

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

CRIMINAL APPEAL NO. 185 OF 2015

Irappa @ Chermal Subhash Dhangar.	]	
Residing at Near Shivsena Shakha,	]	
Ramgad, Goshala Road,	]	
Mulund (W), Mumbai-80	]	...Appellant
V/S		
The State Of Maharashtra (at the instance of Mulund	]	
Police Station, C.R. No.02/2011	]	...Respondent

**WITH
CRIMINAL APPEAL NO. 916 OF 2014**

Irfan Dastagir Shaikh	]	
Residing at Saisadan chawl, R. No.82,	]	
Ramgad, Goshala Road,	]	
Mulund (W), Mumbai-80	]	...Appellant
V/S		
The State Of Maharashtra (at the instance of Mulund	]	
Police Station, C.R. No.02/2011	]	...Respondent

**WITH
CRIMINAL APPEAL NO. 1067 OF 2014**

Balu Prakash Chavan	]	
Residing at Mulebai chawl,	]	
Near Sunil Kirani Stores, Near Nalla,	]	
Ramgad Goshala Road,	]	
Mulund (W), Mumbai-80	]	Appellant
V/S		
The State Of Maharashtra (at the instance of Mulund	]	
Police Station, C.R. No.02/2011	]	Respondent

Adv. Payoshi Roy a/w Adv. Siddharth i/b Dr Yug Mohit Chaudhry for
Appellant.
Shri Arfan Sait, APP for State.

**CORAM : B.P. DHARMADHIKARI &
SANDEEP KASHINATH SHINDE, JJ.**

RESERVED ON : 11/06/2019
PRONOUNCED ON : 09/07/2019

JUDGMENT (Per Dharmadhikari, J.):

. Three appellants before this Court have been sentenced to suffer life imprisonment for the offence punishable under section 302 read with 34 of IPC and RI for six months for the offence punishable under section 324 read with 34 of IPC. They have been acquitted of the offence punishable under section 427 read with 34 of IPC. Accused no. 2 Irappa is also acquitted of the offence punishable under section 4(27) of the Indian Arms Act. This judgment dated 2/1/2014 delivered by the Additional Sessions Judge, City Civil and Sessions Court, Greater Mumbai in Sessions Case No. 265 of 2011 is questioned by the appellants in these appeals.

2. We have heard Advocate Payoshi for the appellants and learned APP Mr. Sait for the respondent State.

3. The case of the prosecution is on 31/12/2010 deceased Ashok Kamble and his group were abused by one Irappa Dhangar and his friends. Dinesh Sable who was abused then filed non cognizable case. One Sakharam Karande and his friends who were with deceased Ashok and Dinesh, latter on came to know that the accused no.2 Irappa was the attacker. Hence, on 1/11/2011 at about 2.00 pm. Sakharam, deceased Ashok and their friends met Irappa and enquired the reason for abusing and beating Dinesh Sable. Irappa then gave complaint against Ashok and

his friends.

4. At about 7.15 pm on the same day, Sakharam, Ashok and their friends were standing on the foot path near Ambika Chawl, Goshala Road, Mulund talking with each other. Accused no.1 Balya, accused no.2 Irappa and accused no. 3 Irfan and one juvenile came there armed with sword, stump, iron rod and started beating them. Balya delivered sword blows and injured Sakharam and Ashok. Accused Irappa gave sword blows on the head of Ashok. Accused no. 3 Irphan gave blows of iron rod on the back and legs of Ashok and blows of stump on the back of injured Sakharam. Fourth attacker (juvenile) gave blows of iron rod on the legs of the injured and deceased. Sakharam and Ashok both fell down.

5. One Vivek Dabhade and Yashvant Jethithor took the deceased Ashok and injured Sakharam to Mulund General Hospital which is of Municipal Corporation. Injured Sakharam lodged complaint against the accused at Mulund Police Station and crime under section 324, 307 read with 234 of IPC along section 4(27) of Indian Arms Act came to be registered.

6. Police arrested accused no.1 Balu Chavan on 2/1/2011, accused no. 2 Irappa and accused no. 3 Irphan on 6/1/2011. Accused no.1 Balya discovered cloths and iron plate on 4/1/2011. Accused no. 2. Irappa

handed over sword, green colour full shirt and black pant under the memorandum of panchanama on 8/1/2011. Accused Irphan handed over wooden stump, pant and white dotted shirt under memorandum panchanama on 10/1/2011.

7. Deceased Ashok died in Sion Hospital (Lokmanya Tilak General Hospital) on 17/1/2011. After completing investigation, chargesheet was filed in 27th Court of Metropolitan Magistrate, Mulund, Mumbai and matter was then made over to Sessions Court.

8. Sessions Court vide Exh. 12 framed charge against accused no.1 Balu Chavan, accused no. 2 Irappa @ Chermal Subhash Dhangar and accused no. 3 Irphan Shaikh under section 302 for causing death of Ashok, under Section 324 for causing hurt to PW 1 Sakharam by sword, stump and iron rod. Charge under section 427 of IPC was also framed but trial court has found the same not established. The charge for the offence under section 4 of the Arms Act punishable under section 27 thereof was also framed as accused no.2 Irappa was found in possession of the country made revolver loaded with live cartridge.

9. Learned counsel for the appellants accused persons has submitted that the accused persons have been roped in a false and fabricated case. The prosecution has not permitted the truth to come on

record and genesis of crime has been entirely suppressed. It is contended that the deceased Ashok and injured Sakharam were carried to Hospital at Mulund together and the version of how they suffered injuries was narrated there. Police constable on duty there has taken its note in the Emergency Police Register (EPR) vide Exh. 67 and 68. Ashok after his initial admission in Mulund Hospital obtained discharge against the medical advice (DAMA) and then got admitted in Sion Hospital. The history of attack finds mention in this EPR Exh. 67, 68 and 84. Even medical papers maintained by the Sion Hospital at Exh. 85 collectively show the same. At Exh. 39A the history of assault for medico legal case at Mulund Government Hospital narrated by PW 1 Sakharam appears. Prosecution did not examine the persons who carried the injured and deceased to hospital and gave history of assault first.

10. It is pointed out that EPR records at hospital are to be used for in corresponding entries to be made in police station. However here, there is variance between the entry at Mulund Hospital and in police station. The investigation agency tried to suppress this variance and therefore, did not permit the hospital EPR to come before the court. When accused tried to obtain that EPR, prosecution produced the entries in police station only and after about one year of the commencement of trial, hospital EPR were produced.

11. Learned counsel states that because of this position and efforts made to fabricate false case against the accused persons, the prosecution examined different set of persons as eye witnesses and did not examine the persons who gave the history of assault in Mulund Hospital first. Our attention has been drawn to evidence of so called eye witnesses, EPR entries and the evidence of IO PW 14 Jalinder Chavan and Police Inspector Pandurang Patil PW 15 to explain how the investigation and prosecution has been conducted in biased manner. It is submitted that the fact that PW-1 was intoxicated, deceased was also armed with stump has been overlooked and tampering in the entries in police station by adding alias name "Balya" after the name of accused no. 2 Irappa is also lost sight of.

12. Learned counsel for the appellants argues that not only there is difference in the spot of alleged occurrence but also about the use of weapons, time of incident, the mode and manner in which the injuries were sustained by the deceased and PW no. 1. The evidence therefore, is mutually destructive and the eye witnesses cannot be believed. As the persons who provided the history of attack for the purpose of entry in EPR are not examined, the prosecution has to fail.

13. To point out inconsistencies and improbabilities in the story of prosecution and material on record, support is being taken from the evidence of PW 8 Dr. Doshi who examined PW 1 Sakharam. It is argued

that no incised wound caused by sword is found on him and iron rod recovered was not shown to Doctor as a possible weapon. Wooden stump was shown to him and Doctor accepted that the injuries can be caused by the stump. This Doctor also deposed that he smelt alcohol on the cloths of Sakharam and he mentioned that Sakharam was smelling of alcohol. This witness also accepted that the injuries on Sakharam are possible by fall on the hard and blunt ground under the influence of alcohol.

14. To bring to notice the injuries sustained by deceased Ashok, evidence of DW 1 Dr. Ujagare is pressed into service. It is pointed out that this Doctor deposed that Ashok was brought to hospital by Yashawant Jethethor who stated that Ashok was assaulted with piece of tile and iron rod. Accordingly it is mentioned in the register. It is to be noted here that it is mentioned in the register vide Exh. 41 that the alleged assault was with sword, floor tile and iron rod. Ashok thereafter was examined and only contused lacerated wounds (CLWs) were found on his person. There was no incised wound. Exh. 41 is relied upon to show that Ashok then admitted in ICU took discharge against the medical advise at 11.45 pm. Learned counsel submits that it is this discharge which has played vital bearing on the death of Ashok which occurred almost 17 days thereafter.

15. For this proposition, deposition of Dr. Dere PW 13 is relied upon. Dr. Dere was then attached to Sion Hospital and he has spoken

about 14 external injuries found on the body. Contention is this Doctor did not distinguish between the assault injuries and surgical injuries. The injuries noticed by him did not match with 7 CLWs noted in Exh. 41 or Exh. 96. The injury no. 10 i.e. multiple healed suture wound present over right thigh does not find any mention in Exh. 41 or 96. This Doctor has deposed that the injuries were caused by hard and blunt object like iron rod, wooden stump or iron plate shown to him. While answering the question, he has stated that the injuries sufficient to cause death in ordinary course of nature are possible by forcible single blow of the broken piece of marble tile. According to this doctor, except injury nos. 1, 2, 9, 11, 12, 13 and 14, the other injuries are simple injuries. Learned counsel for the accused submits that the IO did not examine tile pieces on spot for any finger prints.

16. It is submitted that the discharge form of deceased Ashok from Mulund Hospital is signed by his brother Ganesh and deceased Ashok acted against the medical advice and took a risk.

17. It is urged that the IO did not seize the cloths of PW 1 Sakharam and deposition of PW 1 Sakharam is inconsistent. It shows that no person by name Irappa @ Balya ever existed. The eye witness PW 2 Siddhesh is relied upon to show that Ashok and Sakharam were taken together to Mulund hospital and Ashok had criminal past. It is submitted

that as per this witness, the attack was by 6 to 7 unknown persons and accordingly he has given history to doctor. PW 2 Siddesh told names of assailants to PW 3 Mhaske and PW 4 Dalvi. The prosecution has introduced them as witnesses. These eye witnesses point out different spot and their statement under section 161 Cr.P.C. is recorded on 4/1/2011 and 5/1/2011 respectively. It is submitted that PW 4 Dalvi did not inform about the attack to police though he had seen them in hospital.

18. Cross examination of PW 15 is relied upon to show that his explanation on delay in recording the statements of eye witnesses is unacceptable and he has contradicted himself. He claims at one place that he met PW 2, PW 4 on 1/1/11 itself and also recorded their statements on the same day. These statements are not produced by the prosecution.

19. Recoveries under section 27 of the Evidence Act are challenged on the ground that this inherently weak piece of evidence does not inspire confidence in the present matter. No blood is found on the most of the articles like cloths or weapons. Blood of Group "O" is found on item 9 which is iron stick and that stick was never sealed after its alleged recovery. PW 15 Investigating Officer has accepted this and he has also accepted overwriting in the arrest panchanama. Panch who witnessed these recoveries is a habitual panch. Learned counsel for the accused persons

states that the accused persons were arrested from their respective homes and their houses were searched at that time only. However, farce of recoveries under section 27 is recorded thereafter only for falsely impleading the accused persons.

20. PW 6 Kirit Joshi who was panch did not see any blood and he also does not support the proper sealing of the iron plate/stick.

21. Learned counsel submits that in this situation, prosecution story itself is not free from doubts. How deceased Ashok was armed with stump is not explained and hence eye witnesses need to be totally disbelieved. Deceased Ashok had developed some infection in the injuries because of the DAMA discharge. His elbow wound was found infected even during post mortem. Contention is alleged injuries have therefore not contributed to the death but it is supervening circumstance of infection and acting against the medical advice which contributed to it.

22. Judgment in *Balaka Singh and Others Vs. State of Punjab reported at 1975 SCC (Cri) 601* para 8 and *State of Punjab Vs. Praveen Kumar reported at (2005) 9 SCC Page 769* Para 9 and 10 are relied upon for this purpose.

23. Per Contra, learned APP submits that EPR maintained at hospital is not substantive material against anybody and it is only for the purpose of securing earliest information. When there are eye witnesses and their statements are recorded, EPR does not remain relevant. He also submits that injuries suffered by PW-1 show that accused persons had only intention to kill deceased Ashok. Our attention is invited to the dispute between two groups on 31/12/2010, dispute earlier at 3.00 p.m. on 1/1/2011 and then final attack in the evening at about 7.30 p.m. on 1/11/2011. Accused No.1-Balu was arrested on next day while Irfan and juvenile was arrested on 6/1/2011. They were arrested with revolver and chopper.

24. Our attention is drawn to cross examination of eye witnesses. Learned APP submits that the version in EPR on which appellants rely was not put to any eye witnesses. Line of their cross examination shows that they accepted their presence on spot. Siddhesh who gave EPR was examined by the prosecution and Yashwant could have been examined in defence by accused persons. Reliance upon EPR by accused persons is therefore unwarranted.

25. Our attention is invited to medical papers at Exhibit 85(colly) to urge that deceased Ashok was killed due to injuries suffered by him in attack. His act of taking discharge against medical advice has got no

connection with death. He was admitted at Mulund Government Hospital at 8.05 p.m. and discharged at 11.45 p.m. He was admitted thereafter in hospital at Sion on 2/1/2011 at 1.10 a.m. As such he was continuously under medical attention till his death in Sion hospital on 17/1/2011

26. Medical papers reveal 11 injuries noticed by Sion hospital and Citi scan was advised. Citi Scan revealed head injury. He submits that at Medical Government Hospital he was treated only for urgent/immediate need and it was a sort of first aid. The fact that death is caused due to attack is brought on record even in post mortem. He relies upon evidence of PW-13-Dr. Rajan to show that there were 14 external injuries and there was no supervening circumstance. According to him evidence of PW-13 who attended Ashok at Sion hospital reveals that medical evidence on record is inconsistent with ocular evidence.

27. Our attention is invited to evidence of Investigating Officer PW-15 to urge that that he has pointed out that in investigation he could not find any role played by Javed. As such mention of name of Javed in EPR is of no consequence. Eye witness Siddhesh has been examined as PW-2 and no question is put to him on EPR. He has not been contradicted with contents of EPR.

28. Evidence of PW-1 Sakharam, PW-4 Dalvi is relied upon to urge

that it brings on record the motive behind the attack.

29. Circumstances of recoveries of clothes and weapons along with CA report is also relied upon by him to support the finding of trial Court. PW-6-Mr.Kirit Joshi has proved discovery of clothes of accused No.1 and iron plate (like sword) used as weapon. PW-7 has supported recovery of clothes and sword from accused No.2 Irappa, as also wooden stump and clothes of accused No.3. Recovery Panchanama of recovery from Irfan is relied upon to show that sword discovered at his instance is sharp edged on one side and it is blunt on other side. Report of CA exhibit 78 is relied upon to submit that human blood and blood group "O" is found on those articles.

30. Learned APP submits that evidence before Trial Court therefore through eye witness, medical evidence and recoveries bring on record involvement of accused persons only in the crime. Evidence of PW-1 injured witness cannot be discarded and hence judgment and order of trial Court must be upheld.

31. He has relied upon the judgment in the case of *Nana Keshav Lagad vs. State of Maharashtra, 2013 Cri. L. J. 4011* to contend that PW-6 cannot be ignored only because he is alleged to be stock witness. Judgment reported in the case of *Pravin Dhondiram Chorge vs. State of Maharashtra, 2017 ALL MR (Cri) 1196* is relied upon to show that paper

sealing of recovered weapon /property is also legal and needs to be accepted. To show that the discharge against medical advice has got no importance in the matter, learned APP draws support from judgment reported in the case of *State of Andhra Pradesh vs. Rayavarapu Punnayya*, AIR 1977 Supreme Court 45. He strongly relies upon observations in paragraph Nos.2, 35, 36 and 39 therein.

32. We find it convenient to begin consideration from the stage at which first version of the incident has come on record.

33. First information about the offence is recorded in EPR file/2011 and that entry appears to have been taken at Mulund hospital at about 20.05 i.e. 8.05 p.m. in the evening. It mentions name of deceased Ashok, then injured who was brought to hospital on 1/1/2011 and admitted by his friend Yashwant & Siddhesh. The incident is at 7.00 p.m. on footpath in front of Ambika chawl. It is mentioned that Irappa, Irfan and Javed together have given blows of sword on head, forehead and both legs of Ashok.

34. The next entry in EPR on same date is recorded vide EPR 6/11 at about 22.00 hours. i.e. 10.00 p.m. in the night. There name of injured is recorded as Sakharam. Said Sakharam is PW-1. His place of residence is mentioned as Trimurti chawl, Ramgadnagar, Goshala Road, Mulund.

Sakharam was brought to hospital by his maternal niece Vivek Dabhade, the incident is reported to have taken place at 19.00 hours in front of his residence. Irappa, Irfan and Javed attacked him by wooden stump on both legs, back and hands.

35. This EPR Exhibit 84 at Sion Hospital recorded at about 1.05 hours is in relation to Ashok who expired later on. After discharge from Mulund hospital Ashok was admitted in Sion hospital. In this EPR names of assailants are recorded as Irappa, Wasim, Irfan and Javed. Attack as reported is by sharp edged weapon. First information report about the incident is produced as exhibit 22(A). This report is lodged by police sub-inspector of Mulund Police Station, Shri Chavan who is examined as PW-14 who recorded offence under section 324, 307, 34 and 427 of IPC as also under section 4(27) of Arms Act. It refers to receipt of information at about 20.00 hours and General Diary Number-46 and entry time 21.25 hours. It records names of accused persons as Irappa, Irfan, Balya and name of juvenile. This FIR is recorded after statement of Sakharam at Exhibit 22 in Mulund General hospital. In this statement PW-1 Sakharam has mentioned Irappa, Balya, Irfan and juvenile as assailant. He has also mentioned swords, stumps, iron rod as weapons used. He has mentioned that Irappa and Balya were holding sword, Irfan had stump while juvenile had iron rod. Thus, this FIR is recorded after EPR at Exhibit 67 and before EPR at Exhibit 68.

36. Treatment papers of deceased Ashok marked as Exhibit 85 colly. also carries some reference to history of attack. This history is recorded at Sion hospital where Ashok was admitted later on. It is recorded that 6-7 unknown people attacked him at 7.30 p.m. It also mentions that he was unconscious due to trauma. In treatment papers, at 2.00 a.m. on 2/1/2011 again fact of attack by unknown persons at 7.30 p.m. on 1/1/2011 appears. This information is provided by sister of deceased Ashok by name Shilpa Kamble.

37. PW-8 Dr.Manish Doshi with Municipal General Hospital, Mulund has deposed about disclosure by Sakharam and he has taken relevant entries in casualty register. The copy of said entry is at Exhibit 39-A. It mentions attack by 4 persons half an hour before by stump.

38. Injured witness PW-1 Sakharam is the person who has given FIR and EPR at Exhibit 67 is in relation to deceased Ashok. The EPR given by PW-1 Sakharam is recorded at about 22 hours and FIR is prior to it. In Exhibit 67, it is recorded that the patient was brought by Yashwant and Sidhesh. This Yashwant is not examined by prosecution. Sidhesh is examined as PW-2 as an eye witness. He mentions that at about 19.30 hours on 1/11/2011 he was going by Goshala road and he saw Irappa Dhangar, Balya, Irfan and juvenile holding swords and stumps. They were beating his friend Ashok(deceased) and Sakharam(PW-1) Irappa Dhangar

was holding sword. Balya was holding iron plate like sword. He identified Irappa and Balya. He further stated that Irappa was holding iron rod. He also identified Irappa in Court. He deposed that all these persons were assaulting Ashok with their weapons and they also beat PW-1 Sakharam on his chest and leg. He states that due to this adjacent shops were closed and he also fled away. After accused persons left the spot, he came back. He himself, Yashwant, Vivek then lifted Ashok and Sakharam and brought them to Municipal Corporation Hospital at Mulund.

39. PW-2- Sidharth has carried deceased Ashok(then injured) and injured PW-1-Sakharam to Municipal Corporation Hospital at Mulund together and admitted them for treatment. He claims that he was present in hospital from 7.45 p.m. to 9.30 p.m. and police made inquiries with him and he informed them about the incident. He also gave name of that officer as Mr. Jalinder Chavan who has been examined as PW-14. He has deposed that PW-3 Rakesh Mhaske and PW-4 Prakash Dalvi had also come to hospital when he was there and inquired from him about the health of Ashok and Sakharam. They also asked about the incident and he told them names of assailants. He deposed that he carried Ashok and Sakharam in same Autorickshaw at same time. Vivek Dabhade and Yashwant were with him in the said autorickshaw. It needs to be noted that names of Sidhesh and Yashwant appear in Exhibit 67 while their names are not mentioned in Exhibit 68. In Exhibit 68 name of Vivek Dabhade only appears. This witness

has denied that he and his friends informed Doctors that unknown persons had beaten Ashok and Sakharam. He accepted that police constable on duty at hospital had come and made inquiries with them and they had given information about the incident to police constable. His evidence also shows that deceased Ashok had criminal antecedents.

40. PW-3-Rakesh Mhaske claims to be eye witness. He speaks about the incident dated 31/12/2010 and then about the incident in which offence has occurred on 1/1/2011 at 7.30 a.m. He states that on 31/12/2010 there was some quarrel and hence at 4.00 p.m. on 1/1/2011 they had gone to meet deceased Ashok. At that time there was hot exchange between Ashok and Irappa. Ashok gave fist blows to Irappa. Irappa and his friends ran away. Thereafter they came back to Ramgad, Goshala Road. Earlier he claims that at 4.00 p.m. they had gone to meet Ashok at Goshala Road, Ramgad.

41. His deposition further shows that at 7.30 p.m. when they were having tea near KGN shop, Goshala Road, Ramgad, Irappa, Balu, Irfan and Juvenile came there and they started beating Ashok. It is important to note that he got details from PW-2-Sidhesh and police had recorded his statement for the first time on 4/1/2011.

42. PW-4 Prashant Dalvi is the next eye witness examined by

prosecution. He pointed out the incident dated 31/12/2010 and claims that therefore, on 1/1/2011 at about 3.40 p.m. he himself, one Chetan, PW-1-Sakharam, Yashwant and Ashok Kamble had gone to inquire from Irappa why he had beaten Dinesh Sable. Irappa and Wasim were present there and there was hot exchange of words, scuffle occurred between Irappa and Ashok. Ashok gave fist blow to Irappa. Irappa and Wasim then ran away.

43. At about 7.30 p.m. on 1/1/2011 they were having tea when Irappa, Balya, Irfan and Juvenile arrived there. They were armed with weapons and they started assaulting Ashok. He then described weapons as also attack.

44. It is to be remembered that this person also collected details from PW-2 Sidhesh and his statement under section 161 of Cr.P.C. is recorded by police on 5/1/2011.

45. Thus, neither Yashwant nor Vivek who were accompanying PW-1 Siddhesh are examined by prosecution. Weapons mentioned by Yashwant and Siddhesh in Exhibit 67 and by Vivek in Exhibit 68 are already noted by us supra.

46. It is in this backdrop that we find it appropriate to first

consider evidence of Investigating Officer Jalinder Chavan. He is PW-14 and he states that spot was known to Yashwant and he has shown the same. He stated that on spot he found wooden plank and two pieces of broken wooden stump. Same were seized by him. As Yashwant was eye witness he did not record his statement though Yashwant had given details about the incident. His cross examination further shows that when after first name, when the name is mentioned in bracket, it is a alias name i.e second name of very same person. He accepted that when he went to the hospital constable who had written EPR was present there. He also accepted that after recording EPR, information is to be supplied to concerned police station and then that police station has to record it in EPR register. At this juncture his cross examination was required to be adjourned to 28/3/2013 to enable him to produce EPR register. Court directed prosecution to bring original entry of EPR No.5/11 dated 1/11/2010.

47. On 6/4/2013, Entry No.5/11 and 6/11 were produced and marked as Exhibits. Original Register was then returned to Investigating Officer. He accepted that information about EPR No.5/11 was given by Yashwant and Siddhesh. He accepted that entry mentioned names of assailants as Hira Aappa @ Balya, Javed and Irfan. It also mentions sword as the weapon. This entry was from register kept in police station. He denied that deceased was first taken to private hospital viz., Gokul hospital

as recorded in Exhibit 65 and thereafter he was brought to Mulund General Hospital. He accepted that register maintained in hospital may also be in the police station. His cross was again deferred for producing that register. On 9/4/2013 EPR Register at Mulund General hospital was also produced. Relevant entry therein was given Exhibit 67. This witness accepted that the spot mentioned therein was footpath near Ambika chawl and Irappa, Irfan and Javed were recorded as assailants.

48. He accepted that information in Entry 6/11 was given by Vivek Dabhade. Said entry in hospital register was marked as Exhibit 68. He accepted that as per that entry PW-1-Sakharam was brought to hospital at 22 hours. He accepted that as per hospital record in Exhibit 68 Sakharam was assaulted by iron rod at 19.00 hours by Irappa, Irfan and Javed in front of Sakharam's residence at Trimurti chawl, Ramgad Nagar, Goshala Road. When this entry is perused, it appears that words "wooden stump" are corrected to read "iron rod".

49. Thus, Yashwant, Vivek and Siddhesh did not mention any juvenile as a person attacking and also disclosed Javed as one of the assailants. In EPR entry in the police station, after Hira Aappa name "Balya" has been added in bracket thereby indicating that Hira Aappa and Balya were names of the same person. This fact has also been admitted by him in his cross examination in paragraph 15. He also accepted overwriting about

time of incident. He denied that he has prepared a false case. In paragraph 15, He accepted that EPR entry in police station is taken on the basis of entry taken by police constable in EPR register at hospital.

50. PW-15-Pandurang Patil, police inspector at Bhandup police station was examined as PW-15. His deposition shows that EPR entry in Sion hospital was given by Shilpa Kamble sister of deceased Ashok. She then disclosed Irappa, Wasim, Irfan and Javed as assailants. Police did not record her statement. He also accepted that in Exhibit 85 it is mentioned that 6 to 7 unknown persons assaulted at 7.30 p.m. on 1/1/2011.

51. Paragraph 15 of his cross examination shows that he met PW-2 Siddhesh, PW-3-Rakesh Mhaske and PW-4-Prakash Dalvi and inquired from them, they gave necessary details and he recorded the same as per their say. Thus, this version of eye witnesses recorded earliest in point of time has not been produced on record. Cross examination of this witness in paragraph No.58 shows that statement of eye witness Prashant Dalvi was recorded on 5/1/2009 and he could not explain why there was delay. He accepted that he learnt about the status of Prashant Dalvi as eye witness on 5/1/2011. This is also true in respect of the statement of PW-3 -Rakesh Mhaske. He also accepted that statement of PW-2-Siddhesh was recorded on next date i.e. 2/1/2011. He deposed that he learnt about Siddhesh being eye witness on 2/1/2011 only. This material brought on record by

prosecution therefore casts serious doubt on entire investigation process. This witness has deposed that he investigated into the possibility of Javed being the assailant but could not get any evidence against him. This fact becomes important as Javed is mentioned as assailant by eye witness as mentioned supra. In fact sister Shilpa also disclosed Wasim as one of the assailants.

52. We have already commented briefly on evidence of injured witness PW-1 supra. We have also taken note that when Doctor examined Sakharam he was smelling of alcohol and he disclosed that assault on him was by stump and Doctor specifically deposed that this witness had given stump as the only weapon of attack on him. This history of attack by stump find mention in Exhibit 39A by PW-8. Overwriting in EPR at hospital about wooden stump or iron rod also assumes importance here.

53. The evidence of DW-1-Dr.Ujwala Ujgare shows that she examined Ashok at about 8.00 p.m. He was brought by his friend Yashwant. Yashwant then told Doctor that Ashok was assaulted by piece of tile, sword and iron rod. She accordingly mentioned history in casualty register at Exhibit 41.

54. PW-13-Dr. Rajesh Dere who conducted post mortem of Ashok states that he found 14 external injuries. It is to be noted that injuries at Sr.

No.10 on right thigh does not find mention in Exhibit 41A i.e. register mentioned by DW-1. This witness has mentioned 14 external injuries as under:--

- 1.Healed sutured wound present over forehead on right side, above eyebrow, 4 c.m. in length.
- 2.Healed sutured wound present over left eyebrow, 3 c.m. in length.
- 3.Healed sutured wound present over chest on right side 3 c.m. below and lateral to right nipple 2 c.m. in length.
- 4.Healed sutured wound present 2 c.m. below injury no.3.
- 5.Contusion present on right lateral aspect of abdomen 3 c.m. x 2 c.m. greenish in color.
- 6.Healed sutured wound present over lateral aspect of chest 2 c.m. in length.
7. Healed sutured wound present over left ankle joint 3 c.m. in length, medial aspect.
8. Abrasion with dark colour with dark brown scab over occipital area. 3 c.m. x 3 c.m.
9. Infected lacerated wound over left elbow posterly 2 c.m. x 1 c.m.
10. Multiple healed suture wounds present over right thigh 1 c.m. x 1.5 c.m. in lengths.
11. Healed sutured wound over right frontal area 2 c.m. in length.
12. Healed sutured wound over right parietal area 4 c.m. in length.
13. Healed sutured wound over left parietal area 5 c.m. in length.
14. Two healed sutured wound over left temporal area 5 c.m. and 6 c.m. area.

55. This witness has accepted that injuries 1,2,3,4,6,7 9 to 14 in column No.17 are also possible by hard and blunt object, injury No.5 is also possible by similar object. He deposed that injuries mentioned in column No.19 are are also possible by hard and blunt object. These injuries are possible by iron rod (article 2), wooden stump (article 3) and iron plate (article 4). He has also deposed that all these injuries are possible by blunt portion of sword. Learned APP has invited our attention to the fact that sword recovered under section 27 from Irappa is having sharp edge only on

one side. The sword (Article 1) has been also shown to Dr. Dere. This Doctor has deposed that injuries at Sr. No. 1, 2, 11 to 14 in column 17 or corresponding internal injuries mentioned in column No.17 were sufficient in ordinary course of nature to cause death.

56. Cross examination of this Doctor shows that injury No.11 to 14 are possible by blow of broken piece of marble tile. He accepted that due to proper medical treatment accused survived for 15 days and if such patient does not follow medical advice, his health may deteriorate leading to death.

57. Ashok was admitted at Mulund hospital at 8.05 p.m. and was discharged at 11.45 p.m. He then got admitted at Sion hospital at about 1.10 a.m. on 2/1/2011. Doctors initially found 11 injuries and citiscan was advised. Mulund Corporation hospital at Mulund mentions only 6 injuries. 11 injuries are recorded in document at Sion hospital. This variance in number of injuries has not been explained properly. Dr. Dere who conducted post mortem has accepted that there was no distinction made by him in assault injuries and surgical injuries.

58. Recoveries from accused persons also becomes relevant. PW-6-Kirit Joshi has been examined to prove recovery from accused Balu Chavan. It is claimed that iron plate, pant and shirt were discovered at his instance.

This witness has accepted that he acted as panch in other cases also and could not disclose total number of such cases. This witness PW-6 only pointed out that after seizure, labels were pasted on seized material. He does not point out that the clothes were put in same bag and that bag was sealed. It is mentioned that police wrapped pant, shirt and iron plate in separate papers and on those papers, labels with signatures of witnesses were pasted.

59. Investigating Officer PW-15 who carried out this exercise has deposed in paragraph No.69 that panchas used by him were fresh. He accepted that there was no reference to the sealing of articles under recovery panchanama. He also accepted that there is overwriting in column of date, time and section under which arrest was made in arrest form of accused No.3.

60. In this backdrop when report of Chemical Analyzer is seen, no blood is seen on jeans pant of accused No.2. Group of blood found on full shirt of accused No.2 could not be decided. Similarly group of blood found on full shirt of accused No.3 also could not be decided. No blood is seen on jeans pant of accused No.3. No blood is seen on sword, wooden stump and iron rod. This iron rod is recovered allegedly from juvenile.

61. Learned APP has placed reliance upon the judgment reported

in the case of *Nana Keshav Lagad v. State of Maharashtra, 2013 Cri. L. J. 4011*. There Hon'ble Apex Court has looked into the discrepancies in evidence of complainant and eye witnesses. Hon'ble Apex Court held that in facts appearing before it, evidence of eye witnesses was fully in consonance with complainant and it was supported by other material. Recovery is also found to be established. Accused there, could not explain how his clothes got blood stains. In the light of these findings the judgment of High Court maintaining the conviction was upheld. Hon'ble Apex Court found that objection on the ground that witness to recovery was a stock witness and blood group was not determined, did not hold any water.

62. In facts before us, the eye witness who brought injured Sakharam and Ashok to hospital and explained the assault has not been examined by prosecution. Statements recorded by PW-15 have not been produced. Then persons persons like Javed and Wasim have been mentioned as assailants. PW-15 mentioned that he could not find any role played by Javed. Addition of name Balya as other name of accused Hira Appa also creates doubt. Whether Hira Appa or Irrappa and Irrappa with alias name as Balya is name of any of the accused or of some other person is the moot question. Whether juvenile was assailant or not is again doubtful. Recovery through stock-panch becomes relevant in this backdrop. Overwriting in receipt form or then in EPR entries also becomes relevant. This has got bearing also on identity of weapon. We therefore find that

judgment mentioned supra cannot be used as precedent in present facts.

63. In *State of Andhra Pradesh vs. Rayavarapu Punnayya and Another*, AIR 1977 Supreme Court 45 Hon'ble Apex Court finds that the injuries caused to deceased were mostly on lower limbs. In this backdrop question was whether death was due to these injuries. In paragraph 39 Hon'ble Apex Court has observed that no secondary cause such as gangrene or tetanus could be blamed. It found that assailants had smashed arms and legs & there were total 19 injuries including fractures of most of bones of legs and arms. Hon'ble Apex Court therefore found that injuries were cumulatively sufficient to cause death in ordinary course of nature.

64. In facts before us, we find that after obtaining discharge against medical advice from Mulund hospital at about 11.45 p.m. Ashok got himself admitted in hospital at Sion after one and half hour i.e. 1.10 a.m. on 2/1/2011. No effort has been made to explain variance in injuries noted in Exhibit 41A at Mulund hospital & in postmortem. We find that no direct question about the same were put to PW-13 who performed postmortem. There is some infection to elbow wound, but again its relevance and impact on health of deceased has not been brought on record. PW-13 who has conducted postmortem has expressly stated that death was caused due to injuries found on his person. We therefore find no substance in contention of accused that death was due to taking of

discharge against medical advice. Discharge was obviously taken to extend more effective treatment to then injured victim Ashok who died in Sion Hospital after about 17 days.

65. Judgment of Division Bench of this Court reported at ***Pravin Dhondiram Chorge and Ors. vs. The State of Maharashtra, 2017 ALL MR(Cri) 1196*** in paragraph No.33 shows that there was no cross examination of official witnesses seizing those weapons to demonstrate that when those weapons were sent for chemical analysis, paper seals were in broken condition. In facts before us, the clothes and weapons were wrapped separately and paper labels with signature of panch witnesses were attached to it.

66. Learned counsel for the appellant relies upon the judgment reported in ***Balaka Singh vs. State of Punjab , 1975 Supreme Court Cases (Cri) 601***. This judgment is on appreciation of evidence. It shows that when there are 8 witnesses who had seen the incident and they, with complete unanimity implicated four accused persons who were acquitted by High Court; as the case against acquitted accused persons and appellants before the Hon'ble Apex Court was inextricably mixed up, it was not possible to sever one from another. Acquittal of 4 accused persons was maintained by Hon'ble Apex Court as their names were not found in proved

statement of Investigating Officer. Hon'ble Apex Court also allowed the appeal of the appellants before it.

67. *State of Punjab vs. Praveen Kumar, (2005) 9 Supreme Court Cases 769* is the other judgment of Hon'ble Apex Court where identical view of the matter has been taken. Hon'ble Apex Court found that dying declarations contained different versions of same incident. Doubt about truthfulness of different dying declarations arose. The fact that name of accused person appeared in all the dying declarations is not sufficient to convict accused because of inconsistent narrations therein. The judgment of High Court is therefore maintained by Hon'ble Apex Court.

68. Here names of accused persons like Wasim and Javed as also inclusion of juvenile as accused create serious doubt about the version of prosecution. PW-1-Sakharam who is injured eye witness has stated that two pieces of stump found on spot was of stump that was with deceased Ashok, Introduction of PW-3 and PW-4 as eye witnesses is also not free from doubt. The prosecution has not examined Yashwant, Vivek and Shilpa as witnesses at all. If any person known by both names ie as Irappa & Balya exists, mention of Irappa & Balya as accused may be wrong.

69. As the full facts, correct genesis of the crime have not been brought on record & there are material lapses in the investigation, We are

inclined to give the appellants benefit of doubt & proceed to pass the following orders--

- a) The conviction of the appellants & punishments imposed upon them on 02/01/2014 by the Additional Sessions Judge, City Civil & Sessions Court, Greater Mumbai in Sessions Case No. 265 of 2011 is set aside;
- b) Judgment & order dated 02/01/2014 in Sessions Case 265 of 2011 is quashed & set aside;
- c) They be set free immediately if their custody is not required by the prosecution in any other matter;
- d) Muddemal property be dealt with as directed by the Trial Court after the appeal period is over;
- e) Appeals are accordingly allowed & disposed of.

(SANDEEP K. SHINDE, J.)

(B.P. DHARMADHIKARI, J.)