

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

RAJESH
VASANT
CHITTEWAN

Digitally signed by
RAJESH VASANT
CHITTEWAN
Date: 2021.09.24
15:31:08 +0530

APPEAL NO.725 OF 2017

WITH

INTERIM APPLICATION NO.1933 OF 2021

WITH

INTERIM APPLICATION NO.371 OF 2019

Francis @ Kau Patrick Manvell ... Appellant/Applicant

Versus

The State of Maharashtra ... Respondent

AND

APPEAL NO.324 OF 2017

Ayub Hasan Shaikh ... Appellant

Versus

The State of Maharashtra ... Respondent

.....

Mr. Aniket Vagal for the Appellant/Applicant in Appeal No.725 of 2017

Mr. Raju D. Suryawanshi for the Appellant in Appeal No.324 of 2017.

Mrs. M.M. Deshmukh, APP for the State.

.....

**CORAM : NITIN JAMDAR AND
G.A. SANAP, JJ.**

DATE : 24 SEPTEMBER 2021

Judgment : (Per G.A. Sanap, J.)

. These two appeals arise out of a judgment dated 21 July 2016 passed by Additional Sessions Judge, Nasik in Sessions Case No.90 of 2013. The Appellant in Appeal No.324 of 2017 was arrayed as Accused No.6 and the Appellant in Appeal No.725 of 2017 was arrayed as Accused No.2. Learned Sessions Judge convicted the Appellants for offences punishable under Sections 143, 147, 148 read with Section 149 of Indian Penal Code ("IPC") and under Sections 302, 307 read with Section 149 of IPC and sentenced them to suffer rigorous imprisonment for life under Section 302. They were sentenced to suffer rigorous imprisonment for five years for the offence under Section 307. Learned Sessions Judge awarded the sentence of one year to three months for the remaining offences. They were also sentenced to pay a fine of Rs.1000/- and Rs.500/- for the offences. In these appeals, this order of conviction and sentence is challenged by the Appellants.

The facts leading to filing of appeals are as follows :-

2 In the crime, there were in all six accused. Accused Nos.3 and 4 being juveniles were separately charge-sheeted and their case was sent to Justice, Juvenile Board/Court. The remaining four accused, which included the Appellants, faced trial before learned Additional Sessions Judge. Accused No.1 David died during the pendency of the trial and,

therefore, case against him stood abated. Accused No.5 Shashikant Barve was acquitted.

3 The incident in question occurred on 25 August 2012, about 4 p.m. The FIR was registered on the basis of the statement of P.W. 1 at Igatpuri Police Station. It is the case of the prosecution that P.W.1, deceased Shailesh and P.W.4-Shahid are friends. 25 August 2012 was the birthday of deceased Shailesh. He wanted to celebrate the birthday with P.W.1 and P.W.4. Therefore, at about 03.30 p.m., they purchased *Vadapav* and other eatables and went to Municipal Garden, Igatpuri. They sat in the garden. When they were about to eat food at about 04.00 p.m., Accused Nos.1 to 6 came there with sword, chopper, fighter, sickle and rod. The accused David questioned deceased Shailesh, as to why he has been frequently quarreling with them. The accused David questioned Shailesh, as to why he has filed a complaint against them at Igatpuri Police Station. The accused David thereafter told deceased Shailesh that they will kill him. It is the case of the prosecution that the accused David and Shashikant Barve inflicted blows with sword on the head of Shailesh. The accused Kau alias Francis (Appellant in Appeal No.725 of 2017) assaulted deceased Shailesh with chopper and accused Munna with fighter on his head. P.W. 1 and P.W.4 made attempt to rescue Shailesh from these accused. The accused David, thereafter, inflicted a sword blow on the left knee of the informant-P.W.1. The accused Munna @ Ayub Hasan Shaikh (Appellant in Appeal No.324 of

2017) inflicted blows with sickle on his chest and stomach. The accused Kau alias Francis inflicted a blow on his right hand with sickle. The accused Shashikant, David and Kau inflicted blows with sword and chopper on person of Mahesh Bandi-P.W.1. The informant P.W.1, P.W.4 Shahid and deceased Shailesh sustained injuries. They made hue and cry. The people of the locality gathered on the spot. The accused fled from the spot. Thereafter, people took them to Igatpuri Rural Hospital. Considering their serious condition, they were shifted to Wockhardt Hospital, Nasik. Shailesh succumbed to the injuries on the way to the hospital at Nasik.

4 They were taken to Wockhardt Hospital at Nasik. The medical officer treated P.W.1-informant and P.W.4. The medical officer declared Shailesh dead. The information of the crime was conveyed to Bhadrakali Police Station, Nasik. P.W. 12-API attached to Igatpuri Police Station visited Wockhardt Hospital at Nasik. He recorded the statement of P.W. 1. On the basis of the facts stated by P.W.1, he registered the crime bearing No.70 of 2012 against the six accused persons. P.W. 13 Raosaheb Bhiku Bhapkar conducted the investigation. During the course of the investigation, he recorded the statements of the witnesses. He seized the clothes from the person of the accused as well as person of the injured and deceased. The recovery of sword was made at the instance of David. The recovery of sickle was made at the instance of Francis. The postmortem report of the deceased Shailesh

was forwarded to the Investigation Officer by medical officer, Civil Hospital Nasik. The articles seized in the crime were sent to C.A. The investigation revealed complicity of the accused in commission of the crime. The investigation officer filed chargesheet against the accused. Learned Magistrate, First Class, committed the case to the Sessions Court, since offences disclosed from papers were triable by the Sessions Court. The learned Additional Sessions Judge, vide Exhibit-4, framed charge against the accused. They pleaded not guilty to the charge. Their defence was of total denial and false implication in the crime.

5 The prosecution examined thirteen witnesses. The number of documents have been placed on record by the prosecution. On appreciation and consideration of evidence, the learned Additional Sessions Judge found these Appellants guilty of the offences and sentenced them as above.

6 Being aggrieved and dissatisfied with the judgment and order passed by learned Additional Sessions Judge, Nasik, the Appellants have come before this court by filing the separate appeals. According to the Appellants, there is no evidence on record to establish their complicity in commission of the crime. It is further their case that the learned Additional Sessions Judge has not considered evidence adduced by prosecution in proper perspective and as such, has come to a wrong conclusion.

7 We have heard learned Advocates for the Appellants. We have also heard learned APP for the State. We have perused record and proceedings.

8 Mr. Aniket Vagal for Accused No.2 (Appellant in Appeal No.725 of 2017), submitted that the learned Sessions Judge has failed to properly consider the evidence of P.W.1 and P.W.4, who according to the prosecution are eye witnesses, having sustained the injuries in the assault at the hands of the accused. Learned Advocate submitted that the evidence of P.W. 1 and P.W. 4 is not sufficient to prove the complicity of this Appellant in a commission of a crime. Learned Advocate submitted that the evidence of P.W. 1 and P.W. 4 cannot be believed in as much as there are material omissions, contradictions and inconsistencies in their evidence *vis-a vis* the actual incident. Learned Advocate pointed out that the omissions, contradictions and inconsistencies in the evidence of P.W.1 and P.W.4 create doubt about the false implication of the Appellant in this crime. According to learned Advocate, the evidence is not sufficient to prove their presence on the spot at the given time. Learned Advocate submitted that on the point of use of the weapons for inflicting the blows on person of the deceased, P.W.1 and P.W.4, P.W.1 and P.W.4 have made a conscious attempt to improve their version to suit the case of the prosecution. Learned Advocate submitted that the injury certificate of P.W. 1 produced on record does not support the oral evidence of the witnesses. The evidence of P.W.1 and P.W.4 is

inconsistent on the point of the use of the particular weapons by the accused persons. Learned Advocate further submitted that on the point of initiation of quarrel, there is a major variance in the evidence of P.W.1 and P.W.4 and as such, the same creates doubt about the presence of P.W.1 and P.W.4 on the spot. In the submissions of learned Advocate for the Appellant, the learned Additional Sessions Judge has not recorded the reasons in the impugned order for accepting evidence of P.W. 1 and P.W.4, despite the material omissions, contradictions and inconsistencies in their evidence. Learned Advocate submitted that the evidence is not sufficient to prove the guilt against the accused.

9 Mr. R.D. Suryawanshi, learned Advocate for Accused No.6 (Appellant in Appeal No.324 of 2017) adopted the submissions advanced by the learned Advocate for Accused No.2. Besides, learned Advocate submitted that there is no iota of evidence to establish the presence and role played by the Appellant in the commission of the crime. Learned Advocate submitted that not only P.W. 1 and P.W.4, but the Investigating Officer also has not attributed any role to Shashikant Barve, who was Accused No.5 in the sessions case. Learned Advocate submitted that since the investigating officer on the basis of the evidence collected during the course of investigation had filed a chargesheet against Accused No.5, it was the duty of the investigating officer to place a plausible explanation on record for giving a clean chit to Accused No.5-Shashikant Barve at the stage of the trial. On the basis

of this vital aspects, the learned Advocate submitted that it creates a doubt about the case of the prosecution and it makes the case of false implication of the accused probable. Learned Advocate submitted that the evidence is not cogent and concrete to prove the guilt beyond reasonable doubt. In the submission of learned Advocate for the Appellant, the learned Sessions Judge has placed reliance on this evidence, which is unworthy of credence to base the conviction against the Appellant. Learned Advocate submitted that the investigating officer only with a view to bring the case of the prosecution within the parameters of Section 149 of the Indian Penal Code, inserted the names of the six persons in the crime. Learned Advocate submitted that the injuries on the person of P.W.4 have not been proved. Learned Advocate submitted that P.W. 1 was not conscious to make a statement. Learned Advocate submitted that the perusal of evidence of P.W.1, P.W.4 and P.W.8, who happens to be the grandfather of the deceased, makes it clear that P.W.8, who is a retired Police Officer, gave his statement before the police and the police used the said statement being statement of P.W.1 for registration of a crime against the accused. Learned Advocate submitted that a sufficient doubt has been created about the credibility of P.W.1, P.W.4 and the case of the prosecution, and, therefore, benefit of doubt must go to them.

10 Mrs. M.M. Deshmukh, the learned APP for the State, submitted that P.W.1 and P.W. 4 are eye witnesses to the actual incident. Learned

APP submitted that the evidence of P.W. 1 and P.W.4 has been corroborated by their medical certificates. Learned APP submitted that the omissions and contradictions sought to be relied upon by the Appellants are minor. In the submission of the learned APP, minor omissions and contradictions are possible in the evidence. Learned APP submitted that on material part of the case of prosecution, the evidence of P.W.1 and P.W.4 is consistent. Learned APP pointed out that there is ample contemporaneous documentary evidence to corroborate the version of P.W.1 and P.W.4. Learned APP pointed out that in their evidence, P.W.1 and P.W.4 narrated vivid account of the actual incident. There is no material on record to discard their contention that they were eye witnesses to the incident. In the submission of learned APP, the evidence of P.W. 1 and and P.W4 is worthy of credence and therefore, the same was found sufficient by the learned Additional Sessions Judge to held the Appellants guilty. Learned APP further submitted that the weapons used in the crime, namely, sickle was discovered at the instance of the Appellant Kau @ Francis. Similarly, the sword was discovered at the instance of the accused David. Learned APP submitted that the evidence of the investigating officer cannot be discarded on the point of recovery, merely because panch witnesses have turned hostile. Learned APP further submitted that there is ample evidence to prove the motive for commission of the crime by the accused. The previous enmity between the deceased Shailesh and all the accused has been established on the basis evidence of P.W.1, P.W.4 and P.W.8. Learned APP submitted

that the learned Additional Sessions Judge has recorded the reasons in support of the findings. In the submission of the learned APP, the well reasoned judgment passed by the learned Additional Sessions Judge, does not warrant interference.

11 In order to appreciate rival submissions, it would be necessary to appreciate and consider the evidence afresh. Learned Additional Sessions Judge convicted and sentenced the Appellants mainly relying upon the evidence of P.W. 1 and P.W.4. In view of the pointed submissions advanced by learned Advocates for the Appellants and learned APP for the State, a minute scrutiny of evidence of P.W. 1 and P.W.4 would be warranted. As per the case of the prosecution, Shailesh died due to injuries sustained at the hands of the accused. Out of the four accused, two accused being juveniles were sent to the Juvenile Justice Board. Accused No.1 died during the pendency of the trial. Accused Nos.2, 5 and 6 faced trial before the Additional Sessions Judge. The learned Additional Sessions Judge for want of any evidence against Accused No.5 acquitted him. The prosecution in order to seek corroboration to the evidence of P.W. 1 and P.W.4 relied upon the medical evidence and the evidence of discovery of weapons at the instance of Accused No.1-David and Accused No.2-Kau. Unfortunately, for prosecution panch witnesses to the recovery of weapons, did not support case of the prosecution. The Investigating Officer has deposed about recovery of weapons at the instance of the

deceased David and Appellant Kau. In our opinion, in such a serious crime, in the absence of independent witness, reliance cannot be placed on the evidence of investigating officer-P.W.13 on this point. There is one more reason to discard this evidence. P.W.1 and P.W.4 have made contrary statements with regard to the sword recovered in the crime. P.W. 1 categorically stated that the sword shown to him was not the one used by the assailants. P.W. 4 deposed that it was same sword used by the Appellants in the crime. It is, therefore, apparent that evidence of the recovery of the weapons used in the crime, for the aforesaid two reasons, cannot be given much weightage. Learned Additional Sessions Judge has also discarded the same.

12 It would be necessary to appreciate the evidence of P.W. 1 and P.W.4, who are the main witnesses found worth credence by the learned Additional Sessions Judge to convict the Appellants. It has come on record in evidence of P.W.1 and P.W.4 that the accused assaulted them with sword, sickle, fighter, chopper and wooden rod. They have deposed that initially they were taken to Primary Health Centre at Igatpuri. From Igatpuri, they were taken to Wockhardt Hospital at Nasik for further treatment. Shailesh died on the way to the Wockhardt Hospital at Nasik. The death of Shailesh was certified by medical officer at Wockhardt Hospital Nasik. According to P.W.1 and P.W.4, they were treated by medical officer attached to Wockhardt Hospital Nasik. The evidence of P.W. 1 would be relevant *vis-a-vis* the report at Exhibit-23.

He has deposed that in hospital, his statement was recorded by a police officer. On perusal of Exhibit-23, it is seen that on the basis of this statement of P.W.1, the crime bearing No.70 of 2012 was registered. In order to find out the credibility of evidence of P.W.1 and report Exhibit-23, his oral evidence needs proper scrutiny. On minute scrutiny, it is necessary to find out whether the evidence of P.W. 1 is consistent with the facts stated by him in Exhibit-23 and inspires confidence. It would also be necessary to see whether omissions, contractions and inconsistencies brought on record would cut at the very route of evidence of P.W.1. It is pertinent to mention that P.W. 1 was expected to depose consistent with the facts stated in Exhibit-23, subject to the minor permissible variations. Some latitude for minor variations deserves to be granted inasmuch as it would be impossible even for an eye witness to provide stereotype accounts of the incident recorded in the report.

13 P.W. 1 has deposed about the incident, the names of the accused and the weapons used by the accused to assault deceased Shailesh himself (i.e. P.W.1) and P.W.4. A minute and careful scrutiny of his evidence would show that his evidence consist of major omissions, contradictions and inconsistencies on material part of the case of prosecution. In the report at Exhibit-23, no role was attributed in the crime to accused Alim by P.W.1. In the evidence before court, P.W.1 has stated that Alim inflicted a blow with chopper on his stomach. He has

deposed that the chopper was thrust in his stomach. This vital statement has been found and proved to be an omission. In report at Exhibit-23, P.W. 1 has stated that Appellant Kau inflicted blows with sword over the head of Shailesh and on his left knee. This statement has been proved to be an omission in his report at Exhibit-23. In his report, while highlighting the role of the Appellant Kau, he has stated that the Appellant Kau gave chopper blow over the head of Shailesh. He has also stated that the accused Kau inflicted a sword blow over his left hand. This vital statement is made by P.W. 1 in Exhibit-23. Perusal of the substantive evidence recorded before the court shows that he has not stated this facts in his evidence. The evidence on the above aspect is totally contradictory to the facts stated in his report Exhibit-23. Exhibit-23 is the first such document related to the crime. We are conscious in considering the condition of P.W. 1 at the relevant time, he would deserve some latitude, but the latitude cannot be extended too far to accept self contradictory evidence of P.W.1.

14 The perusal of report Exhibit-23, would show that no specific role has been attributed to accused Ajay. In his substantive evidence before the court, P.W. 1 has deposed that Ajay gave sickle blow on his right hand. This statement has been proved to be an omission. It is further seen on perusal of his report at Exhibit-23 that he has stated that the Appellant Kau inflicted blow with chopper on person of Shahid P.W.4. In his substantive evidence, he has stated that the Appellant Kau gave a

sword blow on the person of Shahid. It is pertinent to mention at this stage that his version before the court is totally contrary to the material facts about the incident stated in Exhibit-23. So far as the roles of Alim, Ajay and Kau is concerned, the perusal of his evidence would show that he has totally resiled from the material facts stated in report.

15 There is one more doubtful circumstance, which, in our opinion, would reflect upon the credibility of P.W.1. In report Exhibit-23, P.W.1 has categorically stated that David and Shashikant Barve-accused No.5 inflicted a blow with sword on the head of Shailesh. A specific role was attributed to Shashikant Barve in the crime. The evidence of P.W. 1 is woefully silent about accused Shashikant Barve. It is not his case in his substantive evidence that name of Shashikant Barve was mentioned in the report by mistake. In view of this admitted position, two inferences are possible. The first inference would be that there was some reason or other, P.W.1 wanted to save the accused Shashikant Barve and therefore, he has not stated his name in his evidence. The second inference would be that P.W. 1 at the time of lodging the report stated the name of Shashikant Barve though he was not present and shared the common object with the remaining accused to assault them. In any case, without plausible explanation, this fact would weigh against the case of the prosecution and the core issue of credibility of P.W.1. The investigating officer, as can be seen from the record, has stated that sword used in the crime was discovered at the instance of the deceased accused David. It

is the case of the prosecution that the sword and sickle recovered during the course of investigation had dark stains. In this context, it is necessary to see the evidence of P.W.1. The relevant evidence is at Exhibit-22, page 2, paragraph 3 of his deposition. The sword was shown to him. He has categorically stated that it was not the sword used by the assailants in the incident. He has stated that the sword used in the crime was a big sword having a copper butt. He has identified the sickle. It is pertinent to mention at this stage that in his substantive evidence, he has categorically deposed that assailants inflicted blows with the sword on person of the deceased Shailesh. P.W. 4 has stated in his evidence that the sword recovered by the investigating officer in the crime is the same. So there is a variance in the evidence of P.W. 1 and P.W.4 on this material aspect. In our opinion, this would not only reflect upon the credibility of P.W.1 and P.W.4, but also on the honesty of the investigation.

16 In his evidence, P.W. 1 has stated that Jolly Guilder-P.W.5 was present on the spot and he intervened in quarrel. This statement has been found to be an omission in the report at Exhibit-23. It is, therefore, seen that on material part of the case of the prosecution, its evidence is self contradictory and inconsistent. The prosecution has relied upon the injury certificate Exhibit-52 to seek a corroboration to his evidence. We have minutely perused Exhibit 52. The perusal of Exhibit 52, would show that medical officer did not find stab injury

over the stomach. It is the case of P.W.1 that chopper was thrust into his stomach. If chopper was inserted in the stomach, as stated by him, then medical officer would not have missed such serious injury. The three injuries have mentioned in Exhibit 52. The question is whether presence of the injuries over his person as mentioned in Exhibit 52 would automatically establish involvement of the Appellants in the crime. In our opinion, in the absence of substantive evidence to establish the complicity of the Appellants in the crime on the basis of cogent and concrete evidence, this medical evidence would be of no use against the Appellants.

17 A specific case is sought to be made out that when P.W. 1 was admitted in hospital, he was not in a condition to speak and on account of enmity with the Appellants, P.W. 8, the grandfather of the deceased Shailesh, narrated the facts to the police and, on the basis of the same, Exhibit-23 was prepared. As P.W.1 was admitted initially in Wockhardt Hospital, it would be necessary to consider evidence of the medical officer from the said hospital. P.W.10 is Dr. Nemichand Zaverilal Jain, who has examined P.W.1, P.W.4 and deceased. In the examination-in-chief P.W. 1 has categorically stated that the grandfather of deceased Shailesh gave history of assault. He had stated that the deceased was assaulted by a group of people with sharp weapons and metal rod. He has not stated the names of the assailants. However, at that point of time, he knew that a group of people assaulted the deceased, P.W.1 and

P.W.4 with sharp weapons and metal rod. It is the case of the prosecution that statement of P.W.1 marked as Exhibit 23, was recorded at Wockhardt Hospital at Nasik. It was recorded in the presence of other medical officer, Dr. Geetanjali Gite. Dr. Geetanjali Gite has not been examined. He has categorically stated that P.W. 1 had sustained injury over the right hand, left knee & puncture wound over left thigh. As far as P.W. 4 is concerned, P.W. 10 has deposed that he had sustained injury on his right feet and there was bleeding. It is pertinent to note that medical certificates of P.W. 1 and P.W.4 from Wockhardt Hospital have not been produced. P.W. 10 has stated that he advised P.W.1 and P.W.4 to get admitted in Wockhardt hospital, but they refused. It is therefore, seen that the mental and physical fitness of P.W.1 to make a statement has not been placed on record by substantive evidence. It is further pertinent to note that in his cross-examination on page 16 at paragraph 14, he has stated that there was no stab wound on the person of deceased as well as P.W.1. It would be necessary to see evidence of P.W. 11 on the point of condition of P.W.1.

18 P.W.11 at the relevant time was attached to Civil Hospital at Nasik as Medical Officer. He has deposed that he had examined P.W.1 at 10.00 p.m. on 25 August 2012. He has noted down injuries found on the person of P.W.1. Medical certificate is at Exhibit-52. The medical certificate would show that three main injuries were found on his person. It is seen on perusal of the medical certificate and evidence of

P.W. 11 that there was no stab injury on the stomach of P.W.1. In his cross examination at page-3 paragraph-7, he has categorically stated that at 10.00 p.m, the general condition of P.W. 1 was critical. He was not in a condition to speak, though he was conscious. It is pertinent to note that while narrating the history of assault, neither P.W.1 nor the person accompanying him stated the names of the Appellants, being the assailants. This evidence of the medical officer on the point of critical condition of P.W.1 creates a doubt about the real author of the report at Exhibit-23.

19 In this context, it would be necessary to consider evidence of P.W.8. P.W.8 is the retired Senior Police Inspector. He is the grandfather of deceased Shailesh. In his evidence, he has stated that on receipt of information of the incident, he went to municipal hospital at Igatpuri. He found that the condition of Shailesh was serious. On the advise of the doctor, he carried Shailesh, P.W.1 and P.W.4 to Wockhardt Hospital, Nasik. In his evidence, he has further stated that on the way, he had asked Shahid-P.W.4 about the incident and Shahid narrated the incident to him. In his examination-in-chief, he has narrated the incident conveyed to him by Shahid-P.W.4 in detail. As per the case of the prosecution, the statement of P.W.1 was recorded by the Police, when he was admitted in Wockhardt Hospital. The evidence of the medical officer, as discussed above, would show that P.W. 1 had sustained serious injuries and he was not in a position to talk. The perusal of Exhibit-23,

in this background, creates a serious doubt about its authorship. The medical officer attached to Wockhardt Hospital, who had certified the fitness of P.W.1 to give the statement, has not been examined. In our opinion, this is one important aspect, which creates a doubt about the case of the prosecution against the Appellants.

20 It would be necessary to consider the evidence of P.W.4. While appreciating the evidence of P.W.1, omissions, contradictions and inconsistencies in his evidence have been mentioned. P.W.4 has deposed about the incident and the involvement of the accused persons in the incident. His evidence is contradictory to the evidence of P.W.1 on the point of a motive for commission of the crime. Similarly, his evidence is inconsistent and contradictory to the evidence of P.W. 1 on the point of use of weapon by the Appellant-Kau to inflict a blow on the person of Shailesh. It is further pertinent to note that the statement made by him in his evidence that the Appellant gave a sickle blow on the person of Shailesh is found to be omission from his statement recorded by the police. He has admitted about it in his evidence at page-8, paragraph-15. Similarly, his statement that Munna beat Shailesh by fighter has also been proved to be an omission. In his evidence, he has nowhere stated that the Appellant-Kau assaulted the deceased Shailesh or P.W.1 with sword. He has identified sword being the weapon used in the crime. We have already stated that P.W.1, who according to the prosecution, had sustained blows with the sword, has

categorically stated that it was not the same sword. The evidence of P.W.4 is full of omissions, contradictions and inconsistencies on the material part of incident. It is pertinent to note that the injury certificate issued on examination of P.W.4 in Civil Hospital Nasik has not been proved. Medical officer has not been examined. P.W.4 has stated that the Appellant-Kau inflicted a sickle blow on his back. P.W.10, in his evidence, is silent about any injury on the back side of the body of P.W.4. Similarly, there is no contemporaneous documentary evidence in the form of medical certificate from Wockhardt Hospital to substantiate the statement of P.W.4 that he has sustained the injury on back of his body. According to the prosecution, P.W.4 was seriously injured. In the absence of the medical evidence to prove that he had sustained serious incised wounds, in our opinion, his evidence would become doubtful on the point of the role attributed to the accused persons. It is, however, pertinent to mention that P.W.4 has also not stated the name of Shashikant Barve being one of the assailants. This conduct of P.W.4 is inconsistent with the case of the prosecution. In our opinion, therefore, evidence of P.W.4 is not sufficient to establish the involvement of the Appellants in the crime.

21 In the backdrop of the above observations, it would be necessary to state that P.W.8 is ex-police inspector attached to Igatpuri Police Station. The uncle of the deceased Shailesh was also attached to Igatpuri Police Station on the date of the incident. P.W. 1 has also

admitted that he used to consume ganja. He has denied the suggestion that deceased and P.W.4 were also addicted to drugs. It was suggested to P.W. 4 that they used to consume ganja in the garden at Igatpuri and would play tape in the car of Shailesh in a loud sound. They would create nuisance to the residents of Gaikwad Nagar Igatpuri. P.W. 5 has stated that the persons who beat deceased Shailesh, P.W.1 and P.W.4 were unknown persons. In his evidence, he has admitted that deceased Shailesh, P.W.4-Shahid and P.W.1 used to go to garden at odd hours for consuming ganja. He has stated that they used to create nuisance by running tape in the car of Shailesh in loud voice to the adjoining occupants. He further stated that they were in habit of raising quarrels and abusing people under the influence of drugs. He has stated that his grandfather and uncle of Shailesh were in police force. He has stated that, therefore, the complaint made by the residents of Gaikwad Nagar Igatpuri against the deceased Shailesh and his friends was not accepted by Igatpuri police. This evidence would show that deceased, P.W.1, and P.W.4 must be having number of enemies. This evidence would show that they were constant nuisance and menace to the residents of Gaikwad Nagar around the Igatpuri garden. In the context of inconsistent evidence of P.W. 1 and P.W.4, this fact would also assume importance. This would, in our opinion, weigh the balance in favour of the defence of the Appellants accused.

22 We may, briefly, deal with other corroborative evidence. It is the

case of the prosecution that at the instance of the deceased David, the sword was discovered on 3 September 2012 and sickle was discovered at the instance of the Appellant-Kau on 5 September 2012. It has been categorically mentioned in discovery panchnama that the sword was stained with blood. In this context, it would be necessary to see requisition at Exhibit-75, forwarded by the investigating officer to C.A., Nasik dated 4 October 2012. Perusal of this document would show that the investigating officer had requested the C.A. to opine, whether the stains on sword and sickle are blood stains or not. This fact would clearly indicate that there were stains on the sword as well as sickle. It is further pertinent to mention at this stage that considering the nature of the assault and manner of use of the sword and sickle, there ought to have been ample blood on the sword as well as on sickle. The recovery of the articles, as can be seen from the case of the prosecution, was made within a period of eight to ten days from the date of the incidents. The articles were forwarded to C.A., Nasik on 4 October 2012. According to the investigating officer, the articles were kept in packed and sealed condition. The relevant C.A. report is at Exhibit-77. Perusal of C.A. report would show that the articles were received in a sealed condition. In all eighteen articles were sent to C.A. by the investigating officer. The report Exhibit 77 pertains to the eighteen articles. The C.A. has categorically opined that no blood was detected on the sword and sickle. Similarly, no blood was detected on the clothes of the accused. The human blood was detected on the clothes of the deceased Shailesh.

However, the blood group was inconclusive. Similarly, C.A. reports of the blood examination of the accused David, Francis and Alim, would show that result of analysis of their blood samples was inconclusive. In our opinion, this evidence is of no help to corroborate oral testimony of P.W. 1 and P.W.4. The evidence, on proper appreciation, creates a doubt about the involvement of the accused persons. The blood was not detected on the sword, sickle and clothes of the accused. In the ordinary circumstance, considering the nature of the incident and the role attributed to each one of the accused, there ought to have been blood on their clothes. Similarly, there ought to have been blood on the weapons used in the crime. In our opinion, this evidence is of no help to take case of the prosecution further.

23 We have minutely perused the judgment and order passed by the learned Additional Sessions Judge. Learned Additional Sessions Judge has not recorded a categorical finding that the deceased Shailesh died a homicidal death. Since we are required to re-appreciate the evidence, it would be necessary to deal with this aspect. It is necessary to mention that in this case, the prosecution has not proved inquest panchnama. Though the above discussions would rule out the involvement of the Appellants in commission of the crime, it would be necessary to consider this aspect. In our opinion, evidence of the medical officer, who conducted the postmortem over the dead body of Shailesh, would be relevant. P.W.9 Dr. Nilesh Shelar conducted the postmortem of the

dead body. Postmortem report is at Exhibit 45. In his substantive evidence, P.W.9 has deposed about injuries found on the dead body. The injuries found on the dead body has been noted down in clause-17 of the postmortem report at Exhibit 45. Clause-18, sub-clause (a), P.W. 9 has stated that injuries were ante-mortem. In his evidence, P.W.9 has deposed that the injuries found on the person on the dead body could be caused by the sword Article-5 and sickle. Perusal of his evidence in entirety would show that possibility of these injuries being accidental has been totally ruled out. The other witnesses have deposed that the deceased as well as P.W.1 and P.W.4 sustained injuries in the assault made on them with deadly weapon. In our opinion, this evidence would be sufficient to record the finding that the deceased died a homicidal death. In our opinion, this evidence fall short to rope in the accused being assailants.

24 On the basis of the evidence, their complicity in the crime has not been established. The evidence of injured eye witnesses is found to be full of omissions, contradictions and inconsistencies. There are major inconsistencies on material part of the incident and use of the weapons by the accused between the evidence of P.W.1 and P.W.4. On minute scrutiny of their evidence, we conclude that the evidence of P.W. 1 and P.W.4 does not inspire confidence. The evidence is not sufficient to establish the complicity of the accused in the crime. The evidence creates a doubt about the case of the prosecution *vis-a-vis* the

Appellants. In our opinion, the learned Sessions Judge has missed the substance of their evidence. The learned Sessions Judge, without pondering over the omissions, contradictions and inconsistencies in their evidence, jumped to the conclusion on the aspect of the credibility of their evidence. The prosecution is required to prove the guilt against the accused beyond reasonable doubt. In this case, a serious doubt has been created about the credibility of evidence of P.W. 1 and P.W.4 against the Appellants. Similarly, their evidence is full of omissions, conditions and inconsistencies. It is pertinent to mention that such major omissions, contradictions and inconsistencies are not expected in the evidence of eye-witnesses. The omissions, contradictions and inconsistencies are material and, as such, cut at the very root of the case of the prosecution. We are conscious of the fact that minor omissions, contradictions and inconsistencies cannot be given much importance to discard evidence of the eye-witnesses in toto. In this case, we are not convinced to accept the evidence of P.W.1 and P.W.4. The prosecution has, therefore, failed to establish the involvement of the accused/Appellants in the commission of the crime on the basis of evidence of the eye-witnesses. The other corroborative evidence is also shaky. It is further pertinent to note that the rejection of evidence P.W.1 and P.W.4 would make circumstantial corroborative evidence insignificant. We, therefore, conclude that the Appellants are entitled to get benefit of doubt. We hold that the judgment and order passed by the learned Sessions Judge cannot be sustained. It requires to be set

aside. Accordingly, we pass the following order :

: ORDER :

- (i) Appeal No.725 of 2017 and Appeal No.324 of 2017 are allowed. The Judgment and Order of conviction and sentence of the Appellants dated 21 July 2016 passed by Additional Sessions Judge, Nasik in Sessions Case No. 90 of 2013 is set aside.
- (ii) The Appellant-Munna @ Ayub Hasan Shaikh in Appeal No.324 of 2017 (Accused No.6 in Sessions Case No.90 of 2013) and the Appellant-Francis @ Kau Pattrick Manvell in Appeal No.725 of 2017 (Accused No.2 in Sessions Case No.90 of 2013) stand acquitted of the offences punishable under Sections 143, 147, 148 read with Section 149 and Section 302, 307 read with Section 149 of Indian Penal Code.
- (iii) The Appellant-Munna @ Ayub Hasan Shaikh in Appeal No.324 of 2017 (Accused No.6 in Sessions Case No.90 of 2013) and the Appellant-Francis @ Kau Pattrick Manvell in Appeal No.725 of 2017 (Accused No.2 in Sessions Case No.90 of 2013) be released forthwith, if not required in any other case/crime.
- (iv) The order passed by the learned Additional Sessions Judge, Nasik with regard to the disposal of muddemal property is maintained.

- (v) In view of the disposal of the Appeals, Interim Application Nos.1933 of 2021 and 371 of 2019 in Appeal No.725 of 2017, do not survive and are disposed of.

(G.A. SANAP, J.)

(NITIN JAMDAR, J.)