

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.922 OF 1998
A/W
CRIMINAL APPLICATION NO.774 OF 2006
IN
CRIMINAL APPEAL NO.922 OF 1998**

- | | | | |
|----|----------------------------------|---|------------|
| 1. | Kishor Mahadev Tarkar |] | |
| | Age: 36 years, Occu. Service, |] | |
| 2. | Satish Dattaram Amberkar, |] | |
| | Age Adult, |] | |
| 3. | Sitaram Dattaram Baraskar, |] | |
| | Age Adult, |] | |
| 4. | Santosh Dattaram Baraskar, |] | |
| | Age Adult, |] | |
| | All R/o Khapridevo Co-op |] | |
| | Housing Society, Parmanand Wadi, |] | |
| | Parel, Mumbai-400 012. |] | Appellants |
- (Original Accused No.1, 2, 4 and 8)

Vs

- | | | |
|----------------------------------|---|-------------|
| THE STATE OF MAHARASHTRA |] | |
| (At the instance of Sr. P. I. |] | |
| R.A. Kidwai Marg Police Station, |] | |
| Mumbai.) |] | Respondents |

a/w

CRIMINAL APPEAL NO.127 OF 1999

- | | |
|------------------------------|---|
| Vijay Sahadeo Karekar |] |
| Age: yrs, Occu... |] |

r/o Khapridevo Co.op. Hsg. Soc.]
 Parmanandwadi, Parel, Mumbai]
 400 012.] **Appellant**

Vs.

THE STATE OF MAHARASHTRA]
 (At the instance of Inspector]
 of Police, R.A. Kidwai Marg,]
 Police Station)] **Respondent**

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Mr. Kuldeep S. Patil, for Appellants in both the Appeals.

Ms. PN. Dabholkar, A.P.P., for Respondent-State.

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

**RESERVED ON : 4th OCTOBER, 2021.
 PRONOUNCED ON: 29th OCTOBER, 2021.**

COMMON JUDGMENT: [Per Prithviraj K. Chavan, J.]:

1. By these appeals, the appellants have challenged the judgment and order of conviction rendered by the learned Additional Sessions Judge, Greater Bombay in Sessions Case No.1362 of 1997 on 24th November, 1998 by which the appellants have been convicted of the offences punishable under sections 144, 148, 302 r/w 149 of the Indian Penal Code (for short 'I.P.C'). They have been acquitted of the offences punishable under sections 452 r/w 149 or 452 r/w 34 as well as offences under sections 427 r/w 149 or under section 427 r/w section 34 of the I.P.C.

2. The prosecution case, in a nutshell, can be summarized as follows;

Accused No.1-Kishor Tarkar was the Chief Promoter of Khapridevi Co-operative Housing Society and rest of the accused were his followers. Deceased Santosh Iyre (for short 'deceased Santosh') was not a member of the said society, but he used to attend the meetings of the said society and used to oppose the office bearers of the society and, therefore, there was an enmity between deceased Santosh and accused.

3. On 14th July, 1997 at about 9.15 p.m, deceased Santosh was proceeding towards *Datta Mandir*. P.W.1-Pravin Iyre (complainant) was following him. Suddenly, they noticed a mob consisting of all the accused and others armed with deadly weapons coming towards deceased Santosh. Deceased Santosh tried to run away, but was chased by the mob. The mob nabbed him near one 'Shinde Saloon' and it was alleged that absconding accused namely Vinayak assaulted deceased Santosh by means of a chopper.

4. Thereafter, accused No.3-Vijay Karekar assaulted deceased Santosh with a *suri* (knife) on his leg and neck. It is further alleged by the prosecution that accused No.2-Satish Amberkar assaulted deceased Santosh with a *suri* (knife) on his right shoulder and accused No.1-Kishor Tarkar assaulted him with a chopper on his right shoulder.

5. At that time, other members of the mob were simultaneously assaulting deceased Santosh with hockey sticks and fists. Deceased Santosh tried to escape and entered into the house of one Vijay Ghadi. However, it is alleged that absconding accused Vinayak, accused No.4-Sitaram Baraskar and accused No.8-Santosh Baraskar dragged deceased Santosh from the house of the said Vijay Ghadi, brought him on the road and then assaulted him. Some of the people in the vicinity came for the rescue of the deceased Santosh. Accused, thereafter, escaped towards the hill side.

6. It is alleged that just before the aforesaid incident, the said mob had also assaulted one more person namely Mangesh Varpe (P.W.7) and injured him. Deceased Santosh and injured Mangesh Varpe were taken to KEM Hospital. Deceased Santosh was declared brought dead on admission.

7. On the basis of the aforesaid allegations against the accused, an F.I.R came to be registered. P.W.12-Surbhi Tripathi- Investigating Officer visited the spot of incident. She recorded a spot *panchanama*. She had seized a Maruti Car bearing registration No. MHO-2-J-6311 which was parked on the road at the entrance of the gate of *Parmanandwadi* in a damaged condition. There were pieces of glass, stones, pieces of roof tiles as well as blood and hair which came to be collected under *panchanama* and were duly seized. The investigating Officer recorded statements of the witnesses. She registered a crime bearing No.213 of 1997 against some unknown persons at Kidwali Marg Police Station. Thereafter,

the Investigating Officer visited the house of P.W.1-Pravin Iyre and attached his blood stained clothes namely one white 'T' shirt and one white jeans. The accused were subsequently arrested. The seized articles were sent for chemical analysis.

8. It is the case of the prosecution that pursuant to the voluntary statement made by accused No.3-Vijay Karekar and accused No.4-Sitaram Baraskar while in the Police custody a *suri* (knife) was produced by accused No.3-Vijay Karekar from his residence and a hockey stick was produced by accused No.4-Sitaram Baraskar from his residence which were seized under a recovery *panchanama*.

9. A Test Identification parade was also arranged on 23rd August, 1997 in Arthur Road Jail wherein accused No.5-Subhash @ Dhomya Sakharam Revane and accused No.6-Arun Babaji Ghanekar were placed for identification by the Special Executive Officer Mr. Chavan. It is the contention of the prosecution that during the Test Identification parade, P.W.1-Pravin Iyre, P.W.3-Santosh Yende and one Raju Karangutkar had identified both accused No.5 and 6 before Special Executive Officer and *panchas*.

10. After investigation, a charge-sheet was filed in 13th Court of Metropolitan Magistrate at Dadar which ultimately came to be committed to the Sessions Court.

11. The learned Additional Sessions Judge after hearing the respective sides framed a charge under sections 144, 148, 302 r/w

149, in the alternative 302 r/w 34, 452 r/w 149, in the alternative, 452 r/w 149, in the alternative 452 r/w 34, under section 427 r/w 149, in the alternative under section 427 r/w 34 of I.P.C. The charge was read over and explained to the accused in Marathi to which each of them pleaded not guilty and claimed to be tried.

12. Defence of the accused, as emerged from the cross-examination as well as from their statements under section 313 of the Code of Criminal Procedure (for short 'Cr. PC') is that they had not committed any offence and they have been falsely implicated in this case.

13. Thirteen witnesses have been examined by the prosecution coupled with documentary evidence in the form of *panchanamas*, Chemical Analysis Report, notes of Post Mortem etc. The prosecution had tendered *muddemal* property during the course of trial.

14. The learned Additional Sessions Judge after recording the evidence of prosecution witnesses and having heard the respective sides, by the impugned judgment and order, convicted the accused as stated hereinabove.

15. We heard Mr. Kuldeep Patil, learned Counsel for the appellants in both the appeals and Ms. Dabholkar, learned A.P.P, for respondent-State.

16. The learned Counsel for the appellants-accused took us through the evidence of the prosecution witnesses and emphasized that the learned Additional Sessions Judge committed a grave error in ignoring the material omissions and contradictions on record with respect to the alleged eye witnesses, more particularly, the weapons held by each of them. These aspects go to the root of the prosecution case as it is not clear as to who was armed with which weapon.

17. Learned A.PP supported the impugned judgment and order of conviction.

18. There were two eye witnesses viz; P.W.1-Pravin Iyre- brother of deceased Santosh (Exhibit 19) and P.W.3-Santosh Yende (Exhibit 24). Another eye witness is P.W.7-Mangesh Varpe, another injured- (Exhibit 31).

19. There is no dispute that deceased Santosh died a homicidal death which is evident from the testimony of P.W.2-Dr. Vijay Kelvekar who conducted autopsy on the corpse of the deceased. His evidence indicates that he noticed the following external injuries;

- (a) Incised stab wound over front of right upper arm 1.0 c.m way from upper angle of anterior axillary fold, size of injury 1.5 c.m x 1.0 cm x muscles deep in axilla;
- (b) Incised stab wound over left side neck 4.0 c.m below left angle of mandible 3.0 c.m away from

midline of neck, oblique, 3.0 cm x 1.5 cm x neck organs deep;

- (c) Incised wound over right cheek, oblique, lower end of injury 2.0 c.m away from right ear lobule and upper end 3.0 c.m. below and lateral to right eye outer angle size of injury 4.0 cm x 2.0 c.m x bone deep, underneath maxilla bone cut lower and tailing downwards 2.0 c.m.;
- (d) Incised stab wound over right side neck, 1.0 c.m below and behind right ear lobule, vertical size was of 2.0 c.m x 1.0 c.m both angles acute;
- (e) Incised chop wound on back of scalp (head), occipital region, 12 c.m behind right ear pinna, with skin flap from above downwards (3.5 cm). Injury is transversely placed 9.0 c.m x 1.0 c.m x scalp deep;
- (f) Abrasion over back of chest, left side, across, upper medial end of left scapula, 7 c.m x 0.5 c.m curved;
- (g) Incised wound over right index finger on palmar aspect of distal phalanx 2 c.m x 0.5 c.m x bone deep, phalanx bone cut obliquely placed;
- (h) Incised wound over right hand middle finger palmar aspect lateral side on proximal phalanx 2 c.m x 0.5 c.m x muscle deep, oblique;
- (i) Incised wound over right hand palmar aspect hypothenar region, 1.0 c.m distal to wrist joint anteroposteriorly placed, 1.5 c.m x 0.3 c.m. muscle deep distal end tailing.

20. On internal examination, P.W.2-Dr. Vijay Kelvekar noticed the following injuries;

(a) On dissection of external injury No.1: It pierces skin, subcutaneous tissues and muscles of axilla vessels of axilla (blood /clots in muscles of axilla). The anterior surface of humerus bone is nicked. Direction is medially backwards and downwards;

(b) On dissection of external Injury No.2 : It pierces skin, subcutaneous tissues and strap muscles and vessels of neck. The thyroid cartilage on left side obliquely cut and enters larynx along with strap muscles carotid vessels and nerves are cut. Blood / clots in left side neck. Direction was injury medially upwards;

(c) On dissection of external injury No.4: It pierces skin, subcutaneous tissues and muscles of neck. The thyroid cartilage on right side is cut at upper border the strap muscles and vessels with nerves of neck in the region are cut. Blood/clots in neck region. Direction medially downwards.

All the injuries were recent and ante mortem.

The Post Mortem report is proved at (Exhibit 22).

21. Though it is an admitted fact that deceased Santosh died a homicidal death, yet a few admissions surfaced in the cross-

examination of P.W.2- Dr. Vijay Kelvekar are also important. Admittedly, this witness did not mention time of death. However, he admits that in a medico legal cases time of death assumes significance. He volunteered that usually the Doctors do not mention time of death but when they were specifically asked by the Investigating Officer then only they mention time of death. He admits that in the present case the Investigating Officer did not seek his opinion as to what kind of weapons could cause the injuries noted on the dead body of deceased Santosh. He admits that in the present case, Investigating Agency had not shown any of the weapons to him in order to ascertain any nexus between the injuries and the weapons alleged to have been used. Be that as it may. Evidence of P.W.2- Dr. Vijay Kelvekar (Exhibit 21) and the evidence of P.W.4-Parshuram Sawant, (Exhibit 25) who acted as *panch* on inquest established the fact of homicidal death of the deceased.

22. Since homicidal death has been established, it will have to be seen whether prosecution has succeeded in establishing a nexus between fatal injuries resulting into death of the deceased Santosh *vis-a-vis* the complicity of each of the assailants and the weapons alleged to have been used by them.

23. The prosecution has come up with a case that all the accused had formed an unlawful assembly; armed with deadly weapons with a common object of committing murder of deceased Santosh. It is also the case of prosecution that all the accused had committed house trespass into the house of one Vijay Ghadi which

is near the Saloon and after dragging deceased Santosh outside, they inflicted several blows on his person resulting into his death.

24. The evidence of P.W.1-Pravin Iyre who is also an informant reveals that residents of the slum area had formed a society by name Khapridevi Co-operative Housing Society for the purpose of rehabilitation of hutment dwellers under the scheme of Government of Maharashtra. Admittedly, deceased Santosh was not the member of the society. However, according to P.W.1-Pravin Iyre, dispute amongst the members of the society was going on, on account of whether they would be provided with 180 square feet of plot area or 220 square feet of plot area to each of the member of the society. It was a dispute which was essentially between the Chief Promoter and members of the society. As a matter of fact, deceased Santosh had no business to attend and take active part in the said meeting as he was not the member of the society.

25. The evidence of P.W.1-Pravin Iyre further indicates that on 14th July, 1997 at about 5.00 p.m, there was a dispute between one Seema Gadade and Sudhakar Shinde. Seema Gadade was assaulted by Sudhakar Shinde. Both were residents of the same area. In the same night around 9.15 p.m when he was present in his house along with his mother and deceased Santosh, somebody had pelted stones from outside upon the roof of their house. He along with deceased Santosh came out of the house and noticed pieces of soda water bottles lying in front of their house.

26. Deceased Santosh proceeded towards the open ground. He was followed by this witness. They noticed accused No.1-Kishor Tarkar, accused No.2-Satish Amberkar and accused No.3-Vijay Karekar along with accused Vinayak Gaikwad, accused No.8-Santosh Baraskar and other members running towards their house. He witnessed accused Vinayak armed with a chopper, accused No.1-Kishor Tarkar armed with another chopper, accused No.3-Vijay Karekar armed with *suri* (knife), accused No.2-Satish Amberkar armed with a knife while accused No.8- Santosh Baraksar and accused No.4-Sitaram Baraskar were armed with hockey sticks. They were abusing while approaching towards the house of this witness. Deceased Santosh frightened and turned back. However, he was followed by the mob near a saloon run by one Mr. Shinde. His evidence further indicates that accused Vinayak Gaikwad dealt a blow of chopper on the rear side of the head of deceased Santosh. Accused No.3-Vijay Karekar inflicted a blow of knife on the left side neck of deceased Santosh. Accused No.2-Satish Amberkar hit the deceased on his right shoulder by means of a knife. Accused No.1-Kishor Tarkar hit deceased Santosh with a chopper on the right cheek and rest of the members of the assembly assaulted deceased Santosh with hockey sticks as well as by fist blows.

27. Deceased Santosh tried to escape from the clutches of the accused, and in that attempt, entered into the house of one Vijay Ghadi which is near the saloon. However, accused No.8- Santosh Baraskar, accused No.4 -Sitaram Baraskar and Vinayak dragged deceased Santosh from the house and again assaulted him. P.W.1-

Pravin Iyre raised hue and cry for help. Hearing his shouts, one Raju Kalgutkar, Vijay Ghadi and Mangesh Rane came over there. By that time, the assailants made their escape good towards the hill side through a lane by the side of a public lavatory alongwith their weapons.

28. Deceased Santosh was lying on the road with bleeding injuries. With the assistance of Vijay Ghadi, Mangesh Rane and Raju Kalgutkar, this witness picked him up and took him to the K.E.M Hospital in a jeep. The jeep was given by one Bunty. On examination, the Doctor declared him dead. The reason for non examination of Vijay Ghadi by the prosecution has had an adverse impact upon the prosecution, for, he could have been the best eye witness from whose house deceased Santosh was dragged by the assailants.

29. The evidence of P.W.1-Pravin Iyre further indicates that P.W.7-Mangesh Varpe had also sustained bleeding injuries in the same incident over his head, right leg and was also admitted in K.E.M Hospital. Upon inquiry, P.W.7- Mangesh Varpe informed this witness that he too was assaulted by the same assailants.

30. P.W.12-Surbhi Tripathi-Woman Police Sub Inspector arrived at K.E.M Hospital and inquired with the injured as well as this witness. She recorded the statement of this witness also. The First Information Report is proved at (Exhibit 20).

31. The evidence of P.W.1-Pravin Iyre further indicates that after recording his statement and complaint, his elder brother Dilip arrived at K.E.M Hospital and asked him to go to the house and stay with their mother. After the incident, P.W.1-Pravin Iyre was again called by the Police in Arthur Road Jail for attending a Test Identification Parade to identify the suspects namely Subhash Revane and Arun Ghanekar. As already stated, they have been acquitted by the trial Court. Even otherwise, Test Identification Parade was a farce since witnesses already knew the suspects.

32. P.W.1-Pravin Iyre in his further examination-in-chief testified that the articles which were shown to him during the course of the trial were as follows;

(a)chopper-Article-1,

(b)*gupti* – Article -2

He identified a chopper held by accused No.1-Kishor Tarkar. Two different knives held by accused No.3 Vijay Karekar and accused No.2-Satish Amberkar and hockey sticks held by accused No.8-Santosh Baraskar and accused No.4- Sitaram Baraskar.

33. The evidence of P.W.3-Santosh Yende is quite similar to that of P.W.1-Pravin Iyre.

34. Interestingly, P.W.1-Pravin Iyre testified that deceased Santosh was assaulted on the left side of his neck but when the *gupti* (sword stick) was shown to him, he called it a *suri (knife)*. Knife and sword stick are altogether different kinds of weapons. He admits that he very well knew the difference between knife,

sword, *gupti* and *suri*. If that being so, how he could call a sword stick as knife? He admits that sword sticks can only be used for mounting an assault, whereas, a knife can be used for cutting vegetables. He admits in the cross-examination that he did not state before the Police as to who was armed with the sword stick which is a material omission. He had correctly described the sword stick in his evidence. Despite knowing the difference between the weapons he describes sword stick as knife is nothing but a height of stupidity.

35. He admits that he had not described any of the weapons before the Police. He further admits that he had witnessed all the weapons for the first time in the Court. He further admits that none of the accused were armed with iron bars. However, he had so stated before the Police. Thus, there are material contradictions and omissions in the evidence of this witness which renders his testimony unworthy of credit.

36. PW.1-Pravin Iyre further admits in his cross-examination that he had not witnessed as to who had pelted stones towards his house. There is a material contradiction brought on record, in the sense, that what had been stated before the Police is that he noticed that deceased Santosh was surrounded by a mob near Shinde Saloon and was being assaulted by them. If that being so, it is difficult to believe as to whether he had really witnessed each of the accused named above armed with specific weapons and their assault upon deceased Santosh. When he was confronted with the said portion from his statement before the Police, he admits that

the said statement, perhaps, had been incorrectly recorded by the Police. But, in the next breath, he deposed that he might have been so stated before the Police.

37. PW.1-Pravin Iyre was further confronted with the statement made before the Police wherein he had stated that accused No.2-Satish Amberkar had inflicted a blow on the right shoulder of deceased Santosh by means of a sharp weapon, which, according to his version is an incorrect statement recorded by the Police. He admits that he only heard Vinayak abusing deceased Santosh and none other. He further admits that he did not state before the Police that all the accused were abusing deceased Santosh. As such, it would be unsafe to rely upon such untrustworthy and shaky evidence which suffers from material omissions and contradictions.

38. It is an admitted fact that there was a dispute in the society on account of rehabilitation of the slum dwellers and the question was whether each member of the society would be allotted 180 or 225 square feet of plot area. The dispute was between the Chief Promoter and the members of the society. It is difficult to digest as to how there can be a motive for the accused to assault the deceased as deceased was, admittedly, not a member of the society and, therefore, there appears to be no reason for the accused to have any grudge against deceased Santosh. It has come in the cross-examination that deceased Santosh was telling the members of the society that they would be getting plots admeasuring 180 square feet and not 225 square feet. Obviously, there would be

some other members of the society having some grudge against the deceased because of his tendency to misguide or mislead the members. It appears that his attitude was incendiary.

39. P.W.3-Santosh Yende spoke in tune with P.W.1-Pravin Iyre in so far as the incident of assault upon deceased Santosh by the accused is concerned. Admittedly, due to fear, P.W.3-Santosh Yende did not dare to intervene or tried to save deceased Santosh from the clutches of the accused persons. One can understand such conduct of a human being, for, everybody, cannot be expected to be courageous enough to intervene in such an incident.

40. Testimony of this witness is rebutted by the defence to a considerable extent which also creates a reasonable doubt as to whether he had, in fact, witnessed each of the assailants armed with different weapons assaulting deceased Santosh? He admits in the cross-examination that there were about ten Chief Promoters of the Housing Society like accused No.1-Kishor Tarkar. There are about 400 to 500 slums/hutments in the area of *Paramanandwadi*. He candidly admits that he had not stated the description of any of the weapons held by any of the assailants before the Police at the time of recording his statement. It goes without saying that in examination-in-chief he had improved his version by testifying about the various weapons held by each of the accused.

41. According to this witness, on the day of the incident, deceased Santosh had called him at about 9.20 p.m to discuss the problems between members of the society and the office bearers

and to find a way out. Deceased Santosh had also called some other persons of the locality. He admits that he is a member of rehabilitation committee formed by the Government of Maharashtra and belongs to *Bhartiya Janata Party*. His evidence reveals that when he was informed by the Police that deceased Santosh has succumbed to the injuries, he admits that he did not disclose the Police that he witnessed the incident nor he disclosed the names of the assailants. This is quite strange as to when this witness had named the assailants? He says that he was afraid and, therefore, he did not approach the Police and did not report the incident.

42. This witness also very well knew the difference between sword, chopper, *gupti* and *suri*. He admits that he did not state before the Police at the time of recording his statement that one of the members of the mob inserted a *gupti* (sword stick) in the body of deceased Santosh. He could not remember whether he had stated that some of the members in the mob were armed with iron bars. He did not notice iron bar in the hands of any of the members of the mob.

43. Further admissions of P.W.3-Santosh Yende indeed dealt a fatal blow to the prosecution story and renders his testimony quite doubtful as to whether he had really witnessed the incident. He admits that he had not stated before the Police that accused No.1-Kishor Tarkar hit deceased Santosh with a chopper and on the right side of head of Mangesh Varpe, but he had stated that accused No.1-Kishor Tarkar inflicted a blow of chopper on the

head of Mangesh Varpe. He even did not state before the Police that he noticed deceased Santosh coming towards *Datta Mandir* from his house and reached near one grocery shop of one Gupta. He further admits that he had stated before the Police that accused No.3-Vijay Karekar inserted the *gupti* in the neck of deceased Santosh. However, this is proved to be an omission which is material in the given state of circumstances. He further testified that he had stated before the Police that accused No.3-Vijay Karekar hit the deceased with a sharpened edge weapon like *suri* on the neck of deceased Santosh. He had not stated before the Police that deceased Santosh shouted for help. Even the fact that after the assault all the accused ran away towards the side of the public lavatory along with their respective weapons is also proved to be an omission. Thus, the evidence of these two witnesses is quite shaky with material omissions and contradictions.

44. Now, it would be expedient to scan the evidence of P.W.12-Surbhi Tripathi - Woman Police Sub Inspector attached to R.A. Kidwai Marg Police Station and Investigating Officer who had conducted some part of the investigation. There are two Investigating Officers. Another Investigating Officer is P.W.13-Anandrao Jadhav attached to Main Control Room.

45. Some vital admissions given by P.W.12-Surbhi Tripathi in her cross-examination would demonstrate as to how the investigation in this case had been carried out in a most casual and perfunctory manner resulting into miscarriage of justice.

46. P.W.12-Surbhi Tripathi admits in her cross-examination that she did not note the timing of recording statements of witnesses during investigation. She admits that till recording of inquest panchanama, P.W.1-Pravin Iyre was present in the hospital, but neither did she notice blood stains upon his clothes nor made any attempt to seize the clothes of P.W.1-Pravin Iyre which were on his person at the time of the incident and while bringing deceased Santosh to K.E.M Hospital. This is a material lacuna in the investigation. She admits that P.W.1-Pravin Iyre was not present on the spot at the time of *panchanama*. He was neither asked to point out the place of incident nor any attempt was made to take him to the spot which also creates a doubt as to by whom the spot of the incident was shown to the Investigating Officer. She admits that during investigation, it did transpire that Vilas Ghadi, Rajendra Kalgutkar, Mangesh Rane, Shobha Deolekar moved injured to K.E.M Hospital. However, prosecution has not examined any of these witnesses which also creates a doubt as to reasons for withholding the evidence of these material witnesses.

47. P.W.13-Anandrao Jadhav was suggested in the cross-examination that evidence of those witnesses was withheld, for, had they been examined, they would have exposed the falsity of the prosecution case. Though P.W.13-Anandrao Jadhav has denied the suggestion, the suggestion is not without any substance. Be that as it may.

48. P.W.12-Surbhi Tripathi in her further cross-examination admits that at the time of recording the complaint of P.W.1-Pravin

Iyre, he did not state as to which side the assailants ran away. She also admits that during investigation, none of the witnesses had stated before her that any of the assailants were armed with sword stick. None of the witnesses had stated before her that any of the assailants were armed with iron bars and had used the same in assaulting the deceased. P.W.12-Surbhi Tripathi did not inquire with the witnesses about the description of the weapons held by each of the assailants at the time of recording their statements. She admits that P.W.7- Mangesh Varpe had not pointed out the spot of incident. No questions were asked to him by this witness. She admits that there is no mention of timing of commencement of the *panchanamas* and conclusion of the same *qua* attachment of clothes of P.W.1- Pravin Iyre which is at (Exhibit 28). She gives an explanation that it remained to be mentioned due to inadvertence which is unacceptable.

49. P.W.12-Surbhi Tripathi admits that she had not recorded the statement of any of the neighbourers of deceased Santosh including that of Vijay Ghadi. She admits that the copy of the F.I.R had not been forwarded to Metropolitan Magistrate 13th Court, Dadar till the date of recording her evidence i.e 19th November, 1998. She admits that she had not asked any of the witnesses to point out the house of any of the accused, though, admittedly they were residents of the same locality.

50. Thus, it has been rightly suggested by the defence in the cross-examination that the F.I.R is a fabricated document prepared in collusion with the complainant as the investigating agency could

not probe and nab the real assailants involved in the said incident. However, the suggestion was denied by this witness.

51. PW.7-Mangesh Varpe, (Exhibit 31) was the Chief Promoter of the society at the relevant time. Accused No.1-Kishor Tarkar was also a promoter. Accused No.2- Satish Amberkar, accused No.7- Sudhakar Shinde, Jaywant Kapdi and others were also the promoters.

52. PW.7-Mangesh Varpe testified that on 14th July, 1997 at about 9 to 9.30 p.m, he was sitting near *Datta Mandir*. He heard a commotion and pelting of stones, soda water bottles etc. He noticed a mob of around 10 to 12 boys coming around him. Accused No.1-Kishor Tarkar, Vinayak Gaikwad and Vishwas were at the forefront armed with weapons like chopper, dagger etc. He could not identify other members of the mob but testified that they too were armed with some weapons.

53. The mob reached near this witness and accused No.1-Kishor Tarkar inflicted a blow of chopper on the front side of his head. Vinayak Gaikwad inflicted a blow of chopper on his left leg due to which he sustained bleeding injuries. Accused Vinayak Gaikwad inflicted second blow on his right leg. He fell down.

54. Accused Vishwas tried to hit him with the weapon in his hand but he could not succeed. He became unconscious and gained consciousness only in K.E.M Hospital at about 9.45 to 10.00 p.m. There were three stitches on his head and three stitches on his left leg.

55. P.W.7- Mangesh Varpe identified the chopper used by accused No.1-Kishor Tarkar while assaulting him at the time of the incident. However, he was not in a position to give description of the chopper. He described that the blade was narrow towards both ends and it was a big weapon. His cross-examination further reveals that none of the Police Personnel inquired with him anything about the incident during his admission in the hospital. He further admits that he did not disclose name of any of the assailants during that period in K.E.M Hospital. Even he did not disclose name of any of the assailants to P.W.1-Pravin Iyre. He could not remember whether P.W.1-Pravin Iyre had disclosed names of any of the assailants. Doctors in the hospital did not ask him name of the assailants.

56. This is something quite strange and unbelievable, for, normally Doctors do ask history of the assault to a patient admitted with such injuries. At least, P.W.1-Pravin Iyre could have mentioned the names of the assailants to P.W.7-Mangesh Varpe since the assailants were not strangers to both of them.

57. P.W.7-Mangesh Varpe further admits in the cross-examination that he did not remember whether he had stated before the Police as to whether he was hit on his head on front side though he was fully conscious when his statement was recorded by the Police. He was unable to remember as to whether accused No.1-Kishor Tarkar, accused No.2-Satish Amberkar, accused No.7-Sudhakar Shinde were the promoters of the Housing Society. He admits that his blood stained clothes were not seized by the Police during the

investigation. As can be seen from the tenor of his language that his evidence is also full of doubts and inconsistencies. It is quite difficult to place implicit reliance upon the testimonies of either P.W.1-Pravin Iyre, P.W.3-Santosh Yende or P.W.7- Mangesh Varpe in so far as the incident of assault by the accused is concerned. Moreover, no motive behind the assault upon this witness has been proved.

58. On the aspect of discovery of fact under section 27 of the Indian Evidence Act, P.W.9-Shantaramm Wairkar (Exhibit 34) deposed that accused No.1-Kishor Tarkar, accused No.2-Satish Amberkar voluntarily made a statement before the Police while in the custody on 4th August, 1997 to the effect that accused No.1-Kishor Tarkar would produce the blood stained clothes as well as the weapon used by him while assaulting deceased Santosh which he had kept at his residence.

59. Accused No.2-Satish Amberkar voluntarily made a statement that he would also produce the weapon used in assaulting deceased Santosh as well as blood stained clothes from his house.

60. Accordingly, memorandum of *panchanama* was prepared by the Investigating Officer which is at (Exhibit 35). His evidence further reveals that accused No.1-Kishor Tarkar led the Police party and *panchas* to his house which is near *Pimple* tree. Accused No.2-Satish Amberkar pointed out his house. He entered into his house. He was followed by this witness and the Police officers. He took out one bundle kept in the cupboard and after opening it they

noticed one *gupti* (sword stick) with wooden cover having wooden handle as well as bluish coloured full pant and one white coloured full shirt having flower design of yellowish colour stained with a blood. No blood stains were found on the pant. The sword stick was found stained with blood when taken out from its cover.

61. Thereafter, accused No.1-Kishor Tarkar took the Police team to his house at the distance of 25 feet away from the house of accused No.2-Satish Amberkar. He entered into his house. He was followed by the Investigating Officer and this witness. He took out a box beneath the cot and opened the same. The box contained a brownish coloured full pant, one full shirt with faint bluish colour having square design. He also took out one chopper from the box stained with blood. All the articles were duly seized under a *panchanama*. It is proved at (Exhibit 35). Admittedly, this witness is resident of the same locality and knew both the accused as well as their houses. From the tenor of his language, it is difficult to believe that accused No.1-Kishor Tarkar and accused No.2-Satish Amberkar had, in fact, voluntary made statement before him in view of the fact that P.W.13-Anandrao Jadhav, the Investigating Officer in his evidence testified that during interrogation of accused No.1-Kishor Tarkar and accused No.2-Satish Amberkar had shown their willingness to make a statement in connection with the case and subsequently their memorandum *panchanama* came to be recorded. It is apparent that the memorandum statements given by accused No.1-Kishor Tarkar and accused No.2-Satish Amberkar were not at all voluntary and perhaps they might have been forced to make such statements while in the Police custody.

62. Secondly, there is no evidence connecting the said discovery *vis-a-vis* the incident of assault and the arms held by each of them in view of the evidence of P.W.1-Pravin Iyre, P.W.3-Santosh Yende and P.W.7-Mangesh Varpe as discussed hereinabove.

63. It is interesting to note that P.W.13-Anandrao Jadhav in his cross-examination admits that the lock up entries, *Muddemal* entries and station diary entries were not made by him personally. His candid admission as regards continuous interrogation of accused No.1 to 4 till the date of recovery *panchanama* was drawn also falsifies the voluntarily disclosure statements made by the accused while in the Police custody.

64. He further admits that the similar type of weapons were lying at the Police station being *muddemal* property of the concerned C.R.No. He further admits that none of the witnesses had stated before him that *gupti* (sword stick) had been used for assaulting the deceased or injured in this case. He had not recorded statement of EPR Constable on duty in K.E.M. Hospital. He further admits that he did not remember whether he had put any special identification mark on any of the articles after it's recovery. He further admits that the bamboo cover of *gupti* (sword stick) Article-2 had a white and faint green original colour and it was not painted with any colour. The original colour of the handle of the sword stick had not been noted in the *panchanama*.

65. He admits that the hockey stick and knife Article 10 and Article 11 produced before the Court on the very day of recording

evidence of *pancha* witness i.e P.W.10-Atul Shinde, as, according to this witness, the articles were not traceable in the storeroom. This shows the casual and perfunctory manner of conducting the investigation. The evidence of P.W.13-Anandrao Jadhav further reveals that no report of search of the above articles was produced before the Court and that P.W.12-Surbhi Tripathi had orally reported him that *muddemal* articles No.10 and 11 are not traceable from the storeroom and the work of searching the articles was going on. What else is required to be stated as regards the genuineness of the weapons of offence produced by the Investigating Officer before the trial Court. It is ridiculous that the Investigating Officer further admits that it is not necessary to make any report to senior Police Officer about non traceability of the articles stored in the storeroom. He had gone to the extent in admitting that he did not remember whether P.W.3-Santosh Yende and P.W.7-Mangesh Varpe were in K.E.M. Hospital on 14th July, 1997. He had not recorded statement of any of the family members of Vijay Ghadi during the investigation. He further admits that P.W.3-Santosh Yende did not state before him that accused No.3-Vijay Karekar inserted the sword stick in the neck of the deceased Santosh and that after the incident all the accused escaped from the spot towards the public lavatory along with their weapons.

66. His last admission in the cross-examination hammers a last nail in the coffin of the prosecution story when he admits that he did not ask description of any of the weapons held by any of the accused while committing the offence to any of the eye witnesses at the time recording their statements. Thus, it can be said to be a

case with no evidence, much less, reliable and acceptable evidence *qua* the crime.

67. There is one more blatant illegality in this case. P.W.10-Atul Shinde acted as a *panch* witness *qua* the voluntary statement made by accused No.3-Vijay Karekar and accused No.4-Sitaram Baraskar on 13th August, 1997 while they were in the Police custody. Incident is of 14th July, 1997. It is surprising as to how, ever since their arrests the accused were in the custody of the Investigating Officer for nearly a month?

68. Evidence of P.W.10-Atul Shinde indicates that while in the Police custody, accused No.4-Sitaram Baraskar made a voluntary statement before him and the Police that he would point out the place where he had kept the hockey stick used by him while assaulting deceased Santosh. Another accused i.e accused No.3-Vijay Karekar had also made a voluntary statement before the Police and this witness that he is ready to point out the place where he had concealed the weapon i.e *suri* used at the time of commission of the offence.

69. Accordingly, memorandum statements of both the accused were recorded pursuant to which accused No.3-Vijay Karekar and accused No.4-Sitaram Baraskar led the Police party along with *panchas* to *Parmanandwadi*. On reaching *Parmanandwadi*, firstly accused No.4-Sitaram Baraskar pointed out his house where his father was present. Accused No.4-Sitaram Baraskar entered his house and took out one hockey stick lying below the cot and

produced the same before the Police. Handle of stick was found cracked and front end was found having curve and flat. The Police seized the said hockey stick and put sign label of *panch* witnesses under *panchanama*.

70. Likewise, accused No.3-Vijay Karekar pointed out his house situate after two houses from the house of accused No.4-Sitaram Baraskar to the Police and P.W.10-Atul Shinde. He took out a *suri* kept backside of a tin which was found on the shelf i.e. stand of utensils. The said *suri* (knife) was made up of a plastic having green colour. The *suri* was sharp edged and length of the blade was 10 c.m and length of handle was 9 c.ms. The Police had seized the same by affixing the sign labels of the *panch* witnesses and tied with the red string.

71. During the course of his evidence, P.W.10-Atul Shinde identified the hockey stick as well as the knife. At the time of production of those articles, learned Counsel for the accused raised an objection for producing articles before the Court, as according to him, the articles were not produced along with the other articles at a proper stage, but produced at the time of evidence which would cause prejudice to the accused. The learned Additional Sessions Judge, however, allowed production of the weapons during the course of evidence but observed that the objection of defence lawyer would be decided at the time of the judgment. This is something unknown to the law and procedure. We say so for the reason that *muddemal* property has to be produced along with a charge-sheet in the Court. If *muddemal*

property is allowed to be tendered during trial, entire trial vitiates, for, *muddemal* property has to be produced along with charge-sheet, otherwise there is every likelihood of tampering with articles, weapons etc. It would be unsafe and prejudicial to the defence of the accused. It would not be a fair trial. The Additional Sessions Judge ought to have decided the objection then and there. Be that as it may.

72. The evidence of PW.10-Atul Shinde indicates that the hockey stick and the *suri*- Articles 10 and 11 respectively were not found packed, sealed or labelled under any wrapper but simply wrapped under a newspaper dated 15th November, 1998. The evidence of this witness came to be recorded on 18th November, 1998, meaning thereby, articles were wrapped just before three days they were produced in the Court and, therefore, it is difficult to digest that those were the very weapons used by the accused in the commission of the offence.

73. PW.10-Atul Shinde admits in the cross-examination that the label bearing his signature and the signature of another *panch* which was tied with red string has not been mentioned in the *panchanama*. PW.10-Atul Shinde is not a person worth believing for the reason that he admits in the cross-examination as regards a charge of misappropriation of Rs.40,000/- *qua* members of the society was levelled against him. When it was asked as to whether there was any written complaint of misappropriation lodged by the members of the society against him with the Police, he answered that he does not know. He did not say that there was no such

complaint. He cannot be called a respectable *panch* witness as his credit has been impeached. He too worked as Assistant Secretary of *Parmanandwadi* proposed society.

74. He further admits that while proceeding towards the respective houses of accused No.3-Vijay Karekar and accused No.4-Sitaram Baraskar, the Police did not carry packing or sealing material and that he very well knew houses of both the accused prior to leaving the Police station. His evidence, therefore, cannot be said to be credible. Thus, evidence of P.W.9-Shantaram Wairkar and P.W.10-Atul Shinde needs to be discarded.

75. Now, a few lines about testimonies of defence witnesses;

Defence of the accused as regards darkness at the time of the incident due to non supply of electricity appears probable in light of the evidence of defence witness No.1-Sunil Shankar Gawade who was then serving as Assistant Engineer in Bombay Electric Supply and Transports at Mumbai (for short 'BEST').

76. His evidence indicates that at the relevant time he was attached to Vigilance Department of BEST at Electric House, Colaba, Mumbai. On 14th July, 1997 there was an off electric supply in *Parmanandwadi* between 9.20 pm and 11.00 p.m. He testified that the said area comes in Z.P Zoppadpatti pillar No.141, Circuit No.3, near Pole No.PT138/9A. The said off supply of 14th July, 1997 was recorded in their off supply book dated 15th July, 1997. He further testified that Commercial Department had

received a message at 9.20 p.m on 14th July, 1997 about off supply of the electricity. After receiving the message, a man from commercial department went to verify the nature of off supply. Commercial Department had reported off supply to their Fault Control section of Operation and Maintenance Department at 10.15 p.m. Thereafter, a person from commercial department went to Zopadpatti pillar No. 141 and found 63 Amp. Fuse of circuit No.3 was blown. It was replaced and the electricity supply was restored at 11.00 p.m. Entry of off supply was recorded as entry No.15/6 by the Operation and Maintenance Department of BEST.

77. D.W.1-Sunil Gawade had tendered extract of their computer which corroborates his oral evidence and is proved at Exhibit 62. This aspect fortifies the fact that at the time of the incident there was absolutely no electricity in the area where the incident took place. It obviously goes without saying that there was hardly any occasion for P.W.1-Pravin Iyre to witness as to who were the assailants and what were the weapons in their hands and whether those weapons were used to commit murder of deceased Santosh. A futile attempt has been made by the learned A.PP to rebut the testimony of this witness.

78. Similarly, another defence witness, D.W.2-Baban Namdeo Sangle who was the Police Naik attached to LA-1 Naigaon, Mumbai bearing PN 26266 testified that on 14th July, 1997 he was attached to Bhoiwada Police station as a police Constable and was doing his duty in Police casualty in K.E.M. Hospital. Around 9.50 p.m on the same day, one Santosh Sakharam Iyre was brought in

an injured condition by his brother namely Pravin Iyre (P.W.1) in the casualty of K.E.M Hospital. Said Pravin Iyre was brother of the deceased who told this witness that deceased Santosh was assaulted by a mob in *Parmanandwadi* at about 9.30 p.m on 14th July, 1997. He testified that Pravin Iyre did not tell him as to the nature of weapons used by the mob while attacking his brother.

79. D.W.2-Baban Sangale had recorded an entry in EPR register dated 14th July, 1997. Certified copy of the said extract is proved at (Exhibit 64) from which it is evident that P.W.1-Pravin Iyre had simply intimated the Constable on duty that a mob had attacked his brother with some sharp weapon inflicting blows on his both hands, neck and head due to which there were blood injuries and he became unconscious. It being the first information given by the informant to the Police who was on duty at K.E.M Hospital, he ought to have mentioned the name of all the assailants which he had subsequently named and, therefore, the first account of the incident itself creates a doubt as to whether informant had an occasion to see the real assailants or the weapons with which they were armed? Surprisingly, D.W.2-Baban Sangale is in fact, a witness in the charge-sheet of the prosecution. Why was he not examined by the prosecution is a mystery, which speaks volumes.

80. Third and last defence witness is Shobha Tukaram Devalekar. She too was the prosecution witness but the prosecution chose not to examine her. In her evidence, she testified that at that time, she was resident of the same area namely *Maharashtra Zopadpatti Sangh* and has a shop of book binding. On 14th July, 1997, she was

doing the work in her book binding shop when the electricity supply suddenly went off between 9.00 p.m and 9.15 p.m. Therefore, she went to grocery shop and brought wax candles. She came to her shop. She lighted the wax candles in the shop. When she was tying bundles of the books in her shop, she heard noise of pelting of stones. She came out of the shop. However, there was darkness. She saw two persons assaulting deceased Santosh and, thereafter they ran away from the spot. She rushed to the deceased Santosh who was lying in front of his house in the pool of blood. At that time, she saw a Sumo Jeep of one Ravindra Rane parked on the road. With the help of Mr. Ravindra Rane this witness lifted deceased Santosh and kept him in the Sumo Jeep. Brother of the deceased namely Pravin Iyre (PW.1) came over there and they took deceased Santosh to K.E.M. Hospital in the said jeep. They kept the deceased upon a stretcher and then he was taken inside the hospital. She further testified that the Police Constable on duty had made an inquiry with Pravin Iyre (PW.1). Doctors examined deceased Santosh Iyre and declared him dead.

81. Her evidence indicates that while lifting the deceased from the spot, her maxi was wet with blood stains. During her cross-examination by the learned A.P.P, nothing could be elicited by which her version can be suspected. She had no reason to depose falsely. Rather, the prosecution could have examined this witness to substantiate the fact that the deceased was assaulted by some persons and she took him to the hospital along with PW.1-Pravin Iyre in the Sumo Jeep of one Ravindra Rane.

82. Thus, cumulative effect of the defence witness probablises the defence raised by the accused. As already stated, the prosecution case itself rests on very weak footing and shaky evidence and, therefore, it is a fit case in which the accused are entitled to be acquitted of all the charges framed against them.

83. The learned Additional Sessions Judge has committed grave error in placing reliance on the prosecution witnesses as the impugned judgment is full of surmises and conjectures. The prosecution has failed to prove the charge against any of the accused beyond all reasonable doubts. The impugned judgment, therefore, warrants interference in the appeal. Hence, the following order is expedient.

: ORDER :

- [a] The appeals are allowed;
- [b] Impugned judgment and order dated 24th November, 1998 in Sessions Case No.1362 of 1997 is quashed and set aside;
- [c] Accused No.1-Kishor Tarkar, Accused No.2-Satish Amberkar, Accused No.3-Vijay Karekar, Accused No.4-Sitaram Baraskar and accused No.8-Santosh Baraskar are acquitted of the offences with which they have been charged;
- [d] Their bail bonds stand cancelled;
- [e] The order as regards disposal of *muddemal* property is maintained.
- [f] In view of disposal of the appeals, Criminal Application No.774 of 2006 in Criminal Appeal No.922 of 1998 stands disposed of.

[PRITHVIRAJ K. CHAVAN, J.] [SMT. SADHANA S. JADHAV, J.]