

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 770 OF 2015

1. Dastgir Gafur Shaha
Age : 24 years, Occu. : Labour,
R/o. Idgah area, Sanjaynagar,
Shrirampur, Dist. Ahmednagar.

... Appellant
(Ori. Accused)

Versus

1. The State of Maharashtra,
Through P.S.I. Shrirampur,
City Police Station, Shrirampur.
2. Varsha w/o Balasaheb Londhe
Age : 33 Years, Occu. : Housewife,
R/o. Bhairavnath Nagar, Kadam Wasti,
Shrirampur, Tq. Shrirampur,
Dist. Ahmednagar

... Respondents

...

WITH

CRIMINAL APPEAL NO. 769 OF 2015

1. Bhausahab Madhukar Gore
Age : 23 years, Occu. : Labour,
R/o. Idgah area, Sanjaynagar,
Shrirampur, Dist. Ahmednagar.

... Appellant
(Ori. Accused)

Versus

1. The State of Maharashtra,
Through P.S.I. Shrirampur,
City Police Station, Shrirampur.
2. Varsha w/o Balasaheb Londhe
Age : 33 Years, Occu. : Housewife,
R/o. Bhairavnath Nagar,
Shrirampur, Tq. Shrirampur,
Dist. Ahmednagar

... Respondent

...

**WITH
CRIMINAL APPEAL NO. 771 OF 2015**

1. Javed Gafur Shaha
Age : 18 years, Occu. : Labour,
R/o. Idgah area, Sanjaynagar,
Shrirampur, Dist. Ahmednagar.
... Appellant
(Ori. Accused)

Versus

1. The State of Maharashtra,
Through P.S.I. Shrirampur,
City Police Station, Shrirampur.
2. Varsha w/o Balasaheb Londhe
Age : 33 Years, Occu. : Housewife,
R/o. Bhairavnath Nagar,
Shrirampur, Tq. Shrirampur,
Dist. Ahmednagar
... Respondent

...
**WITH
CRIMINAL APPEAL NO. 857 OF 2015**

1. Arbaj @ Mosin Kadir Shaikh
Age : 21 years, Occu. : Labour,
R/o. Idgah area, Sanjaynagar,
Shrirampur, Dist. Ahmednagar.
... Appellant
(Ori. Accused)

Versus

1. The State of Maharashtra,
Through P.S.I. Shrirampur,
City Police Station, Shrirampur.
2. Varsha w/o Balasaheb Londhe
Age : 33 Years, Occu. : Housewife,
R/o. Bhairavnath Nagar,
Shrirampur, Tq. Shrirampur,
Dist. Ahmednagar
... Respondent

...
Mr.Joydeep Chatterji, Advocate for Appellants.
Mr.A.M.Phule, APP for Respondent No.1 – State.
Mr. Rajendra N.Chavan, Advocate for Respondent No.2 (Appointed)

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

**RESERVED ON : 7th June, 2023
PRONOUNCED ON : 23rd June, 2023**

JUDGMENT (PER ABHAY S. WAGHWASE, J.) :

1. Above four appeals are directed against judgment and order of conviction recorded by the learned Additional Sessions Judge, Shrirampur in Sessions Case No.16 of 2015, thereby holding appellants guilty for the offences punishable under Sections 143, 147, 148, 302 read with Section 149 of the Indian Penal Code (IPC) and under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (for short "Atrocities Act") and sentenced them to suffer imprisonment for life and to pay fine as spelt out in the operative part of the impugned judgment and order.

FACTS IN BRIEF GIVING RISE TO SESSIONS CASE

2. On 25-07-2014 at around 03:00 p.m. there was quarrel between deceased Balasaheb and appellant accused Dastgir and in such episode, deceased allegedly slapped Dastgir. Consequently, Dastgir while in company of other accused, issued threat to see Balasaheb in the night. Again there was some quarrel between deceased and accused at around 07:00 p.m. At around

09:00 p.m. deceased left the house informing that he is going for answering call of nature. Informant, maternal aunt of deceased namely Vatsala Vinayak Khude, who had come to house of deceased for dinner, was returning with her husband **PW5** Vinayak Rambhau Khude on Motorcycle. When they reached near house of one Bangadiwala, informant and her husband saw accused persons assaulting deceased with Gupti and thereafter fleeing away. **PW6** Deoram Bhalerao and **PW8** Krishna Londhe, who were present in the vicinity and rushed to the spot on hearing hue and cry raised by the informant, lifted and shifted deceased to Kamgar Hospital, Shrirampur, where he was examined and declared dead. As a result of which, **PW3** Vatsala, maternal aunt of deceased lodged report on the strength of which crime was registered.

3. After completing the investigation and all formalities, accused persons came to be charge-sheeted and were made to face trial before learned Additional Sessions Judge, Shrirampur. He conducted trial, heard both the sides and after appreciating the oral and documentary evidence, accepted the case of prosecution as proved and thereby held accused persons guilty and awarded aforesaid punishment. This judgment of conviction dated 23-09-2015 is challenged by way of instant appeals by invoking Section 374 of the Code of Criminal Procedure (Cr.PC.).

4. Heard Mr.Joydeep Chatterji, learned Advocate for the appellants, Mr.A.M.Phule, learned APP for respondent no.1 – State and Mr.R.N.Chavan, learned Advocate for respondent no.2.

5. Respondent no.2 i.e. wife of deceased is arraigned as respondent no.2 here as a result of order of grant of share in the compensation. Learned Advocate for respondent no.2 submitted that learned trial Judge has rightly considered her entitlement to receive compensation and thereby duly compensated her and he prays that said order should be kept intact.

SUBMISSIONS

On behalf of Appellants :

6. The sum and substance of the argument put-forth by the learned Advocate for the appellants is that, though prosecution claims that there is direct eye witness account, he submitted that it is doubtful as to whether it is so. According to him, prosecution is mainly relying on testimonies of **PW3** Vatsala, **PW5** Vinayak , **PW6** Deoram **and** **PW8** Krishna. He pointed out that **PW5** Vinayak and **PW3** Vatsala are husband and wife and are uncle and maternal aunt of deceased and therefore, there evidence is not free from bias. Taking us through the evidence of both these witnesses, he would submit that their evidence cannot be said to be consistent or corroborating each other. Infact their evidence suggests that they are got up witnesses. He emphasized

that informant **PW3** Vatsala spoke about assault with Gupti by only one accused Dastgir and she does not speak of role of other accused persons and moreover only one weapon is recovered by the Investigating Agency which too is not a Gupti rather it is a knife. At the same time, he also took us through the evidence of **PW5** Vinayak and submits that inspite of claiming to be in the company of informant and accompanied her to Police Station, for the best reasons known to him, he has not given statement on his own at the time of lodging of FIR, but he seems to have given statement on the next day and thus, it is submitted by learned Advocate that there is possibility of giving such statement after due deliberation. He next submitted that though prosecution claims that other witnesses **PW6** Deoram and **PW8** Krishna were at the spot, he pointed out that there is no plausible explanation as to why they were in the vicinity of the spot and secondly evidence of witness **PW8** Krishna clearly shows that he had reached after the occurrence and whatever evidence he gave is on the basis of hearsay information. Resultantly, learned Advocate submits that by no means evidence of above four witnesses can be said to be cogent, reliable or lending support to each other. It is submitted that statement of witnesses are not recorded immediately. There is no independent witness and therefore, on the point of direct evidence, it is his submission that evidence of prosecution does not inspire full confidence.

7. Taking us through the post mortem report and evidence of Doctor, he would submit that as per so called direct witness, there was use of Gupti, but medical expert has come across only one stab injury and therefore, even evidence of prosecution on this count is not free from doubt.

8. He also invited our attention to the answers given by prosecution witnesses in cross and would submit that from the same, it is clear that a concocted story has been created to rope in even those accused persons, who were neither armed nor have indulged in any overt act. Consequently, it is his submission that with such quality of evidence, learned trial Judge ought not to have recorded guilt of the accused by accepting the case of prosecution. It is his submission that inference and conclusion drawn by the learned trial Judge are in absence of cogent evidence and as such it is his submission that such judgment cannot be allowed to be sustained in the eyes of law and hence, he prays to allow the appeal.

On behalf of APP :

9. Per contra, supporting the judgment passed by the learned trial Judge, learned APP would also take up through the testimonies of all the witnesses and laid much emphasis on the evidence of **PW3** Vatsala - informant, **PW5** Vinayak, **PW6** Deoram and **PW8** Krishna. He submits that these witnesses are

consistent and lending support to each other and corroborating each other on material count of occurrence. He submits that though there are some inconsistencies, those are minor in nature and not fatal so as to damage the entire case of the prosecution. He submitted that there is clear and cogent evidence about alleged occurrence wherein there was incident of quarrel in the afternoon, which was witnessed by both **PW3** Vatsala and **PW5** Vinayak. At such time, accused Dastgir has given threat to deceased for being slapped by deceased. It is submitted that to execute the threat given in the afternoon, assault had mounted in the night. That deceased died on the spot. Medical expert confirmed death to be homicidal one and as such it is his submission that all accused have gathered together with common intention and they have participated in assault. They all are responsible for death of deceased and are thereby rightly held guilty by the learned trial Judge and as such it is his submission that there is no merits in the appeals and he prays to dismiss the appeals.

10. We have heard both the sides to their satisfaction. We have gone through the record.

11. It transpires from the record before the trial Court that in all 11 witnesses were examined. Their status and role could be categorized and summarized as under :

FIRST SET**Ocular evidence :**

PW3 Vatsala Khude – is informant, who is maternal aunt of deceased.

Her evidence is at Exh.20.

PW5 Vinayak Khude - is maternal uncle of deceased. His evidence is at Exh.25.

PW6 Deoram Bhalerao – is witness who shifted deceased to Kamgar Hospital, Shrirampur with the help of **PW8** Krishna. His evidence is at Exh.26.

PW8 Krishna Londhe – is witness who helped **PW6** Deoram for shifting deceased to Kamgar Hospital, Shrirampur. His evidence is at Exh.29.

SECOND SET**Panch :**

PW1 Manik Khue – is inquest panch. His evidence is at Exh.16. Inquest panchanama is at Exh.17.

PW2 Balu Fargade – is spot panch. His evidence is at Exh.18. Spot panchanama is at Exh.19.

PW4 Niraj Yadav - is panch to seizure of clothes of deceased. His evidence is at Exh.23. Seizure panchanama is at Exh.24.

PW7 Sainath Kale – is panch to house search of accused Bhausaheb. His evidence is at Exh.27.

PW9 Ramesh Shinde – is panch to seizure of clothes of accused Dastgir. His evidence is at Exh.30.

PW10 Suresh Bhalerao – is panch to seizure of Motorcycle No.MH17 2137. His evidence is at Exh.33. Seizure panchanama is at Exh.34.

PW11 Dattatraya Maruti Ugalmugale - is panch to seizure of clothes of accused Javed. His evidence is at Exh.35.

PW12 Shubham Sode – is panch to seizure of knife. His evidence is at Exh.38.

THIRD SET

Autopsy Doctor :

PW13 Dr.Nitin Samudra – is Medical Officer at PHC, Toka, who has conducted post mortem. His evidence is at Exh.41. Post mortem report is at Exh.43.

FOURTH SET

Investigating Officer :

PW14 Ambadas Gangurde – is Deputy Superintendent of Police and Investigating Officer. His evidence is at Exh.46.

12. This being first appellate Court and last fact finding Court, in view of law laid down in the case of *Ishvarbhai Fujibhai Patni v. State of Gujarat; (1995) 1 SCC (Cri.) 222* and also in *Geeta Devi v. State of UP and others; 2022 SCC OnLine SC 57*, this Court is expected to re-appreciate, re-examine and re-analyze the entire evidence before the trial Court.

13. We are also mindful of the legal position and the cardinal principle of criminal jurisprudence that prosecution has to prove the case against accused beyond reasonable doubt and every person is presumed to be innocent until proven guilty by leading cogent, reliable and trustworthy evidence. That

prosecution has to stand on its own leg and or fall and cannot take recourse to defence evidence, if any.

In the light of such legal requirement, we proceed to examine the evidence of so called direct eye witnesses. It seems that alleged occurrence had taken place on 25-07-2014. It is pertinent to note that appellants have not questioned the mode of death to be homicidal one nor there is any serious exception taken to the scene of occurrence, Panchanama or aspects of recovery. Much emphasis is led on the credibility of so called direct eye witnesses. Therefore, the only aspect which remains for consideration is that whether witnesses of prosecution are indeed eye witnesses or not. We undertake the said exercise by quoting sum and substance of the evidence of prosecution which is as under :

SUM AND SUBSTANCE OF PROSECUTION EVIDENCE

14. **PW3** Vatsala, who is informant, seems to be maternal aunt of deceased Balasaheb. In her testimony at Exh.20, she stated that on 25-07-2014, it was Friday and there was quarrel between accused Dasty, Javya (Javed) and Firya and her nephew Balasaheb near a Panipuri cart. She stated that the accused persons were abusing deceased Balasaheb and hence deceased Balasaheb slapped Dastgir. According to her, accused persons told deceased Balasaheb that they will finish him off and so she intervened. In the night deceased

Balasaheb had invited this witness and her husband for dinner and so after taking dinner, they were at his house and at that time deceased Balasaheb had received a phone call and so he left informing that he is going for answering a call of nature but did not return. According to this witness, she herself and her husband were proceeding towards their house. She stated that when they reached near the building of Bangadiwala, she saw five boys near deceased Balasaheb and they were assaulting him with Gupti. She gave their names as Dastgir (Dastya), Arvya (Arbas), Javya (Javed), Umya (Umesh) and Bhausahab (Bhavasha). She claims that she gave a call to Dastgir. She stated that she had seen all accused persons on the spot and they ran away from the spot. She made hue and cry. Persons gathered on the spot and deceased Balasaheb was taken to Kamgar Hospital, Shrirampur. According to her, she went to Police Station with her husband and lodged report FIR Exh.21.

15. The next witness relied by prosecution is **PW5** Vinayak is husband of witness **PW3** Vatsala. In his evidence at Exh.25 he testified that there was quarrel between deceased Balasaheb and accused persons at 03:00 p.m. on 25-07-2014 which was Friday. He stated that at such time, he was in his shop and his wife came and informed him about incident. In his further evidence he stated that Balasaheb and his father called him and his wife for dinner. Therefore, he and his wife went to house of deceased on TVS Motorcycle for dinner. He stated that deceased Balasaheb received a phone call and he went

for answering call of nature. According to him, thereafter, this witness and his wife were going back to their house. He stated that when they reached near house of Bangadiwala, they saw accused Javed, Arbaj, Bhausahab, Umesh and Dastgir were assaulting deceased Balasahab by means of weapon like Gupti. This witness made hue and cry as Bhavasha. Thereafter accused persons ran away on Motorcycle. Neighbours gathered and Deoram and Krishna took Balasahab to Kamgar Hospital, Shrirampur where he died. Then this witness stated that he and his wife went to Police Station and lodged report. In examination-in-chief itself he stated that his statement was recorded by Police on next day.

16. **PW6** Deoram in his evidence at Exh.26 stated that around 09:00 p.m. on 25-07-2014, he came out of the house after taking dinner and proceeded towards the chowk. At that time, he heard hue and cry and hence he ran in that direction. He stated that his maternal aunt **PW3** Vatsala and her husband **PW5** Vinayak were making hue and cry. Umesh Chavan and Bhausahab Gore had caught deceased Balasahab whereas Dastgir Shah was assaulting Balasahab on chest and stomach by a sharp knife. Accused Arbaj and Javed were giving kicks by saying that Balasahab should be killed. Thereafter, Bhausahab and Umesh ran away from the spot whereas Dastgir, Arbaj and Javed fled on Motorcycle. According to him, he and Krishna picked up Balasahab and brought him to road side and shifted him on their Motorcycle

to Kamgar Hospital, Shrirampur, where he was examined and declared dead. He identified the accused, who assaulted Balasaheb by Gupti and kicks. He stated that he can identify the weapon and he identified the same.

17. **PW8** Krishna is brother of deceased. It has come in his evidence at Exh.29 that occurrence was of 25-07-2014 between 08:30 p.m. to 08:45 p.m. He stated that deceased had gone out of house for latrine. This witness stated that after dinner, he walked upto bridge on Sutgirni road and at that time, he heard hue and cry and therefore, he rushed towards that direction and saw that deceased was lying in injured condition near the house of Bangadiwala. His uncle **PW5** Vinayak and aunt **PW3** Vatsala and some other neighbours were gathered on the spot. He stated that he enquired about incident with **PW5** Vinayak and he hold him that accused Dastgir, Arbaj, Javed, Bhausahab and Umesh have assaulted deceased by means of knife and had ran away. He stated that there were injuries on the chest, stomach, rib, fingers and right leg of deceased. Then he himself with the help of **PW6** Deoram shifted deceased on the road side and thereafter, **PW6** Deoram brought Motorcycle, put Balasaheb on Motorcycle and brought him to Kamgar Hospital, Shrirampur, where Doctor examined and declared him dead. He stated that **PW3** Vatsala lodged FIR. He stated that he knows the accused Javed and Arbaj, who were present in the Court and he identified them. He stated that two accused persons are not produced from jail but he knew their names.

18. Before proceeding to sift / analysis the available oral evidence, it would be apt to discuss the cardinal principles which evolved by virtue of series of judicial pronouncements on the point of manner of appreciation of ocular evidence in a criminal case. These principles have been recently spelt out by the Hon'ble Apex Court in the case ***Balu Sudam Khalde and another v. The State of Maharashtra; 2023 SCC OnLine SC 355***, while deciding Criminal Appeal 1910 of 2010 by culling out the legal position discussed in the following cases:

- (i) ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat; AIR 1983 SC 753***,
- (ii) ***Leela Ram v. State of Haryana; AIR 1995 SC 3717*** and
- (iii) ***Tahsildar Singh v. State of UP; AIR 1959 SC 1012***.

We borrow the same and reproduce it 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.”

ANALYSIS AND CONCLUSION

19. On carefully analyzing substantive evidence of above four witnesses, in our opinion, it is emerging that on 25-07-2014, there was quarrel between deceased and accused persons. It was witnessed by **PW3** Vatsala - informant and she narrated about it. She spoke about deceased slapping accused Dastgir and thereafter, threat being issued by accused to see him in the night. Her husband **PW5** Vinayak also claims to have learnt from informant regarding the alleged occurrence taking place in the afternoon near Panipuri cart. **PW3** Vatsala and **PW5** Vinayak, who are wife and husband, are speaking about visiting house of Balasaheb for dinner on being invited and thereafter, deceased receiving a phone call and leaving the house but did not returning. According to both wife and husband, when they were going back to their house, they saw occurrence of assault on the spot and they have named accused persons also.

20. Learned Advocate for the appellants had taken us through the cross-examination of above witnesses and it is strenuously submitted that it is doubtful whether these witnesses had any occasion to see the alleged occurrence. Inviting our attention to the cross-examination of **PW3** Vatsala, he would submit that this witness claims that she had seen five boys assailing deceased with Gupti but only one article is seized. According to him, she answered in cross-examination that her husband also gave report in writing

but the same is not finding place in the record, thereby rendering the case of prosecution doubtful. He pointed out that **PW3** Vatsala stated that neither she nor her husband went to the hospital inspite of being maternal aunt and uncle of deceased and as such it is his submission that their conduct is unnatural. He pointed out that there was no source of light and it being night time, according to him, it is doubtful whether in the light of two-wheeler Motorcycle, **PW3** Vatsala and **PW5** Vinayak had any opportunity at all to have a clear vision about the occurrence. Lastly, he submitted that there are material omissions about stating that all accused persons had ran away from the spot.

21. In our opinion, the above submission of learned Advocate for the appellants has no merit. It is to be noted that occurrence has taken place in the night where admittedly there was no street light. It is common knowledge that even if it is a night time, even a vehicle like Motorcycle having headlight can throw prominent light in the surroundings and objects get focused. **PW5** Vinayak was rider and his wife **PW3** Vatsala was a pillion rider. Therefore, they must have had clear vision of the events which took in their front side. It also needs to be considered that informant was knowing all accused persons and she had also witnessed the quarrel which allegedly took place in the afternoon. She has categorically stated that deceased Balasaheb was assaulted by means of Gupti. Much hue and cry were made that there is no recovery of

Gupti but there is recovery of knife. However, in our opinion, different nomenclature of an article given by lady witness itself is not sufficient to doubt her entire evidence. Similarly, mere exaggeration on the point of her husband lodging written report is also not so serious so as to raise doubt about her version. Sometimes there is tendency amongst witnesses to exaggerate the story. Consequently, above infirmity, in our opinion, is insignificant.

22. Similarly as regard to testimony of **PW5** Vinayak is concerned, it is tried to be submitted that this witness had not given statement to Police inspite of accompanying the informant in the Police Station. True it is that though he accompanied his wife that night but he has not given statement, however, he has given statement on the very next day itself. Therefore, merely on such count, it cannot be said that his version is afterthought or after due deliberation. He too has lend support to the version of his wife about firstly hearing from her regarding quarrel taking place in the afternoon on the aspect of they being invited for dinner, then deceased leaving house on the pretext of answering call of nature and thereafter, while this witness and his wife returning to their home, they saw occurrence. He too named accused persons who are from the same vicinity. Therefore, there are reasons to hold that testimonies of **PW3** Vatsala informant and her husband **PW5** Vinayak are corroborating and lending support to each other on the point of assault.

23. As regards to credibility of **PW6** Deoram is concerned, he is branded as a planted witness. On going through the substantive evidence of this witness, it is emerging that on the date of incident, after taking dinner, when he was proceeding towards chowk, on hearing hue and cry, he rushed to the spot and he also spoke about accused mounting assault on deceased Balasaheb. He with the help of **PW8** Krishna lifted and shifted deceased to the hospital. True it is that during said process of lifting and shifting, his clothes which were admittedly got blood stained, but the investigating machinery has not seized the same. Such aspect at the most could be attributed to investigating machinery and not this rustic villager.

24. As regards to testimony of **PW8** Krishna is concerned, we do agree with the submission advanced by learned Advocate for the appellant, that, he cannot be said to be eye witness because from entire tenor of his evidence, it is clear that he has reached the scene of occurrence later on and he has learnt about the events from **PW5** Vinayak. Hence, it is correct that he has hearsay information.

Learned Advocate for the appellant also tried to question the prosecution case by submitting that on one hand informant claims about a single blow being inflicted on deceased but Autopsy Doctor has noted seven injuries and consequently he would try to impress upon us that there is inconsistency in the oral account and in the medical account. It needs to be

noted that there are five accused allegedly involved in assault at night. They all said to have surrounded deceased and were beating him. **PW3** Vatsala and **PW5** Vinayak must have been shocked to see nephew Balasaheb being assaulted. Therefore, it cannot be expected that they would define roles of other accused distinctly. However, it needs to be noted that presence of accused persons are marked by giving their names and they are the same persons who had issued threats in the day time. Therefore, failure to account for other injuries, should not render case of prosecution itself doubtful. As stated above, testimonies of **PW3** Vatsala and **PW5** Vinayak, on the point of threat, occurrence and assault has virtually remained unshaken. Therefore, the above submissions advanced before us are in our opinion worthless.

25. Now let us turned to other evidence i.e. witnesses to inquest panchamana, spot panchanama, recovery panchanama etc. It is pertinent to note that while arguing appeals, learned Advocate for the appellants has not seriously questioned above evidence. **PW1** Manik seems to be the panch to inquest and he identified panchanama Exh.17 which was drawn at Kamgar Hospital. **PW2** Balu seems to be the panch to spot panchanama Exh.19. He has also testified about visiting the spot. He has given description of circumstances at the scene of occurrence and spoke about collection of blood stains and blood stained soil. Therefore, inquest as well as spot has been proved by the prosecution. Likewise testimony of **PW4** Niraj – panch to

seizure of clothes of deceased handed over by the Police Constable. The seizure panchanama at Exh.24 is also not seriously questioned by the appellants. **PW7** Sainath seems to be panch to house search panchanama of Bhausahab at Exh.28 during which prosecution claims to have seized a revolver. However, there is no nexus of said article with the present case. **PW9** Ramesh seems to be panch to seizure panchanama of clothes of accused Dastgir, **PW10** Suresh seems to be panch to seizure of Motorcycle, **PW11** Dattatraya seems to be panch to seizure of clothes of accused Javed. But as stated above even such panchanamas are not seriously questioned before us by the appellants. Prosecution has come with a case about recovery of knife at the instance of accused Dastgir and to support such allegation **PW12** Shubham has been examined at Exh.38. It seems that on 29-07-2014 accused Dastgir gave memorandum of disclosure regarding handing over the knife and after drawing panchnama at Exh.39 witness stated that accused took them to Babhulvedha on Nagar road and they reached to a bridge where accused got down from the vehicle and he was followed and he took them to dry stream and a knife which was blood stained was seized. He also identified the article shown to him in the Court.

Said panch witness though extensively cross-examined, nothing damaging for prosecution case has been solicited. Aspect of giving memorandum while in custody and seizure of article at the instance of accused is also not shown to be doubtful. Merely because accused was in handcuffed

condition, in itself is not a ground to hold recovery to be meaningless or involuntary.

26. On taking survey of entire oral and documentary evidence, which is re-appreciated and re-analyzed by us, we too are in complete agreement with the findings reached by the learned trial Judge. There is infact legally acceptable ocular account regarding assault on deceased Balasaheb. Quarrel and slapping in the day time at the instance of deceased has triggered the incident. Informant speaks about threat being issued in the afternoon to deceased in her presence that he would be seen in the night. Consequently, threat seems to have been given effect too. All accused who were together during the quarrel in the day time are shown to be with main accused Dastgir in the night time also and they are also named alongwith Dastgir. One witness **PW6** Deoram has also attributed roles to other accused. There is evidence suggesting kicks being given to deceased.

27. It is tried to be submitted that at the most accused Dastgir is attributed with a role of stabbing but not other accused persons and therefore their impleadment or conviction is improper. Here admittedly prosecution has arraigned other accused by invoking Section 34 of the Indian Penal Code.

In the light of above submission, we proceed to see whether Section 34 of Indian Penal Code (IPC) comes into play or not. It is settled position that

for attracting Section 34 of the IPC, in view of the provisions laid down in Section 33 of the IPC, a series of acts done by several persons can be related to a single act which constitutes a criminal offence. By virtue of Section 34, a criminal act done by one person can be imported in the light of common intention and can be put to use against other persons. It is a vicarious liability that automatically gets fastened for the act done by others as the act is done with a common intention. There has to be common conscious meeting of mind amongst all participants for bringing desired result. A word “furtherance” suggests existence of advancement. Undoubtedly it is for the prosecution to demonstrate existence of common intention and for employing Section 34 of the IPC, prosecution need not prove that act was done by only a particular person. The act of going together with a common intention itself is sufficient to attract said charge.

28. In the light of such legal requirement, if the evidence in case in hand is tested for ascertaining existence of common intention, it is seen from the chronology of events, which are narrated by the informant, that in the morning, there was gathering of all accused persons during which deceased allegedly slapped Dastgir. In presence of other accused, Dastgir had issued threat to see deceased. Such aspect has remained intact throughout in the testimony of informant inspite of being cross-examined at length. The sequence of events narrated by eye witnesses clearly suggest that accused

persons had come in the night with common intention for giving effect to the threat given by Dastgir to deceased. Therefore, even if prosecution could not define exact over acts or roles of each of them distinctly, in the light of above discussion, in our opinion, Section 34 of the IPC does get attracted. Resultantly, the submission advanced before us about evidence to be only against accused Dastgir and therefore conviction of other accused is not sustainable, holds no merit.

29. We have minutely gone through the impugned judgment. We have noticed that learned trial Judge has properly appreciated the oral as well as documentary evidence. The substantive evidence and answers given in the cross-examination are properly analyzed for arriving to the conclusion. Findings are supported by sound reasons. In appeals no patent infirmity or perversity is brought to our notice so as to interfere in the impugned judgment. We are in complete agreement with the learned trial Judge who held wife of victim i.e. respondent no.2 to be entitled to receive compensation and she has been awarded share in the same. The said order to that extent seems to be justified in the light of facts and circumstances of the case in hand. Hence, there is no need to overturn or interfere in the impugned judgment. Consequently, we proceed to pass following order :

ORDER

I) Criminal Appeal Nos.770 of 2015, 769 of 2015, 771 of 2015 and 857 of 2015 stand dismissed.

II) Fees of learned Advocate appointed for respondent No.2 is quantified @ Rs.10,000/- to be paid by the High Court Legal Services Sub-Committee, Aurangabad.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

SPT