

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPEAL NO.580 OF 2008

State of Maharashtra,
Police Station Babhulgaon.

. . . **APPELLANT**

..VERSUS..

1. Rajesh s/o Dattuji Kumbhekar,
Aged about 20 years,
2. Dashrath s/o Dharma Debur,
Aged 21 years,
3. Shrawan s/o Dharma Debur,
Aged 19 years,
4. Ravi s/o Wasudeo Debur,
Aged 19 years,
5. Raju s/o Dharma Debur,
Aged 25 years,
6. Jitendra s/o Mahadeo Debur,
Aged about 24 years,
7. Mahadev s/o Udebhan Debur,
Aged about 50 years,
8. Vijay s/o Shankar Debur,
Aged about 28 years,

(As per Court's Order
dtd. 07/09/18 R.no.8 is
deleted.)

9. Dharma s/o Suryabhan Debur,
Aged about 54 years.
All resident of Yawali, Tq.
Babhulgaon, Distt. Yavatmal.

. . . **RESPONDENTS**

Shri S.S.Doifode, A.P.P , for the appellant/State.
Ms. Sonali Saware (Gadhawe), Advocate for the respondent nos.1
to 4.
Shri Sumit Joshi, Advocate for the respondent nos.5 to 7 and 9.

**CORAM : Z. A. HAQ AND
AMIT B. BORKAR, JJ.
DATED : 26.11.2020.**

JUDGMENT (PER : AMIT B. BORKAR, J.) :

1. Through this appeal, the appellant - State of Maharashtra, challenges the judgment and order passed by Adhoc Additional Sessions Judge, Yavatmal, in Sessions Case No.113 of 2006 dated 14.05.2008, thereby acquitting all the respondents of the offences punishable under Sections 147, 148, 302 and 307 read with Section 149 of the Indian Penal Code and Section 37 (1) punishable under Section 135 of the Bombay Police Act.

2. In short, the prosecution case runs as under:-

FI.R., dated 24.08.2006 filed by Informant - Mangala (PW 1), who is the wife of Mahadev (deceased), contends that her husband (deceased) was serving in M.S.R.T.C. Alongwith the informant, parents of the informant and her two brothers namely Dnyaneshwar and Bhayya were also residing. Brother-in-law of the informant is running pan-stall, which is managed by one Sunil. On

24.08.2006 at around 8.00 a.m. when the informant was in her house, the accused nos.1 to 6 went to the said pan-stall, which is situated in front of her house. Sunil was present at the pan-stall. The accused nos.1 to 6 purchased pouches of gutkha and when Sunil demanded the price of gutkha, accused nos.1 to 6 raised quarrel with Sunil. Therefore, one Jitendra filed report in Police Station in the name of Sunil.

3. At about 3.00 p.m. on 24.08.2006 Mahadev - husband of informant - Mangala (PW 1) returned to the house. When he came to know about the incident happened at about 8.00 a.m., he went to the place of the accused and asked why they raised quarrel with Sunil and then returned home. Thereafter at about 4.00 p.m. on 24.08.2006, all nine accused came in front of the house of the informant and asked Mahadev (deceased) and Bhayya as to why they had come to their house and abused. When Mahadev and Bhayya came outside the house, the accused abused and assaulted both of them using sticks. Accused no.2 - Dashrath assaulted Mahadev by using the sword on his head and killed him and also caused hurt to Bhayya.

4. The complainant - Mangala (PW 1) filed F.I.R., at 5.00 p.m. on 24.08.2006, which was registered as Crime No.125/2006

and the investigation started. On the same day, inquest, spot and seizure panchanamas of simple earth, earth containing blood were prepared and the dead body of Mahadev was referred to the Medical Officer Dr.Sute (PW 10) for carrying out post-mortem. The post-mortem report was prepared by Dr. Sute (PW 10), which was collected by the Investigating Officer Shri Fulpagar (PW 11). The Investigating Officer recorded statements of witnesses including eye-witnesses on 25.08.2006 and 26.08.2006. The Investigating Officer referred all the accused for medical examination and seized weapons alleged to have been used by the accused and also seized clothes of the accused alleged to have been worn by them at the time of offence under panchanamas on 26.08.2006. The Investigating Officer seized blood sample of all the accused on 26.08.2006 and sent muddemal to the Chemical Analyst by letter dated 26.9.2006. The Investigating Officer completed the investigation and filed charge-sheet in the Court of the Judicial Magistrate First Class, Babhulgaon.

5. The case was committed to the Court of Sessions in the usual manner. In the trial Court, the appellants were charged under Sections 302, 147, 148 and 149 of the Indian Penal Code. They pleaded not guilty to the said charges and claimed to be tried.

6. During the trial, in all the prosecution examined eleven witnesses. Three of them namely Mangala Borkar (PW1), Siddheshwar Parsude (PW 2) and Sushila Parsude (PW 4) were examined as eye-witnesses. In defence, no witness was examined.

7. After recording the evidence adduced by the prosecution; perusing the exhibits proved by the prosecution and the defence; and hearing the learned Advocate for the accused and learned A.P.P. for the State, the trial Judge acquitted all the accused. Hence, the State has filed the present appeal.

8. The respondent no.8 had died during pendency of the present appeal, hence appeal stands abated against the respondent no.8.

9. We have heard Shri S. S. Doifode, learned Additional Public Prosecutor for the Appellant/State, Ms. Sonali Saware (Gadhawe), learned Advocate for the respondent nos. 1 to 4 and Shri Sumit Joshi, learned Advocate for the respondent nos.5 to 7 and 9. We have also perused the depositions of the prosecution witnesses; the material exhibits tendered and proved by the prosecution; the statements of the respondents-accused recorded

under Section 313 of the Code of Criminal Procedure; and the impugned judgment.

10. Before analysing the evidence available on record and going into legal aspects of the same, we feel it appropriate to first deal with the contentions advanced by the learned Advocate on either side.

11. Shri S. S. Doifode, learned A.P.P., for the appellant strenuously urged that flimsy reasons for acquittal have been assigned by the learned Trial Judge in the impugned judgment. He urged that the said reasons can be stigmatised as being grossly unreasonable. He faulted disbelieving of evidence of the three eye-witnesses by the Trial Court as being manifestly unreasonable. He urged that the view of the learned Trial Judge in rejecting their testimonies cannot be defended as even a possible view. He urged that the prosecution had succeeded in bringing home guilt of the respondents in respect of all the charges and we should reverse the impugned judgment of acquittal. Shri Doifode, learned A.P.P., on behalf of the appellant strenuously urged that the view of acquittal taken by the Trial Court is not a possible view. In his contention, it is a wholly erroneous view; in fact a perverse view. He contended that this being so, the impugned order of acquittal cannot stand. He

strenuously urged that there are some clinching circumstances, which are a guarantee of the truthfulness of the prosecution case and weightage is not given to them by the learned Trial Judge. He firstly contended that the prosecution case is backed up by the evidence of three eye-witnesses namely Mangala (PW 1), Siddheshwar (PW 2) and Sushila (PW 4). He strenuously urged that the account given by Mangala (PW 1), Siddheshwar (PW 2) and Sushila (PW 4) is not only corroborated by the nature of injuries found on the body of Mahadev by Dr. Sute (PW 10) but, also by the circumstance of recovery of the blood of Mahadev (deceased) on the clothes of accused nos.2 and 4. He further urged that if the first leg of the prosecution story stated by Mangala (PW 1) is correct, as it is in his contention on account of the said circumstance, then there is no difficulty in accepting that Siddheshwar and Sushila must have seen the incident, which took place adjacent to their house. He also urged that the manner and place of the assault on the deceased is also probablised by their evidence.

12. Ms. Sonali Saware (Gadhawe), learned Advocate appearing for the respondent nos.1 to 4, submitted that alleged eye-witnesses i.e. Mangala (PW 1), Siddheshwar (PW 2) and

Sushila (PW 4) have not seen anything and have deposed falsely against the accused. Managala (PW 1) being the wife of deceased Mahadev is an interested witness, her evidence cannot be relied upon to convict all accused. She argued that there is material inconsistency in the testimonies of eye-witnesses. She invited our attention to paragraph nos.33, 40, 43 and 53 of the impugned judgment and submitted that the Trial Court has correctly appreciated the material on record and acquitted all accused. She submitted that material inconsistencies in the testimonies of Mangala (PW 1), Siddheshwar (PW 2) and Sushila (PW 4) are to the extent that Mangala (PW 1) has stated that the accused nos.2 and 4 had given one blow of stick and one blow of sword but, Siddheshwar (PW 2) and Sushila (PW 4) have stated that the accused nos.2 and 4 had given two blows of the stick and two blows of the sword. It is submitted that it is also not mentioned in the F.I.R., that Siddheshwar (PW 2) was sitting alongwith Mahadev at the relevant time and it is not stated in the F.I.R. as to who had given which blow, and therefore the judgment of acquittal by the learned Sessions Judge is a possible view and no interference is called for.

13. After conclusion of the arguments, Ms. Sonali Saware, learned Advocate appearing for the respondent nos.1 to 4 submitted that as per instructions received by her, the respondent no.4 was below 18 years of age on the date of commission of alleged offence. She thereafter filed Criminal Application No.453/2020 under her own signature annexing attested copy of birth certificate dated 14.07.2012 and attested copy of School Leaving Certificate dated 13.12.2006. Relying on the said documents, she submitted that the appellant, on the date of offence alleged against him, was a juvenile in terms of Section 2 (k) of the Juvenile Justice (Care and Protection of Children) Act, 2000, wherein it is provided that a 'juvenile' or a 'child' means a person who has not completed eighteenth year of age, and he has to be dealt with under the provisions of The Juvenile Justice (Care and Protection of Children) Act, 2000. She submitted that Section 7-A(1) of the Act provides for the procedure to be followed when the claim of juvenility is raised before any Court and Section 7-A(2) provides that if the Court finds a person to be juvenile on the day of commission of offence, it shall forward the juvenile to the Board for passing appropriate order and the sentence, if any, passed by a Court shall be deemed to have no effect. She submitted that Section 7-A(1) of the Act provides for the procedure to be followed when the claim of

juvenility is raised before any Court and Section 7-A(2) provides that if the Court finds a person to be juvenile on the day of commission of offence, it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any passed by a Court shall be deemed to have no effect.

14. We have considered the averments in Criminal Application and attested copies of the documents submitted on behalf of the respondent no.4. We have gone through Section 7A of the Juvenile Justice (Care and Protection of Children) Act of 2000 and Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules 2007 (for short “Rules of 2007”). The procedure to be followed under the Juvenile Justice Act in conducting an inquiry is laid down in Rule 12 of the Rules of 2007. The Apex Court has time and again held that all Courts/Juvenile Justice Boards and Committees functioning under the Act are duty bound to seek evidence by obtaining certificates mentioned under Rule 12 (3)(a) (i) to (iii) of the Rules of 2007. It has been laid down by the Apex Court that in such situation, the Courts act as *parens patriae* because they have a kind of guardianship over minors, who from their legal disparity stand in need of protection. It is held that once the Court/Board, following the above mentioned procedure, passes an order, that order shall be conclusive proof of the age as regards

such child or juvenile in conflict with law. We, therefore, are of the view that the claim of the respondent no.4 about his juvenility needs to be considered by the Juvenile Justice Board and once the report is received about the claim of the respondent no.4, the case of the respondent no.4 can be considered by this Court. We, therefore, are sending claim of the respondent no.4 about his juvenility to Juvenile Justice Board, Yavatmal.

15. Since we have heard submissions of all the parties about role of accused other than the respondent no.4, we are proceeding to decide the present appeal as against those respondents-accused.

16. At the very outset, we would like to state that we are seized of the matter in an appeal against acquittal. It is well-settled that unless appreciation of evidence is clearly unreasonable or the impugned order of acquittal is vitiated by some illegality and/or perversity this Court does not interfere in an appeal against acquittal. It is equally well-settled that if the view of acquittal is a possible view then this Court does not interfere in spite of the fact that it may feel that had it been the Trial Court, it may have taken a different view. We are fortified in our view by the decisions of the Apex Court reported in **1970 (2)SCC 450 : AIR 1971 SC 66, Khedu**

Mohton and others vs. State of Bihar and (1987) 2 SCC 529 : AIR 1987 SC 1083, Tota Singh and another vs. State of Punjab. We also feel that in this connection, it would be pertinent to refer to the decision of the Apex Court reported in **(1995) 2 SCC 486, *State of Punjab vs. Ajaib Singh***, wherein in para 7, Their Lordships of the Apex Court observed thus:

“We agree that this court is not precluded or the court hearing the appeal against acquittal is not prevented from examining and reappreciating the evidence on record. But the duty of a court hearing the appeal against acquittal in the first instance is to satisfy itself if the view taken by acquitting court exercising appellate jurisdiction was possible view or not. And if the court comes to conclusion that it was not, it can on reappreciation of evidence reverse the order.”

17. The evidence on the basis of which prosecution presses for conviction of the respondents can be classified under two heads:

- (a) ocular evidence in the form of testimonies of Mangala (PW 1), Siddheshwar (PW 2) and Sushila (PW 4); and
- (b) recovery of incriminating clothes of the respondent no. 2 having the blood of deceased Mahadev.

18. We now propose to examine the evidence of Mangala (PW 1). In short, Mangala (PW 1) stated therein that on 24.08.2006, the accused no.4 assaulted Mahadev by stick on his head and deceased Mahadev fell down on the ground, accused no.2 - Dashrath assaulted Mahadev using a sword, on his head. Mangala stated that accused no.2 - Dashrath took Mahadev behind the house of Ramrao by pulling him. It is pertinent to note that Mangala (PW 1) has stated that the accused no. 2 assaulted Mahadev, she has not stated about number of blows. In cross-examination, she stated that Mahadev died in front of her house and the accused no. 2 took him behind the house of Ramrao by pulling. Mangala stated that she had no idea about what happened with Mahadev and Bhayya behind the house of Ramrao and she had asked Bhayya when he returned to her house as to how the incident took place. This statement in cross-examination is relied upon by the accused to urge that this statement amounts to admission on the part of Mangala (PW 1) that she had not witnessed the incident. We do not agree with the said submission on behalf of the accused. Mangala (PW 1) stated that she could not see what happened behind the house of Ramrao. Mangala (PW 1) has stated that assault on Mahadev (deceased) took place before he was pulled behind the house of Ramrao. Mangala (PW 1) has also stated that Mahadev

died in front of her house. She has specifically denied suggestions that she did not witness the incident of Dashrath - accused no.2 assaulting Mahadev using a sword.

19. We have gone through the evidence of Mangala (PW 1) with extreme caution because, she is the wife of Mahadev (deceased) and, therefore, is the interested/related witness. We have no reservations in observing that her evidence inspires implicit confidence.

20. Let us now consider the law on evidentiary value of the related witness. Way-back in 1953, commenting on the aspect, Justice Vivian Bose in *Dalip Singh v. State of Punjab, AIR 1953 SC 364* observed as under:

“25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in Rameshwar v. The State of Rajasthan AIR

1952 SC 54 at p.59. *We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel”.*

26. *A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person.....”*

21. In this context, it was observed by Justice H.R. Khanna in ***State of Uttar Pradesh v. Samman Dass, (1972) 3 SCC 201.***

“23.....It is well known that the close relatives of a murdered person are most reluctant to spare the real assailant and falsely involve another person in place of the assailant.....”

22. Again in a recent decision of the Supreme Court, in ***Khurshid Ahmed v. State of Jammu and Kashmir, (2018) 7 SCC 429*** on the issue of evidence of the related witness, Hon’ble Apex Court has laid down that :

“31. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the

contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused (See Harbans Kaur v. State of Haryana)”

23. The above precedents make it amply clear that the testimony of the related witness, if found to be truthful, can be the basis of conviction and we have every reason to believe that Mangala (PW 1) was present at the spot and identified the accused no. 2 with sword in his hand.

24. We have no reservations in observing that on very flimsy grounds, the learned Trial Judge has rejected the evidence of the Mangala (PW 1), which in our view is corroborated by the medical evidence and to which assurance is lent by the evidence of Siddheshwar (PW 2) and Sushila (PW 4).

25. Siddheshwar (PW 2), who is the neighbour of Mahadev (deceased) was sitting alongwith Mahadev at the time of the incident. Siddheshwar (PW 2) being neighbour and sitting with the deceased at the time of the incident, is the natural witness. The accused no.2 assaulted Mahadev on his head by using a sword. The accused no.2 assaulted Mahadev using a sword on the upper and lower side of the right ear. The testimony of Siddheshwar

(PW 2) is consistent with the testimony of Mangala (PW 1). Siddeshwar (PW 2) also stated that at the time of the assault, Mangala (PW 1) rushed also to the spot of the incident to rescue Mahadev (deceased) . The examination of Siddeshwar (PW 2) has not been shaken by the defence, except the statement that the police seized a sword from the spot of the incident. Siddeshwar (PW 2) denied the suggestion that he did not witness the incident.

26. Sushila (PW 4) who is also neighbour of Mahadev (deceased) is natural witness. Sushila (PW 4) also stated that the accused no.2 assaulted Mahadev by using sword near his right ear. She stated that remaining accused came at the spot after Mahadev fell on the ground. She denied the suggestion that she did not witness the incident.

27. It is also pertinent to mention that all the three eye-witnesses are natural witnesses of the incident inasmuch as Mangala (PW 1) is the wife of the deceased; at the time of the incident Siddeshwar (PW 2) was sitting with the deceased; Sushila (PW 4) was the neighbour of the deceased.

28. In our view all three eye-witnesses had no difficulty in recognising the respondent no.2 , who was known to them since

before. It should also be borne in mind that the respondent no. 2 and these three eye-witnesses belonged to the same village. The Supreme Court in the decision reported in *AIR 1965 SC 712, Kirpal Singh v. The State of Uttar Pradesh* in para 4 has observed that, 'known persons can be identified by the timbre of their voice, gait etc'.

29. The autopsy on the corpse of Mahadev was conducted on 25.08.2006, by Dr. Sute (PW10). Dr. Sute (PW 10) found that in all, Mahadev had suffered six ante-mortem injuries, their break-up being thus:-

'Three lacerated injuries on the head and three contusions'.

30. The lacerated injuries were over the head of Mahadev on right parietal eminence. Dr. Sute (PW 10) found the following injuries on the person of Mahadev:

1. Laceration was present over head on right parietal immence measuring 4 cm x 1 cm in size situated 4 cm above right ear. The wound was irregular in shape and margins, bone deep, fresh oozing of blood;

2. Laceration was present over head over left parietal region, measuring 6 cm x 1 cm in size. Irregular in shape and margins,

bone deep, oozing of blood from the wound. It was situated 8 cm above left ear and 13 cm away from left eye brow;

3. Laceration was present below mastoid process 1 cm behind right auricle, measuring 2 cm x 1.5 cm in size. Irregular in shape and margins, bone deep, margins are contused;

4. Contused abrasion was present 2 cm medial to right ear measuring 1 x 0.5 cm in size, vertical in direction associated with swelling;

5. Two linear contusions were present on the back measuring 7 cm & 6 cm in length respectively and 0.5 cm in breadth. 2 cm apart from each other, situated 6 cm lateral to midline;

6. Contusion was present on back of right shoulder 13 cm in length and 2 cm in breadth.

On internal examination, Dr. Sute (PW 10) found the following injuries:

Effusion of blood seen under the scalp over right parietal and left parietal occipital region.

Linear fracture present over skull vault extending from sagittal suture upto right temporal lane, 13 cm in length. Merisges are congested. Subdural haemorrhage and subarachnoid haemorrhage present over right parietal and left Pareto-temporo-occipital region. Wt. of brain = 1000 gm.

31. In the opinion of Dr.Sute (PW 10), Mahadev (deceased) died on account of the injuries to vital organ - head. Dr. Sute (PW 10) stated in the Court that the injuries, which were mentioned in the post-mortem report can be possible by the said sword, which was sent for query. We see no reason to reject this evidence of Dr. Sute (PW 10).

32. The learned Advocate for the respondent nos.1 to 4 urged that the medical evidence belies oral account furnished by Mangala (PW 1) because Dr. Sute (PW 10) admitted that the injuries nos.1 to 6 were not possible due to the sharp edge of the sword. It is true that in her cross-examination, she stated that all injuries to Mahadev (deceased) were not possible by the sharp object. But, in our view, her said statement in no way demolishes the evidence furnished by her. In her examination-in-chief referred to above, she stated that the injuries, which were mentioned in the post-mortem report could have been possible by the said sword, which was sent for query. In our view, the learned Trial Judge has not properly appreciated the medical evidence furnished by Dr.Sute (PW 10). It has come on record that only one side of the sword was sharp. There is no suggestion given by the defence to Dr. Sute (PW 10) that the injuries, which caused the death of Mahadev were not

possible by sword recovered by the prosecution. Dr.Sute (PW 10) in her evidence specifically stated that the injuries caused to Mahadev (deceased) were possible by the sword, which was sent for query. We have reflected over the submission of the learned Advocate for the respondent no. 2 and are constrained to observe that we do not find any merit in it.

33. The manner of the assault, which is contained in the F.I.R. lodged by Mangala (PW 1), and the evidence of Siddheshwar (PW 2), and Sushila (PW 4), before the trial Court is corroborated by the medical evidence. In this connection, it would be pertinent to refer to the F.I.R., which was lodged within one hour of the incident, and wherein there is a categorical averment that the accused no.2 - Dashrath assaulted Mahadev with the sword on his head. This is corroborated by ante-mortem injury nos.1 to 3 suffered by Mahadev (deceased), which was lacerated wound over the head on right and also left parietal immence behind right auricle. As mentioned above, manner of the assault contained in the F.I.R., has also been deposed to by these three eye-witnesses in their evidence before the Trial Court.

34. Assurance is lent to the claim of these eye-witnesses by the circumstance that F.I.R. of the incident was lodged very

promptly. As mentioned earlier, the incident is alleged to have taken place on 24.08.2006, at 4.00 p.m. and the F.I.R., wherein the respondents are named, was lodged after one hour i.e. at 5.00 p.m. on 24.08.2006. As mentioned earlier, in the said F.I.R., all the essential features of the prosecution case are mentioned. From the evidence of the informant, it appears that the Police Station, Babhulgoan, where the F.I.R. was lodged, was situated about 15 kms. from the place of the incident. Considering the circumstance that father of the informant went to the Police Patil of the village and called him at the spot of incident, and then the informant Mangala (PW 1), proceeded to the Police Station, Babhulgoan, and lodged the F.I.R., the F.I.R., in the instant case is certainly a prompt one. In our view, this prompt F.I.R., goes a long way in establishing the truthfulness of the prosecution case.

35. Criminal Courts attach great importance to the lodging of a prompt F.I.R. The same, substantially eliminates the possibility of embellishments and concoction in the prosecution case. In our view, the circumstance that within one hour of the incident, the name of the respondent no .2 coupled with his specific overt acts corroborated by the medical evidence, saw the light of the day in

the F.I.R., is a circumstance which implicitly shows that both the eye - witnesses saw the incident.

36. Assurance is also lent to the ocular account by the circumstance that on the place of the incident i.e. in front of Ramrao's house, the Investigating Officer Fulpagar found blood-stained earth. The said earth was sent to the Chemical Analyst who found the blood of 'A' group, the blood-group of the deceased, on earth. This establishes that place of the incident deposed by the three eye-witnesses was actually the place, where the deceased Mahadev was assaulted.

37. The circumstance that the blood of blood group "A" which was of Mahadev (deceased) found on the clothes of the respondent no .2 seized by the prosecution was by the Chemical Analyst (Exh.78) also goes against the respondent no. 2. We may rely on para 10 of the decision of the Apex Court reported in **(1991) 3 SCC 627, Khujji @ Surendra Tiwari v. State of Madhya Pradesh**, wherein Their Lordships have held that the finding of human blood on clothes of accused is a material circumstance which goes against accused.

38. For the said reasons, in our view, the learned Trial Judge acted in manifestly unreasonable manner in disbelieving the involvement of the respondent no .2 , in the crime. We are of the view that the learned Trial Judge is not justified in acquitting the respondent no. 2 for offence punishable under Section 302 of the Indian Penal Code, 1860. In our view, the act of the said respondent no. 2, fell squarely within the ambit of third clause of Section 300 of the Indian Penal Code, 1860 the breach of which, is punishable under Section 302 of the Indian Penal Code, 1860. Third Clause of Section 300 of the Indian Penal Code, 1860, provides that culpable homicide is murder, “if the act is done, with intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.” The Supreme Court in the time-honoured decision, reported in *AIR 1958 SC 465, Virsa Singh v. State of Punjab*, in para 12, has held that if the injury caused is the intended injury i.e. not accidentally caused and is sufficient to cause death in the ordinary course, the case would fall under third clause of Section 300 of the Indian Penal Code, 1860. The said decision of the Hon’ble Supreme Court is considered and followed by the Supreme Court in the case reported in *(1995) 1 SCC 326, State of Karnataka v. Vedanayagam*. This is apparent from the observations contained in para 4 of the

said judgment. In the instant case, the evidence of all the eye-witnesses is that respondent no. 2 intentionally inflicted blows on the head of the deceased Mahadev with a sword. The medical evidence in the form of the deposition of Dr. Sute (PW 10) is that the injuries suffered by Mahadev (deceased) on his head were possible by the recovered sword. We find opinion of Dr. Sute (PW 10) to be plausible because vital organ like head, is damaged.

39. We may straight away mention that we are not inclined to accept the evidence of recovery of weapons, on the pointing out of respondent no. 2. As per the testimony of the Investigating Officer, accused no.2 - Dashrath produced the sword and he seized it under panchanama at Ex.112, when accused no.2 - Dashrath was in custody but, Siddheshwar (PW 2) in his cross-examination in para 6 admitted that the police had seized the sword from the spot of the incident. This is a material contradiction about recovery of weapon and, therefore, we hold that recovery of weapon (sword) is not proved.

40. The Trial Court acquitted all the accused firstly, on the ground that there is contradictory evidence as regards the cause of injury. The Sessions Court recorded finding that Dr. Sute (PW 10) admitted in her cross-examination that all the injuries noted in the

post-mortem report were not possible by the sharp edge of the sword and might have been caused by a hard and blunt object. In our view, said reason for acquittal of accused no. 2 was unreasonable as Dr. Sute (PW 10) in her examination in chief specifically stated that the injuries caused to Mahadev (deceased) were possible by the sword referred in query. Therefore, we have no doubt that considering the nature of the injuries and that those injuries were possible by the blunt side of the sword, the finding recorded by the Trial Court in para no. 32 of its judgment that there is contradictory evidence of eye witnesses is unreasonable.

41. The Trial Court has also recorded finding that Mangala (PW 1) had asked Bhayya after the entire incident of assault was over, as to how the incident took place and the said question amounts to admission on behalf of Mangala (PW 1) that she had not witnessed the incident. As stated earlier, Mangala (PW 1), in her examination-in-chief, specifically stated that Mahadev died after being assaulted in front of her house. Mangala (PW 1) stated in her cross-examination that she did not know as to what happened behind the house of Ramrao where the body of Mahadev was taken after the assault on Mahadev. Once Mangala (PW 1) has stated that she did not know anything about the incident that occurred behind

the house of Ramrao, the query, which Mangala (PW 1) had made to Bhayya was in respect of the incident, which occurred behind the house of Ramrao. Therefore, the said query by Mangala (PW 1) to Bhayya could not have been treated as admission to acquit the respondent no.2.

42. The third reason for acquittal recorded by the Trial Court is delay in recording statements of eye-witnesses under Section 161 of the Code of Criminal Procedure. The Trial Court has observed that the statement of any of the eye-witnesses were not recorded on the date of the incident but were recorded on the next day or day after. Non-recording of the statements of witnesses by the Investigating Officer on the same day is held to be fatal to the prosecution. In the context of delay in recording statements of eye-witnesses, it would be appropriate to refer to the judgment of the Hon'ble Supreme Court in the case of ***Krishna Pal (Dr) v. State of U.P., (1996) 7 SCC 194***, wherein it is laid down as under:

“ 9.....In the instant case, no explanation has been given by the prosecution as to why eye-witnesses had not been examined shortly after the incident and from the materials on record it appears that there had been inordinate delay in examining the eye-witnesses. But simply on that account, the

*convincing and reliable evidences adduced in this case should not be discarded. The Investigating Officer in his deposition has also admitted that through mistake he omitted to mention the crime number in the inquest report. It appears to us that the Investigating Officer had not been diligent enough but for that reason we do not feel that reliable and clinching evidences adduced in this case by the eye-witnesses particularly by Dr Rajveer Singh should be discarded. In this connection, we may refer to a recent decision of this Court in **Karnel Singh v. State of M.P [(1995) 5 SCC 518]** . In the said decision, it has been indicated by this Court that in a case of defective investigation, it would not be proper to acquit the accused if the case is otherwise established conclusively because in that event it would tantamount to be falling in the hands of an erring Investigating Officer”.*

In view of the authoritative conclusions of the Hon’ble Supreme Court, we feel that the testimonies of the eye-witnesses in the present case inspire confidence and we find all eye-witnesses to be reliable and convincing, and therefore, we are satisfied that the Trial Court is not justified in holding that non-recording of statements of witnesses by the Investigating Officer on the same day is fatal.

43. The fourth reason given by the Trial Court for acquittal is that the second blow given by the accused no.2 by his weapon, is not supported by the testimony of Mangala (PW 1). We are afraid that the said reason is complete misreading of the testimony of Mangala (PW 1). Mangala (PW 1), in her examination-in-chief has stated that the accused no.2 Dashrath assaulted her husband using a sword on his head. It is pertinent to note that Mangala (PW 1) has stated about assault and not number of blow/blows given by each of the accused. Siddeshwar (PW 2) and Sushila (PW 4) have given details of blows, which do not make the testimonies of the said witnesses contradictory with the testimony of Mangala (PW 1).

44. The fifth reason, in support of the judgment of acquittal by the Trial Court, is inconsistencies between the evidence of the eye-witnesses. The Trial Court observed that as per the evidence of Siddeshwar (PW 2) and Sushila (PW 4), incident took place in front of the house of Mahadev, but, according to the evidence of Mangala (PW 1), Bhayya was found lying behind the house of Ramrao and, therefore, there are contradictions in the evidence of the witnesses. We do not agree with the said reasoning, as Mangala (PW 1) in her testimony has clearly stated that the incident of assault on Mahadev (deceased) occurred in front of the house of

Mahadev (deceased) and thereafter Mahadev (deceased) was pulled to the backside of the house of Ramrao, and Bhayya was found injured behind the house of Ramrao. We find no inconsistencies in the evidence of the eye-witnesses.

45. The sixth reason for the acquittal of the accused is the so-called admission of Mangala (PW 1) that she had not witnessed the incident. As stated earlier, Mangala (PW 1) has specifically stated that she witnessed the incident of assault committed by the accused no.2 in front of Ramrao's house and thereafter, Mahadev fell on the ground, and then the accused pulled him behind the house of Ramrao. Mangala (PW 1) was not aware of the incident which occurred behind the house of Ramrao. The admission by Mangala (PW 1) about asking Bhayya of the incident, which occurred behind the house of Ramrao was in the context of Mangala (PW 1) not witnessing the incident which occurred behind the house of Ramrao. Therefore, it cannot be concluded that Mangala (PW 1) did not witness the incident in front of her house.

46. The seventh reason for acquittal of the accused is that there is material inconsistency between the testimony of PW nos.1, 2 and 4, the testimonies of Mangala (PW 1), Siddeshwar (PW 2)

and Sushila (PW 4) do not support each other and are full of contradictions and improvements. After having carefully scrutinized the testimonies of Mangala (PW 1), Siddeshwar (PW 2) and Sushila (PW 4), we find that there are no material inconsistencies in the evidence of Mangala (PW 1), Siddeshwar (PW 2) and Sushila (PW 4). There may be minor discrepancies in their testimonies but, they are not on material aspect and such minor inconsistencies would not make their testimonies unreliable.

47. We may straight away mention that we cannot concur with the learned Trial Judge in his view that since there were some contradictions and omissions in the testimonies of all the eye-witnesses, their credibility is eroded. In this connection, we are inclined to accept the submission of Shri Doifode, learned A.P.P., to the effect that some omissions in the statements recorded under Section 161 of the Criminal Procedure Code, are bound to be there for they contain a brief account of the incident and the evidence in the Trial Court, on the other hand, contain an elaborate account of the incident. In this connection, we may refer to the decision of the Apex Court reported in **1980 Supp SCC 157, Matadin and others v. State of U.P.**, wherein in para 3, Their Lordships observed thus:-

“The learned Sessions Judge, had rejected the evidence of the eye-witnesses on wrong, unconvincing and unsound reasons. The Sessions Judge appears to have been swayed by some insignificant omissions made by some of the witnesses in their statement before the police and on the basis of these omissions dubbed the witnesses as liars. The Sessions Judge did not realise that the statements given by the witnesses before the police are meant to be brief statements and could not take the place of evidence in the Court. Where the omissions are vital, they merit consideration but, mere small omissions will not justify a finding by a court that the witnesses concerned are self-contained liars.”

48. In this context, it is laid down in a recent judgment in the case of ***Khurshid Ahmed v. State of J & K***, reported in (2018) 7 SCC 429 at page 441 as under :

“35. When analysing the evidence available on record, the court should not adopt hyper technical approach but should look at the broader probabilities of the case. Basing on the minor contradictions, the court should not reject the evidence in its entirety. Sometimes, even in the evidence of truthful witness, there may appear certain contradictions basing on their capacity to remember and reproduce the minute details. Particularly in the criminal cases,

from the date of incident till the day they give evidence in the court, there may be gap of years. Hence, the courts have to take all these aspects into consideration and weigh the evidence. The discrepancies and contradictions which do not go to the root of the matter, credence shall not be given to them. In any event, the paramount consideration of the court must be to do substantial justice. We feel that the trial court has adopted a hyper technical approach which resulted in the acquittal of the accused.”

49. This brings us to challenge by the State of Maharashtra against acquittal of accused nos.1, 3, 5 to 9 for the offence punishable under Section 302 read with Sections 147, 148, 149 of the Indian Penal Code, 1860. The short and long of submission of State is that all the respondents assaulted Mahadev (deceased), they were members of unlawful assembly within the meaning of Section 149 of the Indian Penal Code, 1860, and that being so, they would be liable for all the acts committed by any of the member of the unlawful assembly; including the act of the respondent no. 2 of inflicting fatal blows with sword and stick on the head of Mahadev (deceased).

50. A perusal of the provision contained in Section 149 of the Indian Penal Code, 1860, would show that the vicarious liability of the members of an unlawful assembly, would only extend to acts committed or done :-

(a) in prosecution of the common object of the unlawful assembly; or

(b) to such offences which each member of the unlawful assembly knew to be likely to be committed in the prosecution of the common object of the unlawful assembly.

In our view, the evidence on record is not sufficient to hold that the murder of Mahadev (deceased), was committed in prosecution of the common object of the unlawful assembly nor can it be said that the members of the unlawful assembly knew that it was likely to be committed. It is well-settled that question of common object is a question of fact and not one of law. Whether there was common object to commit the murder of Mahadev, or a lesser common object would depend on the facts of the case. In the instant case, after scrutinizing the evidence on record, we are of the view that there was no common object of the accused to commit murder of Mahadev (deceased). As per the testimony of Sushila

(PW 4), rest of the accused came to the spot of the incident after accused no. 2 assaulted Mahadev and after Mahadev fell down on the ground. In our view, it was an act, which was clearly in excess of the common object of the assembly. In our view, the learned Trial Judge acted correctly in holding that the murder of the deceased Mahadev was not committed in prosecution of the common object of the assembly.

51. After utmost circumspection, we have reached the conclusion that the prosecution has proved beyond all shadow of doubt the commission of an offence under Section 302 of the Indian Penal Code by the respondent no. 2.

52. We make no bones in observing that in reaching the said conclusion, we have borne in mind the time-honoured principles which this Court keeps in mind while interfering in an appeal against acquittal, namely that the interference should only be made, if either the assessment of the evidence by the acquitting Court is grossly unreasonable or the impugned order of acquittal suffers from any manifest illegality which has occasioned in the failure of justice.

53. We have kept in mind the golden rule that if two views are equally reasonable; one of acquittal and one of conviction then, the mere circumstance that this Court is inclined to take the latter view would be no ground to reverse an order of acquittal.

54. This leaves us with only one question namely, the sentence to be awarded to the respondent no. 2. We have heard learned Advocate for respondent no. 2 on the point of the sentence. She submitted that considering the young age; not being involved in any other crime, the lenient view may be taken.

55. We have reflected over the said question of sentence. Considering the manner of assault committed on Mahadev (deceased), we are of the view that this is not the rarest of the rare case to impose a death sentence. Bearing this in mind, as also the fact that nearly 14 years have elapsed since the incident took place and there is nothing to indicate that the respondent no.2 has any adverse antecedents, in our view, the ends of justice would be satisfied, if he is sentenced to undergo a sentence of rigorous imprisonment for life, for the offence punishable under Section 302 of the Indian Penal Code.

56. In the result, we pass the following order:

ORDER

- (i) Criminal Appeal No.580 of 2008 is partly allowed;
- (ii) The acquittal of the respondent no.2 - Dashrath Dharma Debur recorded vide impugned judgment for the offence punishable under Section 302 of the Indian Penal Code is set aside. He is found guilty of having committed the offence punishable under Section 302 of the Indian Penal Code and is directed to suffer sentence of rigorous imprisonment for life. The respondent no.2 is on bail and we grant him time till 15th January, 2021 to surrender. He shall be taken into custody after 15th January, 2021 to serve out his sentence;
- (iii) Acquittal of respondent no.2 - Dashrath Dharma Debur for offences punishable under Sections 147, 148 and 149 of the Indian Penal Code is confirmed;
- (iv) Acquittal of the respondent nos.1, 3, 5 to 7 and 9 for offences punishable under Sections 302, 147, 148 and 149 of the Indian Penal Code, is confirmed;
- (v) All case papers in relation to claim of juvenility of the respondent no.4 - Ravi s/o Wasudeo Debur be sent to the Juvenile Justice Board, Yavatmal, for holding inquiry as to juvenility of the respondent no.4 - Ravi s/o Wasudeo Debur. The Juvenile Justice

Board, Yavatmal, shall hold an inquiry, as contemplated under Rules of 2007 and shall send report to this Court about genuineness the claim of the respondent no.4 - Ravi s/o Wasudeo Debur within one month from today;

(vi) Bail bonds of the respondent nos.1, 3, 5 to 7 and 9 stand cancelled; and

(vii) The appeal is kept pending for decision against respondent no.4 - Ravi s/o Wasudeo Debur on merits, after receipt of the report from Juvenile Justice Board, Yavatmal.

Appeal is fixed on 15th January, 2021 for further orders regarding respondent no.4 - Ravi s/o Wasudeo Debur.

JUDGE

JUDGE

Ambulkar