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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1144 OF 2012**

Janardan Mahadu Gondhali	..Appellant
Versus	
The State of Maharashtra	..Respondent

**ALONGWITH
CRIMINAL APPEAL NO.217 OF 2013**

The State of Maharashtra	..Appellant
Versus	
Jaydev Rama Gondhali and others	..Respondents

**ALONGWITH
CRIMINAL APPEAL NO.814 OF 2013**

Rupesh Janardan Gondhali	..Appellant
Versus	
The State of Maharashtra	..Respondent

**ALONGWITH
CRIMINAL APPEAL NO.815 OF 2013
AND
CRIMINAL APPLICATION NO.1012 OF 2018**

Dinesh Janardan Gondhali	..Appellant
Versus	
The State of Maharashtra	..Respondent

**ALONGWITH
CRIMINAL APPEAL NO.816 OF 2013**

Sandeep Balaram Gondhali	..Appellant
Versus	
The State of Maharashtra	..Respondent

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ALONGWITH
CRIMINAL APPEAL NO.817 OF 2013

Sanjay Balaram Gondhali	..Appellant
Versus	
The State of Maharashtra	..Respondent

ALONGWITH
CRIMINAL APPEAL NO.926 OF 2012

Ramesh Maruti Gondhali	..Appellant
Versus	
The State of Maharashtra and others	..Respondents

ALONGWITH
CRIMINAL APPEAL NO.934 OF 2012
AND
CRIMINAL APPLICATION NO.534 OF 2018

Ravindra H. Pawshe	..Appellant
Versus	
The State of Maharashtra	..Respondent

ALONGWITH
CRIMINAL APPEAL NO.935 OF 2012

Ramnath Mangal Pawshe	..Appellant
Versus	
The State of Maharashtra	..Respondent

ALONGWITH
CRIMINAL APPEAL NO.936 OF 2012

Somnath Mangal Pawshe	..Appellant
Versus	
The State of Maharashtra	..Respondent

ALONGWITH
CRIMINAL APPEAL NO.937 OF 2012

Kailash Mangal Pawshe	..Appellant
Versus	
The State of Maharashtra	..Respondent

ALONGWITH
CRIMINAL APPEAL NO.938 OF 2012

Mangal Rama Pawshe	..Appellant
Versus	
The State of Maharashtra	..Respondent

ALONGWITH
CRIMINAL APPEAL NO.939 OF 2012

Vikas Mangal Pawshe	..Appellant
Versus	
The State of Maharashtra	..Respondent

ALONGWITH
CRIMINAL APPEAL NO.940 OF 2012

Yashwant Savlaram Bhoir	..Appellant
Versus	
The State of Maharashtra	..Respondent

ALONGWITH
CRIMINAL APPEAL NO.941 OF 2012

Nandu Savalaram Bhoir	..Appellant
Versus	
The State of Maharashtra	..Respondent

ALONGWITH
CRIMINAL APPEAL NO.942 OF 2012

Suresh Savalaram Bhoir
Versus
The State of Maharashtra

..Appellant

..Respondent

ALONGWITH
CRIMINAL APPEAL NO.971 OF 2012

Pradeep Namdev Gondhali
Versus
The State of Maharashtra

..Appellant

..Respondent

ALONGWITH
CRIMINAL APPEAL NO.1059 OF 2012

Prananath Eknath Pawshe
Versus
The State of Maharashtra

..Appellant

..Respondent

Mr. Shirish Gupte, Senior Advocate a/w Mr. Deepak C. Natu and Ms. Sunita S. Ghone i/by N. Deepak & Co., Advocate for the Appellant in Appeal No.815 of 2013, Appeal No.817 of 2013, Appeal No.816 of 2013, Appeal No.1144 of 2012 and Appeal No.814 of 2013.

Mr. Santosh S. Musale, Advocate for Appellant in Appeal No.942 of 2012.

Mr. Ajay Waghmare, Advocate for Appellant in Appeal No.934 of 2012.

Mr. Pankaj Deokar h/f Mr. Yuwraj Patil, Advocate for Appellant in Appeal No.935 of 2012, Appeal No.936 of 2012, Appeal No.938 of 2012 and Appeal No.939 of 2012.

Mr. Ganesh Gole a/w Mr. Ateet Shiroadkar, Advocate for Appellant in Appeal No.1059 of 2012, Appeal No.940 of 2012, Appeal No.941 of 2012 and Appeal No.926 of 2012.

Mr. Dr. Y. M. Chaudhari a/w Mr. Dashrath Gaikwad, Advocate for Appellant in Appeal No.971 of 2012.

Mr. S. V. Marwadi, Advocate for Respondent Nos.1 to 4, 10 and 12 in Appeal No.217 of 2013.

Mr. Priyatosh R. Tiwari, Advocate for Appellant in Appeal No.926 of 2012 and for complainant in rest of the Appeals.

Mr. H. J. Dedhia, APP for the State in all the Appeals & for Appellant in Appeal No.217 of 2013.

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

DATE: 10th July, 2018

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

1] Since all these appeals arise out of judgment and order dated 14/06/2012 passed by the learned Sessions Judge in Sessions Case No. 61 of 2009 with Sessions Case No. 108 of 2010, the appeals have been heard together and decided by this common judgment and order.

2] Criminal Appeal No. 926 of 2012 is filed by the original complainant and Criminal Appeal No.217 of 2013 is filed by the State, being aggrieved by the acquittal of accused Nos. 2, 4, 5, 6, 7, 9, 13, 15, 16, 17, 20, 27, 28, 29, 30, 32, 33, 34 and 35, whereas following

appeals are filed by the accused who have been convicted.

Sr. No.	Accused No.	Name of the Accused	Number of appeal
1.	01	Dinesh Janardan Gondhali	Criminal appeal No.815 of 2013
2.	03	Sanjay Balaram Gondhali	Criminal appeal No.817 of 2013
3.	08	Prannath Eknath Pavshe	Criminal appeal No.1059 of 2012
4.	10	Yashwant Savlaram Bhoir	Criminal appeal No.940 of 2012
5.	11	Sandeep Balaram Gondhali	Criminal appeal No.816 of 2013
6.	12	Pradeep Namdeov Gondhali	Criminal appeal No.971 of 2012
7.	14	Vikas Mangal Pavshe	Criminal appeal No.939 of 2012
8.	18	Somnath Mangal Pavhse	Criminal appeal No.936 of 2012
9.	19	Suresh Savlaram Bhoir	Criminal appeal No.942 of 2012
10.	21	Nandu Savlaram Bhoir	Criminal appeal No.941 of 2012
11.	22	Janardan Mahadu Gondhali	Criminal appeal No.1144 of 2012
12.	23	Rupesh Janardan Gondhali	Criminal appeal No.814 of 2013
13.	24	Kailash Mangal Pavhse	Criminal appeal No.937 of 2012
14.	25	Ramnath Mangal Pavshe	Criminal appeal No.935 of 2012
15	26	Mangal Rama Pavshe	Criminal appeal No.938 of 2012
16	31	Ravindra Harishchandra Pavshe	Criminal appeal No.934 of 2012

The said accused have been convicted for the offence punishable under section 302 read with section 149 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs 5,000/- each and, in default thereof to suffer simple imprisonment for six months. These accused have also been convicted for the offence punishable under section 324 read with section 149 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs 500/- each and in default thereof to suffer simple imprisonment for one month.

3] The prosecution story, as could be gathered from the material placed on record, is thus :-

4] Undisputedly, most of the accused, the first informant, the deceased Gurunath and the witnesses are resident of the Village Bamrali, Taluka & District Thane. The deceased Gurunath is the cousin of the first informant P.W. 1 – Ramesh . As per his oral report, on 01/07/2008, accused No.3 – Sanjay had taken his animals for grazing near buffalo farm which was owned by Gurunath. Deceased Gurunath requested accused No.3 not to graze animals at that place.

Gurunath and his brother Hiranman were beaten by accused No.3 – Sanjay and his associates. Gurunath thereafter lodged a complaint at the Police Station. Accused No.3 – Sanjay and one Harischandra were arrested and subsequently enlarged on bail. It is the prosecution case that, due to this, accused No.3 was having grudge on deceased Gurunath.

5] The first informant P.W. 1 – Ramesh Gondhali was working at New Mumbai. On 29/10/2008, at around 3.30 to 3.45 P.M., he came back to his house. He learnt that sons of his uncle had gone to play on playground. He also went to the playground at about 4.30 P.M. to play cricket. Deceased Gurunath, P.W. 10 – Bhagwan, P.W. 2 – Takdeer, P.W. 3 – Yogesh, P.W. 4 – Milind, one Somnath and P.W. 5 – Kiran were playing cricket. He joined them. He was also playing cricket. At about 4.45 to 5.00 P.M., Dinesh Janardan Gondhali, Rupesh Gondhali, Damu Bhoir, Nandu Bhoir, Somnath Pavshe, Vikas Pavshe, Kailas Pavshe, Ramnath Pavshe, Ravindra Pavshe, Prannath Pavshe came there for playing cricket. They were having stumps and cricket bats with them. They threw their stumps in their pitch. They were telling that, they would start their game. Gurunath requested

them that since they were already playing, they could play after their game was over. All the aforesaid persons left the ground, threatening that they would teach lesson today only. They went towards the village. It is the prosecution case that, thereafter, within 15 minutes, they all came there having swords, axes, stumps, sickles with them. Dinesh, Sunil, Pradeep, Arjun, Vijay, Raju, Damu, Vikas and Kailas were having axes with them. Whereas Yashwant & Sandeep had sticks with them. Pradeep, Santosh, Nilesh, Sanjay, Rupesh, Suresh, Somnath, Valmik & Naresh were armed with swords. Ramchandra & Jayant were having stumps with them. Remaining persons were having sticks with them. They beat Gurunath by all these weapons on his head, leg, hands, and back. Gurunath fell down on the ground. He was having bleeding injuries on his person. Then these persons rushed towards Bhagwan. Bhagwan also sustained various injuries. It is further the case of the complainant that, he tried to intervene in the matter. However, the accused beat him also. Accused No.25 - Ramnath Mangal Pavshe beat him on his shoulder by stick. He sustained fracture injury on his shoulder. They also beat Gajanan Bhoir (P.W.6) and Pandit Gondhali (P.W.7) with their weapons. His

uncle's children came there. They took Gurunath and Bhagwan to Shivaji Hospital, Kalwa. Gurunath was declared dead and Bhagwan was serious. When Bhagwan was referred to Sion Hospital Mumbai, his cousin took Bhagwan to Sion Hospital. P.W. 1 - Ramesh went to Police Station for lodging complaint. The oral report is exhibited at Exhibit-176. According to the first informant, he was referred to Medical Officer of Shivaji Hospital. He further states that, he went to Police Station on 30/10/2008 and gave names of remaining accused on that day. On the basis of oral report of P.W. 1, C.R. No.I-171/2008 came to be registered by Shil Daighar Police Station, District Pune. Upon completion of investigation, charge-sheet came to be filed on 23/01/2009 before the learned J.M.F.C. 5th Court, Thane against accused Nos.1 to 31. Since the case was exclusively triable by the learned Sessions Judge, it was committed to the learned Sessions Judge. The said case was numbered as Sessions Case No. 61 of 2009. Subsequently, a supplementary charge-sheet came to be filed against accused Nos. 32 to 35 on 04/03/2010 before the learned J.M.F.C., 1st Court, Thane. It was also committed for trial to the learned Sessions Judge. The same came to be numbered as Sessions Case No.108 of

2010.

6] Charge came to be framed below Exhibit-110 for the offence punishable under sections 302, 307, 324, 325, 504 read with section 149 of the Indian Penal Code and under section 135 of the Bombay Police Act. Accused pleaded not guilty and claimed to be tried. During trial, the prosecution examined 46 witnesses, including 8 eye witnesses. At the conclusion of trial, learned Trial Judge passed an order of conviction and sentence as against accused Nos. 1 – Dinesh Janardhan Gondhali, accused No.3 – Sanjay Balaram Gondhali, accused No.8 – Prannath Eknath Pavhse, accused No. 10- Yashwant Savlaram Bhoir, accused No.11 – Sandeep Balaram Gondhali, accused No.12 – Pradeep Namdeo Gondhali, accused No. 14 – Vikas Mangal Pavhse, accused No. 18 – Somnath Mangal Pavhse, accused No. 19 – Suresh Savlaram Bhoir, accused No.21 – Nandu Savlaram Bhoir, accused No. 22 - Janardan Mahadu Gondhali, accused No.23 – Rupesh Janardan Gonhdali, accused No.24 – Kailash Mangal Pavhse, accused No. 25 – Ramnath Mangal Pavhse, accused No. 26 – Mangal Rama Pavhse and accused No.31 – Ravindra Harishchandra Pavhse, for the offence punishable under section 302 and 324 read with

section 149 of the Indian Penal Code. However, the learned Trial Judge acquitted rest of the accused. Being aggrieved by the order of conviction and sentence the accused, who have been convicted, have approached this Court by way of various appeals, whereas complainant and the State have approached this Court by way of Appeal Nos. 926 of 2012 and 217 of 2013 respectively, being aggrieved by the judgment and order which acquits 19 accused.

7] We have heard learned Senior Counsel Mr. Shirish Gupte, and also learned Counsel Mr. Musale, Mr. Waghmare, Deokar, Mr. Gole, Dr. Chaudhari, Mr. Marwadi, appearing for the convicted accused in their respective appeals and also Mr. Dedhia, learned APP for the State in all the appeals and Mr. Tiwari learned Counsel appearing on behalf of the original complainant in appeal No.926 of 2012.

8] The learned Counsel appearing on behalf of the convicted accused, submitted that the ocular testimony of the eye witnesses is totally unbelievable. It is submitted that, if ocular testimony is compared with medical evidence, it is clear that version given by the

witnesses in their evidence is totally false. It is further submitted that, the version given by all the eye witnesses is stereotype. They further submitted that, insofar as injured witnesses P.W. No.2, P.W. No.6 and P.W. No.7 are concerned, they have been medically examined on 31/10/2008. It is submitted that evidence of P.W. 34 – Dr. Mohan, would reveal that the said witness had given history of assault on 31/10/2008, whereas the alleged incident had taken place on 29/10/2008. It is further submitted that, the statement of these witnesses have been recorded belatedly. It is therefore submitted that all these witnesses are got up witnesses. It is further submitted that, though P.W. 1 claims to have lifted the deceased and P.W.10, he states that his clothes were not stained with blood stains. It is submitted that this is totally impossible. The learned Counsel further submitted that, even the spot panchanama does not support the prosecution version. It is submitted that, it is the case of the prosecution witnesses that they were playing with white stumps. However what is seized on the spot is black stumps. It is further submitted that, though all the witnesses have narrated in precision with regard to which accused assaulted whom and in what sequence,

most of them have given different version with regard to ball with which they were playing. It is submitted that one of the witness stated that, they were playing with Tennis ball, whereas second witness has stated that they were playing with Season ball whereas third one has stated that they were playing with rubber ball. It is further submitted that, evidence of P.W.3 – Yogesh, P.W. 6 – Gajanan and P.W. 7 – Pandit and I.O. Jagdish Satav (P.W.45) would reveal that, witnesses themselves admit that there was scope for manipulation and fabrication of the evidence. The learned Counsel for the Appellants therefore submitted that the appeals deserve to be allowed and order of conviction and sentence set aside.

9] Mr. Dedhia, the learned APP for the State and Mr. Tiwari the learned Counsel for the original complainant, submitted that when the learned Trial Judge has convicted 16 accused, the acquittal of 19 accused on the very same set of evidence is totally untenable. They submit that, so far as the appeals of convicted accused are concerned, the same are without merit. It is submitted that, the learned Trial Judge on the basis of ocular testimony of eye witnesses which is cogent, trustworthy and reliable, has convicted the appellants and as

such no interference is warranted.

10] In the present case, undisputedly, the accused, witnesses and deceased are from the same village and were known to each other. In the present case, prosecution has examined as many as 8 eye witnesses, including the first informant. The fate of the case would largely depend upon the ocular testimony of the eye witnesses. If the evidence of these witnesses is found to be trustworthy, the order of conviction will have to be maintained. However, if their evidence is found to be doubtful then the order of conviction and the sentence will have to be interfered with.

11] The prosecution has examined following 8 eye witnesses viz. P.W. 1 – Ramesh Gondhali, P.W. 2 – Takdeer Bhoir, P.W. 3 – Yogesh Gondhali, P.W. 4 – Milind Gondhali, P.W. 5 – Kiran Gondhali, P.W. 6 – Gajanan Bhoir, P.W. 8 – Madan Gondhali and P.W. 10 – Bhagwan Gondhali. Out of these 8 eye witnesses, P.W. 1, P.W. 2, P.W. 6, P.W. 7 and P.W. 10 are injured eye witnesses. Since there is also an history of enmity and previous rivalry, the evidence of these witnesses will have to be scrutinized with greater caution and circumspection.

12] We will first examine the evidence of first informant P.W. 1 – Ramesh Gondhali. We do not wish to reproduce again, the version given by him in his examination-in-chief inasmuch as what he has stated in his examination-in-chief has already been referred to by us hereinabove. In a nutshell, what he says is that, all 35-36 persons were armed with sword, axes, stumps, sickles and sticks. They beat Gurunath on his head, leg, hands and back due to which Gurunath fell down on the ground. After Gurunath fell down on the ground, these persons ran towards the village. Bhagwan also sustained injuries. When he tried to intervene in the matter of Bhagwan, they also beat him. He states that, they also beat Gajanan Bhoir (P.W.6) and Pandit Gondhali (P.W.7).

13] In his cross-examination, he has reiterated that all 35 persons had beaten Gurunath with the weapons which were in their hands. It will be relevant to refer to the following part of his cross-examination.

“All 36 persons beat Gurunath with their weapons, which were in their hands. They were

beating Gurunath from all directions one after another. They were beating Gurunath for 2 to 5 minutes. It is not correct to say that myself and Takdeer were at our places. We all the players tried to save Gurunath. Distance between Gurunath and Bhagwan was 10 to 15 feet. I was in front of Gurunath when they beat Gurunath. Thereafter, they started beating Bhagwan. 36 persons beat Bhagwan. They beat Bhagwan from all directions. They beat Bhagwan for 2 to 3 minutes. I ran towards Bhagwan. I tried to save Bhagwan. Yogesh and Kiran tried to save Bhagwan. I intervened the matter and requested them not to beat Bhagwan. At that time I was between assailants and Bhagwan. The assailants did not listen and still beat Bhagwan. They beat me first and thereafter they beat Bhagwan. I do not know whether Yogesh and Kiran tried to intervene the matter.”

It could thus be seen that, according to this witness, 36 persons had beaten Gurunath and Bhagwan from all directions. Perusal of his evidence would further reveal that on the day on which he lodged the complaint, he did not read it. On the next day, when he went to Police Station he had gone through the complaint. He further states that he helped in lifting Gurunath and though Gurunath had sustained bleeding injury and was having blood all over his clothes, there were no blood stains on his clothes. It will further be relevant to note that he has stated in his cross-examination that on 29th no

policeman met him. He further states that on 30th policeman met him, when he went to Police Station. He further states that, when he went to Shivaji Hospital, he did not show his injuries to the Medical Officer at Shivaji Hospital. He further states that, he also did not intimate this fact to the police who was at Kalwa Police Station. He further states that he did not take permission from police who was at Kalwa Hospital, while leaving the hospital to go to Police Station. He further states that, he did not inform the police at Kalwa hospital. He further states that, he went to his village at around 10.30 to 11.00 P.M. He did not go to house of Bhagwan and Gurunath, neither did he inform any one on 29th that he had lodged the complaint. Though he had denied that in the night of 29th, he was considering to involve some more person, he has been confronted with his averment in the complaint that some more 11-20 persons who were residents of village Bamarli were also involved. He further states that, police obtained his signature on FIR on 30/10/2008.

14] He has further stated that, while carrying injured to the hospital, he had not talked with his cousins who were present with

him in the vehicle about the incident. He did not talk with his cousins even at the hospital about the incident. He has admitted that, if one person from each house is taken, whole village is covered in the said case.

15] P.W. 2 - Takdeer Bhoir is also resident of the same village. The version given by this witness in his cross-examination upto attack on P.W. 10 – Bhagwan is almost identical with the version of P.W. 1 – Ramesh, except some changes after attack on Bhagwan. He states that when they went to intervene in the matter, Shankunath gave him stick blow on his waist at left side, Yuvraj Gondhali (not examined), Gajanan (P.W.6), Ananta Bhoir (not examined) and Ramesh (P.W1) were also beaten. Thereafter, they ran away. He states that Hiranman and Motiram took Gurunath and Bhagwan upto main road and took them to Shivaji Hospital, Kalwa. He also states that Hiranman and Motiram came there to lift Gurunath and Bhagwan. He states that Hiranman came with Motiram in the vehicle. He states that, he also went alongwith deceased Gurunath and others in the said vehicle to Kalwa Hospital. He states that medical officer checked him on the

same day i.e. on 29th. However, he was not admitted in the hospital. He states that, he was at the hospital up to 9.00 P.M. He did not see whether police came to hospital when he was there. He states that, thereafter, he went to his house. Police came to his house to take him. He asked the police the reason as to why he was taken to Police Station. They told him the reason that, he was taken for recording his statement. He has admitted in his cross-examination that, he has married to Kanchan, who is a daughter of deceased Gurunath. He has further admitted that, family members of deceased Gurunath have filed a case against him that he had kidnapped Kanchan. Again this witness states that after leaving the dead body at hospital, he came out. He also reiterates that, his clothes did not sustain blood stains. He states that, he narrated the doctor, that he had sustained injuries and also about the persons who beat him. He also stated to doctor as to how he was beaten. He states that he was not treated by doctor and the doctor asked him to go to police. He further states that, police was there. He narrated this fact to the police. It is interesting to note that, he states that he married Gurunath's daughter on 02/11/2008. His testimony would show that police came to take him

to Daighar Police Station on 30/10/2008 at around 5.00 to 6.00 P.M.

He categorically states that, he did not go to Police Station on his own.

16] P.W. 6 – Gajanan is the next injured witness. Again evidence given by him upto the attack on Bhagwan is identical with that of P.W. 1 – Ramesh and P.W. 2 – Takdeer. After narrating about earlier incident, he states that, they tried to intervene. As such, accused also beat them. Santosh Gondhali injured him by sword on his head. Valmik – accused No. 34 gave him a blow of sword from backside. Nandu Bhoir beat him by stick on his hand. He therefore sustained bleeding injury. He states that then they left for village. Hiranman came there with vehicle. They went to Chhatrapati Shivaji Hospital. They were told that Gurunath had died and Bhagwan was transferred to Sion Hospital. He states that, thereafter, he went to Police Station Kalyan Phata Daighar. Police referred him to hospital with chit. He again came to hospital. He was treated there. He states that, his shirt was seized by police. In his cross-examination, he states that, his statement was not recorded prior to 02.11.2008. He states that, he

has stated these facts to police prior to 02.11.2008. Police did not record his statement prior to that date. He states that, though he tried to narrate these facts to police prior to 02.11.2008, police asked him to come later on. He states that, when he went to Kalwa Hospital, Doctor asked him to go to police before treatment. He, however, did not go to police who were present at Kalwa Hospital. He admits that, he could have stated these facts to the police who were present at Kalwa Hospital. He further states that, policemen who were present at Kalwa Hospital did not inquire with him about injuries. He states that, he reached his house on that night at about 9.00 P.M. He further admits that, prior to giving his statement to police on 02/11/2018, he did not state these facts to anybody. He further states that, though he had stated to police that Nilesh had sword with him, this fact is not mentioned in his statement. He states that, police told him that they will insert it later on.

17] P.W. 7 – Pandit Gondhali is an another injured witness. His evidence also upto the attack on Gurunath and Bhagwan is the same as deposed to by above injured witnesses. After narration of

the said incident, he states that, they rushed towards Bhagwan to save him. However, the accused also beat them. He states that, Jaywant, Ramchandra, Dilip, Ravindra beat him by sticks and stumps on back and leg. He further states that, Gajanan, Yuvraj, Bhagwan and Takdeer were also beaten. His statement was recorded on 30/10/2008. He states that on 29/10/2008, when he returned to his house, he did not discuss about the incident with any member of his family. He states that, he did not lift Gurunath and Bhagwan from that place. He has been confronted with his police statement marked "A", viz. "aamhi sarvani milun Gurunath and Bhagwan yanna mukhya rastyaparyant uchlun annun tethun tyanchya gaditun Chhatrapati Shivaji Hospital, Kalwa yethe gheun gelo." He further states that, though he has stated to police that when Bhagwan went to save Gurunath, Bhagwan was beaten mercilessly, the same was not written in the police statement. He states that, on being asked to police as to why this fact was not mentioned in the statement, though he had stated it, police told him that they would do it. He further states that, police came to his house on bike to take him to the Police Station. He states that, when he reached hospital, neither did he

inform Medical Officer, nor police, that since he was injured he wants to take treatment and thereafter he came to his house. He states that, on 30/10/2008 he went to hospital for treatment. He further states that, police came to him prior to 10-15 days of the date on which he gave evidence. They told him about the case being fixed for hearing in court. He further states that, they also told him to speak like his statement. He states that, at that time, Motiram, Hiranman, Pintu, Rajesh, Milind, Bhagwan and Yuvraj were at his house. He further states that, police asked them to give statement before the court as per their recorded statement.

18] The last of the injured witnesses is P.W. 10 – Bhagwan, who is said to have received maximum injuries, next to the deceased Gurunath. He states in his examination-in-chief that on 29.10.2008, there was Deepawali festival. On that day, at around 4.30 to 5.00 P.M., he, alongwith his elder brother Gurunath, younger brother Yuvraj and Milind, Yogesh, Takdeer, Pandit, Ramesh and some other persons went to play cricket on the ground. They were playing cricket on the ground. Damu Bhoir, Suresh Bhoir, Dinesh Gondhali, Rupesh

Gondhali, Sandeep Gondhali, Sanjay Gondhali, Yashwant Bhoir, Vikas Pavshe, Ramnath Pavshe, Somnath Pavshe, Kailas Pavshe, Prannath Pavshe, Naresh Pavshe, Ravindra Pavhse and Sandeep Shantaram Patil came on the ground. Santosh Gondhali and Rajaram Gondhali also came with them. They said that they also wanted to play cricket. These witnesses and others told them that, since they had come first, they should play after their game was over. The accused told them that, “wait for some time, we will teach you lesson today only”. Then they left towards village. After 15 to 20 minutes they appeared on the ground having swords, axes, sticks, sickles, stumps with them. Janu Rama Mali, Mangal Rama Pavshe, Balaram Rama Gondhali, alongwith all other persons who had previously left the ground, came there. They said, “not to leave these persons and teach them a lesson today only”. They beat his brother Gurunath by axes, swords, sticks, sickles. He rushed to rescue his brother. They attacked on him. Suresh Bhoir, Damu Bhoir, Pradeep Gondhali, Sanjay Gondhali beat him on his head by axes and sword. They also beat on his hand, leg and back. He fell unconscious there. When he regained consciousness, he was at Patel Hospital. On 09/11/2008, police

recorded his statement. Since in his statement, there were no names of Raju Gondhali, Vijay Gondhali and Nilesh Gondhali, he narrated these names on 10/11/2008 to the police. In his cross-examination, he states that, all 35 persons were beating Gurunath. He further states that, all of them were beating Gurunath with force. He rushed towards Gurunath to rescue him. However, Gurunath fell down and thereafter those persons attacked him.

19] P.W. 3 – Yogesh Gondhali, P.W. 4 – Milind Gondhali and P.W. 5 – Kiran Gondhali are other eye witnesses, who have not received injuries in the incident.

20] Narration in the examination-in-chief of P.W. 3 – Yogesh is almost identical with that of P.W. 1 – Ramesh P.W 6 – Gajanan and P. W 7 - Pandit upto attack on Gurunath and Bhagwan. After that, he states that, those who tried to intervene were also beaten. He states that, P.W. 1 – Ramesh Gondhali, P.W. 2 – Takdeer Bhoir, P.W.6 – Gajanan Bhoir and P.W. 7 - Pandit Gondhali were also beaten. He states that, thereafter, injured were taken to Chhatrapati Shivaji

Hospital, Kalwa in vehicle. Gurunath was declared dead there and Bhagwan was referred to Sion Hospital. In his cross-examination, he states that, his statement was recorded on 30/10/2008. He states that, police came on two wheeler at 2.00 to 2.30 P.M and told him that, he was called at Police Station. He states that, he did not narrate about the incident to his parents till 30/10/2008. His parents did not inquire with him. He states that, he had stated to police that, his statement was not as per narration given by him about the incident. However, police told him that, they would correct it. He further states that, no correction was made in his presence. Though he states in his cross-examination that, he did not intervene in the attack on Gurunath and Bhagwan, he has been confronted with his police statement wherein he has stated that he, alongwith others, had made an attempt to save Bhagwan and Gurunath. He also states that, after taking Gurunath to hospital, he returned after half an hour to his house. He also states that, after taking Gurunath and Bhagwan to hospital, he returned to his house after half an hour.

21] The narration of P.W. 4 – Milind is word to word same as that of P.W. 3 – Yogesh, which reads thus :

“The assailants came running and were shouting, don't leave and hit them. I did not go to Gurunath for intervening the matter. I was afraid. I was standing on my spot. Bhagwan was near Gurunath at a distance of 5 to 6 feet. Bhagwan did not go to save Gurunath. Bhagwan did not run anywhere. Bhagwan was standing at one place only when Gurunath was beaten. Then all these assailants went towards Bhagwan. Bhagwan was standing on same place. I came to know that these persons were going to beat Bhagwan. I did not shout and ask Bhagwan to run away. I did not feel that after these two persons, there was my number for beating.”

In his cross-examination, he admits that his statement was recorded on 31/10/2008. He states that, Gurunath and Bhagwan were beaten at different places. He further states that, he did not help to lift Bhagwan and Gurunath from that place upto vehicle. He further states that, he does not remember names of the persons, who were present in vehicle. He states that, he also does not remember the number of persons who were in the vehicle. It will be relevant to refer to the following portion of his cross-examination :-

“I do not remember name of the persons who were in the vehicle. I do not

remember number of the persons who were
in the vehicle.”

Though he states that, he had not lifted Gurunath and Bhagwan, he has been confronted with portion marked “C” in his police statement, wherein he has stated that he had lifted Gurunath and Bhagwan.

22] The narration of the incident in examination-in-chief by P.W. 5 – Kiran is again identical with that of P.W. 3 – Yogesh and P.W. 4 – Milind, upto the incident of assault on Bhagwan. Thereafter, he states that, when they tried to save Bhagwan, accused beat them. He states that, they carried Gurunath and Bhagwan upto the main road and then they put them in one vehicle and took them to Shivaji Hospital, Kalwa. Gurunath was declared dead by doctor and Bhagwan was shifted to Sion Hospital, Mumbai. They came back to their house from the hospital. In his cross-examination, he admits that, his statement was recorded after two days of the incident. He further admits that, he did not talk to anyone prior to recording of his statement. He further admits that, before recording his statement, he discussed with his parents. He further admits that police made inquiry with him as to whether he was involved in that quarrel. He

further states that, he was not aware as to whether he was witness or accused. In his deposition, he initially states that, he did not lift injured Gurunath and Bhagwan but when he has been confronted with portion marked "A" in his police statement, he denied making such statement. However, in the next breath, he states that, he has stated portion marked "A" to police. Again, he states that he followed the persons who lifted Gurunath and Bhagwan. He further states that, he did not help those persons to keep Gurunath and Bhagwan in the vehicle. He further states that, he does not remember who lifted Bhagwan and Gurunath.

23] No doubt that, all these witnesses implicate all those accused who have been convicted as well as those who have been acquitted. The learned Trial Judge on the basis of evidence of these witnesses, has convicted some of the accused and acquitted some. No reasons are given by the learned Trial Judge for doing so.

24] In this background, we will have to independently scrutinize the testimony of these witnesses. Undisputedly, all the accused as well as deceased, witnesses are from the same village. They are also relatives.

In a sense, they would be interested witnesses and also not interested witnesses inasmuch as they are relatives of deceased as well as the accused.

25] Though oral report of P.W. 1 – Ramesh is said to have been lodged on 29/10/2008, he himself admits that, he has signed his complaint on 30/10/2008. He admits that, he learnt on 30/10/2008 that there were some names missing in the complaint and, therefore, he gave those names in his supplementary statement. He further goes on to admit that, though he had lifted deceased Gurunath and Bhagwan and there were blood stains all over the clothes of Gurunath, there were no blood stains on his clothes. At one place, he states that no policemen met him on 29/10/2008 and it is only on 30/10/2008 policemen met him. At another place, he states that though he had intimated to police who were on duty at Shivaji Hospital about the quarrel, police did not ask him to wait. In other place, he admits that, though he was beaten and he had gone to Shivaji Hospital alongwith deceased Gurunath and Bhagwan, he did not show his injuries to medical officer in Shivaji Hospital. He further admitted that, if one person from every house was taken, whole

village would be covered in the case.

26] Insofar as P.W. 2 – Takdeer is concerned, he is married to Kanchan, the daughter of deceased Gurunath. He has admitted that, there was opposition from the family of Gurunath for the marriage and therefore he had eloped alongwith Kanchan and married against wishes of her family. Again, he also states that, there were no blood stains on his clothes. He also states in his evidence that, police came to him on 30/10/2008. They told him that they were taking him in connection with murder of Gurunath. He admits that for three days, he did not come out of house. He has stated in his evidence that he has married to daughter of deceased Gurunath on 02/11/2008 i.e within four days from the date of death of the deceased Gurunath. We had certain doubt with regard to correctness of the said statement and therefore we have verified it from vernacular deposition of this witness, wherein the date of marriage shown is the same. He states that, he was checked by medical officer on 29/10/2008. However, his version is falsified by evidence of P.W. 34 – Dr. Mohan Gangwani, which would show that, he was medically examined on 01/11/2008.

27] The statement of P.W. 6 – Gajanan was recorded on 02/11/2008. He admits that, prior to that date, he did not state about the incident to anybody. He states that, on 29/10/2008, after reaching the deceased Gurunath to the hospital, he returned to his home on the same day. He further admits that, though police were present at Kalwa Hospital, neither he had informed them about the incident, nor police had asked him about the same.

28] The statement of P.W. 7 - Pandit is recorded on the next date of the incident i.e. on 30/10/2008. He also states that, after the incident, he went to his home and did not inform anyone regarding the incident. He states that, he did not lift deceased Gurunath and Bhagwan. However, he has been confronted with his police statement viz “aamhi sarvani milun Gurunath and Bhagwan yanna mukhya rastyaparyant uchlun annun tethun tyanchya gaditun Chhatrapati Shivaji Hospital, Kalwa yethe gheun gelo.” He states that, his clothes were not stained with blood. He admits in his cross-examination that, prior to 10-15 days of his evidence being recorded, police came to his house and asked him to speak like his statement. He further states that, at that time Motiram, Hiranman, Pintu, Rajesh,

Milind, Bhagwan and Yuvraj were at his house and that, the police asked them to give statement before the Court as per their recorded statement.

29] P.W. 10 – Bhagwan is the brother of the deceased Gurunath. He has also stated in his evidence about brutal attack on him and the deceased. He has stated that, he tried to rescue his brother and at that time, he was attacked by the accused persons. P.W. 3 – Yogesh, P.W. 4 – Milind and P.W. 5 – Kiran, though state that they were present, they did not intervene and as such, did not receive injuries. Though Bhagwan and some of the witnesses categorically state that Bhagwan tried to save the deceased, P.W. 4 – Milind categorically states that Bhagwan did not make an attempt to save the deceased. The statements of these witnesses have been recorded belatedly. P.W. 4 – Milind states that, he does not remember as to who lifted deceased and Bhagwan and who were in the vehicle. P.W. 5 – kiran also states that he does not remember as to who lifted these persons. All these three witnesses as well as other witnesses categorically state that, till recording of their statements, they neither informed about the incident to anyone nor discussed with

someone.

30] It is further to be noted that P.W.3 – Yogesh, P.W. 6 – Gajanan and P.W. 7 – Pandit have categorically admitted in their cross-examination that, their police statements were not recorded as per their narration and when they informed the police about the same, police had told them that their statements would be corrected later on. Not only this, the Investigating Officer has also categorically admitted in his deposition thus:

“It is correct to say that all the statements computerized statements. It is correct to say that contents mentioned in all the statements except first two introductory para. Sequence of accused is also same. It is correct to say that sequence of accused no.1 to 16 is also same mentioned in the F.I.R. It is not correct to say that I have narrated the F.I.R. It is not correct to say that I recorded statements of witnesses suitable to me.”

31] Taking into consideration this aspect of the matter and also that in all the statements, except first introductory para, the narration is identical and admission given by eye witnesses that police had assured them that their statements would be corrected

later on and the delay in recording the statements, we find that it will not be safe to rely on the testimony of P.W. 3 – Yogesh, P.W. 4 – Milind and P.W. 5 – Kiran.

32] Insofar as P.W. 1 – Ramesh, P.W. 2 – Takdeer, P.W. 6 – Gajanan, P.W. 7 – Pandit and P.W. 10 - Bhagwan are concerned, no doubt that, they being injured witnesses, it will be presumed that, they were on the spot and as such, have witnessed the incident. Insofar as other witnesses except P.W. 10 – Bhagwan are concerned, they were on the spot and with the deceased and P.W. 10 – Bhagwan till they were brought to the hospital. All of them say that, they returned to village, after the deceased was declared dead. All of them admit that, they did not discuss the incident with anyone till their statements were recorded. In so far as P.W. 1 complainant is concerned, as discussed hereinabove, though FIR was lodged on 29/10/2008, he states that he had signed the FIR on 30/10/2008.

33] Another reason why we are not inclined to accept testimony of these witnesses is that, though all of them state that, they were on the spot and they also accompanied the deceased up to

the hospital, either they say that they did not lift the deceased and if they lifted, there were no blood stains on their clothes. In this regard, we may gainfully refer to the following observations of Their Lordship of the Hon'ble Apex Court in the case of ***Khima Vikamshi and Others vs. State of Gujarat***¹

“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 bloodstained clothes from PWs 4 and 5 creates serious doubts in our minds as to the presence of

1 (2003) 9 SCC 420

these witnesses at the time of the incident in
question.”

34] Taking into consideration all these aspects, we will have to scrutinize their testimony with greater caution. No doubt, as held by Their Lordships of the Hon'ble Apex Court, merely because there are lacunae in the prosecution case, if prosecution otherwise establishes its case beyond the reasonable doubt, accused should not be acquitted. However, at the same time, evidence of the witnesses must be found to be trustworthy, reliable and cogent.

35] We are of the view that for appreciating the truthfulness or otherwise of the prosecution witnesses, it will be necessary to refer to the injuries sustained by the deceased and the injured witnesses.

36] Insofar as deceased Gurunath is concerned, postmortem is conducted by P.W. 33 – Dr. Mangesh Ghadge. The injuries sustained by deceased are as under:-

“1] chop wound over head left fronto parietal

region, oblique 8 cm x 3 cm x bone deep, bone cut.

2] chop wound over head right parietal region 8 cm above right ear 6 cm x 2 cm x bone deep, bone cut.

3] chop wound over right parietal bone 3 cm oblique to injury no.2, 6cm x 2 cm bone deep, bone cut.

4] chop wound over head, occipital region left side 5.8 cm x 2.1 cm x bone deep, bone fracture.

5] stab wound over left forearm just below olecranon 4 cm x 2 cm x bone deep.

6] two parallel abrasions over left arm laterally midpart 2.5 cm x 0.8 cm and 2 cm x 1 cm.

7] linear abrasion over left thigh midpart laterally vertical 4.5 cm x 0.3 cm.

8] abrasion over right upper limb 4 cm below olecranon 1.5 cm x 0.6 cm.

9] abrasion over right forearm 3cm above wrist joint posteriorly 1 cm x 0.5 cm.

10] contusion over right forearm 3 cm below cubital fossa 5 cm x 3cm.

11] chop wound over right leg anteriorly 5 cm below knee joint 15cm x 6 cm x bone deep. Bone cut.

12] chop wound over right leg 3 cm below

injury no.11, 7 cm x 2 cm.

13] Incised wound over right leg 1 cm above
injury no.11, 4 cm x 0.5 cm.

14] chop wound over left popliteal fossa 9
cm x 4 cm x bone deep.

15] chop wound over left leg posteriorly 6 cm
above ankle joint, 8cm x 2 cm.

16] linear abrasion over left arm posteriorly
midpart 6 cm x 0.5 cm.”

37] Insofar as injuries sustained by P.W. 10 – Bhagwan are concerned, prosecution has examined P.W. 11- Dr. Ramesh Patel who runs Patel Clinic. As per his evidence P.W. 10 – Bhagwan was admitted on 31/10/2008 as an indoor patient. The injuries found on the person of Bhagwan by Dr. Ramesh Patel are as under:-

“1] C.L.W on the right arm, 3” long, sutured
in Sion hospital.

2] C.L.W right forearm with compound
fracture of ulna, 5” x 05” skin deep.

3] Sutured C.L.W in right parietal region, 5th
long.

4] Multiple linear contusions over back.”

38] Insofar as injuries sustained by P.W. 1 – Ramesh and P.W. 6 Gajanan are concerned, prosecution has examined P.W. 35 – Dr. Dattatray Bharaskole. The injury suffered by Ramesh (P.W.1) are as under:-

“suspected fracture on left humerus on
left arm”

Dr. Bharaskhole (P.W.35) has deposed that this injury could be caused by hard and heavy object.

Insofar as injuries sustained by P.W. 6 – Gajanan are concerned, the same are as under :

“1] contusion over vertex of size 1 cm x 1 cm, simple injury.

2] linear contusion over mid back scapula, 10 cm long, simple injury.

3] contusion on left tricep, 10 cm, simple injury.”

Bharaskole (P.W.35) has stated that these injuries also could be caused by blunt and heavy object. P.W. 11 – Dr. Ramesh Patel, who runs Patel Clinic, where P.W. 10 – Bhagwan was admitted on 31/10/2008, has also stated that the injuries suffered by him could be caused by hard and blunt object.

39] Insofar as injuries sustained by P.W. 2 – Takdeer and P.W. 7 – Pandit are concerned, prosecution has examined P.W. 34 – Dr. Mohan Gangwani, who was attached to Chhatrapati Shivaji Hospital. He has stated that, P.W. 2 – Takdeer and P.W. 7 – Pandit were brought for medical examination on 01/11/2008. As per medical certificate, the injury sustained by P.W. - Takdeer is thus :

“local pain and tenderness on left side of back. It is was fresh injury simple injury caused by hard object.”

The injury sustained by P.W. 7 – Pandit is thus :

“local pain and tenderness on right hip. It was simple injury and fresh caused by hard and blunt object.”

40] Insofar as injuries sustained by P.W. 2 – Takdeer and P.W.

7 – Pandit are concerned, P.W. 34 – Dr. Mohan Gangwani has stated that, they have been examined on 01/11/2008. Perusal of the injuries would reveal that, injuries are simple in nature. In the examination-in-chief, the doctor has admitted that the injuries were fresh. He has further admitted that if injury is caused within 24 hours, it is called as a fresh injury. He has further admitted that, the said witnesses had told him that, they had sustained injuries on 31/10/2008. P.W. 2 – Takdeer states that, he was medically examined on 29/10/2008 when he went to the hospital, whereas P.W. 7 – Pandit states that, he was examined by medical officer on 30/10/2008. As per P.W. 7 – Pandit, Jaywant, Ramchandra, Dilip, Ravindra beat him by sticks and stumps. It could thus be seen that, the version of these two witnesses that they were examined on 29/10/2008 and 30/10/2008, is totally falsified by evidence of P.W. 34, who categorically states that they were medically examined on 01/11/2008 and that the injuries were fresh. He states that, the said witnesses gave history that they received injuries on 31/10/2008. It would thus appear from the evidence of P.W. 34 that these three witnesses have received injuries on 31/10/2008 and they are

medically examined on 01/10/2008. However, they have falsely stated in their evidence that they have been injured on 29/10/2008 and that they were either examined on 29/10/2008 or 30/10/2008. Apart from that, version given by them is that, they were beaten by sticks and stumps by 3 to 4 persons. If a person is beaten by 3 to 4 persons by sticks and stumps, such a persons would receive atleast some contusion. However, perusal of injuries received by them would reveal that, it is only local pain and tenderness. As such, it is doubtful as to whether these witnesses were really present on the spot and have witnessed the incident or not. Taking into consideration this aspect of the matter, we do not find that much credence can be given to the testimony of these witnesses.

41] That leaves us with testimony of P.W. 1 – Ramesh, P.W. 6 – Gajanan and P.W. 10 – Bhagwan. As per the evidence of these three witnesses and also other witnesses, the deceased was initially assaulted with full force from all directions with deadly weapons like swords, axes and sickles. If 35 persons attack a person with such deadly weapons then it is not possible that such a person will receive

only the injuries as are sustained by the deceased. Not only that, as per the version given by these witnesses after the deceased fell down, they also beat P.W. 10 – Bhagwan mercilessly with the said weapons. However, as discussed hereinabove, Bhagwan has not received a single incised wound. The injuries sustained by him could be by hard and blunt weapon. The conduct of P.W. 1 – Ramesh, also needs to be taken into consideration. At one place, he states that, he gave information to the police on 29/10/2008 and at other places, he states that he did not give such information and once again he states that though he has given report on 29/10/2008, he has signed it on 30/10/2008. He further states that on 30/10/2008, he realized that he has not given certain names in the FIR and therefore he gave supplementary statement. Though P.W. 1 - Ramesh states that, he has signed the FIR on 30/10/2008, his signature in the FIR bears the date 29/10/2008. He also states that, though he had lifted deceased, there were no blood stains on his clothes.

42] Insofar as P.W. 6 - Gajanan is concerned, his statement is recorded on 02/11/2008. He states that, prior to recording of his

statement, he has not narrated the incident to anyone. In his examination-in-chief, he states that Santosh Gondhali assaulted him by a sword on his head, Valmik gave him blow of sword from backside, Nandu Bhoir beat him by stick on his head and therefore he sustained bleeding injuries. However, the evidence of P.W. 35 – Dr. Dattatraya Bharaskole totally falsifies his version. The injuries received by him are of contusion and which can be caused by blunt and heavy object. There is not a single injury which corresponds with the assault by sword. It could thus be seen that the version given by him is not at all truthful. He admits that, when he went to hospital, neither did he inform the police nor doctor about the injuries sustained by him. We find that evidence of P.W. 1 – Ramesh is also liable to be rejected on the ground that, his clothes were not stained with blood in view of the judgment of Their Lordships of the Hon'ble Apex Court in the case of *Khima Vikamshi* (supra).

43] We may gainfully refer to the following observations of Their Lordships of the Hon'ble Apex Court in the case of *Hallu and Others vs. State of Madhya Pradesh*²

² (1974) 4 SCC 300

“11. The postmortem report prepared by Dr. N. Jain shows that on the body of Jagdeo were found three bruises and a hematoma. On the body of Padum were found four lacerated wounds and two bruises. According to the eye-witnesses the two men were attacked with lathis, spears and axes but that clearly stands falsified by the medical evidence. Not one of the injuries found on the person of Jagdeo and Padum could be caused by a spear or an axe. The High Court however refused to attach any importance to this aspect of the matter by saying that the witnesses had not stated that “the miscreants dealt axe blows from the sharp-side or used the spear as a piercing weapon”. According to the High Court axes and spears may have been used from the blunt side and therefore the evidence of the eye-witnesses could safely be accepted. We should have thought that normally, when the witness says that an axe or a spear is used there is no warrant for supposing that what the witness means is that the blunt side of the weapons was used. If that be the implication it is the duty of the prosecution to obtain a clarification from the witness as to whether a sharp-edged or a piercing instrument was used as a blunt weapon.”

It could thus be seen that Their Lordships held that normally when the witness says that an axe or a spear is used there is no warrant for supposing that what the witness means is that the blunt side of the weapons was used. Their Lordships further held that, if that be the

implication it is the duty of the prosecution to obtain a clarification from the witness as to whether a sharp-edged or a piercing instrument was used as a blunt weapon

44] We may also gainfully refer to the following observations of Their Lordships of the Hon'ble Apex Court in the case of *Gangabhavani vs. Rayapati Venkat Reddy and Others*³

“12. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence stands crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-a-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.”

It could thus be seen that, Their Lordships held that, when medical evidence makes the ocular testimony improbable, that becomes relevant factor in the process of the evaluation of evidence It is further held that where the medical evidence goes so far that it

³ (2013) 15 SCC 298

completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.

45] In the present case, we have in-depth scrutinized the ocular testimony of the witnesses. We have also compared medical evidence with ocular testimony. As discussed hereinabove, it is the version of prosecution that P.W. 10 – Bhagwan was brutally attacked by swords and axes. However, he has not received a single incised injury. Even the injuries sustained by P.W. 6 – Gajanan are contusions. He has also not sustained a single incised injury. It could thus be seen that there is total contradiction in the medical evidence as against ocular testimony of these witnesses. We have found that, apart from medical evidence not being in tune with the ocular testimony of the witnesses, the evidence of eye witnesses cannot be said to be trustworthy, cogent and reliable. Suggestions have been given to the witnesses that, the deceased and his brother Hiranman were influential persons and that witnesses had given statements and were deposing under the influence of Hiranman. No doubt, these suggestions have been denied by the witnesses.

46] There is another aspect to the matter. Though all the witnesses have given narration of the incident in identical sequence in their examination-in-chief about the assault and weapons held by each of the accused, atleast three witnesses in their cross-examination have given different types of ball with which they have played. Whereas P.W. 2 – Takdeer states that they were playing with Tennis ball, P.W. 5 – Kiran states that, they were playing with season ball and P.W. 6 – Gajanan states that, they were playing with rubber ball. It is further to be noted that, though it is the case of most of the witnesses that, they were playing with white stumps, what has been found on the spot is black stumps. It is further to be noted that, on the spot, blood stained shirt was also found. It will be relevant to refer to the following part of the cross-examination of IO Jagdish Satav (P.W.45) :

“The complainant has not stated whose stumps were lying on the ground. The complainant has not stated whose bats were lying on the ground. I made inquiry with the persons those who were playing cricket at that time about the stumps and bats which were found on the ground. They have not stated anything about the stumps and bats to me. No witness has stated that accused came there with the bat for

beating. It is not mentioned in the complaint as well as supplementary statement of the complainant that accused came there to beat them with stumps. No witness has stated that anybody from the accused removed his shirt and thrown on the ground. The shirt found on the playground was having blood to it. This shirt does not belong to deceased or injured. I did not check whether that shirt suits any of the accused person.”

It is further to be noted that, the IO has stated that 4 to 5 motorcycles were found on the spot prior to his reaching there. However, he did not make inquiry with RTO as to who were the owners of those vehicles. He also admits that, he did not inquire whether deceased or players or whether anybody from injured is owner of those motorcycles. He also admits that, he did not seize those motorcycles. He further states that, the complainant did not show where Gurunath and Bhagwan were lying on the playground. He further admits that, blood stains were found sixty feet away from the pitch. It is thus clear that the investigation has not been done in fair manner. Either true genesis of the incident has been withheld by the prosecution or attempt has not been made to find out the true genesis.

47] Apart from ocular testimony, though the prosecution has also relied on various recoveries of incriminating material, most of the panchas have turned hostile. In any case, most of the recoveries are from bushes behind the houses and as such from open space accessible to one and all and not from the place which is distinctly and exclusively within the knowledge of the accused persons. Insofar as these recoveries are concerned, it would be interesting to note the observations of the learned Trial Judge, which read thus :

“173] There are various panchas and various other panchas are declared hostile. Therefore, their evidence is not useful to the prosecutiun. There are near about 29 to 30 panch witnesses. Some of them deposed about the recovery of the weapons. So many witnesses declared hostile. I have no reason to disbelieve the panch witnesses who deposed about the memorandum and recovery pachnama.”

Since we have reproduced the aforesaid para of the judgment of the learned Trial Judge, we also would like to reproduce the following observations of the learned Trial Judge as to the manner in which he has dealt with the evidence of one of the eye witnesses. The said observations read thus :

“170] Another eye witness is P.W. No.4 Milind Deepak Gondhali. He has also narrated same story

like P.W. No.3 and denied all the facts in cross examination, but admitted in cross examination that he has not stated portion marked A to police. This person has exaggerated certain facts which do not find place in his statement. But this witness is unable to give explanation why the portion is not appeared in his statement. This witness admitted that he has not stated which assailant had which weapon and injured which person. I have no reason to disbelieve this witness also.”

48] As discussed hereinabove, the learned Trial Judge has not given any reason as to why he finds the evidence of prosecution witnesses trustworthy insofar as convicted accused are concerned and unbelievable insofar as acquitted accused are concerned. In the totality of the circumstances, we find that convicted accused are entitled to the benefit of doubt and their appeals deserve to be allowed. However, since we find that, evidence of the prosecution is lacking credence, no merit is noticed in the appeals filed by the State as well as complainant, challenging the acquittal of 19 accused. The appeals of the State and complainant therefore deserve to be dismissed.

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

ORDER

- I] Criminal Appeal No.217 of 2013 and Criminal Appeal No.926 of 2012 are dismissed.
- II] Criminal Appeal No. 1144 of 2012, Criminal Appeal No.814 of 2013, Criminal Appeal No.815 of 2013, Criminal Appeal No.816 of 2013, Criminal Appeal No.934 of 2012, Criminal Appeal No.935 of 2012, Criminal Appeal No.936 of 2012, Criminal Appeal No.937 of 2012, Criminal Appeal No.938 of 2012, Criminal Appeal No.939 of 2012, Criminal Appeal No.940 of 2012, Criminal Appeal No.941 of 2012, Criminal Appeal No.942 of 2012, Criminal Appeal No.971 of 2012, Criminal Appeal No.1059 of 2012 and Criminal Appeal No.817 of 2013 are allowed.
- III] The order of conviction and sentence of Accused Nos.1, 3, 8, 10, 11, 12, 14, 18, 19, 21, 22, 23, 24, 25,

26 and 31 is quashed and set aside.

IV] The aforesaid accused are acquitted of the charges charged with.

V] The Appellants are directed to be set at liberty, if not required in any other case.

VI] In view of disposal of Criminal Appeals, Criminal Applications do not survive and accordingly stand disposed of.

(SARANG V. KOTWAL, J.)

(B. R. GAVAI, J.)