

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 475 OF 2016

1. Shri Ishwar Khandu Patil
Age: 55 years, Occupation: Agriculture

[Appeal abated against him as per
order dated 24.07.2023]

2. Shri Umesh Ishwar Patil
Age: 25 years, Occupation: Agriculture

3. Shri Chandu Ishwar Patil
Age: 35 years, Occupation: Agriculture

All Residents of : At Mukti
Taluka and District Dhule
Presently in jail.

... Appellants

Versus

1. The State of Maharashtra
[At the instance of Shri Prithviraj
Pandit Patil, Age : 30 years,
Resident of : At Mukti,
Taluka and District Dhule]

Through Dhule Taluka Police Station,
Dhule, Taluka and District Dhule.

2. Kavita Samadhan Patil
Age : Major, Occu. : Household,
R/o. Mukti, Tq. Dhule, Dist. Dhule.

[R. No.2 added as per order dated
24.07.2023]

... Respondents

**WITH
CRIMINAL APPEAL NO. 490 OF 2016**

1. Sunil @ Appa Nimba Patil
Age 32 years, Occu: Agriculturist,
2. Satish @ Yogesh Limba Patil
Age 32 years, Occu: Agriculturist,
Both residing at Mukti,
Tq. and Dist. Dhule.

... Appellants

[Ori. Accused Nos. 1 & 2]

Versus

1. The State of Maharashtra
2. Kavita Samadhan Patil
Age : Major, Occu. : Household,
R/o. Mukti, Tq. Dhule, Dist. Dhule.

[R. No.2 added as per order dated
24.07.2023]

... Respondents

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Mr. R. N. Dhorde, Senior Advocate i/by Mr. V. R. Dhorde, Advocate for the Appellants in Criminal Appeal No. 475 of 2016.

Mr. A. B. Girase, Advocate h/f Mr. Tapan K. Sant, Advocate for the Appellants in Criminal Appeal No. 490 of 2016.

Mr. S. D. Ghayal, APP for Respondent No.1-State in both Appeals.

Mr. P. S. Paranjape, Advocate for Respondent No.2 in both Appeals.

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**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

Reserved on : 26.10.2023

Pronounced on : 03.11.2023

JUDGMENT [ABHAY S. WAGHWASE, J.] :

1. Appellants are convicts for commission of offence under Sections 143, 147, 148, 302, 307, 323, 504, 506 r/w 149 of the Indian Penal Code [IPC] in Sessions Case No. 87 of 2014 dated 04.07.2016 passed by learned Additional Sessions Judge, Dhule. Original accused nos. 1 to 4 and 6 have preferred appeals bearing Criminal Appeal Nos. 475/2016 and 490/2016 respectively.

2. Though two distinct appeals have been filed questioning legality and maintainability of the judgment of conviction, as both appeals are heard simultaneously and answered by learned APP on one and the same day, appeals are dealt together by way of common judgment.

PROSECUTION STORY IN BRIEF IS AS UNDER

3. Shorn of details, in brief, case of prosecution is that during Ganpati festival of 2014, there was quarrel between accused party and informant party on account of raising volume of the loudspeaker. It is in such backdrop, case of prosecution is that, both sides were in

cross terms. On 29.01.2014, accused named in the chargesheet came on two motorcycles and in backdrop of above previous quarrel, assault was made on Samadhan and Dattatraya causing them grievous injuries. PW2 informant when intervened to pacify them, he was beaten by fistiscuffs. Deceased Samadhan was declared dead on examination and therefore, PW2 Pruthviraj, brother of Samadhan, registered FIR which was investigated by PW10 P.I. Somwanshi and on gathering sufficient evidence, in all 6 accused were chargesheeted and tried by learned Additional Sessions Judge, Dhule, who, on appreciating the oral and documentary evidence adduced by prosecution, passed following order:

“1) The accused No.1 Sunil @ Appa Nimba Patil, accused No.2 Satish @ Yogesh Nimba Patil, accused No.3 Ishwar Khandu Patil, accused No.4 Umesh Ishwar Patil & accused No.6 Samadhan @ Chandu Ishwar Patil all R/o Mukti, Tal & Dist. Dhule, are hereby convicted u/s 235(2) of the Code of Criminal Procedure for the offence punishable under section 302 r/w/s. 149 of the Indian Penal Code and sentenced to suffer life imprisonment and to pay a fine of Rs.5,000/- (Rs.Five thousand only) each. In default of payment of fine amount, they have to suffer rigorous imprisonment for six (6) months each.

2) The accused Nos. 1 to 4 & 6 are convicted u/s 235(2) of the Code of Criminal Procedure for the offence punishable under section 307 r/w/s. 149 of the Indian Penal Code and sentenced to suffer life imprisonment and to pay a fine of Rs.3,000/- (Rs. Three thousand only) each. In default of payment of fine, they have to suffer rigorous imprisonment for three (3) months each.

3) The accused Nos. 1 to 4 & 6 u/s 235(2) of the Code of Criminal Procedure are convicted for the offence punishable under section 143 of the India Penal Code and sentenced to suffer rigorous imprisonment for six (6) months each.

4) The accused Nos. 1 to 4 & 6 are convicted for the offence punishable under section 147 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for six (6) months each.

5) The accused Nos. 1 to 4 & 6 are convicted for the offence punishable under section 148 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for two years each.

6) The accused Nos. 1 to 4 & 6 are convicted for the offence punishable under section 323 r/w/s 149 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for six (6) months each.

7) The accused Nos. 1 to 4 & 6 are convicted for the offence punishable under section 504 r/w/s. 149 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for one (1) year each.

8) The accused Nos. 1 to 4 & 6 are convicted for the offence punishable under section 506 r/w/s. 149 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for three (3) years each.

9) As punishment for performing an unlawful assembly, assaulting, committing murder and attempt to commit murder of deceased Samadhan and injured Dattatraya respectively, is already imposed against the accused, therefore, separate punishment is not required to be imposed for the offence u/s 130 p/u/s 177 of the Motor Vehicles Act.

10) After depositing amount of fine, 50% amount out of the fine may be given to the widow of deceased Samadhan as compensation.

11) The above substantive sentences shall run concurrently.

12) The accused Nos. 1 & 2 are in jail since 30/01/2014 onwards, accused Nos. 3 & 4 are in jail since 08/04/2014 and accused No.6 is in jail since 29/04/2014 onwards. They are entitled for already undergone period as set-off under section 428 of the Code of Criminal Procedure.

13) The accused Nos. 1 to 4 & 6 are hereby acquitted vide section 235(1) of the Code of Criminal Procedure for the offence u/s 4 punishable under section 25 of the Arms Act.

14) Police Inspector of Dhule Taluka Police Station, Dhule, is hereby directed to file separate charge against the absconding accused No.5 Yogesh Nana Patil, R/o Mukti, Tal & Dist. Dhule, whenever he is arrested.

15) Muddemal properties be sent to Dhule Taluka Police Station, so as to enable them to produce it along with separate charge sheet to be filed against the absconding accused No.5 Yogesh Nana Patil, on his arrest as directed by this Court.

Copies of this judgment be provided to all accused, free of costs.

(Dictated and pronounced in open Court.)”

Thus accused nos. 1 to 4 and 6 are convicted.

SUBMISSIONS

4. Learned senior Advocate Shri R. N. Dhorde representing accused nos. 4 and 6 (appellant accused no.3 Ishwar died and therefore proceedings stood abated against him), while defending

them would submit that it is apparently false implication. He pointed out that PW5 Ritesh, eye witness as well as PW1 Rohidas have not marked presence of his clients i.e. Umesh and Chandu. Though PW2 informant has named his clients, it is pointed out that only role attributed to them is of holding. It is pointed out that going by the evidence of prosecution witnesses, it is doubtful whether they had occasion at all to see the alleged incidence. He emphasized that alleged incidence had taken place in the night and in spite of injured claiming people around, no independent witness has been examined. Even important witness like Yogesh and Dnyaneshwar (cousin brothers of deceased), whose names are repeatedly appearing in the evidence of prosecution witnesses, have been withheld by prosecution for the best reasons known to it. He took us through the evidence of prosecution witnesses and would question as to whether, from the evidence of prosecution witnesses, genesis of the occurrence is coming on record. At this juncture, he pointed out that some incidence of quarrel is stated by prosecution witnesses but according to him, even so called quarrel was during Ganpati festival and the incident in question has taken place in January and therefore, what was the motive after five to six months having not come on record, it is his submission that there is no motive and the alleged assault comes under shadow of doubt.

5. His next submission is that when there is no role attributable to his clients, how Section 149 of IPC could at all be invoked when according to him, there is nothing to infer common object entertained and shared by his clients along with others. In support of his such submissions, he seeks reliance on the ruling of Hon'ble Apex Court in *Taijuddin v. State of Assam and Others* ; (2022) 1 SCC 395, *Bal Mukund Sharma alias Balmukund Chaudhary and others v. State of Bihar* ; (2019) SCC 469 and *Roy Fernandes v. State of Goa and others* ; (2012) 3 SCC 221.

6. As regards failure of prosecution to examine important witnesses and deliberately withholding them, he seeks reliance on the ruling of Hon'ble Apex Court in the case of *Deepak Kumar v. Ravi Virmani and another* ; (2002) 2 SCC 737, *Ishwar Singh v. State of U.P.* ; AIR 1976 SC 2423, *Vencil Pushpraj v. State of Rajasthan* ; AIR 1991 SC 536 and *Ramashish Yadav and others v. State of Bihar* ; AIR 1999 SC 3830.

7. Learned counsel Mr. A. B. Girase representing accused nos. 1 and 2 i.e. Sunil and Satish also criticized the judgment by pointing out that evidence of prosecution witnesses is not trustworthy as they

are not consistent. Even he questioned the credibility of prosecution version on the premise that in spite of occurrence taking place in residential locality and in spite of reference of people at the spot at the time of occurrence, no independent witness is examined. He would submit that only interested witnesses are examined and important witnesses like Yogesh, Dnyaneshwar and Onkar are not examined. Taking us through the answers given by prosecution witnesses in cross, he questioned the prosecution story by submitting that different witnesses are quoting different timings. There is no unanimity about exact spot of incident as various versions are coming from the mouth of various witnesses. On such count, he submits that here, prosecution has failed to establish the exact spot of incident and therefore story of prosecution is doubtful. According to him, some witnesses point to the spot in court yard of one Onkar Bhoi whereas, other spot coming from prosecution's own witness is a spot in front of garage, but no blood stains are found at the said spot. Evidence of PW2 informant Pruthviraj and even injured PW6 Dattatraya is full of material omissions and contradictions. He pointed out that by no means PW1 Rohidas can be said to be an eye witness.

8. Attacking the recovery evidence, he submitted that prosecution witnesses claim that after the occurrence accused fled with the

weapons in their hand but surprisingly, subsequently weapons are shown to be recovered from the very vicinity of the spot and thus, on such count, prosecution version is criticized as unworthy of credence.

9. He claims that even testimony of PW2 informant, PW5 Ritesh and PW6 Dattatraya is not consistent and is rather full of variances. For all above reasons, it is his submission that, implication is because of some quarrel which had taken place few months back and as such, there being no evidence regarding previous occurrence, it is his submission that both, motive and genesis, are not forthcoming. For all above counts, he criticized the judgment of conviction by submitting that there is improper appreciation and analysis of the evidence at the hands of learned trial court and consequently, he too prays for allowing the appeal by setting aside the impugned judgment.

10. According to learned APP, the judgment under challenge is perfectly valid, legal and sustainable in the eyes of law. He submits that here, case of prosecution is rested on not only direct eye witness but also injured eye witness. Occurrence has been proved through their testimonies. Throughout their testimonies have remained unshaken. There is use of deadly weapons like knife and gupti. Occurrence had taken place in the backdrop of previous quarrel.

Therefore motive is also established. There is death of one person and PW6 Dattatraya was a victim of murderous assault. Injured PW6 Dattatraya, informant PW2 Pruthviraj as well as independent witness PW5 Ritesh are all consistent about arrival of accused getting armed and carrying out assault. Therefore, only conclusion that could be drawn from the available evidence is that appellants are real culprits and are rightly held guilty. According to learned APP only on proper appreciation, conclusion has been reached at. There being no perversity, he submits that there is no merit in the appeal and consequently he prays to dismiss the same.

EVIDENCE BEFORE THE TRIAL COURT

11. To establish their case, prosecution has examined in all 10 witnesses. Their role and status can be summarized as under:

PW1 Rohidas Gangaram Patil, is resident of the same locality, who acted as pancha to inquest panchanama Exhibit 42

PW2 Informant Pruthviraj Pandit Patil is brother of deceased Samadhan. He claims to have witnessed the incident. He identified the complaint lodged by him to be at Exhibit 44 so also the weapons Article 41 gupti and Article 40 knife.

- PW3** Dr. Ajeet Gajanan Pathak is the autopsy doctor. He identified the postmortem report issued by him to be at Exhibit 49. He also issued weapon examination report Exhibit 52 opining about injuries mentioned in column no. 17 to be possible weapons Articles 40 and 41.
- PW4** Dr. Noyel Philip Britto is the doctor who treated injured Dattatraya and issued injury certificate Exhibit 55.
- PW5** Ritesh Suresh Saindane (Patil) is resident of the locality. He claims to be the eye witness.
- PW6** Dattatraya Pandit Patil is the injured eye witness.
- PW7** Rajendra Pandit Shimpi is pancha to memorandum of disclosure and recovery of weapon gupti at the instance of accused no.2 Satish (Exhibits 62 and 63).
- PW8** Bhaskar Chaitram Nagrale is pancha to memorandum of disclosure and recovery of knife at the instance of accused no.1 Sunil (Exhibits 67 and 68).
- PW9** Narendra Randhir Gaikwad has acted as pancha to seizure of clothes of deceased Samadhan.
- PW10** P.I. Ramrao Madhavrao Somwanshi is the Investigating Officer [IO].

Defence has also examined following three witnesses:

DW1 Dr. Ravindra Prakash Sonawane who examined accused nos. 1 and 2 i.e. Sunil and Satish. He claims to have noticed two CLW to Sunil and one CLW injury to Satish which, according to this medical expert, were simple in nature. He identified injury certificates issued by him to be Exhibits 118 and 119.

DW2 PI Salim Abdul Raje deposed about registering offence on the strength of complaint lodged by Accused Sunil while in Civil Hospital, Dhule. He identified the complaint and the FIR to be Exhibits 124 and 125.

DW3 PSI Milind Kisan Bansode is the police official who investigated the FIR lodged by accused Sunil and filed "B" summary report.

HOMICIDE

12. We have noticed that here, there is absolutely no challenge to the manner of death to be homicidal one. Still, when we visited evidence of autopsy doctor PW3 Dr. Pathak, he is found to have deposed about coming across three stab injuries, two abraded contusions and seven incised wounds which he mentioned in column no.17. Considering his substantive evidence containing number, nature and sites of injuries and the manner of his cross, we are also of

the firm opinion that death of Samadhan is proved by prosecution to be homicidal one.

ANALYSIS

13. In our opinion, on the point of actual occurrence, evidence of PW1 Rohidas, PW2 informant Pruthviraj, PW5 Ritesh, PW6 Dattatraya is of significance. Rest are panchas, medical experts and police officials. Therefore, we would proceed to analyze the evidence of so called ocular account and then switch over to medical account to ascertain whether ocular account finds support from medical evidence and finally, to ascertain whether, as questioned in appeal, independent witnesses are deliberately withheld and whether testimonies of so called eye witnesses are worthy of credence or not.

14. **PW1 Rohidas**, in his evidence at Exhibit 41, has deposed about knowing accused as well as informant party being residents of his village and there being quarrel between them on account of volume of loudspeaker during Ganpati festival.

Regarding the occurrence on 29.01.2014, he deposed in para 3 of his examination-in-chief as under:

“3) On 29/1/2014 at about 9.30 pm, I was talking with one Sudam Budha Patil near the hotel of Mohan Gambhir Patil. At that time I heard some shouts from Anchale road. I and Sudam Patil rushed towards that shouts. There I saw in the light of electric pole that accused Sunil Nimba was running away possessing with blood stained knife towards Duttnagar area. I also saw that accused Satish @ Yogesh Nimba Patil was running having blood mixed gupti (big knife). Thereafter, I saw in the courtyard of Onkar Dhana Bhoi, Samadhan Pandit and Dattatraya Patil were lying in injured condition. They were in bleeding condition. I saw that the intestines from the stomach of Dattatraya had come out. People sent Samadhan and Dattatrya to Astha Hospital, Dhule, in the separate vehicle. After half an hour I went to said Astha Hospital, Dhule, there I came to know that Samadhan is died. From Astha Hospital, I returned to home.”

15. **PW2 Pruthviraj** is the informant and brother of deceased Samadhan as well as injured Dattatraya. In his evidence at Exhibit 43, in para 1 he deposed about the earlier incident which took place during Ganpati festival four and half months prior to the main incident. He deposed about accused Sunil, his brothers and uncles being aggrieved due to increased volume of loudspeaker, all accused along with absconding accused Yogesh coming armed with axe and sticks, asking Dattatraya to minimize the volume, assaulting him and

when this witness tried to rescue Dattatraya, accused assaulting him too by means of stick and so Dattatraya lodging complaint at Dhule taluka police station. He deposed that since the said incident, there was enmity between two families.

Regarding the actual incident on 29.01.2014, he deposed in para 2 which is reproduced as under:

“2) My cousin brother Yogesh and Dnyaneshwar run garage of motorcycle repairing on Anchale road at Mukti village. On 29/1/2014 at about 9.15 pm, I had gone to the grocery shop of Anil Jain. The distance between said grocery shop of Anil Jain and garage of my cousin Yogesh is 80 to 85 feet. At that time Yogesh and Dnyaneshwar both were at their garage. At that time all accused came triple seats each on two motorcycles from Anchale road and proceeding through the said road. They stopped their motorcycles on the garage of Yogesh and Dnyaneshwar. They alighted from the motorcycles and started abusing to Yogesh and Dnyaneshwar. During that period Samadhan and Dattatraya were proceeding near the garage. All accused were saying that “tumhi loka matun gele” you have become arrogant and lodged complaints against us. They started assaulting Dnyaneshwar, Yogesh, Dattatraya and Samadhan. I went there to rescue. They also started assaulting me. They assaulted me by means of fist and kick blows. Meanwhile accused Chandu said not to leave

anybody and kill either of them. At that time accused Sunil and Satish removed pointed weapon like kukari. Accused Ishwar and Chandu caught hold Samadhan. Accused Sunil and Satish started giving blow of said weapon on the person of Samadhan. Meanwhile, Dattatraya went to rescue, accused Sunil gave blow on the person of Dattatrya. Initially, when Dattatrya went to rescue, accused Yogesh and Umesh caught hold of his hands. Samadhan and Dattatrya both fallen on the ground. The intestines of Dattatraya had come out. Both were in bleeding condition. My cousin Yogesh, Dnyaneshwar, Ritesh Suresh Patil, Rohidas Gangaram Patil gathered there and took Dattatraya and Samadhan to Astha Hospital, Dhule, in separate vehicle. I and my parents were with Dattatraya in one vehicle and Dnyaneshwar and Yogesh were with Samadhan in another vehicle. Doctor examined Samadhan in the hospital and declared him as dead. Thereafter, I went to Dhule Taluka Police Station and lodged complaint there. Complaint now shown to me is the same. Its contents are correct. It bears my signature. It is marked at Exh. 44.”

16. **PW5 Ritesh** is the resident of the same village. He also claims to be an eye witness to the incident. In his evidence at Exhibit 58 in the first para he gave deposition as under:

“I know all accused present before court. The incident is occurred on 29/01/2014 at about 9.00 to 9.15 pm. At that

time, I along with one Sharad and Ravindra were sitting on the bench near one pan stall on Anchale road. At that time, I and Sharad were proceeding for urination towards Anchale road. When we reached there, we saw there was rush near the house of Onkar Bhoi. I saw that there was gupti in the hand of Satish Nimba Patil and a knife in the hand of Sunil Nimba Patil. They both gave blows of the said gupti and knife on the person of Samadhan Pandit. At the same time, Sunil Nimba Patil hold the neck of Dattatraya and gave a blow of a knife in the stomach of Dattatraya. Therefore, intestines of Dattatraya were came out. Both Dattatraya and Samadhan fallen on the ground. At that time, Rohidas Gangaram, Dnyaneshwar Gulab, Pruthwiraj Pandit and Dnyaneshwar Bapu were present there. Accused Satish Nimba and Sunil Nimba ran away towards Anchale road along with their weapons. Near the said spot there was an electric mercury street light. Said Satish Nimba and Sunil Nimba are present before the court today. I can identify the said gupti and knife if shown to me. Muddemal Article No.40 knife now shown to me was in the hand of Sunil Nimba, whereas muddemal article No.41 gupti now shown to me was in the hand of Satish Nimba.”

17. Injured **PW6 Dattatraya** is another brother of deceased Samadhan. His evidence is at Exhibit 60 in which he initially deposed about enmity between accused and informant party due to the

incident during Ganpati festival in 2013. On the occurrence dated 29.01.2014, he deposed in para 3 as under:

“(3) On 29/1/2014 at about 9.00 to 9.15 pm, I was sitting near the ‘Jaishriram Garage’ of Dnyaneshwar Bapu Patil. At that time, accused Sunil Nimba, Satish Nimba and Ishwar Khandu came on one motorcycle by name Pulsar. Along with them accused Chandu Ishwar, Umesh Ishwar and Yogesh Nana came on another motorcycle of Discover make. They made motorcycle stationary, alighted from it and started abusing us. They said that at the time of Ganpati festival, we saved, but now we will kill someone. Accused Sunil Nimba said this fact. Due to this, Dnyaneshwar Bapu and Yogesh Bapu made the shutter of the garage down. All accused started assaulting me, Dnyaneshwar Bapu and Yogesh Bapu by means of fist and kick blows. Accused Sunil Nimba removed the knife from the pocket of his jacket and showing it gave slogan viz. ‘Jai Shivaji Jai Bhawani’. Pruthwiraj Pandit who was at the adjacent grocery shop came there by seeing this. Meanwhile, accused Satish Nimba removed one gupti from PVC pipe which was with him. During that period my brother Samadhan was coming after answering nature’s call and by seeing him, accused Chandu Ishwar shouted by saying that ‘ तो बघ मादरचोद येतो आहे त्याला पाहू व खलास करू.’ Both accused Sunil Nimba and Satish Nimba along kinfe and gupti proceeded towards Samadhan. They caught Samadhan in the courtyard of Onkar Bhoi. Both

accused Sunil Nimba and Satish Nimba gave blows of knife and gupti on chest and abdomen on the person of Samadhan in the courtyard of Onkar Bhoi. I caught hold Sunil Nimba to prevent him. At that time Sunil Nimba caught hold my neck and gave blow of a knife in my stomach. Due to said blow, there was bleeding and intestines were came out. Samadhan fallen on the ground in bleeding condition and I also sat on the ground due to coming out intestines from my stomach. All accused became violent and therefore, nobody could dare to come and save us. Thereafter, accused Satish and Sunil ran away towards Duttanagar, possessing knife and gupti. Other accused ran away by motor cycle. Rohidas Gangaram, Ritesh Suresh, Pruthwiraj, Dnyaneshwar Gulab etc. kept Samadhan in black-yellow taxi jeep and kept me in the Bolero vehicle and brought us to Ashta Hospital, Dhule.”

18. Above witnesses have been extensively cross-examined by defence counsel, however, it is pertinent to note that there is little or no effective cross on the alleged actual occurrence of assault. On carefully sifting the testimony of PW2 Pruthviraj, PW5 Ritesh and PW6 Dattatraya, what is emerging is that they are all consistent about previous quarrel. Though it has been shown that so called previous quarrel had taken place during Ganpati festival, here, there is not only eye witness account but also injured witness account. Under such

circumstances, ground raised that what triggered the occurrence and what is the genesis of assault on the night of 29.01.2014, in our considered opinion, is not of much significance and it takes back seat. Had it been otherwise and had it been a case based on circumstantial evidence, the point raised by both the learned counsel before us could have some relevance.

19. PW2 informant, PW5 Ritesh and PW6 Dattatraya along with PW1 Rohidas, pancha to inquest panchanama, are all unanimous about occurrence taking place around 9.00 p.m. There may be variances but it is common knowledge that there are bound to be variances. There may be variances on several counts as different witnesses grasp occurrence distinctly and reproduce it in distinct manner. Above all, there is injured eye witness account in the form of PW6 Dattatraya, who suffered injury which would have turned out to be fatal.

As regards to submission of inconsistencies and variances in the evidence is concerned, it is to be noted that occurrence has taken place around 9.00 p.m. to 9.30 p.m. The Hon'ble Apex Court in the recent case of *Birbal Nath v. State of Rajasthan and others* [Criminal Appeal No. 1587 of 2008 along with connected matter, decided on

30.10.2023], by taking recourse to the earlier judgment in ***State of M.P. v. Mansingh and others*** ; (2003) 10 SCC 414, has reproduced para 9 which is as under :

“9. The evidence of injured witnesses has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly. Merely because there was no mention of a knife in the first information report, that does not wash away the effect of the evidence tendered by the injured witnesses PWs 4 and 7. Minor discrepancies do not corrode the credibility of an otherwise acceptable evidence. The circumstances highlighted by the High Court to attach vulnerability to the evidence of the injured witnesses are clearly inconsequential.”

Therefore, here also, there is injured eye witness account and informant is also a victim of fisticuffs. Consequently, we do not wish to give much importance to the so called variances which are apparently not material one and the core of the accusation having remained undisturbed.

20. Evidence of PW1 Rohidas shows that on hearing shouts, he had approached the spot and his evidence shows that he merely saw

accused Sunil and Satish running away and this witness has directly seen Dattatraya and Samadhan lying in injured condition. Therefore, he cannot be said to be an eye witness.

However, if we carefully visit evidence of PW2 Pruthviraj - informant, PW5 Ritesh (an independent witness and resident of same village) and PW6 Dattatraya (an injured witness), it has clearly come in their evidence about arrival of all accused persons triple seat on two motorcycles together at one and the same time. They are all unanimous about accused Satish to be armed with gupti and accused Sunil to be armed with knife. PW2 informant and PW6 Dattatraya are both attributing instigation to accused Chandu directing others not to spare anybody and to kill either of them. Therefore, common object is becoming explicit. PW5 Ritesh claims that he was in the company of one Sharad and he also saw the occurrence. There is nothing in his cross which could damage his testimony, nor there is suggestion of false implication.

21. Further, PW6 Dattatraya himself is an injured witness and as such his presence also need not be doubted. He has narrated the sequence since arrival of accused on motorcycles. He has also narrated about utterance of accused after parking their motorcycles.

He too is assaulted initially by means of fist and kick blows. He too has stated that accused Sunil was armed with knife and he removed it from his jacket and he gave slogans upon which PW1 Rohidas came. According to him, meanwhile accused Satish removed gupti from a PVC pipe and seeing Samadhan arrive, Satish and Sunil rushed towards him and mounted assault and seeing such assault on his brother, he claims to have gone to his rescue and thereafter, he too to be assaulted by means of knife. PW5 Ritesh-independent witness has also narrated about assault on PW6 Dattatraya. Therefore, evidence of PW2 informant, PW5 Ritesh and injured PW6 Dattatraya does inspires confidence on the point of actual occurrence of assault.

22. Learned senior Advocate Shri R. N. Dhorde would vehemently submit that names of his clients i.e. Umesh and Chandu are coming from the mouth of only PW2 informant alone and neither PW5 Ritesh nor PW6 Dattatraya are marking their presence.

23. In the light of above submissions, we have carefully gone through the evidence of PW2 informant Pruthviraj, PW5 Ritesh and PW6 Dattatraya. We are not at all impressed by the above ground for two reasons. Firstly, informant apart from naming them in FIR, has also deposed and named them in his substantive evidence before the

court. Secondly, PW6 injured witness in his substantive evidence has stated that accused Sunil, Satish and Ishwar came on one Pulsar motorcycle whereas, accused Chandu, Umesh and Yogesh came on Discovery motorcycle. He is attributing abuses and assault to himself, Dnyaneshwar and Yogesh by means of fisticuffs. He also spoke about accused Chandu shouting and instigating others to kill Samadhan. He further stated that all accused persons became violent after Samadhan fell and his own intestine came out of the stomach. Therefore, both informant and injured are marking presence of accused Umesh and Chandu. It is true that PW5 Ritesh has, in his substantive evidence, not marked their presence, but this witness had watched it from a distance while he was returning after urinating and was in the company of one Sharad. Therefore, mere failure on his part alone to mark presence of Umesh and Chandu itself is not sufficient to overlook or discard or even doubt version of PW2 informant and injured PW6 Dattatraya, who are both victims of assault and they are not mere watchers like PW5 Ritesh. For such reasons, we are not ready to accept the ground about false implication of accused Umesh and Chandu.

24. The next limb or argument raised by learned senior counsel is that names of Umesh and Chandu not being appearing, their

implication cannot be by invoking Section 149 of IPC. We are also not ready to accept above submission because Section 149 IPC is admittedly a vicarious liability. Law to this extent has been fairly and repeatedly settled in the case of ***Sukhan Raut and others v. State of Bihar*** ; (2001) 10 SCC 284, ***Ram Dular Rai and others v. State of Bihar*** ; (2003) 12 SCC 352, ***Onkar and others v. State of Uttar Pradesh*** (2012) 2 SCC 273 and ***Gurmail Singh and another v. State of Uttar Pradesh and another*** ; (2022) 10 SCC 684.

In ***Sukhan Raut*** (supra) it is held “*under Section 149 IPC, liability of other members of unlawful assembly for the offence committed during the continuance of occurrence, rests upon fact whether the other members knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object. Once it is established that the unlawful assembly has common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act for the purposes of incurring the vicarious liability for the offence committed by a member of such unlawful assembly*”.

In ***Gurmail Singh***, in para 21, the Hon’ble Apex Court has held that “*even the presence in an unlawful assembly, with an active mind, to achieve the common object, would make a person vicariously liable*

for the acts of the unlawful assembly. Inference of common object has to be drawn from various factors such as weapons with which the members were armed, their movements, the acts of violence committed by them and the result. The presence of accused as a part of unlawful assembly is sufficient for his conviction.”

In para 31 of the same judgment, it has been observed that in order to attract Section 149 IPC, it must be shown that the incriminating act was done to accomplish the common object of the unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object.

In ***Onkar*** (supra), it has been observed that the number and nature of injuries is also relevant to be considered and that common object may also be developed at the time of incident.

25. Keeping in sight the above discussed settled legal position, here, there is already background to the occurrence dated 29.01.2014. PW2 informant, PW5 Ritesh and PW6 Dattatraya, as stated above, are consistent about arrival of appellants accused. They had come armed with weapons like knife and gupti. After hurling

abuses, prosecution witnesses are beaten by fists and kick blows. On arrival of Samadhan, accused Chandu had directed to kill. Even at that point of time all accused, who had come together at one and same time, had remained there and thereafter, initially Samadhan was assaulted by knife and gupti, followed by assault on PW6 Dattatraya who went to rescue Samadhan. So much part of their evidence clearly indicates that the gathering was not only unlawful but they had come armed with deadly weapons. Such material definitely is itself sufficient to impute common object. Consequently, mere failure on the part of only one witness, i.e. PW5 Ritesh, to name accused Umesh and Chandu while in witness box, is in itself not sufficient to segregate them from others. PW2 informant as well as PW6 injured are specific about arrival of all accused and all indulging initially in giving fist and kick blows and thereafter putting deadly weapons to use. Hence, in our opinion, provision under Section 149 IPC does come into play.

26. Another distinct feature of this case is that FIR is lodged promptly. There is also evidence of injured PW6 Dattatraya whose testimony has remained intact and therefore gets placed at higher pedestal.

27. As regards the ground of non-examination of Dnyaneshwar and Yogesh, the same also is of not much significance because it is the quality and not the quantity that matters. Occurrence is categorically getting unfolded from the evidence of PW1 Rohidas, PW2 informant Pruthviraj, PW5 Ritesh and PW6 Dattatraya. Therefore, we do not feel that the above ground has any merit or substance.

Likewise, prosecution version is also sought to be questioned by submitting that genesis of the occurrence dated 29.01.2014 has not been proved by prosecution. It is true that there was some incident in Ganpati festival that year and regarding that, complaint was also lodged and directly alleged occurrence of night of 29.01.2014 has come on record. But there is background for the animosity as is evident from prosecution witnesses. Even suggestions given to witnesses are regarding previous quarrel and therefore, it is not open to agitate that genesis is not getting unfolded. Occurrence is reproduced by informant as well as injured consistently and therefore, in the light of availability of ocular evidence, even aspect of motive takes back seat

28. Apart from above witnesses, prosecution has examined autopsy doctor PW3 Dr. Pathak. The injuries noticed by him have been reproduced by him both in postmortem report as well as while in witness box. PW4 Dr. Britto, who medically examined and treated injured PW6 Dattatraya, has also been examined. Ocular account is supported by medical evidence which further strengthens and fortifies the case of prosecution. There is recovery evidence. Mere aspect of recovery of weapons from nearby vicinity of the spot itself is no good ground to doubt the recovery. It is possible to hide weapons while fleeing from the spot. Therefore, there is no reason to disbelieve the recovery evidence.

29. To sum up, here, there is credible trustworthy oral account of informant PW2 Pruthviraj, independent witness PW5 Ritesh and injured witness PW6 Dattatraya finding support from medical evidence. Previous quarrel not being disputed, motive is also existing. Therefore, evidence of prosecution deserves to be accepted even on its re-appreciation, re-analysis and re-examination i.e. both, oral and documentary.

30. In our opinion, learned trial Judge has considered every aspect from all possible angles and has rightly accepted prosecution evidence

further holding case of prosecution to be proved. No patent perversity is brought to our notice and hence we uphold the findings and conclusion reached at by learned trial Judge. Resultantly, no reason to interfere in the findings and the impugned judgment. Hence we proceed to pass the following order:

ORDER

Both appeals are hereby dismissed.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]

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