

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 151 OF 2017

1. Nasir Osman Pathan,
Age 60 years, Occu. Business,
2. Basaroddin @ Munna Nasiroddin
Kazi @ Sidhaqui, Age 32 years,
Occu. Labour,
3. Shaikh Munir Shaikh Noor,
Age 64 years, Occu. Business,

All R/o. Pangaon, Tq. Renapur,
District Latur.

....Appellants.

Versus

1. The State of Maharashtra
2. Veenabai Bhaguram Pedde,
Age 50 years, Occu. Housewife,
R/o. Near Hanuman Mandir,
Pangaon, Tq. Renapur,
District Latur.

....Respondents.

Mr. Joydeep Chatterji, Advocate for appellants.

Mrs. D.S. Jape, APP for respondent No. 1/State.

**WITH
CRIMINAL APPEAL NO. 494 OF 2018**

State of Maharashtra
Through Police Station Renapur,
Dist. Latur.

....Appellant.

Versus

1. Nasaroddin Yasanoddin Kazi,
Age 49 years, Occu. Labour,
2. Hafiz Abdul Ajij Shaikh,
Age 29 years, Occu. Labour,

3. Shaikh Aslam Shaikh Rahiman,
Age 35 years, Occu. Labour,
4. Asad Nabisab Shaikh,
Age 33 years, Occu. Business,
5. Vasakoddin Kayamoddin Sidhaqui,
Age 32 years, Occu. Reporter,
6. Ajmoddin Mainoddin Maniyar,
Age 49 years, Occu. Labour,
7. Mehraj Dildarkha Pathan,
Age 40 years, Occu. Agri.,
8. Hamid Yunus Sayyed,
Age 26 years, Occu. Tailor,
9. Juber Balam Qureshi,
Age 28 years, Occu. Labour,
10. Akbar Ibrahim Bagwan,
Age 40 years, Occu. Business,
11. Mehtab Ajij Kotwal,
Age 45 years, Occu. Driver,
12. Gous Ajij Kotwal,
Age 38 years, Occu. Business,
13. Farookh Osman Pathan,
Age 32 years, Occu. Business,
14. Samsher Karimkha Pathan,
Age 27 years, Occu. Labour,
15. Hiranman @ Gulam Mohammad Bashu
Shaikh, Age 40 years, Occu. Labour,
16. Shaikh Babu Shaikh Bashu,
Age 45 years, Occu. Private Service,
17. Amir Chandpasha Maniyar,
Age 28 years, Occu. Auto,
18. Fakir Nabisab Shaikh (Pathan),

Age 30 years, Occu. Labour,

19. Najmohammad Osmansab Shaikh,
Age 45 years, Occu. Fruit Seller,
20. Taher Ibrahim Maniyar,
Age 35 years, Occu. Business,
21. Harun Balam Qureshi,
Age 19 years, Occu. Business,
22. Paiyambar Babulal Shaikh,
Age 45 years, Occu. Labour,
23. Yusuf Isaaq Shaikh,
Age 27 years, Occu. Mechanic,
24. Sadiq Ibrahim Maniyar,
Age 21 years, Occu. Private Service,
25. Bashir Osmansab Pathan,
Age 45 years, Occu. Fruit Seller,
26. Yusuf Ibrahim Maniyar,
Age 23 years, Occu. Business,
27. Babu Salauddin Shaikh,
Age 24 years, Occu. Labour,
28. Afsar Najoddin Shaikh,
Age 23 years, Occu. Business,
29. Badroddin Khaisroddin Kazi,
Age 20 years, Occu. Agri.,
30. Sheru Mohammad Shaikh,
Age 32 years, Occu. Agri.,
31. Khaisroddin Khaliloddin Kazi,
Age 67 years, Occu. Agri.,
32. Asif Abdul Rahiman Sayyed,
Age 45 years, Occu. Labour,
33. Maheboob Osman Attar,
Age 70 years, Occu. Labour,

34. Mohammad Mujahid Ajmoddin,
Age 27 years, Occu. Business,
35. Khaisar Khadar Shaikh,
Age 45 years, Occu. Business,
36. Noorsab @ Mohammad Musa
Pashasab Maniyar, Age 40 years,
Occu. Business,
37. Ibrahim Yakubsab Maniyar,
Age 65 years, Occu. Business,
38. Munir Chotekha Pathan,
Age 20 years, Occu. Hamali,
39. Mainoddin Gulabnabee Maniyar,
Age 60 years, Occu. Business,
40. Ansar Khadar Shaikh,
Age 45 years, Occu. Labour,
41. Yunus Ismail Shaikh,
Age 27 years, Occu.
42. Shafik Rahimkhan Pathan,
Age 29 years, Occu.

All R/o. Pangaon, Tq. Renapur,
District Latur.

....Respondents.

Mrs. D.S. Jape, APP for appellant/State.

Mr. Joydeep Chatterji, Advocate for respondents.

Mr. S.J. Salunke, Advocate for respondent Nos. 1 to 7, 41 and 42.

Mr. Pathan Tahiwar Khan Wajeed, Advocate for respondent Nos. 8 to 11.

Appeal is admitted only against respondent Nos. 1 to 11, 41 and 42 as per order of Hon'ble Court dated 18.7.2018.

WITH
CRIMINAL APPEAL NO. 740 OF 2018

1. Shaikh Munir Shaikh Noor,
Age 64 years, Occu. Business,
R/o. Village Pangaon, Tq. Renapur,
District Latur.

....Appellants.

Versus

1. The State of Maharashtra
2. Veenabai Bhaguram Pedde,
Age 50 years, Occu. Housewife,
R/o. Near Hanuman Mandir,
Pangaon, Tq. Renapur,
District Latur.

....Respondents.

Mr. R.D. Biradar, Advocate for appellant.

Mrs. D.S. Jape, APP for respondent No. 1/State.

**CORAM : T.V. NALAWADE AND
K.K. SONAWANE, JJ.
RESERVED ON : 13/08/2019.
PRONOUNCED ON : 11/09/2019.**

JUDGMENT : [PER T.V. NALAWADE, J.]

1) The appeals are filed against judgment and order of Sessions Case No. 87/2009, which was pending in the Court of learned Additional Sessions Judge, Latur. The chargesheet was filed as against 50 persons. One accused, accused No. 34 Rahim Noormohammad Shaikh died during pendency of the case and the case against him was disposed of as abated. Accused No. 48 Yunuskha Salimkha Pathan was shown as absconding accused in the chargesheet and so, the case of remaining accused was separated and it was tried separately. After the decision of the Sessions Case,

the matter as against accused No. 4 Firoz Rahimkha Pathan was sent to Juvenile Court after holding him guilty for the offence punishable under sections 302, 324, 149 etc. of Indian Penal Code (hereinafter referred to as 'IPC' for short) and under the Juvenile Justice (Care and Protection) Act, the learned Chief Judicial Magistrate, the Presiding Officer has directed Firoz Pathan to do some social work for the period of one year and pay some compensation to the legal heirs of the deceased. The learned Additional Sessions Judge has convicted accused No. 1 Nasir Osman Pathan, Accused No. 2 Basaroddin Kazi and accused No. 3 Shaikh Munir for the offence punishable under section 302 r/w. 149 of IPC and they are sentenced to suffer imprisonment for life. They are also convicted for the offence punishable under sections 324 r/w. 149, 504 r/w. 149 and sections 147 and 148 of IPC. Separate sentences are given by the learned Additional Sessions Judge for these offences.

2) Criminal Appeal No. 151/2017 is filed by Nasir Pathan, Basaroddin Kazi and Shaikh Munir, accused Nos. 1 to 3. Criminal Appeal No. 494/2018 is filed by the State and it is admitted by this Court as against 13 accused who are acquitted by the Trial Court. Leave was not granted by this Court to the State to file appeal against the remaining accused. Accused No. 3 Shaikh Munir from Criminal Appeal No. 151/17 filed separate appeal subsequently and

it is numbered as Criminal Appeal No. 740/2018. All the sides are heard.

3) The facts leading to the institution of the appeals can be stated as follows :-

The crime was registered on the basis of report given by Shankar Pende, who is residing in front of Hanuman Mandir, Pangaon, Tahsil Renapur, District Latur. He belongs to Yellam community and at the relevant time, he was living with his two brothers, parents and sisters in the same building, though in different portions.

4) The incident in question took place on 26.12.2008. At about 8.30 p.m. when Shankar's brother Bhaguram was present in front of his house, he noticed that accused Nasir Pathan (accused No.1) was sitting right in front of their house for defecating, in open. When Bhaguram questioned this act of Nasir and asked him to go away from that place, Bhaguram had a quarrel with Nazir. While leaving the spot, Nasir gave threat to Bhaguram.

5) Due to the aforesaid incident, Bhaguram and Balaji, son of Bhaguram started for police chowky as they wanted to give report against Nasir. The informant also started following them and he was

at the distance of around 10 feet. from Balaji and Bhaguram. Along with the informant, Dhondiram Sherkhane, Indrajeet Sampate and Dharmaraj Sampate also started proceeding towards police chowky for giving report. That was at about 10.30 p.m.

6) When informant and aforesaid persons reached Khatik Galli, they noticed that from Masjid situated in Khatik Galli, the persons like Nasir Pathan, Shaikh Aslam Rahiman Shaikh, Nasroddin Kazi, Munir Shaikh, Firoz Pathan, Siddiqui Aasifoddin, Hafiz Abdul Aziz Shaikh, Jamir Shaikh, Ajmoddin Maniyar, Mehraj Pathan, Yunus Khan Pathan, Munna Kazi, Shaikh Yunus, Shaikh Shafik and others came out and they were holding weapons like long knife, sticks etc. They intercepted Bhanuram and they started asking him as to why he had given abuses to Nasir Pathan. Then the quarrel started. During quarrel those persons said that the persons of Yellam community had become arrogant and lesson needs to be taught to them. By saying so, they started assaulting Bhanuram and Balaji.

7) During incident, Nasir Pathan gave blow of knife on the abdomen of Bhaguram, Munna Kazi gave blow of long knife in to the chest of Balaji and others started assaulting them by using weapons like sticks. As there was streetlight, the informant and others who were following Bhaguram could witness the incident. They rushed

forward to save the life of Bhaguram and Balaji and then Yunus Pathan gave blow of knife on the right leg of informant and Munir Shaikh and Firoz Pathan gave beating by using sticks. After hearing hue and cry, many persons rushed to the spot and they separated the quarrel.

8) Bhaguram, Balaji, Sandeep Gude, Shankar Kaspate had sustained injuries in addition to informant and they were shifted to hospital. There doctor declared that Bhaguram and Balaji were already dead. The report of Shankar Pende came to be recorded on 27.12.2008 and crime came to registered at 3.30 a.m. for aforesaid offences.

9) During the course of investigation, inquest was prepared on the dead bodies and spot panchanama came to be prepared. P.M. was conducted on the two dead bodies. Some accused persons came to be arrested immediately and on the basis of statements given by them some weapons came to be recovered. The P.M. revealed that dangerous weapons were used. Injury certificates in respect of other injured persons also came to be collected. Blood which was found on the spot came to be collected and all the articles including clothes came to be sent to C.A. Office.

10) On the basis of evidence, the Trial Court convicted some accused mentioned above and held that the evidence as against the remaining accused was not sufficient to infer that they were members of unlawful assembly.

11) When there is charge by using the provision of section 149 of IPC, at the time of appreciation of the evidence, the Court is expected to keep in mind the possibility of exaggeration of things and also the possibility of false implication of some of the persons for the reasons which may not come on the record. When the case is filed against the persons of one community like Muslim community and all the witnesses belong to other community like Hindu community, (in the present matter the prosecution witnesses belonging to Yellam caste of Hindu community), the Court is expected to scrutinize the evidence properly and the Court is expected to always look for corroboration to the direct evidence. The motive in such cases is not only relevant, but may gain more importance even when there is direct evidence. Only on the basis of circumstance that all the accused were belonging to particular community like Muslim community, it is never safe to infer that all of them had formed unlawful assembly with a particular object. The Court is expected to keep in mind that there is never such possibility as every person has different mindset. Many a times, persons rush

to the spot where the incident is taking place and they remain present on the spot as passive spectators. Due to all such possibilities, various circumstances which can lend credence to the version of eye witness need to be established by the prosecution.

12) In the present matter, the prosecution has given both direct and circumstantial evidence. Three eye witnesses who include Shankar (PW 1), who gave first information report, are examined. Deceased Bhaguram was real brother of PW 1. Other deceased Balaji was son of Bhaguram. Shankar has given evidence that his family and family of Bhaguram were living in the same building, though in different portions at the relevant time. Both the prosecution witnesses, eye witnesses and the accused persons hail from the same village viz. Pangaon, Tahsil Renapur, District Latur. In the present matter, it also needs to be kept in mind that there is no positive evidence given by prosecution to show that any of the accused is close relative of main accused, who is accused No. 1 as per the motive given for the crime.

13) Shankar (PW 1) has given evidence that on that day, the first incident took place at about 8.30 p.m. when accused No. 1 was seen defecating in open space in front of their building. Evidence is given that the deceased Bhaguram saw it and he questioned accused

No. 1 as to why he was defecating there in open space. Evidence is given by PW 1 that Bhaguram said that even the lady members of his family were passing by that side. PW 1 has deposed that due to questioning of Bhaguram, there was exchange of words between Bhaguram and accused No. 1. PW 1 has given evidence that while leaving the place, accused No. 1 gave threat to victim to teach him a lesson.

14) It is brought on the record in the evidence of PW 1 to 3 that Bhaguram and his son Balaji were proceeding to police station to give report about the aforesaid incident against accused No. 1 and on the way, they were intercepted by the accused persons in Khatik Galli and then the incident in question took place.

15) Dhondiram Sherkhane (PW 2), other eye witness has deposed that when the first incident took place, he was present near Hanuman temple which is situated in the vicinity of the house of informant and there, he heard the noise of quarrel. He has deposed that he went towards the house of informant and there, it was informed to him that there was quarrel of aforesaid nature. It is not his version that he had seen accused No. 1 on the spot when he reached the spot. In the F.I.R., the name of Dhondiram (PW 2) is not mentioned showing that he was present on the spot when first

quarrel took place or to show that he had rushed to the spot after hearing about first quarrel.

16) Evidence of Shankar Kaspate (PW 3) shows that he was not present on the spot when the first incident of quarrel took place. The name of Shankar Kaspate (PW 3) is however mentioned in the F.I.R. showing that he was in the company of first informant when they started proceeding towards the police station. These three witnesses have given evidence that they were following Bhaguram and Balaji when Bhaguram was proceeding towards police station on that night. Thus, a particular reason is given by the prosecution witnesses for the incident in question. On the other hand, it is the contention of the accused persons which can be found in the statement given under section 313 of Cr.P.C. that on that day, in the first incident, not aforesaid incident, the persons of complainant's side had assaulted accused No. 2 Munna, they had caused bleeding injury to him and due to that the main incident took place. It is the contention of the accused that the main incident took place out of trivial reason and there was no intention of anybody to commit aforesaid offence, of two murders.

17) Shankar (PW 1) and other two witnesses have given evidence that they were proceeding towards police station and the

way goes through Khatik Galli. Their evidence shows that other persons like Indrajeet and Dharmaraj were also in their company, but they were at some distance from Bhaguram and Balaji when the incident started.

18) Shankar (PW 1) has deposed that in Khatik Galli there is Masjid and accused like accused No. 1 Nasir, accused No. 2 Munna, accused No. 3 Munir Shaikh, accused No. 4 Firoz Pathan and other accused persons whose names were given in the F.I.R. had gathered near masjid. He has deposed that after seeing Bhaguram and Balaji, these persons came running towards them with weapons like iron bars, knives and choppers. Thus, an attempt is made to prove that all the accused rushed to the spot together.

19) Shankar (PW 1) has deposed that all the accused started assaulting deceased Bhaguram by asking him as to why Bhaguram had abused Nasir (accused No. 1). He has deposed that during incident accused No. 1 said that Yellam people had become arrogant and so, lesson needs to be thought to them.

20) Shankar (PW 1) has deposed that during incident accused No. 1 gave blow of chopper below the belly of Bhaguram, accused No. 2 Munna gave blow of chopper on the chest of Balaji

and other accused also assaulted the two deceased with wooden logs, sticks. PW 1 has deposed that due to this assault, both the deceased collapsed on the spot of offence. Thus, Shankar (PW 1) has attributed specific role to accused Nos. 1 and 2, but so far as the assault made on Bhaguram and Balaji by other accused is concerned, there is general evidence against the remaining accused.

21) Shankar (PW 1) has deposed that he could see the entire incident in the street light. He has deposed that when he and other persons who were with him went ahead to rescue the two deceased, accused Yunus Pathan (accused No. 48) gave blow of knife on his right knee. He has given evidence that then accused Munna (accused No. 3) and Firoz (accused No. 4) gave beating to him by using wooden log, sticks. This part of evidence of PW 1 shows that accused Nos. 3, 4 and 48 actively participated in the incident in some way and they were armed with weapons.

22) Shankar (PW 1) has deposed that after starting of the incident, the villagers rushed to the spot and they separated the persons of the side of complainant from the accused persons.

23) Shankar (PW 1) has deposed that the witnesses like Shankar Kaspate (PW 3), Sandeep Ghude shifted Bhaguram and

Balaji to hospital, but both of them died. He has deposed that when he learnt from Sandeep Ghude about the death of aforesaid relatives, he went to Renapur Police Station and gave report. The report is proved as Exh. 185. He has deposed that after registering the crime, he was referred to Renapur Rural Hospital for treatment. He has deposed that he showed the spot of offence to police on 27.12.2008. In the Court he identified all the accused persons and defence did not dispute that he could identify all the accused. His version that he knew all the accused from prior to the date of incident is not disputed by the defence. Shankar (PW 1) has then given evidence that other accused instigated by uttering the words like 'हाना, मारा' [beat, kill].

24) Shankar (PW 1) has given vague evidence against acquitted accused persons that they had all assaulted Bhaguram and Balaji. There is vague evidence against those accused that they instigated the main accused during incident by uttering words like 'हाना, मारा'. The omission in F.I.R. to the effect that PW 1 had not informed to police that other accused were giving instigation by uttering words like 'हाना, मारा' is duly proved by the defence. This omission needs to be kept in mind while appreciating the other evidence which can be used as circumstantial evidence in the

present matter. The evidence of aforesaid nature which is hit by material omission cannot be used in the case like present one to infer that the other accused, who were not holding the weapons had become the members of unlawful assembly. On the basis of other circumstances, it needs to be ascertained in the present case whether all the remaining accused had taken part in beating and such injuries were found on the prosecution witnesses or the dead bodies. It is also necessary to ascertain whether against other accused there is evidence to corroborate like recovery of weapons, presence of blood stains on the clothes etc. It is already observed that the relationship of such accused with the main accused and their connection to the motive also need to be considered as those circumstances also can connect such accused with the main accused can help the prosecution to prove that they had become the members of unlawful assembly.

25) There is corroboration of F.I.R., Exh. 185 registered under section 154 of Cr.P.C. which is available under section 157 of Evidence Act atleast in respect of specific oral evidence given as against accused Nos. 1 and 2, who had assaulted the two deceased and on the oral evidence given on the assault made by accused Nos. 3, 4 and 48 on the first informant. Even if the omission in respect of the evidence given on instigation that accused No. 1 was instigating

others by saying that people of Yellam community had become arrogant and lesson needs to be though to them, is considered and that part of evidence given as against accused No. 1 is ignored, to other part of oral evidence, there is corroboration of F.I.R.

26) Shankar (PW 1) has given evidence against accused No. 48 Yunus Pathan that he assaulted by using knife on his knees. Accused No. 48 was absconding when the case was tried against available accused, but this part of evidence needs to be kept in mind as to form 'unlawful assembly', there need to be five or more persons available in the assembly.

27) The omission in F.I.R. in respect of oral evidence of Shankar (PW 1) about the existence of street light is also duly proved by the defence. At proper place the evidence of spot panchanama is discussed and that also shows that the circumstance like availability of facility of street light is not mentioned in the spot panchanama. The other two eye witnesses have given evidence on existence of such facility. If due to the circumstance of absence of street light in the spot panchanama, that part of the evidence of these three witnesses is ignored, in that case also only due to that circumstance, the evidence of these three eye witnesses cannot be discarded. When the incident takes place in the night time and when

there are houses adjacent to the spot of offence, the light from those houses comes to the street. Further, when there is evidence of eye witness who knew the assailants, Court can safely believe the evidence if his evidence is credit worthy and has corroboration of circumstantial evidence. Even in the dark, in the month of December in the light of stars a person can identify other person who is known to him from such close distance.

28) Dhondiram (PW 2) has given evidence on the main incident by saying that at the relevant time, he was in the company of Shankar (PW 1) and that is why he could witness the incident. His evidence is similar to the evidence of PW 1. In his evidence, he has described the weapons as big knife (Sura) used by accused Nos. 1 and 2 when PW 1 described the weapon as chopper. Not much can be made out due to this discrepancy as many times a big knife appears like chopper which is ordinarily bigger in size than the regular knife. The incident took place in Khatik Galli, where persons of Khatik community live. These persons possess weapons like small and big knives for their business. His evidence on weapon used by accused Nos. 1 to 4 and 48 is similar to the evidence of PW 1 and the role attributed by PW 2 to accused Nos. 1 to 4 and 48 during incident is similar to the evidence of PW 1. He has given evidence against other accused that they were giving abuses to Yellam

community. He has given evidence that when the mob thought that Dhondiram and Balaji were dead, the mob left the place. Though in the evidence of Dhondiram it is brought that attempt was made to save the life of two deceased by shifting them to the hospital, not much can be made out of the circumstance that Dhondiram felt that Bhaguram and Balaji died on the spot.

29) Dhondiram (PW 2) took the names specifically of aforesaid accused and other accused like Azimoddin Maniar, Meharaj Pathan, Shaikh Asad, Vasikoddin Sidique, Akbar Bagwan and Sayed Hamed. His examination in chief itself shows that he could identify the accused only named by him in the Court. His evidence shows that he did not know all the remaining accused. He could not identify the other accused by taking the names the in the Court.

30) The evidence of Dhondiram (PW 2) shows that in one vehicle Bhaguram and Balaji were shifted to the hospital and in the other vehicle PW 1 was taken to Rural Hospital. His evidence shows that from Rural Hospital Bhaguram and Balaji were shifted to Government Hospital, Latur.

31) In the cross examination of Dhondiram (PW 2), the previous police statement of this witness, statement given under

section 164 of Cr.P.C. and evidence given by him before Juvenile Justice Board were confronted. The statement given by him under section 164 of Cr.P.C. gives general corroboration to his version given in the present matter on material points. The inconsistencies pointed out to him during his evidence by the defence are not that material and due to those inconsistencies, it is not possible to discard his evidence. The police statement of this witness was recorded on 28.12.2008, but his name was mentioned in the F.I.R. by PW 1 immediately on 27.12.2008.

32) The evidence of Kaspate (PW 3), the last eye witness is similar to the evidence of PW 1 and PW 2 on material points. The statement given by this witness under section 164 of Cr.P.C. at Exh. 214 is consistent with his version given in the Court on material points and it gives corroboration to the oral evidence. Though he has denied that he had stated before police that accused No. 3 Munir had assaulted PW 1 by using knife, that part of evidence is not sufficient to discard his remaining part of evidence.

33) To all the three eye witnesses the defence has suggested that accused persons are implicated in the case falsely and the reason behind it is political rivalry between the prosecution witnesses and accused. This suggestion is denied by all the three

witnesses. It is brought on the record in the evidence of PW 3 that the main incident took place out of trivial reason. All the three witnesses have given the same reason for the incident. No probability is created by the defence that there was any particular reason for any of the three witnesses to falsely implicate accused Nos. 1 to 4 or accused No. 48.

34) In the cross examination of all the three eye witnesses it is suggested to them that accused No. 3 Munir had sustained injury in the incident. This suggestion is admitted by the prosecution witnesses. Similar suggestion was given to the Investigating Officer and it was suggested that report was given by accused No. 2 in respect of the same incident against the persons of side of the complainant. Though such kind of defence was taken, the relevant record was not produced before the Trial Court. It was necessary for the defence to prove the injuries sustained by accused No. 2 or other accused and on that basis, it could have been ascertained as to whether dangerous weapons were used against accused persons.

35) In absence of evidence and when no probability is created which could have helped the defence, not much can be made out due to admission by the prosecution witnesses that accused Munir had sustained some injuries in the incident. Unless

such circumstance, sustaining of some serious injury or use of dangerous weapon by the prosecution witnesses, is established, there is no burden on the prosecution to explain the injuries which were allegedly caused to the accused. When many persons are involved in the incident and many assailants are assaulting one person, there is bound to be resistance from the victim and in such a case, some minor injuries are bound to be there to the other side. No other inference can be drawn in the present case.

36) The evidence on the record shows that the crime was registered at 3.30 hours on 27.12.2008. F.I.R. at Exh. 185 was given by PW 1 by visiting the concerned police station. The post mortem was conducted on the two dead bodies in Latur and it was completed at 8.35 a.m. of 27.12.2008. As the evidence of PW 1 and other prosecution witnesses show that PW 1 had not gone to Latur, he had no opportunity to see the actual injuries found on the dead bodies, necessary weight needs to be given to his version which is corroboration of F.I.R. If the medical evidence corroborates his oral version, that circumstance certainly lends credence to the evidence of such injured witness.

37) Dr. Shelke (PW 6) performed post mortem on the two dead bodies. In his evidence, the two P.M. reports are duly proved as

Exhs. 232 and 233.

38) Dr. Shelke (PW 6) has given evidence that he found following injuries on the dead body of Bhaguram :-

"(i) Punched out wound on left forehead measuring 2 x 1 cm, bone deep.

(ii) Incised injury on left parietal region, 5 x 1 cm, bone deep oblique.

(iii) Stab injury over left upper abdomen (hypocondriac) transverse oblique, zig zag clear cut, measuring 10 x 5 cm., opening into abdominal cavity. Intestinal coils with mesentery protruding out and blood oozing.

(iv) Stab injury over lumbar region of back left side, transverse measuring 6 x 1.5 cm., opening to abdominal cavity tailing medically.

(v) Small incised injury over right hand thinner eminence 1 x 0.2 cm.

(vi) Red abrasion over (a) left lumbar region 7 x 0.5 cm. (b) left hand dorsally 2 x 0.5 cm."

All the injuries were antemortem.

According to PW 6 the external injuries had caused following internal injuries.

(i) Minimal hamatoma under neath injuries over left forehead and parietal region.

Corresponding to stab injuries, injures to corresponding wall and peritoneum mesentry clean cut at two places 5 cm and 3 cm gaping. Hemoperitoneum 3.5 litres including cluid blood and clots contaminated with intestinal contents.

Incised injuries at two places opening into lumen mucosa everted.

Perinepheric hematoma on right kidney. Retro peritoneal hemorrhage with mesentric hemorrhage."

39) Dr. Shelke has given evidence that the death of Bhaguram took place due to stab injuries which was found on abdomen and due to corresponding internal injury caused by stab injury. He has deposed that the stab injury was caused by sharp and pointed weapon like Article 13. He has given evidence that such injury is sufficient in ordinary course of nature to cause the death. Exh. 232, post mortem report is consistent with this oral evidence. In the cross examination of this witness it is brought on the record that the external injury Nos. 3 and 4 caused death. The tenor of the cross examination of the doctor shows that the defence has not disputed that both Bhaguram and Balaji died homicidal death.

40) Dr. Shelke (PW 6) has given evidence that he found following external injuries on the dead body of Balaji.

- (i) Red abrasions (a) over right mandibular body lower margin 0.5 x 4 cms.
- (b) Right upper neck 1 x 2 cm.
- (c) Right knee 1 x 1 cm.
- (d) Left knee 1 x 1 cm.
- (e) Left leg 0.5 x 1.5 cm. upper third
- (f) Left thigh linear vertical posterio laterally upper third 15 cm.
- (g) Mid trunk left anterior axillary line 0.5 x 0.3 cm.
- (ii) Stab injury over left chest mid clavicular region situated 7.5 cm. below left clavicle vertical 4 x 2.5 cm. opening into chest cavity subcutaneous tissue exposed in lateral part. Angle and margins clean cut. Blood coming out fish tail appearance at lower medial aspect. Left rib fracture.

The injuries were antemortem and fresh.

Dr. Shelke (PW 6) has deposed that he found following internal injuries on the dead body of Balaji :-

- (i) Minimal hematoma corresponding to stab injury

left intercostal muscles and third coastal cartilage clearly cut in an area 0.5 to 1.00 cm. x 3. cm. Vertical oblique left lung exposed.

(ii) Hemothorax 1.4 litre blood and clot in right and 1 litre in left.

(iii) Larynx, Trachea and Bronchi were intact.

(iv) Corresponding to stab injury following internal injuries found.

(a) Left lung upper lobe anterior margin with incised injury 1 cm. Pericardium clearly cut vertically over left and anterior aspect.

(b) Right ventricle showed perforating clean cut injury. Wound of entry 4 cm. gaping over anterior aspect of right ventricle opening into cavity, wound of exit posterior aspect of right atrium minimally gaping 3 cm. Heart almost empty. Another stab injury to right ventricle 1 cm. below wound of entry measuring 1 cm. with minimal gaping. Right lung shows stab injury near hilum going laterally in middle lobe 2 cm. Minimal gaping at entry. Reaching up to sub pleural space.

Direction of stab :- Antero posteriorly left to right, supero inferiorly.

Right lobe contused 2 cm. above anterior inferior

border 0.5 x 10 cm.

41) Dr. Shelke (PW 6) has given evidence that external injury No. 2 found on the dead body of Balaji caused aforesaid internal injuries and this injury is sufficient in ordinary course of nature to cause the death. He has deposed that weapon like Article 14 can cause such injury. In the cross examination of this witness, some hypothetical questions were put to him regarding the possibility of use of Article 14 as weapon used as this Article is not having handle and after the blade there is some metal portion to which handle is generally attached. Doctor has given evidence that he cannot say anything as to whether such weapon could have been used. Whether the weapon was having handle or not at the relevant time is a different question and whether a person who wants to use such weapon could have firm grip on the weapon for giving blow is also hypothetical point. Not much can be made out due to the circumstance that Article 14 is not having handle.

42) The aforesaid medical evidence shows that more injuries caused by dangerous weapon were on the dead body of Bhaguram than the injuries described by PW Nos. 1 to 3. This circumstance is not sufficient to discard the evidence of PW 1 to 3. There is specific evidence only against accused Nos. 1 and 2 that they used

dangerous weapons and they assaulted two deceased persons. Considering the time taken for the incident which was 2-4 minutes and which is brought on the record by the defence, not much can be made out due to the circumstance that the prosecution witnesses have not given positive evidence that these two accused inflicted more blows. It needs to be kept in mind that as many as five persons were holding the weapons and they were assaulting the two deceased and PW 1. In such a case, it is not possible even for injured eye witness to describe each and every blow of weapon given to the deceased. This Court holds that due to these circumstances, the evidence of PW 1 to 3 cannot be discarded. On the contrary, it can be said that even when there were many injuries on the dead body of Bhaguram, PW 1 did not make an attempt to give specific role to other accused persons in that assault. When there is specific evidence that only few accused used dangerous weapons and there is medical evidence of aforesaid nature, not much can be made out due to such circumstance in favour of the accused. This Court holds that the aforesaid medical evidence gives necessary corroboration to the direct evidence of aforesaid three witnesses given on the murders of Bhaguram and Balaji.

43) Dr. Dandade (PW 7) was incharge of Renapur Rural Hospital and he is examined to prove the injuries sustained by

Shankar (PW 1) in the incident. The injury certificate is proved as Exh. 238. He found following injuries on the person of Shankar (PW 1) :-

- (i) An incised wound, deep, reddish oblique, to medial aspect of right knee joint, clean cut margins everted oblique in direction. The size of the injury was 3.5 x 2 x 2 cms., caused by sharp and hard object.
- (ii) A contusion, superficial, reddish brown to dorsum of right hand, diffused margins, oval in shape. The size of the injury was 4 x 2 x 1 cms., caused by hard and rough object.
- (iii) An abrasion superficial reddish brown in colour to the nape of the neck on left side, distorted margins vertical. The size of the injury was 5 x 2 x 1 cms., caused by hard and rough object.
- (iv) A blunt trauma to the left thigh.

Dr. Dandade has given evidence that the age of the injuries was within six hours. Exh. 238 shows that PW 1 was examined on 27.12.2008 at about 4.20 a.m. This medical evidence is also consistent with the oral evidence of PW 1 and also with the evidence of PW Nos. 2 and 3. This evidence also gives necessary corroboration to the versions of PW Nos. 1 to 3.

44) In the evidence of Khandade (PW 8) the spot panchanama at Exh. 242 is proved by the prosecution. The spot panchanama was drawn between 7.00 a.m. and 7.45 a.m. of 27.12.2008. Blood was found on the spot and spot was shown by PW 1. Earth samples mixed with blood and blood collected by using cotton swab from the stones which were lying on the spot were taken over under the panchanama. So many chappals and shoes were lying in scattered condition on the spot of offence. The spot was situated on Gandhi Chowk to Bus Stand road. As already observed there is no mention of facility of street light in the spot panchanama. The defence is not disputing that Bhaguram and Balaji died homicidal death and incident took place on the spot shown in Exh. 242. This evidence gives necessary corroboration to the version of PW Nos. 1 to 3.

45) Prosecution has given other circumstantial evidence like discovery of weapons on the basis of statements given by accused Nos. 1 and 2 under section 27 of Evidence Act. Panch witness Ige (PW 4) has given evidence that accused No.2 Munna gave statement to police in his presence and memorandum of the statement was prepared. Exh. 220 memorandum of statement is duly proved in his evidence. He has given evidence that after preparation of

memorandum of statement, this accused took police and panchas to his house and from his house, he produced weapon knife which is at Article 14. This article was seized under panchanama at Exh. 221 as per the version of this witness. He has given similar evidence against accused No. 1 Nasir. According to him, Exh. 222 is memorandum of statement and Exh. 223 is panchanama of seizure of knife produced by this accused from his house. Article 13 was produced by accused No. 1 as per the version of this witness. He identified both the accused in the Court. There is evidence on memorandum statements and also seizure panchanama of the Investigating Officer also. Though PW 4 belongs to Yellam community, only on that ground his evidence cannot be discarded. From the nature of evidence given by him, this Court holds that he was not interested witness. The weapons were recovered on 31.12.2008. There is evidence of Investigating Officer Ranjalkar (PW 10) that after recovery of these weapons the weapons were sent to C.A. Office.

46) Evidence is given by Investigating Officer Ranjalkar (PW 10) that weapons were sent with covering letter to C.A Office on 4.1.2009. Office copy of covering letter is at Exh. 256. C.A. report at Exh. 262 shows that blood of group 'A' was detected on these weapons. The evidence of doctor who conducted P.M. examination shows that the blood samples were collected from two dead bodies.

The evidence on record shows that these samples were forwarded to C.A. Office along with covering letter. This record shows that blood group of Balaji was 'A'. But the blood group of Bhaguram could not be ascertained as the results of C.A. were inconclusive. Evidence is given that blood of accused No. 1 was collected and as per the record, blood group of this accused is 'AB' (Exh. 259). The evidence shows that the blood of accused No. 2 is of group 'B' (Exh. 263). Thus, the evidence on discovery of weapons on the basis of statements given by accused Nos. 1 and 2 under section 27 of Evidence Act and the presence of blood on the weapons is available as circumstantial evidence and that gives more corroboration to the direct evidence.

47) There is no positive evidence from the side of defence to create probability that the circumstances were such that they were required to exercise right of private defence. No such probability is created in the evidence of prosecution witnesses also. As already observed, even the injury certificate was not produced and proved in respect of any accused for creating reasonable probability. In the appeal, certified copy of chargesheet came to be filed though without application for getting permission. Even if that record is considered it can be said that crime No. 160/2008 was registered in respect of the same incident on the basis of report given by accused

No.2 and the chargesheet came to be filed in the year 2009 for offences punishable under sections 336, 324 and 149 of IPC. As already observed, even after consideration of such record, it is not possible to infer that there was free fight or there was exercise of right of private defence by the accused persons. When the prosecution proves that accused persons had used dangerous weapons, they committed two murders and when there is evidence to show that they caused injuries to eye witnesses by using dangerous weapons, in absence of the necessary material as observed already, it is not possible to infer that there was either free fight or prosecution witnesses were aggressors.

48) The Trial Court has believed the eye witnesses. As Appellate Court, this Court is not expected to interfere in that finding as the Trial Court is in the best position to appreciate the direct evidence. These witnesses have attributed specific role to five accused persons. Considering the number of injuries which were found on the two dead bodies, the number of injuries found on the person of PW 1, the circumstance that out of five accused three accused had used deadly weapons, by using deadly weapons aforesaid number of injuries were inflicted, the site of the injuries inflicted by using dangerous weapons, the medical evidence of the nature available in the present matter, the circumstance that the

spot of offence was away from the place of residence of accused, it is easy to infer that these five accused persons had formed unlawful assembly and the object of the unlawful assembly was to assault the two deceased persons. Three accused used dangerous weapons. In view of nature of evidence and the aforesaid circumstances, there is no other inference possible than to infer that injuries were inflicted intentionally by these accused. These injuries proved to be sufficient to cause the death in ordinary course of nature. For all these reasons, this Court holds that accused Nos. 1 to 3 who are convicted and sentenced by the Trial Court are liable for conviction for offences of murder of Bhaguram and Balaji punishable under section 302 r/w. 149 of IPC. For the same reason, this Court holds that they are also guilty of the offence of causing simple injury to PW 1 punishable under section 324 r/w. 149 of IPC. Thus, it is not possible to interfere in the decision given by the Trial Court against accused Nos. 1 to 3. They are convicted for the offences punishable under sections 504, 147, 148 etc. of IPC. It can be said that the Trial Court could have avoided to convict accused No. 3 for the offence punishable under section 148 of IPC in view of nature of weapon used by him. However, the sentences will run concurrently and no fine is imposed by the Trial Court and so for that reason it is not necessary to disturb any part of the decision given by the Trial Court.

49) The Trial Court has given decision of acquittal in favour of remaining accused persons. For the reasons already given, this Court holds that the view taken by the Trial Court is a possible view. If all the accused had assaulted the two deceased, more injuries and of different nature would have been found on the dead bodies. The circumstance like not attributing specific role to these accused and absence of injuries which could have been caused by them are circumstances which are sufficient to create reasonable probability that they were not members of unlawful assembly. This Court has already observed that there is always possibility of false implication of some in such cases. In the present matter, the other accused are belonging to Muslim community and there is every possibility that they were present on the spot by chance as they had come out of Masjid. So, the view taken by the Trial Court is a possible view.

50) It was submitted for the convicted accused that in place of provision of section 302, the provision of section 304 Part II of IPC can be used against accused as many accused were involved in the incident and incident took place out of trivial reason. Reliance was placed by the counsel of appellants on the case reported as **AIR 1982 SC 126 [Kulwant Rai Vs. State of Punjab]**. The facts of this reported case were different. In criminal cases the facts of each and

every case are always different. In all the cases either number of persons involved is different or number of injuries found on the deceased is different. There may be difference in use of weapons and the site chosen for assaulting. All the circumstances are required to be considered and medical evidence plays important role while ascertaining the offences committed in such cases. That part of evidence is carefully considered by this Court and so, this Court holds that the observations made by the Apex Court in the case cited supra cannot help the convicted accused. In the present matter, the learned counsel placed reliance on two more cases reported as **2011 ALL MR (Cri) 1874 [Sitaram Tukaram Masulkar Vs. State of Maharashtra]** and **2011 ALL MR (Cri) 1800 [State of Maharashtra Vs. Raju s/o. Bhagwan Kothimbire & Ors.]**. Facts of these two reported cases were also different and for the same reasons, this Court holds that observations made by this Court in the cases cited supra can be of no help to the convicted accused.

51) The learned counsel representing acquitted accused placed reliance on following three cases :-

(i) **AIR 1987 SC 1083 [Tota Singh and Ors. Vs. State of Punjab],**

(ii) **AIR 2010 SC 2147 [Daya Kishan Vs. State of Haryana], and**

(iii) **AIR 1965 SC 202 [Masalti Vs. State of**

U.P.].

In two cases, the Apex Court has considered the limitation of Appellate Court while deciding the appeal against acquittal. The Apex Court has also discussed the use of provision of section 149 of IPC. There is no dispute over the proposition made in the two cases. This Court has also come to the conclusion that the view taken in favour of acquitted accused by the Trial Court is a possible view and so, no more discussion is necessary in respect of observations made in these cases. In the result, all the appeals stand dismissed.

[K.K. SONAWANE, J.]

[T.V. NALAWADE, J.]

ssc/