/08/2007, police officer met him on 18/08/2007 in the morning at about 11.00 A.M. He states that, he did not narrate the incident to the police officer to whom he had seen in the hospital as he did not feel it necessary to tell the police. He further states that, he did not disclose incident of assault on his friend till police recorded his statement on 18/08/2007. Again, the blood stained clothes of this witness were also not seized. In para 6 of his evidence he states that, police did not ask him to handover the blood stained clothes and he also did not handover blood stained clothes to the police. From the testimony of P.W. 4 – Rajmani and P.W. 14 – Vinodkumar, it would reveal that, after P.W. 6 Navinkumar was assaulted, they waited for mother of P.W. 6 to come and thereafter shifted P.W. 6 to the hospital. If they were so close friends of P.W 6, then their conduct of not rushing P.W. 6 to the hospital immediately, also creates doubt with regard to veracity of their version.

43] That leaves us with the last incident i.e. with regard to assault

on P.W. 7 – Shivan. He is the sole witness insofar as the said incident of attack on him is concerned. We need not detain ourselves on his testimony inasmuch as veracity of his version can be tested from testimony of P.W. 20 – Dr Navin Ukande. Though this witness (P.W.7) states that all the accused persons armed with deadly weapons like sword and koyta (sickle) assaulted him, testimony of P.W. 20 would reveal that, he gave history of alleged assault by two persons by sickle. Apart from that, the nature of injuries which we have already reproduced hereinabove, do not corroborate the ocular testimony of P.W. 7.

44] It is further to be noted that accused No.3 – Asaytambi is polio affected person. P.W. 27 – IO Megha Kadam in her cross-examination has admitted the same. It appears that when accused No.3 had filed Criminal Application No.4212 of 2008 for bail in this Court, this Court had directed accused No.3 to be medically examined. He was medically examined and it was found that he was suffering from partial permanent disability of 44% and he was able to walk with the support of right hand (hand to knee gait). It is highly improbable that such a person armed with deadly weapon, as alleged

by the prosecution witnesses, would come running. Specific suggestions have been given to the witnesses that, there was dispute between accused No.1 and accused No.2 on one hand and deceased Perumal and one Bhuminathan on the other. Most of the witnesses have admitted to this position. As held by the Hon'ble Apex Court in the case of *Ramashish Rai vs Jagdish Singh*² previous enmity is a double edged weapon. Though, it could provide a motive, possibility of false implication also cannot be ruled out. In the present case, most of the witnesses are interested witnesses. Either they are related to the deceased or friends of the deceased or friends of his sons. On the scrutiny of their evidence, we are of the considered view that, their evidence cannot be said to be reliable, trustworthy and cogent. The possibility of false implication of the accused on the ground of previous enmity cannot be ruled out. It has come in the evidence of witnesses that, there was previous enmity between the deceased Perumal and Bhoominathan on one hand and some of the accused on the other hand. We further find that, investigation in the case has not been done in fair, transparent and impartial manner. Though, according to P.W. 1 – Balkrishnan, statement of Jennu was recorded

² (2005) 10 SCC 498

in the hospital and though, according to P.W. 8 – Shivkumar, his statement was also recorded in the hospital, on being confronted, the learned APP has stated that no such statements were recorded in the hospital. It thus creates a doubt as to whether those two statements which were immediately recorded in the hospital were deliberately withheld by the prosecution since the same did not support the prosecution case. It is further to be noted that P.W.1 – Balkrishnan and P.W. 14 – Rajmani states that though their clothes were stained with blood, they have changed their clothes in the hospital. They state that they have called fresh shirt from the house and changed the same in the hospital by throwing the blood stained shirt in the hospital. Taking into consideration other lacunae in the investigation, the aspect of non-recovery of blood stained clothes of witnesses also creates doubt about truthfulness of the prosecution case. The another important aspect is with regard to different versions given by P.W. 1 – Balkrishnan with regard to his statement being recorded in the hospital. At sometime in his evidence, he states that his statement was recorded in the hospital and at sometime he states that it was not recorded in the hospital and it was recorded on the

next date in the Police Station. However, he is consistent that he has put up his signature on his oral report on the next date in the Police Station, which also creates a doubt with regard to genuineness of the First Information Report.

45] In that view of the matter, appeals deserve to be allowed.

46] In the result, we pass the following order :-

ORDER

- (i) All the above Criminal Appeals are allowed.
- (ii) Judgment and Order of conviction and sentence is quashed and set aside.
- (iii) Appellants/Accused are acquitted of the charges charged with.
- (iv) Appellants/Accused are directed to be set at liberty forthwith, if not required in any other case.
- (v) Since all the above Criminal Appeals are allowed and disposed of, Criminal Application No.480 of 2014 taken out in Criminal Appeal No.512 of 2011 and Criminal Application No.792 of 2016 taken out in Criminal Appeal No.889 of 2012, do not survive and they are also disposed of.

(SARANG V. KOTWAL, J.)

(B. R. GAVAI, J.)