

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 192 OF 2014

Samadhan S/o Laxman Dandage
Age 35 years, Occ – Labour,
Galli No.4, Misarwadi, Aurangabad.

... Appellant

Vs.

The State of Maharashtra
(At the instance of CIDCO Police
Station, Aurangabad.)

... Respondent

...

Advocate for Appellant : Shri A. K. Bhosale
APP for Respondent – State : Shri R. B. Bagul

...

**CORAM : RAVINDRA V. GHUGE
AND
B. U. DEBADWAR, JJ.**

**RESERVED ON 11th DECEMBER, 2020
PRONOUNCED ON 06th JANUARY, 2021**

JUDGMENT [PER: B. U. DEBADWAR, J.]:

1. This is an appeal against judgment and order dated 10-03-2014 passed by the learned Additional Sessions Judge-2, Aurangabad, in Sessions Case No. 380 of 2009, whereby convicted the appellant under Section 235(2) of Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.'), for the offences punishable under Sections 302 and 324 of the Indian Penal Code (hereinafter referred to as 'I.P.C.') and sentenced him to suffer rigorous imprisonment for life and fine of Rs.5,000/- (Rupees Five

Thousand Only), in default in payment of fine further rigorous imprisonment for six months and rigorous imprisonment for one year and to pay fine of Rs.1,000/- (Rupees One thousand Only), in default of payment of fine further rigorous imprisonment of one year, respectively.

2. Case of the prosecution in brief is as under :

a) Bhagwan Shyamrao Misal was elder brother of deceased Rajesh @ Raju Shyamrao Misal. They both used to reside at Misarwadi, Lane No.3, Aurangabad, with their families.

b) Mandabai w/o Bhagwan Misal (PW1), Gautam s/o Bhagwan Misal (PW4), Sandeep s/o Bhagwan Misal (PW5) and Rahul s/o Bhagwan Misal (PW6) are the wife and sons of Bhagwan Shyamrao Misal, respectively.

c) The appellant Samadhan Laxman Dandge and his brother Pravin S/o Laxman Dandage are also resident of Misarwadi, Lane No.3, Aurangabad.

d) The appellant and deceased Raju Misal were friends *inter se*.

e) On the eve of *Nagapanchami* Festival inhabitants of Misarwadi, Lane No.3 locality had tied swing on the branch of big Peepal tree standing on eastern side of the internal road running in north south direction.

f) On 26-07-2009 (i.e. on the day of *Nagapanchami* festival) at about 04.00 p.m. Raju Misal was swinging on the swing tied on the Peepal tree and the appellant Samadhan was pushing the swing. Rahul Misal (PW6), nephew of deceased Raju Misal was standing near the swing. While Raju Misal was enjoying swinging, all of a sudden, appellant stopped the movement of the swing by holding the same and got off Raju Misal from the swing. Upon getting off from the swing, appellant asked Raju Misal either to arrange liquor or accompany him for drinking liquor. When Raju Misal refused for the same, scuffle started between they two.

g) Rahul Misal (PW6) and his friend Ravi Magre rushed forward for intervention.

h) Meanwhile, Pravin Laxman Dandge (accused No.2), brother of appellant, and Gautam Misal (PW4), son of Bhagwan Misal and nephew of deceased Raju Misal came there one after another.

i) Thereafter, Pravin Dandage (accused No.2) caught hold the deceased Raju Misal and upon that appellant Samadhan Dandge rushed forward and slashed neck of Raju Misal with a knife, taking it out from the pocket.

j) After slashing the neck of Raju Misal, appellant turned towards Gautam Misal (PW4) and gave blows of the said knife on his neck and abdomen.

k) Because of slashing of neck, Raju Misal suffered profuse bleeding injury and collapsed then and there only.

l) After committing assault on Raju Misal and Gautam Misal (PW4), appellant and his brother Pravin (accused No.2) ran away from the spot.

m) Gautam Misal (PW4) and Rahul Misal (PW6) carried Raju Misal to Ghati Hospital, Aurangabad, in an auto-rickshaw.

n) Soon after examining, Medical Officer on duty declared Raju Misal dead and provided medial aid to Gautam Misal (PW4).

o) Then on the very same day at about 05.30 p.m. Gautam Misal (PW4), victim and eye witness of the incident, lodged the report narrating aforesaid incident.

p) On the basis of the report lodged by Gautam Misal (PW4) Crime bearing No. 248 of 2009 was registered at CIDCO Police Station, Aurangabad, against the appellant and his brother Pravin both, for the offences punishable under Sections 302 and 324 read with Section 34 of IPC.

q) Investigation of the said crime commenced as expected.

r) During the course of investigation, on the same day i.e. on 26-07-2009 at about 06.00 p.m. to 07.10 p.m. spot inspection was carried out in presence of panchas and spot panchanama was drawn. Then on the same day at about 09.30 p.m. appellant was arrested under the arrest panchanama drawn in presence of

panchas. Thereafter, postmortem was conducted on the dead body of deceased Raju Misal. His clothes, soaked with blood removed at the time of postmortem, were seized under the seizure panchanama drawn in the presence of panchas.

s) Then, on 27-07-2009, Pravin (accused No.2), brother of appellant was arrested under the arrest panchnama drawn in presence of panchas.

t) While in police custody on 29-07-2009, appellant in presence of panchas made a statement to the investigating officer leading to discovery of the knife used in commission of crime. The memorandum of that statement was reduced in writing. Thereafter, at the instance of appellant, crime weapon i.e. knife recovered after taking off the same from the place where it was concealed under the recovery panchanama drawn in presence of the said panchas.

u) Prior to that, clothes worn by appellant and his brother Pravin (accused No.2) were seized in presence of panchas after drawing seizure memos. All the muddemal articles viz. articles seized from the spot and articles seized from appellant and his brother Pravin (accused No.2) were sent to forensic lab with requisition dated 30-09-2009 for examination and report.

v) Postmortem report and CA report were collected.

w) After completion of investigation, as sufficient material against the appellant and his brother Pravin was found, they both

were charge-sheeted before the learned J.M.F.C., Aurangabad, for the aforesaid offences.

x) As the offence under Section 302 of IPC is exclusively triable by the Court of Sessions, learned J.M.F.C., Aurangabad, committed the case to the Sessions Court at Aurangabad, who in turn made it over to the Court of Additional Sessions Judge-2, Aurangabad.

y) After hearing the learned APP and defence counsel, on 12-04-2010 learned Additional Sessions Judge-2, Aurangabad, framed charge against both the accused i.e. appellant and his brother Pravin vide Exhibit-28. When so framed charge was read over and explained to accused in vernacular, they both pleaded not guilty and claimed to be tried.

z) Their defence as disclosed from trend of cross-examination and statements recorded under Section 313(1)(b) of Cr.P.C. was that of denial. According to them, there was dispute between two brothers Rajesh @ Raju Misal and Bhagwan Misal regarding partition of property and out of that dispute sons of Bhagwan Misal committed the murder of Rajesh @ Raju Misal. None was examined in defence.

aa) To prove the guilt of accused viz the appellant and his brother Pravin, prosecution has examined as many as nine witnesses including first informant and surviving victim Gautam

Misal (PW4) and other two eye witnesses namely Sandeep Misal (PW5) and Rahul Misal (PW6).

ab) Having considered the evidence on record and arguments advanced by both the sides, learned Additional Sessions Judge-2, Aurangabad, acquitted Pravin Dandge (accused No.2) but convicted appellant for both the charges and sentenced him as stated above.

ac) Being aggrieved by the impugned judgment and order, appellant has preferred the present appeal.

3. Heard Shri. A. K. Bhosale, learned Advocate for the appellant and Shri. R. B. Bagul, learned Additional Public Prosecutor for the State.

4. While taking us through the aforesaid evidence adduced by the prosecution, Shri. Bhosale, learned Advocate, vehemently argued that impugned judgment and order is incorrect. The learned Additional Sessions Judge-2, Aurangabad, failed to appreciate the evidence in proper perspective and arrived at wrong conclusion. The evidence of three eye witnesses on the material aspects is false. No incident as alleged by the prosecution has ever taken place. Alleged three eye witnesses examined by the prosecution, being kith and kin of deceased Raju Misal, are interested witnesses. Though independent witnesses were

available, prosecution has not examined them. In such circumstances, merely relying on the inconsistent testimonies of highly interested witnesses appellant should not have been convicted. Absolutely, there is no evidence about packing and sealing of muddemal articles immediately after their seizure. In such circumstances, it would be risky to rely upon C.A. reports.

5. Shri. Bhosale, learned Advocate, further argued that though the statements of Sandeep Misal (PW5) and Rahul Misal (PW6) were recorded on the day when incident took place, they were not brought on record. The conduct of the prosecution in suppressing the same gives rise to draw adverse inference. There is no consistency in the evidence of witnesses. At one place they say that deceased Raju Misal was directly taken to the Ghati Hospital, Aurangabad, from the spot of incident and at another place they say that initially deceased Raju Misal was taken to the CIDCO Police Station and then to Ghati Hospital. This inconsistency cannot be overlooked.

6. It is also argued by Shri. Bhosale, learned Advocate that Gautam Misal (PW4) could have lodged the FIR immediately, but he lodged the same after about one and a half hour of alleged incident. This unexplained delay creates every doubt about its genuineness. The place from where crime weapon is alleged to

have been seized was the public place accessible to all, therefore, no reliance can be placed on the memorandum and recovery panchanama relied upon by the prosecution. Moreover, both the panch witnesses of the said discovery and recovery panchanamas have not been supported to the prosecution. Therefore, the evidence of I.O. on this aspect becomes doubtful. The reason for not recording the statement of material witnesses immediately, though available, is not assigned. As such, the ocular evidence of Mandabai w/o Bhagwan Misal (PW1), Gautam Misal (PW4), Sandeep Misal (PW5) and Rahul Misal (PW6) cannot be considered and on the basis of their evidence appellant cannot be held guilty.

7. According to Shri. Bhosale, learned Advocate, in view of the facts and circumstances of the case, the defence raised by the accused that there was dispute between two brothers viz. Bhagwan Misal and deceased Raju Misal over the partition of property and out of that dispute sons of Bhagwan viz. Gautam Misal (PW4), Sandeep Misal (PW5) and Rahul Misal (PW6) picked up quarrel with Raju Misal and during that quarrel Raju Misal suffered injuries and died, appears to be probable. The learned Additional Sessions Judge-2, Aurangabad, ought to have acquitted both the accused instead of only accused No.2 – Pravin Dandge, by giving benefit of doubt. Therefore, the appeal deserves to be allowed.

8. Shri. A. K. Bhosale, learned advocate, in support of aforesaid submissions made by him, placed reliance on following rulings :-

- 1] *Kochu Maitheen Kannu Salim vs State Of Kerala* [1998 CRI.L.J. 2277]
- 2] *Bachhu Narain Singh Vs. Naresh Yadav and Others* [2004 AIR (SC) 3055]
- 3] *State of Rajasthan Vs. Madho* [1991 AIR (SC) 1065]
- 4] *Kishor Shamrao Bhoyar Vs. State of Maharashtra* [2020 ALL M.R.(Cri) 306]
- 5] *Irappa @ Chermal Subhash Dhangar and Others Vs. The State of Maharashtra* [2020 (1) Mh.L.J. 242]
- 6] *Tulshiram Bhanudas Kambale and Others vs. State of Maharashtra* [2000 Cri.L.J.1566]
- 7] *Salim Akhtar alias Mota Vs. State of U.P.* [Air 2003 SC 4076]
- 8] *Lakshmi Singh and others Vs. State of Bihar* [AIR 1976 SC 2263]
- 9] *Suryabhan Dattu Kharat Vs. State of Maharashtra* [2016 (3) Mh.L.J. 373]
- 10] *Lalchand Cheddilal Vs. State of Maharashtra* [2000 (3) Mh.L.J. 438]
- 11] *Amarjeetsingh S/o Jagtarsingh Mohar and Others Vs. State of Maharashtra* [2016 (4) Mh.L.J. 446]
- 12] *State of Rajasthan Vs. Motia and Others* [1955 AIR (Rajasthan) 82]

9. Per contra Shri. Bagul, learned APP, vehemently argued that appellant and deceased Raju Misal were friends *inter se*. They were inhabitants of the same locality. The incident of murder of Raju Misal took place on broad daylight, near his house. The case

is based on direct evidence. Out of nine witnesses examined by the prosecution, Gautam Misal (PW4), Sandeep Misal (PW5) and Rahul Misal (PW6) are the eye witnesses. Their presence at the spot, when incident took place, is a natural one. Gautam Misal (PW4) is the injured eye witness. He has lodged FIR shortly after the incident. The testimonies of three eye witnesses on material particulars are consistent. The inconsistencies in their evidence are minor in nature. Merely for those inconsistencies their evidence as to the incident and complicity of appellant in the incident cannot be doubted.

10. Shri. Bagul, learned APP, further argued that evidence of three eye witnesses discussed above is corroborated and supported by recovery of knife under Section 27 of the Evidence Act and C.A. reports. Postmortem report Exhibit-36 proved in the evidence of Dr. Kailas s/o Ukhardaji Zine (PW7), Autopsy Surgeon who conducted autopsy on the dead body of deceased Raju Misal, speaks volumes about the stab wound suffered by Raju Misal on his neck and its consequential effects. Dr. Kailas Zine (PW7) in his evidence at Exhibit-35 very clearly deposed that the cause of death of Raju Misal was hemorrhagic shock due to stab wound in the neck. Nothing could be brought on record through his cross-examination, on the basis of which his testimony as to the nature

and cause of death of Raju Misal, can be discarded. On the contrary, during the cross examination, he has very clearly stated that deceased Raju Misal could not have survived even if medical treatment was provided to him immediately. As per Shri. Bagul, learned APP, medical evidence, beyond doubt, proves that Raju Misal died instantly due to slashing of neck by the appellant with muddemal knife, when he refused for arranging liquor demanded by the appellant or accompanying the appellant to liquor shop for drinking.

11. Shri. Bagul, learned APP, also submitted that after slashing the neck of deceased Raju Misal appellant turned towards Gautam Misal (PW4), and assaulted him on his neck and abdomen with the same knife. Dr. Khan Heena Kausar (PW8) deposed about the injuries suffered by Gautam Misal (PW4) and nature of the said injuries. Injury certificate Exhibit-43 corroborates his evidence. Out of two injuries suffered by Gautam Misal (PW4), one was on left side neck and another was on left side of lower arm. Nothing is elicited in the cross examination of Dr. Khan Heena Kausar (PW8) which would discredit his evidence.

12. Shri. Bagul, learned APP, while taking us through the panchanama Exhibit-18 under which clothes on the person of deceased Raju Misal were seized after postmortem, memorandum

and recovery panchanama at Exhibit 53 and 54 regarding discovery and recovery of crime weapon i.e. knife at the instance of appellant, panchanama Exhibit-56 under which cloths worn by appellant at the relevant time were seized, vehemently argued that though panch witnesses of the said panchanamas have not supported to the prosecution as far as the contents therein, but PSI Baburao s/o Uttamrao Bodkhe (PW9), investigating officer, clearly deposed about contents of all those panchanamas. In such circumstances, merely for the reason that aforesaid panch witnesses, without denying the execution of the said panchanamas, denied about the contents therein, those material documents lending corroboration to the ocular evidence of three eye witnesses, cannot be discarded. C.A. report at Exhibit-59 also corroborates to the ocular evidence of three eye witnesses discussed above. The defence raised by the appellant that there was a dispute between two brothers i.e. Bhagwan Misal and deceased Raju Misal about partition of the property and out of that dispute murder of Raju Misal took place, is not at all worthy of credence and cannot be accepted when no evidence is adduced to justify the same.

13. According to Shri. Bagul, learned APP, relevant entries in case diary make sure that after lodging the FIR on 26-07-2009, first time statements of material witnesses including aforesaid eye

witnesses under Section 161 of Cr.P.C. came to be recorded on 31-07-2009. Therefore, merely relying on some stray admissions given by some of them that on 26-07-2009 enquiry as to the incident was made with them and their statements were recorded by police, inference of suppression of those police statements cannot be drawn. Moreover, PSI Baburao s/o Uttamrao Bodkhe (PW9), investigating officer was not cross examined on this aspect.

14. As far as injuries suffered by the appellant are concerned, Shri. Bagul, learned APP, submits that after arrest on 27-07-2009 the appellant was referred for medical examination and after medical examination he found to have suffered two simple injuries, one was on the occipital region and another was on lower lip mentioned in the injury certificate Exhibit-44, have been explained by Sandeep Misal (PW5). Therefore, case of the prosecution cannot be thrown away on that ground. During the course of statement recorded under Section 313(1)(b) of Cr.P.C. appellant has not come with a specific case. He has answered almost all questions by saying 'No'. When appellant has not come with a specific defence, very clear evidence adduced by the prosecution establishing incident of murder of Raju Misal and complicity of the appellant in the said incident, cannot be discarded for minor contradictions and omissions. The totality of the evidence

throws light on the intention of appellant. The case squarely falls within the ambit of Section 300 of the IPC. The impugned judgment is correct, proper and legal in all respect, therefore, deserves to be confirmed.

15. In support of his aforesaid submission, Mr. Bagul has placed his reliance on following ruling :-

- 1] *Mallikarjun and Others Vs. State of Karnataka*
[2019 DGLS(SC) 1301]
- 2] *Sathya Narayan Vs. State Rep. By Inspector of Police*
[2012 DGLS(SC)592]
- 3] *Ramesh & Others Vs. State of Haryana*
[2016 DGLS(SC) 1260]
- 4] *Jodhan Vs. State of Madhya Pradesh* [2015 DGLS(SC)459]
- 5] *Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat*
[1983 DGLS(SC) 171]
- 6] *Naseem Ahmed Vs. Delhi Administration*
[1973 DGLS(SC) 400]
- 7] *Dalipsingh Vs. State of Punjab* [1953 DGLS(SC) 62]
- 8] *State of Uttar Pradesh Vs. M. K. Anthony*
[1984 DGLS(SC) 307]
- 9] *State of Uttar Pradesh Vs. Anil Singh* [1988 DGLS(SC)507]
- 10] *Babulal Bhagwan Khandare Vs. State of Maharashtra*
[2004 DGLS(SC) 1108]
- 11] *Bishna @ Bhiswadeb Mahato Vs. State of West Bengal*
[2005 DGLS(SC) 942]
- 12] *Ashok Rai Vs. State of Uttar Pradesh and Others*
[(2014) 5 SCC 713]
- 13] *State of Uttar Pradesh Vs. Ashok Kumar Shrivastava*
[1992 DGLS(SC) 21]

16. Before turning towards the ocular and documentary evidence adduced by the prosecution for appreciation, we would like to note down the facts which are not in dispute and they are as under :-

- a) Gautam Misal (PW4), Sandeep Misal (PW5) and Rahul Misal (PW6) are brothers *inter se* and nephews of deceased Raju Misal, Mandabai Misal (PW1) is their mother and sister-in-law (brother's wife) of deceased Raju Misal.
- b) Deceased Raju Misal and appellant were friends *inter se*.
- c) Deceased Raju Misal, his family members and appellant were resident of one and the same locality i.e. Misarwadi, Lane No.3.

17. In the light of aforesaid admitted facts now we will turn to the evidence on record.

WHETHER DECEASED RAJU MISAL DIED OF THE HOMICIDAL DEATH?

18. The FIR Exhibit-26 indicates that immediately after the incident Raju Misal was carried to the Ghati Hospital, Aurangabad, in injured state and after reaching there CMO on duty declared Raju Misal brought dead. Dr. Kailas Zine (PW7), Autopsy Surgeon, vide his deposition at Exhibit-35 deposed that on 27-07-2009, Shri K. K. Shinde, PSI attached to CIDCO Police Station, Aurangabad, sent

dead body of Raju Misal to the Government Medical College and Hospital, Aurangbad, with report for conducting postmortem and inquest. He along with Dr. Sane, Jambure and Dr. Tisgaonkar conducted postmortem. During the postmortem following ante-mortem injuries found on the dead body of Raju Misal :-

- "1) Stab wound over left lateral side of neck, elliptical in shape and obliquely placed. Upper and placed anteriorly and lower end placed posteriorly, of size 3 cm x 1 cm deep upto pharynx on approximately 3.5 cm. Distance from left mastoid process 3 cm. Both angles are acute directed downwards and medially margins cleancut. Evidence of blood infiltration seen. Track :- Skin – Subcutaneous tissue – External jugular vein – Sternocleidomastoid muscle – left upper part clean upto pharynx
- 2) Abrasion over left side of chest in mid-axillary line of size 3 x 0.5 cm. Reddish in colour"

19. According to Dr. Kailas Zine (PW7), hemorrhagic shock due to stab wound over the neck was the cause of death of deceased Raju Misal. Postmortem report Exhibit-36 corroborates to his aforesaid testimony as to the injuries suffered by deceased Raju Misal, dimensions and locations of those injuries and cause of death of deceased Raju Misal. In his further evidence, Dr. Kailas Zine (PW7) has very clearly stated that aforesaid injuries suffered by deceased Raju Misal are possible by knife Article-5 which was shown to him during the course of recording of his evidence.

20. In cross-examination he has stated that Raju Misal was

brought in casualty ward of the hospital in dead condition. The CMO had informed police about the same. The patient i.e. Raju Misal died due to blood loss caused due to cutting of jugular vein. In further cross-examination Dr. Kailas Zine (PW7) admitted that the margins of injury No.1 were clean cut, however, very clearly denied that when margins are clean cut the weapon should be sharp on both sides. In last part of the cross-examination Dr. Kailas Zine (PW7) very clearly stated that the patient would not have survived even if he would have given treatment immediately. Nothing is elicited from the cross-examination of Dr. Kailas Zine (PW7) which would discredit his testimony. Thus, from the evidence of Dr. Kailas Zine (PW7), which is corroborated by the postmortem report Exhibit-36 issued by him, it is clear enough that Raju Misal died of homicidal death.

21. Once it is proved that Raju Misal died of homicidal death the next question arises as to who killed him. Admittedly, after the investigation appellant and his real brother Pravin Laxman Dandge (accused No.2) were charge-sheeted for murder of Raju Misal and for causing hurt to Gautam Misal (PW4), injured eye witness. The charge for the offences under Sections 302 and 324 read with Section 34 of IPC was framed (Exhibit-8) against they both, however, after trial the learned Additional Sessions Judge-2,

Aurangabad, vide impugned judgment and order acquitted Pravin Laxman Dandge (accused No.2) for both the charges and convicted only appellant for both the charges and sentenced him as stated in para supra.

22. The case of the prosecution is based on three eye witnesses viz. Gautam Misal (PW4), Sandeep Misal (PW5) and Rahul Misal (PW6). Out of these three eye witnesses Gautam Misal (PW4) is not only the injured eye witness but also the first informant of the case. The evidence of these three eye witnesses needs to be scrutinized carefully as, admittedly, they are nephews of deceased Raju Misal.

23. Gautam Misal (PW4) vide his deposition Exhibit-25 deposed that he resides with his parents and brothers namely Rahul Misal (PW6) and Sandeep Misal (PW5). Incident took place on 26-07-2009 at about 04:00 p.m. to 04:30 p.m. There was *Nagapanchami* festival on that day. Raju Misal (PW6), was swinging on the swing tied to the Peepal tree standing near their house. He was sitting below the said tree. Appellant was giving swings to Raju Misal. At that time, in addition to he himself, Rahul Misal (PW6) and Ravi Magre were also present there. Meanwhile, appellant stopped the swing and told Raju Misal either to arrange liquor for him or accompany him for drinking liquor. When Raju

Misal denied the same quarrel started between appellant and deceased Raju Misal. At that time, Pravin Dandge (accused No.2) rushed to the spot and caught hold Raju Misal from back side and then appellant took out knife and slashed the neck of Raju Misal by the said knife. When he intervened appellant also gave blows of the said knife on his neck and stomach. Raju Misal and he himself both sustained bleeding injuries. Raju Misal collapsed since his throat was cut. After committing assault appellant and his brother both ran away from the spot. His brother Sandeep Misal (PW5) and Rahul Misal (PW6) took him and Raju Misal to the Ghati Hospital. Medical officer on duty declared Raju Misal dead and treated him. He lodged the FIR at Exhibit-26. He has identified knife Article-5, his shirt and pant (Articles 2 and 3) and shirt and pant of deceased Raju Misal (Articles 1 and 4) when shown to him.

24. In his cross-examination, he has stated that, he reached to the spot after intervention of Rahul Misal (PW5) and Ravi Magre in the quarrel. He has also stated in further cross-examination that in the scuffle appellant and deceased Raju Misal both assaulted each other. From his further cross-examination it has come on record that initially he along with deceased Raju Misal and his brothers had been to the police station in an auto-rickshaw. Police referred them to the Ghati Hospital without recording his

report. His parents and grand mother had also followed them to the police station in another auto-rickshaw. However, he has very clearly denied the suggestion that he along with brother Rahul Misal (PW6) and Ravi Magre assaulted deceased Raju Misal on account of property dispute. Thus, except improvement regarding his directly proceeding to the hospital from the spot of incident along with deceased Raju Misal, rest of his evidence is consistent one.

25. Since, he has very clearly narrated the incident of slashing neck of deceased Raju Misal by appellant, merely for the reason that he rushed forward after intervention of Rahul Misal and Ravi Magre in the quarrel between appellant and Raju Misal, his version that he has witnessed the incident cannot be discarded. We cannot forget that in opening part of his examination-in-chief he has very clearly stated that when Raju Misal was sitting on the swing and appellant was pushing / giving the swings, he was sitting below the Peepal tree on which swing was tied. This unchallenged statement of Gautam Misal (PW4) inspires full confidence about his witnessing the incident clearly.

26. It is pertinent to note that Gautam Misal (PW4) was not only the injured eye witnesses but also the first informant. The FIR Exhibit-26 dated 26-07-2009 lends full corroboration to his testimony. His aforesaid testimony as to the assault committed on

him by appellant, after slashing neck of deceased Raju Misal and giving blows of the same knife on his neck and stomach, is corroborated by injury certificate Exhibit-43 proved in the evidence of Dr. Khan Heena Kausar (PW8). There is no effective cross-examination of Gautam Misal (PW4) on this aspect. Since Gautam Misal (PW4) suffered injuries in the same incident in which deceased Raju Misal died, his presence on the spot when incident took place and his witnessing the incident of slashing the neck of deceased Raju Misal by appellant cannot be doubted. Thus, we have no hesitation to accept his evidence which speaks volumes about the complicity of appellant in the incident.

27. Sandeep Misal (PW5) is another eye witness. His testimony at Exhibit-28, as far as date, time, place and manner of the incident concerned, is similar to the testimony of Gautam Misal (PW4). He too has clearly deposed as to the complicity of appellant in the incident of slashing of the neck of Raju Misal with knife and thereafter giving blows of the said knife on neck and stomach of Gautam Misal (PW4). He has also very clearly stated that appellant had committed assault on Raju Misal when he refused either to arrange liquor for him or to accompany him for drinking liquor and ran away from the spot after the incident.

28. Through his cross-examination it has come on record

that quarrel was going on for 15 to 20 minutes. He had intervened in the quarrel. Quarrel took place under Peepal tree. After assault Raju Misal sat on the same spot. The blood oozed from the injury suffered by Raju Misal had spread at the distance of about of 50 ft. from the Peepal tree. Deceased Raju Misal and appellant Samadhan were good friends. All these aspects no way discredit his version in examination-in-chief as to the incident and his witnessing the same.

29. He too has very clearly denied the defence of the appellant that out of the dispute regarding partition of the property, he along with Gautam Misal (PW4) and Ravi Magre assaulted deceased Raju Misal. Besides, he has denied the suggestion pertaining to one more defence raised by the appellant that deceased Raju Misal had kidnapped sister of Ravi Magre, and therefore, Ravi Magre was at inimical terms with deceased Raju Misal and out of that enmity Ravi Magre along with Gautam Misal (PW4) and him assaulted deceased Raju Misal and also the appellant, when appellant tried to intervene in the incident of assault on Raju Misal. Moreover, both the defences are not probable. Thus, in any angle, testimony of Sandeep Misal (PW5) as to the incident, complicity of appellant in incident and his witnessing the same cannot be discarded.

30. It is true that name of Sandeep Misal (PW5) does not

find place in the FIR. But that itself would not be a ground to disbelieve him. Material came on record through his cross examination, discussed in para supra, inspires confidence about his presence at the spot when incident took place. Thus, in view of foregoing discussion we hold that like Gautam Misal (PW4), Sandeep Misal (PW5) is also a truthful witness.

31. Rahul Misal (PW6), one more eye witness, is also an important and material witness. His testimony at Exhibit-31 is completely in consonance with testimonies of two more eye witnesses viz. Gautam Misal (PW4) and Sandeep Misal (PW5) as far as the date, time, place of incident and complicity of appellant in the said incident, is concerned.

32. In cross examination Rahul Misal (PW6) has stated that the swing tied to the Peepal tree was a common swing. He was standing about 5 ft. to 6 ft. away from the swing towards south. Except them no other person had intervened in the quarrel. This substantive evidence, came on record through the cross-examination, inspires confidence about his presence at the spot when incident took place. It is pertinent to note that his name and role played by him after the incident is reflected in the FIR Exhibit-26. This adds in truthfulness of his version pertaining to the incident. Omission, as to accused No.2 Pravin's catch holding

deceased Raju Misal from back side, in his statement before police is not too vital to reject his testimony in it's entirety. Therefore, we have no reason to discard the testimony of this witness on material aspect of incident of assault on deceased Raju Misal and Gautam Misal (PW4) by knife and complicity of appellant in the said incident.

33. Mandabai Misal (PW1) is the mother of Gautam Misal (PW4), Sandeep Misal (PW5) and Rahul Misal (PW6) and sister-in-law of deceased Raju Misal. Vide her deposition at Exhibit-14 she has deposed that on 26-07-2009 there was *Nagapanchami* festival. On that day at about 04.30 p.m. while engaged in cooking she heard commotions. Therefore, she rushed outside the house and saw that Raju Misal and Gautam Misal (PW4) both were lying near Peepal tree in injured condition. Crowd was also gathered there. She along with others took both the injured to Ghati Hospital in an auto-rickshaw. After examination, doctor declared Raju Misal brought dead and treated Gautam Misal (PW4). Gautam Misal told her about the incident. Gautam Misal (PW4) had suffered stab injuries on his neck and stomach whereas Raju Misal had suffered stab injury on his neck.

34. In cross examination she has stated that their house in Misarwadi consists of three rooms. Deceased Raju Misal was

residing with them, since his wife was not cohabiting with him and had shifted to her paternal house. Their house is surrounded by many houses. When she rushed to the spot from her house, Rahul Misal (PW6) and Sandeep Misal (PW5) were present near Raju Misal and Gautam Misal (PW4). Sandeep Misal (PW5) accompanied her when she carried injured Raju Misal and Gautam Misal (PW4) to the hospital in an auto-rickshaw. The CIDCO Police Station is on the way leading to Ghati Hospital from Misarwadi. They did not stop at the CIDCO Police Station. Police had made enquiry regarding the incident to her and Sandeep Misal (PW5) at Ghati Hospital and recorded their statements. Crowd of about 25 to 50 persons gathered near Peepal tree. She along with her husband at about 05.00 p.m. rushed to the CIDCO Police Station from Hospital.

35. It is clear enough from aforesaid evidence of Mandabai Misal (PW1) that after rushing outside the house, on hearing commotion, she saw Raju Misal and Gautam Misal (PW4) lying in injured state and Rahul Misal (PW6) and Sandeep Misal (PW5) were present near the Peepal tree. Like eye witnesses viz. Gautam Misal (PW4), Sandeep Misal (PW5) and Rahul Misal (PW6), she has also denied the suggestion that deceased Raju Misal was insisting for partition of their house. Though Mandabai Misal (PW1) had not witnessed the incident of assault on deceased Raju Misal and

Gautam Misal (PW4) by the appellant, but she had seen the situation at spot immediately after happening of incident and presence of Gautam Misal (PW4), Sandeep Misal (PW5) and Rahul Misal (PW6) at the spot. Her evidence lends full corroboration to the evidence of Gautam Misal (PW4), Sandeep Misal (PW5) and Rahul Misal (PW6) as to their presence at the spot when incident took place. In this way evidence of Mandabai Misal (PW1) assumes importance.

36. According to Sandeep Misal (PW5) and Rahul Misal (PW6) incident took place at about 04.00 p.m. whereas according to Gautam Misal (PW4) incident took place at about 04.00 p.m. to 04.30 p.m. It is to be noted that Gautam Misal (PW4) has not stated that incident took place at 04.30 p.m. but he has stated that it had taken place at about 04.00 p.m. to 04.30 p.m. Therefore, it cannot be said that there is a variance in evidence of three eye witnesses regarding exact time of incident.

37. Though it is argued that there are inconsistencies in the evidence of three eye witnesses, regarding happening of incident but, in fact, absolutely there is no inconsistency as to the main incident i.e. incident of assault with knife committed on deceased Raju Misal and Gautam Misal (PW4) by the appellant, on the contrary, testimonies of three eye witnesses on this aspect are very

much consistent.

38. No doubt, there is inconsistency in ocular evidence of PW1 to PW4 only as to whether both the victims were directly taken to the Ghati Hospital from the spot of incident or first they were taken to CIDCO Police Station and then to the Ghati Hospital. Mandabai Misal (PW1) and Gautam Misal (PW4) stated that victims were directly taken to Ghati Hospital from the spot whereas Sandeep Misal (PW5) and Rahul Misal (PW6) stated that first victims were taken to CIDCO Police Station from the spot and then on the say of police, carried them to Ghati Hospital. But merely on the basis of that inconsistency, evidence of all three eye witnesses cannot be rejected outrightly, branding it false and afterthought. Looking to the injury suffered by Raju Misal which was very serious in nature, police appears to have not detained victims at police station for recording FIR and have referred them urgently to the Ghati Hospital for examination and treatment.

39. Mandabai Misal (PW1), Sandeep Misal (PW5) and Rahul Misal (PW6), in their cross-examination have stated that, when they were in hospital, police made enquiry with them about the incident and recorded their statement. Whereas Gautam Misal (PW4) in his cross-examination stated about enquiry made by the police pertaining to the incident but denied to have recorded the

statement. PSI Baburao Bodkhe (PW9), investigating officer in his cross examination stated about recording the statement of witnesses on 26-07-2009. Harping a lot on the said statements of Mandabai Misal (PW1), Gautam Misal (PW4), Sandeep Misal (PW5) and PSI Baburao Bodkhe (PW9), investigating officer, Shri. Bhosale, learned Advocate, vehemently argued that prosecution has suppressed police statements of PW1, PW5 and PW6 recorded on 26-07-2009 at hospital, as they were different and after five days of lodging concocted FIR, their false statements in consonance with FIR have been prepared.

40. Though the aforesaid arguments regarding suppression of statements of witnesses, including eye witnesses PW5 and PW6 recorded on 26-07-2009, appears to be probable but after calling and verifying the station diary of relevant period and case diary of the crime in question, it has become clear that the statements of all the material witnesses came to be recorded first time on 31-07-2009. Entries in station diary and case diary rules out possibility of recording of statements of material witnesses including eye witnesses either on 26-07-2009 or on any date prior to 31-07-2009 and suppressing of the same. As such no adverse inference as to the version of eye witnesses viz. Gautam Misal (PW4), Sandeep Misal (PW5) and Rahul Misal (PW6) vis-a-vis case

of prosecution can be drawn.

41. It is painful to say that PSI Baburao Bodkhe (PW9), investigating officer found to be very casual while facing cross-examination. He should have given answers to the questions asked to him during cross-examination with due responsibility. Without referring case diary he has very casually and negligently stated about his recording statement of witnesses on 26-07-2009, though, in fact, the statement of not a single witness was recorded on that day. The case diary clearly states that on 26-07-2009, during the course of investigation, except visiting the spot, drawing spot panchanama, arresting the accused, drawing inquest panchanama of the dead body of deceased Raju Misal, taking snaps of the spot and attaching clothes worn by deceased Raju Misal, nothing more was done. Thus, no reliance can be placed on vague admission, about recording of statements of witnesses on 26-07-2009, given by PSI Baburao Bodkhe (PW9), investigating officer. As such, testimonies of Sandeep Misal (PW5) and Rahul Misal (PW6) cannot be rejected branding them doubtful.

42. Having regard to the totality of facts, it appears that when victims were taken to the hospital by their family members viz. Mandabai Misal (PW1), Sandeep Misal (PW5) and Rahul Misal (PW6), police officials present there made cursory enquiry about

the incident with eye witnesses, but that does not mean that in-depth enquiry was made and their statements were recorded. If the statements of eye witnesses had been recorded in the Ghati Hospital on 26-07-2009 or on any date prior to 31-07-2009, entry pertaining to the same would have been reflected in station diary and case diary, however, both these documents rule out possibility of recording the statements of eye witnesses on 26-07-2009 or on any date prior to 31-07-2009. As such the adverse inference as suggested by Shri. Bhosale, learned Advocate, cannot be drawn only relying on admission given by PW1, PW5 and PW6, without understanding meaning of statement contemplated in Section 161 of Cr.P.C.

43. Gautam Misal (PW4), injured eye witness, has lodged the FIR at about 05.30 p.m. on 26-07-2009 i.e. only after one and a half hour of occurrence of incident. From his testimony which is discussed in para supra, it is clear enough that he lodged the FIR after medical examination and treatment given to him by the medical officer at Ghati Hospital, Aurangabad. Since FIR came to be lodged shortly after the incident and it covers all the details about the incident as well as presence of Rahul Misal (PW6) at the spot when incident took place, no doubt can be raised about the testimonies of Gautam Misal (PW4) and Rahul Misal (PW6), when

FIR Exhibit-26 fully corroborates to their substantive evidence in the Court.

44. Gautam Misal (PW4) being injured eye witness, his evidence cannot be rejected on the ground that he is an interested witness.

45. In the case of ***State of Uttar Pradesh Vs. Naresh and Others [(2011) 2 SCC(Cri.) 216]***, the Hon'ble Supreme Court has held under :-

“ The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be a very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate some one else. The testimony of an injured witness has it's own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for commission of the offences. Thus, evidence of injured witness should be relied upon unless there are grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.”

46. In case of ***Abdul Sayeed Vs. State of Madhya Pradesh [(2010) 10 SCC 259]***, the Hon'ble Supreme Court held as under :-

“ The question of the weight to be attached to the evidence of witnesses that was himself injured in the course of occurrence has been extensively discussed by this Court. Where a witness to occurrence has himself

been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in-guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. Convincing evidence is required to discredit an injured witness.”

47. In case at hand the evidence of Gautam Misal (PW4) is very much clear as to the incident and complicity of appellant in the incident. Appellant has not brought on record any material to discredit his evidence. We have already demonstrated in para supra as to how defence raised by appellant is not at all worthy of credence. On going through the cross-examination of three eye witnesses, viz. Gautam Misal (PW4), Sandeep Misal (PW5) and Rahul Misal (PW6), it can be gathered very well that no suggestion denying the complicity of appellant in the incident was given to them. On the contrary, FIR Exhibit-26 lodged by Gautam Misal (PW4), injured eye witness, in very clear words speaks about presence of appellant at spot and role played by him in the incident. Therefore, it would not be legal and proper to reject the testimony of three eye witnesses for minor omissions and contradictions when they are very consistent with each other and corroborated by the FIR.

48. It is evident from record that statements of material witnesses recorded under Section 161 of Cr.P.C., including

statements of eye witnesses viz. Gautam Misal (PW4), Sandeep Misal (PW5) and Rahul Misal (PW6), were recorded on 31-07-2009 i.e. after five days of occurrence of incident. PSI Baburao Bodkhe (PW9), investigating officer has not explained the said delay. In normal course, such unexplained delay would have adversely affected on the prosecution case. However, having regard to the facts that out of three eye witnesses one namely Gautam Misal (PW4) was injured eye witness, and he lodged the FIR Exhibit-26 shortly after the incident, describing role played by the appellant in the incident and presence of Rahul Misal (PW6) at the spot when incident took place, clear, cogent and consistent testimonies of eye witnesses Sandeep Misal (PW5) and Rahul Misal (PW6) which are consistent with the testimony of Gautam Misal (PW4), cannot be doubted or viewed with suspicion only on the ground that delay of five days caused in recording their statements under Section 161 of Cr.P.C. and that the said delay was not explained by prosecution.

49. Spot panchanama Exhibit-17 proved in the evidence of panch witness Pritam s/o Nagorao Bhavare (PW2) also inspires confidence about truthfulness about versions of all three eye witnesses. Appellant has not seriously disputed the spot panchanama which not only gives detailed description with dimensions of the spot but also speaks about collection of plain

earth and blood mixed earth from the spot for chemical analysis and report about the blood group of the blood mixed in earth.

50. In addition to the testimonies of three eye witnesses viz. Gautam Misal (PW4), Sandeep Misal (PW5) and Rahul Misal (PW6), prosecution has also placed reliance on discovery and recovery of crime weapon i.e. knife under Section 27 of the Evidence Act. Recovery panchanama under which crime weapon i.e. knife came to be recovered at the instance of appellant is at Exhibit-54. Pritam Bhavare (PW2) and Devidas Pachavane (PW3) are the panch witnesses of the memorandum Exhibit-53 and recovery panchanama Exhibits-54. They both turned hostile and have not supported the prosecution. However, Devidas Pachavane (PW3) has admitted his signature appearing on memorandum as well as recovery panchanama and also his signature appearing on slip affixed to crime weapon i.e. knife. However, Baburao Bodkhe (PW9), investigating officer, deposed about the statement Exhibit-53 made by appellant while in police custody, pertaining to place where crime weapon i.e. knife was concealed, and about recovery of the crime weapon knife at the instance of appellant from the place shown by him under recovery panchanama Exhibit-54. There is no effective cross-examination of Baburao Bodkhe (PW9), investigating officer, on the aspect of discovery and recovery of

crime weapon. However, there is one inconsistency in the recovery panchanama Exhibit-54 and testimony of PSI Baburao Bodkhe (PW9), investigating officer at Exhibit-50. The said inconsistency is about the place from where crime weapon was recovered. According to recovery panchanama Exhibit-54 crime weapon viz. Knife (Article-5) was took out from the pond/puddle situated near to the spot after making it empty. However, in his examination-in-chief, PSI Baburao Bodkhe (PW9), investigating officer, deposed that crime weapon i.e. knife was recovered from the house of appellant. It seems that he deposed the same mistakenly.

51. Appellant has challenged discovery / recovery of crime weapon i.e. knife on two grounds one is that panch witnesses of the said recovery have not supported to the prosecution and another is that the place from where knife was alleged to have been recovered was public place accessible to all. It is true that panch witnesses of memorandum Exhibit-53 and panchanama Exhibit-54, under which crime weapon i.e. knife came to be recovered at the instance of appellant, namely Pritam Bhavare (PW2) and Devidas Pachavane (PW3) turned hostile and not supported the prosecution, however, Devidas Pachavane (PW3) has admitted his signature appearing on label affixed to the muddemal knife. We have already discussed in para supra the evidence of PSI Baburao Bodkhe (PW9),

investigating officer, on the aspect of discovery and recovery of knife at the instance of appellant. He has categorically stated about appellant's, while in police custody, disclosing the place where crime weapon knife was thrown, shown the said place and crime weapon i.e. knife was recovered from the said place.

52. In the matter of *Mallikarjun and Others Vs. State of Karnataka [2019 DGLS(SC) 1301]* in para No. 23 of the judgment, the Hon'ble Supreme Court has held as under :-

"23. As pointed out earlier, based on the disclosure statement of accused No.1, MO-1-dagger which was kept hidden in the haystack of fodder in the loft of the cattle shed behind the house of accused No.1 had been seized under Ex.-P9- Panchnama in the presence of panch witnesses PW-8- Chandrappa and PW-9- Mahadevappa Needgera. The said panch witnesses have not supported the prosecution case and turned hostile. MO-2-dagger and MO-3-handle of the axe were recovered from the scene of occurrence under Ex.-P7-spot panchnama. On behalf of the accused, learned senior counsel contended that the evidence of PW-17-PSI as to the recovery of MO-1-dagger at the behest of accused No.1 is doubtful and when PWs 8 and 9 have turned hostile, no weight could be attached to the alleged recovery of MO-1-dagger. There is no merit in the contention that merely because the panch witnesses turned hostile, the recovery of the weapon would stand vitiated. It is fairly well settled that the evidence of the Investigating Officer can be relied upon to prove the recovery even when the panch witnesses turned hostile. [In Rameshbhai Mohanbhai Koli v. State of Gujarat and others](#) (2011) 11 SCC 111, it was held as under:-

"33. [In Modan Singh v. State of Rajasthan](#) (1978) 4 SCC 435 it was observed (at SCC p. 438, para 9) that where the evidence of the investigating officer

who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses did not support the prosecution version. Similar view was expressed in [Mohd. Aslam v. State of Maharashtra](#) (2001) 9 SCC 362.

34. [In Anter Singh v. State of Rajasthan](#) (2004) 10 SCC 657, it was further held that: (SCC p. 661, para 10)

"10. ... even if panch witnesses turn hostile, which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated."

35. This Court has held in a large number of cases that merely because the panch witnesses have turned hostile is no ground to reject the evidence if the same is based on the testimony of the investigating officer alone. In the instant case, it is not the case of defence that the testimony of the investigating officer suffers from any infirmity or doubt. (Vide Modan Singh case, Krishna Gopal case and Anter Singh case.)"

PW-17-PSI has clearly spoken about the recovery of MO-1- dagger at the behest of accused No.1 and MO-2-dagger and MO-3-handle of the axe from the scene of occurrence and his evidence cannot be discarded merely because panch witnesses have turned hostile.""

53. In view of the aforesaid ratios laid down by the Hon'ble Supreme Court, though panchwitnesses of memorandum Exhibit-53 and recovery panchanama Exhibit-54 Pritam Bhavare (PW2) and Devidas Pachavane (PW3) have turned hostile, on the basis of testimony of PSI Baburao Bodkhe (PW9), investigating officer, which does not suffer from any deformity, discovery / recovery of crime weapon knife can be accepted, without any hesitation.

54. As far as another objection raised by appellant pertaining to place from where muddemal knife recovered, we would like to say that crime weapon knife was recovered from a big puddle situated within the vicinity, where the incident took place. Hand sketch (map) drawn in column No.9 of the crime details form (Spot Panchanama Exhibit-17) demonstrates that the said pond/puddle was situated adjacent to the south of foot-way, running in east west direction, connecting lane No.4 to the colony road running in north south direction, passing from Lane No.3. The size of the said puddle was 20 ft x 30 ft. Recovery panchanama Exhibit-54 demonstrates that the said puddle was full of water and after drawing water from the puddle with the help of people of the said locality, crime weapon knife found at its bottom, was taken out. Though the pond/puddle was a public place, looking to the fact that at the instance of appellant crime weapon knife was recovered from the said puddle which was full of water, such recovery of crime weapon can be accepted only for corroboration to the evidence of eye witnesses discussed in para supra and not as an independent evidence.

55. Even if, solely for the reason that aforesaid puddle was a public place, the recovery of crime weapon knife is rejected, then also, it would not adversely affect on the case of prosecution based

on the evidence of three eye witnesses viz. Gautam Misal (PW4), Sandeep Misal (PW5) and Rahul Misal (PW6).

56. It is evident from record that during the course of investigation clothes of deceased Raju Misal, clothes of injured Gautam Misal (PW4) and clothes of both the accused viz. Pravin and appellant, came to be seized under panchanama Exhibit Nos. 18, 56, 55 and X, respectively. Clothes seizure panchanam of appellant does not bear exhibit number, therefore, for the purpose of identification we marked it as Exhibit-X. Panch witnesses of the said panchanamas have not supported the prosecution, however, PSI Baburao Bodkhe (PW9), investigating officer, proved seizure of the clothes of victims and accused under aforesaid panchanamas. Record reveals that all muddemal articles viz. plain earth, blood mixed earth, crime weapon knife seized at the instance of appellant and clothes of deceased Raju Misal and both the accused, were sent to forensic lab under the requisition dated 30-09-2009 for scientific examination and report. Reference of that requisition does not find place in the evidence of PSI Baburao Bodkhe (PW9), investigating officer. C.A. report at Exhibit-59 indicates that human blood of 'B' group was detected on the full shirt of deceased Raju Misal and full shirt of appellant. Likewise, human blood of 'B' group was detected on the crime weapon knife. Absolutely, there is no evidence as to

the blood group of deceased and blood group of appellant. So also, explanation for delay of two months, caused for forwarding all the aforesaid muddemal articles to the forensic lab, was not given. Therefore, it would not be safe to rely on C.A. report Exhibit-59. Even if C.A. report is kept out of consideration for aforesaid reason, then also, it would not adversely affect case of prosecution which is fully supported by clear, cogent and consistent ocular evidence of three eye witnesses out of which one is injured eye witness.

57. Gautam Misal (PW4) has admitted in his cross-examination that appellant had suffered injury to his head. Injury certificate Exhibit-44 proved in the evidence of Dr. Khan Heena Kausar (PW8) demonstrates that head injury and one more injury on upper lip suffered by appellant were simple in nature. Upon going through ocular evidence of three eye witnesses, more particularly ocular evidence of Sandeep Misal (PW5), it can be gathered very well that when deceased Raju Misal refused either to arrange liquor or to accompany him for drinking liquor, quarrel took place between Raju Misal and appellant and in that quarrel appellant suffered aforesaid simple injuries. When appellant had targeted his neck it was natural on the part of deceased Raju to resist and take every effort to prevent blow of knife but appellant over powered and succeeded in slashing neck of deceased Raju and

while doing so he appears to have suffered aforesaid injuries. The ocular evidence of eye witnesses, more particularly evidence of Sandeep Misal (PW5) is quite sufficient to explain two simple injuries suffered by appellant. As such, appellant cannot claim benefit of doubt on the ground of non explanation of injuries suffered by him.

58. In case of ***State of Rajasthan Vs. Madho [1991 AIR (SC) 1065]***, the Hon'ble Supreme Court held as under :-

"2. If the prosecution witnesses shy away from the reality and do not explain the injuries caused to the respondents herein it casts a doubt on the genesis of the prosecution case since the evidence shows that these injuries were sustained in the course of the same incident. It gives the impression that the witnesses are suppressing some part of the incident. The High Court was, therefore, of the opinion that having regard to the fact that they have failed to explain the injuries sustained by the two respondents in the course of the same transaction, the respondents were entitled to the benefit of the doubt as it was hazardous to place implicit reliance on the testimony of the injured PW 2."

59. In case of ***Lakshmi Singh and others Vs. State of Bihar [AIR 1976 SC 2263]***, the Hon'ble Supreme Court has held as under :-

"11. It is well settled that fouler the crime, higher the proof, and hence in a murder case where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non-explanation of such injuries by the prosecution is a manifest defect in the prosecution case and shows that the origin and genesis of the occurrence had been deliberately suppressed which leads to the irresistible conclusion

that the prosecution has not come out with a true version of the occurrence. This matter was argued before the High Court and we are constrained to observe that the learned Judges without appreciating the ratio of this Court in [Mohar Rai v. State of Bihar](#), (1968) 3 SCR 525 = (AIR 1968 SC 1281) tried to brush it aside on most untenable grounds.

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.... The facts of the present case clearly fall within the four corners of either of the first two principles laid down by this judgment. In the instant case, either the accused were fully justified in causing the death of the deceased and were protected by the right of private defence or that if the prosecution does not explain the injuries on the person of the deceased the entire prosecution case is doubtful and the genesis of the occurrence is shrouded in deep mystery, which is sufficient to demolish the entire prosecution case.

17. Thus in view of the inherent improbabilities, the serious omissions and infirmities, the Interested or inimical nature of the evidence and other circumstances pointed out by us, we are clearly of the opinion that the prosecution has miserably failed to prove the case against the appellants beyond reasonable doubt. We have already pointed out that on one of the most important points arising in a criminal trial, namely, the non-explanation of the injuries on the person of the accused by the prosecution, the High Court has not only committed an error of fact but an error of law by showing a lack of proper appreciation of the principles decided by this Court. For these reasons, therefore, we think there are special circumstances in the present case which have compelled us to interfere in this appeal by special leave."

60. In case at hand, prosecution has not suppressed injuries suffered by appellant on, the contrary, prosecution witnesses, more particularly Sandeep Misal (PW5), has explained as

to how appellant suffered injuries which are proved to be simple injuries. Therefore, ratio laid by the Hon'ble Supreme Court would not come to rescue the appellant.

61. In the matter of *Bishna @ Bhiswadeb Mahato Vs. State of West Bengal [2005 DGLS(SC) 942]*, the Hon'ble Supreme Court in para No.52 of the judgment held as under :-

"52. The fact as regard failure to explain injuries on accused vary from case to case. Whereas non-explanation of injuries suffered by the accused probabilises the defence version that the prosecution side attacked first, in a given situation it may also be possible to hold that the explanation given by the accused about his injury is not satisfactory and the statements of the prosecution witnesses fully explain the same and, thus, it is possible to hold that the accused had committed a crime for which he was charged. Where injuries were sustained by both sides and when both the parties suppressed the genesis in the incident, or where coming out with the partial truth, the prosecution may fail. But, no law in general terms can be laid down to the effect that each and every case where prosecution fails to explain injuries on the person of the accused, the same should be rejected without any further probe. [See Bankey Lal and others Vs. The State of U.P. AIR 1971 SC 2233 and Mohar Rai Vs. The State of Bihar AIR 1968 SC 1281]"

62. In case at hand, from the evidence on record discussed in para supra it is clear that appellant had reached the spot of incident with knife. When deceased refused to arrange liquor as demanded by the appellant and also refused to accompany him for drinking liquor, appellant committed attack on deceased Raju Misal

with knife and during the process of resistance appellant suffered two simple injuries. Therefore, it cannot be said that deceased Raju Misal was aggressor and to defend himself appellant committed attack on deceased Raju Misal and slashed his neck. Thus, appellant cannot make the capital of two very simple injuries suffered by him in the incident and claim innocence.

63. In the case of *Ashok Rai Vs. State of Uttar Pradesh and Others [(2014) 5 SCC 713]*, in para No.12 of the judgment Hon'ble Supreme Court has held as under :-

"12. It is argued that the prosecution case rests on evidence of interested witnesses. No independent witnesses are examined. Unless there is corroboration to the evidence of interested witnesses, their evidence cannot be accepted. We cannot accept this submission. Evidence of interested witnesses is not infirm. It would be good to have corroboration to their evidence as a matter of prudence. But corroboration is not always a must. If the evidence of interested witnesses is intrinsically good, it can be accepted without corroboration. However, as held by this Court in *Raju Vs. State of T.N. (2012) SCC 107 : (2012) 4 SCC (Cri.) 184*, the evidence of interested witnesses must be scrutinized carefully. So scrutinized, the evidence of PW1, PW2 and PW4 appears to be acceptable."

64. In case at hand, though Gautam Misal (PW4), Sandeep Misal (PW5) and Rahul Misal (PW6) being nephews of deceased Raju Misal, are related witnesses, considering the fact that incident took place at broad daylight within the vicinity of their house and on the day of *Nagapanchami*, their presence at the spot was natural

and their evidence discussed in para supra is intrinsically good, we accept the same without corroboration of other circumstantial evidence after scrutinizing the same minutely and carefully.

65. In the matter of ***Ramesh & Others Vs. State of Haryana [2016 DGLS(SC) 1260]***, the Hon'ble Supreme Court held as under :-

"40. On the analysis of various cases, following reasons can be discerned which make witnesses retracting their statements before the Court and turning hostile:

- (i) Threat/intimidation.
- (ii) Inducement by various means.
- (iii) Use of muscle and money power by the accused.
- (iv) Use of Stock Witnesses.
- (v) Protracted Trials.
- (vi) Hassles faced by the witnesses during investigation and trial.
- (vii) Non-existence of any clear-cut legislation to check hostility of witness."

66. In case at hand, it has come on record that incident was witnessed by many persons from the locality. Statements of some of them came to be recorded by the investigating officer during the course of investigation but merely for non examination of independent witness/s clear, cogent and consistent evidence of three eye witnesses, out of which one was injured witness, cannot be rejected outrightly. It is common experience that witnesses are

not inclined to come forward and give statement about incident which they saw. Even if, any how they are convinced they would not gather courage to depose against the accused because of threats to their life for economic or other reasons including muscle power.

67. Inquest panchanama Exhibit-57 reveals that the dead body of Raju Misal kept in mortuary of Ghati Hospital was identified by Manohar Jagannath Avasarmol who happens to be cousin (son of mother's sister of deceased Raju) and not by anybody from eye witnesses, but that would not adversely affect the case of prosecution in any way. Therefore, arguments of defence counsel on this aspect holds no water and cannot be accepted.

68. It is true that Rahul Misal (PW6) in his cross-examination stated that incident took place in spur of the moment but having regard to the totality of evidence it cannot be said that there was no intention on the part of the appellant to commit the murder of deceased Raju Misal and in a sudden fight Raju Misal suffered injury on his neck and died. Ocular evidence of three eye witnesses in one voice states that appellant picked up quarrel with deceased Raju misal, who was sitting on the swing and swinging on the occasion of *Nagapanchami*, for the petty reason of not fulfilling his demand of arranging liquor and during the quarrel appellant

took out knife from his pocket and slashed neck of the deceased Raju Misal. Looking at the location, nature and severity of injury which resulted in instant death of Raju, it cannot be said that assault was unintentional. The case squarely falls within the ambit of clause secondly or thirdly of Section 300 of the IPC and not either part (I) or part (II) of Section 304 of the IPC.

69. Testimony of Gautam Misal (PW4), corroborated by testimonies of Sandeep Misal (PW5) and Rahul Misal (PW6) and medical evidence viz. testimony of Dr. Khan Heena Kausar (PW8) at Exhibit-42 and injury certificate at Exhibit-43 proved in his evidence, establishes charge under Section 324 of IPC for causing hurt to Gautam Misal (PW4) by knife in addition to the charge of murder of deceased Raju Misal.

70. In *KKochu Maitheen Kannu Salim vs State Of Kerala [1998 CRI.L.J. 2277]*, Hon'ble Supreme Court held as under:-

"6. The High Court has also not considered another important aspect, viz. the conduct of PW 2. According to PW 2, the deceased came to his shop requested him to close it and then both of them went to the shop of PW 3 to purchase plantains and thereafter both of them were walking on the road and at that time the incident took place. He has further stated that thereafter he went near the intersection of the road and shouted that Salim and Jalal had given knife blows to Ummer. If his relations with Ummer were so friendly as stated by him then in that case he would not have left Ummer like that and gone near the junction shouting that Salim and Jalal had given knife blows to him but would have

really taken him to his aunt's place which was near by or to a hospital for treatment or gone to the police station for lodging a complaint. He did neither of these things and just disappeared till next day evening. This conduct has to be regarded as inconsistent with his being with the deceased at the time of incident. PW 3 from whose shop the deceased and PW 2 are stated to have purchased plantains did not support PW 2. According to PW 2, he had informed PWs 7 and 8 about the incident. But their evidence has been found to be inconsistent both by the trial court and the High Court. That would mean that he had not really informed those witnesses. All this creates a serious doubt regarding his having seen the incident.

7. The High Court also committed an error in relying upon the evidence regarding discovery of MO3 - knife. It appears from the evidence of the attesting witness - PW 16 that he was a man of the police and not an independent person. if he was thus a selected person, it becomes difficult to appreciate how the evidence of the Investigation Officer - PW 20 could have made the discovery evidence reliable. The trial court has rightly pointed out that no independent person of the locality was associated with the preparation of Mahazar - Ex. P. 10 even though as admitted by PW 16 himself, there were number of houses near the place from where the knife was alleged to have been discovered."

71. In case at hand, eye witnesses present at spot not only intervened and tried to pacify the quarrel but also immediately carried deceased Raju Misal to the hospital. Therefore, the consistent versions of three eye witnesses establishing complicity of appellant in the incident cannot be discarded.

72. We have demonstrated in para supra how the evidence of three eye witnesses viz. Gautam Misal (PW4), Sandeep Misal

(PW5) and Rahul Misal (PW6) is clear, cogent and convincing and how the discrepancies pointed out by the defence are not material discrepancies going to the root and create doubt about their truthfulness. Therefore, in our view the judgment delivered by the Hon'ble Supreme Court in *Kochu Maitheen Kannu Salim vs State Of Kerala* is not applicable to the case at hand.

73. In case of *Kishor Shamrao Bhoyar Vs. State of Maharashtra [2020 ALL M.R.(Cri) 306]*, co-ordinate Bench of this Court, while dealing with the aspect of delay in recording statements of witnesses recorded as under :-

"20. Another aspect which requires to be considered in favour of appellant is delay in recording statements of eye witnesses. It is admitted by PW-10 Yogesh Ingle, Investigating Officer that though he was investigating this crime on 6.4.2014 and 7.4.2014, he has not recorded statements of any of the eye witnesses on any of these two days. PW-4 Guruprasad, however, admitted that his statement is recorded by police in the night on 5.4.2014 itself and further admitted that after that day he was never called by police. It is material to note that no such statement of PW-4 Guruprasad dated 5.4.2014 is on record. In fact, according to PW-10 Yogesh Ingle, I.O. till 7.4.2014 he did not record statement of any of the eye witnesses.

21. All these facts create doubt in the case of prosecution to establish guilt of appellant. In that view of the matter, merely because blood of group 'AB', which is blood group of deceased, was found on the clothes of appellant, that by itself is too short to connect the appellant with the present crime. More particularly when, in spite of seizure of his clothes on his arrest on 6.4.2014, were forwarded for its analysis to C.A. on 22.4.2014 and there is no link evidence brought on record with reference to safe custody of

these articles nor there is reference to sealing of same at the time of its seizure on 6.4.2014. Above aspect thus leaves no room to doubt about tampering of clothes of appellant, more particularly in absence of any satisfactory explanation on record to dislodge above suspicion.

22. In the case of [State of Rajasthan .vs. Teja Singh and Others](#) reported in 2001 ALL MR (Cri) 994 (S.C.), the Hon'ble Apex Court did not rely upon eye witnesses because of the fact that though they were available in village, their statements were recorded after five days of the crime, for which explanation given by Investigating Officer was not at all satisfactory. As against this, in the appeal in hand, there is absolutely no explanation by the Investigating Officer for not recording statements of eye witnesses for three days after the incident. In fact, there is specific admission of Investigating Officer to have not recorded statement of any of the eye witnesses on 6.4.2014 or 7.4.2014 and in fact, PW-Guruprasad claims to have made his statement to police 5.4.2014 and no such statement is on record."

74. In para supra we have demonstrated by referring case diary and station diary of the relevant period as to how material came on record through the cross examination of Mandabai Misal (PW1) and Gautam Misal (PW4), that their statements were recorded on 26-07-2009 when they were in the hospital is not correct and as to how it is correct that first time the statements of all the witnesses including eye witnessed were recorded on 31-07-2009. Besides, we have demonstrated that out of three eye witnesses one viz. Gautam Misal (PW4) was injured and he had lodged the FIR within one and half hour after the incident on getting discharged from the hospital. The name of Rahul Misal (PW5) appears in FIR, whereas presence of Sandeep misal (PW4) at spot

when incident took place, reveals from evidence of Mandabai Misal (PW1), Gautam Misal (PW4) and Sandeep Misal (PW5). Evidence of three eye witnesses, is in consonance with FIR, therefore, worthy of acceptance, and cannot be discarded merely for the reason that statements of two eye witnesses viz sandip and rahul u/s 161 of Cr.P.C came to be recorded after five days of the incident and that delay has not been explained by investigating officer.

75. In case of *Tulshiram Bhanudas Kambale and Others vs. State of Maharashtra [2000 Cri.L.J.1566]*, co-ordinate Bench of this Court held that No evidential value can be attached to the recovered articles which are not sealed with lac immediately.

76. In the matter of *Lalchand Cheddilal Vs. State of Maharashtra [2000 (3) Mh.L.J. 438]*, Co-ordinate bench of this Court held as under:-

“(c) Evidence Act, S.27 – Once the factum of sealing of the knife becomes doubtful, possibility of blood being smeared on it prior to its being sent to the Chemical Analyst cannot be ruled out – Prosecution did not prove that right from the time, the knife came into possession of the police and till it was sent to the Chemical Analyst, the seals were intact – The person who carried the knife to the Chemical Analyst had not been examined by the prosecution – Extremely unsafe to place reliance on recovery evidence in the circumstances.

11. The position in respect of recovery of blood stained knife on the pointing out of the appellant is hardly better. In the first instance, we feel it pertinent

to mention that in the recovery panchanama of the knife, there is no mention that the knife was sealed. The recovery panchanama was a contemporaneous document and absence of mentioning of sealing in the same, in our view, hits the prosecution hard. Since in it, it has not been mentioned that the knife was sealed, we feel it unsafe to accept the evidence of PSI Navkhurkar and the public panch Pramod Waigankar that it was sealed.

Once the factum of sealing of the knife becomes doubtful, possibility of blood being smeared on it prior to its being sent to the Chemical Analyst cannot be ruled out.

In this connection, it would be pertinent to refer to para 8 of the Division Bench decision of the Rajasthan High Court reported in A.I.R. 1955 Rajasthan 82 Vol. 42 C.N. 27 [The State v. Motia and others](#) accused, wherein Wanchoo, C.J., (as he then was) observed thus :---

"..... It is, therefore necessary for the prosecution to produce evidence that steps were taken at once to seal the articles, and that from the time the articles came into possession of the police to the time they were sent for identification before a Magistrate or for examination to the Chemical Examiner the seals remained intact. This evidence is missing in this case. It is, of course not difficult to sprinkle a few human blood stains on articles recovered if somebody wants to do so. We do not say that this was done in the present case; but as precautions were not taken the argument raised on behalf of the accused that this might have been done remains unrefuted"

In the instant case, the prosecution has also not proved that right from the time, the knife came into possession of the police and till it was sent to the Chemical Analyst, the seals were intact. Again, it is pertinent to mention that the person who carried the knife to the Chemical Analyst has not been examined by the prosecution."

77. In the matter of *Amarjeetsingh S/o Jagtarsingh Mohar*

and Others Vs. State of Maharashtra [2016 (4) Mh.L.J. 446], the

Co-ordinate Bench of this Court has held as under :-

“Evidence Act, S.27 – Recovery of weapon – No blood stains present on weapon when it was recovered – C.A. report showing weapon was having blood stains loses its value – Prosecution has not adduced to exclude possibility of tampering the seized Khanjar/dagger as it appears that the same was not kept in sealed condition after its seizure – It cannot be said that said Khanjar/dagger is proved to have been used in the commission of murderous assault (para34)

34. - Avinash Sonawane shows that there were no stains of blood on the Khanjar/dagger recovered at the instance of accused No.1 – Amarjeetsingh Mohar. However, Chemical Analyzer’s report at Exh.103 shows that the said Khanjar/dagger was having stains of blood group ‘B’. When the Khanjar/dagger recovered at the instance of accused No.1 – Amarjeetsingh Mohar was not sealed while it was seized and when Investigating Officer has categorically stated that there was no blood on the said Khanjar/dagger at the time of its seizure, finding of blood of group “B” on that Khanjar/dagger cannot be construed as an incriminating circumstance against accused No.1 – Amarjeetsingh Mohar. The prosecution has not adduced evidence to exclude possibility of tampering the seized Khanjar/dagger as it appears that the same was not kept in sealed condition after its seizure. Therefore, it cannot be said that said Khanjar/dagger is proved to have been used in the commission of murderous assault on P.W.3 – Jarnelsingh and as such the fact of recovery of Khanjar/dagger at the instance of accused No.1 – Amarjeetsingh Mohar loses its significance and its discovery cannot be said to be that of a relevant fact.”

78. In the matter of ***State of Rajasthan Vs. Motia and Others [1955 AIR (Rajasthan) 82]***, the High Court of Rajasthan has held as under :-

"It is necessary that the officer recovering the articles should immediately take steps to seal them and evidence should be produced that the seals were not tampered with till the identification is over, or till the articles are sent to the Chemical Examiner for analysis. In the absence of such precautions it would always be open to the accused to say that the police later put human blood on the articles in order to implicate the accused. If evidence as to such sealing is not produced, court cannot place the same reliance on the discovery of blood stains on various articles as the Court would have done if necessary precautions had been taken."

79. In case at hand, we have not relied on C.A. report as evidence as to the sealing of all the muddemal with lac seal is lacking and two months delay caused in forwarding the same to forensic lab. We uphold the conviction of appellant relying on the evidence of three eye witnesses out of whom one was injured and as their presence at the spot when incident took place found to be natural and their evidence found to be clear cogent and convincing to prove complicity of appellant in the incident of causing murder of Raju Misal and causing hurt to the injured witness Gautam Misal.

80. In case of *Dalipsingh Vs. State of Punjab [1953 DGLS(SC) 62]*, the Hon'ble Supreme Court has held as under :-

"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. It is

true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

81. Therefore, from any angle, defence of the appellant about his false implication cannot be accepted as testimonies of three eye witnesses, one of whom was injured witness is clear, cogent and consistent to prove the incident and complicity of the appellant in incident.

82. Through the cross-examination of Gautam Misal (PW4) it has come on record that appellant was resident of Lane No.4, Misarwadi, Aurangabad, and he was the fast friend of deceased Raju Misal. Since appellant and deceased Raju Misal Were residents of one and the same locality and fast friends of each other question of falsely implicating appellant in the incident by sister-in-law and nephew of deceased Raju Misal respectively does not arise. In view of facts and circumstances of the case, it appears that when deceased Raju Misal refused proposal made by appellant, either for arranging liquor or accompanying him for drinking liquor, appellant

annoyed, lost the temper and suddenly took out knife from his pocket, slashed the neck of deceased Raju Misal and also assaulted Gautam Misal (PW4) with the same knife when he intervened in rescuing uncle Raju Misal from his assault. The act of appellant, killing deceased Raju Misal by slashing his neck with knife, squarely falls under Section 300 of the IPC and not at all either Part I or Part II of Section 304 of the IPC.

83. Having regard to the totality of evidence discussed above, we have come to the conclusion that the impugned judgment and order dated 10-03-2014, convicting the appellant-accused, passed by the learned Additional Sessions Judge-2, Aurangabad, in Sessions Case No. 380 of 2009 is correct, proper and legal. Therefore, no interference is called for.

84. Accordingly, the criminal appeal is dismissed.

(B. U. DEBADWAR, J.)

(RAVINDRA V. GHUGE, J.)

SVH