

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1307 OF 2012
WITH
INTERIM APPLICATION NO. 674 OF 2020

1. Sanjay Sadashiv Girigosavi	}	
age- 31 years, Occupation-Agricultural,	}	
R/o Bahireswar, Taluka-Karveer	}	
	}	
2. Dadu Babu Girigosavi	}	
age- 50 years, Occupation-Agricultural,	}	
R/o Bahireswar, Taluka-Karveer	}	
	}	
3. Yashwant Dadu Girigosavi	}	
age- 23 years, Occupation-Agricultural,	}	
R/o Bahireswar, Taluka-Karveer	}	
	}	
4. Digambar Rangrao Girigosavi	}	Appellants 1 to 4
age- 23 years, Occupation-service,	}	(orig. accused
R/o Sadoli, Taluka-Karveer	}	nos.1,5,7,16)
	}	
5. Mahadev Babu Girigosavi	}	
age- 45 years, Occupation-Agricultural,	}	
R/o Bahireswar, Taluka-Karveer	}	
	}	
6. Sadashiv Babu Girigosavi	}	
age- 67 years, Occupation-Agricultural,	}	
R/o Bahireswar, Taluka-Karveer	}	
	}	
7. Rangrao Ramchandra Buwa alias	}	
Girigosavi	}	
age- 37 years, Occupation-Agricultural,	}	
R/o Sadoli Khalsa, Taluka-Karveer	}	
	}	
8. Kedari Babu Buwa alias Girigosavi	}	Appellants 5 to 8
age- 47 years, Occupation-Service	}	(orig. accused 4,6,8
R/o Padali Budruk, Taluka-Karveer	}	and 10-have abated)

Versus

1. The State of Maharashtra	}	
(At the instance of Karveer Police Station,	}	
Dist-Kolhapur)	}	
	}	
2. Smt. Savitri Shivaji Girigosavi	}	
Age: Major, Occupation-Household	}	
R/at: Tal: Karveer, Kolhapur	}	Respondents

**WITH
CRIMINAL APPEAL NO. 847 OF 2017**

1. Namdeo Mahadeo Girigosavi	}	
age- 30 years, Occupation-Gosavi	}	
R/o Bahireswar, Taluka-Karveer	}	
	}	
2. Sambhaji Babu Girigosavi	}	
age- 45 years, Occupation-Agricultural,	}	Appellants
R/o Bahireswar, Taluka-Karveer	}	(orig. accused nos.2
	}	and 3)

Versus

1. The State of Maharashtra	}	
(At the instance of Karveer Police Station,	}	
Dist-Kolhapur)	}	
	}	
2. Smt. Savitri Shivaji Girigosavi	}	
Age: Major, Occupation-Household	}	
R/at: Tal: Karveer, Kolhapur	}	
	}	Respondents

**WITH
CRIMINAL APPEAL NO. 433 OF 2013**

1. The State of Maharashtra
(At the instance of Karveer Police Station,
Dist-Kolhapur)

Appellant

Versus

1. Kum. Jayshri Kedari Girigosavi (Buwa)	}	
Age-19 years, occupation: Education	}	
r/a – Padali Budruk, Taluka-Karveer	}	
	}	
2. Sou. Sampada Bajrang Girigosavi	}	
Age-32 years, Occu: Household	}	
R/a- Battis Shirala, Tal-Battis Shirala	}	
District-Sangli	}	
	}	
3. Sou. Nanda Kedari Buwa @ Girigosavi	}	
Age-40 years, Occu:- agri and household	}	
R/a- Padali Budruk, Tal-Karveer	}	
	}	
4. Sou. Kamal Rangrao Girigosavi	}	
Age-35 years, occu-household and	}	
agricultural	}	
r/a Sadoli Khalsa, Tal-Karveer	}	
	}	
5. Sou. Sarita Vijay Girigosavi	}	Respondents
Age-28 years, Occu: Household	}	(acquitted accused
R/a-Padali Budruk, Tal: Karveer.	}	nos. 9, 11, 12, 14, 15)

Mr. Kuldeep Patil a/w. Mr. Prashant Patil a/w. Ms. Sayali Dhuru for the
appellants in APEAL/1307/2012.

Mr. Kuldeep S. Patil a/w. Ms. Sayali Dhuru for respondent nos. 1 to 5
in APEAL/433/2013.

Ms. Rebecca Gonsalvez I.by Dr. Yug Mohit Chaudhry for the appellant
in APEAL/847/2017.

Ms. Geeta P. Mulekar – APP for the State.

**CORAM : SMT. SADHANA S. JADHAV &
PRITHVIRAJ K. CHAVAN, JJ.**

RESERVED ON : SEPTEMBER 30, 2021.

PRONOUNCED ON : DECEMBER 16, 2021.

JUDGMENT :- (PER SADHANA S. JADHAV, J.)

1. The appellants herein seek to challenge the judgment and order dated 19th October 2012 passed by the Additional Sessions Judge, Kolhapur in Sessions Case No. 21 of 2004. The appellants are original accused nos. 1 to 8 and 16. The original accused nos. 4, 6, 8 and 10 have died. The appellants are convicted for the offence punishable under sections 302, 307, 326, 324, 323, 147 and 148 read with 149 of Indian Penal Code and are sentenced to undergo Rigorous Imprisonment for life and to pay a fine of Rs. 25,000/- (Rupees Twenty Five Thousand Only), in default of payment of fine, to undergo Simple Imprisonment for six months..

2. Such of the facts necessary for the decision of this appeal are as follows:-

a) That there was a civil dispute between the accused and the deceased in respect of land situated in Gat Nos. 96 of Padali Burduk. One Shree Krishna Prayag Datta Temple is situated in Gut No. 96. The administration of the said temple and the adjacent land is done by the the trust of the temple.

Ramgiri was the common ancestor of Yashwant Ananda Girigosavi (the first informant) and the accused Nanda Kedari Buwa @ Girigosavi (acquitted accused). Ramgiri was survived by three sons namely Dattatraya, Mahadev and Ananda.

b) Mahadev had no legal heir therefore he executed a Will in favour of Babasaheb whereby his share would devolve upon Babasaheb. Dattatraya had 5 daughters. Dattatraya adopted his grandson-Nilesh and therefore Nilesh along with his parents was staying at Village Padali. The first wife of Dattatraya namely Hirabai was also residing with 4 brothers. Nilesh was the son of Nanda Kedari Girigosavi therefore Dattatraya had filed a civil suit seeking partition which were pending. whereas Ananda had 4 sons namely Shivaji, Ashok, Yashwant and Sambhaji. The temple was being managed by 4 sons of Ananda. There was a oral partition amongst themselves. Dattatraya had filed a suit for partition. There were 2 sheds in the property each one managed the shares during their tenure. In May 2003 the temple was being managed by Ashok by rotation. Babasaheb expired on 15th May 2003. Mahadev had renounced the world and executed a Will in favour of Babasaheb who was the elder son of Ananda Girigosavi. Therefore, the property was devolved upon Babasaheb, the son of Shivaji i.e. grandson of Ananda. Accused Nos. 1, 2 and 7 are the sons of the brother-in-law of Nanda. It is the case of the prosecution

that on 11th May 2003, in the morning at about 10.00a.m. Sarita and Supriya were cutting the grass in the agricultural land. Ashok has restrained them from cutting the grass. Hence there was a verbal altercation between Sarita and Supriya on one hand and Ashok on the other hand. Thereafter, Ashok narrated the incident to his brother Shivaji who is alleged to have approached the police station and lodged a report in respect of the said altercation. On the basis of the said report a non-cognizable case was registered.

c) On 11th May 2003 at about 12.30 p.m. Shivaji returned from the police station after lodging a N.C. report in respect of the quarrel which took place at about 10.00 a.m. At about 3.30 p.m. all the accused reached the land in a Trax vehicle. Vehicle was parked on the road. All the male accused were armed with weapons like sticks, axes and iron rods. There was an altercation between both the groups. Accused Sanjay had given a blow of weapon stick on the head of Shivaji. Immediately Shivaji collapsed on the ground, thereafter, he was assaulted by Namdev. In the said altercation the complainant was also assaulted. Soon thereafter, the female members of the family brought the injured to CPR hospital at Kolhapur. While in transit Shivaji had succumbed to the injuries. Ashok and Babasaheb were shifted to Dr. Prabhu's Hospital. The P.I. attached to Karveer Police Station visited CPR hospital and recorded the

statement of PW.7-Yashwant Girigosavi. On the basis of which, Crime No. 107 of 2003 was registered against the accused for offence punishable under section 302, 307, 326, 324, 323, 147 and 148 of Indian Penal Code.

3. At the trial the prosecution has examined as many as 20 witnesses to bring home the guilt of the accused. According to the prosecution, this is a case of direct evidence. PW.7- Yashwant, PW-8A- Anil son of Ashok, PW.-9-Ashok, brother of Shivaji are injured eye-witnesses in the present case and therefore, implicit reliance is placed upon the evidence of PW.7, PW-8A and PW.9.

4. PW.7-Yashwant Ananda Girigosavi has deposed before the Court in respect of the prelude to the incident which relates to a quarrel at about 10.00 a.m. between the accused members 1 to 7. Whereas accused no. 8 Rangrao is the husband of Kamal i.e. the son-in-law of Dattatraya. Whereas accused nos. 9 and 13 are the daughters of Nanda. While accused no. 10 is the husband of Nanda. At about 3.00p.m. Shivaji and Ashok were in Datta Temple, whereas PW.7 and his wife were in field. Ashok was residing in the house near the temple itself. All the accused came to the land armed with weapons.

5. PW.7 has attributed specific overt act to all the accused. According to him, the first blow was given by the accused no.1- Sanjay on the head of Shivaji, followed by an assault by Namdev with an axe on Shivaji's head. When PW.7 attempted to rescue his brother, he was assaulted by accused no.7-Yashwant with an iron rod followed by Dadu and Mahadev who assaulted PW.7 with axes. Accused No. 3-Sambhaji

was beating his brother Ashok in front of the temple with a wooden stick. When Babasaheb intervening the accused nos. 7 , 10 and 16 assaulted him with their respective weapons.

6. It is alleged that the said accused persons have also assaulted Anil and Swapnil. They also assaulted Asha, Savitri, Mangal and Indubai. When the female members raised hue and cry the accused fled from the spot. The female members have taken the injured to CPR hospital. Ashok and Babasaheb were shifted to Dr. Prabhu's Hospital. Babasaheb succumbed to his injuries on 15th May 2003 in the hospital of Dr. Prabhu. Ashok was unconscious for 15 days. Anil was patient in CPR hospital for 2 days and thereafter shifted to Sai Siddhi Hospital in Kolhapur. It is admitted by PW.7 that in the said altercation accused Sanjay, Sambhaji, Namdev and Jayashri had also sustained minor injuries.

7. PW.7, who happens to be the injured eye-witness has stated that all the four assailants had assaulted Anil and Swapnil on their head. It is further admitted that the disputed lands are owned by the trust and PW. 7 and others are only the occupants of the said lands. Ramgiri was the original owner and after his demise Ananda, Mahadev and Dattatraya were in exclusive possession of the said land. They also received the offerings made in the temple. Dattatraya had challenged the Will executed by Mahadev and the said litigation was pending on the day of the incident. It is also admitted by PW.7, he and his kids have amicably divided the aforesaid land of the trust amongst themselves and are in possession of the same.

8. PW.7 has feigned ignorance about the suit filed by the Dattatraya and the orders passed therein upto the High Court. He has also feigned ignorance in respect of the sugarcane crop supplied to sugar factory in the name of Nilesh, grandson of Dattatraya. It is admitted that PW.7 and his kids never obstructed the accused from cultivating their land.

9. The whole incident commenced with the objection raised by Ashok to Sarita and Supriya from cutting the grass. However, PW.7 has admitted that he has not shown the said piece of land to the police, where the quarrel took place at 10.00a.m. PW.7 has categorically stated that 16 persons had approached his land. However, he had mentioned 15 to 16 people. At the time of incident, PW. 7 was in the field between the temple and the main road. He has denied the contention marked 'A' which shows that Shivaji was being beating in the temple just before he attacked but at the same time it is stated that Shivaji was inside the Datta Temple but Shivaji was attacked near the shed and in front of Datta Temple. Ashok was assaulted in front of Datta Temple and that Ashok and Shivaji were assaulted simultaneously. But it was Sanjay who had assaulted Shivaji on his head and Namdev inflicted a blow axe on his head.

10. There are several omissions in the evidence of PW. 7 in respect of overt act attributed towards the accused, the place of incident and the weapon held by the accused persons. All the omissions are proved by the investigating officer. PW.7 has stated that they have not assaulted the accused- Sanjay, Namdev, Sambhaji and

Jayshri but it is equally true that they had sustained injury on the person in the said incident. According to PW. 7 after hearing hue and cry the accused had abandoned their weapons on the spot and fled.

11. The next eye-witness is PW.8A – Anil Ashok Girigosavi he is nephew and cousin of deceased person i.e. he was the cousin of Babasaheb and nephew of deceased Shivaji. He was discharged on 21st May 2003.

12. PW.-8A happens to be son of Ashok. According to him, at the time of incident his father was incharge of the said temple and therefore they were living in the shed near the temple itself. As far as the topography of the incident and genealogy of the incident are concerned, he has admitted the incident of quarrel between his father Ashok on one side and Savitri and Supriya on the other side in the morning at 10.30 a.m. and thereafter Shivaji had lodged the report. That at the time of incident Ashok and Shivaji were sitting in the temple while Yashwant, Savitri and Sambhaji were working in the agricultural land whereas his cousins Balasaheb and Swapnil were playing near the temple. At about 3.00 p.m. all the accused had allegedly come in tempo trax. They were armed with weapons and that they inflicted blows on Shivaji, Ashok, Anil and Yashwant, PW. 8A and also female members of the family. Shivaji succumbed to the injuries whereas Ashok and Babasaheb were critical and therefore they were shifted to Dr. Prabhu's Hospital. On 15th May 2003, Babasaheb succumbed to the injuries while undergoing treatment. PW.8A was admitted in CPR hospital for 2 days and then shifted to Sai Siddhi

Hospital, Kolhapur and was treated for 5 days as he had sustained fracture. It is admitted that his father and his three uncles had taken ownership of the land by oral partition and they took charge and managed the temple for one year in rotation.

13. Witness was confronted with photographs which are at Exhibit-175 to 179 and the list of photographs is marked at Exhibit-174. Upon being confronted with the photographs, the witness has admitted the topography as depicted in the photographs. The witness feigned ignorance whether Kedari was in possession of the temple land at the time of incident as he has never seen accused Kedari taking away yield of that land. It is admitted that Shivaji had lodged a report in the police station in respect of the incident at 10.30 a.m. on 11th May 2003. He claimed to have no knowledge as to whether Kedari was detained in the police station upto 4.00 p.m. on that day. There are omissions in the evidence of the witness. According to him, at the time of incident Babasaheb was 22 years whereas Swapnil was 10 years old and they were playing cricket at the time of incident.

14. It is specifically admitted that after alighting from the Trax. All the accused started proceeding towards Datta temple but they could not reach upto the temple. He has denied that his father Ashok and Shivaji were assaulted near Datta Temple itself. But infact they were assaulted in two different directions. The said averments are therefore marked as portion marked 'B'. He has also admitted that the cross case in respect of assault by the prosecution witnesses on the accused is pending wherein there is an allegation that the prosecution

witnesses had assaulted accused persons. He has withdrawn his earlier contention that accused Yashwant had assaulted Shivaji with iron rod vide Dadu and Mahadev assaulted him with sticks. It is also admitted that he and his uncle Yashwant were admitted in the same ward.

15. The next injured eye witness is Ashok Ananda Girigosavi (PW.9) on 27th August 2004 charge was framed against the accused persons. Thereafter, the statement of Ashok was recorded on 12th May 2005 by PW. 12. In fact, the said statement of Ashok was recorded pursuant to the order dated 1st February 2005. According to PW. 9, Ashok had objected Sarita and Supriya from cutting the grass in the agricultural land but they forcibly cut the grass and also threatened him of dire consequences.

16. According to PW.9 Sarita and Supriya had threatened him of dire consequences and therefore he had informed the said incident to his brother Shivaji who lodged a report at the police station. Yashwant had also reached the spot. He has attributed the overt act to Sanjay and Namdev who had assaulted Shivaji and also corroborated the allegation that the accused Yashwant assaulted PW.7- Yashwant. As far as Babasaheb is concerned, according to PW.9, he was assaulted by Kedari followed with an assault by Yashwant and Digambar and Sambhaji had assaulted PW.9. According to PW.9 his statement was recorded after 1 and ½ years because he was mentally upset after the incident.

17. According to him, the members of the family used to forcibly take away grass from the land and therefore their relations

were strained. It is admitted in the cross-examination that after returning from the police station Shivaji had not disclosed that Kedari was also in the police station to lodge report. That all the assailants had assaulted simultaneously. There are inherent omissions in the evidence of PW.9, which are proved by the investigating officer. PW. 2 to 8 are hostile witnesses.

18. PW.8-Prakash Havaladar is the driver of the trax. He is declared hostile.

19. The next set of witness is medical officer (PW.10), Atulya Jaywantrao Patil had treated Anil Girigosavi. PW. 8A have hand injury and issued medical certificate, which is at Exhibit-201.

20. PW.11. Dr. Beena Kiran Ruikar was medical officer at CPR hospital, Kolhapur and she had examined the deceased injured and accused and has proved the injury certificate and the medical case record. According to PW.11 on 11th May 2003 at about 4.30p.m. she had examined the injured Shivaji Ananda Girigosavi, Ashok, Babasaheb, Yashwant, Sambhaji, Anil, Swapnil, Savitri, Indubai and Asharani and their injury certificates are exhibited collectively at “222 to 241”.

21. PW. 11 has examined the accused-Sambhaji and she noticed the following injuries:-

i) tooth fall left upper inside and swelling back side of neck.

The dental opinion was that no fracture of mandible. The

medical certificate is at 'Exhibit-243'.

The accused no. 1 Sanjay was admitted in the hospital on 11th May 2003 at 10.00 p.m. On examination it was noticed that he had sustained following injury:

i) crush and lacerated wound 5x3x2 cms on parietal region and abrasion 6x1 cm. below parietal region. The medical certificate is at Exhibit-247.

22. The accused Namdev Gosavi was admitted in the hospital on 11th May 2003 at 5.00p.m.. He had sustained the following injuries:

i) Abrasion with contusion 5x1 cm and 2x1 cms. Skull frontal aspect.
ii) Abrasion 2x1 cm below above injury.
iii) Crush and lacerated wound 7x5x2 cm on backside of the right side of the chest.
iv) Tenderness with contusion 1x1 cm right radius head and right elbow joint.
The injury certificate is at Exhibit-249.

23. The accused-Jayashri also admitted in the hospital on 11th May 2003 at 5.00p.m. She had sustained the following injury:

i) Abrasion on back side of chest 5x4 cm.
The medical certificate is at Exhibit-251.

24. According to PW. 11 the nature of injuries sustained by the accused persons are simple in nature and possible in the course of scuffle and / or falling on the ground. As far as the injuries on the person of Ashok are concerned, PW.11 has specifically stated as

follows:-

“When I have written CLW that does not mean contused lacerated wound, in fact, it is crushed and lacerated wound. By “crush” injury means irregular border injury. According to me in “crush” injury destruction of tissue whereas in laceration, only skin is peel out and no destruction of tissues”.

25. The witness was confronted with Modi's Medical Jurisprudence. More particularly, page 418 to 419. She has disagreed with the proposition that the tooth is fallen due to injury the same cannot necessarily be termed as fracture injury. She has further denied the observation of Dr. Modi's, while disagreeing that it amounts to grievous injury. PW.11 was confronted with “Exhibit-123 collectively”. The 4th injury in the medical case paper was nasal injury. However, she has clarified that she had not found any external injuries on the nose of Ashok Girigosavi. She has admitted that Ashok Girigosavi was examined by Neurosurgeon on 12th May 2003 at about 10.15a.m. The Neurosurgeon upon seeing CT scan report had not found any fracture injury of skull of Ashok Girigosavi. That injury No. 1 to 13 found on the person of Ashok Girigosavi are wounds. She has feigned ignorance as to whether crush injuries or lacerated wounds are mentioned or discussed in Modi's Medical Jurisprudence. The injury sustained by Ashok Ananda Girigosavi on the right lateral aspect of head, over lateral aspect of right forearm and over frontal aspect of head and all these injuries are possible due to a single fall. It is also admitted by PW.11 that injury no.4 was mentioned in the column of treatment as the patient was in a serious condition. Shivaji has sustained all the 4 injuries on the backside of his head. As far as Babasaheb Girigosavi is

concerned, PW.11 has categorically admitted as follows:-

“I have wrongly stated in my examination in chief about injury no.1 of said Babasaheb Girigosavi about posterior aspect of skull. It should be laceration of nose only”. That all the injuries were on the face and they can be caused by a single fall on earth.

All the injuries found on the person of Yashwant Girigosavi were simple injuries. He was in a conscious state of mind when he was brought to the hospital.

26. It is further admitted in the cross-examination that injury no.2 on the person of Anil Girigosavi was on left forearm and not on left forehead and it was wrongly stated in the examination-in-chief that Anil Girigosavi had sustained simple injuries. Sambhaji Girigosavi had sustained three injuries on his person. All the said injuries can be possible by fall on earth and the fourth injury was on right black eye. Savitri, Indubai and Asharani had sustained simple injuries which may be caused by rubbing on any hard and scrub object.

27. PW.12. Dr. Kumar Nanavare has performed autopsy on the deceased Babasaheb and had identified the signature and hand writing of Dr. A.S. Ruikar who had performed autopsy on Shivaji Girigosavi. PW.12 was attached to Civil Hospital, Kolhapur. At about 11.15p.m. the dead body of Shivaji Girigosavi to the hospital with the history of assault. PW. 12 had conducted autopsy on the dead body of Shivaji Girigosavi from 11.30p.m. to 12.30a.m. The injuries noticed on the dead body of Shivaji Girigosavi were as follows:-

- i) stitched wound over occipital, oblique, 6 cms in length.
- ii)stitched wound over occipital region, oblique, 5cms in length, below external injury no.1.
- iii)contusion with swelling over left cheek with abrasion on it.
- iv) Stitched wound over base of nose with abrasion of 2 x 2 cms.

There were no external injuries. Internal injuries are as follows:

- 1) contusion under scalp on occipito parietal region, present corresponding to external injuries no.1 and 2.
- 2) Fractured skull present over occiput, extended into base of skull, corresponding to external injury no.1.
- 3) extensive bilateral sub arachnoid haemorrhage present.

28. PW.12 after verifying the signature and hand writing of A.S. Ruikar, PW.12 had proved the contents of the post-mortem that Babasaheb was 22 years at the time of autopsy.

29. It would be trite to consider the evidence of PW.19 - Dr. Prabhu. Dr. Prabhu happens to be a neurosurgeon. Babasaheb and Ashok were admitted in his hospital on 12th May 2003 with history of assault on the previous day. Babasaheb had brain haemorrhage during his stay in the hospital whereas Ashok was discharged on 25th June 2003. It is also admitted in the cross-examination that no operation was performed on Ashok. He proved the contents of Exhibit-370. "C.T scan shows 1) fractured of right parietal bone and Bilateral high posterior parietal haemorrhagic contusion with diffuse cerebral oedema. Patient was diagnosed with Lt. P.O EDH with Pul Tuberculosis. He was complaining of joint aches, had high fever. Dr. Madhavi Kamat

had introduced anti tubercular therapy”. The suggestion that patient died due to medical negligence is denied.

30. PW.13 - Ishwar Sutar is the investigating officer who had taken over the investigation on 12th May 2003. Accused nos. 1, 2 and 3 were arrested on 14th May 2003. The accused were medically examined on 15th May 2003. According to PW.13 there is recovery of axe at the instance of Namdev on 17th May 2003 and Jeep was seized on the same day. The charge sheet was filed on 6th August 2003.

31. It is elicited in the cross-examination of the I.O that on 13th May 2003 only Babasaheb was admitted in the hospital of Dr. Prabhu. He had visited the hospital of Dr. Prabhu personally and noticed that the injured Babasaheb was unconscious. It is admitted that at the time of arresting the accused person, no written intimation was given to the near relatives. PW. 13 has feigned ignorance in respect of suspension of ASI, Vibhute for detaining accused no. 10 Kedari and accused Sarita in police station till 4.00p.m. on the day of incident.

32. PW.14- Jaywant Deshmukh had recorded the First Information Report. He had done initial investigation i.e. spot panchnama, inquest panchnama of deceased Shivaji, recorded the statement of some witnesses including PW.8A – Anil Girigosavi and arrested some accused persons. The spot panchnama was prepared on the next day i.e. on 12th May 2003, when he visited the spot of incident he had seized the articles lying on the spot and also collected the samples of blood mixed soil. The medical officer Dr. Mitra had

informed him that the patient Ashok and Babasaheb are not in a position to give statement. He had taken leave on personal ground and therefore further investigation was transferred to PW.20-Anandrao Khobare who had recorded the statement of Ashok Girigosavi on 12th May 2005 at the police station. He has admitted in the cross-examination that he had not inquired with the witnesses as to whether his statement was recorded on previous occasion.

33. The learned APP submits that the accused in the present case have assaulted several members of the family and two namely Shivaji and Babasaheb have succumbed to death due to the said injuries therefore the accused do not deserve any sympathy and hence the conviction in sentence deserves to be upheld.

34. Ms. Gonsalvez, appearing for original accused nos. 2 and 3 has vehemently submitted that in fact the accused along with family members had gone to offer their prayers in Datta Temple. However due to the verbal altercation between Sarita, Supriya and Ashok the family of the complainant attacked the accused, there was a grave apprehension and there was a free fight and therefore it cannot be said that the accused persons had gone to the land with an intention to assault the injured. That there is suppression of the genesis of the incident and it is apparent that the prosecution witnesses are not telling the whole truth.

35. It is submitted that there are inherent inconsistencies in the evidence of the witnesses. Moreover the statement of Ashok was

recorded in 2005 i.e. after framing of charge. The same could not have been included in the charge sheet. That the evidence of PW.7 would show that the cross case is pending. The complainant has only stated that some of the accused had sustained some injuries. However, the complainant has not offered any plausible explanation for the injuries sustained by the accused persons. The accused were also taken to the hospital on the same day. There was long standing litigation pending between the parties. In fact, the prosecution witnesses were in unlawful occupation of the said land. It is also categorically stated by all the accused witnesses that soon after the incident when the women raised hue and cry the accused persons threw the weapons on the spot and fled from the scene of offence and therefore the recovery under section 27 of Indian Evidence Act is nothing but a farce and cannot be considered to be incriminating circumstances.

36. Upon perusal of the evidence adduced by the prosecution the following facts would emerge.

1. There are civil suits pending between the parties.
2. The Datta Temple was built by Ramgiri Gosavi who was common ancestor of Yashwant Girigosavi and the accused Nanda.
3. Ramgiri was survived by three sons namely Dattatraya, Mahadev and Ananda. Dattatraya, Mahadev and Ananda had mutually drawn oral partition amongst themselves and yet Dattatraya had filed a civil suit seeking partition. In fact, the oral accused nos. 1,2 and 7 were sons of the brother-in-law of Nanda and had no concern with the pending litigation between the brothers interse but the family of the

complainant and the accused regularly offered prayers to shri Krishna Prayag Datta Temple.

37. In the morning at 10.00 a.m. it was a trifling quarrel between Ashok, Sarita and Supriya. In fact, there was no reason for Ashok to object Supriya from cutting the grass as she happened to be the sister of Nilesh and daughter of Nanda. Nilesh was adopted by Dattatraya and hence he alongwith his parents and sisters Sarita and Supriya were residing in the shed adjacent to the temple.

38. It is not the case of the prosecution that Nanda, Nilesh anyone of them had called upon their family members. In fact, Kedari the husband of Nanda had taken recourse to law and had reported the said incident to the police, a non-cognizable case was registered. It is in the evidence of PW. 13-Ishwar Sutar that the Havaldar was suspended for detaining Kedari in the police station on 11th May 2003.

39. There is no denial to the fact that the quarrel had ensued in Gat No. 96 on arrival of the accused. However, it cannot be presumed that they had intended to assault the family members of the complainant. Incident has occurred near the temple and not inside the shed. It was a case of free fight.

38. In the case of “*Gajanand and Ors. vs State of Uttar Pradesh Ceveator*”¹ in the said judgment, the Hon’ble the Apex Court has referred to the judgment in the case of “*Ahmad Sher vs Emperor*”², in which it was observed as under :-

1 AIR 1954 SC page 695

2 AIR 1931 Lah page 513 (A)

“ When both sides mean to fight from the start, go out to fight and there is a pitched battle. The question of who attacks and who defends in such a fight is wholly immaterial and depends on the tactics adopted by the rival commanders”.

40. There is no evidence on record to show that the accused had arrived at the scene of offence with deadly weapons like axes, sticks and weapons alleged to have been used in the said incident. The weapons alleged to have been used in the incident are sticks, and the medical evidence corroborates the same. As far as medical evidence is concerned, Ashok was suffering from Tuberculosis and the court cannot be oblivious of the fact that Babasaheb had died due to brain haemorrhage. The medical records do not indicate that the brain haemorrhage was caused because of assault on Babasaheb. As far as Shivaji is concerned, according to PW.11. Shivaji had sustained head injury which was due to fall. PW. 11 had stated that the injuries were crush and lacerated wounds. The witness has disagreed with Modi's Medical Jurisprudence. The weapon of assault was not shown to PW.11 to ascertain as to whether the said weapon could have cause crushed and lacerated wound. In fact accused no.1 Sanjay has also sustained crush and lacerated wound 5x3x2 cms on parietal region. It is not the case of the prosecution witnesses that they had acted in self-defence and therefore Sanjay and others had sustained injuries. There is no explanation for the injury sustained by the accused.

41. In the case of “Lakshmi Singh and Ors. vs. State of Bihar”³
in which the Apex Court has held as follows:-

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

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

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

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

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

³ AIR (1976) SC 2263

42. It appears from the facts on record that the possibility of free fight cannot be ruled out, then no right of private defence is available to either party and they both would be guilty for their respective acts. In fact Sessions Case No. 144 of 2005 was pending against the prosecution witnesses. In the statement under section 313 of Cr.P.C. the accused no. 1 has specifically pleaded that on 11th May 2003 at 10.00 a.m. Ashok had picked up the quarrel with Sarita and Supriya. In answer to question no. 15 the accused no. 1 has stated that 'we all are looking after management'.

43. The omissions and contradictions in the substantive evidence of the witnesses goes to the root of the matter, especially, the portion marked at 'A and B' in the statement of PW.8A-Anil Girigosavi.

44. The submission of the learned APP that there are 3 injured eye witnesses, is controverted by the learned counsel Mr. Kuldip Patil appearing for the accused-appellant nos. 9, 11, 12, 14 and 15 submits that it is the quality and not the quantity of the evidence which needs to be appreciated and taken into consideration.

45. The evidence on record is not sufficient to hold that the accused had voluntarily assaulted the family members of the complainant on 11th May 2003. The prosecution has failed to establish that it was a case of criminal trespass. The accused are also descendants of Ramgiri and stakeholders in the said property.

46. It is also submitted by the respective counsel that the appellants herein are in custody since 19th October 2012. That original

accused no.4 Mahadev Girigosavi, accused no.6-Sadashiv and accused No. 8-Rangrao Ramchandra Buwa @ Girigosavi and accused no. 10-Kedari Babu Buwa have expired. Hence, appeal stands abated against them.

47. Original accused no. 13 was juvenile in conflict with law. Original accused nos. 9, 11, 12, 14 and 15 are acquitted. The surviving accused are accused no. 1-Sanjay Girigosavi who was also injured in the said incident, Namdev Girigosavi -Accused no.3, Dadu Girigosavi-accused nos. 5, Yashwant Girigosavi- accused no.7 and Digambar Girigosavi- accused no. 16. The assault on Shivaji is attributed to Sanjay and Namdev. The assault on the complainant PW.7 Yashwant is attributed to accused No. 7-Yashwant. Assault on Babasaheb is attributed to Sambhaji.

48. In the present case, it is a matter of fact that the prosecution witnesses and the accused were at loggerheads. According to the prosecution the unlawful assembly comprise of 16 members or more. The equal number of prosecution witnesses were present on the spot and there were 6 people who were also injured. In such a situation it would be difficult to lodge a specific overt act to any or all members of the unlawful assembly.

49. It would be trite to place implicit reliance upon the landmark judgment in the case of Masalti vs State of U.P⁴, the Hon'ble Supreme Court has held as follows:-

4 AIR (1965) SC 202

“Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault.

Appreciation of evidence in such a complex case is no doubt a difficult task: but criminal courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and decide which part of it is true and which is not”.

50. It is pertinent to note that in fact Accused nos. 1 to 3 were also injured in the said incident. Sambhaji had a tooth fall and has sustained injury on the backside of his neck. Accused no. 1-Sanjay had sustained injury on parietal region which was a grievous injury. Namdev had also sustained crush and lacerated wound on the backside of the right side chest. The accused Jayashri has sustained abrasion on the backside of her chest. None of the deceased or the injured witnesses had sustained any injury by an Axe or an iron rod. Although according to PW.7, Namdev was armed with an axe whereas Yashwant was armed with an iron rod. The allegations against Dadu and Mahadev are that they were assaulted by PW.7.

51. The accused persons have been in custody for almost 9 years.

52. In view of the above discussion, the appeals are deserve to be allowed.

CRIMINAL APPEAL NO. 433 OF 2013

53. The State seeks to challenge the judgment and order dated 19/10/2012 passed by the Additional Sessions Judge, Kolhapur in Sessions Case No. 21 of 2004, thereby challenging the acquittal of the accused – original accused nos. 9, 11,12,14,15.

54. It appears from the record that the women have were acquitted. According to the learned APP the respondent herein were members of the unlawful assembly which had assaulted PW.-7 Yashwant Girigosavi and PW.-8A-Anil Girigosavi and PW.9-Ashok Girigosavi on 11th May 2005 in Gat no. 96 at village Padali. It is alleged that respondent no.5 is root cause of the trouble. That according to the learned APP there was an altercation between respondent no.5-Sarita and PW.9-Ashok on 11th May 2005 at about 10.00 a.m. That the husband of respondent no.3 – original accused no. 10 (deceased) had lodged a report at the police station against Ashok. That the accused nos. 3,4,6,10 and 13 are the close relatives of respondent no. 3. That the acquittal of the accused has resulted in miscarriage of justice.

55. It needs to be appreciated that the respondent no.1 was injured in the said incident. There is no specific overt act against respondent nos. 2 to 5.

56. It is submitted by the learned counsel for the respondent that the prosecution witnesses were aggrieved by the fact that son of

the respondent no.3 was taken in adoption by Dattatraya father of Nanda and therefore she assumed rights to reside in the said land. None of the respondents have assaulted the deceased nor there is any allegation that they were armed with weapons. There was no question of respondent no.3 and respondent no.5 going in tempo trax along with other accused since they were residing in a shed adjacent to the temple.

57. In view of the above discussion, in the companion appeals i.e. Criminal Appeal No. 1307 of 2012 and Criminal Appeal No.847 of 2017 and in view of the fact that the co-accused are acquitted, the appeal filed by the State necessarily needs to fail. There is no reason to interfere with the judgment passed by the learned Session Judge, Kolhapur and hence appeal stands dismissed.

ORDER

- i) The Criminal Appeal No. 1307 and criminal Appeal no. 847 of 2017 are allowed and Criminal Appeal No. 433 of 2013 is dismissed.
- ii) The conviction and sentence imposed vide Judgment and order dated 19th October 2012 passed by the Additional Sessions Judge, Kolhapur in Sessions Case No. 21 of 2004 is hereby quashed and set aside.
- iii) The appellants are acquitted of all the charges

levelled against him.

iv) The appellants be released forthwith, if not required in any other case.

v) Fine be refunded, if already paid.

vi) The bail bonds of the respondents in Criminal Appeal No. 433 of 2012 stand cancelled.

vii) The appeals along with connected IA are accordingly disposed of.

(PRITHVIRAJ K. CHAVAN, J)

(SMT. SADHANA S. JADHAV, J)