

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.197 OF 2016

1. Ramji s/o Kondji Khandare
Age: 70 years, Occu.: Agri.,
2. Ravindra s/o Prabhakar Khandare
Age: 20 years, Occu.: Agri.,
3. Arun s/o Prabhakar Khandare
Age: 22 years, Occu.: Agri.,
4. Jaiwanta s/o Mohan Khandare
Age: 30 years, Occu.: Agri.,
5. Nana s/o Bhimrao Patil (Dukre)
Age: 23 years, Occu.: Agri.,
6. Mohan s/o Kondji Khandare
Age: 65 years, Occu.: Agri.,

All above are resident of
Dhol Umari Tq. & Dist. Hingoli

.. Appellants

Versus

The State of Maharashtra
Through Police Station, Basamba,
Tq. and Dist. Hingoli

.. Respondent

...

WITH

CRIMINAL APPEAL NO.149 OF 2017

Nana Bhimrao Patil (Dukre)
Age: 23 years, Occu.: Agriculture,
R/o. Dhol Umri, Tq. & Dist. Hingoli

.. Appellant

Versus

The State of Maharashtra

.. Respondent

...

WITH

CRIMINAL APPEAL NO.444 OF 2016

Dipak Sadashiv Khandare
Age: years, Occu.: Service,
R/o. Village Dhol Umari,
Tq. and Dist. Hingoli

.. Appellant

Versus

1. The State of Maharashtra
2. Tanaji @ Ankush Prabhakar Khandare
Age: 21 years, Occu.: Agri.,
R/o. Village Dhol Umari,
Tq. and Dist. Hingoli
3. Latabai Jaiwanta Khandare
Age: 24 years, Occu.: Household,
R/o. Village Dhol Umari,
Tq. and Dist. Hingoli.
4. Padmabai Prabhakar Khandare
Age: 64 years, Occu.: Household,
R/o. Village Dhol Umari,
Tq. and Dist. Hingoli

.. Respondents

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Mr. S. S. Bora h/f Mr. M. D. Shinde, Advocate for appellants in APEAL/197/2016.

Mr. Joydeep Chatterji, Advocate for appellant in APEAL/149/2017.

Mr. Ashpak Taher Patel Shaikh, Advocate for appellant in APEAL/444/2016

Mr. A. V. Deshmukh, APP for respondent – State in all the matters.

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**CORAM : SMT. VIBHA KANKANWADI AND
Y. G. KHOBRADE, JJ.**

**RESERVED ON : 24th April, 2023
PRONOUNCED ON : 9th August, 2023**

JUDGMENT :- (Per Smt. Vibha Kankanwadi, J.)

. Criminal Appeal No.197 of 2016 has been filed by original accused
Nos.1 to 6, who faced trial before the learned Additional Sessions Judge,

Hingoli, Dist. Hingoli, however, Criminal Appeal No.149 of 2017 is then separately filed by accused No.5 – Nana Bhimrao Patil (Dukre) through another Advocate. All of them are challenging their conviction for the offence punishable under Sections 302, 307, 506(II) read with Section 149 of Indian Penal Code. Accused Nos.2 and 4 in addition have challenged their conviction for the offence punishable under Section 354 read with Section 149 of Indian Penal Code. The conviction was awarded to them on 25.02.2016, whereas Criminal Appeal No.444 of 2016 is filed by original informant challenging the acquittal of accused Nos.7 to 9 from the offences punishable under Sections 147, 148, 302, 307, 326, 325, 324, 354, 506(II) read with Section 149 of Indian Penal Code and under Section 135 of Bombay Police Act, by the same judgment, in the said case, by the same Judge. Under such circumstance, all the appeals are taken up for hearing together.

2. Heard learned Advocate Mr. S. S. Bora holding for learned Advocate Mr. M. D. Shinde for the appellants in Criminal Appeal No.197 of 2016, learned Advocate Mr. Joydeep Chatterji for the appellant in Criminal Appeal No.149 of 2017, learned Advocate Mr. Shaikh Ashpak Taher Patel for the appellant in Criminal Appeal No.444 of 2016 and learned APP Mr. A. V. Deshmukh for the respondents – State in all the matter.

3. The case of the prosecution in short is that the informant Dipak Sadashiv Khandare is a Professor with Women's BCA College, Parbhani, however, his native place is village Dol-Umri Taluka and District Hingoli. His parents reside in the said village. He has four sisters and all of them are married and residing with their respective husbands. Informant's family is having ancestral property bearing Gat No.107 at village Digras Vani. His parents were in need of money for performing marriage of informant's sister Punyalatabai and, therefore, according to the informant out of the ancestral property, land admeasuring 1 H 20 R was mortgaged to accused No.1 for an amount of Rs.10,000/-, however, document in the nature of sale-deed was executed. His parents had gone to repay the said amount in the year 2003, however, accused No.1 refused to accept the money. Prior to that a well was sanctioned through Panchayat Samiti, Hingoli under a government scheme and, therefore, when they were digging the well in the year 1998-1999, accused No.1 raised dispute. The land was still in possession of the parents of the informant. Accused No.1 had then knocked the doors of the Civil Court, however, it was decided in favour of the informant's parents in 2004. Accused No.1 then preferred appeal, which came to be allowed and then his parents have approached this Court. The matter was still pending on the date of the FIR and this Court had granted status quo. Though the said Court proceedings were pending, Talathi of the village mutated the name of accused No.1 in the records of right

possession column in the year 2009-2010. Informant's parents had then preferred appeal to challenge the Talathi's decision with Sub Divisional Officer. The decision was then taken that the Tahsildar would visit the land, draw panchanama and make inquiry on 18.01.2023. The said notice was given by Talathi - Dhabe through phone call, however, on the said date i.e. 18.01.2013, neither Tahsildar, nor Talathi visited the field till 3.00 p.m. The informant has further contended that he received a phone call around 4.00 p.m. on the same day from sister Punyalata that she and parents have been beaten by in all 10 persons with sticks, iron rod, axe and stones. Therefore, informant contacted his relative and asked him to shift the injured persons in the hospital. He also started to go towards the village and he could catch up the ambulance and private vehicle, which were taking his parents and sister near Pedgaon. He then accompanied them to Government Hospital. After examining his father, the doctor declared him dead and it was told that his mother and sister are seriously injured. Informant had noted the injuries by means of axe on the body of his father. So also, his sister and mother had received serious injuries. They were referred to Nanded Government Medical College Hospital and then at that point of time, he lodged FIR with the police station and on the basis of his FIR, offence vide Crime No.04 of 2013 came to be registered with Basamba Police Station, Dist. Hingoli.

4. After the FIR was lodged, investigation was carried out, panchanama of the spot was executed and also inquest panchanama was also carried out and the dead body was sent for postmortem. It appears that there was attempt to record the statements of injured persons, but they were referred to Nanded Government Medical College Hospital. Statements of witnesses were recorded. Thus, samples as well as articles which were required to be sent for chemical analysis were sent. Accused came to be arrested. Some of the accused have led discovery and the weapons used in the commission of the crime as well as the clothes on the person of deceased as well as accused persons came to be seized by drawing separate panchanama for each of the said items. The injury certificate as well as postmortem report have been collected and after considering the evidence on record and hearing both sides, the learned Trial Judge has convicted accused Nos.1 to 6 for the offence punishable under Section 302 read with Section 149 of Indian Penal Code and sentenced them to suffer imprisonment for life and to pay fine of Rs.1,000/- each in default to suffer rigorous imprisonment for six months. Further, they have been convicted for the offence punishable under Section 307 read with Section 149 of the Indian Penal Code and each one of them have been sentenced to undergo imprisonment for life and to pay fine of Rs.1,000/-, in default, to suffer rigorous imprisonment for six months. Further, they have been convicted for the offence punishable under Section 506(II) read with Section 149 of the Indian Penal Code and

they have been sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs.500/-, in default to suffer rigorous imprisonment for one month. Accused Nos.2 and 4 have been further held guilty of committing offence punishable under Section 354 read with Section 149 of Indian Penal Code and they have been sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.500/- in default to suffer rigorous imprisonment for one month. Accused Nos.1, 3, 5 and 6 came to be acquitted of the offence punishable under Section 354 read with Section 149 of Indian Penal Code and under Section 135 of the Maharashtra Police Act, however, original accused Nos.7 to 9 came to be acquitted from all the charges. Hence, these three appeals.

5. Learned Advocate Mr. S. S. Bora holding for learned Advocate Mr. M. D. Shinde for appellants in Criminal Appeal No.197 of 2016 and learned Advocate Mr. Joydeep Chatterji for the appellant in Criminal Appeal No.149 of 2017 vehemently submitted that the Trial Court has not appreciated the evidence properly. Though the prosecution has examined in all nineteen witnesses to bring home the guilt of the accused, yet the legal points which were raised by the accused persons have not been considered. The first and the foremost fact to be noted is that even in the FIR, the informant has accepted that the document that was executed by his mother was sale-deed and not a mortgage deed. Therefore, there was no question of re-conveying

the property to the parents of the informant. It is alleged by them that the informant's mother had gone to return the amount in the year 2003, but it was not accepted by accused No.1. She has not filed any suit to assert her rights. It was accused No.1, who had filed the suit. Unfortunately that suit came to be dismissed, however, the appeal filed by him came to be allowed and there was in a way injunction running against the parents of the informant, when in their appeal this Court has asked the parties to maintain status quo. Therefore, there was no reason for the parents of the informant to go in the field on the fateful day.

6. It has been further submitted that the prosecution has come with the case that Tahsildar had agreed to visit the field on 18.01.2013 and, therefore, notice was given by Talathi to the parents of the informant. Unfortunately Talathi has not been examined in this case, but according to the testimony of the informant and other witnesses, it can be gathered that many persons were present in the house of the informant, waiting for Tahsildar and Talathi to come to the spot i.e. disputed land. Abruptly, it is stated that Tahsildar cancelled his tour and what has come on record through the testimony of the Tahsildar that he had given intimation to Talathi that he will not be able to visit the land on that day and requested Talathi to pass on the said information to the parties. Talathi had not informed it to the mother of the informant and other family members.

Initially, it is stated that they were waiting for Tahsildar in the house of the deceased, however, when Tahsildar did not visit the house till about 2.00 p.m., deceased, his wife and daughter went to the field under the assumption that there is possibility of visit of Tahsildar after 2.00 p.m. till 5.30 p.m., which is the official timing of Tahsildar. Though Tahsildar has been examined, prosecution has failed to examine the Talathi. Therefore, the alleged presence of the deceased and the witnesses in this case in the disputed land was not justifiable, when the injunction was running against them.

7. It has been further submitted that there are discrepancies in the testimony P.W.11 Punyalata, who is sister, P.W.13 Prayagabai, who is the mother of informant/widow of deceased. Their statements under Section 161 of the Code of Criminal Procedure have been recorded belatedly and no proper explanation is coming from the prosecution side about the said delay. It has come on record through the medical officer who had examined them that both of them were cautious, oriented, when they were brought to the hospital. Except those two injured eye witnesses, nobody has been examined to corroborate their version. P.W.5 Subhash is the person to whom P.W.2 Deepak – informant had given call and asked him to go to the spot. He had not witnessed the incident. Same is the case with P.W.10 Nilsing Rathod, who had also gone to the spot after the incident and made

arrangements to shift the injured as well as deceased. The discovery panchanamas ought not to have been relied by the learned Trial Judge as PW.4 Gautam Khandare has admitted in the cross-examination that panchanama was already prepared on 24.01.2023 in respect of axe and iron rods. The panchas are the relatives of the informant and, therefore, they cannot be said to be independent panchas. The informant, PW.11 Punyalata and PW.13 Prayagabai had reason to implicate the accused persons and, therefore, a concocted story has been prepared. The civil dispute has triggered lodging up of the FIR and on the basis of the evidence before the trial Court, the Court ought not to have convicted the original accused Nos.1 to 6. Another fact which has not been considered is as to how the conviction could have been awarded under Section 149 of Indian Penal Code, when the accused persons have come one after another and there was no evidence that there was some prior meeting of minds to set a common object. Accused Nos. 7 to 9 have been acquitted, when they were also alleged to be the members of the unlawful assembly. It cannot be said that the prosecution has proved the guilt of the accused persons beyond reasonable doubt and, therefore, the appeal deserves to be allowed.

8. To answer the above submissions, the learned APP has supported the reasons given by the learned Trial Judge. It is submitted that each and every circumstance and evidence has been considered by the Trial Court

and the voluminous evidence has been appropriately scanned. The role attributed to each and every accused has been considered. The role of each accused has come in the evidence of P.W.11 Punyalata and it is supported by P.W.13 Prayagabai. Accused No.2 Ravindra and accused No.4 Jaiwanta had assaulted with axe on the head and neck respectively of the deceased. Accused No.6 had assaulted with iron rod on the legs of the deceased, Prayagabai and Punyalata. Punyalata's hand was fractured. Accused No.3 Arun had assaulted with crowbar on the leg of deceased, Prayagabai and Punyalata and the said assault has caused fracture to Punyalata. Accused No.7 Tanaji @ Ankush had used sickle, which caused injury to Prayagabai on her head, back, chest and other parts of the body. Accused No.4 Jaiwant had also given blow of axe on the head of Punyalata and her right leg. Accused No.2 had given blow of axe below the left eye of Punyalata. Now, the appellant No.1 is reported to be dead, but he had caused injury by iron rod on the legs of deceased and both the injured. Accused No.5 Nana had assaulted by iron rod on all the three persons and in addition to that accused Nos.2 and 4 had outraged the modesty of Punyalata. When all these details have been stated, it cannot be said that they are concocting the story. The discovery panchanams cannot be brushed aside on the ground that the panchas are relatives. Nothing contradictory has been transpired in their cross. All the witnesses have gone through the ordeal of cross-examination at length and then the learned Trial Judge has scanned

the evidence. Even the accused persons are admitted that there is long standing civil dispute. The prosecution has examined Tahsildar to prove that though he had planned visit to spot on 18.01.2023, because of some emergency meeting he could not and he had asked Talathi to communicate the said fact of cancellation of visit of Tahsildar to the parties. The deceased as well as both the injured were justified in presuming that Tahsildar will still visit the field till 5.00 p.m, because they had not received the communication from Talathi. Though Talathi - Dhabe has been examined as defence witness by the accused, it has not been proved from him that he had communicated to either the deceased or his wife P.W.13 Prayagabai about the cancellation of visit by Tahsildar and, therefore, the learned Trial Judge held that though some interim order was operating against them, their visit to the disputed area was not with any *mala fide* intention. The accused persons should not have taken objection for the presence of the deceased as well as both the injured at the said place. The common object was to eliminate the deceased and cause injury to the family members of the informant and therefore, Section 149 of Indian Penal Code has been rightly invoked. Some delay in recording the statement of the injured should not be viewed with suspicion. They would be under shock, though conscious but may take some time to settle the mind, for giving the statement. No valid fault can be found with the impugned judgment and, therefore, the conviction of the appellants is justified. It requires no

interference.

9. The learned Advocate Mr. Shaikh Ashpak Taher Patel appearing for the original informant, who has filed appeal under Section 372 of the Code of Criminal Procedure, submits that as regards accused Nos.7, 8 and 9 is concerned, the learned Trial Judge has not appreciated the evidence properly. P.W.11 Punyalata has told that accused No.7 Tanaji had assaulted Prayagabai with sickle on her leg, back, chest and other parts of the body. As regards appellant No.8 is concerned, it is stated that she used sickle to cause injury to Punyalata and accused No.9 had caught hold of the hair of Prayagabai, dragged Prayagabai and then she had also assaulted Punyalata by kicks and blows as well as abetted to kill the deceased. The learned Trial Judge has unnecessarily observed that the evidence of the prosecution is not consistent and corroborative to prove the participation and presence of accused Nos.8 and 9 at the spot. The discovery has not been taken into consideration by the learned Trial Court. They also ought to have been held guilt of committing crime.

10. Since for the criminal appellate Court dealing with criminal appeal it is permissible and mandated by law to re-appreciate and revisit the evidence, we would like to consider the evidence that has been led before the learned Trial Court. P.W.1 Satish Ghansawant is the panch to the inquest panchanama executed on 18.01.2013. He has proved inquest

panchanama Exhibit-37. He has stated that they had noticed injuries on the person of deceased. The cross-examination appears to be general in nature and to point out that he is the relative of the deceased. Even if it is taken that the said witness is relative of the deceased, yet accused has not brought on record such evidence that the injuries noted in the inquest panchanama were false. At this stage itself, we would like to consider the testimony of P.W.9 Dr. Yashwant Pawar. He has proved the inquest panchanama Exhibit-103. He had noted following external injuries on the person of deceased Sadashiv:-

1. Contused lacerated wound of 7 cms x 2.5 cms x bony depth, edges inverted, irregular shape in occipital area.
2. Contused Lacerated wound of 2.5 cms x 0.5 cms x skin deep depth, irregular shaped in frontal region left side.
3. Compound close fracture of distal radius ulna of right side along with fracture of middle 1/3rd undisplaced of radius and ulna with contusion in mid forearm admeasuring 5 cms x 3 cms. With multiple abrasions on laterally. It was antemortem wound.
4. Fracture of left side radius and ulna styloid process with carpel and metacarpel bones with contusion admeasuring 7 cms x 5 cms. On dorsum of hand and wrist. Penetrated lacerated wound of 7 cms. Distal to lateral epicondyles – a-2 x 1 x 4 cms. Deep over lateral aspect of forearm and b-3 x 2 x 3 cms. Deep over lateral aspect of forearm. C-Abrasion admeasuring 5 x 1 cms. Inprint on extensor surface of elbow.

5. Open compound fracture of tibia and fibula left side admeasuring 15 cms. Below tibial tuberosity at tibial shin. Contusion with penetrating lacerated wounds. a- admeasuring 5 x 4 cms exposed bone outside irregular shape; b-2 x 1 x 3 cms. Deep in middle 1/3rd of leg lateral aspect; and c- lacerated contused wound of size 3 x 2 x 1 cms. Irregular margins 17 cms. Below tibial tuberosity.

6. Penetrating lacerated wound of 5 cms x 0.5 cms x 3 cms. Linear shaped on lower 1/3rd of right leg medial aspect. Contused lacerated wound of size 2.5 cms x 1 cms x skin deep irregular shape on medial malleolus. Contusion of size 10 cms x 5 cms on right foot.

7. Multiple abrasions on left side scapular and inter scapular area with close fracture of left scapula with contusion.

He has deposed that the probable cause of death was head injury and hemorrhagic shock due to multiple injuries and fractures. All the injuries were antemortem. In the cross-examination, he has stated that probable time of death of Sadashiv may be one or two hours before he was brought to hospital. He has further stated that certain injuries may be possible if a person falls on stone, but it appears that he has categorically stated that all the injuries are not possible due to fall. As regards fracture to the skull is concerned, he has admitted that in respect of age old person, the simple force can cause fracture to the skull as like in the present case. He was not agree with the proposal put that except head injury all other injuries would

not have caused death. Thus, it can be said that though he has been cross-examined at length; the accused were not able to put a different picture or reason for the death of deceased Sadashiv than homicidal one. It is therefore held that the conclusion drawn by the learned Trial Judge that Sadashiv's death is homicidal in nature is proved by the prosecution. P.W.2 Deepak is the informant who was admittedly not present in the village on the day of incident, but then he says that he had received a phone call from his sister Punyalata around 4.00 p.m. on 18.01.2013 informing that all the accused persons had assaulted them. They have sustained grievous injuries and she asked him to send somebody to the field. Thereupon, he sent P.W.5 Subhash Khandare to help his family. Testimony of P.W.2 Deekap would show that there was dispute in respect of land amongst his family and the family of the accused. According to him, his mother is the owner of land bearing Gut No.107 admeasuring 1 H 20 R and she had mortgaged it to accused No.1 Ramji for Rs.10,000/-, but at that time his mother had executed sale-deed, but possession of the said land was with his mother. Dispute arose when accused No.1 got his name mutated to the revenue record of the land. He also says that he had gathered information that the Tahsildar was going to pay visit to the land on 18.01.2013. He also says that immediately after asking P.W.5 Subhash to make arrangements for shifting the injured to the hospital, he also went from Parbhani to Digras. The ambulance and private van crossed him and, therefore, he went to

Government Hospital, Hingoli from that place. In a way he is suggesting that when Sadashiv was taken to hospital, at that time, he was with his father. After his father was examined by the doctor, father was declared dead. He also says about the fact that the mother and sister are also seriously injured and they were then admitted to hospital. In the cross-examination it has been brought on record that accused No.1 had filed suit against his parents bearing Regular Civil Suit No.136 of 1999 in respect of the same land and then that suit came to be dismissed on 15.09.2004. He admits ignorance. Accused No.1 had preferred First Appeal bearing Regular Civil Appeal No.67 of 2004 and it came to be allowed on 24.06.2009. In the said appeal, accused No.1 had filed application for temporary injunction, which came to be allowed against his father, but then it is said that his parents have come to this Court challenging the order. It was denied by him that Talathi had informed his mother that Tahsildar had cancelled his visit to the suit land, thereby it was tried to be indicated that there was no necessity for his parents as well as sister to go to the disputed land. If they had no such reason, then the incident would not have taken place appears to be the defence. However, as aforesaid, he cannot be said to be the person who would depose in respect of what had happened at the disputed place. The answers to those questions were not of any importance. Thus, the informant proves the fact which was within his knowledge.

11. At this stage itself, we would like to consider the testimony of P.W.11 Punyalata and P.W.13 Prayagabai, who are the daughter and widow of the deceased Sadashiv respectively and injured witnesses themselves. They both have stated about the same dispute which was in respect of the suit land as stated by P.W.2 Deepak. As regards the events those have taken place on the day of incident is concerned, P.W.11 Punyalatha gives reason as to why she had come to the village of her parents and was with the parents at the disputed site though ordinarily she used to reside at a different village with her husband. She says that she had visited the parents after festival of Sankrant. She reached Digras around 10.30 a.m. and thereafter came to know from her mother that they had received a notice from Talathi and Tahsildar that Tahsildar would visit the field. The deceased had informed to Sarpanch, President of Tanta Mukti Samiti and other respectable persons from their village about the visit of Tahsildar. All about 10-15 persons including those named persons were awaiting for the arrival of Tahsildar and Talathi till 1.00 p.m. in the house of deceased, however, thereafter also the accused did not come till 1.00 p.m. She says that Sadashiv had given a phone call to Talathi, but that phone was switched off. They were under the impression that Talathi and Tahsildar would visit the field upto 5.00 p.m. as they have fixed the date of visit. As she herself went to the field, she says that they had carried the lunch box with them and steel utensil for drinking the water. They reached field around 2.30

p.m. They were waiting for Tahsildar to come by sitting in the shadow of the tree. Thus, it is to be noted that the purpose for which they had gone to the field has come on record. The same facts have been repeated by PW.13 Prayagabai. It was tried to be submitted that when the deceased, his widow, relatives as well as agents, servants etc. were restrained by temporary injunction order passed by the District Court, then they ought not to have gone in the field at all. Their presence at the spot is doubtful. Here, it is to be noted that the accused persons have not filed any complaint against the parents as well as these witnesses that they have committed offence by encroaching upon their field. When these witnesses have stated that under the *bona fide* belief they had gone to the spot, then we cannot raise any objection for the presence of Sadashiv, Prayagabai and Punyalata. At this stage itself we would like to consider the testimony of PW.8 Vidyacharan Kadavkar, the Tahsildar. He says that case was pending before him for mutation and, therefore, he decided to pay visit to the land on 18.01.2013, thereby he admits the issuance of notice to the concerned parties for remaining present at the spot on 18.01.2013, but then it is stated that he had cancelled that visit because of his urgent official work and, therefore, he had given directions to Talathi on 17.01.2013 regarding cancellation of the visit. In the cross, this fact has not been disputed, however, the defence has come with the case that the Talathi in turn had informed all the parties about the cancellation of visit of Tahsildar.

Interesting point to be noted is that said Talathi has been examined by the defence as the defence witness. D.W.1 Trimbak was the then Talathi of circle Sirsam. He was in-charge of village Digras. He says that on 17.01.2013 Tahsildar had called him to Tahsil office and suggested to bring record of Gut No.107 to him. As per the intimation given by Tahsildar, he says that Tahsildar had decided to pay visit to the spot on 18.01.2013, but later on D.W.1 Trimbak was called with record in Tahsil office on 18.01.2013. Accordingly, he reached Tahsil office around 10.30 a.m., but at that time, Tahsildar told him that the said visit is cancelled as he had some meeting with the Collector office. Tahsildar had suggested him to inform the said fact to the parties. He says that he had given a telephone call to Bhaskar Kure, who was the member of the Grampanchayat stating that the visit of the Tahsildar is cancelled. He had then asked Bhaskar Kure to inform the said fact to the concerned parties i.e. accused as well as deceased Sadashiv. Important point to be noted is that the defence has not examined Grampanchayat member Bhaskar Kure. If the intimation about cancellation of visit of Tahsildar was not properly given to the deceased and his family members, it can be said that the deceased and his family members were justified in going to the land and waiting for Tahsildar to come. The presence of these three persons near the spot cannot be doubted at all.

12. Further, the testimony of P.W.11 Punyalata and P.W.13 Prayagabai would show that they had stated that after they reached to the spot, first of all accused Nos.2 and 4 came with axe. They had given blow of axe to the father on the neck and head. It is stated that other accused came armed with iron rod, sickle, axe, etc. Role is attributed to each of the accused as to what they have done. We need not repeat the same for the sake of brevity. As regards the outrage of modesty is concerned, it is stated that it was done by accused Nos.2 and 4 and there cannot be a common intention to outrage modesty of woman and, therefore, the learned Trial Judge has rightly acquitted the other accused persons from the charges of Section 354 of Indian Penal Code. The accused persons have not only assaulted the deceased, but they also assaulted to P.W.11 Punyalata and P.W.13 Prayagabai.

13. The testimony of these two witnesses is attacked on the point that their statements under Section 161 of the Code of Criminal Procedure are belated. As regards the evidentiary value of the statement of accused under Section 161 of the Code of Criminal procedure is concerned on the point of belated recording, the law has been laid down in ***Bunty @ Guddu Vs. State of M. P., (2004) 1 SCC 414***, wherein it has been held that :-

“As regards delayed examination of certain witnesses, this Court is in several decisions has held that unless the

Investigating officer is categorically asked as to why there was delay in examination of witnesses, the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness the prosecution version becomes suspect. It would depend on several factors. If the explanation offered for the delayed examination is plausible and acceptable and the Court accepts the same as plausible, there is no reason to interfere with conclusion.”

14. Here, the defence Advocate has tried to bring it on record that P.W.11 and P.W.13 both were conscious oriented. The incident has taken place on 18.01.2013 and the statement of Prayagabai has been recorded by P.W.16 P.I. Shaikh on 29.01.2013. First of all, it was tried to be brought on record from the cross-examination of P.W.2 Deepak that his mother and sister were in a fit state to give statement, however, it is to be noted that he has stated that he had not even talked to them on 19.01.2013 at 4.00 a.m. he admits that on 20.01.2013 police officer of Hingoli had come to record the statement of his mother and sister, but he denies the suggestion that he himself and his relatives restrained police officer from recording their statements. He cannot be said to be the proper person to say anything regarding the fitness of the mother and sister to give statement. It has to be told either by the doctor who were treating them or the police officer who recorded or attempted to record the statement and the injured herself.

PW.9 Dr. Yashwant Pawar from Civil Hospital, Hingoli was the person who had examined PW.11 Punyalatabai and PW.13 Prayagabai. He has told in his examination-in chief as to what were the injuries sustained by them, but in cross-examination he admits that both the injured patients were referred to Nanded hospital. PW.15 Dr. Devendrasingh Palewal is the medical practitioner of Sai Accident Hospital at Nanded. He has also stated the injuries which he had noted on the injured witnesses. In his cross-examination he had stated that the two patients were admitted in his hospital after taking discharge from Yeshoda Hospital. He says that Prayagabai was conscious and well oriented to the person and time when she was admitted in his hospital, so also Punyalatabai was conscious and well oriented. He says that Punyalatabai and Prayagabai was never unconscious in his hospital from the time their admission till discharge i.e. from 20.01.2013 to 29.01.2013, but in the cross-examination he further says that police had not approached him in between 20.01.2013 to 23.01.2013. With this background, it is required to be seen as to what the investigating officer says about the belated recording of statement of these two witnesses. PW.16 P.I. Shaikh admits that he had not collected the medical certificates of both the injured witnesses from medical officer, Hingoli, but those certificates are from Dr. Palewal. Further it has come that when both the injured were admitted to Yeshoda hospital on 18.01.2013, he himself not made inquiry with the doctor there. He says

that our police staff had gone to the hospital to record the statement of Punyalatabai and Prayagabai, but constable V. T. Narnaware gave report Exhibit-149 to him. The said report has been exhibited as it was referred in the cross-examination. As per Exhibit-149, it was reported that when the police went to record the statement, had met Dr. R. N. Jadhav and asked him to give report regarding the fitness of the witness, but they were told that they are not in a position to give statement. In the said report also it is said that the relatives of the injured asked the concerned police officer as to where the Investigating Officer is and the said police officer should not take the statement as he is not authorized, was their stand. Further, in his cross-examination, it has come that he met Prayagabai on 23.01.2013 and found her to be conscious. He put questions to her, but she did not answer. Though the doctor initially certified that both the witnesses were conscious and would be able to give statement, it is not further extracted that as to why he had not recorded the statement of Punyalata. That reason has not been extracted from him. The statement of Prayagabai is recorded on 29.01.2013 by P.W.17 Namdev after it was certified by the doctor that she is in a position to give statement.

15. As regards the belated recording of statement is concerned, the learned Trial Judge has dealt with the point in paragraph Nos.217 to 220. It has been concluded by him that the prosecution has not adduced

trustworthy and reliable evidence to prove the fact that Prayagabai and Punyalatabai were unconscious between 18.01.2013 to 20.01.2013. It is also observed that the prosecution has withheld the material piece of evidence. Thus, when the Trial Court itself had come to that conclusion and there is no proper explanation on the part of the prosecution for belated recording of evidence, then it is required to be seen as to whether we can discard the testimony of those two witnesses and whether it can be the sole ground for acquitting the appellants.

16. In order to consider the said fact we would also consider the testimony of the defence witness. We have already taken note of the testimony earlier, but by way of quick reference it can be said that D.W.1 Trimbak Dhabe, Talathi, had stated that the Tahsildar informed him about the cancellation of visit and he has given the said message to the Grampanchayat member Bhaskar Kure. In the cross-examination, D.W.1 Trimbak has stated that he do not remember the mobile number of said Bhaskar and his mobile number was not saved with him. He has not taken care to see that whether Bhaskar had communicated the said message to the parties concerned or not. He had not issued any notices in respect of cancellation of visit of Tahsildar. Therefore, when the fact of cancellation itself is not communicated properly, we have already observed that the presence of deceased, P.W.11 Punyalatabai and P.W.13 Prayagabai cannot be

said to be justifiable. Death of Sadashiv is homicidal in nature. Therefore, doubt in respect of presence of P.W.11 Punyalatabai and P.W.13 Prayagabai cannot be raised as eye witness to the incident. Under the said circumstance, recording their statements belatedly cannot be considered as a ground of acquittal of the accused. Even if there is belated recording of statement of the eye witnesses, yet if their statements are believable and inspiring confidence, then their testimony cannot be brushed aside. Here, in this case, we want to rely on the decision in ***Raju Alias Balachandran and others Vs. State of Tamil Nadu, [(2012) 12 SCC 701]***, wherein it has been observed thus :-

“21. What is the difference between a related witness and an interested witness? This has been brought out in *State of Rajasthan Vs. Kalki, [(1981) 2 SCC 752 : 1981 SCC (Cri.) 593]*. It was held that :

“7. ... True, it is, she is the wife of the deceased; but she cannot be called an ‘interested’ witness. She is related to the deceased. ‘Related’ is not equivalent to ‘interested’. A witness may be called ‘interested’ only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be ‘interested’.”

22. In light of the Constitution Bench decision *State of Bihar Vs. Basawan Singh, [AIR 1958 SC 500 : 1958 Cri.LJ 976]*, the view that a “natural witness” or “the only possible eyewitness” cannot be an interested witness may not be, with respect, correct. In

Basawan Singh (Supra), a trap witness (who would be a natural eyewitness) was considered an interested witness since he was “concerned in the success of the trap”. The Constitution Bench held :

“15. ... The correct rule is this: if any of the witnesses are accomplices who are *particeps criminis* in respect of the actual crime charged, their evidence must be treated as the evidence of accomplices is treated; if they are not accomplices but are partisan or interested witnesses, who are concerned in the success of the trap, their evidence must be tested in the same way as other interested evidence is tested by the application of diverse considerations which must vary from case to case, and in a proper case, the court may even look for independent corroboration before convicting the accused person.”

17. Further, we would like to say that though the medical officer, who examined P.W.11 Punyalatabai and P.W.13 Prayagabai and found them to be conscious, but the investigating officer not taking steps to record their statements under Section 161 of the Code of Criminal Procedure immediately. It can be said to be the defect in the investigation. The effect of defective investigation was considered by the Hon’ble Supreme Court in ***Karnel Singh Vs. State of M.P., [(1995) 5 SCC 518]*** and observed that :-

“In cases of defective investigation the court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.”

18. The same observations have been reiterated in *Amar Singh Vs. Balwinder Singh and others*, (2003) 2 SCC 518 and in *Dhanaj Singh Alias Shera and others Vs. State of Punjab*, [(2004) 3 SCC 654]. Note has also been taken in respect of the decision in *Paras Yadav and others Vs. State of Bihar*, 1999 (2) SCC 126, wherein it has been held that if the lapse or omission is committed by the investigating agency or because of negligence, the prosecution evidence is required to be examined de hors, such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials alone should not stand on the way of evaluating the evidence by Courts; otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

19. The principle laid down in all these cases would be that if evidence led by the prosecution is worthy of credence, the point that the investigation was faulty or statements under Section 161 of the Code of Criminal Procedure were belatedly recorded pales into insignificance.

20. What is transpiring from the testimony of PW.11 and PW.13 is that accused No.2 and accused No.4 used axe. The blow of axe by accused No.4 was on the neck of Sadashiv and blow of axe by accused No.2 was on head. After Sadashiv fell down, the other accused came, but they were armed with iron rod, crowbar, sickle and axe. Accused No.6 gave blow of iron rod on the leg of Sadashiv, legs of PW.11 and PW.13 and also on the hand of

PW.11 resulting in fracture to her hand. Accused No.3 used crowbar for causing injury to the leg of Sadashiv and PW.13 and fracture to PW.11. Accused No.7 used sickle to cause injury to the PW.11 and PW.13 on different parts of their body. Accused No.4 used axe to cause injury to the head and right leg of PW.11. Accused No.2 used axe to cause injury to the eye of PW.11. Accused No.9 had hold the hair of PW.13 and she dragged PW.11 and gave kicks and blows as well as abetted the killing of Sadashiv. Accused No.8 used sickle to cause injury to hand and body of PW.11. Independently, PW.13 Prayagabai has said that accused No.2 and accused No.4 had given threat to commit rape on PW.11 and PW.13. Their roles have been taken into consideration by the learned Trial Judge and, therefore, they are believable though their statements under Section 161 of the Code of Criminal Procedure have been recorded belatedly.

21. PW.5 Subhash is the person who visited the spot, but in the cross-examination, he has stated that he had not noticed the injuries. This might be in the sense that he may not be able to describe them properly, otherwise if they were not injured at all, then why he would have shifted them to hospital. Therefore, the said cryptic answer will not be in favour of the accused. PW.2 Deepak says about what had happened after he joined the ambulance and the vehicle and goes with them to the hospital.

22. The prosecution has proved the inquest panchanama and the homicidal death of Sadashiv. Prosecution has also proved the injuries on the person of P.W.11 and P.W.13. Further the prosecution has also examined P.W.3 Santosh, panch to the spot panchanama Exhibit-48, P.W.4 Gautam panch to the seizure of clothes of some of accused and discovery of axe. It is pertinent to note that the incident had taken place on 18.01.2013 and the discovery of the axe is on 24.01.2013. He is also the panch to the seizure of iron rods. P.W.6 Babarao is the panch to the discovery panchanama by accused Arun Khandare and Ravindra Khandare of crowbar and axe respectively. P.W.7 Uttam is the panch to the seizure of clothes of accused Mohan Khandare and Nana. P.W.12 Satish is the panch to the seizure of clothes of injured. Though almost all have admitted in the cross-examination that they are the relatives of the deceased, that cannot be the only criteria to reject the discovery or seizure proved by them. P.W.16 to P.W.19 are the police officers, who have done part of the investigation. Therefore, taking into consideration the above re-assessment and re-appreciation of evidence before the trial Court, we hold that the Trial Court has not committed any illegality or error in convicting the accused.

23. As regards the acquittal of accused Nos.7 and 9 is concerned, we are satisfied with the reasons given by the learned Trial Judge. It would be the human tendency that when such incident take place then the other family

members are roped in. That does not mean that the other family members, who have committed the offence, can claim benefit of false implication of the co-accused.

23. In *Rohtas and others Vs. State of Haryana*, MANU/SC/934/2020, the difference between Section 34 and 149 of Indian Penal Code has been reiterated, which was stated in *Nallabothu Venkaiah Vs. State of Andhra Pradesh*, (2002) 7 SCC 117. It has been further observed by referring to *Mahbub Shah Vs. King Emperor*, AIR 1945 PC 118 that :-

“22. Although both Section 34 and 149 of the Indian Penal Code are modes for apportioning vicarious liability on the individual members of a group, there exist a few important differences between these two provisions. Whereas Section 34 requires active participation and a prior meeting of minds, Section 149 Indian Penal Code assigns liability merely by membership of the unlawful assembly. In reality, such ‘common intention’ is usually indirectly inferred from conduct of the individuals and only seldom it is done through direct evidence.”

24. Therefore, even if we consider that case under Section 149 of Indian Penal Code is not made out, yet it would certainly fall under Section 34 of Indian Penal Code.

25. There is no merit in the appeals. All the appeals deserve to be dismissed. Accordingly, all the appeals stand dismissed.

[Y. G. KHOBRADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm