

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

CRIMINAL APPEAL NO. 562 OF 2014

1. Kuta S/o Gimbya Vasave
Age : 40 years Occu. : Agriculture
R/o Kella-Khurd, Aagri Ghatpada
Tq. Dhadgaon, Dist. Nandurbar.
2. Dhirsing S/o Gimbya Vasave
Age : 34 Years, Occu. : Agriculture
R/o Kella-Khurd, Aagri Ghatpada
Tq. Dhadgaon, Dist. Nandurbar.

... Appellants
(Orig. Accused)

Versus

The State of Maharashtra

... Respondent

...

Advocate for Appellants : S/Shri C. R. Deshpande with
Akshay Kulkarni & C. C. Deshpande
APP for Respondent – State : Shri K. S. Patil

...

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

DATE : 29TH JANUARY, 2021

JUDGMENT [PER RAVINDRA V. GHUGE, J.] :-

1. By this appeal, the appellants, who are the original accused, seek to challenge the judgment and order dated 22-08-2014 delivered by the learned Additional Sessions Court, Shahada, in Sessions Case No. 35 of 2012. They have been convicted for having committed offences punishable under Section 302 read with Section 34 of the Indian Penal Code.

2. We have heard the strenuous submissions of the learned advocate for the appellants and the learned prosecutor, at length on 27-01-2021 and 28-01-2021. Since, the submissions of the parties concluded beyond rising time on 28-01-2021, we posted the matter today for dictating the judgment in the open Court. With the assistance of the learned counsel, we have gone through the appeal paper book and the record and proceedings, especially the Marathi version of the testimony of witnesses, since we found that the English version was a bit deceptive and, at some places, carried a different meaning.

3. The prosecution had put up its case before the trial Court contending that accused No.1 Kuta S/o Gimbya Vasave and accused No.2 Dhirsing S/o Gimbya Vasave had committed an offence of murdering Sanya Vasave. The FIR was lodged by PW5 Smt. Bondibai Sanya Vasave, who was the wife of the deceased.

4. According to PW5, She was residing along with her deceased husband, sons Ashish and Asma and daughter Sangita, in their agricultural field at village Kellakhurd - Agrighatpada. Both the accused are the nephews of the complainant and the deceased and they were also residing in their field adjacent to the field of the informant. A well is located in the field of the informant. Both the accused used to utilise the water from the said well for agricultural

and domestic purposes.

5. Due to the summer of 2012, leading to the shortage of water, the deceased had prevented the accused from drawing water and a feud cropped up between the two sides. On the date of the incident 04-05-2012, the complainant claimed to be sweeping her courtyard at about 07:00 a.m. and her deceased husband was offering fodder to the bullocks. Both the accused are said to have approached the deceased on the issue of sharing of the water. Accused No.1 was carrying a spear and accused No.2 was holding an iron rod. Both of them insisted on drawing the water from the well and since the deceased declined to share the water, both assaulted him. The spear used by accused No.1 caused an injury on the left shoulder of the deceased and the iron rod blow inflicted by accused No.1 on the forehead of the deceased, is said to have caused his death.

6. The informant has set out in the FIR that after hearing the screams of the deceased, she, her son Ashish, brother-in-law Vanya and the neighbor Dilya, arrived at the spot, and are an eye-witnesses. After seeing them at the scene of the crime, both the accused ran away from the spot. The FIR was lodged on the same day 04-05-2012. Both the accused are behind bars since 2012.

7. The following witnesses were examined by the prosecution before the trial Court :-

PW1 – Aatrya Andya Vasave – Panch Witness – turned hostile

PW2 – Kalla Sheda Padavi – Panch witness – turned hostile

PW3 – Akbarsha Imamsha Fakir – Panch witness of the spot panchanama.

PW4 – Vanya Bhijja Vasave – Eye witness

PW5 – Bondibai Sanya Vasave – Eye witness – wife of the deceased

PW6 – Deelip Dadala Vasave – Panch witness of the spot panchanama – turned hostile

PW7 – Sama Devji Vasave – panch witness – turned hostile

PW8 – Ashish Sanya Vasave – Son of the deceased

PW9 – Shankar Garbad Shirole – Investigating Officer

PW10 – Dr. Onkar Chamarya Valavi – Doctor who conducted postmortem on the dead body.

8. On the basis of the oral and documentary evidence, the trial Court convicted both the accused for having committed an offence punishable under Section 302 read with Section 34 of the IPC and awarded the sentence of imprisonment for life along with fine.

9. The learned counsel for the appellants has strenuously submitted that the hostile witnesses have weakened the case of the prosecution. The three eye witnesses, who claim to be such, are improbable eye-witnesses and were actually not at the spot where the crime was allegedly committed by the accused. Four witnesses

have turned hostile and the trial Court has awarded the conviction on the basis of the testimonies of three improbable eye witness and are interested witnesses being closely related to the deceased.

10. He further submits that though the Regional Forensic Science Laboratory has submitted it's report, the blood found on the soil sample, clothes, baniyan of the deceased, towel, underpant and half t-shirt, could not be determined as belonging to any blood group, except the towel and the underpant used by the deceased which exhibited blood group AB. The blood group test on the remaining items was inconclusive. Merely because it was revealed that the blood found on the articles at Exhibits 1, 2, 4, 7 and 11 was human blood, does not advance the case of the prosecution.

11. The learned advocate for the appellants has read out the testimonies of the witnesses, threadbare. It is contended that the statement of PW4, who is the brother of the victim, renders no assistance, since he has wrongly mentioned the date of incident as 03-05-2012. This witness has introduced a new version of the neck of the deceased having been pressed, fist blows having been inflicted and the deceased having been assaulted on his stomach.

12. He places reliances upon the following judgments :

- a) Parvat Singh and others vs. State of Madhya Pradesh [(2020) 4 SCC 33]

- b) Raj Kumar Singh Vs. State of Rajasthan
[AIR 2013 SC 3150]
- c) Manoj Kumar and others Vs. State of Himachal Pradesh
[AIR 2018 SC 2693]
- d) Mihir Gope and others Vs. State of Jharkhand, decided
by the Hon'ble Apex Court on 08-01-2021.
- e) Yogesh Singh Vs. Mahabeer Singh
[2016 AIR (SC) 5160]

13. It is submitted that both the accused have put up a version through cross examination of the prosecution witnesses that the deceased had suffered a head injury in the recent past and considering the inquest panchanama and the deposition of the doctor, PW10, in paragraph No.3, that a person may die of internal hemorrhage suffered two to three days prior to the incident at issue, the deceased has died on account of an old injury and the two accused have been implicated by the complainant and her relatives to seek revenge.

14. As an alternative to the submission put forth above, the learned counsel for the appellants prays that if this Court concludes that both the accused have committed offences which they are charged with, the offence committed by accused No.1 can be converted into an offence under Section 324 in view of Mihir Gope and Others (supra) and the offence committed by accused No.2 can be converted into Section 304 Part-II in view of Manoj Kumar and

Others (supra).

15. The learned prosecutor has strenuously supported the impugned judgment. He contends that merely because the three eye witnesses are related to the informant PW5, it would not mean that their testimony should be discarded. They are natural witnesses. The spot panchanama would indicate the topography. The huts of these eye witnesses are at a close distance from the spot of the crime and merely because they are related to the deceased, would not mean that the conviction handed down by the trial Court, cannot be sustained as there is no independent witness.

16. He submits that PW4, PW5 and PW8 are eye witnesses. Each one of them has deposed stating that accused No.1 inflicted a spear injury on the left shoulder of the deceased and accused No.2 inflicted an iron rod injury on the forehead of the deceased. Each one of them has seen the event with their own eyes. Their houses are close to each other. Close relatives reside in such houses.

17. He then submits that the prosecution witnesses were examined after about 21 months of the incident. Law prohibits the witnesses from meeting the prosecutor or the I.O. prior to stepping into the witness box. Minor discrepancies in their versions need to be overlooked. Both the accused had planned the attack and

therefore, they had arrived at the scene, armed with weapons. If they had no intention of harming the deceased, and if the alleged incident had occurred in the heat of the moment, they would not have carried a rod and a spear along with them. The accused did not choose to lead evidence or even examine themselves. No explanation, as regards the carrying of deadly weapons, is forthcoming from the accused. The doctor has opined on the basis of the postmortem report (Exhibit-52) that the deceased had suffered a spear injury on his left shoulder and a life threatening injury on his forehead with the iron rod. The injury caused by the iron rod is opined to have caused the death of the husband of PW5 and therefore, neither Section 304 Part-II nor Section 324 of the IPC would be attracted in this case.

WHETHER THE DEATH OF SANYA WAS HOMICIDAL

18. The postmortem report at Exhibit-52 indicates that a corpse was brought by police constable, for the purpose of postmortem, to the Rural Hospital, Dhadgaon. It was sent by PSI, Dhadgaon Police Station. The corpse were identified by the informant PW5, who was the wife of the deceased. The FIR was registered on 04-05-2012 at 10.05 a.m. The postmortem was conducted in between 04:15 p.m. to 05:15 p.m. Rigor mortis had slightly developed. There was no sign of decomposition. Both the

eyes were semi-opened. The tongue was inside the mouth and ENT bleeding was present.

19. The injuries set out at clause 17 of the postmortem report, read as under:-

- "A) C.L.W. over right parietal region of head, size 5 cm x 2 cm, margin irregular, with blood clot.
- B) C.L.W. over left shoulder joint near lateral end of clavicle bone, size 3 cm x bone deep, with margin irregular, Edges deeply stared, blood clot formation
- C) Abrasion over right back of shoulder joint."

20. The postmortem report indicates that the injuries were ante-mortem. Haematoma was present under the scalp and corresponding brain area. In view of the injuries mentioned above, the probable cause of death in the opinion of the autopsy surgeon was "due to head injury".

21. PW10, the autopsy surgeon, has deposed by narrating the internal and external injuries that were found on the body of the deceased. All the injuries were said to be caused within 24 hours, with the use of a hard, blunt and sharp object. He stated that all the injuries were ante-mortem and he reiterated the cause of death being on account of the head injury. In cross examination, he denied that the external injuries at Sr. Nos. 1 to 3, reproduced above, were old injuries. He admitted that the injury at Sr. No.2

(B) suffers overwriting. We have perused the same, which indicates that it was earlier written as Rt shoulder joint, which means the right shoulder joint, and by a correction duly initialed by the autopsy surgeon, it was corrected as Lt meaning Left. In our view, nothing turns on this aspect, because it is consistently deposed by the eye witnesses as well as by the autopsy surgeon that the spear injury was inflicted on the left shoulder joint near the lateral end of the clavicle bone. It was a deep injury.

22. The learned counsel for appellant has strenuously contended that there is no evidence with regard to injury 'C' which is as abrasion over the right back of the shoulder joint. In our view, nothing turns on this issue, since no questions have been put forth by the defence as regards this abrasion. It is established by evidence that the deceased had fallen to the ground after suffering the injuries and the rough ground surface may have caused the abrasion which was not the reason for death of the deceased.

23. PW10 has clearly established that the injury 'A' could be possibly caused by an iron rod – Article-B shown to him and the injury 'B' can be possible caused by a spear – Article-A. The learned counsel for the appellants has vehemently contended that as the doctor has opined that a person could die because of internal hemorrhage (in the brain area) on account of an injury suffered two

to three days prior to the death, would indicate that the deceased had suffered a head injury earlier and his death cannot be attributed to the injury inflicted on his forehead. In the absence of any evidence to establish a previous injury, we cannot rely upon conjectures and surmises that the deceased may have suffered an injury to his brain / skull in the recent past.

24. Considering the above, we find that the victim Sanya has suffered a homicidal death.

WHETHER THE ACCUSED ASSAULTED THE DECEASED

25. PW4 is the younger brother of the deceased. He was brushing his teeth in front of his house at 07:00 a.m. He has stated that the incident occurred on 03-05-2012, which is being sought to be capitalised by the accused contending that the testimony of the said witness needs to be discarded as he contends the occurrence of the incident on 03-05-2012 and the prosecution has charged the accused of having committed an offence on 04-05-2012. Taking into account the total evidence before us, we are of the view that the said wrong date has been mentioned out of inadvertence.

26. We have considered the testimony of PW4 in the light of the spot panchanama Exhibit-22 dated 04-05-2012, which has a specific sketch map on internal page II-4. His house and the house

of the deceased, as well as, the house of the accused are said to be adjacent to each other. The defence has contended that, on the one hand, the place at which the body of the deceased was located, is about 300 ft. away from the house of the deceased and therefore, PW4 had no chance of witnessing the accused assaulting the deceased. PW4 has contended that a bullock belonging to the deceased had strayed upto the house of the first accused. The deceased went towards the said house to bring back the bullock and at that time, both the accused started following the deceased, who was subsequently assaulted by accused No.1 with a spear and by accused No.2 with an iron rod. Having suffered an injury on his left shoulder and forehead, the deceased fell to the ground. Accused No.1 pressed his neck with his hands and accused No.2 inflicted fist blows on his stomach. PW5 and PW8 have also witnessed the said assault along with son of PW4 namely Ratilal Vanya. Ratilal is not examined.

27. In his cross examination, PW4 denied of being in the State of Gujarat, when the incident occurred. He admitted that the well is about 300 ft. from his house and the house of accused No.1 is about 200 ft. to 300 ft. from the house of the deceased. He denied that accused No.2 was not present in village Kellakhurd as he resides in another village. In so far as the bullock part of the

testimony is concerned, PW4 stated that he does not know why his version about the bullock part is not set out in his statement under Section 161 of Cr.P.C., though he had told the police about the same. However, in our view, since this part was not confronted to the I.O. PW9 and no explanation was sought for the omission of the bullock part from such statement under Section 161, we are unable to read that part of the testimony of PW4. However, PW4 has specifically stated in paragraph No.3 of his deposition that accused No.1 was trying to draw water forcibly from the well and a dispute had erupted between him and the deceased which led to the attack on the deceased.

28. We also find that the version of PW4, to the extent of pressing the throat of the deceased and inflicting a blow on his stomach, was also not set out in his statement under Section 161 and this omission was neither confronted to PW4, nor to the I.O. PW9. This part of the version is, therefore, not available to us to be considered as a substantive piece of evidence.

29. PW5 is the wife of the deceased. She has stated in her testimony that they owned a pair of bullocks who were being used for plowing the field. One of the two bullocks had loitered in front of the house of accused No.1, who was brought back by the deceased. Both the accused followed him with a spear and an iron

rod, which were used by the said accused to inflict blows, viz. by the spear on the left shoulder and by the iron rod on the forehead of the deceased. Deceased Sanya fell to the ground and is said to have died at that spot itself. Since Sanya screamed on the assault, she, PW4 and PW8 rushed out and saw the two accused assaulting the deceased. After the accused ran away from the spot, she went to the concerned police station and lodged the FIR which is at Exhibit-30. She identified the spear Article-A and the rod Article-B.

30. The learned counsel for the appellant has pointed out that the FIR did not disclose the bullock part of the version. However, as PW5 contended in cross examination that this part of her version was narrated to the police, it was inevitable for the defence to have confronted the I.O. as to the reasons for his omission in mentioning that part in the FIR, in view of the law laid down by the Hon'ble Apex Court, (Three Judges Bench) in ***V. K. Mishra and another Vs. State of Uttarakhand and another*** WITH ***Rahul Mishra Vs. State of Uttarakhand and another*** [AIR 2015 Supreme Court 3043]. The Hon'ble Apex Court has held in paragraph No.18 as under :-

"18. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the

writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo moto make use of statements to police not proved in compliance with Section 145 of Evidence Act that is, by drawing attention to the parts intended for contradiction."

31. PW8 is the son of the deceased who was about 17 years of age. Both the accused were his cousin brothers. He was taking

education in 2012 and had returned to his native village Kellakhurd due to the summer vacation. His father owned eight acres of agricultural land and a well was situated in the said field. He deposed that his two cousin brothers, i.e the two accused, were permitted to fetch water from their well. Since, in the summer of 2012 the water level had depleted, that his father had restrained the two accused from drawing water, and this caused a feud between them.

32. He has further stated that one of the bullock had strayed towards the house of accused No.1 and was fetched by the deceased. Accused No.1 followed him with a spear and gave a blow on his left shoulder. Accused No.2 carried an iron rod and inflicted a wound on his forehead. PW8 was standing on the platform in front of his house and saw his father being assaulted, who collapsed to the ground. PW8 and PW4 rushed to the spot, by which time his father was bleeding and died. PW8 had brought the police Patil to the spot, who advised them to lodge an FIR in the police station.

33. In cross examination, he denied that the villagers also used to fetch water from the same well. The house of accused No.1 was at a distance of about 24 Meters from his house and accused No.2 was residing in village Velkhedi near Toranmal. He and his uncle PW4 had gone to Gujarat in search of a job and they had

returned a day prior to the date on which the incident occurred. In paragraph No.6, he has narrated the topography and the location of the houses. PW4 and PW5 were in their houses, when the incident occurred. A question was put to him in cross examination that his father had not walked upto the house of accused No.1 to bring the bullock back and that both the accused had not assaulted him. He had denied the said suggestions, and further also denied the suggestion that his father was attacked about four to five days ago, by an unidentified person and he had suffered severe injuries in that assault. He reiterated that both the accused had assaulted his father on account of his refusal to let them draw water from in well in summer.

34. PW9 is the investigating officer who has dealt with the contents of the FIR. He narrated the manner in which the investigation was handed over to him, his visit to village Kellakhurd and the preparation of the spot panchanama. A spear was found lying at the spot which was seized by him. Sample of blood mixed earth and simple earth was collected by him, a rough sketch map was prepared and the spot panchanama Exhibit-22 bears his signature and the signature of two panchas. He identified the spear Article-A, the inquest panchanama Exhibit-23 and the two arrest panchanamas Exhibit- 45 and 46. He then stated that, on

10-05-2012, accused No.2, while in custody, agreed to discover the iron rod by which the deceased had suffered a homicidal death. A memorandum panchanama was prepared under Section 27 of the Evidence Act, in the presence of two panchas, which is at Exhibit-47. He identified his signature, the signatures of the two panchas and the thumb impression of accused No.2. He then narrated the manner in which accused No.2 led the police and the panchas to his house in Agri Ghatpada locality. They all traveled by the police Jeep. Accused No.2 entered his house and took out an iron rod from beneath the roof and produced it before PW9. The iron rod was seized and a seizure panchanama was drawn. Exhibit-48 was identified to be the seizure panchanama, bearing the signature of the I.O., the two panchas and the thumb impression of accused No.2. The iron rod is Article-B.

35. Thereafter, the clothes worn by accused No.2, were seized with the aid of another seizure panchanama. The colour of the shirt, Article-C, the colour of the towel, Article-D and the seizure panchanama Exhibit-49 along with his signature and the signature of the panch, were identified by PW9.

36. Thereafter, a further seizure panchanama Exhibit-50 was prepared, when the clothes of accused No.1 were seized. The seizure panchanam is Exhibit-50 and PW9 identified his signature

and the signatures of the two panchas. The description of the shirt and the pant was stated and he identified Articles E and F, respectively.

37. In cross examination, PW9 supported the seizure panchanama, the articles seized, the spot inspection and the inquest panchanama. He contended that the inquest panchanama Exhibit-23 was prepared on the basis of what he had seen and as the injuries appeared to him. He denied all the suggestions as regards there being no seizure, there being no spot panchanama, there being a false inquest panchanama or that the deceased had died because of an old injury or that he had conducted a false investigation and presented a false charge-sheet in the Court.

38. The thrust of the appellant's case is primarily on two grounds. Firstly, that the three eye witnesses are interested witnesses and their testimonies cannot be relied upon, in the absence of an independent witness. Secondly, the appellants have relied upon the testimonies of hostile witnesses to support the contention that there was no seizure panchanama and there was no seizure of the spear, the iron rod, the clothes, etc. It is strenuously canvased that PW1, PW2, PW3, PW6 and PW7 have turned hostile. It is, therefore, canvased that once the seizure is dispute, the entire case of the prosecution collapses.

39. In a judgment delivered by this Court in the matter of ***Saraswati w/o Ganpat Landge Vs. State of Maharashtra*** in Criminal Appeal No. 40 of 2015, delivered on 19-01-2021, while placing reliance upon the judgment of the Hon'ble Apex Court in ***State through PS Lodhi Colony, New Delhi Vs. Sanjeev Nanda [(2012 8 SCC 450)]***, this Court has dealt with the menace of such panch witnesses turning hostile. The Hon'ble Apex Court has come down heavily with regard to such hostile witnesses, who act as panch witnesses. It is at the time of deposing before the Court, after about a year or two from the date of the crime, that they turn hostile. No doubt, we find that the learned prosecutor in the case before the trial Court could have conducted a better and probing cross examination by confronting the panch witnesses as regards they having signed various seizure panchanama, memorandum statement under Section 27, having not lodged any protest or complaint that they were coerced or tutored to sign on such panchanama. The Hon'ble Apex Court has also observed in one of its judgments that there could be many reasons behind such panch witnesses turning hostile and one such reason could be that they are won over by the defence for reasons that could be perceived.

40. In the instant case, quite peculiarly, the panch witnesses have turned hostile and those who have signed on the

seizure panchanama are refusing to identify the articles seized, though they admit their signatures and do not contend that they were made to sign on blank papers. A tough cross examination, if would have been conducted by the learned prosecutor, would have surely assisted in exposing the motive of such hostile witnesses whose testimonies were aimed to support the defence. Nevertheless, it is now well settled that the circumstances and available evidence concerning the seizure of articles, murder weapons etc. could be used in aid of the case of the prosecution. Moreover, when there are three eye witnesses whose testimonies cannot be discarded merely because they are close relatives of the deceased and in view of being natural witnesses, the seizure panchanama need not be dumped as trash. We have evidence before us which would indicate the manner in which the accused led the police party to particular spots, from where the seizure was made, the blood appearing on articles, being human blood, and the testimonies of the eye witness, could be used in aid of the case of the prosecution.

41. With regard to often repeated submissions and insistence of the defence counsel that the witness should not be related to the victims, it was held in the ***State of Rajasthan Vs. Teja Ram, [(1999) 3 SCC 507]***, in paragraph No. 20 as under :-

"20. The over-insistence on witnesses having no relation with the victims often results in criminal justice going awry. When any incident happens in a dwelling house the most natural witnesses would be the inmates of that house. It is unpragmatic to ignore such natural witnesses and insist on outsiders who would not have even seen anything. If the Court has discerned from the evidence or even from the investigation records that some other independent person has witnessed any event connecting the incident in question then there is a justification for making adverse comments against non-examination of such a person as a prosecution witness. Otherwise, merely on surmises the Court should not castigate the prosecution for not examining other persons of the locality as prosecution witnesses. The prosecution can be expected to examine only those who have witnessed the events and not those who have not seen it though the neighbour-hood may be replete with other residents also."

42. It is concluded that even in the case of circumstantial evidence, in which the chain is complete, merely because an independent witness has not been examined, would not lead to a conclusion that the entire case of the prosecution should be dumped. If eye witnesses, who are relatives of the victim or the deceased, are natural witnesses, their testimonies could be scrutinized closely and the Court should take extra caution in assessing the probative value of the testimonies of closely related witnesses who are being termed as interested witnesses.

43. In *Raj Kumar Singh Vs. State of Rajasthan* (supra) the Hon'ble Apex Court has observed in paragraph Nos. 38 and 39 as under :

"38. In the instant case, there have been major contradictions/ improvements/embellishments in the deposition of witnesses which cannot be ignored when they are examined in the correct perspective. The chain of links connecting the appellant with the crime appears inconclusive. It is a settled legal proposition that, while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the case of the prosecution, must not prompt the court to reject the evidence thus provided, in its entirety. The irrelevant details which do not in any way corrode the credibility of a witness, cannot be labeled as omissions or contradictions. Therefore, the courts must be cautious and very particular, in their exercise of appreciating evidence. The approach to be adopted is, if the evidence of a witness is read in its entirety, and the same appears to have in it, a ring of truth, then it may become necessary for the court to scrutinize the evidence more particularly, keeping in mind the deficiencies, drawbacks and infirmities pointed out in the said evidence as a whole, and evaluate them separately, to determine whether the same are completely against the nature of the evidence provided by the witnesses, and whether the validity of such evidence is shaken by virtue of such evaluation, rendering it unworthy of belief. "Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test the credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." It is in fact, the entirety of the situation which must be taken into consideration. While appreciating the evidence, the court must not attach undue importance to minor discrepancies, rather must consider broad spectrum of the prosecution

version. The discrepancies may be due to normal errors of perception or observation or due to lapse of memory or due to faulty or stereo-type investigation. After exercising such care and caution, and sifting through the evidence to separate truth from untruth, embellishments and improvements, the court must determine whether the residuary evidence is sufficient to convict the accused. (Vide: ., (2004) 9 SCC 186;, (2010) 8 SCC 191; and Sampath Kumar v. Inspector of Police, Krishnagiri, AIR 2012 SC 1249). In Kehar Singh & Ors. v. State (Delhi Admn.), AIR 1988 SC 1883, this Court has held that if the discrepancies are material it would be safer to err in acquitting than in convicting the accused.

39. In Subhash v. State of Haryana, AIR 2011 SC 349, this Court has held that a significant omission in the statement of a witness recorded under Section 161 Cr.P.C. may amount to a major contradiction. However, it may depend upon the facts of case and in case of a material contradiction the accused becomes entitled for benefit of doubt and thus acquittal."

44. In view of the above law, we have accessed the testimonies of the eye witnesses in the light of other pieces of evidence. We find that, that part of the bullock story i.e a bullock straying towards the house of accused No.1 and being brought back to the house of the victim, needs to be ignored in view of the law laid down by the Hon'ble Apex court in ***V. K. Mishra and another Vs. State of Uttarakhand and another*** (supra). So also, that part of the testimony of the eye-witnesses introducing a blow on the stomach

of the victim also can be ignored. By deleting these portions, the consistent testimonies of the three eye witnesses would be that the deceased had been allowing his two nephews i.e the two accused, to draw water from his well and it was in the summer season when the water level was depleting vigorously, that he was restraining them from drawing water. This denial in the month of May which is the severest month in the summer season, in this part of the State, appears to have agitated the accused and though the victim was their real uncle (father's brother), they have attacked him resulting in his death.

45. Through paragraph No.5 of the cross-examination of PW4 – Vanya Bhijja Vasave, an eye witness, the defence has brought on record the following four omissions :-

- 1) His stating before the police about accused No.2 Dhirsing's giving blow of iron rod "on the forehead" of deceased Sanya (omission is only to the extent of "on the forehead").
- 2) His stating to the police that bullock of Sanya had gone in front of the house of accused No.1.
- 3) His disposing to the police about Sanya's proceeding towards the house of accused No.1 to bring his bullocks back.
- 4) His stating to the police that when Sanya was taking his bullocks to his house, both the accused followed him.

46. Since PW4 Vanya in his cross-examination claimed to have stated the aforesaid portion to the police while recording his statement under Section 161 of Cr.P.C., it was necessary on the part of the defence to prove the said omissions by confronting the same to PW9 I.O., Shankar Garbad Shirole, PI, during his cross-examination. Admittedly, the defence has not proved the same.

47. Like PW4 Vanya, defence has also brought on record following one omission through the cross examination of PW8 Ashish Sanya Vasave, an eye witness :-

Accused No.2 Dhirsing's inflicting blow of iron rod on the head of his father Sanya (Omission is only to the extent of "on the head"). Since PW8 Ashish in cross-examination has stated the aforesaid omission to the police while recording his statement under Section 161 of Cr.P.C., it was necessary on the part of the defence to prove the said omission by confronting the same to PW9 I.O., Shankar Garbad Shirole, PI, during his cross-examination. Admittedly, defence has not proved the same.

48. From the aforesaid ratio laid down by the Hon'ble Supreme Court, it is clear enough that if the witness was not confronted with the part of the statement with which defence wanted to contradict him, then the Court cannot make use of that

statement made to the police until it is proved in compliance with Section 145 of Evidence Act, i.e. by drawing attention of I.O. to the part intended for contradiction.

49. In this case, though the defence has brought on record aforesaid omissions from the cross-examinations of PW4 Vanya and PW8 Ashish, it failed to prove the same by drawing attention of the I.O. PW9 to the said statements during his cross-examination, in compliance of Section 145 of the Evidence Act. Therefore, by using the aforesaid omissions, substantive evidence of PW4 Vanya and PW8 Ashish cannot be discarded.

50. Moreover, aforesaid omissions are minor in nature. Therefore, by relying upon the same, veracity of PW4 – Vanya and PW8 – Ashish cannot be doubted. The evidence of both these eye witnesses on the material point of assault by both the accused, is clear, cogent and consistent, and also corroborated by the evidence of their mother i.e. PW5 Bondibai Sanya Vasave, who too had witnessed the incident and lodged the FIR.

51. PW5 Bondibai is an eye witness of the incident and also the first informant. Through her cross examination, in paragraph No.8, defence has brought on record the following omissions :-

a) While lodging the FIR, she disclosed to the police about her

husband Sanya's going in front of the house of accused for bringing back the bullock.

b) Her disclosing to the police while lodging the FIR that when her husband Sanya was bringing back the bullock, both the accused assaulted him with the spear and iron rod on his shoulder and his head, respectively.

c) FIR (Exhibit-30) clearly demonstrates that accused No.1 was holding a spear and accused No.2 was holding an iron rod and they both assaulted her husband Sanya with the said weapons. However, FIR (Exhibit-30) does not specifically state that accused No.1 Kuta and accused No.2 Dhirsing inflicted blows of spear and iron rod on the right arm and the head of her husband Sanya, respectively. The said omission is only to the extent of locations of blows on the person of the deceased Sanya.

52. It is a settled position of law that an FIR is not an encyclopedia to cover each and every fact. However, if it is accepted that the aforesaid version of PW5 Bondibai, as far as locations of the blow of spear and iron rod received by deceased Sanya, is an improved version, then, having considered the medical evidence, it clearly shows that the deceased Sanya had suffered injuries on his right shoulder and head, respectively. Only on the basis of the aforesaid minor omissions, the evidence of PW5

Bondibai, which is very cogent and natural, and corroborated by the FIR (Exhibit-30) and evidence of two more eye witnesses viz. PW4 Vanya and PW8 Ashish, cannot be viewed with suspicion or be discarded.

53. This consistent version of three eye witnesses coupled with the postmortem report and the testimony of PW10 autopsy surgeon clearly establishes that the deceased died on account of the head injury. The evidence indicates that accused No.2 had inflicted the iron rod head injury. In this back drop, we have no reason to deviate from the conclusion of the trial Court that the accused had assaulted the deceased and it was the blow inflicted by accused No.2 that resulted in the death of Sanya.

**WHETHER THE OFFENCE COMMITTED BY ACCUSED. NO. 1 AND
ACCUSED NO. 2 WAS UNINTENDED AND WHETHER IT WOULD BE
CONVERTED INTO AN OFFENCE U/S 324 OR 304 PART II OF THE
IPC, RESPECTIVELY**

54. The learned counsel for the appellants has canvassed, in the alternative, that the cases of these two accused could be looked differently. Accused No.1 was 38 years of age, as in 2012 and accused No.2 was about 32 years of age. Both are behind bars since 04-05-2012 and 07-05-2012, respectively. Accused No.1 had used a spear which, in the light of the evidence recorded, was not the cause of the death of Sanya. Accused No.2 had given a single

blow of the iron rod which hit the forehead of Sanya. He never desired to kill his uncle and it is out of a sudden act that the iron rod hit the skull of Sanya and that turned out to be a fatal injury. In these circumstances, the case of accused No.1 could fall u/s 324 and the case of accused No.2 could be covered by Section 304 Part-II of the IPC.

55. At first blush, the strenuous submissions of the learned advocate for the appellants might appear to be convincing. However, we cannot ignore that these two accused have been charged with committing an offence under Section 302 read with Section 34 of the IPC. The charge framed at Exhibit-7 on 13-09-2012 by the learned Additional Sessions Judge, Shahada, reads as under -

“That you accused persons, in furtherance of your common intention, on 04-05-2012, at Kella-Khurd Upgari Ghatpada, Tahsil Dhadgaon, you accused No.1 gave blow by means of Bhalu and you accused No.2 gave blow by means of iron bar to Sanya Bhigja Wasave as refused to give water of his well to you and you did commit murder by intentionally causing death of Sanya Bhigja Wasave and thereby committed an offence punishable under Section 302 read with Section 34 of the Indian Penal Code and with my cognizance.

AND, I hereby direct that you be tried by me on the said charge. ”

56. Sections 34, 324, 300, 302 and 304 of the Indian Penal

Code read as under :-

"34. Acts done by several persons in furtherance of common intention —

When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

324. Voluntarily causing hurt by dangerous weapons or means —

Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

300. Murder —

Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

Secondly —

If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

Thirdly —

If it is done with the 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, or—

Fourthly —

If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

302. Punishment for murder —

Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.

304. Punishment for culpable homicide not amounting to murder —

Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death. "

57. Section 34 is with regard to a criminal act committed by several persons in furtherance of a common intention of each of such person which would make them liable for that act in the same manner as if it was done by a single person alone. Both the accused are real / biological brothers. Both were said to be drawing water from the well of the deceased whenever there was enough water in the well. Both were restrained from drawing water owing to the summer season when the water bodies were drying up and the water level in the well was depleting.

58. According to the eye witnesses and the articles seized, both came near the deceased with weapons in their hands. Accused No.1 was holding a spear and accused No.2 had an iron rod. Evidence indicate that the first blow was inflicted by accused No.1, which hit the left shoulder of the deceased. Had it pierced the left ribs or the neck, it would have been life threatening. Accused No.2

appears to have inflicted a vicious blow on the forehead of the deceased which caused a severe internal injury and the deceased suffered bleeding inside the skull. The contused lacerated wound (CLW) over the right parietal region of the head was 5 cm x 2 cm. This brain injury was enough to kill Sanya. It is not the case of the accused, as may have emerged through their statements recorded under Section 313 of the Cr.P.C. or through the cross examination of the prosecution witnesses, that there was an altercation between the accused and the deceased and in the heat of the moment, the accused picked up whatever article that they could lay their hands on and hit the deceased. The evidence indicates that both carried weapons from their home and assaulted the deceased together, thereby establishing a common intention and a common object.

59. In *Suresh and Another vs. state of U.P. [AIR 2001 Supreme Court 1344]*, it is concluded that Section 34 of the IPC recognizes the principle of vicarious liability in criminal jurisprudence. It is a rule of evidence and does not create a substantive offence. This section has two postulates in its applicability to an offence committed by more than one person, punishable under any of the provisions of the IPC. These two postulates would be indispensable. The criminal act should have been done by persons more than one and each of such individual

act cumulatively must result in commission of a crime which is punishable under the IPC.

60. We are of the considered view that neither Section 324 could be attracted, nor could it be said that the act committed by any of them would be covered by Part-II of Section 304. The Act committed by the accused would not fall within any of the five exceptions to Section 300, defining culpable homicide not amounting to murder.

61. As such, this appeal being devoid of merit, is dismissed.

(B. U. DEBADWAR, J.)

(RAVINDRA V. GHUGE, J.)