

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 192 OF 2015

1. Pramod @ Papa Pandurang Garad
Age : Adult, Occu. : --
2. Sambhaji Laxman Garad
Age : 26, Occu. : --
Both R/o Narkhed, Tal. Mohol,
Dist. Solapur. (Solapur District Jail) **...Appellants**
(Accused nos.1&3)

Versus

State of Maharashtra **...Respondent**

WITH
CRIMINAL APPEAL NO. 230 OF 2015

Bhausahab Pandurang Garad **...Appellant**
Age : 33 years. Occu. : Agriculturist (Accused no.2)
R/o Narkhed, Tal. Mohol,
Dist. Solapur.
(At present District Prison, Solapur.)

Versus

State of Maharashtra **...Respondent**

WITH
CRIMINAL APPEAL NO. 232 OF 2015

1. Baliram Krishnath Gotane
Age : 40 yrs., Occu. : Agriculturist
2. Ramesh Sukhdeo Garad
Age : 48 yrs., Occu. : Agriculturist
3. Sunil Vishnu Khandare
Age : 23 yrs., Occu. : Agriculturist
All R/o Narkhed, Tal. Mohol,
Dist. Solapur. **...Appellants**
(At present District Prison, Solapur) (Accused nos.4,6
&7)

Versus

State of Maharashtra **...Respondent**

WITH

CRIMINAL APPEAL NO. 231 OF 2015

Ashok Krishnath Gotane
Age : 48 years. Occu. : Teacher
R/o Mohol, Dist. Solapur.
(At present District Prison, Solapur.)
...Appellant
(Accused no.5)

Versus

State of Maharashtra
...Respondent

WITH
CRIMINAL APPEAL NO. 229 OF 2015

Hanmant Bhagwat Garad
Age : 20 years. Occu. : Agriculturist
R/o Narkehda, Tal. Mohol,
Dist. Solapur.
(At present District Prison, Solapur.)
...Appellant
(Accused no.8)

Versus

State of Maharashtra
...Respondent

Mr. Harshad Nimbalkar, a/w Shivam Nimbalkar, Sudeep
Deshmukh, i/b Satyam Nimbalkar, for the Appellant in
Criminal Appeal Nos./231/2015, 229/2015 and 232/2015.
Mr. Sudhir C. Halli, for the Appellant in Criminal Appeal
Nos./192/2015 and 230/2015.
Mr. Satyavrat Joshi, a/w Sunil Kamble, i/b Jaydeep Mane, for
Appellant nos.2 and 3 in Criminal Appeal No./232/2015.
Ms. P. P. Shinde, APP for the State/Respondent.
Mr. Surel Shah, for the Complainant in all appeals.

CORAM: SMT. SADHANA S. JADHAV
& N. J. JAMADAR, JJ.

RESERVED ON : 08.01.2021

PRONOUNCED ON: 30.04.2021

JUDGMENT : (Per: N. J. Jamadar, J.)

1. These appeals are directed against a judgment and order dated 20th January, 2015, passed by the learned Sessions Judge, Solapur, in Sessions Case No.107 of 2013, whereby and whereunder the appellants – accused came to be convicted for

the offences punishable under Sections 143, 147, 148 and 302 read with Section 149 of the Indian Penal Code, 1860 ('the Penal Code'), for having committed murder of Dhanyakumar @ Samadhan Sudam Ubale ('the deceased') in prosecution of the common object of unlawful assembly, and sentenced to suffer rigorous imprisonment for three months and pay fine of Rs.500/- each, for the offence punishable under Section 143; rigorous imprisonment for one year and fine of Rs.2,000/- each, for the offence punishable under Section 147; rigorous imprisonment for two years and fine of Rs.5,000/- each, for the offence punishable under Section 148 and imprisonment for life and fine of Rs.10,000/- each, for the offence punishable under Section 302 read with Section 149 of the Penal Code, with default stipulation.

2. The accused – appellants have preferred separate appeals. All these appeals can be disposed of by a common judgment. The appellants are hereinafter referred to as the accused.

3. The gravamen of indictment against the accused runs as under:

(a) Subhash Ubale ('the first informant') is the brother of the deceased Dhanyakumar. The latter was running a hotel near S.T. Stand, Narkhed. The accused are also the residents of

Narkhed. In the year 2010, accused no.1 Pramod @ Papa Garad and his associates had assaulted Hanmant Khandare and Vitthal Khandare near the S.T. Stand, Narkhed. The deceased Dhanyakumar was a witness to the said occurrence; in respect of which a prosecution was pending. The accused were insisting that the deceased should not depose against them in the said prosecution. The deceased was not yielding to the pressure exerted by the accused. Thus, the accused had a grudge against the deceased and had kept a vigil on the movements of the deceased since a couple of days prior to the occurrence.

(b) On 11th July, 2012, the deceased had been to the house of Chiu Jagtap, to attend the last rites (*shradh*), on a motorcycle bearing No. MH-12/AT-9313. At about 12 noon to 12.15 pm. the first informant Subhash, his nephew Prabodhan Sathe and Shankar Gavali were proceeding towards Shivaji chowk. The deceased came in front of Shradharani Collection Saree Centre. The accused suddenly came from the lane leading to Khandoba temple. Accused no.1 Pramod (A1) was armed with a sword. Accused no.2 Bhausahab (A2) was armed with a *sattur*. Accused no.3 Sambhaji (A3) also had a *sattur*. Accused no.4 Baliram (A4) was armed with a sword. Accused no.5 Ashok (A5), accused no.6 Ramesh (A6), accused no.7 Sunil (A7)

and accused no.8 Hanmant (A8) accompanied the above named accused. The accused pulled the deceased from the motorcycle and unleashed the blows by means of sword and *sattur* on the neck, face and shoulders of the deceased. The deceased fell on the spot in a pool of blood. When the first informant and his companions rushed towards the deceased, the accused fled away through the lane leading to Khandoba temple. The deceased sustained fatal injuries and died on the spot. The informant thus approached Mohol police station and lodged report.

(c) On the basis of the report, crime was registered at Crime No.153 of 2012, for the offences punishable under Sections 302, 143, 147, 148 and 149 of the Penal Code and Section 135 of the Maharashtra Police Act, at about 1.15 pm. Investigation commenced thereon. The Investigating Officer reached the scene of occurrence. Inquest was held. The Investigating Officer drew the scene of occurrence panchnama. Incriminating articles including plain earth and blood mixed earth were collected from the scene of occurrence. The body was sent for postmortem examination. The autopsy surgeon opined that the death was caused due to shock due to poly-trauma.

(d) The Investigating Officer interrogated witnesses and recorded their statements. The accused came to be arrested. Sambhaji (A3) made discovery leading to the recovery of blood stained clothes wore by him and Hanmant Garad (A8), at the time of occurrence. Sambhaji (A3) also made a disclosure statement leading to the recovery of the blood stained sickle (*koyta*) (Article-8). Pursuant to the discovery made by Hanmant (A8) a *sattur* (Article-9) came to be recovered. Seized articles were sent for analysis to the Forensic Science Laboratory. C.A. Reports were obtained. After finding the complicity of the accused charge-sheet was lodged, in the Court of jurisdictional Magistrate, against the accused for the offences punishable under Sections 302, 143, 147, 148 and 149 of the Penal Code and Section 135 of the Maharashtra Police Act.

(e) Upon committal, the learned Sessions Judge framed charge against the accused for the offences punishable under Sections 143, 147, 148 and 302 read with 149 of the Penal Code. The accused abjured their guilt and claimed for trial.

(f) At the trial, in order to bring home the charge to the accused, the prosecution examined 10 witnesses including Subhash Ubale (PW-3); the first informant and Prabodhan Sathe (PW-6); as eye witnesses to the occurrence, Santosh Mote (PW-

2); a public witness to the scene of occurrence panchnama, Nagesh Babar (PW-7); a public witness to the alleged discoveries made by Sambhaji (A3) and Hanmant (A8), Dr. Prafulla Gaikwad (PW-1); the autopsy surgeon, Mr. Nilkanth Khandare (PW-5), who professed to depose about the alleged meeting a week prior to the occurrence in respect of the pending prosecution against Pramod (A1) and his associates in which the deceased was cited as an eye witness, Sanjay Dhumale (PW-8); the Police Officer, who had recorded the First Informant Report ('FIR') and carried out the initial investigation, and Jitendra Shahane (PW-10); who completed the rest of the investigation and lodged the charge-sheet.

(g) After the closure of the prosecution evidence, the accused were examined under Section 313 of the Code of Criminal Procedure, 1979 ('the Code'). The defence of the accused was of denial and false implication. Ashok (A5) raised the defence of alibi. In order to substantiate the defence that at the time of occurrence Ashok (A5) was imparting instructions in the New English School, Narkhed, Mr. Suryabhan Borade (DW-1) the then incumbent Head Master of New English School, Narkhed, and Mr. Babulal Nabilal Mali (DW-2), who was working

as the Head Master at the said school at the time of occurrence, were examined.

(h) After appraisal of the evidence led by the prosecution and Ashok (A5), the learned Sessions Judge was persuaded to enter a finding of guilt against all the accused. The learned Sessions Judge was of the view that the prosecution succeeded in establishing that the accused committed murder of the deceased in prosecution of the common object of the unlawful assembly of which they were the members. In the process, the learned Sessions Judge discarded the defence of alibi taken by Ashok (A5). Thus, the accused came to be convicted and sentenced as indicated above.

4. Being aggrieved by and dissatisfied with the impugned judgment of conviction and order of sentence the accused have filed distinct appeals.

5. We have heard Mr. Sudhir Halli, the learned Counsel for accused nos.1 to 3, Mr. Harshad Nimbalkar, the learned Counsel for accused nos.4, 5 and 8 and Mr. Satyavrat Joshi, the learned Counsel for accused nos.6 and 7, in the respective appeals. We have also heard Mrs. P. P. Shinde, the learned APP for the State and Mr. Surel Shah, the learned Counsel for the first informant, in all the appeals. With the assistance of the

learned Counsels, we have carefully perused the material on record including the depositions of the witnesses.

6. Though the learned Counsels for the accused, in the respective appeals, have advanced separate submissions, yet, the legality, propriety and correctness of the impugned judgment and order is assailed by the learned Counsels on few common grounds. We deem it appropriate to first enumerate the broad challenges to the impugned judgment and order and deal with the special submissions of the learned Counsels for the accused thereafter. From the submissions advanced across the bar by the learned Counsels for the appellants, the following challenges can be culled out:

(i) The prosecution has suppressed the original first information report. To suit the prosecution case, the FIR has been ante-timed and ante-dated.

(ii) The time of occurrence is in the realm of uncertainty as the medical evidence runs counter to the claim of the prosecution witnesses as regards the time of occurrence.

(iii) The presence of the star witnesses at the time and place of the occurrence is highly doubtful. The star witnesses Subhsh Ubale (PW-3) and Probodhan Sathe (PW-6) are highly interested in the prosecution and the learned Sessions Judge

committed a manifest error in placing reliance on their testimony.

(iv) The conduct of the star witnesses is so unnatural that their presence at the scene of occurrence becomes suspect.

(v) The testimony of the star witnesses bristles with material omissions, improvements and contradictions and renders them unworthy of credence.

(vi) Conversely, the alleged incident occurred at a busy place and yet the prosecution has not examined any independent witness and, therefore, the prosecution case could not have been readily believed by the learned Sessions Judge.

(vii) The circumstantial evidence is of no avail to the prosecution as, on the one hand, the public witness to the alleged discovery leading to the recovery of the weapons is a stock panch and, on the other hand, no value can be attached to the alleged seizure as there is no evidence of proper sealing and safe keeping of seized articles till they were sent for analysis.

7. In addition to these broad submissions, it was urged by Mr. Halli, the learned Counsel for accused nos.1 to 3, that there was no motive for the accused to eliminate the deceased.

8. Mr. Nimbalkar, the learned Counsel for accused nos.4, 5 and 8 would urge that the fact that only two weapons (Articles 8 and 9) were recovered and there is a serious discrepancy as regards the weapon with which the accused were armed would render it unsafe to place implicit reliance on the testimony of Subhash (PW-3) and Prabodhan (PW-6). The discoveries are of no evidentiary value as the alleged weapons were recovered from the places which were open and accessible to all. Hanmant (A8) thus cannot be attributed with exclusive knowledge of the concealment of the weapon *sattur* (Article-9), which was allegedly discovered pursuant to the discovery made by him. Mr. Nimbalkar would further urge that the learned Sessions Judge committed a grave error in not giving due weight to the evidence of Mr. Suryabhan Borade (DW-1) and Mr. Babulal Mali (DW-2), which establishes beyond the pale of controversy that at the time of the alleged occurrence Ashok (A5) was imparting instructions in the school.

9. Mr. Joshi, the learned Counsel for accused nos.6 and 7, strenuously urged that the complicity of accused nos.6 and 7 cannot be said to have been established beyond reasonable doubt. Neither accused nos.6 and 7 were armed. Nor accused nos.6 and 7 participated in the assault. In the absence of any

overt act having been attributed accused nos.6 and 7, according to Mr. Joshi, accused nos.6 and 7 could not have been roped in by invoking the principle of constructive criminality.

10. Mr. Joshi advanced a severe criticism against the manner in which the accused were examined under Section 313 of the Code. Taking the Court through the statement of accused under Section 313 of the Code, which indicates that a common questionnaire was put to all the accused, it was urged that the examination of the accused under Section 313 was in a most perfunctory and callous manner. A serious prejudice was thus caused to the accused. The accused were deprived of the opportunity to offer meaningful explanation to the incriminating circumstances which were arrayed against the accused. On this count alone, according Mr. Joshi, all the accused deserve to be acquitted.

11. In contrast to this, Mrs. P. P. Shinde, the learned APP submitted with tenacity that the guilt of the accused is squarely established by the testimony of Subhash (PW-3) and Prabodhan (PW-6). Their ocular account is amply corroborated by medical evidence. The challenge to the prosecution on the count of ante-dating and ante-timing of the FIR is wholly misconceived. In contrast, the FIR came to be recorded within an hour and

half of the occurrence, with the substantial prosecution case being reported therein. There was hardly any scope for embellishment, urged the learned APP. It was further submitted that the testimony of Subhash (PW-3) and Prabodhan (PW-6), which is found trustworthy, cannot be discarded on the ground that they happen to be the relations of the deceased. In the totality of the circumstances, according to the learned APP, the learned Sessions Judge was justified in returning the finding of guilt. Thus, no interference is warranted with the impugned judgment of conviction and order of sentence, submitted Mrs. Shinde.

12. A brief resume of the ocular and medical evidence would assists us in appreciating the aforesaid submissions in proper perspective. The ocular account primarily consists of the testimony of Subhash (PW-3); the first informant, and Prabodhan (PW-6).

13. Subhash (PW-3) unfolded the prosecution case. After apprising the Court that like him and deceased, the accused are the residents of Narkhed and related *inter se*, Subhash (PW-3) endeavoured to impress upon the Court that in the year 2010 a quarrel had taken place between Hanmant Khandare and Vitthal Khandare, on the one side, and Pramod @ Papa (A1) and

his associates, on the other side, in front of the hotel of the deceased; the later had intervened therein. A report about the said incident was lodged by Hanmant Khandare and Vitthal Khandare. The deceased Dhanykumar was cited as an eye witness in the said prosecution, which was then pending before the Court at Mohol. The accused were insisting that the deceased should not depose in the said prosecution. They were extending threats to the deceased. Five to six days prior to the occurrence a meeting had taken place at the house of Hanmant Khandare. Accused Pramod (A1), Hanmant Khandare and Neelkant Khandare and others had attended the said meeting. The deceased had declined to compromise the matter. Thus, Sambhaji (A3) and Hanmant (A8) had kept a watch on the deceased.

14. On the core of the occurrence, Subhash (PW-3) wants the Court to believe that on 19th July, 2010, at noon time the deceased had been to the house of Chiu Jagtap for attending last rituals (*shradha*) of latter's father. While, Subhash (PW-3), Prabodhan (PW-6) and Shankar Gavali were proceeding together towards the house of Chiu Jagtap, the deceased was returning from Shivaji Chowk. When the deceased reached in front of Shraddharani Saree Centre accused nos.1 to 8 came thereat

from the Khandoba temple lane. The accused forced Dhanyakumar to stop the vehicle. They encircled the deceased. After exhorting that the deceased should not give evidence against them in the Court, the accused unleashed fatal blows of deadly weapons, with which they were armed, on his head, neck and shoulder. Subhash (PW-3) affirmed that Pramod (A1) was armed with a sword, Bhausahab (A2) was armed with a *sattur*, Baliram (A4) was armed with a sword, Sambhaji (A3) was armed with a sickle (*koyata*) and Hanmant (A8) was armed with a *sattur*. These accused inflicted blows on the person of the deceased by their respective weapons in quick succession.

15. Subhash (PW-3) further affirmed that at the time of the said occurrence they were near the house of Tatya Patil, at a distance of 60 feet from the place of assault. When he ran towards the scene of occurrence, the accused fled away towards river Bhogawati from the lane leading to Khandoba temple. He found the deceased in a pool of blood and dead on the spot. Thus, he claimed to have lodge the report (Exhibit-93).

16. Prabodhan (PW-6), the nephew of the deceased and the first informant, lends support to the claim of Subhash (PW-3). Prabodhan (PW-6) was in unison with Subhash (PW-3) as regards the prelude to the occurrence on account of which the

accused allegedly had a grudge against the deceased as the latter did not budge to the demand of the accused not to depose in the prosecution initiated in respect of the incident of the year 2010. Prabodhan (PW-6) affirmed that on the day of occurrence he was on his way to the house of Chiu Jagtap to attend the last rites (*shradha*) of latter's mother. Subhash (PW-3) and Shankar Gavali accompanied him. When they came in front of the house of Tatyapa Patil, he noticed that the deceased was coming on a motorcycle. When the deceased reached in front of Shaddharani Saree Centre, the accused rushed thereat from Khandoba temple lane and accosted the deceased. According to Prabodhan (PW-6), Pramod (A1) was armed with a sword, Bhausaheb (A2) had a *sattur*, Sambhaji (A3) was also armed with a *sattur*, Baliram (A4) had a sword and Hanmant (A8) had sugarcane cutting instrument (*koyata*) and they unleashed the blows by means of the respective weapons on the neck, head and shoulder of the deceased. He, Subhash (PW-3) and Shankar Gavali rushed towards the scene of occurrence. Accused fled away through the Khandoba temple lane, alongwith their weapons. He claimed to have given a chase for a distance and thereafter returned to the spot. He found the deceased dead on the spot.

17. At this juncture, recourse to the medical evidence may be apposite. Dr. Pralhad Gaikwad (PW-1), the autopsy surgeon, informed the Court that on 19th July, 2012, the body of the deceased was brought at Rural Hospital, Mohol, at about 5.30 pm. He conducted postmortem in between 5.45 pm. to 6.45 pm. Dr. Gaikwad (PW-1) claimed to have found the following external injuries.

- (i) Incised wound on neck back side of size 38 cm. X 6 cm. up to cervical vertebral column with fracture of vertebral column at level C3 – C4 with complete transection of spinal cord at C3 – C4 level. Injury was transversely placed.
- (ii) Incised wound at base on neck back side of size 6 cm. X 2 cm. X muscle deep transversely placed.
- (iii) Incised wound on inter scapula region of size 12 cm. X 2 cm. X muscle deep, two in number each transversely placed.
- (iv) Incised wound on right shoulder back side of size 4 cm. X 2 cm. X muscle deep.
- (v) Incised wound on right mandible of size x X 2 X muscle deep.
- (vi) Abrasion on left elbow of size 7 cm. X 3 cm.

18. Dr. Gaikwad (PW-1) claimed to have noticed fracture at cervical at C3 – C4 level. There was complete transection of spinal cord at C3 – C4 level. In the opinion of Dr. Gaikwad, all the injuries were ante-mortem and caused within 12 hours of the examination. The injuries were possible by sharp weapons such as sword, sickle and *sattur*. They were sufficient in the

ordinary course of nature to cause death. The deceased had died due to shock due to poly-trauma. Dr. Gaikwad (PW-1) categorically asserted that because of injury no.1 (described above), death must have been immediate and instant. He further opined that the injuries were possible by the *sattur* and sickle (Articles 8 and 9).

19. If the ocular account is considered, in conjunction with the aforesaid medical evidence, the fact that the deceased met homicidal death can hardly be contested. The fatal nature of the injuries, especially, injury no.1, which indicates that there was a complete transection of spinal cord at C3 – C4 level, establishes the homicidal nature of the death beyond the pale of controversy. This propels us to the question of authorship of the homicidal death.

20. The edifice of the submission on behalf of the accused that the prosecution suppressed the genesis of the occurrence, in as much as initial FIR was suppressed and, to suit the prosecution, a different version implicating the accused was brought on record, was based on certain statements in the inquest panchnama (Exhibit-82), the requisition sent to the medical officer for postmortem examination (Exhibit-89) and the report (Exhibit-116) submitted alongwith requisition. The

learned Counsels for the accused laid a very strong emphasis on the statement in the inquest (Exhibit-82) attributed to Subhash (PW-3), that the deceased was belaboured by Hanmant Khandare, Vitthal Khandare, Pramod Garad (A1) and others. The same assertion finds mention in the requisition (Exhibit-89) and the report (Exhibit-116) submitted to the medical officer for the postmortem examination by Mr. Sanjay Dhumale (PW-8), the then Police Sub-Inspector, Mohol Police Station.

21. A two-pronged submission was canvassed on behalf of the accused. One, initially the first informant had named Hanmant Khandare and Vitthal Khandare as the assailants. Conversely, the names of the accused were not mentioned as the assailants. Two, the fact that the investigating agency proceeded to take steps during the course of investigation by asserting that the named assailants were Hanmant Khandare and Vitthal Khandare, indicates that the subsequent implication of the accused as the assailants is a creature of an afterthought. This factor coupled with the interested nature of the testimony of Subhash (PW-3) and Prabodhan (PW-6) throws a serious cloud of doubt over the very initiation of the prosecution.

22. Mr. Dhumale (PW-8) endeavoured to explain away the aforesaid discrepancy. Mr. Dhumale (PW-8) affirmed that while

scribing the inquest (Exhibit-82) a mistake crept in. He intended to incorporate that the persons who were accused in the case of Hanmant Khandare and Vitthal Khandare had assaulted the deceased but instead it came to be recorded that the deceased was assaulted by Hanmant Khandare, Vitthal Khandare, Pramod Garad (A1) and others. Similar mistake crept in in the requisition (Exhibit-89).

23. This explanation of Mr. Dhumale (PW-8) was assailed on behalf of the accused of being unworthy of acceptance. To this end, it was elicited in the cross-examination of Mr. Dhumale (PW-8) that while drawing inquest panchnama the information was furnished by Subhash (PW-3). He had read over the contents of the inquest panchnama to the persons who were present thereat. He had verified the documents before filing charge-sheet. Yet, he had not filed an application before the Court to rectify the alleged mistake in the contents of the inquest panchnama nor he gave any report to his superior officers regarding the alleged mistake.

24. It was strenuously urged on behalf of the accused that the fact that the inquest panchnama (Exhibit-82) and the documents under which the dead body was sent for postmortem examination, on the one hand, contain the names of two other

persons as assailants, and, on the other hand, do not contain the name of the accused as assailants cannot be said to be immaterial or inconsequential. This inconsistency erodes the very substratum of the prosecution case.

25. To lend support to the aforesaid submission, Mr. Nimbalkar placed reliance on a judgment of the Supreme Court in the case of *State of Gujarat vs. Patel Mohan Mulji and another*¹, wherein the Supreme Court had taken note of the fact that in the inquest report names of none of the assailants found place. Reliance was also placed on a judgment of the Division Bench of this Court in the case of *Deoraj Deju Suvarna and etc. vs. State of Maharashtra*², wherein this Court had found the evidence of star witnesses therein unreliable as in the emergency police report the appellants therein were not named as the assailants and the weapons of offence, the sword and soda water bottles, were not mentioned. And the names of two of the assailants were introduced by way of interpolation.

26. Mr. Satyavrat Joshi, the learned Counsel for accused nos. 6 and 7 placed reliance on a judgment of the Supreme Court in the case of *Ramesh Baburao Devaskar and others vs. State of*

¹1994 Cri. L.J. 280.

²1994 Cri. L.J. 3602.

*Maharashtra*³, wherein also, the Supreme Court had factored in non-mentioning of the names of the assailants in the inquest panchnama, wherein a statement was attributed to the panchas that unknown assailants had killed the deceased.

27. We have carefully perused the aforesaid pronouncements. We are of the view that the aforesaid pronouncements do not advance the cause of the accused to the extent desired by the learned Counsels for the accused. The legal position as regards the utility of the inquest panchnama is absolutely clear and well settled. The object of inquest proceedings is to ascertain whether a person has met an unnatural death and, if so, what is the apparent cause of death. Its utility is restricted to contradict the witnesses to the inquest, if they are examined during the trial. The question as to how the deceased was assaulted or who was the assailant and under what circumstance the deceased was assaulted are beyond the remit of inquest proceedings under Section 174 of the Code. The failure to mention names of the assailants, or for that matter, mentioning the names of persons other than accused as assailants, cannot be exalted to such a pedestal as to throw the prosecution case overboard.

3(2007) AIR (SC)1606.

28. A profitable reference, in this context, can be made to a judgment of the Supreme Court in the case of *George and others vs. State of Kerala & another*⁴, wherein the following observations were made:

“31. The whole purpose of preparing an inquest report under Section 174 (1) CrPC is to investigate into and draw up a report of the apparent cause of death, describing such wounds as may be found on the body of the deceased and stating in what manner, or by what weapon or instrument, if any, such wounds appear to have been inflicted. In other words, for the purpose of holding the inquest it is neither necessary nor obligatory on the part of the Investigating Officer to investigate into or ascertain who were the persons responsible into or ascertain who were the persons responsible for the death. In dealing with Section 174 CrPC in *Podda Narayana vs. State of A.P. [(1975) 4 S.C.C.153]*, this Court held that the object of the proceedings thereunder is merely to ascertain whether a person died under suspicious circumstances or met with an unnatural death and, if so, what was its apparent cause. According to this Court the question regarding the details how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of such proceedings. With the above observation this Court held that the High Court was right (in that case) that the omissions in the inquest report were not sufficient to put the prosecution out of Court. In *Eqbal Baiq vs. State of A.P. [(1986) 2 S.C.C.476]* this Court observed, while dealing with a similar question, that the inquest report was not the statement of any person wherein all the names of the persons accused were to be mentioned. On this ground also the finding of the trial Court based on the inquest report cannot be sustained.

29. The aforesaid pronouncement was followed by the Supreme Court in the case of *Satbir Singh and others vs. State of Uttar Pradesh*.⁵ The observations in paragraphs 36 and 37 are material. They read as under:

⁴(1998) 4 Supreme Court Cases 605.

⁵(2009) 13 Supreme Court Cases 790.

“36. Mr. Sushil Kumar would urge that in the inquest report the name of the accused persons had not been mentioned. In our opinion that in law it was not necessary to do so. The inquest report is prepared for the purposes mentioned in 174 of the Code of Criminal Procedure and not for corroborating the prosecution case.

37. In *Pedda Narayana v. State of A.P.*, [(1975) 4 SCC 153] this Court has held :

“11. A perusal of this provision would clearly show that the object of the proceedings under Section 174 is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted appears to us to be foreign to the ambit and scope of the proceedings under Section 174.”

30. In view of the aforesaid legal position, the accused cannot draw much mileage from the fact that in the inquest report (Exhibit-82), the requisition (Exhibit-89) and report (Exhibit-116) sent for postmortem examination, a statement was attributed to Subhash (PW-3) that Hanmant Khandare and Vitthal Khandare were the assailants. Even otherwise, on facts, there are two circumstances which render the explanation furnished by Mr. Dhumale (PW-8) nearer to the truth. One, in the inquest (Exhibit-82) apart from the names of Hanmant Khandare and Vitthal Khandare, the other assailants were identified as Pramod Garad (A1) and others. Thus, it cannot be urged that Pramod Garad (A1) and his associates were not at all in the frame. Two, the scene of occurrence panchnama

(Exhibit-91) which came to be proved in the evidence of Santosh Mote (PW-2), the assailants were identified as Pramod Garad (A1) and others. The scene of occurrence panchnama (Exhibit-91) commenced at 2.30 pm.; immediately after the conclusion of the inquest (Exhibit-82). The scene of occurrence panchnama (Exhibit-91) thus constitutes a formidable dyke against the manipulation of the record to suit the prosecution case. It is not the case that an interval of time passed so as to facilitate deliberation and confabulation between the drawing of the inquest and the scene of occurrence panchnama.

31. This takes us to the pivotal challenge of the FIR itself being manipulated. The claim of Subhash (PW-3) that he had approached the police and lodged the report (Exhibit-93) finds support in the testimony of Dhumale (PW-8). The latter affirmed that on 19th July, 2012, Subhash (PW-3) had arrived at Mohol Police Station and lodged the report (Exhibit-93).

32. An endeavour was made on behalf of the accused to draw home the point that FIR (Exhibit-93) was ante-timed. Two grounds were pressed into service. One, considering the time of occurrence, the FIR could not have been recorded at 1.15 pm., as deposed to by Mr. Dhumale (PW-8), having regard to distance between the scene of occurrence and Mohol Police Station. Two,

the copy of the FIR reached the jurisdictional Magistrate on 20th July, 2012. This delay in forwarding the copy of the FIR to the concerned Magistrate, which is situated at a close distance of Mohol Police Station, indicates that the FIR was ante-timed.

33. In the cross-examination of Subhash (PW-3) it was elicited that he did not call the police from the scene of occurrence. Nor he requested anybody else to make a telephone call to police. He conceded that he was present on the spot when the police officers arrived thereat. Initially inquest was held by the police. The police did not make any inquiry when they drew panchnama. It was further brought out, in the cross-examination of Subhash (PW-3), that the distance between Mohol and Narkhed is 12 kms. Jitendra Shahane (PW-10), the investigating officer conceded in the cross-examination that the distance between Narkhed and Mohol via Ashti is 28 kms. He did not cave in to the suggestion that it takes one hour to reach Narkhed from Mohol via Ashti. He affirmed that one can reach Narkhed from Mohol within half an hour.

34. On the strength of the aforesaid admissions, an earnest effort was made on behalf of the accused to drag home the point that the first informant was at the scene of occurrence itself from the time of the alleged occurrence till the arrival of the

police. The first informant thus could not have approached Mohol Police and lodged FIR (Exhibit-93) which is shown to have been recorded at 1.15 pm.

35. The aforesaid endeavour on behalf of the accused is factually not well grounded. In the cross-examination itself, when Subhash (PW-3) was confronted with the question as to whether he had made a telephone call to the police, while admitting that he did not make the call to police, Subhash (PW-3) categorically affirmed that he had gone to the police station. The said claim of Subhash (PW-3) went completely unchallenged. Likewise, the claim of Mr. Dhumale (PW-8) that on the day of occurrence Subhash (PW-3) had arrived at the police station also went completely untraversed. In the context of the distance between Narkhed and Mohol, even if we reckon it on the higher side, it was not impracticable for Subhash (PW-3) to reach Mohol Police Station and lodge the report. We are thus not persuaded to accede to the submission on behalf of the accused that the FIR was ante-timed.

36. To buttress the defence that there was a deliberate delay in forwarding the copy of the report to the Magistrate, which dents the veracity of the prosecution case, Mr. Dhumale (PW-8) was confronted with a copy of the report (Exhibit-115) which was

received in the Court of Judicial Magistrate, First Class, Mohol, on 20th July, 2012. It was urged that in the circumstances of the case, the delay is inordinate and unexplained. In the absence of a reasonable explanation for the delay, no inference other than that of the investigating agency having marked the time to manipulate the prosecution case can be drawn, urged the learned Counsel for the accused.

37. Mr. Nimbalkar, the learned Counsel for accused nos.4, 5 and 8 placed a strong reliance on the judgment of Division Bench of this Court in the case of *Tulshiram Bhanudas Kambale and orthers vs. State of Maharashtra*⁶, wherein after adverting to the previous pronouncements, this Court had held that, “in our view what can be said is that before in a given case an inference is drawn that the F.I.R. was ante-timed some circumstances have to be shown either from cross-examination of the relevant witnesses or from material appearing on record which would probabilise the ante-timing of the F.I.R. But we hasten to add that, Section 157, Cr.P.C. casts an obligatory duty on the police to forthwith send a copy of the F.I.R. to the Magistrate and whenever the Police fail to discharge this mandatory duty it is under a legal obligation to furnish reasons for not discharging it.”

62000 Cri. L.J. 1566.

38. The legal position as regards the consequences which entail the delay in forwarding the copy of the report to the Magistrate is also well recognized. Mere delay by itself is of little consequence. It has to be shown that the delay in forwarding report to the Magistrate under Section 157 has resulted in a serious prejudice to the accused. Mere delay without any concomitant circumstances, especially where there is evidence to indicate that FIR has been promptly lodged and investigation commenced immediately, is of no significance.

39. A useful reference, in this context, can be made to a judgment of the Supreme Court in the case of *Jafel Biswas and others vs. State of West Bengal*⁷, wherein after a survey of the previous pronouncements, the Supreme Court culled out the legal position in the following words:

“19. The obligation is on the I.O. to communicate the report to the Magistrate. The obligation cast on the I.O. is an obligation of a public duty. But it has been held by this Court that in the event the report is submitted with delay or due to any lapse, the trial shall not be affected. The delay in submitting the report is always taken as a ground to challenge the veracity of the F.I.R and the day and time of the lodging of the F.I.R.

20. In cases where the date and time of the lodging of the F.I.R. is questioned, the report becomes more relevant. But mere delay in sending the report itself cannot lead to a conclusion that the trial is vitiated or the accused is entitled to be acquitted on this ground.

21. This Court in the case of *Anjan Dasgupta Vs. State of West Bengal and Ors.* (2007) 11 SCC 222 (of which one of us was a member, Hon. Ashok Bhushan, J.) had considered

7(2019) 12 Supreme Court Cases 560.

Section 157 CrPC. In the above case also, the FIR was dispatched with delay. Referring to an earlier judgment of this Court, it was held that in every case from the mere delay in sending the FIR to the Magistrate, the Court would not conclude that the FIR has been registered much later in time than shown."

[emphasis supplied]

40. In the case of *Ombir Singh vs. State of Uttar Pradesh and another*⁸, a three Judge Bench of the Supreme Court approved the aforesaid pronouncement and observed that delay in compliance in Section 157 cannot, in itself, be a good ground to acquit the accused. Albeit, this fact has to be considered while examining the credibility of the version of the eye witnesses.

41. On the aforesaid touchstone, reverting to the facts of the case, there is evidence to indicate that the FIR was lodged and recorded instantaneously, and the investigation commenced in right earnest, the inquest panchanama (Exhibit-82) was drawn in between 13.40 pm. to 14.20 pm, the scene of occurrence panchnama was drawn in between 14.30 pm. to 15.15 pm. and the postmortem examination on the body of the deceased was held between 5.45 pm. to 6.45 pm. In this view of the matter, the fact that the copy of the FIR reached the learned Magistrate on the next day, even if taken at par, does not detract materially from the prosecution. It is more so for the reason that no circumstance could be brought on record to demonstrate that

8(2020) 6 Supreme Court Cases 378.

the delay in forwarding the copy of the report to the Court of the learned Magistrate caused prejudice to the accused.

42. A strenuous effort was made to show that the ocular account as regards the time of occurrence is discredited by the medical evidence. Emphasis was laid on an admission elicited in the cross-examination of Dr. Gaikwad (PW-1), the autopsy surgeon, to the effect that considering the nature of rigor-mortis present on the body of the deceased, the death must have been caused before 12 hours of the postmortem. Since the postmortem was conducted in between 5.45 pm. to 6.45 pm., the prosecution case that the occurrence took place at 12 noon is belied by the aforesaid admission of the autopsy surgeon, urged the learned Counsel for the accused. The learned Sessions Judge was of the view that the aforesaid admission is an outcome of skillful cross-examination. Since Dr. Gaikwad (PW-1) had initially affirmed that the rigor-mortis had partially developed, the said admission was of no conclusive significance.

43. In our view, the aforesaid approach of the learned Sessions Judge is impeccable. The aforesaid admission cannot be read torn out of context. Dr. Gaikwad (PW-1) has initially affirmed that the rigor-mortis was partially present all over the body. In the postmortem report (Exhibit-88) also it was specifically

recorded that rigor mortis was partially present all over the body. In the context of the time-lag and the explanation by the autopsy surgeon to the effect that rigor-mortis normally starts within two to three hours of the death and it spreads over the entire body after 10 to 12 hours of the death, the aforesaid admission cannot be pressed into service to bolster up the defence that the deceased had died prior to 12 hours of the postmortem examination. The categorical assertion that rigor-mortis was partially present diminishes the value of the aforesaid admission, if it can be termed so.

44. It is imperative to note that there is direct ocular account as regards the time of the occurrence. Moreover, there are contemporaneous documents in the form of the FIR (Exhibit-93), inquest (Exhibit-82) and scene of occurrence panchnama (Exhibit-89) which freeze the time and place of the occurrence. Furthermore, as the occurrence had taken place on a street, and indubitably, the deceased was found in a pool of blood on the street, the opinion of the medical officer, that too in the form an admission elicited in an unguarded moment, cannot command primacy.

45. It was next urged that Dr. Gaikwad (PW-1) conceded that semi-digested food was noticed in the stomach of the deceased.

The discrepancy was played down by the learned Sessions Judge by observing that in the villages the villagers are usually in the habit of having the breakfast in early morning hours. In the absence of any evidence to show that the deceased had breakfast in the morning, the discrepancy cannot be said to have been properly accounted for, urged Mr. Nimbalkar.

46. To buttress this submission, Mr. Nimbalkar, the learned Counsel for the accused nos.4, 5 and 8 placed a strong reliance on a judgment of the Supreme Court in the case of *Moti and others vs. State of U.P.*⁹, wherein in the context of the controversy as regards the exact time at which the incident in the said case had occurred and which had a bearing on the opportunity for the witnesses to observe the incident, the Supreme Court observed that, "It may be possible to contend that contents of the stomach may not always be an indicator of the time of death. But in a case where stomach is empty and the prosecution evidence is that the murder had taken place shortly after the deceased had his last meal, to say that the contents of the stomach have no material bearing on the determination of time, in our opinion, is not acceptable. In the instant case, time of death being a material factor to verify the presence of the eyewitnesses, it was obligatory for the prosecution to have

⁹2003 Supreme Court Cases (Cri) 1821.

clarified the discrepancy between the medical evidence and the oral evidence. The prosecution having failed to do so, in our opinion, there is a serious doubt as to the time of incident and presence of the eyewitnesses at the time of incident and their narration of the incident also becomes doubtful.”

47. There can be no duality of opinion about the aforesaid proposition which underscores the relevance of the contents of the stomach in assessing the probable time of death. However, in the facts of the case, nothing turns on the presence of semi digestive food in the stomach of the deceased. The occurrence took place at noon time. The fact that the deceased have had opportunities to have food in the morning can hardly be disputed. From this stand point, in our view, the learned Sessions Judge committed no error in not attaching much weight to this aspect of the matter.

48. This leads us to the crucial aspect of the challenges to the veracity and reliability of the testimony of Subhash (PW-3) and Prabodhan (PW-6). Indisputably, Subhash (PW-3) and Prabodhan (PW-6) are the relatives of the deceased. The incident had occurred on a street. The twin factors which constitute the foundation of the challenge to their testimony are of interestedness and being chance witnesses.

49. The legal position as regards the evaluation of evidence of a close relative is absolutely clear. Often, a relative is a natural witness. Ordinarily, a close relative who is a natural witness cannot be termed as an interested witness, for the term, “interested” implies that the witnesses have some interest in having the accused somehow or the other convicted to settle some animus or for some other reason. It is well recognized that it cannot be laid down as an immutable rule of law that evidence of a relative can not form the basis of conviction unless corroborated to a material extent and in material particulars by independent evidence. What is imperative is that the evidence of the such witness should be subjected to careful scrutiny and accepted with caution. If on a careful scrutiny the testimony of a relative is found to be trustworthy and inherently probable, then that by itself would be sufficient to base a conviction.

50. The broad submission on behalf of the accused that the testimony of Subhash (PW-3) and Prabodhan (PW-6) does not merit acceptance as they are the chance witnesses cannot be acceded to unreservedly. As the incident occurred on a public street, consistent with the submissions on behalf of the learned Counsel for the accused, any person who happened to witness

the occurrence can be branded as a chance witness. Such approach has not been appreciated by the Supreme Court.

51. A profitable reference in this context can be made to a judgment of the Supreme Court in the case of *Rana Pratap vs. State of Haryana*¹⁰, wherein following pertinent observations were made:

“3. We do not understand the expression “chance witnesses”. Murders are not committed with previous notice to witnesses, soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that that they are mere “chance witnesses”. The expression “chance witnesses” is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual. To discard the evidence of street hawkers and street vendors on the ground that they are “chance witnesses” even where murder is committed in a street is to abandon good sense and take too shallow a view of the evidence.”

52. A useful reference can also be made to a judgment of the Supreme Court in the case of *Jarnail Singh and others vs. State of Punjab*¹¹, again a case of murder on a street based on the evidence of a passersby, wherein the Supreme Court had further elucidated the legal position in the following words:

“21. In *Sachchey Lal Tiwari v. State of U.P. (2004) 11 SCC 410*, this Court while considering the evidentiary value of

10(1983) 3 SCC 327.

11(2009) 9 SCC 719.

the chance witness in a case of murder which had taken place in a street and passerby had deposed that he had witnessed the incident, observed as under:

"If the offence is committed in a street only passer- by will be the witness. His evidence cannot be brushed aside lightly or viewed with suspicion on the ground that he was a mere chance witness. However, there must be an explanation for his presence there."

The Court further explained that the expression "chance witness" is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country like India where people are less formal and more casual, at any rate in the matter of explaining their presence.

22. The evidence of a chance witness requires a very cautious and close scrutiny and a chance witness must adequately explain his presence at the place of occurrence (*Satbir v. Surat Singh (1997) 4 SCC 192; Harjinder Singh v. State of Gujarat (2004) 11 SCC 253; Acharaparambath Pradeepan & Anr. v. State of Kerala (2006) 13 SCC 643; and Sarvesh Narain Shukla v. Daroga Singh and Ors. (2007) 13 SCC 360*). Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded (vide *Shankarlal v. State of Rajasthan (2004) 10 SCC 632*).

23. Conduct of the chance witness, subsequent to the incident may also be taken into consideration particularly as to whether he has informed anyone else in the village about the incident. (vide *Thangaiya v. State of Tamil Nadu (2005) 9 SCC 650*). ..."

53. On the aforesaid touchstone, we propose to re-advert to the evaluation of the testimony of Subhash (PW-3) and Prabodhan (PW-6). Undoubtedly, their testimony is required to be appreciated with utmost care and caution and in the backdrop of the previous statements and probabilities. The manner in which Subhash (PW-3) and Prabodhan (PW-6) fared

in the cross-examination would be of assistance in judging their veracity and reliability.

54. In the cross-examination of Subhash (PW-3) it was elicited that Shankar Gavali, his another companion, is the father-in-law of the deceased Dhanyakumar. He went on to concede that till the day of occurrence the evidence of the deceased was not recorded in the prosecution of the year 2010. He further conceded that he or the deceased had not lodged any report with the police in respect of the incident wherein the deceased was allegedly threatened by the accused not to give evidence against them in the said case. In this context, an omission was also elicited to the effect that he had not stated before the police that the said quarrel was resolved by the deceased Dhanyakumar. It was further brought out that the FIR does not find mention of the fact that the deceased was an eye witness to the said quarrel. An omission to the effect that the FIR does not find mention of the fact that prior to five to six days of the occurrence, a meeting had taken place and Pramod (A1) was present in the said meeting, was also elicited.

55. As regards the core of the occurrence, a contradiction was brought out to the effect that in the FIR he had stated that Sambhaji (A3) was armed with a sword and not sickle (*koyata*).

Subhash (PW-3) conceded that he did not state before the police that Hanumant (A8) was armed with *sattur*. Reflecting upon the contemporaneous conduct it was elicited in the cross-examination of Subhash (PW-3) that he did not shout when he noticed that the deceased was accosted by armed assailants. He raised hue and cry during the course of the assault on the deceased. When the assault was being unleashed he ran towards the scene of occurrence. He did not take his brother in his lap to find out if he was in a position to speak. Nor he made any attempt to take the deceased to the hospital.

56. Prabodhan (PW-6) conceded that at the time of occurrence he was employed with State Road Transport Corporation as a daily wager. Even a daily wager was required to visit depot everyday. Prabodhan (PW-6) did not cave in to suggestion that on the day of occurrence he was on duty. In the context of the visit to the house of Chiu Jagtap to attend the last rites, a contradiction was brought in the cross-examination of Prabodhan (PW-6) that he had attended the rites at the house of Chiu Jagtap. He went on to further admit that there is a direct road from his house to the house of Chiu Jagtap from the rear side of the village. On the core of the occurrence, omissions were elicited to the effect that his statement before police does

not find mention of the fact that the incident had taken place when they reached in front of the dilapidated house of Taty Patil, Hanmant Garad (A8) was armed with *sattur* and he had chased the accused to the distance of 150 feet.

57. On the aspect of contemporaneous conduct, it was elicited that Prabodhan (PW-6) did not talk with his companions after noticing the armed assailants. He claimed to have shouted. The strangers did not gather after hearing his shouts. He was raising cries when the assault was being perpetrated. When the deceased fell down with his face towards the earth, he did not turn him up. Till the arrival of the police the deceased was in the same condition. He did not make any telephone call to the police.

58. On the strength of the aforesaid manner in which Subhash (PW-3) and Prabodhan (PW-6) fared in the cross-examination, a strenuous effort was made to draw home the point that the very presence of Subhash (PW-3) and Prabodhan (PW-6) to witness the occurrence is highly improbable. As a second limb, it was urged that the material omissions and contradictions rendered their testimony unworthy of reliance. It was further urged that there is an inherent contradiction in the claim of Subhash (PW-3) and Prabodhan (PW-6) as regards the

purpose for which they were allegedly visiting the house of Chiu Jagtap. For Subhash (PW-3) the last rites were of the father of Chiu Jagtap. For Probodhan (PW-6), the last rites were of the mother of Chiu Jagtap. These factors cumulatively erode their credibility, urged the learned Counsels for the accused.

59. In contrast of this, the learned APP would urge that minor discrepancies are bound to occur in the testimony of the most truthful witness. The omissions and contradictions, which have been elicited in the case at hand, are not material and in any event do not dent the trustworthiness of the claim of Subhash (PW-3) and Prabodhan (PW-6).

60. To being with, in our view, the omissions as regards the then pending prosecution are of no significance. The learned Sessions Judge, after perusal of the certified copies of the documents in Regular Criminal Case No.96 of 2012 recorded that Pramod (A1), Ashok (A5), Sunil (A7) and Hanmant (A8) were the accused, alongwith others, in the said case. The said case was posted for recording evidence. Eventually, a compromise pursis was filed by the first informant therein on 21st December,, 2013. The fact that accused nos.1, 5, 7 and 8 were facing prosecution in RCC No.96 of 2012 cannot be gainsaid. The prosecution witnesses have categorically asserted that the

deceased was an eye witness in the said incident and the accused were insisting upon him not to depose against them. The fact that no report was lodged against the accused who allegedly gave the threats or it was not specifically stated in the FIR that the accused was an eye witness therein, thus, does not detract materially from the broad prosecution case.

61. The claim of Subhash (PW-3) and Prabodhan (PW-6) that at the time of occurrence they were proceeding towards the house of Chiu Jagtap alongwith Shankar Gavali, to attend the last rites, cannot be said to have been demolished during the course of the cross-examination. A minor discrepancy as regards the person for whom the rituals were then being held, when a witness is called upon to depose after a lapse of period, cannot be exalted to such level as to throw the entire testimony overboard. It is trite that in the matter of appreciating the effect of omissions and contradiction, the Court has to steer clear of two extremes. One, giving undue weight to discrepancies which are minor and occur on account of normal errors of perception etc. Two, brushing aside material omissions and contradictions as being of no significance.

62. In the case hand, the fact that the FIR came to be lodged within one and half hour of the occurrence, with the requisite

details as to how the witnesses happened to be at the place of occurrence, the apparent cause of the assault, the persons who participated in the assault and the broad role played by them, lends assurance to the credibility of the claim of Subhash (PW-3) and Prabodhan (PW-6). What has to be seen is, whether there is an explanation for the presence of the witnesses at the place of occurrence. In the case at hand, the reason ascribed by Subhash (PW-3) and Prabodhan (PW-6) for their presence at the scene of occurrence cannot be stated to be inconceivable and unreliable.

63. From the tenor of the cross-examination, especially as regards the conduct of Subhash (PW-3) and Prabodhan (PW-6), at the time of the occurrence, it does not appear that their conduct can be stated to be so unnatural as to render their very presence at the scene of occurrence doubtful. The thrust of the submission on behalf of the accused was that the prosecution witnesses did not make any effort to either call the police or take the deceased to hospital, which would have been the most natural conduct.

64. On an analysis of the evidence, we find that on both the aforesaid counts, the conduct of Subhash (PW-3) and Prabodhan (PW-6) cannot be said to be unnatural. There is

evidence of Dr. Gaikwad (PW-1), the autopsy surgeon, that because of the injury no.1 (extracted above) death must have been immediate and instant. We have noted that injury no.1 was so fatal that there was a complete transection of spinal cord at C3 – C4 level. Subhash (PW-3) and Prabodhan (PW-6) have consistently deposed that the deceased plunged to death on the spot. In the context of the injuries which were noticed on the person of the deceased, the fact that Subhash (PW-3) and Prabodhan (PW-6) did not make effort either take the deceased on their lap or to hospital, does not militate against their presence at the scene of occurrence. Indisputably, neither Subhash (PW-3) nor Prabodhan (PW-6) had made the telephone call to the police. However, Subhash (PW-3) categorically asserted that he rushed to Mohol Police Station and lodged the report. There is evidence which lends unwavering corroboration to this claim of Subhash (PW-3) of having lodged the report at Mohol Police Station.

65. In any event, there is no straight-jacket formula in which the witnesses are supposed to react when faced with such a gruesome attack. The temperament, the inner strength, the experience in life and the like factors influence the manner in which the witnesses react in a given situation. Evidence of a

witness cannot be discarded on the ground that the witness did not react in a particular way. In our view, in the case at hand, the learned Sessions Judge rightly placed reliance on the judgment of the Supreme Court in the case of *Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat*,¹² to repel the contention that the conduct of the witnesses is inconsistent with their claim of having witnessed the occurrence.

66. In this context, the reliance placed on behalf of the prosecution on the judgment of the Supreme Court in the case of *Leela Ram (Dead) through Duli Chand vs. State of Haryana and another*,¹³ wherein the following observations were made, appears to be well founded:

“11. The court shall have to bear in mind that different witnesses react differently under different situations : whereas some become speechless, some start wailing some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise.

12. It is indeed necessary to note that hardly one comes across a witness whose evidence does not contain some exaggeration or embellishments - sometimes there could even be a deliberate attempt to offer embellishment and sometimes in their over anxiety they may give slightly exaggerated account. The Court can sift the chaff from the corn and find out the truth from the testimony of the witnesses. Total repulsion of the evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness - If this element is satisfied, they ought to inspire confidence in

121983 (3) SCC 217.

131999 (9) SCC 525.

the mind of the Court to accept the stated evidence though not however in the absence of the same.”

67. Indisputably, there are contradictions as regards the weapon with which Sambhaji (A3) and Hanmant (A8) were armed. Sambhaji (A3) was initially stated to have been armed with a *sattur*. However, pursuant to the disclosure statement made by the Sambhaji (A3) a sickle (*koyata*) came to be recovered. There was an omission in the FIR as regards the weapon with which Hanmant (A8) was armed. These contradictions and omissions are required to be appreciated in the light of the attendant circumstances. The incident lasted for not more than two minutes. At least five armed assailants assaulted the deceased. The failure to describe the exact nature of the weapon with which the five assailants unleashed blows on the victim, by the witnesses, who are at a distance from the scene of occurrence, can be attributed to normal errors of observation and perception. Such discrepancies, where the evidence is found otherwise reliable, do not corrode the testimony of the witnesses. The reliance placed on behalf of the prosecution on a judgment of the Supreme Court in the case of *Satbir vs. Surat Singh and others*¹⁴ wherein the following observations were made, appears to be well founded:

141997 (4) SCC 192.

“12. ... The High Court ought to have appreciated that an incident where a number of persons assaulted three persons at one and the same time with different weapons, some contradictions as to who assaulted who and with what weapon, were not unlikely and such contradictions could not be made a ground to reject the evidence of eye-witnesses, if it was otherwise reliable. ...”

68. The learned Counsels for the accused then urged that the prosecution is guilty of withholding material witnesses. Since the incident had occurred on a public street and in broad day light and the cross-examination of the prosecution witnesses indicates that there were houses and shops in the vicinity, non-examination of independent witnesses is fatal to the prosecution. Even more inexplicable is the non-examination of Mr. Shankar Gavali, the father-in-law of the deceased, urged Mr. Halli, the learned Counsel for accused nos.1 to 3.

69. By a catena of decisions, it is well neigh settled that non-examination of a material witness cannot be resorted to as a ritualistic formula for discarding the evidence led by the prosecution, howsoever natural and trustworthy. The challenge to the prosecution on the ground of withholding a material witness is required to be examined through the prism whether the witness was intentionally withheld

despite there being no evidence on the point on which such witness would have shed the light. Conversely, if the Court finds the evidence adduced by the prosecution is worthy of reliance, non-examination of any other witness does not materially affect the prosecution.

70. In the case at hand, Shankar Gavali sailed in the same boat. It is the claim of Subhash (PW-3) and Prabodhan (PW-6) that Shankar Gavali accompanied them and witnessed the occurrence in question. If examined, the testimony of Shankar Gavali would also have been susceptible to the identical charge of being an interested and chance witness. His testimony would not have added any additional dimension to the prosecution case. Therefore, in the circumstances of the case, the non-examination of Shankar Gavali does not dent the prosecution.

71. It is true that the occurrence took place on a public street and in broad day light. It must have been witnessed by a number of persons. However, the prosecution case cannot be jettisoned away for non-examination of independent witnesses. The entire setting of the matter is

required to be appreciated. In a faction ridden village the situation becomes even more accentuated. People are reluctant to come forward and depose even when they witness a gruesome murder. This position was illuminatingly postulated by the Supreme Court in the case of *Appabhai and another vs. State of Gujarat*¹⁵

“11. In the light of these principles, we may now consider the first contention urged by the learned Counsel for the appellants. The contention relates to the failure of the prosecution to examine independent witnesses. The High Court has examined this contention but did not find any infirmity in the investigation. It is no doubt true that the prosecution has not been able to produce any independent witness to the incident that took place at the bus stand. There must have been several of such witnesses. But the prosecution case cannot be thrown out or doubted on that ground alone. Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability if any, suggested by the accused. The Court, however, must bear in mind that witnesses to a serious crime may not react in a normal manner. Nor do they react uniformly. The horror stricken witnesses at a dastardly crime or an act of egregious nature may react differently. Their, course of conduct may not be of ordinary type in the normal circumstances. The Court, therefore, cannot reject their evidence merely because they have behaved or reacted in an unusual manner.

[emphasis supplied]

72. In the case hand, the genesis of the occurrence was the alleged insistence of the deceased to depose against the members of the accused party in a pending prosecution. The deceased was done to death. The reluctance of the villagers and persons who happened to be present at the scene of occurrence to come forward and assist the prosecution is required to be appreciated in this context as well. Therefore, in the case at hand, we are not persuaded to discard the prosecution on the count of non-examination of independent witnesses.

73. A faint attempt was made by Mr. Halli, the learned Counsel for the accused nos.1 to 3 to demonstrate that eventually the accused in the said case, RCC No.96 of 2012, were acquitted. Thus, the pendency of the said prosecution could not have furnished a motive for the elimination of the deceased. It would be suffice to note that the acquittal of the accused in RCC No.96 of 2012 does not advance the cause of the accused as it, in a sense, fortifies the prosecution version that the accused in the said case were deploying means to get a favourable verdict. Even the

learned Sessions Judge recorded that eventually the compromise pursis was filed by the informant in the said case.

74. The reliance sought to be placed by Mr. Halli on a judgment of the Supreme Court in the case of ***Badam Singh vs. State of M.P.***¹⁶ to bolster up the submission that mere formal consistency in the evidence of the witnesses is not a guarantee of their truthfulness, also does not advance the cause of the accused as the aforesaid proposition does not govern the facts of the case at hand.

75. The learned Sessions Judge was of the view that the circumstantial evidence comprising the recovery of the sickle (*koyata*) at the instance of Sambhaji (A3) and sugarcane cutting instrument (*koyata*) at the instance of Hanmant (A8) and the fact that the human blood stains were found on those weapons as well as the clothes of Sambhaji (A3) and Hanmant (A8), as evidenced by CA Report (Exhibit-113), lent requisite support to the ocular account since there was no explanation as to how human blood stains were found on those articles.

162004 Cri.L.J. 22.

76. Mr. Nimbalkar, the learned Counsel for accused nos.4, 5 and 8 strenuously urged that the learned Sessions Judge committed a grave error in recording the finding that the circumstantial evidence lent the necessary corroboration. The discoveries cannot be said to have been fully established as the testimony of Nagesh Babar (PW-7), the public witness, was totally discredited. Nagesh Babar (PW-7) conceded in the cross-examination that he has acted as a panch in numerous cases and he did not recollect as to when the panchanama in respect of a particular accused was drawn. He has merely signed the panchnama. Since Nagesh Babar (PW-7) was employed by the investigating agency in all the panchnamas, no credibility could have been attached to the evidence of discovery. It was further urged that even the discoveries cannot be said to have been proved through the evidence of Mr. Dhumale (PW-8) and Mr. Shahane (PW-10), the investigating officers as the discoveries were made from the places which were open and accessible to all.

77. Mr. Babar (PW-7) conceded in no uncertain terms that he has acted as a panch witness in numerous cases. He

went on to further concede that Mr. Chormule another panch, invariably acted as the second panch. From the clear and explicit admission in the cross-examination it appears that Mr. Babar (PW-7) was the one on the beck and call of police. The challenge to the prosecution on this count, could not have been lightly brushed aside by the learned Sessions Judge. The reliance placed by Mr. Nimbalkar on the judgment of the Supreme Court in the case of *State of Haryana vs. Ramsing*,¹⁷ wherein the employment of very same persons for all disclosures, discoveries and even arrest was adversely commented upon, appears well founded.

78. The testimony of Mr. Dhumale (PW-8) the police officer who effected the discovery on 13th August, 2012 pursuant to the disclosure statement made by Sambhaji (A3), which led to the recovery of the clothes of Sambhaji (A3) and Hanmant (A8) from the thorny bushes in the forest near Diksal shivar, could not be impeached during the course of the cross-examination. Nor the testimony of Mr. Shahane (PW-10), the Investigating Officer who effected the recovery

172002(2) SCC 426.

of the weapons of the offence pursuant to the disclosure statements made by Sambhaji (A3) and Hanmant (A8) could be impeached. It was urged that the recovery of the clothes as well as the weapons was from the places open and accessible to all and, thus, no exclusive knowledge could be attributed to Sambhaji (A3) and Hanmant (A8). Such a broad proposition that discovery from a place open and accessible to all cannot be fastened against the accused is not sustainable.

79. A useful reference, in this context, can be made to the judgment of the Supreme Court in the case of *State of Himachal Pradesh vs. Jeet Singh*,¹⁸ wherein it was enunciated that, "there is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is "open or accessible to others". It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places

181999 (4) SCC 370.

which are open or accessible to others. For Example, if the article is buried on the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred, its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence, the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.”

80. Lastly it was urged that there is no evidence of proper sealing and safe keeping of the articles which were allegedly seized. In the absence of such evidence no value can be attached to the seizure of the articles. Reliance was placed on a judgment of the Division Bench of this Court in the case of *Baboo Ramchandra Shinde vs. State of Maharashtra*,¹⁹ wherein the following observations were made:

192005 ALL M.R. (Cri.) 1070.

“25. In the present case, the entire process of seizure of weapons, seizure of clothes on the person and finding of human blood, fails to support the prosecution case. These dislinks are also material, which cannot be overlooked. The improper sealing of the articles before sending them to the Chemical Analyzer for report is also a relevant factor against the prosecution as observed in *1996 Cri.L.J. 314 (Ashraf Hussain Shah vs. State of Maharashtra)*. Therefore also, no support can be taken from the Chemical Analyzer’s report as such lacunas raise doubt in the prosecution case.”

81. In the seizure panchnama (Exhibits-104 and 106) whereunder the weapons of offence were seized and in the seizure panchnama (Exhibits-110 and 111), whereunder the clothes of Sambhaji (A3) and Hanmant (A8) were seized, it is mentioned that the articles were seized by affixing labels bearing the signatures of the panchas and police. The fact that those articles were sealed is not specifically mentioned in any of the seizure panchnamas. Shrikant Joshi (PW-4), the carrier informed the Court that he had collected the muddemal articles in a sealed condition and delivered the same to the office of C.A., Pune again in sealed condition on 18th September, 2012. Indeed, the fact that the articles were immediately sealed after seizure is not borne out by the seizure panchnama. This constitutes a lapse in the investigation. However, in the totality of the circumstances,

in our view, the circumstantial evidence cannot be completely discarded.

82. This takes us to the defence of alibi taken by Ashok (A5). Ashok (A5) raised the defence of alibi at the earliest opportunity and the prosecution witnesses were confronted with said defence. It is interesting to note that the prosecution made an attempt to preempt the defence of alibi by examining Dilip Kadam (PW-9) a former student of New English School, Narkhed, where Ashok (A5) is employed as a teacher. Dilip Kadam (PW-9) endeavoured to impress upon the Court that in the year 2012 he was studying in 9th standard 'A' Division. He has known Ashok (A5) as he used to teach Marathi subject in the school. On the day of occurrence, on 19th July, 2012, Ashok (A5) came to the school at 11.00 am. Prayers were offered by 11.15 am. Ashok (A5) thereafter left the school as he received the phone call. He did not return to the school on that day nor took the Marathi class, which he was supposed to take.

83. In the cross-examination of Dilip Kadam (PW9) it was elicited that he cannot tell the names of all the teachers who imparted instruction on 19th August, 2012 and 19th

September, 2012. An omission was elicited in his cross-examination to the effect that his statement before police does not find mention of the fact that Ashok (A5) left the school as he had received telephone call. The omission was duly proved in the evidence of Mr. Shahane (PW-10), the investigating officer. Evidently, the endeavour of the prosecution to establish that Ashok (A5) had initially attended the school on the day of occurrence and thereafter left the school did not succeed. The omission to state that Ashok (A5) left the school as he had received a telephone call, in the circumstances of the case, cannot be said to be inconsequential or immaterial. It was the most notorious fact so far as the absence of Ashok (A5) from the school on the day of occurrence and, thus, Dilip Kadam (PW-9) could not have missed to state the same. Even otherwise, it does not appeal to human credulity that a student of a particular class would be in a position to remember as to which teacher had left the school at a particular point of time on a given day.

84. Recourse to the testimony of Suryabhan Borade (DW-1) and Babulal Malli (DW-2) becomes necessary to

appreciate the defence of alibi. In the evidence of Borade (DW-1), copy of the muster and extract of bulletin register (Exhibit-130) were placed on record. Babulal Malli (DW-2), the then Head-Master of the school, informed the Court that on 19th July, 2012 Ashok (A5) had signed the muster in his presence. He taught to the student of class 10-A division, from 11.10 am. to 11.45 am. and class 10-B division, from 11.45 am. to 12.15 pm. And, thereafter, for the third period Ashok (A5) was sent to class 6-A division since the regular teacher was not available. He affirmed that Ashok (A5) was present in the school in between 11.00 am. to 2.00 pm. Mr. Malli (DW-2) further affirmed that Ashok (A5) had signed the bulletin register in token of having taken the bulletin period for 6th standard 'A' division. Nothing material could elicited in the cross-examination of Mr. Malli (DW-2), on behalf of the prosecution, to discard the aforesaid version.

85. The learned Sessions Judge was not persuaded to delve into the aforesaid evidence as the learned Sessions Judge was of the view that since the scene of occurrence was at a walking distance of five minutes from the school

where Ashok (A5) was working, it was not physically impossible for Ashok (A5) to be at the scene of occurrence and since Subhash (PW-3) and Prabodhan (PW-6) categorically deposed that Ashok (A5) was a member of the unlawful assembly, there was no reason to disbelieve their version.

86. Whether the aforesaid approach of the learned Sessions Judge is justifiable. In our view, the plea of alibi, in the facts of the case, required adequate consideration by the learned Sessions Judge. It is trite that the defence witnesses are entitled to equal treatment with those of the prosecution. The defence evidence cannot be discarded by an instinctive disbelief in the credibility of defence version.

87. The pronouncement of the Supreme Court in the case of Dudh Nath Pandey Vs. State of Uttar Pradesh, (1981) 2 SCC 166 expounds the nature of the plea of alibi and also the approach of the Court while appreciating the defence of alibi. It reads as under :-

“19. xxxxxxxxxxxx Defence witnesses are entitled to equal treatment with those of the prosecution. And, Courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses. xxxxxxxxxxxx The plea of alibi postulates the physical impossibility of the presence of the accused at the

scene of offence by reason of his presence at another place. The plea can therefore succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed. xxxxx”

88. In the case of **Binay Kumar Singh Vs.State of Bihar (1997) 1 SCC 283**, the nature of the defence of alibi and standard of proof required to discharge the said defence was enunciated in the following words :-

“The Latin word alibi means “elsewhere” and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi.”

[emphasis supplied]

89. The approach of the Court in appreciating the plea of alibi was again delineated by the Supreme Court in the case of **Jumni Vs. State of Haryana,(2014) 11 SCC 355** in the following words :-

“20. It is no doubt true that when an alibi is set up, the burden is on the accused to lend credence to the defence put up by him or her. However the approach of the court should not be such as to pick holes in the case of the accused person. The defence evidence has to be tested like any other testimony, always keeping in mind that a person is presumed innocent until he or she is found guilty.”

[emphasis supplied]

90. In the backdrop of the aforesaid exposition of the legal positions, undoubtedly a higher degree of proof is warranted when the accused takes up the defence of alibi. However, the distance between the place of occurrence and the place where the accused claimed to be present, at the time of occurrence, cannot be the sole determinative factor in all the cases. In a given case, despite the fact that the distance between the scene of occurrence and the place of presence, was not such that it would render the presence of the accused at the scene of occurrence absolutely impossible, if there is cogent evidence which indicates that the presence of the accused at the place other than the scene of occurrence is satisfactorily made out, then the

defence evidence cannot be simply brushed aside. In the least, such evidence led by the accused would persuade the Court to entertain a reasonable doubt regarding presence of the accused at the scene of occurrence and, in that event, the accused would be entitled to benefit of such reasonable doubt.

91. A useful reference can also be made to the pronouncement of the Supreme Court in the case of Jayantibhai Bhenkarbhai Vs. State of Gujarat, (2002) 8 SCC 165, wherein the Supreme Court enunciated the manner in which the prosecution evidence in support of the charge that the accused was present at the scene of occurrence and the defence evidence in support of plea of alibi is to be appreciated. The observations in paragraph No.19 are instructive and, thus, extracted below :-

“19. The plea of alibi flows from Section 11 and is demonstrated by illustration (a). Sarkar on Evidence (Fifteenth Edition, p. 258) states the word 'alibi' is of Latin origin and means "elsewhere". It is a convenient term used for the defence taken by an accused that when the occurrence took place he was so far away from the place of occurrence that it is highly improbable that he would have participated in the crime. Alibi is not an exception (a special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognized in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. The burden of proving commission of offence by the accused so as to fasten the liability of guilty on him remains on the prosecution and would not be lessened by the mere fact that the accused had

adopted the defence of alibi. The plead of alibi taken by the accused needs to be considered only when the burden which lies on the prosecution has been discharged satisfactorily. If the prosecution has failed in discharging its burden of proving the commission of crime by the accused beyond any reasonable doubt, it may not be necessary to go into the question whether the accused has succeeded in proving the defence of alibi. But once the prosecution succeeds in discharging its burden then it is incumbent on the accused taking the plea of alibi to prove it with certainty so as to exclude the possibility of his presence at the place and time of occurrence. An obligations is cast on the Court to weigh in scales the evidence adduced by the prosecution in proving of the guilt of the accused and the evidence adduced by the accused in proving his defence of alibi. If the evidence adduced by the accused is of such a quality and of such a standard that the Court may entertain some reasonable doubt regarding his presence at the place and time of occurrence, the Court would evaluate the prosecution evidence to the see if the evidence adduced on behalf of the prosecution leaves any slot available to fit therein the defence of alibi. The burden of the accused is undoubtedly heavy. This flows from Section 103 of the Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. However, while weighing the prosecution case and the defence case, pitted against each other, if the balance tilts in favour of the accused, the prosecution would fail and the accused would be entitled to benefit of that reasonable doubt which would emerge in the mind of the Court."

[emphasis supplied]

92. In the case at hand, it is imperative to note that Subhash (PW-3) and Prabodhan (PW-6) have asserted that the accused No.5 Ashok was a member of the unlawful assembly, which caused death of the deceased. The prosecution witnesses, however, have not attributed any specific role to Ashok (A-5). It is not the case that Ashok (A-5) was armed with any weapon. From the tenor of evidence of Subhash (PW-3) and Prabodhan (PW-6), it

becomes abundantly clear that the role of assault is attributed to armed assailants only. Six injuries were noticed on the person of the deceased. Nor any exhortation is attributed to Ashok (A-5). The evidence against Ashok (A-5) is thus of being a member of unlawful assembly, at best.

93. In the backdrop of this nature of the prosecution evidence, in our view, the learned Sessions Judge ought to have considered the veracity of the defence evidence. As indicated above, Mr. Babulal Malli (DW-2) categorically asserted that Ashok (A-5) was present in the school and was imparting instructions in various classes in between 11.00 a.m. to 02.00 p.m. Bulletin register was placed on record to substantiate the claim that Ashok (A-5) had imparted instructions in the third period, from 12.15 p.m., to the students of class 6-A division. The presence of Ashok (A-5) in the New English School, in the capacity of a regular teacher therein, was in the regular course of his employment. The prosecution made a halfhearted attempt to demonstrate that though Ashok (A-5) attended the school on that day, yet, he left the school after 11.15 a.m.

In this setting of the matter, in the absence of any material to connect Ashok (A-5) with the crime, in our view, a reasonable doubt is created regarding the presence of Ashok (A-5) at the scene of occurrence. Thus, Ashok (A-5) is entitled to benefit of doubt.

94. Mr. Joshi, learned Counsel for the accused Nos.6 and 7 would urge that there is no overt act attributed to accused Nos.6 and 7. In the light of the evidence led by the prosecution, the submission on behalf of accused Nos. 6 and 7 cannot be said to be factually unsustainable. Subhash (PW-3) and Prabodhan (PW-6) do not claim that accused Nos.6 and 7 were armed with a particular weapon. Nor any exhortation is attributed to accused Nos.6 and 7. However, the question is of the application of principle of constructive criminality.

95. It is trite that it cannot be laid down as a general proposition of law that unless an overt act is proved against a person who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an unlawful assembly. Undoubtedly, mere presence in an unlawful assembly cannot render a person liable unless

there was a common object and he was actuated by that common object, which is one of the objects set out in section 141 of the Code.

96. A useful reference can be made to the judgment of the Supreme Court in the case of **Vinubhai Ranchhodbhai Patel Vs. Rajivbhai Dudababhai Patel (2018) 7 SCC 743**, wherein the following observations have been made :-

“32. For recording a conclusion, that a person is (I) guilty of any one of the offences under Sections 143, 146 or 148 or (ii) vicariously liable under Section 149 for some other offence, it must first be proved that such person is a member of an “unlawful assembly” consisting of not less than five persons irrespective of the fact whether the identity of each one of the 5 persons is proved or not. If that fact is proved, the next step of inquiry is whether the common object of the unlawful assembly is one of the 5 enumerated objects specified under Section 141 IPC”.

97. In the case of **Joseph Vs. State (2018) 12 SCC 283**, the Supreme Court while adverting to the previous pronouncements, expounded the essential requirement for invoking vicarious liability under section 149 and the scope of two parts of the said section as under :-

11. Before we consider the testimony of the witnesses, let us consider the requirements for invoking the vicarious liability under Section 149 IPC. Section 149 IPC consists of two parts:

11.1 The first part of the section means that there exists common object and that the offence has been committed in prosecution of the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common

object of the unlawful assembly of which the accused was member.

11.2 The second part of the section means that even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149, if it can be shown that the offence was such as the members knew was likely to be committed.

11.3 What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was the one which the members knew to be likely to be committed. Once the court finds that the ingredients of Section 149 IPC are fulfilled, every person who at the time of committing that offence was a member of the assembly has to be held guilty of that offence. After such a finding, it would not be open to the court to see as to who actually did the offensive act nor would it be open to the court to require the prosecution to prove which of the members did which of the above two ingredients. Before recording the conviction under Section 149 IPC, the essential ingredients of Section 141 IPC must be established.

98. Reverting to the facts of the case, in the light of aforesaid legal position, like Ashok (A-5), the sole piece of evidence against accused Nos. 6 and 7 is that they accompanied the armed assailants i.e. accused Nos. 1 to 4 and 8. Subhash (PW-3) and Prabodhan (PW-6) have not professed to affirm that accused Nos. 6 and 7 participated in the assault. They were firm that armed assailants unleashed deadly blows by their respective weapons. Both the eye-witnesses were in unison on the point that the incident did not last more than two minutes. Neither any exhortation nor instigation is attributed to accused Nos. 6 and 7, during the course of the said occurrence. These factors cumulatively dissuade us from roping in the

accused Nos.6 and 7 by invoking the principle of constructive criminality.

99. Reliance placed by Mr. Joshi on a judgment of the Supreme Court in the case of Akbar Shaikh and Ors. Vs. State of West Bengal, 2009(7) SCC 415, wherein the following observations were made, appears well founded.

“43. We are not unmindful that Akbar and Kanku have been named by both the witnesses but even against them no overt act has been attributed. We, therefore, are of the opinion that doubts legitimately arise as regards their presence and/ or sharing of common object. While saying so, we are not oblivious of the fact that the incident had taken place at the dead of night. Enmity between two groups in the village is admitted. But, we cannot also lose sight of the fact that a person should not suffer rigorous imprisonment for life although he might have just been a bystander without anything more.”

100. This leads us to challenge to the impugned judgment on the count of defective examination of the accused under section 313 of Cr.P.C. Indeed, the learned Sessions Judge recorded a single statement of all the accused. Common questions were put to all the accused. The question which wrenches to fore is whether any prejudice was caused to the accused. Mr. Joshi, learned Counsel for the accused Nos.6 and 7 urged that a serious prejudice was caused to the accused as the accused were deprived of opportunity to

explain the incriminating circumstances. The common questions were put to the accused which did not contain any incriminating material qua a particular accused. In such scenario, there is no other go but to acquit all the accused, urged Mr. Joshi.

101. A strong reliance was placed on a judgment of the Division Bench of this Court in the case of **Swapnali @ Sapna Sharad Mahadik Vs. State of Maharashtra, 2016 ALL MR (Cri) 1824**, wherein after adverting to various pronouncements on purpose of examination under section 313 of Cr.P.C., the necessity of recording the same in a fair and faithful manner and the consequences of error or omission therein, it was observed that :-

“19. The gist of the above authorities is that every error or omission in compliance with the provisions of Section 313 does not necessarily vitiate the trial. Such errors fall within the category of curable irregularities and question, whether trial is vitiated in each case, depends upon the degree of error and whether prejudice has been or is likely to have been caused to the accused. The ultimate test in determining whether or not the accused has been fairly examined under this Section is to see whether, having regard to the questions put to him, he did not get an opportunity to say what he wanted to say in respect of the prosecution case against him. Where the non compliance with Section 313 holds the trial to be vitiated, ordinarily the proper course is to order a retrial from the stage at which the provisions of this section were not complied with.

20. We have meticulously examined the statement at Exhibits 127 to 133. We could notice that 66 identical questions were put to each of the accused by the learned Additional Sessions

Judge though entirely different incriminating circumstances against each of them were brought on record.

It is pertinent to note that role played by accused Nos. 5,6 and 7 even according to prosecution was limited, as accused Nos. 5 and 6 were guarding at the gate of the building and accused No.7 passed on the information to accused No.5, who, executed the plan. Accused No.7 was not even present on the spot. Therefore, there was no meaning in putting all 66 questions to each of the accused. As questions were not put specifically, distinctly and separately, in our view, it amounts to serious irregularity vitiating the whole trial, as it is shown that serious prejudice has been caused to the accused.”

102. The importance of faithfully recording statement under section 313 of Cr.P.C. can hardly be over emphasised. There can be no two views on the point that the attention of the accused must be specifically brought to the incriminating piece of evidence, qua the particular accused, so as to give an opportunity to offer explanation, if he desires to. Each incriminating circumstance must, therefore, be put to the particular accused specifically and distinctly. The manner in which the learned Sessions Judge, in the instant case, recorded the common statement of all the accused under section 313 of the Cr.P.C., leaves much to be desired. However, every error or omission in compliance with the provisions of section 313 of the Cr.P.C. does not necessarily vitiate the trial. Nor the omission to put a material circumstance to the accused ipso facto leads

to the acquittal of the accused. It has to be shown that the failure to put an incriminating circumstance, or for that matter the manner of examination of the accused, under section 313 of the Cr.P.C., resulted in prejudice and led to miscarriage of justice.

103. The Supreme Court in the case of **Nar Singh Vs. State of Haryana, (2015) 1 SCC 496** took a survey of the authorities and enunciated the legal position in the following words :-

“20. The question whether a trial is vitiated or not depends upon the degree of the error and the accused must show that non-compliance of Section 313 Cr.P.C. has materially prejudiced him or is likely to cause prejudice to him. Merely because of defective questioning under Section 313 Cr.P.C., it cannot be inferred that any prejudice had been caused to the accused, even assuming that some incriminating circumstances in the prosecution case had been left out. When prejudice to the accused is alleged, it has to be shown that accused has suffered some disability or detriment in relation to the safeguard given to him under Section 313 Cr.P.C. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused. The burden is upon the accused to prove that prejudice has been caused to him or in the facts and circumstances of the case, such prejudice may be implicit and the Court may draw an inference of such prejudice. Facts of each case have to be examined to determine whether actually any prejudice has been caused to the appellant due to omission of some incriminating circumstances being put to the accused.”

[emphasis supplied]

104. In the light of aforesaid legal position, we have carefully perused the statement of the accused recorded

under section 313 of the Cr.P.C. Mr. Joshi urged that prejudice was caused to the accused as common questions were put at Sr. Nos.21,23 and 25 in respect of the previous incident of the year 2010. As regards the core of the occurrence, according to Mr. Joshi, again prejudice was caused as common questions were put at Sr.Nos.28, 29,30,31 and 32.

105. On analysis, we find that the said criticism is not justified. The incident of the year 2010 and the prosecution arising therefrom were pressed into service by the prosecution as the cause for the incident in question. No prejudice seems to have been caused to the accused by putting common question in respect of the said quarrel and the alleged threats by the accused to the deceased not to depose in the prosecution arising out of the said incident. In-fact, we have noticed that, the learned Sessions Judge put incriminating circumstance qua particular accused, in question No.31, regarding the weapons with which the respective accused was allegedly armed. The statement further reveals that the learned Sessions Judge had put few common questions to only those of the accused against

whom the incriminating material was attributed therein. In the totality of the circumstances, though we do not approve of the manner in which the statement of the accused under section 313 of the Cr.P.C. was recorded by the learned Sessions Judge, yet, we are of the firm opinion that no serious prejudice was caused to the accused by recording their statement under section 313 of the Cr.P.C. in such fashion. Thus, the challenge to the prosecution on the count of the defective recording of the statement of the accused under section 313 of the Cr.P.C., does not merit countenance.

106. The conspectus of aforesaid consideration and foregoing reasons is that the impugned judgment of conviction and sentence qua accused Nos.1 to 4 and 8 does not warrant any interference. We are of the view that the prosecution did not succeed in establishing the guilt of accused Nos.5,6 and 7 beyond reasonable doubt. The accused Nos.5,6 and 7, therefore, deserve to be acquitted. Resultantly, Criminal Appeal No.192 of 2015, Criminal Appeal No.230 of 2015 and Criminal Appeal No.229 of 2015 are required to be dismissed. Criminal Appeal No.232 of

2015 is liable to be dismissed qua appellant No.1/accused No.4 – Baliram. Criminal Appeal No.232 of 2015 deserves to be partly allowed qua appellant Nos.2 and 3/accused No.6 – Ramesh and accused No.7 – Sunil. Likewise, Criminal Appeal No.231 of 2015 preferred by accused No.5-Ashok deserves to be allowed. Hence, the following order :-

O R D E R

Criminal Appeal No.192 of 2015 (preferred by accused No.1-Pramod and accused No.3-Sambhaji), Criminal Appeal No.230 of 2015 (preferred by accused No.2-Bhausahab), Criminal Appeal No.229 of 2015 (preferred by accused No.8-Hanumant) stand dismissed.

Criminal Appeal No.232 of 2015 stands dismissed qua appellant No.1/accused No.4-Baliram.

The judgment of conviction and order of sentence against appellants/accused Nos.1 to 4 and 8 stands confirmed.

Those of the appellants/accused Nos.1 to 4 and 8, who are on bail, shall surrender before the learned Sessions Judge, within a period of eight weeks from today.

Criminal Appeal No.231 of 2015 stands allowed.

Criminal Appeal No.232 of 2015 stands partly allowed qua appellant No.2/accused No.6-Ramesh and appellant No.3/accused No.7-Sunil.

The impugned judgment of conviction for the offences punishable under sections 143, 147, 148 and 302 read with section 149 of the Indian Penal Code and order of sentence qua accused Nos.5,6 and 7 stands quashed and set aside.

Accused No.5-Ashok, accused No.6-Ramesh and accused No.7-Sunil stand acquitted of the offences punishable under sections 143, 147, 148 and 302 read with section 149 of the Indian Penal Code.

Their bail bonds stand cancelled and sureties stand discharged.

Fine, if paid, be refunded to the accused Nos.5,6 and 7.

All pending applications in all the criminal appeals do not survive and accordingly stand disposed of.

[N. J. JAMADAR, J.]

[SMT. SADHANA S. JADHAV J.]