

Uday S. Jagtap

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

CRIMINAL APPEAL NO. 1006 OF 2006

The State of Maharashtra
(Through the MIDC Police Station,
Shiroli, Dist. Kolhapur

.. Appellant

Vs.

1. Jahangir Babu Fakir,
Age 62 years, Occ. Agri.
2. Wasim Harun Fakir,
Age 18 years
3. Mansur Bapu Rahiman Desai,
Age 33 years
4. Ahmed Mahamod Jamadar,
Age 43 years, Occ. Agri.
5. Safiq Jahangir Fakir,
Age 43 years, Occ. Agri.
6. Latif Jahangir Fakir,
Age 31 years, Occ. Agri.
7. Ikbal Ajij Sanade,
Age 23 years, Occ. Agr.
8. Gafur @ Nayaku Babu Fakir
Age 45 years, Occ. Agri.
9. Harun Babu Fakir,
Age 51 years, Occ. Agri.
10. Fakruddin @ Satpal Jahangir
Fakir, Age 30 years, Occ. Agri.

All accused residents of village
Shiroli – pulachi, Tal. Hatkanagale,
Dist. Kolhapur

.. Respondents

.....

Ms. Geeta Mulekar, APP for the appellant - State
Mr. Shekhar A. Ingawale for respondent nos. 1 to 10

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

**RESERVED ON : 21st SEPTEMBER, 2021
PRONOUNCED ON : 12th OCTOBER, 2021**

JUDGMENT :- *(Per Prithviraj K. Chavan)*

1. This is an appeal by the State, challenging the judgment and order of the acquittal passed by the II Ad-hoc Additional Sessions Judge, Kolhapur in Sessions Case No.140 of 2004 on 26th May, 2006 thereby acquitting respondent nos. 1 to 10 of the offences punishable under Sections 143, 147, 148, 302, 323, 504 r/w 149 of Indian Penal Code and Section 37(1) r/w Section 135 of the Bombay Police Act.
2. The prosecution story is like this :-
3. There were two rival groups in village Shiroli-pulachi, Tal. Hatkanagale, Dist. Kolhapur. On 16th May, 2004 at about 2.00 p.m. Yasin – brother of complainant – PW-2 Chandso Sarjekhan had been to the field of one Kutub Mulla named ‘*Katwan*’ for bringing rice straws with one Ananda Chougule and Baban Sarjekhan in a tractor. A wordy duel ensued on account of loading more rice straws in the tractor between

Imran Fakir and Yasin Sarjekhan. Imran Fakir gave a kick to Yasin Sarjerao. On the same day, at around 6.30 p.m. Yasin reported about the said incident to some of the accused.

4. Having learnt about the same, PW-2 Chandso Sarjekhan along with Amjad and Yasin Sarjekhan had approached the house of accused no.1 – Jahangir Fakir at about 9.00 p.m. to discuss the issue. While returning after discussion, accused nos. 1 to 10 suddenly approached them and started abusing. Accused no.5 - Shafiq Fakir and A-7 Ikbāl Sanade were armed with swords and rest of the accused were armed with sticks and iron bars. In the meanwhile, PW-9 Samir Sarjekhan, PW-10 Amin Sarjekhan and PW-12 Bhola Sarjekhan also came over there. They too were assaulted by the accused persons resulting into injuries.
5. The complainant PW-2 Chandso Sarjekhan and PW-9 Samir Sarjekhan were assaulted with sticks and iron bars whereas PW-12 Bhola Sarjekhan, PW-10 Amin Sarjekhan and deceased Amjad Sarjekhan were assaulted by means of swords, sticks and iron bars.
6. All the injured came to C.P.R. Hospital, Kolhapur for treatment and subsequently an First Information Report came to be lodged in the intervening night of 16th May, 2004 and 17th May, 2004 on the basis of which Crime No.34 of 2004 under Sections 143, 147, 148, 149, 307, 323, 504 of the Indian Penal Code came to be registered against the

accused persons. Amjad Sarjekhan succumbed to the injuries while under treatment. As such, Section 302 of the Indian Penal Code had been added.

7. The Investigating Officer noticed that the accused had also committed breach of Notification of District Magistrate, Kolhapur, promulgated under Section 37(1) and 3 of the Bombay Police Act. After completion of investigation, a charge-sheet came to be filed against the accused persons for the offences as stated above.
8. After committal of the case, the learned II Ad-hoc Additional Sessions Judge, Kolhapur framed a charge in terms of **Exh.42**, which was read over and explained to the accused. They pleaded not guilty and claimed to be tried.
9. The defence of the accused as emerged from the line of cross-examination as well as from their statements under Section 313 of the Criminal Procedure Code is that they did not commit any offence and have been falsely implicated. It was their contention that the complainant and witnesses were the aggressors, who approached their house well prepared and armed in order to cause hurt and consequently mounted the assault in view of the incident, which had occurred on the same day in the afternoon *qua* Yasin Sarjekhan.
10. Admittedly, there was a counter case filed against the

complainant and others, which was bearing Sessions Case No.141 of 2004. The respondents / accused have also raised an alternative plea of private defence.

11. During trial, the prosecution examined as many as 18 witnesses coupled with documentary evidence in the form of medical certificates, report of chemical analyzer, panchanamas, discovery panchanama under Section 27 of the Evidence Act etc.
12. Having considered the evidence of the prosecution witnesses and after hearing the respective sides, the learned trial Court found the evidence adduced on behalf of the prosecution short of proving the guilt against all the accused, in the sense, firstly, they were inherent contradictions in the oral evidence *vis-a-vis* in the medical evidence. Secondly, there is a delay in lodging the FIR, which remained unexplained. Thirdly, the prosecution has failed to prove that there was some common object of unlawful assembly coupled with the fact that there are several material omissions and also no independent eye-witness had been examined. Thus, the learned Additional Sessions Judge gave benefit of doubt to the accused.
13. As such, the State has approached this Court by way of present appeal.
14. We heard Ms. Geeta Mulekar, learned APP and Mr. Ingawale,

learned Counsel appearing for the respondents – accused.

15. Ms. Mulekar, assailed the impugned judgment on various grounds by contending that despite there being clinching and satisfactory evidence in the form of injuries on the vital part of the witness, including the fact of death of deceased Amjad Sarjekhan, the trial Court erred in giving a benefit of doubt. She submits that the fact of unlawful assembly of the accused, at the relevant time while mounting assault on the opposite party has not been disputed by the defence. There is no dispute as regards recovery of weapons freely used by the accused while assaulting the complainant party and, therefore, the learned Trial Court ought to have convicted the respondents – accused for the offences with which they have been charged.
16. It is also submitted by Ms. Mulekar that some discrepancies and human error might have been crept into the medical certificates, which cannot be termed as a doubtful evidence insofar as the injuries on the persons of witnesses are concerned. According to the learned APP, if the oral evidence is taken into consideration, there is hardly any scope of doubting the veracity of the prosecution witnesses, especially those who are injured in the assault. She, therefore, urged to interfere with the judgment of the acquittal passed by the learned trial Court.
17. *Per contra*, Mr. Ingawale, learned Counsel for the

respondents - accused supported the impugned judgment while pointing out the glaring discrepancies in the prosecution story and its evidence. To name a few and to highlight what has been submitted at bar is that the medical evidence is in absolute contradiction to that of the oral testimony of the four witnesses. There are discrepancies in the statement of witnesses in describing the incident. There is a long delay in lodging FIR which had not been explained though the police station was at a very short distance. It is further submitted that the plea of right of private defence has been raised for the first time during the arguments *sans* any suggestion in cross-examination of the witnesses to that effect.

18. The learned Counsel also drew our attention to the material omissions, more particularly in the evidence of witness PW-12 Bhola Sarjekhan. It is submitted that there were no cut or incised wound even though it is the case of the prosecution that there was free use of swords. Last but not the least, there is no independent eye-witness examined by the prosecution even though it is their case that there was a huge crowd at the time of incident.
19. We have meticulously scanned the evidence of prosecution witnesses *vis-a-vis* the impugned judgment. It is the cardinal principle of the criminal jurisprudence that the prosecution has to prove its case beyond all reasonable doubts to bring home the guilt of the accused. If the

prosecution fails, the benefit must be given to the accused.

20. Before analyzing the evidence of prosecution witnesses, it is pertinent to note that the genesis of the bilateral clash started with a petty incident of loading more paddy straws by Yasin, brother of PW-2 Chandso Sarjekhan, in a tractor.
21. There are in all 5 injured witnesses. They are PW-2 Chandso Sarjekhan, PW-9 Samir Sarjekhan, PW-10 Amin Sarjekhan, PW-12 Bholu Sarjekhan and the deceased - Amjad Sarjekhan.
22. The Investigating Officer had recovered in all 2 swords, 3 iron bars and 5 sticks about which, PW-6 Mahavir Mithari has testified, who also happens to be a witness upon memorandum panchanama under Section 27 of the Indian Evidence Act.
23. This is a peculiar case wherein the prosecution had not examined a single independent eye-witness despite the fact that crowd of more than 60 to 70 persons had gathered at the scene of occurrence when the incident took place.
24. The prosecution had also not seriously disputed glaring discrepancies and inconsistency in the ocular versions of the injured witnesses *vis-a-vis* the medical reports, including interpolations, insertions as well as change of ink.
25. Now, turning to the sequence of the event unfolded by the

prosecution witnesses, more particularly the injured witnesses.

26. PW-2 Chandso Sarjekhan had lodged the First Information Report (**Exh.63**), wherein he had informed the police that accused A-5 Shafiq Fakir and A-7 Ikbal Sanade were armed with swords whereas rest of the accused were armed with sticks and iron bars. PW-9 Samir Sarjekhan, PW-10 Amin Sarjekhan, PW-12 Bhola Sarjekhan and deceased Amjad were assaulted on their face by means of sticks and iron bars.
27. In his evidence, PW-2 Chandso Sarjekhan testified that when he went to the house of A-1 Jahangir Fakir with Yasin Sarjekhan and Amjad to question as to why Imran kicked Yasin, a discussion took place however, while returning, all the accused suddenly started abusing them.
28. Accused No.5 - Shafiq Fakir dealt a blow of a sword on his head. When Amjad (deceased – son of Yasin) tried to intervene and rescue this witness, A-5 Shafiq Fakir and A-7 Ikbal Sanade dealt blows of sword on his head, right parital region and neck. The accused also abused and assaulted PW-9 Samir Sarjekhan, PW-10 Amin Sarjekhan and PW-12 Bhola Sarjekhan. It is thus, testified by PW-2 Chandso Sarjekhan that accused A-3 Mansur Desai, A-4 Ahemad Jamadar and A-8 Gafur@ Nayaku Fakir assaulted PW-10 Amin Sarjekhan and PW-12 Bhola Sarjekhan, whereas A-5 - Shafiq Fakir and A-7 Ikbal Sanade dealt blows of sword on the head of PW-12

Bhola Sarjekhan. Accused no.1 Jahangir Fakir, A-10 Fakruddin @ Satpal Jahangir Fakir and A-6 Lalit Sanade assaulted PW-9 Samir Sarjekhan by means of sticks and iron bars. People in the vicinity gathered over there and had witnessed the incident. The injured were first taken to C.P.R. Hospital and then to Lotus Hospital.

29. Certain vital admissions surfaced during the cross-examination of PW-2 Chandso Sarjekhan, which indeed go to the root of the prosecution's case. He admits that except A-7 Ikbal Sanade, rest of the accused reside in Fakir Galli at the end of the village, which is at a distance of 400 to 500 feet. He admits that Yasin was accustom to consuming liquor, however denied the suggestion that he used to quarrel with people in the village under influence of liquor. He admits that when he along with Yasin and Amjad (deceased) had been to A-1 Jahangir Fakir, accused no.1 was not armed. It can be seen that the accused are prosecuted for forming an unlawful assembly with some common object. How an assembly of family members be branded and called an unlawful assembly, unless some clinching and satisfactory evidence is adduced? It seems that in fact there was neither a common object nor an unlawful assembly formed, which we shall discuss in the later part of the judgment.
30. A suggestion has been given to PW-2 Chandso Sarjekhan that complainant party and the witnesses were the aggressors, who approached the accused to teach them a lesson in view

of the incident which took place in the afternoon *qua* Yasin. However, the witnesses denied the said suggestion but admits that there is a counter case against them wherein, admittedly, accused nos. 1 and 2 had suffered bleeding injuries. This suggestion assumes significance in the light of the injuries sustained by the accused party herein and a question would arise as to who were the aggressors. Some material omissions have been brought on record, which also discredit the testimony of PW-2 Chandso Sarjekhan. Suffice it to say that the prosecution had not tendered any plausible explanation with regard to the injuries sustained by A-1 Jahangir Fakir and A-2 Wasim Fakir. This creates a reasonable doubt as regards the authenticity of the prosecution case.

31. PW-2 Chandso Sarjekhan further admits in his cross-examination that he did not know as to how he fell down on the ground and was facing to which side. He also admits that when deceased Amjad was lying on his body, he could not see as to who had dealt blows of sword, sticks and iron bars on the person of Amjad. He did not remember as to whether he had stated before the police that A-5 Shafiq Fakir and A-7 Iqbal Sanade dealt blows of sword on the head of Amjad. He did not remember whether Amjad was injured due to the blows of the sword. Thus, it is crystal clear that not only the evidence of this witness is shaky and inconsistent but lacks credibility as regards the main incident which alleged to have occurred on 16th May, 2004 at about

- 8.00 p.m. He appears to have belied his own version in chief as well as contradicted his FIR too.
32. It is pertinent to note that PW-2 Chandso, PW-9 Samir Sarjekhan, PW-10 Amin Sarjekhan and PW-12 Bhola Sarjekhan spoke in tune with one another, in the sense, their evidence is so identical that it would be difficult to place implicit reliance upon their testimonies. It is a classic example of '*Dramatis Personae*'. We say so for the reasons stated hereinbelow.
33. It would also be necessary to scan the evidence of PW-9 Samir Sarjekhan. His examination-in-chief is identical to that of PW-2 Chandso, which needs no reiteration. However, certain vital admissions have been extracted in his cross-examination which creates a doubt as regards the authenticity of his evidence also. He admits that he had no occasion to see from where all the accused came with weapons in their hands. He deposed that all of them were beaten by the accused in a sequence. He too testified that the first blow of sword was received by PW-2 Chandso Sarjekhan on left back side of his head. PW-2 Chandso received only one blow of sword. Later on, he was assaulted by sticks and iron bars. He could not see whether blows of sticks and iron bars were inflicted upon PW-2 Chandso Sarjekhan.
34. The fact that deceased Amjad fell down after he received

blows of sword, has been proved to be an omission. He testified that each of the accused delivered single blow on his person. Interestingly, he admits that even though his tooth fell on the ground at the time of assault he did not sustained any injury to the lip, which sounds incredible. Falling of tooth during the assault has also been proved to be an omission.

35. PW-10 Amin Sarjekhan, as already stated, had also testified in an exact identical manner to that of PW-2 Chandso Sarjekhan and PW-9 Samir Sarjekhan. His evidence indicates that when he reached on the spot at about 8.30 p.m. to 9.00 p.m., the witnesses were being assaulted. However, deceased Amjad and PW-2 Chandso Sarjekhan were already lying on the road. It has come in the evidence of this witness that his mother had informed him that PW-2 Chandso Sarjekhan and deceased Amjad had gone ahead towards the house of the accused. However, that is also proved to be an omission. He was present at a distance of 10 to 15 feet from the house of the accused when they were beating PW-2 Chandso Sarjekhan, is also an omission. The fact that the deceased Amjad went to rescue PW-2 Chandso Sarjekhan when he was assaulted by the accused and, therefore, he fell down, has also been proved as an omission. The fact that when PW-9 Samir Sarjekhan went to rescue Amjad and PW-2 Chandso Sarjekhan, he was assaulted with iron bars, has again been proved be an omission. It is testified by this witness that he had received 7 blows of

sword on his person inflicted by the accused. As already stated hereinabove that the medical evidence is totally inconsistent and contrary to what has been testified by the injured witnesses. Looking to the tenor of his language, his presence itself is doubtful at the scene when the incident in question occurred.

36. Needless to state that in a criminal case, the version of the injured witnesses are required to be corroborated by medical evidence, even though it is a settled law that the evidence of the injured eye-witnesses would prevail over the medical evidence as medical evidence is necessarily an opinion of an expert. However, there are certain decisions of the Apex Court that if the statement of eye-witnesses / injured witnesses contradicts the medical evidence, then, it can be said that the prosecution has failed to prove the guilt of the accused beyond all reasonable doubts, more particularly where the injuries on the persons of the witnesses are highly improbable with the nature of weapons alleged to have been used or the manner in which the injuries were inflicted.
37. PW-2 Chandso Sarjekhan testified that due to the blow of sword inflicted on his head by A-5 Shafiq Fakir, he sustained bleeding injury. The Medical Officer, PW-13 Dr. Wadkar, who has proved the medical certificate *qua* this witness at **Exh.103**, had noticed CLW on parieto-occipital region 5x1x9 cm deep-simple in nature caused due to hard and blunt object. It necessarily means that it was not an injury caused

due to a blow of a sword. PW-13 Dr. Dilip Wadkar admits in cross that the said injury was possible by a stick or iron bar. PW-13 Dr. Wadkar admits in cross that the said injury was possible by a stick or iron bar. Surprisingly, the learned prosecutor did not suggest this witness during his evidence that the injury sustained by this witness could be caused by means of a sword.

38. Looking to the location of the injury, which is on the parieto-occipital region, it can be safely inferred that the blow must have been given from the back side. However, PW-2 Chandso Sarjekhan says that A-5 Shafiq Fakir had dealt blow while standing in front of him. By no stretch of imagination, it can be said to be a frontal attack.
39. PW-9 Samir Sarjekhan testified that A-7 Ikbal Sanade had dealt a blow of the sword on his hand and kicked him when he tried to intervene. A-3 Mansur Desai assaulted him on his left leg whereas A-5 Shafiq Fakir beat him on his left hand. A-8 Gafur@ Nayaku Fakir beat him by means of iron bar on his mouth, due to which his tooth fell down. Thus, according to this witness, the accused was holding an iron bar and assaulted him but A-7 Ikbal Sanade who was armed with sword did not use it but inflicted a kick. PW-13 Dr. Wadkar in his Medical Certificate at **Exh.110** noted that the left lower tooth had fallen and upper 2nd incisor was mobile. There was swelling on the left forearm and on the left frontal bone above orbit and there was abrasion on left knee joint.

No sane man will believe that the witness who had been assaulted by 8 persons armed with different weapons, inflicting single blow by each one of them and the resultant injuries were only four in number. This is something quite strange and indigestible. Interestingly, PW-9 Samir Sarjekhan admits in his cross-examination that there was no injury to his lip. Even the doctor had noted that there were no blood clots in the mouth which again renders his version dubitable. The doctor admits that if canine tooth falls due to strike of an external object, then, necessarily injury must appear on the upper lip. Thus, the evidence of PW-9 Samir Sarjekhan too sharply contradicts the evidence of the medical expert.

40. Turning to the injuries sustained by PW-10 Amin Sarjekhan. When he went to rescue PW-9 Samir Sarjekhan, A-7 Iqbal Sanade delivered a blow of the sword on his head due to which he fell down. He testified that A-3 Mansur Desai, A-4 Ahmead Jamadar and A-8 Gafur@ Nayaku Fakir were holding iron bars and had assaulted him with the same. A-1 Jahangir Fakir, A-2 Wasim Fakir, A-6 Lalit Sanade A-9 Harun Fakir and A-10 Fakruddin@ Satpal Jahangir Fakir assaulted him with sticks and A-5 Shafiq Fakir assaulted him with a sword. We accept the evidence of PW-9 Samir Sarjekhan with a pinch of salt, for, had he been really assaulted by all the 10 accused armed with different weapons, then, the medical evidence should have been consistent and corroborative to his oral testimony. However, according to PW-13 Dr. Wadkar, there were only 3 CLWs, first on the left

side occipital region, second, on upper lip left side and third over left leg above ankle joint. He opined that all the 3 injuries were simple. The case papers are produced at **Exh.105** and the medical certificate is produced at **Exh.109**. The doctor however, failed to produce x-ray plate. In the absence of x-ray report, no reliance can be placed on the evidence as regards the fracture sustained by this witness. Surprisingly, despite assault by a sword, there is not a single incised wound on the person of this witness. There is no imprint, fracture or wheal mark by sticks.

41. Coming to the evidence of one more eye-witness PW-12 Bhola Sarjekhan, according to whom A-5 Shafiq Fakir and A-7 Ikbāl Sanade inflicted blows of sword on his head, back and leg. According to him, he had sustained 7 blows of sword. It is his evidence that at the time of each blow, the blade of the sword entered into his body but according to PW-13 Dr. Wadkar, he noticed only 5 simple CLWs caused by hard and blunt object and not by sharp cutting object, namely sword. One can understand the natural tendency of some witnesses to exaggerate the facts but not to this extent. Thus, the medical evidence *qua* the injured witness contradicts his ocular version. Absence of even a single incised or cut wound on the person of any of the injured is a clear indication of a concocted case of assault by means of sword, especially by A-5 Shafiq Fakir and A-7 Ikbāl Sanade. The learned trial Court has, therefore, rightly disbelieved the evidence of injured witnesses.

42. There is one interesting angle to this case. The medical certificate in respect of the injuries on the person of PW-12 Bhola Sarjekhan (**Exh.107**) indicates that there were two more injuries i.e. injury no.6 which is termed as sharp incised superficial wound and injury no.7 as a wheal mark on the left loin of PW-12 Bhola. It transpires from the evidence of the PW-13 Dr. Wadkar that he was asked to produce MLC register in respect of injury nos. 6 and 7. It was noticed that the page of the MLC register were carbon copies along with case papers wherein injuries nos. 6 and 7 were absent. PW-13 Dr. Wadkar admits that the MLC register is the carbon copy of the case papers. He admits that in the MLC register, only injury nos.1 to 5 are carbon copied and injury nos. 6 and 7 are written in ink. It was written in different handwriting than that of a person who had scribed injury nos. 1 to 5. PW-13 Dr. Wadkar admits that injury nos.6 and 7 were written with a different pen with different ink than injury nos. 1 to 5.
43. It can be seen that after noting injury nos.1 to 5 on the case papers and reproducing it on the carbon copy of the MLC register, PW-12 Bhola was examined by another doctor and he had noted the injuries on the person of PW-12 Bhola on another page nos.3 and 4 (**Exh.111**). PW-13 Dr. Wadkar admits description of injuries *qua* PW-12 Bhola Sarjekhan, made by another doctor i.e. so called incised wound on the back and injury no.7 Lathi mark on left loin, which was

missing there also. It can safely be inferred that injury nos. 6 and 7 on the back of PW-12 Bhola Sarjekhan are manipulated only with a view to show that the sword had been used as a weapon of assault. It appears that even PW-12 Bhola Sarjekhan himself was well aware of this manipulation and, therefore, in his examination-in-chief, he improved by deposing that A-5 Shafiq Fakir and A-7 Ikbāl Sanade delivered blows of sword on his back and also other part of his body. When he was confronted with the said improvement, he testified that he did not narrate before the Police that blows of sword were inflicted on his back. The said omission has been duly proved by PW-16 Mr. Amol Bhujbal, Investigating Officer. Thus, the evidence of the prosecution on this aspect can be said to be fabricated and false, for the best reasons known to it.

44. The Hon'ble Supreme Court in its decision in the case of ***Ganesh Datt Vs. State of Uttarakhand, AIR 2014, SC 2521*** while dealing with inconsistency between the ocular and medical evidence, has unequivocally observed that evidence of eye-witnesses that accused persons fired shots with pistol and gun respectively at the deceased during the occurrence resulting in injuries, were found to be in contradiction with the medical evidence which indicates that no gun shot injury was found on any part of the body of the deceased. Thus, the ocular evidence is totally inconsistent with the medical evidence with respect to the assault by the accused and, therefore, the evidence of eye-witnesses is not reliable.

Paragraph 14 and 15 of the judgment can be extracted for advantage :-

“14. The eye-witnesses namely PWs 1 to 3 and CW-1 Smt. Raj Kumari, widow of deceased Prabhunath have testified that accused Sudarshan and accused Deep Narain fired shots with pistol and gun respectively at Prabhunath during the occurrence resulting in injuries but as per the medical evidence there was no gun shot injury found on any part of the body of Prabhunath. Thus, in short, the deceased Prabhunath is concerned the ocular evidence is totally inconsistent with the medical evidence with respect to assault by accused Sudarshan and Deep Narain. If this matter is false, there is no guarantee that the other assault deposed to by the eye-witnesses was also not false.

15. As per the ocular testimony the weapons used in the occurrence are country made pistol, gun, axe and lathis. In his testimony PW7 Sub-Inspector Surender Singh has stated that he went to the occurrence place during investigation and seized 10 bullets of 12 bore from the spot out of which 4 were empty and 6 were live, under Exh. A-16 Memo. Initial investigation was done by PW7 Sub-Inspector Surender Singh and thereafter it was continued and concluded by PW5 Inspector Vijender Kumar Bhardwaj. They have not taken any steps to recover the weapons alleged to have been used in the occurrence. No scientific method of investigation was pressed into service. We did not find any explanation in the testimonies of the Investigating officers conducting investigation is deplorable”.

45. As regards deceased Amjad, it is the case of the prosecution that while trying to rescue PW-2 Chandso Sarjekhan, A-5 Shafiq Fakir and A-7 Ikbal Sanade dealt blows of sword on his person resulting into several injuries. Initially, deceased Amjad was examined by PW-13 Dr. Wadkar. The deceased was then shifted to Lotus Hospital where during treatment he succumbed to the injuries. Evidence to that effect has been given by PW-17 Dr. Prasad Patil. Dr. Ruikar of CPR Hospital, who is no more, had conducted the autopsy. The autopsy notes are proved by PW-14 Dr. Bhalchandra Chikhalkar (**Exh.119**). There were 4 simple injuries on the right lateral chin, behind right ear pinna and black discolouration of both eyes. There was CLW on right lateral chin which was clinically diagnosed as a fracture of mandible. The dis-colouration of both eyes is not an independent injury but it is the effect of internal bleeding reflected in the eyes. In case of deceased Amjad also, there was not a single incised wound which could be caused by a sword.
46. In the autopsy report of deceased Amjad which is at **Exh.119**, Dr. Ruikar had mentioned one sutured wound on right side chin 2.3 cms., contusion on right deltoid region and some minor abrasions on right foot. Thus, the autopsy report also does not indicate a single incised or cut wound, which could have been caused by any sharp cutting instrument like a sword. This clearly falsifies the ocular evidence of the prosecution witnesses that A-5 Shafiq Fakir and A-7 Ikbal Sanade assaulted all the injured witnesses

including deceased Amjad with swords in their hands.

47. As regards fracture on the person of PW-12 Bhola Sarjekhan is concerned, PW-13 Dr. Wadkar testified that x-ray plate of Bhola's skull reveal crack fractured in his right fronto parietal region. The Medical Officer in his cross-examination admits that findings of x-ray are noted on the yellow colour paper. He admits that said findings have also been noted on the case paper but such findings are neither mentioned on yellow colour paper nor on case paper, which is at **Exh.111**. Doctor admits that he cannot precisely say whether the said fracture corresponds to injury no.1 or injury no.2 in the certificate.
48. As regards the injury on the person of witness PW-10 Amin Sarjekhan, it has come in the evidence of PW-13 Dr. Wadkar that he noted 4 injuries as a swelling with deformity on the right forearm. Despite an opportunity, the doctor could not produce the x-ray plate to substantiate his observations of fracture. In such an eventuality, the oral evidence of the doctor cannot be safely accepted as a truthful version as regards fracture to PW-12 Bhola Sarjekhan and PW-10 Amin Sarjekhan *sans* x-ray plate. There is a reason to infer that the evidence has either been tampered with or fabricated.
49. In the absence of either cut or incised wound or fracture to any of the 5 injured witnesses, it is difficult to accept their versions as truthful and genuine. The medical evidence does

not at all corroborate with the oral evidence of the injured witnesses.

50. The Trial Court has, therefore, rightly observed that in the absence of cogent and satisfactory evidence on behalf of the prosecution and also in view of the defective investigation as well as other lacunae in the prosecution case, the accused are entitled for a benefit of doubt.
51. Last but not the least, there is a delay in lodging the first information report by PW-2 Chandso Sarjekhan which remained unexplained. No reason has been forthcoming as to why it was not prompt when complainant PW-2 Chandso Sarjekhan was brought to CPR Hospital and had an occasion to meet a police officer. It is apparent that after the discharge of PW-2 Chandso Sarjekhan from CPR Hospital and thereafter when he was admitted in Lotus Hospital, ample opportunity was there for him to concoct or deliberate with the witnesses to file an embellished report.
52. We say so because we do not find any reason for not reporting the incident promptly to the police by any of the injured persons as the police station was just a furlong away from the scene of occurrence. Not only that, there was also a delay in forwarding a copy of the FIR to the nearest Judicial Magistrate, First Class. It is, therefore, unsafe to accept the recitals of the First Information Report to be a truthful version of the incident.

53. Failure on the part of the prosecution to explain or disclose the genesis of the offence is also an additional factor which renders the prosecution story a bit doubtful. We say so for a simple reason that in view of a counter case against the prosecution witnesses, the Investigating Agency had not made any discovery from A-2 Wasim Fakir, A-4 Ahemad Jamadar, A-8 Gafur@ Nayaku Fakir and A-9 Harun Fakir. There is no evidence that there was sufficient light since the incident occurred at about 8.00 p.m. and whether in fact, the witnesses had an opportunity to clearly witness the assault as testified by them in their examination-in-chief.
54. Corollary of the aforesaid discussion is that the prosecution has failed to bring home the guilt of the accused – respondents beyond all the reasonable doubts.
55. The impugned judgment and order of acquittal, therefore, does not warrant interference in appeal. As such, the appeal stands dismissed.

(PRITHVIRAJ K. CHAVAN, J.)

(SMT. SADHANA S. JADHAV, J.)