

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1380 OF 2003

1. Ramchandra Gopal Konde
56 yrs.
 2. Baburao Ramchandra Konde
23 yrs.
 3. Haridas Mahadeo Konde
23 yrs.
- All R/o. Loni Kalbhor, Tal. Haveli
Dist: Pune.

... Appellants
(Orig. Accused Nos.1,2 and 4)

Versus

1. The State of Maharashtra
2. Smt. Shaila Sunil Konde
Age: Adult, Occu: Household.
3. Balu Narayan Konde
Age- 26 yrs. Agriculturist.
4. Narayan Gopala Konde
Age-70 yrs. Agriculturist.

Resp. Nos. 2 to 4 are
R/o. Loni Kalbhor, Tal. Haveli
Dist: Pune.

... Respondents
(Respondent Nos. 2 to 4
– Compensatory parties).

**WITH
CRIMINAL APPEAL NO. 1498 OF 2003**

The State of Maharashtra

... Appellant
(Orig. Complainant)

Versus

1. Ramchandra Gopal Konde
Age : about 56 yrs.
 2. Baburao Ramchandra Konde
Age: about 23 yrs.
 3. Mahadeo Gopal Konde
Since deceased-abated.
 4. Haridas Mahadeo Konde
Age about: 23 yrs.
 5. Vikas Ramchandra Konde
Age about : 18 yrs.
 6. Smt. Bebibai Ramchandra Konde
Age about : 18 yrs.
 7. Smt. Kalawatibai Mahadeo Konde
Age about 51 yrs.
- All R/at – Loni Kalbhor,
Tal. Haveli, Dist: Pune.

... Respondents.
(Orig. Accused Nos. 1 to 7)

**WITH
CRIMINAL APPEAL NO. 1499 OF 2003**

The State of Maharashtra

... Appellant
(Orig. Complainant)

Versus

1. Ramchandra Gopal Konde

Age : about 56 yrs.

2. Baburao Ramchandra Konde

Age: about 23 yrs.

3. Haridas Mahadeo Konde

Age about: 23 yrs.

All R/at – Loni Kalbhor,

Tal. Haveli, Dist: Pune.

... Respondents.

(Orig. Accused Nos.

1,2 and 4).

....

Mr. Rahul S. Kate, for the Appellants in Appeal No. 1380 of 2003 and Respondent Nos. 1, 2 and 4 in Appeal No. 1498 of 2003 and Respondent Nos. 1 to 3 in Appeal No. 1499 of 2003.

Mr. Shekhar Ingawale, appointed Advocate for Original Complainant/ Compensation Party.

Mr. V.B. Konde-Deshmukh, APP for the Respondent/State in Appeal No. 1380 of 2003 and Appellant in Appeal Nos. 1498 of 2003 and 1499 of 2003.

....

CORAM : S.S. SHINDE

V.G. BISHT, JJ.

Reserved on : 03/02/2020

Pronounced on : 24/02/2020

JUDGMENT (PER : V. G. BISHT, J.)

These three appeals arise out of a Judgment and Order dated 29th August, 2003 passed by the learned Additional Sessions

Judge, Pune in Sessions Case No. 19 of 2000.

2 Appeal No. 1380 of 2003 is filed by original accused nos. 1, 2 and 4 against conviction and sentence awarded by learned Additional Sessions Judge for the offence punishable under Section 324 r/w 34 of Indian Penal Code. However, Appeal Nos. 1498 of 2003 and 1499 of 2003 are filed by the State against acquittal and for enhancement of sentence, respectively.

3 By the said judgment and order, the learned Additional Sessions Judge convicted the accused Baburao Ramchandra Konde and Haridas Mahadeo Konde for the offence punishable under Section 324 r/w 34 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for three years each and to pay fine of Rs.10,000/- each, in default, to undergo rigorous imprisonment for six months.

4 The learned Additional Sessions Judge also convicted the accused Ramchandra Gopal Konde and Baburao Ramchandra Konde for the offence punishable under Section 324 r/w 34 of the Indian Penal

Code and sentenced them to suffer rigorous imprisonment for a period of one year and further directed them to pay fine of Rs.5000/- each, in default, further undergo rigorous imprisonment for three months.

5 The learned Additional Sessions Judge also convicted the accused Haridas Mahadeo Konde for the offence under Section 324 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for one year. However, the learned Additional Sessions Judge acquitted the said accused of the offences punishable under Sections 147, 148, 149, 302 and 452 of the Indian Penal Code.

6 The case of the prosecution is as follows:-

Accused, namely, Mahadeo Gopala Konde (A-3), Ramchandra Gopala Konde (A-1) and Dattu Gopala Konde are the uncle of informant and also neighbours. Two months prior to the incident there were some differences amongst them in respect of partition of agriculture land, however, they sorted it out and all started cultivating their respective lands.

7 As per prosecution theory, on 07/10/1999 at about 10-00

am the informant, his brother Sunil (since deceased), mother and sister-in-law were plucking tomatoes in the field. At about 1-00 pm, informant's cousin, namely, accused Haridas Mahadeo Konde (A-4) came and enquired deceased as to why he had confronted his servant in respect of tying of a bull in the field and when deceased asked what he had told, accused no.4 threatened that whether he should see him and then caught hold of deceased from the back side and bit him on the back. The deceased somehow got himself free from the clutches of A-4 and ran towards the house. Informant, his mother and sister-in-law also followed deceased, who had reached the house.

8 The prosecution then alleged that A-3, A-1, accused Baburao Ramchandra Konde (A-2) and Vikas Ramchandra Konde (A-5) brought deceased from the house by dragging and started beating by means of sticks and iron rods on his hands, legs and back. The prosecution further alleged that when the informant, his mother and sister-in-law tried to save deceased, A-4, A-2 and A-1 assaulted them by means of sticks and iron rods on his forearm, right leg and on the back. Informant's mother, namely, Lilabai was assaulted on the left thigh by A-

3. Sister-in-law, namely, Shaila was caught hold of and pushed by accused Bebibai Ramchandra Konde (A-6) and Kalawatibai Mahadeo Konde (A-7). The prosecution further alleged that at that time informant's father Narayan came to separate the quarrel but A-4 also assaulted him by means of sticks on his right wrist. When the said scuffle was going on, it is further alleged, when the informant's uncle, namely, Laxman Gopala Konde came to separate quarrel, he was also assaulted by means of a stone on his back by A-5 as a result of which informant's uncle fell down. Later on, accused went away.

9 Informant and all the injured then went to the police station, who were then referred to the hospital by giving a *yadi*. It appears that in the hospital the informant's statement came to be recorded on the basis of which Crime No. 269 of 1999 for the offences punishable under sections 147, 148, 149, 452, 302, 326, 324, 323, 337, 504, 506 of the Indian Penal Code, came to be registered and after necessary investigation the accused were chargesheeted.

10 Accused abjured their guilt and pleaded false implication because of property dispute.

11 Mr. Rahul S. Kate, learned counsel for the appellants, submitted that the accused wrongly came to be convicted only on the basis of interested testimony of the witnesses. According to learned counsel, it is an admitted position on record that the accused also had sustained injuries and this material fact is not only suppressed by the prosecution but there is no explanation at all as to how and under what circumstances the accused suffered those injuries. In the circumstances the true genesis of the incident was concealed by the prosecution and in view of this, it can not be said that the prosecution has come before the Court with clean hands. Apart from this major infirmity, there are material discrepancies appearing in the evidence of witnesses which also put a question mark on the theory of prosecution. The learned Trial Court failed to appreciate the evidence in this background and wrongly convicted the accused, argued learned counsel.

12 Mr V.B. Konde-Deshmukh, learned APP, on the other hand, submitted that there being cogent and convincing evidence the learned Trial Court wrongly acquitted the accused. Since the acquittal is bad in law, not only the judgment of acquittal is liable to be set aside but the

accused deserve to be convicted of all the offences with which they were charged, argued learned APP.

13 We have carefully perused the evidence on record with the assistance of learned counsel.

14 The prosecution in order to bring home the charge, examined in all 10 witnesses.

15 In order to prove that the death of Sunil Narayan Konde (deceased) was homicidal, the prosecution has relied upon the evidence of PW 7- Dr. Nitinkumar Sudhakar Rao Londhe (Exh. 83) and PW 9-Dr. Milind Sharad Wable (Exh. 90), who conducted postmortem on the dead body of the deceased on 18/10/1999.

16 PW 7- Medical Officer stated in his evidence that at the relevant time he was working as neuro surgeon in KEM Hospital, Pune. On 07/10/1999, the deceased was admitted in the said hospital. He examined him at about 11-00 a.m. on 08/10/1999 and noticed following injuries on his person.

- 1) Contused lacerated wound on forehead frontal

region measuring 4cm x 3cms.

- 2) Contused lacerated wound on right parietal region measuring 6cm x 1cm.
- 3) Contused lacerated wound on lateral aspect of right arm measuring 2 x 1 cm.
- 4) Contused lacerated wound on lateral aspect of left arm measuring 2 x 1 cm.
- 5) Abrasion of skin on left lower limb medical aspect 4cm x 1cm.
- 6) Abrasion on right upper limb, medical aspect 4cm x 1cm.
- 7) Fracture of right metacarpal bone.

17 His evidence further shows that he further noted corresponding internal injuries:-

Internal Injuries:

- 1) There was left temporal in sub-dural haematoma.
- 2) No evidence of raise intra cranial pressure.

18 It is his evidence that the external injuries abrasions were simple in nature while remaining external injuries were grievous in nature. According to him, the external injuries and the internal injuries were sufficient in the ordinary course of nature to cause death. He

further stated that the injuries could have been caused with the weapons viz. stick and iron bars, if forcibly used.

19 The examination-in-chief of this witness clearly goes to show that the injuries viz. external and internal found on the person of the deceased were sufficient in ordinary course of nature to cause death. However, this witness took somersault in the cross-examination and simply admitted that the aforesaid external and internal injuries could not have resulted in causing the death of a person. Since the witness has contradicted himself, his opinion given as to the cause of death is meaningless and cannot be read and accepted with a sense of satisfaction. Let us see what PW-9 Autopsy Surgeon has to offer on his part.

20 The evidence of PW 9 shows that on 18/10/1999 he conducted postmortem on the dead body of the deceased and found following external injuries.

External Injuries :

- 1) stitched wound right parietal region 2" lateral to midline and 2" behind coronal suture, 3" long

stitches present.

2) stitched wound 1/2" above, left eyebrow, starting from medial angle of eyebrow running upwards and then horizontally to left, size 3" long, 12 stitches present.

3) Circular wound right elbow on lateral aspect 1" diameter bone deep, evidence of infection present.

4) Multiple abrasions on right forearm size: vary from 1/4th inch diameter to 2x1/2 inch scap present.

5) Multiple abrasion left upper limb all over size vary from half x 1/4 to 1 3/3 x 3/4th, scap present.

6) Multiple abrasions left lower limb from knee to ankle joint size vary from 1/4th diameter to 3 x 3/4th inch, scap present.

7) Multiple abrasions right lower limb size vary from 3/4" x 1/2" to 2x1 inch, scap present.

8) Infected bed sores left scapulpar region 2" diameter.

9) Laceration contusion left side of back 3" below scapula 3 x 1" brown colour.

10) Contused abrasion 2" below injury No.9 2 1/2 inches brown colour, margins abraded scap present.

21 PW 9, on internal examination, also noticed following injuries.

Internal Injuries :

- 1) Haematoma right parietal region 3 x 1½” corresponding to external injury No.1.
- 2) Haematoma frontal region 3 x 2” corresponding to external injury No.2.
- 3) Sub-archnoid haemorrhage right parietal lobe 2 x 2½ inch corresponding to external injury No.1.
- 4) Subduaral haemorrhage left temporal lobe 2 x ½ inch.

There was thin film of puss covering whole brain surface.

- 5) Lungs were consolidated, posterior aspect of spleen shown localised abscessed 1½ x ½ inch.

22 According to evidence of this witness, all the aforementioned injuries were antemortem. The probable cause of death, in his opinion, was due to septicemia following injuries. He then proved the postmortem report at Exh. 91. Thus, from the evidence of this witness who performed postmortem on the dead body of deceased, the cause of death was septicemia. It is also pertinent to note that the septicemia was developed as a result of the injuries on the person of the deceased. This is what his examination-in-chief clearly and categorically

shows. However, this clarity is blurred and blown away in the cross-examination.

23 In the cross-examination, he was forthright in stating that the consolidation of lungs is the sign of pneumonitis and is also an infection. According to him, there was abscess in the spleen which was also the sign of infection and such infection can also result in septicemia. The third infection which he noted on the bed sore of left scapular region and this also could have led to septicemia.

24 Interestingly, this witness does not attribute that all these infections were necessarily outcome and as a result of the injuries sustained by the deceased. This becomes abundantly clear when he in so many unequivocal terms and candidly stated that he is unable to tell about origin of the septicemia in the case of the deceased. Needless to say, this witness has taken away all the force of his examination-in-chief wherein he squarely attributed the case of septicemia as a result of injuries found on the person of deceased. Rather, contradicting himself in the cross-examination, he was helpless to state the origin of septicemia in the case of deceased. This being so, in our considered

opinion, it can not be deduced from the evidence of this material witness that pursuant to the injuries the deceased in due course of time developed septicemia which proved fatal. Thus, on the basis of this evidence, we are unable to hold that the death of the deceased in question was homicidal.

25 Coming to the ocular evidence, we are mainly concerned with the testimonies of PW-2 informant, PW-3 father of the informant and PW 4 uncle of the informant. The fact that no other independent witness(es) is there on record to lend support to the prosecution theory all that is necessarily required is a guarded approach while appreciating and marshaling the evidence of witnesses who are the close relatives of the deceased.

26 PW 2- informant, the real brother of the deceased, stated in his evidence (Exh.66) that all the accused are closed relation of informant, an undisputed fact. It is also undisputed fact that there were differences between the rival parties over the partition of agricultural land. The evidence of this witness shows that two months prior to the incident re-partition had taken place and 3/4th share of the land which

was allotted to the share of the informant was to be re-allotted to the share of accused Mahadeo (A-3). It was also agreed that possession of the said land should be delivered after the removal of Bajra crop which was standing at the relevant time. The sons of A-3, however, started tying their cattle in the said 3/4th acres of land soon after the removal of Bajra crop.

27 It is his further evidence that on 07/10/1999, he, his mother and brother Sunil (deceased) and his wife went to field for cutting tomatoes. A-4 arrived around 1.00 pm and asked the deceased as to why he had spoken to his servant on account of tying of cattle in the field. The deceased denied that he had spoken to his servant. A-4 then asked deceased “should I see you” and then caught hold of deceased from his back and took bite on the back of deceased. The deceased got himself released from A-4 and being afraid of him ran towards the house. The deceased was immediately followed by A-4. According to informant, he followed A-4 along with his mother and wife of deceased.

28 It is his further evidence that A-1, A-3, A-5, A-6 and A-7 at

that time were coming from respective houses armed with sticks and iron rods. All of them entered into the house in which the deceased was there. They assaulted deceased and dragged him outside the house. The deceased was saying “ Don’t beat me”. A-4 was assaulting the deceased with iron rod. A-2 and A-3 were assaulting the deceased with sticks. When he intervened, he was assaulted by A-4 by means of iron rod on his left arm. A-1 and A-2 assaulted him with sticks on his left leg. When his mother intervened to rescue the deceased from the accused, A-3 assaulted his mother with stick on her left thigh. The wife of deceased also intervened to rescue the deceased during which she was also assaulted by A-6 and A-7 with fists. His father then arrived at the place of occurrence. He also tried to intervene but he was assaulted by A-4 by iron rod on his forearms. When his uncle Laxman arrived at the place of incident and tried to intervene, he was also assaulted by A-5 with stone on his back. Lastly, informant stated that on seeing that the deceased was quietly lying, they left the place of incident.

29 According to informant, as the deceased had sustained severe bleeding injuries they all lifted him and all of them went to Loni-

Kalbhor Police Station and narrated the incident to the police. The deceased was referred to Medical Officer along with a *yadi*. At Loni-Kalbhor, the doctor examined and advised to take the deceased to Sassoon Hospital, Pune. He, his mother and father were treated also at Sassoon Hospital. It appears that the statement of informant was recorded by police at KEM Hospital on 08/10/1999. The informant then proved his FIR at Exh. 67. His evidence then shows that the deceased was receiving medical treatment at KEM Hospital till 18/10/1999. He did not regain consciousness till his death and died on 18/10/1999.

30 There are certain infirmities appearing in the evidence of informant vis-a-vis FIR. His evidence showing that since the deceased was afraid of A-4, he ran away towards his house followed by A-4 and that he also followed A-4. This piece of evidence does not get corroboration from the contents of FIR. What FIR only shows is that after getting himself relieved from the clutches of A-4, the deceased ran towards his house. Then the material infirmity which is to be noted and is appearing in his evidence is that A-1, A-3, A-5, A-6 and A-7 were

coming from their respective houses armed with sticks and iron rods. This material fact is nowhere alleged in the FIR. It is nowhere disclosed or revealed that after the deceased ran towards the house, all these accused stepped out of their respective houses armed with sticks and iron rods.

31 The next infirmity is that when the deceased was allegedly dragged out of house, he was saying “don’t beat me”. Again it is not shown in the FIR. In the evidence, the role of A-2, A-3 and A-4 is clearly specified by stating that A-4 was assaulting deceased with iron rod while A-2 and A-3 were assaulting deceased with sticks. This kind of individual role of A-2, A-3 and A-4 is nowhere clearly given in the FIR. A vague allegation is made in the FIR that after dragging the deceased out of the house, A-1, A-2, A-3 and A-4 were beating him by means of sticks and iron rods. It is not at all clarified who was armed with what weapon.

32 The evidence then shows that when the wife of deceased intervened to rescue the deceased, she was also beaten by A-6 and A-7 with fist blows. There is absolutely nothing in this regard as is deposed

in the FIR. Lastly, the evidence of informant shows that A-5 had also assaulted his uncle Laxman (PW 4) by means of a stone on his back but PW 4 Laxman nowhere corroborates in his evidence that A-5 had given a blow of stone on his back. All that he has deposed is that he was assaulted with stone by A-5 which struck on his waist.

33 The above-noted infirmities are not the simple infirmities in essence and can not be brushed aside lightly. Let us find out what the other eye witnesses have to offer on their part.

34 PW-3 Narayan Gopala Konde, father of informant, stated in his evidence (Exh. 71) all about the differences in respect of accused and themselves in respect of agricultural property and about re-partition. It is his evidence that about two months after the re-partition Bajra crop was cut but it was lying for the purpose of drying. The servant of A-3 started tying the cattle in the said 3/4th acre of land. His deceased son asked the servant as to why they were tying the cattle as they can tie the cattle after delivery of possession of the said land. A-3 was annoyed on account of saying of the deceased.

35 On the day of incident while he was grazing the she-goats. At about 1.00 pm he heard noise coming from the side of his house and therefore, rushed towards his house. On his way, he saw Laxman (PW 4) cutting tomatoes crop in the field and therefore, he told him to accompany him since there was a quarrel at his residence. When he reached near his house, he saw the deceased lying on the floor in the courtyard of his house and was being assaulted by A-3 with stick. A-1 and A-2 were assaulting the deceased with sticks. A-4 was beating deceased with iron rod. A-6 and A-7 were giving abuses and were uttering “Hana hana, mara mara”. It is his further evidence that he intervened so as to rescue the deceased and while doing so, A-4 gave two blows by an iron rod on his right arm and one blow on his left thigh.

36 His further evidence is that Laxman also intervened and started pulling A-3 away during which A-3 pushed him. A-5 assaulted Laxman with stone. The deceased had sustained severe bleeding injuries and was lying on the floor. After beating the deceased all the accused left the place. They then went near the deceased and found that

the deceased had sustained injuries on his head and legs.

37 It is quite clear from the evidence of this witness that at the time of incident he was grazing she-goats and it is only after hearing the commotion emanating from the side of his house, he rushed only to found the deceased lying on the floor in courtyard of his house and was being assaulted by A-1, A-3 and A-4 by means of sticks and iron rods. We would like to point it out here quickly that it is not at all the case of prosecution that at the time of incident this witness was away from the house with she-goats grazing in a field. It is also not the case of prosecution that this witness rushed to the place of occurrence only after hearing noise from the side of his house. Even the very PW 2 informant does not say so as is deposed by his father.

38 The next material aspect of the evidence of PW 3 is that when he reached the place of occurrence, he saw his son lying on the courtyard of his house and was being assaulted by A-1, A-3 and A-4. Again, it is not so the prosecution case. On the contrary, the evidence of PW 2 informant shows that when his father i.e. PW 3 tried to intervene, he was also assaulted. Again according to PW 4, he was also assaulted

on left thigh apart from the right arm but then so far as sustaining assault on the left thigh is concerned, it does not get corroboration from the mouth of PW 2.

39 There are omissions also appearing in the evidence of this witness vis-a-vis the statement recorded under section 161 of the Criminal Procedure Code and those omissions are duly proved by PW-10, the Investigating Officer, in his cross-examination.

40 The evidence of PW-3 also shows that when he and others gathered near deceased, they found the deceased had sustained injuries on his head and legs. Similarly, his evidence also shows that after Laxman intervened he (Laxman) had also started pulling A-3 away. However, when confronted in the cross-examination about missing of those facts in his statement, he insisted that he had in fact stated before the police that Laxman was pulling A-3 during the incident and that he had also stated before the police of having seen injuries on the head and legs of deceased-Sunil. However, as noted above, PW 10-Investigating Officer in his cross-examination at para 9 clearly stated that this witness had not stated before him that Laxman was pulling A-3 and that

deceased had sustained injuries on his head and legs.

41 In our considered opinion, these are major omissions which definitely contribute towards the fatality of the prosecution case. Having regard to over all view of the evidence of this witness and as pointed out by us in our earlier part of discussion about his presence at the place of occurrence and as also for want of satisfactory corroboration from the mouth of PW 2-informant, we are not inclined to accept his testimony.

42 This brings us to last eye witness, namely, PW 4- Laxman Gopala Konde i.e. brother of PW-3. This witness has also similarly deposed about the differences between them and the accused over the agricultural property and the factum of re-partition and as also about tying of cattle by accused in the field of PW 2 which was it to be given to the accused.

43 This witness stated in his evidence that on the day of incident, he and his wife were cutting tomatoes crop in their land. At about 1 pm, he heard noise coming from *Vasti*. Narayan (PW 3) asked

him to accompany him to the *Vasti* and accordingly he followed him. It is his further evidence that when he reached in the courtyard of the house, he saw Sunil (deceased) lying on the floor facing upwards and had sustained many injuries. A-1, A-2 and A-3 were beating the deceased with sticks. A-6 and A-7 were beating wife of deceased. A-4 assaulted Narayan with iron rod. According to him, he intervened and tried to pull A-1 away from the place of assault, however, he was pushed aside by A-3 as a result of which he fell down. A-5 then assaulted him with a stone which struck on his waist. A-1 and A-2 were also beating Balu (PW 2), son of Narayan.

44 It is interesting to note from the testimony of this witness that when he intervened he saw that A-1, A-2 and A-3 were beating deceased by means of sticks whereas the versions of PW 2 and PW 3 to that effect are different. While according to PW 2, A-1, A-2 and A-3 were assaulting deceased by means of sticks, A-4 was assaulting by means of iron rod. Similarly, according to PW 3, A-1 and A-2 were assaulting deceased with sticks whereas A-4 was assaulting by means of iron rod. Thus, there is great inconsistencies between the versions of these

witnesses.

45 Similarly, the evidence of PW 4 showing that A-1 and A-2 were also beating Balu (PW 2) has come on record by way of omission as the said fact does not find place in his statement recorded under section 161 of the Criminal Procedure Code. When confronted in the cross-examination, he insisted that he had stated the said fact before the police officer, however, PW 10 investigating officer in his cross-examination at para 8 has clearly proved the said omission stating that this witness had not stated before him that A-1 and A-2 were also assaulting Balu (PW 2).

46 In view of above glaring inconsistencies vis-a-vis testimony of PW 2 and PW 3 and as also omissions, it would be hazardous for us to place explicit reliance on the testimony of this witness.

47 The next material evidence is on the point of discovery of alleged weapon of offence. On going through the impugned judgment, it appears from the observation of the learned Trial Court in para 15 that the recovery pertaining to iron rod could not be established but there

was recovery of a stick on the basis of statement of one of the accused. We fail to understand how this finding of recovery of sticks came to be recorded by learned Trial Court. There is no discussion of the evidence on the basis of which the learned Trial Court came to the conclusion that the recovery of a stick was duly established by the prosecution. There is reason for such an observation.

48 The only witness examined by the prosecution on the point of discovery of weapon was PW 1-Narayan Kisan Surve (Exh.52) but this witness is treated hostile by the prosecution without any gain in the cross-examination. From the cross-examination conducted by learned APP, it appears that this witness was on the point of seizure of stick pursuant to the disclosure statement given by A-2 under Section 27 of the Indian Evidence Act. But, because of his hostility and the fact that nothing concrete could be elicited in the cross-examination, the factum of seizure of sticks could not be established. Nonetheless, it appears that the learned Trial Court placed reliance on the evidence of PW 10-Investigating Officer in this regard.

49 PW 10- Investigating Officer stated in his evidence

(Exh. 94) that on 13/10/1999 A-2 made a statement to him before panchas to produce sticks and then simply proved panchanama at Exh. 53. It is his further evidence that thereafter sticks were recovered in presence of panchas under panchanama Exh. 54.

50 What is disturbing aspect of alleged recovery is that despite knowing that PW 1- Panch witness is treated hostile, no attempts were made to examine another panch witness. Be that as it may, it does not mean that the evidence of investigating officer cannot be read in evidence, if it qualifies its admissibility in accordance with law.

51 We may refer with profit the decision given in the case of **State of Maharashtra v. Damu S/o Gopinath Shinde and others**,¹ wherein it has been observed that,

“the basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The

¹ AIR 2000 SC 1691,

information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information. Hence, the legislature has permitted such information to be used as evidence by restricting the admissible portion to the minimum.”

52 In **State of Punjab v. Gurnam Kaur and Others**,² it has been held by the Hon’ble Apex Court that,

“ by reason of statements made by an accused some facts have been discovered, the same would be admissible against the person who had made the statement in terms of Section 27 of the Evidence Act.”

53 In **Aftab Ahmad Ansari v. State of Uttaranchal**,³ the Hon’ble Apex Court after referring to earlier decision in **Pulukuri Kottaya v. Emperor**, AIR 1947 PC 67 held that,

“when the accused was ready to show the place where he had concealed the clothes of the deceased, the same was clearly admissible under Section 27 of the Evidence Act because the same related distinctly to the discovery of the clothes of the deceased from that very place.”

² (2009) 11 SCC 225,

³ AIR 2010 SC 773,

54 In the case at hand, although PW 10-Investigating Officer does say about the discovery statement but that in itself is very cryptic as it nowhere discloses that A-2 had pointed out a particular place where he had concealed the sticks allegedly used in the commission of offence. The evidence also does not show as to from which place those stick came to be recovered pursuant to the alleged discovery statement given by the accused. It is not at all his evidence that not only accused no.2 had given statement that related to discovery of certain facts, but in fact, pursuant to the statement of such nature the accused led him and other panch witnesses to the place from where the sticks used in the commission of offence were produced in respect of which he had earlier given statement.

55 Tested on the anvil of the aforesaid principle, the factum of recovery is not proved beyond reasonable doubt by the prosecution. This being so, the learned Trial Court was absolutely in error in placing reliance on the aspect of recovery of sticks at the instance of accused.

56 Having cleared the appreciation of evidence qua material witnesses and their evidentiary value, equally and very much significant

aspect of prosecution case, as is seen through the pattern of cross-examination, is about the injuries sustained by accused during the course of said incident. In other words, the defence has very rightly agitated that the prosecution has not disclosed the genesis of the incident and rather suppressed its inception and, therefore, on this count alone the prosecution case needs to be rejected.

57 During the course of argument, learned counsel for the appellants took us through cross-examination of PW-2, PW-3 and PW-4 and as also PW-10 Investigating Officer. PW-2 informant is specifically suggested in the cross-examination that when A-3 and A-4 started tying their cattle in the disputed land, he and others got angry. It was further suggested that when A-3 and A-4 were proceeding towards their land by crossing their houses, he, deceased and his mother obstructed them and after confronting them about tying of cattle assaulted by means of sticks. It was further suggested that when A-2 tried to intervene, he was also assaulted with sticks by all of them. It was further suggested that in that quarrel all of them tried to defend them with sticks and in that attempt sustained minor injuries. However, all these suggestions were

denied by the informant. More or less, similar suggestions are given to PW 2 and PW 3 but they also denied.

58 On the other hand, if the cross-examination of PW 10- Investigating Officer is read then it would appear that on 08/10/1999 i.e. on the next day of the incidence, A- 4 made a report to the police station regarding the incident on the basis of which NC No. 913/99 was registered. A-3 and A-4 were referred for medical examination and examined and treated at PHC Loni-Kalbhor. Surprisingly, this version of investigating officer is quite contrary to the versions of PW-2, PW-3 and PW-4, who have out rightly denied such incident having taken place on 08/10/1999. Though, the investigating officer stated that A-3 and A-4 were examined and treated at PHC Loni-Kalbhor, no medical certificate is forthcoming. Surprisingly, even the investigating officer does not say whether that incident was investigated thoroughly or for that matter who was aggressor.

59 In **Lakshmi Singh and others v. State of Bihar**,⁴ the Hon'ble Apex Court at para 11 made the following observations:

⁴ AIR 1976 Supreme Court 2263,

“In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one.”

out with the true version. As noticed earlier, the prosecution evidence consists of interested and inimical witnesses. Therefore, non-explanation of the injuries sustained by the accused may assume greater importance. There is also the defence version of they being assaulted, which is denied falsely by witnesses, which competes in probability with that of the prosecution. If injuries on the person of deceased and PW 2 to PW 4 are reckoned vis-a-vis accused, except injury no.1 sustained by deceased, all were of simple in nature. In our opinion, therefore, non-explanation of the injuries of what-so-ever nature sustained by the accused renders the prosecution story not wholly true.

61 Even otherwise on evaluation of testimonies of witnesses, we have found that the evidence of said witnesses is not so clear and cogent, independent, disinterested and consistent.

62 We are clearly of the opinion that the prosecution has miserably failed to prove the case against the appellants/accused beyond reasonable doubt. Hence, the order as follows:

ORDER

1. Appeal No. 1380 of 2003 is accordingly allowed.

2. The conviction and sentence passed on the appellants are set aside and all the appellants are acquitted of the charges.
3. Fine amount, if any paid, be refunded to appellants after the appeal period is over.
4. Bail bonds, if any, stand cancelled.
5. In view of above, consequent Appeal Nos. 1498 of 2003 and 1499 of 2003 stand dismissed.

(V.G. BISHT, J.)

(S.S. SHINDE, J.)