

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 522 OF 2016

1. Atmaram s/o Dnyanba Pathade
Age : 26 years, Occu. Agriculture,
R/o. Chorjawala,
Taluka & District Hingoli.
2. Madhav Dnyanba Pathade
Age : 34 years, Occu. Agriculture,
R/o. As above

[Both the appellants are in jail]

... Appellants
[Orig. Accused Nos. 2 & 4]

Versus

The State of Maharashtra
Through Police Station Officer,
Hingoli (Rural) Police Station, Hingoli,
Taluka and District – Hingoli.

... Respondent

.....
Mr. Swapnil S. Rathi, Advocate for the Appellants.
Mr. A. M. Phule, APP for Respondent-State

.....

**WITH
CRIMINAL APPEAL NO. 557 OF 2020**

Maroti Baban Pathade,
Age : 24 Yrs., Occ: Agri,
R/o: Choujavla,
Tq. & Dist. Hingoli.

... Appellants
[Orig. Informant]

Versus

1. The State of Maharashtra
2. Arjun Gangaram Pathade
Age: 30 Yrs., Occ: Agriculture,
R/o: Choujavla, Tq. and Dist. Hingoli.

3. Dnyanba Sakharam Pathade
Age: 60 Yrs., Occ: Agriculture,
R/o: Choujavla, Tq. and Dist. Hingoli.
4. Rameshwar Rustum Pathade
Age: 35 Yrs., Occ: Agriculture,
R/o: Choujavla, Tq. and Dist. Hingoli.
5. Jagganath Rustuma Pathade
Age: 26 Yrs., Occ: Agriculture,
R/o: Choujavla, Tq. and Dist. Hingoli.
6. Hari Narayan Pathade
Age: 23 Yrs., Occ: Agriculture,
R/o: Choujavla, Tq. and Dist. Hingoli.
7. Datta Narayan Pathade
Age: 35 Yrs., Occ: Agriculture,
R/o: Choujavla, Tq. and Dist. Hingoli. ... Respondents
[R.2 to 7 Orig. Accused]

.....

Mr. Rajendra N. Chavan h/f Mr. Vishal A. Bagadiya, Advocate for the Appellant.

Mr. A. M. Phule, APP for Respondent No.1-State.

Mrs. Pratibha S. Bharad, Advocate for Respondent Nos. 2 and 4 to 7.

Mr. Swapnil S. Rathi, Advocate for Respondent No.3.

.....

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

Reserved on : 12.09.2023

Pronounced on : 18.10.2023

JUDGMENT [ABHAY S. WAGHWASE, J.] :

1. Both the appeals are arising out of the judgment and order dated 03.08.2016 passed by Additional Sessions Judge, Hingoli in S.T. No. 49 of 2014, whereby, out of in all 25 accused persons, accused

no. 2 Atmaram and accused no. 4 Madhav are convicted for the offence punishable under Sections 302 and 326 r/w 34 of the Indian Penal Code [IPC] and sentenced to suffer rigorous imprisonment for life, while rest of the accused i.e. accused nos. 1, 3, and 5 to 25 stand acquitted from all the charges.

2. The convicted accused nos. 2 and 4 i.e. Atmaram and Madhav have challenged the above conviction by preferring Criminal Appeal No. 522 of 2016, while the original informant has preferred Criminal Appeal No. 557 of 2020 questioning the acquittal to the extent of accused nos. 1, 3, 5, 6, 8 and 9. Since both the appeals are arising out of one and the same judgment and heard at one and the same time, we propose to decide them by this common judgment.

PROSECUTION CASE IN TRIAL COURT IS AS UNDER

3. The conspectus of the prosecution case in brief is that Baban and appellant Dnyonaba are cousins. Whereas, injured Jijabai is wife of Baban, informant is son of Baban and rest accused are family members of appellant Dnyanoba. They both are agriculturist by occupation and their lands are abutting to each other. There were issues between them about area of the land since four to five years prior to the incident.

4. The first spark of controversy fell on 24.04.2014 at 6.00 p.m. at marriage ceremony of daughter of one Parasram Gaikwad in the village which was attended by PW10. Prosecution story is that, accused appellat party taunted and teased PW10 saying that he has rendered no assistance in marriage and has merely come to enjoy food. Feeling humiliated, PW10 Baban came home in the evening and reported to his family members. Informant and his brothers, namely, Prakash (deceased) and Sopan went to the field and haulted that night there itself.

5. The second episode took place at 8.00 am on the next morning i.e. 25.04.2014. In all 25 accused persons came to the house of PW10 Baban, getting armed with articles sticks, rod, axe. Shivcharan and Karan passed the information to PW1 on phone and therefore informant and his brothers reached home. According to them, accused no.17, 18, 19, 20, 21, 22, 24, 25 entered the house. According to informant, accused no.1 Arjun, Accused no.2 Atmaram, Accused 3, 5 also entered and they assaulted his mother on the head with sticks and rod and caused her greivous injury. When informant and his brothers intervened, that time it is alleged accused 1, 3, 2, 4, 6 Jagannath and Accused no. 9 Hari, Accused no. 8 Datta mounted assault on Prakash on face, nose, back , legs and caused his greivous

injuries. Further according to informant, when he and Sopan fled to save themselves, accused no. 7, 10, 11, 14 Badri, 15 Prasad, 12 Vithal, 16 Sheshrao chased them with sticks and rods and caught informant on the bridge near the field of one Trimbak Sambhaji Pathade and assaulted him . One Bhagwan, Sitabai sopan Pathade intervened and rescued him. According to informant, his brother Prakash and mother were shifted to Civil Hospital. On examination Prakash was reported dead. His mother was admitted alongwith himself and his father. Police officer approached him in the hospital where he gave report, on the strength of which FIR was registered.

6. After completion of investigation, all accused were made to face trial before Additional Sessions Judge, Hingoli, who on conclusion of trial appreciated the evidence and passed following order:

1. Accused No.2 Atmaram Dnyanoba Pathade and accused No.4 Madhav Dnyanoba Pathade are convicted under section 235(2) of Cr.P.C. of charges for the offence punishable under section 302 read with section 34 of Indian Penal Code. They are sentenced to suffer R.I. for life and shall pay a fine of Rs.2,000/- (Rupees two thousand) each. In default they shall suffer simple imprisonment for three (03) months.

2. Accused Nos. 2 Atmaram Dnyanoba Pathade and accused No.4 Madhav Dnyanoba Pathade are convicted under section 235(2) of Cr.P.C. of charges for the offence punishable under section 326 read with section 34 of the Indian Penal Code. They are sentenced to suffer R.I. for ten (10) years and shall pay fine each of Rs.1,000/- (Rupees one thousand). In default shall suffer simple imprisonment for a period of one month.
3. Both sentences shall run concurrently.
4. Accused Nos. 2 and 4 are acquitted under section 235(1) of Cr.P.C. of charges punishable under section 147, 148, 302, 449, 450, 324, 504, 506, 109 read with section 149 of Indian Penal Code.
5. Accused Nos. 2 & 4 to surrender their bail bonds.
6. Set off is granted to accused Nos. 2 and 4.
7. Accused Nos.1, 3, 5 to 25 are acquitted under section 235(1) of Cr.P.C. of charges punishable under section 147, 148, 449, 450, 302, 307, 324, 504, 506 read with section 149 of Indian Penal Code.
8. Their bail bonds stands cancelled.

9. Muddemal property being worthless be destroyed after appeal period is over.
10. In view of mandate laid down under section 437(A) of Cr.P.C., accused Nos. 1, 3, 5 to 25 are directed to furnish surety of Rs.15,000/- (Rupees fifteen thousand) each on execution of PR. Bond alongwith one solvent surety and shall undertake to appear before appellate Court on receipt of notice of appeal.

Here, Criminal Appeal No. 522 of 2016 is on behalf of two convicts i.e. accused nos. 2 and 4. At the same time, informant has exercised provision under Section 372 of Cr.P.C. to question the order of acquittal to the extent of accused nos. 1, 3, 5, 6, 8 and 9. However, it needs to be noted and mentioned that State has not preferred appeal against order of acquittal of rest of the accused i.e. accused nos. 7, 10 to 25.

SUBMISSIONS

On behalf of convicts:

7. The sum and substance of the arguments advanced by learned counsel for the appellants in Criminal Appeal No. 522 of 2016 is that alleged incidence was a free fight. Prosecution failed to bring forward

very genesis of the occurrence. According to him, very motive is missing in the evidence of prosecution. He would strenuously submit that only interested witnesses are examined and independent witnesses are withheld and therefore adverse inference needs to be drawn against prosecution. Taking us through the evidence of informant, he would vociferously submit that apart from being interested witnesses, these witlessness cannot be said to be direct eye witnesses, more particularly in view of the answers given by them in cross. He submitted that it is apparently doubtful whether these witnesses had any occasion to see the occurrence. Referring to the evidence of informant and his cross, learned counsel would submit that his evidence is ambiguous in nature. He has not spelt out the nature of articles allegedly held by accused persons and he has also not specifically attributed any distinct role to the accused persons and it is so evident from his substantive evidence, but he has referred to some articles in his statement dated 25.04.2014.

8. According to learned counsel, here prosecution has failed to demonstrate where the actual incident took place as, according to prosecution, there are two spots, but according to him, there is no incriminating material laid hands on by investigating machinery. He also took us through the evidence of wife of deceased i.e. PW4 Jijabai

and would point out to her chief and submit that even her testimony too is silent about nature of weapon allegedly held and used and further he questioned prosecution version by submitting that when according to this witness, there was assault by article like stick, how at all there could be grievous injury.

9. Further taking us through the testimonies of PW5 Sumanbai, PW6 Sitabai, PW7 Kiran and PW10 Baban, he would submit that none of them are lending support to the testimony of informant.

10. According to him, none of the panchas have supported prosecution, but still learned trial court has accepted the prosecution case which is only of related witnesses.

11. That, cross of the witnesses have exposed the prosecution story to be fabricated and manufactured as it is full of material omissions, contradictions and inconsistencies. Even according to learned counsel, in this case, ocular account does not match with medical account and for the more reason, case of prosecution cannot be accepted as proved. In support of his above submissions he seeks reliance on ruling of this Court in the case of State of ***Maharashtra v. Kisan Nivrutti Choudhary***; 2015 (1) Bom Cr. (Cri) 229.

12. Lastly he would submit that on the same set of evidence, learned trial court has acquitted rest of the accused, but has convicted two accused for offence under Sections 302 and 326 r/w 34 of IPC and therefore, it is his submission that apparently the analysis and appreciation of evidence is improper.

On behalf of informant:

13. On behalf of informant, there is challenge to the order of acquittal to the extent of accused nos. 1, 3, 5, 6, 8 and 9. Learned counsel would submit that roles of above acquitted accused are apparently reflected in the testimonies of injured as well as eye witnesses. That, ocular account was finding support from medical evidence and therefore, learned trial court ought not to have acquitted these accused. They had all come with intention to commit the offence and all were seen and reported to be armed and all had participated in assaulting deceased, informant and injured party. Therefore, learned trial court ought not to have acquitted them and as such, it is prayed that their acquittal be set aside and they too be convicted like other accused persons.

On behalf of State:

14. On behalf of State, learned APP would point out that learned trial court has correctly sifted the evidence on behalf of prosecution. Evidence of eye witnesses and injured witnesses, on correct assessment and analysis, is accepted as worthy of credence. That, so much part of the evidence which was uncorroborated has been discarded by learned trial court and accused nos. 1, 3, 5 to 25 have been acquitted and therefore, it is his submission that, such approach itself shows that there is meticulous examination and only guilty are convicted. That, there is no merit in the appeals and as no perversity has been brought to the notice, he prays to dismiss both appeals, i.e. on behalf of convicts as well informant.

EVIDENCE ON BEHALF OF PROSECUTION

15. In order to establish their case, prosecution seems to have examined in all 23 witnesses. Their role and status can be summarized as under:

Injured/eye witnesses

PW1 Maroti s/o Baban Pathade is the informant and an injured eye witness. He is brother of deceased Prakash.

PW4 Jijabai is the wife of Prakash Pathade and an eye witnesses.

PW5 Sumanbai w/o Baban Pathade is the mother of deceased Prakash and an injured eye witness.

PW6 Sita w/o Sopan Pathade is sister-in-law of deceased and also an eye witness.

PW7 Kiran is a minor son of deceased Prakash. He has also witnessed the assault.

PW10 Baban s/o Ganpati Pathade is the father of deceased and an injured eye witness.

Pancha witnesses

PW2 Trimbak Sambhaji Pathade is pancha to spot panchanama Exhibit 151.

PW3 Tulshiram Kishan Khedekar is father-in-law of informant. He has acted as pancha to inquest panchanama Exhibit 156.

PW8 Shanker Gangaram Gade is pancha to disclosure and recovery panchanama Exhibits 168 and 169 at the instance of accused Vithal Narayan Pathade. He has identified the accused as well as weapon stick [article 26] in the court.

PW9 Jagan s/o Prakash Khedekar is pancha to disclosure and recovery panchanama Exhibits 172 to 175 at the instance of accused Madhav and Arjun respectively. He has identified both accused as well as weapons i.e. axe [article 8] and rod [article 9].

PW11 Vishwanath s/o Sakharam Pathade and **PW 14** Madhav s/o Bhagwan Pathade have acted as pancha to seizure panchanamas Exhibits 181 to 189. However, they have **not supported** prosecution.

PW12 Vishwanath Rustuma Jogdand, **PW13** Gajanan s/o Ananda Ghyar, panchas to seizure panchanamas Exhibits 193 and 194, have also turned **hostile** and cross-examined by prosecution itself.

PW15 Subhash s/o Namdeo Kamble, **PW21** Shaikh Shakil Shaikh Gaffar, panchas to seizure panchanamas Exhibits 199 and 200 have also turned **hostile**.

PW17 Bhimao s/o Gangaram Kashide, **PW19** Shaikh Babu s/o Shaikh Hussein, panchas to seizure of clothes of deceased Prakash as well as injured Sumanbai [Exhibits 222 and 223], have also **not supported** prosecution.

Police Officials

PW16 P.S.O. Dilip Thombal is the second Investigating Officer.

PW20 Head Constable Abhimanyu Kande is carrier of muddemal.

PW22 PI. Punaji s/o Gamaji Pohane is the police officer who registered FIR Exhibit 146. He is the first Investigating Officer.

PW23 PI. Rafique Chand Shaikh is the third Investigating Officer.

Medical Evidence

PW18 Dr. Sandip Balasaheb Kakandikar is the doctor who examined injured Sumanbai and Maroti as well as accused persons, namely, Dnyanoba and Atmaram. He has also conducted postmortem and issued cause of death as 'hemorrhagic shock due to multiple injuries (unnatural)'. He has identified injury certificates Exhibits 229, 230, 237 and 238. He has also identified provisional cause of death certificate as well as postmortem report Exhibits 233 and 234 respectively.

16. Apart from oral account, in trial court, prosecution has placed on record multiple documents such as FIR, various panchanamas, medical and CA reports etc.

17. Here, we are called upon to ascertain whether conviction of accused nos.(2) and (3), namely, Atmaram and Madhav [appellants in Criminal Appeal No. 522 of 2016] for the offence under Sections 302

and 326 r/w 34 of IPC is just, legal and proper. Further, we are also required to get satisfied whether acquittal of accused nos.(1) Arjun, (3) Dnyanba, (5) Rameshwar, (6) Jagganath, (8) Datta and (9) Hari from above charge is justified.

18. As Section 374 of Cr.P.C. is invoked, we are required to re-appreciate, re-examine and re-analyze the entire oral and documentary evidence adduced by prosecution in the trial court.

Homicidal

19. Before advertng to the so called ocular account, we wish to get ourselves satisfied that death of Prakash is shown by the prosecution to be homicidal one. To find answer to the same, we are required to visit evidence of autopsy doctor i.e. PW18 Dr. Sandip Kakandikar, who, in his substantive evidence, has deposed about coming across following external injuries as mentined in column no.17 of the postmortem report :

1. Contused lacerated wound of size 2 x 2 x 0.5 cm. present over root of nose with irregular margin red brown in colour.

2. Contusion of size 2 x 1 cm. x muscle deep above left brow red brown in colour.
3. Contusion of size 18 cm. length, 6 cm. width and muscle deep red brown colour extending from right inframammary region, extending obliquely on left side involving right hypochondraic epigastric left hypochondraic region.
4. Contused lacerated wound of size 3 x 2 x 0.5 cm. present over right leg over sheen of tibia over 1/3rd anterior surface exposing underlying muscle with sharp edges, red brown in colour.
5. Abrasion of size 2.1.5 cm. present over left knee red brown in colour.
6. Abrasion of size 2 x 2 cm. over right knee red brown in colour.

The autopsy doctor, in column no.18, has noted fracture injury to root of nose and fracture of 8th, 9th and 10 ribs on right side and according to him, all above injuries are ante-mortem.

According to the autopsy doctor, the cause death is **'hemorrhagic shock due to multiple injuries (unnatural)'**. After noting the corresponding internal injuries, the autopsy doctor has further opined about injuries mentioned in column no.17 that, injury nos. 1

and 4 are possible due to assault by axe, injury nos. 2 and 3 are possible due to assault by stick and iron rod and injury nos. 5 and 6 are possible is assaulted by stick.

20. In the light of above discussed evidence of medico legal expert, nature of injury, its size, location, there is no hesitation to hold that Prakash met homicidal death only and not otherwise.

21. Now, let us see whether there is convincing and legally acceptable direct eye witness account as claimed by prosecution.

22. Prosecution came with a case of availability of direct evidence i.e. in the form of ocular account of PW4 Jijabai, PW6 Sita and PW7 Kiran so also injured witnesses PW1 informant Maroti, PW5 Sumanbai and PW10 Baban.

ANALYSIS OF OCULAR ACCOUNT

23. Before dealing with the evidence of above so called crucial witnesses, i.e. PW1 informant Maroti (injured), PW4 Jijabai, PW5 Sumanbai (injured), PW6 Sita, PW7 Kiran, and PW10 Baban (injured), we deem it fit to spel out the principles which are expected to be borne in mind while appreciating ocular account. Useful

reference could be made to the judgment of Hon'ble Apex Court in the case ***Balu Sudam Khalde and another v. The State of Maharashtra*** [Criminal Appeal No. 1910 of 2010], reported in 2023 SCC OnLine SC 355 wherein certain principles are enunciated and we borrow and reproduce the observations made in the above judgment, more particularly in para 25, which run as under:

“25. The appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under:

“I. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.

II. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.

III. When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.

IV. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

V. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

VI. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

VII. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

VIII. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

IX. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

X. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters.

Again, it depends on the time-sense of individuals which varies from person to person.

XI. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

XII. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.

XIII. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness.”

[See Bharwada Bhoginbhai Hirjibhai v. State of Gujarat 1983 Cri LJ 1096 : (AIR 1983 SC 753) Leela Ram v. State

of Haryana AIR 1995 SC 3717 and Tahsildar Singh v. State of UP (AIR 1959 SC 1012)]”

24. Here, PW1 Maroti, PW5 Sumanbai and PW10 Baban, according to prosecution, are not only eye witnesses, but are also injured witnesses. It is fairly settled position that testimony of injured eye witness always remains at higher pedestal and should not be overlooked or discarded unless it is shown to be patently unworthy of credence. Testimonies of injured witnesses has its own relevancy and efficacy and hence, on numerous times, testimonies of injured witnesses are accorded special status and are readily accepted. Law on the point of evidentiary value of injured witness is dealt in the celebrated case of *Jarnail Singh v. State of Punjab*; (2009) 9 SCC 179 and *Balraje @ Trimbak v. State of Maharashtra*; (2010) 6 SCC 673;

25. Now, let us see whether there is convincing and legally acceptable direct eye witness account as claimed by prosecution.

26. **PW1 Maroti**, the informant and the injured witness, in his evidence at Exhibit 144, has initially deposed about relations with accused persons and a dispute concerning land since last four to five years. He further deposed that one day prior to the incident, i.e. in the

evening of 24.04.2014, his father PW10 Baban had been to attend marriage of daughter of one Parasram Dnyandeo Gaikwad, where accused no.3 Dnyanoba and accused no.4 Madhav were also present. They taunted Baban saying that he had not come for work and so he should not have come only to enjoy dinner. According to this witness, his father Baban told him the above fact. Thereafter, he himself along with brothers Prakash and Sopan went to the field and halted there for the night.

This witness further states that on the next day i.e. on 25.04.2014, he received a call from Shivcharan and Kiran informing him about accused persons approaching their house and intending to assault his father Baban and so he rushed home and saw accused persons gathered before his house armed with weapons. According to this witness, the female accused i.e. accused nos. 17 to 25 instigated rest of the accused to enter in the house and assault, upon which, accused no.1 Arjun, accused no.2 Atmaram, accused no.3 Dnyanoba, accused no.5 Rameshwar entered in the house and assaulted his mother Sumanbai on head left parietal region with sticks and rods causing her grievous hurt and when this witness along with brothers Prakash and Sopan went to rescue, accused no.1 Arjun, accused no.2 Atmaram, accused no.3 Dnyanoba, accused no.4 Madhav, accused

no.6 Jagannath, accused no.8 Datta and accused no.9 Hari assaulted brother Prakash on face, nose, back, legs by weapons and caused grievous injuries. According to this witness, when he himself and Sopan ran away due to apprehension of assault, accused no.7 Waman, accused no.10 Kishan, accused no.11 Kedar, accused no.12 Vithal, accused no.14 Badri, accused no.15 Prasad and accused no.16 Sheshrao chased them armed with sticks and rods. They caught this witness on the bridge near the field of one Trimbak and assaulted him by stick, kicks and fists due to which he sustained covert injuries on shoulder, back and stomach. This witness further deposed that his brother Prakash and mother Sumanbai were shifted to Civil Hospital, Hingoli where, upon examination, the Medical Officer declared Prakash dead. According to this witness, police recorded his statement in the hospital itself, which is made the basis of registration of crime. He identified his statement as well and the FIR to be marked at Exhibits 145 and 146 respectively.

27. **PW4 Jijabai**, wife of deceased Prakash, in her evidence at Exhibit 157 has also deposed about the incident of taunting Baban in the marriage ceremony on the previous day of assault. In para 2 of her examination-in-chief, she has deposed that, on the next day early morning, when her father-in-law Baban was sitting before the house,

all accused came there armed, accused no.1 Arjun assaulted Baban by iron rod and accused no.4 assaulted him by the butt side of axe. That, when her mother-in-law Sumanbai attempted to intervene, accused no.1 Arjun and accused no.5 Rameshwar assaulted her by iron rods and accused no.2 Atmaram and accused no.3 Dnyanoba assaulted her by sticks.

She further deposed that when her husband Prakash and brothers-in-law Maroti and Sopan came there on being called by her son Kiran on telephone, accused no.1 Arjun assaulted Prakash by iron rod, accused no.4 assaulted him by axe while accused no.2 Atmaram, accused no.3 Dnyanoba and accused no.6 Jagannath assaulted him by sticks, due to which he fell down and became unconscious. She narrated the sites targeted by them as face, legs, stomach, head and back. According to her, Maroti and Sopan ran away and all accused chased them. After some time, Sitabai came there and informed her about maroti being assaulted near the field of Trimbak. She also stated about Medical Officer examining Prakash and declaring him dead. On being confronted with the weapons, she was unable to mention which accused possessed which weapon.

28. **PW5 Sumanbai** an injured witness, who is mother of deceased Prakash and informant Maroti, also deposed on the similar lines and attributed acts of assault to the accused as is deposed by PW4 Jijabai. However, in addition to that, she has also attributed assault on deceased Prakash by sticks to accused nos. 8 and 9 i.e. Datta and Hari. She has narrated sites of injuries suffered by her as head, left side of face, backside of head; by Prakash as head, nose and all body; and by her husband Baban as head. She was not able to identify the weapons on being confronted to her while in the witness box.

29. **PW6 Sita** w/o Sopan Pathade, is the sister-in-law of deceased Prakash. **PW7 Kiran** is the minor son of deceased Prakash, whereas **PW10 Baban** is the father of deceased Prakash. All three of them gave evidence similar to that of PW5 Sumanbai except that all these three witnesses have not attributed role of assault on Prakash by stick to accused no.3 Dnyanoba, as is done by PW5 Sumanbai. These witnesses were also unable to disclose which weapon was used by which accused, except that PW10 Baban identified the axe article 8 to be possessed by accused no.4 Madhav.

30. It is noticed that each of the above witnesses are extensively cross-examined. Informant-injured **PW1 Maroti** is questioned about

family disputes over landed properties, visibility of spot form house, location of the house, details of surroundings, geographical description, location of doors and windows, their height, length and breadth, distance between house and field, neighbours to the field, village politics etc. In para 18, questions are put regarding dispute on account of water outlet with Sitaram Nimbole and crime registered in that backdrop. Para 19 to 22 are regarding questions which are not relevant with the occurrence in question. Regarding the occurrence, questions are raised in para 23 wherein omissions are brought regarding assault on face of deceased Prakash by weapons and accused catching this witness on the bridge near field of Trimbak.

While under cross at the hands of learned counsel for accused nos. 2, 3, 4, 22 and 23, i.e. from para 24 to 31, enmity is brought and questions are posed regarding occurrence of 24.04.2014. Again details about population of the village, houses of villagers and their geographic directions are solicited. In para 32 of the cross, questions are posed about whether accused entered the varandah and which room they entered thereafter and who all amongst the family members were present and where was mother Sumanbai present. Para 34 suggests that occurrence is not disputed. Rather, the manner of questioning itself indicates that there is no serious challenge to the

aspect of accused visiting informant's house. In further cross, suggestions about informant party assaulting accused nos. 2 and 3 is flatly denied. Thereafter, again questions are put which are not relevant to the occurrence. Again questions posed in para 64 of the cross suggest that occurrence of assault has not been disputed.

31. Another eye witness **PW4 Jijabai**, who is wife of deceased Prakash, is also extensively cross-examined and omission is brought regarding assault by accused no.3 with stick. She has denied her husband and his brothers Sopan and Maroti chasing accused no.4 Madhav. In para 18 and 19 of the cross, questions are regarding occurrence which allegedly took place on 24.04.2014. Para 20 to 22 are touching the aspect of occurrence.

32. **PW5 Sumanbai**, injured, is also extensively cross-examined but in our considered opinion, her testimony has not been shaken on the point of accused persons first coming, pelting stones, they to be armed with stones, sticks, iron rod and axe. So also, her testimony about she herself, her husband Baban and her son Prakash being assaulted has virtually remained unchallenged.

33. Even wife of Sopan i.e. **PW6 Sitabai** is subjected to extensive cross and in para 6, she has answered that all accused came to their house and she saw injury on the head of Baban. She has volunteered that she was taking care of the children. Surprisingly this witness is asked about the force and intensity of the blows inflicted on the face of her mother-in-law i.e. Sumanbai. Omissions are brought regarding accused coming at about 7.30 a.m., obstructing Maroti and this witness pacifying the quarrel. Apparently, these are not material omissions. She answered that she herself, Jijabai, Nandabai and 9 children were present in the kitchen and therefore, it is possible that details spelt out by PW1 informant, PW4 Jijabai and PW5 Sumanbai may not have been reiterated by her.

34. **PW7 Kiran**, a child witness, is also extensively cross-examined and even this witness admitted that at the time of assault he himself, his brother, sisters, mother and aunts were in the kitchen. However, in cross though he stated that he is unable to give time of the incident, he categorically answered that he had seen axe in the hands of accused no.4 Madhav. In para 12 he answered that Baban suffered blow of axe and accused no.2 Atmaram assaulted his grandmother, but he is unable to state exact part of the body of Prakash on which Madhav had assaulted. Rest of the cross is also of not any relevance.

35. Another injured witness **PW10 Baban**, in his cross at para 10 has admitted that on the day of incident, he was sitting before the lap nearer the side of bathroom and that he sustained swelling injury on head. He denied about sustaining bleeding injury. He has admitted that his daughters-in-law were in the kitchen and his wife Sumanbai was in varandah in standing position. This itself shows that whatever PW6 Sitabai and PW5 Jijabai testified is truthful. He admitted that Sumanbai did not come near him in order to rescue him and that Kiran was at the window of kitchen room. He further admitted that his daughters-in-law came out of the kitchen room after accused ran away. In para 10 of the cross, he admitted that he can not give details of the rod used by accused no.1 Arjun or the clothes on the person of accused and his family members. Such questions are absolutely irrelevant. Even questions posed in para 14 till 33 are also having no nexus with the alleged occurrence. In para 34 of the cross, witness has confirmed about assault on his shoulder by side of the axe and about sustaining contusion injury and accused Atmaram and Dnyanoba assaulting his wife Sumanbai by stick, accused Madhav assaulting Prakash with axe. He admitted inability to disclose exact which part of the head of Prakash was assaulted by Madhav.

Therefore, such manner of cross itself shows that irrelevant questions are posed and even occurrence is got confirmed.

Therefore, on going through the lengthy cross, we have noticed that there are too many questions on aspects which have no relevance with the occurrence.

36. From the manner of the cross, we are of the opinion that endeavour of the defence from the entire tenor of the cross was to suggest that complainant party had assaulted accused party. However, above quoted witnesses are unanimous and categorical about accused party visiting house of complainant party and mounting assault.

37. On re-appreciation and re-analysis, we have noticed that the ocular evidence on behalf of prosecution is intact about accused coming armed and mounting assault. As stated above, there does not seem to be serious dispute about the occurrence of assault, more particularly in the backdrop of nature of cross.

38. If we juxtapose the prosecution evidence, more particularly of PW1 Maroti, PW4 Jijabai, PW5 Sumanbai, PW6 Sitabai, PW7 Kiran and PW10 Baban, we are of the firm opinion that firstly, they are all

natural witnesses being present in their house; occurrence had taken place in the broad day light and in early hours of morning just inside their own abode and second episode had taken place at a spot near the bridge. Their evidence is inspiring confidence. Evidence shows that injured PW10 Baban was sitting outside. PW4 Jijabai and PW6 Sitabai were also very much in the house but in the kitchen. Whereas PW5 Sumanbai was in varandah. Therefore taking into account their location, there are bound to be different versions. However, Jijabai and Sitabai both were with children in the kitchen and they are both consistent about accused persons entering their house and carrying out the assault. They had clear occasion to note what was happening around. Their testimonies are lending support to each other. In cases where there are numerous witnesses, when two of them are consistent, there is no reason to doubt the case of prosecution.

Ocular evidence coupled with injured witness account has remained unshaken on the material part of the occurrence. Witnesses are found to be amply corroborating and lending support to each other about the occurrence on the morning of 25.04.2014. Though there are certain variances, it is to be borne in mind that they are bound to be, because assault was carried out all of a sudden and therefore witnesses were taken by surprise. They must have been in

shock at the time of occurrence. Even various persons react in various manner and capacity of observation also varies from person to person and hence it is unreasonable to expect each of the witness to be consistent on each count. It is fairly settled position, as has been observed by the Hon'ble Apex Court in ***Gangadhar Behera v. State of Orrisa ; (2002) 8 SCC 381***, that those variances and discrepancies, which do not corrode the credibility of witness, are insignificant. In the case in hand, the prosecution witnesses are rustic villagers and more particularly while facing lengthy cross-examination at the hands of skilled cross examiner, there are bound to be some variances. We do not wish to give undue importance to the so called omissions and variances which are not material. No person under attack is expected to take mental note of actual time of occurrence, directions of arrival, who assaulted for how much time and with what force and witnesses are not expected to reproduce the number of blows. The manner and duration of cross clearly shows that attempt has been made to bring the rustic villagers to the brink of virtually admitting to every question.

39. Now let us deal with the objections raised by learned counsel for appellants.

40. It is vociferously submitted that on the same set of evidence, accused nos. 1, 3 and 5 to 25 are acquitted and only accused nos. 2 and 4 are charged with murder. Same ground is also raised by learned counsel for the informant. In the light of such objections we have meticulously gone through the evidence of above discussed witnesses. We too have come to the conclusion that, taking into consideration the manner of assault and nature of articles held by accused no. 2 Atmaram and accused no. 4 Madhav, coupled with the medical evidence, only they two can be attributed the charge of homicide because prosecution has not shown in trial court that acquitted accused also shared the common intention or object along with accused nos. 2 Atmaram and 4 Madhav. Therefore, taking into consideration the role attributed by each of the eye witnesses as well as injured witnesses, it would be unreasonable to hold rest of the accused also responsible for homicide. The Hon'ble Apex Court in ***Gurcharan Singh v. State of Punjab ; AIR 1956 SC 460*** has observed that merely because of some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same, does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is observed that it is always open to a court to differentiate the accused who had been acquitted from those who are convicted. Here, there

are distinguishable roles of accused persons and therefore, only those accused who are responsible for death have been held guilty for charge of murder.

41. The next attack on the prosecution case is that no independent witness is examined, rather only interested witnesses are examined. In our opinion, mere failure of prosecution to examine independent witness itself will not be sufficient to raise doubt about the entire prosecution version and evidence. It is to be noted that occurrence has taken place in the morning at around 8.00 a.m. Assault was made by entering the house of informant and therefore, independent witnesses may not be available. Even eye witnesses and injured persons have not spoken or named any other villagers to be present there and therefore, non examination of independent witnesses would not be fatal to the prosecution. It is fairly settled law that merely because related witnesses are examined, that by itself would not affect the credibility of testimony of witnesses.

42. The third ground of criticism raised before us is that prosecution had not brought forward genesis behind the occurrence and there is no motive. We discard the above submissions for the simple reason that in the very FIR at the instance of PW1 Maroti,

enmity has been spelt out. Even suggestions to prosecution witnesses are clearly indicating animosity on account of land. Moreover, here, when there is overwhelming evidence not only in the form of ocular account but even injured witness account, the aspect of motive takes a back seat and prosecution is not expected to establish the same.

43. Prosecution version is also doubted by submitting that accused party was also injured. Evidence to that extent is sought to be brought, however, except accused no. 2 Atmaram, rest of the so called injured accused has suffered simple injuries. Though Atmaram is shown to have suffered grievous injury, there is no evidence from his side to show that it was independently caused by complainant party. Said injury could have been caused during free fight. No evidence has been brought on record by accused who was holding what and who caused the grievous injury. Note is required to be taken of the fact that so called injured accused have not set law into motion. Therefore, prosecution is not expected to explain so called simple injuries suffered by accused party. Resultantly, the above objection raised before us holds no water.

44. It is also vehemently pointed out that almost all pancha witnesses have not supported prosecution version and that all

panchanamas are therefore not proved. True it is that panchas have taken somersault while in witness box but all panchanamas are got proved through I.O. and therefore there is no force in the submission that panchas having not supported, story of prosecution is rendered doubtful. We wish to note that pancha to recovery of axe has supported prosecution.

45. On carefully going through the impugned judgment, we have noticed that learned trial Judge has meticulously and carefully analyzed the eye witness account and injured witness account. The findings are outcome of careful appreciation regarding role of each of the accused. Roles of accused nos. 1 Arjun, 3 Dnyanoba, 5 Rameshwar, 6 Jagannath, 8 Datta and 9 Hari are not clearly established. As regards to accused nos. 1, 6, 8 and 9 are concerned, their presence at the spot is natural, being neighbours of Baban. They were attributed role about holding sticks but the same are not recovered. Only those accused, against whom there is consistent evidence, are held guilty. Acquitting some of the accused for want of evidence itself suggests that learned trial Judge has carefully sifted the prosecution evidence and thereafter, on getting satisfied about credibility and reliability of the evidence, findings have been recorded. Even on re-appreciation and re-analysis of prosecution

evidence, in our opinion, the conclusion drawn is the only possible conclusion that would flow. Therefore, we do not want to interfere or disturb the findings reached at by learned trial Judge.

46. Learned counsel for informant also failed to point out which part of the evidence has not been appreciated properly or there is improper appreciation of available evidence. Therefore, we find no merit in appeal at the end of informant also. Hence, we proceed to pass the following order :

ORDER

Both the appeals are hereby dismissed.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]

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