

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

CRIMINAL APPEAL NO. 730 OF 2013

- 1) Shashikumar Ramswami Harijan
Aged : 30 Yrs. Indian Inhabitant
Occ: Service.
- 2) Babu Subramaniam Ramaswami Harijan
Aged : 28 Yrs. Indian Inhabitant
Occ: Service.
- 3) Meghraj Subramaniam Harijan
Aged : 33 Yrs. Indian Inhabitant
Occ: Service.
- 4) Annadurai@ Tata Ramswami Harijan
Aged : 39 Yrs. Indian Inhabitant
Occ: Service.

All Permanent Resident of Government Quarters,
Unit No.31, Aarey Colony, Goregaon (E),
Mumbai 400 065.

(Presently Appellant No.1 lodged at Thane Central Prison, at Thane and Appellant No.2 to 4 are lodged at Taloja Central Prison, Panvel, Raigadh, Maharashtra as life Convict Prisoner.)

... Appellants

Versus

State of Maharashtra

... Respondent

.....

Ms. Payoshi Roy i/b. Mr. Khan Abdul Wahab, Advocate for the Appellants.

Mrs. P. P. Shinde, APP for Respondent – State.

.....

**CORAM : PRASANNA B. VARALE &
PRAKASH D. NAIK, JJ.**

DATE : 12th AUGUST, 2020.

**RajeP.
Aher**

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JUDGMENT : (Per : Prakash D. Naik J.)

1. This appeal is preferred under Section 374 of Code of Criminal Procedure challenging the Judgment and order dated 25th June, 2013 passed by the learned Additional Sessions Judge, Gr. Bombay in Sessions Case No.39 of 2012 convicting the appellants for offence punishable under Section 302 r/w Section 34 of Indian Penal Code (for short "IPC") and sentencing them to suffer rigorous imprisonment for life and to pay fine of Rs.10,000/- each.

2. The brief facts of the prosecution case which led to the trial are as follows :

a) Complainant Smt. Aadilaxmi Sudhakar Reddy was residing with her husband deceased Sudhakar, two daughters and one son at Unit No.31, Ekta Vikas Mandal, Aarey Milk Colony, Slum, Goregaon, (E), Mumbai. Accused No.1 to 4 were also residing in the same area near the house of the complainant. The husband of complainant was dealing with transporting soil.

b) Accused were also dealing in similar business and

there were strained relations between the accused and the complainant. In the month of September, 2011 there was quarrel between the complainant's husband and accused No.2 to 4. Complaint was lodged against the accused at Aarey Police Station. In pursuant to that the accused changed their residence and there was no communication between complainant's family and the accused.

c) The complainant was informed by her husband that the accused had hatched up a plan to kill him and given contract for Rs.8,00,000/- to kill him. Sudhakar was informed about the said fact by his friend. This fact was disclosed to the complainant by her husband two days prior to the incident in question. Accused No.4 had called his brother to kill her husband.

d) On 17th October, 2011, complainant's husband left home at about 10.30 a.m. along with son to drop him to school. Within 10 to 15 minutes, their son came back running and informed the complainant that his father had sustained injuries on various parts of body. Clothes of her son were blood stained. The complainant immediately rushed to house of her sister. Both

rushed towards the spot. However, on the way complainant was unconscious. On regaining consciousness her sister disclosed to her that accused No.1 to 4 assaulted her husband by sickle and the said incident had occurred at Adivasi Pada.

e) The complainant's husband Sudhakar was removed to Bhagvati Hospital but he was declared dead. Thereafter, the complaint was lodged against the accused with Aarey Police Station. On the basis of report, offence was registered vide C.R. No. 127 of 2011 under Section 302 r/w Section 34 of IPC.

f) Investigation proceeded. Accused were arrested. Statements of witnesses were recorded. Weapons were recovered and on completing investigation, charge-sheet was filed against the accused.

3. Charge was framed against the accused for offence punishable under Section 302 r/w 34 of IPC vide order dated 15th June, 2012.

4. In support of it's case, prosecution examined 14 witnesses. PW-1 Adilaxmi Sudhakar Reddy is the complainant. She is the wife of the deceased. PW-2 Shantalaxmi Ayyangar

Swami Reddy is the sister of complainant. PW-3 Surekha Bhaskar Pujari is eye witness. PW-4 Shaikh Najul Ismail Shaikh acted as panch on discovery Panchanama at the instance of accused No.2. PW-5 Sukhdev Laxman Ahire acted as panch on memorandum statement of accused No.4. PW-6 Janki Ravi Harijan is eye witness. PW-7 Radhakrishna Kuruswami Reddiar acted as panch on memorandum statement of accused No.3. PW-8 Rekha Rajiv Harchekar is Naib Tahsildar, who conducted test identification parade. PW-9 Rajesh Arunachal acted as Panch on memorandum statement of accused No.1. PW-10 Dr. S.M. Chavan is Medical Officer, who conducted post-mortem on the dead body of the deceased. PW-11 API - Ashok Sukhdev Rahate is the Investigating Officer. PW-12 Subhash Shankar Shinde acted as panch on panchanama regarding seizure of motorcycle. PW-13 Ashok Pandurang Kadam is PSI, who conducted investigation and PW-14 Mukund Balkrishna Zunzar is the Head Constable, who carried the article to Chemical Analyzer.

5. The trial Court has given findings of guilt on the basis of the evidence adduced by the prosecution. The trial

Court observed that the prosecution has proved the previous enmity between the accused and the deceased, the prosecution adduced evidence which discloses that PW-3 and PW-6 have witnessed the incident. Accused persons were identified by PW-3 and PW-6 during identification. Blood stained clothes and blood stained weapons were discovered at the instance of the accused. Clothes were recovered at the instance of accused No.3 were having blood stains bearing group -A which is found on clothes of deceased. Blood stained earth and other articles were found at the spot of incident were having blood group-A which is on the clothes of deceased and the medical evidence has proved that death is homicidal. Death can be caused by weapons used in the crime by the accused.

6. Ms. Payoshi Roy, learned counsel representing the appellants assailed the impugned Judgment of conviction on several grounds. Her submissions can be summarized as follows :

i) The appellants were falsely implicated in this case. The trial Court has committed error while appreciating the

material on record.

ii) The evidence of two eye witnesses i.e. PW-3 and PW-6 does not inspire confidence.

iii) The trial Court has failed to consider that the eye witnesses were interested witnesses. There were material contradictions in the evidence of PW-3 and PW-6. There was substantial delay in recording statements of PW-3 and PW-6. The investigating officer has not explained the delay in recording the statements of the eye witnesses.

iv) The evidence of PW-3 and PW-6 was based on test identification parade which is not held as per guidelines of the High Court. There are serious infirmities in the identification parade.

v) In the test identification parade PW-3 has identified three suspects whereas in the Court she has identified all the four accused. PW-3 at the time of identification parade identified dummy person instead of accused No.1 and during the evidence she identified accused No.1.

vi) PW-3 at the time of identification parade, identified accused No.3, however, during the recording of evidence she did not identify accused No.3. The evidence of PW-3 and PW-6 is contrary to evidence of Investigating Officer. PW-6 had admitted that the accused were known to him by name, however she did not disclose the name of accused to the police.

vii) PW-8 conducted the test identification parade in the office of Tahsildar instead of holding it in the jail. Witnesses were arranged by the police and not by PW-8. The said witness have admitted that the contents of the parade were prepared much latter in her office after the parade was over, on the basis of rough notes which were not produced before the Court. PW-8 accepted all the dummy persons produced by the police without seeing the faces of the accused.

viii) The recovery of weapons was from open place which were accessible to any person.

7. Mrs. P. P. Shinde, learned APP for the state supported the Judgment of trial Court. She submitted that the trial Court has analyzed the evidence on record and has correctly given

findings of the guilt of the accused. There is evidence in the nature of oral and documentary which has proved the charge against the accused. The prosecution has established that there was enmity between the accused and the deceased. The incident of assault was witnessed by two eye witnesses. They have supported the prosecution case. They have identified the accused in the parade as well as in the Court. There is recovery of blood stained weapons and blood stained clothes at the instance of the accused. The discovery Panchnama has been proved through the evidence of the panch witnesses and the Investigating Officer. The contradictions, if any were of minor nature which does not affect the prosecution case.

8. We have perused the evidence of witnesses and documentary evidence on record. The prosecution is based on the evidence of the complainant, her sister and two eye witnesses. The prosecution is also relying upon the evidence of recovery of clothes and weapons to establish the crime. PW-1 Adilaxmi Reddy is the wife of the deceased Sudhakar. She lodged the complaint with Aarey Police Station after the incident of murder. She has deposed that the relations between

the accused and the deceased were strained on account of business of transporting soil. She has also referred to a quarrel which had occurred in September, 2011 between her husband and accused Nos.2 to 4. She also stated that her husband had informed her that he came to know from his friend that the accused have given contract to kill him. On 17th October, 2011 her husband had left the house along with son to drop him to school. However, her son had returned home within 10 to 15 minutes. His clothes were blood stained. He informed that his father had suffered injuries. She rushed to the house of her sister Shantalaxmi Ayyangar Swami Reddy (PW-2). She disclosed the incident to her sister. Both of them proceeded to the spot of incident. However, on the way she was unconscious and she was brought home. After she regained consciousness her sister informed her that the accused had assaulted her husband by means of sickle. Her husband was removed to hospital and was declared dead. She lodged the complaint on 17th October, 2011. Thus, from the tenor of her evidence it is apparent that, she is not the eye witness to the incident. She was informed about assailants by her sister. In the cross

examination she deposed that, she narrated the incident to police and they recorded her statement. The statement was not read over to her. The police obtained her signature on the statement at Police Station. She had stated before the police while recording her statement that her husband was having strained relations with all four accused. However, she cannot assign any reason why it is not mentioned in her statement. As per her statement, name of accused No.4 and his brother was mentioned and the omission was restricted to the names of the other three accused. She had also stated before the police about the quarrel between husband and accused Nos.2 to 4. The omission were restricted to the name of accused No.4 and other brothers. She had not stated before the police that her sister Shantalaxmi disclosed to her that the accused had assaulted her husband by means of sickle. Since last fifteen years her husband was dealing with the work of collecting soil. She was not aware the exact nature of his work. She could not tell name of friend of her husband who disclosed about the contract given by the accused No.4 to kill her husband. She had not inquired about name of friend with her husband.

9. PW-2 Shantalaxmi Ayyangar Swami Reddy is the sister of complainant. She has deposed that, she is acquainted with the accused as they are residing in front of her house. There were disputes between the accused and the deceased on the count of transporting soil. Both have filed cross complaints against each other at the Police Station. On 17th October, 2011 her nephew told her that his father has sustained bleeding injuries. She along with her sister rushed to the spot. Her sister (PW-1) was unconscious on the way. She proceeded to the spot and saw Sudhakar lying in injured condition. He was not in a position to talk. Motorcycle of Sudhakar was lying there. She also saw blood stained stone at the spot. She returned home and thereafter, took PW-1 to Bhagvati Hospital. Subsequently, Sudhakar had succumbed to the injuries. From her evidence, it can be seen that she was not knowing the names of the assailants. She has not witnessed the assault. She did not disclose the names of assailants to PW-1. In cross examination she stated that she does not know Surekha Pujari, Jokhan Raj Saroj and Janki Harijan. She does not have documents to show that both accused and deceased filed cross complaints against

each other.

10. PW-3 Surekha Bhaskar Pujari claimed that she is residing in Adivasi Pada. She saw four persons assaulting one person. They were holding sickle in their hands. One of them picked up small boy who ran towards home. One of the accused picked up stone and threw it on the face of the injured. She could not tell the names of the assailants and the injured. She gave description of assailants to the police. She was called for identification parade of accused at Borivali. In first round she identified one accused but cannot tell name to whom she identified. In the Court she pointed out at accused No.4 and stated that she identified him in the identification parade. In the second round she identified two accused but could not tell the names of the accused. However, she pointed out towards the accused No.1 and 2 and stated that she had identified them in the test identification parade. The accused gave blow on deceased by means of sickle. She assigned role of hitting injured with stone to the accused sitting in Court. and throw it on the deceased. In cross examination she stated that, since last 4 to 5 years she is working as social worker and assist the police

machinery in investigation. On various occasions she is called by police. She knows all the four accused. Prior to the incident they were not known to her. She do not know Sudhakar and she never met him prior to the incident. She did not inform the police that person by name Sudhakar Reddy was injured in the incident. Police had not read over the contents of her statement to her. She did not read its contents. She admitted that name of Sudhakar is mentioned in her statement. She was confronted with her statement wherein the name of Sudhakar was appearing at several places and she denied that she has disclosed the name to the police while recording her statement. Her statement was recorded on 19th or 20th. Police did not recorded her statement after identification. She had not stated before the police while recording her statement that she identified accused No.1 to 4. She stated that she cannot assign any reason as to why it is mentioned in her statement. She had not described the weapons to the police. She was called for identification parade on 19th November, 2011 at Police Station. She went to Tahsildar office in police vehicle. She saw policemen who brought accused in Tahsildar office. Accused

were handcuffed. Police collected dummies and took them in Tahsildar room. Dummies were not taken in handcuffed condition. PW-8 did not put any questions to her. Dummies and handcuffed accused were standing in the room. 17 persons were in the room at the time of identification. PW-8 did not ask her whether she has seen the accused or their photographs after the incident and before the parade. She did not ask whether the police have shown her the accused. All the persons put in the identification parade were having different looks. She did not meet Shantalaxmi at the spot. Adilaxmi is residing in the same area where she is social worker.

11. PW-6 Janki Ravi Harijan is another eye witness to the incident. According to her on 17th October, 2011 at about 10.30 a.m. she was proceeding from Sunil Maidan towards Chota Kashmir. At that time one person was proceeding along with child on his motorcycle. Four persons assaulted him by means of sickle. They also assaulted by fist and kick blows. Assailants also assaulted the victim by throwing stone on his head. She identified accused before the Court. After the assault one women came at the spot. She was not in position to speak.

Thereafter, she went home. After two days she approached the police and her statement was recorded. She was called at Borivali for identification of accused. She was asked to identify the accused who were present with other persons. She identified all the accused. Police recorded her statement. Distance between her house and house of accused is 20 minutes by walk. She is using the road in front of the house of the accused, hence she know their house. She is using the same road since last 10 years. She identified the accused in the Court with their names. She further stated that police have not made inquiry with her regarding the name of assailants when she approached the police first time. She did not disclose names to police. At that time she was not knowing the names of the accused and therefore she had not disclosed it. She was knowing the deceased one month prior to the incident. She did not disclose to the police that the assailants were in the age group of 25 to 30 and having dark complexion. She could not assign any reason why it was mentioned in the statement. On 17th October, 2011 police arrived at the spot. 6 to 7 persons came on the spot. From the spot of incident her house is situated at a distance of

one and half hour. She went home immediately when police came there. She felt it necessary to inform the police about the incident. She do not know who was the women who came on the spot after the incident. The women who came at the spot inquired with Sudhakar as to who assaulted him but Sudhakar could not speak. She did not inform the women the name of the assailants. She identified all the four accused in two rows in parade.

12. PW-4 Shaikh Najul Ismail Shaikh acted as panch witness for Panchnama at Exh.24 in relation to the recovery of sickle at the instance of accused No.2. The weapon was recovered from Mali Nagar Slum towards hill area from bushes. She admitted that the place of discovery was open place. It was accessible to all. PW-5 Sukhdev Laxman Ahire acted as panch witness for recovery of weapon sickle at the instance of accused No.4. The accused took them near bushes through Kachha Road and took out one sickle and shirt having blood stains. He stated that the place was open and it was accessible to all. The distance between his house and the house of the accused is 5 to 6 minutes by walk. He knows the accused as they were residing

his house. The house of deceased is also situated at the distance of 4 to 5 minutes by walk. He was residing in the same vicinity therefore he knows the deceased. Police did not make inquiry with him whether he knows the accused or deceased before he acted as pancha. He also did not disclose to the police that he is acquainted with the deceased and the accused. PW-7 Radhakrishna Kuruswami Reddiar acted as panch witness for recovery of clothes at the instance of accused No.3. In cross examination he stated that his house is at the distance of one and half Km. from the house of accused Nos.3 and 4. Police informed him that the clothes of accused No.3 which were on his person on the day of incident are to be seized. Police informed him that he will produced the clothes in his presence and he has to watch the same. PW-9 Rajesh Arunachal acted as Panch witness for the recovery at the instance of accused No.1. Accused took them to dairy Naka. He took them to the forest of bamboo and produced sickle from the roots of bamboo bushes. He could not assign any reason why it is not mentioned in the Panchnama that sickle was blood stained. Police informed him that accused will give a statement and accordingly he will lead

them to the place and produce a sickle and he has to sign on the Panchnama. PW-12 Subhash Shinde acted as panch witness for seizure of the bike parked in the open space in front of one godown on film city road. It was seized in his presence. Panchnama was drawn. He stated that none of the accused had shown the said bike. Police personnel were already present at spot. In his presence police have not called any finger print expert. Police have not collected blood stains from the said bike with the help of cotton.

13. PW-8 Rekha Rajiv Harchekar was serving as Naib Tahsildar. On 1st November, 2011 she received letter from the Police Station for holding test identification parade of accused in the present crime. Her officer informed Aarey Police Station that if accused are produced in Tahsil Office at Borivali then identification parade would be conducted. On 19th November, 2011 police brought 24 dummy persons and 3 witnesses namely Jokhan Ramrakshak Saroj, Smt. Surekha Bhaskar Pujari, and Janki Ravi Harijan. She told the police to bring panch witnesses. She selected two persons as panchas. She made inquiry with the witnesses whether police have shown them accused or their

photographs. She decided to hold identification parade in two steps. She selected 12 persons as dummy and divided them into two groups. She noted age of dummy persons. She asked the police to bring the accused. Accused were brought by covering their faces. She made inquiry with accused about their names. Police initially brought accused No.1 and accused No.3. She told panch to bring witness Jokhan Raj Saroj in identification room. Accused No.1 occupied place in Group-A and accused No.3 occupied the place in Group-B. Witness Jokhan Raj Saroj has not identified any accused. Another witness Surekha Pujari was brought in identification room. Accused No.1 occupied the place in Group-A and accused No.3 occupied the place in Group-B. Witness Surekha Pujari pointed towards dummy person at Sr. No.1 from Group-B. The name of dummy person was Sunil Pandhari Chavan. She did not identify anyone from Group-A. Accused No.1 occupied the position in Group-A. The witness identified accused No.3 from Group-B. Thereafter, another witness Janki Ravi Harijan was brought in identification room. Accused No.1 occupied place in Group-A and accused No.3 occupied place in Group-B. Witness Janki Ravi Harijan pointed

out the person in Group-A. He disclosed his name as Shashikumar (Accused No.1). She identified the accused No.3 who was occupying the place in Group-B. In the second step the police brought dummy persons. Accused No.2 and accused No.4 were to be identified. 12 dummy persons were brought. They were divided into two groups. She asked the panch to bring the witness Jokhan Raj Saroj in identification room. Accused No.2 occupied place in Group-A and accused No.4 occupied place in Group-B. Witness Jokhan Raj Saroj identified accused No.2 from Group-A and he has not identified any person from Group-B. Thereafter, witness Surekha Pujari was brought in identification room. She identified accused No.2 and accused No.4. Subsequently witness Janki Ravi Harijan was brought in identification room. She identified both the accused no.2 and accused 4. In cross examination she deposed that she had deposed as per notes prepared by her. Tahsil office is public office accessible to all. She is not aware whether after the Judgment of 1995 delivered by Hon'ble High Court, all the parades are to be conducted in jail. Investigating Officer advised her to hold parade in jail. Investigating officer also informed her

that as per the order of the High Court parade is to be held in jail. There was no difficulty in holding parade in jail. She conducted it in Tahsil office as per order of her superior. She was not aware about the purpose of identification parade in this case. The reason behind identification has to be inquired and she has not mentioned any reason behind identification. During identification parade she prepared rough notes. She prepared Exh.43 identification parade panchanama on the basis of rough notes. She had not seen the accused before she saw dummy persons. The dummy persons were brought in identification room which is situated adjacent to circle office room. Two windows and one door is to the room. Police had brought dummy persons before she entered in the room. She did not select dummy person as it was not possible for her. She is not aware whether it is mandatory to see the accused before selecting the dummy person. Dummy persons are different in height, complexion looks and age of accused. When she entered in the identification room she met dummy persons and investigating officer. She did not leave the room till completion of identification parade. She did not meet the witnesses before

entering the room of identification parade. She has not assigned any reason why she has not select independent person as panch. Accused were brought in handcuffed position.

14. PW-10 Dr. S.M. Chavan conducted post-mortem on the dead body of Sudhakar. He has referred to the injuries on the person of deceased in column No.17 of post-mortem report. He also examined internal injuries. He stated that all the injuries mentioned in column No.17 are anti mortem. The age of injuries are more than 24 hours. The injuries mentioned in the column No.17 are possible by weapon shown to him i.e. sickle. Injury Nos. 1,2,3,5,6,10,13,,15 and 16 are possible by sickle. Other injuries are possible by stone or due to rough service. He did not find any fracture injuries. If sickle or stone is used with full force then there is chance of fracture of bones. If sharp side of sickle is used it will create particular pattern of injury. He has not mentioned the pattern or shape of injuries.

15. PW-11 Ashok Sukhdev Rahate was API attached to Aarey Police Station. He was on duty as P.S.O. on 17th October,

2011. He received information that one person is lying in injured condition. He made station diary entry and proceeded to the spot. The spot was situated near open ground. Injured was removed to hospital. He was declared dead. Wife of the deceased was present in hospital. She lodged the report against accused in the hospital. The offence was registered under Sections 302, 120(B) r/w 34 of IPC. He collected the information and copy of ADR. In the ADR no name of the offender was mentioned. Dead body was forwarded for post-mortem in ADR inquiry. Inquest Panchnama was recorded during the inquiry of ADR. At the time of inquest Panchnama he did not receive crime number and have not collected the information for the same. Till drawing the inquest panchnama cognizable offence was not revealed. When he left the Police Station on 17th October, 2011 dead body was lying at the spot. Complainant has not stated that there was strained relationship with the accused. Name of Surekha was not disclosed by any witnesses. He made inquiry with her on the same day at the spot and she has narrated the incident on 17th October, 2011. He has reduced the same in the writing on the spot itself. PW-13

Ashok Pandurang Kadam was attached to Aarey Police Station. Investigation was handed over to him on 18th October, 2011. He arrested 3 accused on 18th October, 2011. Accused No.2 made statement about incriminating articles on 21st October, 2011 and accordingly sickle was recovered from bushes in the forest. On 24th October, 2011 accused No.1 made the statement about incriminating article and sickle from bushes of bamboo was recovered from him. On 29th October, 2011 accused No.4 made a statement that he will show the place where he concealed incriminating articles. Sickle and shirt was recovered at his instance from bushes. All the incriminating articles were forwarded for chemical analysis on 20th October, 2011 vide forwarding letter at Exh.62. On 8th November, 2011 he forwarded other articles to chemical analyzer vide forwarding letter at Exh.64. On 3rd November, 2011 he issued letter to Tahsildar office for holding the identification parade of the accused. He recorded supplementary statement of witnesses regarding identification parade. In the cross examination he stated that deceased was charge-sheeted in various offences. He was on record as a criminal. As per the guidelines of the High

Court all the parades are to be held in jail. There was no hurdle in holding parade in jail. The identification parade was held in Tahsil office by obtaining order of Court. As per his decision identification parade was held in Tahsil Office. PW-14 was attached to Aarey Police Station. He was deputed in store department of the Police Station. He received sealed bags on 28th October, 2011, 29th October, 2011, 2nd November, 2011 and 8th November, 2011. He forwarded the same to C.A.

16. The prosecution is also relying upon the C.A. report in respect to the articles forwarded for examination. Exh.39 is the C.A. report dated 30th October, 2012 in respect to the Koyata and Full Shirt. The result of analysis is that Koyata was stained with blood and full shirt is also stained with blood. The species origin on both the articles was human but the ABO grouping on both the articles was inconclusive. C.A. report Exh.40 dated 30th October, 2012 was in respect to the articles forwarded for analysis. Exh.1 stone was stained with blood, Exh.2, 3, 4 and 6 i.e. half Shirt, Sando baniyan, full pant and pair of socks were soaked with blood. Exh.5 underwear had blood stains. Exh.7 Helmet, Exh.8 leather belt, Exh.9 Red shirt, Exh.10 Broken

helmet, Exh.11 broken blade of sickle, Exh.11A wooden handle of sickle, Exh.12 shoe. Exh.13 liquid in glass bottle were stained with blood. Exh.14 earth was mixed with blood. Exh.16 half pant has moderate blood stains. Exh.17 half shirt has moderate blood stains. No blood was detected on earth. The ABO grouping on Exh.1 to 11A was A group and Exh.12 to 14 was inconclusive and Exh.16 and 13 it was 'A' Group. Exh.41 is C.A. report dated 30th October, 2012 in respect to the articles such as half T-shirt, full shirts, koyata and sickle. Exh.1 was stained with blood. Exh.2 and 3 had moderate blood stains. Exh. 4 and 5 had blood stains on blade. The species of origin and ABO grouping of half T-shirt, full T-shirt was of A group and the grouping on koyata and sickle was inconclusive. The C.A. report in respect to the blood labeled Sudhakar Reddy showed that blood of Sudhakar Reddy was not suitable for blood grouping and the blood on clothes of Sudhakar cannot be determined as results are inconclusive. C.A. report dated 10th September, 2012 at Exh.76 in respect to blood in phial labeled Anna Durai @ Tata Ramswami Harijan (Accused No.4) and nail clippings of accused No.4 is that the blood was unsuitable for clipping and no blood

or tissue matter was detected in nail clippings. Exh. 77 is the C.A. report in respect to blood in a phial labelled Shashikumar Ramswami Harijan (Accused No.1) and nail clippings of accused No.1. The result showed that no blood was detected in nail clippings and the blood was unsuitable for grouping. Exh.78 is the C.A. report dated 17th July, 2012 in respect to blood in a phial labelled Babu Subramanyan Harijan (Accused No.2) and nail clippings of accused No.2. The result indicated that no blood was found in the nail clippings and the blood was unsuitable for blood grouping. Exh.79 is the C.A. report dated 17th July, 2012 in respect to blood in phial labelled Meghraj Harijan (Accused No.3) and nail clippings of accused No.3. The result of analysis were that no blood was detected in nail clippings and the blood was not suitable for grouping.

17. On analyzing the evidence as above we are of considered opinion that on several counts the version of prosecution witnesses is required to be rejected. The accused is entitled for benefit of doubt. The infirmities in evidence are of such nature that it is difficult to come to the conclusion that the accused were responsible for committing murder of deceased

Sudhakar Reddy beyond all reasonable doubt. The evidence suffers from contradictions and omissions. The evidence of eye witnesses does not inspire confidence. The frequent variation in the version of the eye witnesses creates doubt about their credibility. The identification of the accused is a factor which goes to the root of the matter as the burden was on the prosecution to establish that the accused were perpetrators of crime. The test identification parade conducted by PW-8 suffers from serious discrepancies. It is not in accordance with the legal norms. It is not in accordance with the High Court Criminal Manual.

18. PW-1 is the complainant. She is the wife of deceased. She has referred to the previous quarrel and the lodging of complaint on account of dispute with the accused. However, nothing is placed on record to substantiate the said fact, she is not eye witness to the incident. PW-2 is the sister of PW-1. She had proceeded to the spot along with PW-1, after learning about the assault on the deceased. However, PW-1 could not reach the spot as she was unconscious and brought back to her residence. PW-2 is also not an eye witness to the

incident. She reached the spot, she saw deceased in an injured condition. The deceased could not speak to her. Thus, the deceased had not disclosed to her the names of the assailants. PW-1 has stated that after regaining consciousness she came to know about names of the assailants through her sister PW-2. However, this was an omission as it does not form part of her complaint. From evidence of PW-2 it is apparent that she was not aware names of accused. She also does not say that she had disclosed the names of the assailants to PW-1. PW-2 has stated that she do not have any documents to show that complaints were lodged by both sides against each other. Thus as far as enmity is concerned except vague statements by PW-1 and PW-2, there was no evidence to corroborate the same. It is also pertinent to note that in the cross examination of both these witnesses, they were asked whether the deceased had any criminal record which was totally denied by them. The evidence of the investigating officer however categorically mentions that the deceased had a criminal record. PW-3 and PW-6 were alleged eye witnesses to the incident. Their evidence is not trustworthy. There was one more eye witness to the incident

namely Jokhan Raj Saroj who has not been examined by the prosecution.

19. PW-3 is the alleged eye witness to the incident. She proceeds with her version that the accused are not known to her. The description of the assailants was given by her. In the cross-examination, however, she stated that she knows all the four accused. The question which arises is what was necessity of holding test identification parade if she was knowing the accused. Why she did not disclose the names of the accused to the police. Subsequently she stated that prior to incident the accused were not known to her. Again the question which arises for consideration is then how she came to know the names of accused or how she came to know the accused. It is pertinent to note that PW-3 did not inform Police that she disclosed the name of Sudhakar as injured. The contents of her statement were read over to her. According to her the deceased was not known to her and therefore she did not disclose his name to the police in her statement. However, on verifying the statement of the witnesses recorded by the police during the investigation, it is apparent that at several places she has

referred the name of Sudhakar Reddy. She stated that her statement was recorded either on 19th or 20th. It is pertinent to note that the incident had occurred on 17th October 2011. She had not come forward to inform the incident to the police or any other person immediately after the occurrence of incident. She further stated that her supplementary statement was not recorded after the identification parade. In respect to test identification parade her evidence deserves to be rejected for more than one reason. She has stated that the accused were handcuffed at the time of test identification parade. The accused were brought by police. Dummies were brought by the police. Dummies were not handcuffed. From her evidence it can be seen the suspects could be distinguished as they were handcuffed. She has not mentioned that while identification their handcuffs were removed. It can be also seen that arrangement for dummies was made by the police and not by Tahsildar who conducted test identification parade. She categorically stated that dummies were not handcuffed. Accused were standing in the room meant for identification parade. It was easy to distinguished between the accused and the

dummies. She has further stated that PW-8 did not ask her whether she had seen accused or their photographs after the incident or before the parade. PW-8 also did not ask her whether the police had shown her the accused at any point of time. She also stated that all the persons were having different looks. From this version it is apparent that the test identification parade was not conducted in accordance with the settled legal norms. The Tahsildar, who conducted the parade has not adhered to the procedural requirement for conducting test identification parade. Apart from that such parade cannot be accepted as there was clearly distinction between the accused and the dummies. One of the most important requirement while holding the identification parade is that the suspects and dummies should be as far as possible similar in appearances. This witness has categorically stated that there were dissimilarities in their appearance. According to her she is the eye witness to the incident. The prosecution case is that PW-2 had rushed to the spot after learning about the incident. However, this witness has not mentioned that she met PW-2 at the place of incident. The record would also indicate that the

supplementary statement of this witness was recorded on 19th November 2011. In the said statement she had stated that she had identified three suspects viz. Accused Nos.2, 3 and 4. Thus, the evidence of this witness does not inspire confidence and the conviction cannot be based on the evidence of this witness.

20. PW-6 is the another eye witness to the incident. Her evidence proceeds with the assertion that the assailants were not known to her. However, in the cross-examination, she deposed that she knows the accused by their names. Thus, her evidence is absolutely contradictory to her version in the statement before the police and her examination-in-chief. She also contradicts her in examination in chief and cross examination. She stated that the house of the accused is 20 minutes away by walk. She was using the road in front of house of accused and hence she knows them. If this was the fact then question which arises is why she did not disclose the names of assailants. She stated that earlier she was not knowing the names of accused, hence she did not disclose the names of accused. Her version is shaky. It is not trustworthy. At one point of time she said that since she was using the road in front

of the house of accused she knew accused and subsequently she stated that at the time when the statement was recorded she was not knowing the names of accused. Her evidence also disclose that the police came at the spot after the victim was assaulted on 17th October, 2011. Since this witness was purportedly an eye witness, she was present at the spot. Surprisingly, she did not come forward to disclose about the incident to the police who visited the spot. She did feel it is necessary to inform the police about the incident. She also stated that she do not know the women who came on the spot. It is relevant to note that according to the prosecution PW-2 had visited the spot after the incident. Her evidence reveals that woman who came to the spot made inquiry with Sudhakar about the name of assailants. However, this witness did not inform the said women the names of assailants. She had participated in the test identification parade conducted on 19th October 2011. Thus, the infirmities which were prevailing in the test identification parade as stated above would also affect the testimony of this witness. Thus, no reliance could be placed on the evidence of PW-6.

21. PW-24 acted as panch witness for recovery of weapon at the instance of accused No.2 has admitted in the cross-examination that the weapon was recovered from the open place which was accessible to all. PW-5 who acted as panch witness for recovery of weapon and shirt at the instance of accused no.4 has also admitted that it was recovered from the open place which was accessible to all. This witness has also stated that the accused and deceased were known to him. PW-2 the panch witness for recovery of clothes at the instance of accused no.3 has deposed that the police had informed him that the accused will produce the clothes in his presence and he has to watch the same. It is relevant to note that the police had already assumed that the accused would produce the article in his presence. It is pertinent to note that the accused has made memorandum statement stating that he is willing to discover the article. It is also revealed from his evidence that the accused Nos.3 and 4 were known to him. PW-9 is the panch witness for recovery of weapon at the instance of accused No.1. He stated that sickle which was recovered had blood stains. However, the said fact is not appearing in the panchanama. He

has also stated that the police had informed him that he has to act as pancha for recovery of weapon at the instance of the accused. He was also informed that accused will give statement and lead them to place and produce the vehicle. This is completely contrary to the requirements of Section 27 of the Indian Evidence Act, 1872. PW-12 panch witness for the bike from the open place. There were no blood stains on the bike. It is relevant to note that this bike was not shown by any accused. It was not recovered at the instance of any of the accused. The police when already present at the place where bike was parked. This witness also stated that finger print expert was not called in his presence and the blood on the said bike was not collected with cotton.

22. PW-8 the Tahsildar, conducted the test identification parade without following the procedural safeguard. The manner in which the test identification parade was conducted completely falsifies the evidence of identification of suspects (accused). Parade was conducted in the Tahsildar's office room and not in the jail. There is no plausible explanation as to why the parade was not conducted in the jail. She selected 12

persons as dummies. She formed two groups, group-A and group-B. From her evidence, it is apparent that witness No.1 Jokhan Raj Saroj did not identify accused Nos.1 and 3 in the identification parade. PW-3 Surekha Pujari identified one of the dummy as accused. Accused No.1 was standing in group-A and accused No.3 was in group-B. Thus, she could not identify any accused from Group-A and resultantly she has not identified accused No.1 in the parade. However, she identified the accused No.3 who was standing in group-B. PW-6 has identified accused Nos.1 and 3 who were standing in group-A. In the second step, while conducting test identification parade, accused Nos.2 and 4 were standing in group A and group-B. They were allegedly identified by both eye witnesses. PW-8 deposed as per notes with her, however she declined to produce them. There are various discrepancies which would affect the test identification parade which are apparent from the evidence of this witness, which can be summarized as follows.

- (i) The Tahsil office is public office which is accessible to all.
- (ii) She was not aware of the judgment of 1995 delivered by

the Bombay High Court, wherein it was directed that the identification parades are to be conducted in jail.

(iii) Investigating Officer had advised her to hold test identification parade in jail. The Investigating Officer had also appraised her about the order of High Court. There was no difficulty to hold parade in jail. She prepared rough notes at the time of conducting the test identification parade.

(iv) She had not seen the accused before she saw dummy.

(v) Police brought dummy. She did not select dummy.

(vi) She is not aware whether it is mandatory to see accused before selecting dummy.

(vii) Dummy persons were different in height, complexion, age etc. *vis a vis* the accused.

(viii) She did not meet witnesses before entering into room of identification parade.

(ix) She cannot assign any reason why she has not selected independent persons as panch witness.

(x) Accused were brought handcuffed.

23. We have already referred to the infirmities qua identification of accused appearing in the evidence of PW-3 and PW-6. The defects apparent from the evidence of PW-8 completely discards the evidence of test identification parade. The learned counsel for the appellant had relied upon the decision of division bench of this Court delivered in Criminal Appeal No. 199 of 2002, in the case of ***Ziya-ul-haq Shaikh and Others Vs. State of Maharashtra*** dated 17th October 2006. The parade in the said case was conducted in the office of Tahasildar. Similar witnesses for holding the parade were selected before the accused were seen by the Magistrate. Criminal manual of this Court and the Rules provided for holding test identification parade in the High Court Criminal Manual were not followed. The object of holding the test identification parade in the jail is to put an end to the practice of holding the parade at Police Station and to enable the police to wash the stigma of showing suspects prior to their identification. It is easy in the jail to find persons similar to suspects sought to be put for identification. Such similar persons

have to be mixed with the suspect at the time of identification. The identification in jail would not only actually be free from any taint or suspicion but equally importantly it would also appeared to be so. We have noted above the approach of PW-8 while conducting identification parade.

24. From the evidence of the Investigating Officer PW-11 it appears that, the wife of the deceased lodged the report against the accused in the hospital. ADR was registered before the registration of offence. In the ADR name of offenders was not mentioned. The dead body of the deceased was sent for post mortem under ADR. Inquest panchanama was recorded under ADR. It is necessary to note that after the incident of assault. PW-2 had rushed to the spot. She had seen the victim lying in an injured condition. She enquired with the injured about the assailants. However, he could not speak. The police had arrived at the spot. PW-3 and PW-6 were also around the spot at the time of incident. PW-2 returned home and thereafter rushed to hospital along with PW-1. It is surprising that the inquiry proceeded under the ADR. The post mortem and inquest panchanama was conducted in the enquiry under ADR. This

witness also stated that name of Surekha was not disclosed by any witnesses. Looking into the nature of the evidence of PW-3 and PW-6 it is clear that these are got up witnesses and their version is tainted. They did not come forward immediately to disclose the incident to police. Their statements were recorded after two days from the day of incident. PW-11 has also stated that he made inquiry with PW-3 on the same day at the spot and she narrated the incident on 17th October 2011. The question which raises suspicion is that why the statement of PW-3 was not recorded on 17th October 2011 itself and why FIR was not recorded immediately after incident. PW-13 has deposed that deceased was charge-sheeted in various offences and he was on record as criminal. This goes contrary to the version of PW-1 and PW-2. It is clear that they had deliberately suppressed this fact and tried to attribute motive to the accused that there was enmity between them and complaints were lodged against each other. The evidence of CA report as stated above does not support the prosecution to prove the guilt of the accused beyond doubt. Considering all these aspects we do not find that the prosecution has succeeded in proving the charge of murder

against the appellant. The judgment of the trial Court is therefore erroneous and deserves to be set aside with consequential acquittal of the appellant.

25. Hence, we pass the following order :

ORDER

- i) Criminal Appeal No. 730 of 2013 is allowed.
- ii) The Judgment and order dated 25th June, 2013 in Sessions Case No.39 of 2012 whereby the sentence and conviction was awarded by the learned Additional Sessions Judge, Gr. Bombay, is quashed and set-aside. The appellants be set at liberty forthwith, if not needed in any other case.
- iii) The appeal stands disposed of accordingly.

26. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(PRAKASH D. NAIK, J.)

(PRASANNA B. VARALE, J.)