

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 572 OF 2016

1. Rama Abaji Jadhav,
Age: 64 years, Occupation: Agriculture,
2. Chagan @ Rushi Rama Jadhav,
Age: 28 years, Occupation: Agriculture,
3. Jyoti Rama Jadhav,
Age: 59 years, Occupation: Housewife,

All R/o: Morandi Mohalla, Old Jalna,
District: Jalna.

... Appellants

[Orig. Accused No.1, 3 & 4]

Versus

State of Maharashtra

... Respondent

**WITH
CRIMINAL APPEAL NO. 125 OF 2017**

The State of Maharashtra
Through Police Station,
Kadim Jalna, Tq. and Dist. Jalna.

... Applicant

[Orig. Respondent]

Versus

1. Rama s/o Abaji Jadhav
Age: 62 years,
2. Digambar s/o Narayan Gaike
Age: 24 years,
3. Jyoti w/o Rama Jadhav
Age: 57 years,
4. Rani w/o Chagan @ Rushi Jadhav
Age: 23 years

All R/o Morandi Mohalla, Old Jalna,
Dist Jalna.

... Respondents

[Ori. Accused nos.1, 2, 4 & 5]

**WITH
CRIMINAL APPEAL NO. 124 OF 2017**

Laxman Shamrao Yeole
Age-67 years, Occupation - Labourer,
R/o. Morandi Mohalla,
Old Jalna, Tq. & Dist. Jalna. ... Appellant

[PW2, informant & victim of the crime]

Versus

- 1] The State of Maharashtra
- 2] Rama s/o Abaji Jadhav
Age- 62 years, Occupation-Business
- 3] Jyoti w/o Rama Jadhav
Age- 57 years, Occupation-Household,
- 4] Rani w/o Chagan @ Rushi Jadhav
Age- 23 years, Occupation-Household,

Respondent no. 2 to 4 are
R/o. Morandi Mohalla, Old Jalna,
Dist. Jalna.

... Respondents

[R.Nos. 2 to 4 original accused]

**WITH
CRIMINAL APPEAL NO. 581 OF 2016
WITH
CRIMINAL APPLICATION NO. 5645 OF 2016
IN CRIMINAL APPEAL NO. 581 OF 2016**

Rani Chagan @ Rushi Jadhav
Age: 25 years, Occupation: Housewife,
R/o: Morandi Mohalla, Old Jalna,
District: Jalna.

... Appellant

[Orig. Accused No.5]

Versus

State of Maharashtra

... Respondent

.....

Mr. Joydeep Chatterji, Advocate for the Appellants in Criminal Appeal No. 572 of 2016, Criminal Appeal No.581 of 2016 and Criminal Application No. 5645 of 2016.

Mr. S. J. Salgare, APP for Appellant in Criminal Appeal No. 125 of 2017 and for Respondent in rest of the matters.

Mr. S. J. Salunke, Advocate for Appellant in Criminal Appeal No. 124 of 2017.

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

Reserved on : 31.07.2023

Pronounced on : 10.08.2023

JUDGMENT [ABHAY S. WAGHWASE, J.] :

1. Original accused nos. 1, 3 and 4 [appellants in Criminal Appeal No. 572 of 2016] and original accused no.5 [appellant in Criminal Appeal No. 581 of 2016] are hereby invoking Section 374 of the Code of Criminal Procedure [Cr.P.C.], thereby taking exception to the judgment and order of conviction passed by learned Additional Sessions Judge-1, Jalna dated 17.08.2016 in Session Case No. 66 of 2014, convicting them as under:

1. Accused No.3) Chagan alias Rushi Rama Jadhav is hereby held guilty under Section 235(2) of Cr.P.C. for commission of offence p.u.s.302 of IP Code, and he is sentenced to

suffer **rigorous imprisonment for life and to pay fine of Rs.5000/-** I.D. of payment of fine to suffer simple imprisonment for **Six** months.

2. Accused No.1) Rama s/o Abaji Jadhav, No.4) Jyoti Rama Jadhav and No.5) Rani w/o Chagan @ Rushi Jadhav, are hereby held guilty under Section 235(2) of Cr.P.C. for commission of offence p.u.s. 323 of I.P.Code and they are sentenced to suffer Simple Imprisonment for **One year** and to pay fine of **Rs.500/-** each I.D. of payment of fine to suffer Simple Imprisonment for **three** months. They shall surrender their bail bonds.
3. Accused No.3 Chagan @ Rushi Rama Jadhav, is hereby acquitted under section 235(1) of Cr.P.C. for commission of offence p.u.s.143, 147, 148, 323, 504 r.w. 149 of IPC, u/sec.4/25, 7/25(1)(A) of the Arms Act and Sec. 135 of the Bombay Police Act.
4. Accused no.2 Digamber Narayan Gaike is hereby acquitted u/sec.235(1) of Cr.P.C. for commission of offence p.u.s. 143, 147, 148, 302, 323, 504 r.w. 149 of IPC, 4/25, of the Arms Act and U/Sec. 135 of the Bombay Police Act. His bail bonds stand cancelled.
5. Accused nos.1) Rama s/o Abaji Jadhav, No.4) Jyoti Rama Jadhav and No.5) Rani w/o Chagan @ Rushi Jadhav, are hereby acquitted under section 235(1) of Cr.P.C. for commission of offence p.u.s. 143, 147, 148, 302, 504 r.w.

149 of IPC, U/Sec. 4/25, 7/25(1)(A) of the Arms Act, and u/sec. 135 of the Bombay Police Act.

6. Set off under Section 428 of Cr.P.C. be given to accused nos. 1) Rama s/o Abaji Jadhav, No.3) Chagan @ Rushi Rama Jadhav, No.4) Jyoti Rama Jadhav and No.5) Rani w/o Chagan @ Rushi Jadhav.
 7. Muddemal properties article no.9 Knife (Khanzir) and Article No.11 Sword be sent to District Magistrate, Jalna, as provided u/sec.32 of Arms Act, for its disposal and rest of the Muddemal property being worthless be destroyed after appeal period is over.
 8. Accused no.2 Digambar Narayan Gaike is directed to furnish P.R. and S.B. of Rs.05,000/- as per Section 437-A of Cr.P.C. for appearing before appellate court.
 9. Copy of the Judgment be given to accused nos. 1, 3 to 5 free of costs.
 10. Dictated and pronounced in open Court.
2. Here, even State is challenging the order of acquittal of accused nos.1 Rama, 2 Digambar, 4 Jyoti and 5 Rani from charge under Section 302 of the Indian Penal Code [IPC] by preferring Criminal Appeal No.125 of 2017 and simultaneously, father of deceased is also

challenging the order of acquittal from charge under Section 302 of IPC to the extent of accused nos.1 Rama, 4 Jyoti and 5 Rani.

PROSECUTION CASE IN TRIAL COURT

3. An event of celebration of Devi festival was organized at Morandi Mohalla on 29.11.2013. According to prosecution, sound system for the festival was arranged but there was dispute as to who should pay rent towards the amplifier and in such backdrop, there was quarrel between deceased and accused no.3 Chagan @ Rushi [hereinafter referred to as "Rushi"]. The issue and quarrel was resolved and deceased Ganesh was taken back by his family members in the house. After a short while, accused no.4 Jyoti, [mother of accused no.3 Rushi], and accused no.2 Digambar [brother in law of accused no.3 Rushi] again visited house of deceased Ganesh and it is the case of prosecution that, he was allegedly abused by accused no.4 Jyoti challenging him to come to their house. So, around 7.00 p.m., Ganesh went to the house of accused. There, accused no.3 Rushi stabbed him in his abdomen, accused no.1 Rama inflicted blow with sword on his leg, whereas accused no.4 Jyoti [wife of Rama], accused no.5 Rani [wife of Rushi] and accused no.2 Digambar showered fist blows on Ganesh and as a result of said assault, he collapsed. Ganesh was shifted to hospital but, on examination, was declared as brought

dead and therefore, PW2 Laxman [father of deceased Ganesh] set law into motion vide report Exhibit 51 on the basis of which instant crime was registered.

4. PW14 PSI Suresh Bhale carried out investigation and after completing the same, he presented chargesheet. Trial was conducted by learned Additional Sessions Judge-1, Jalna, who on its conclusion and on appreciation of evidence, recorded the above conviction vide judgment and order dated 17.08.2016. This is now questioned before us by convicts as well as State and father of deceased [informant].

RIVAL CONTENTIONS :

On behalf appellants in Criminal Appeal No.572 of 2016 and Criminal Appeal No. 581 of 2016:

5. According to learned counsel, prosecution has not discharged its primary burden of proving the case against accused appellants beyond reasonable doubt, i.e. by adducing trustworthy and credible evidence. Taking us through the evidence of informant PW2 Laxman, he pointed out that it is doubtful whether he himself has seen the occurrence of assault as his evidence shows that he had reached the spot after everything was over and therefore, he has not named

accused no.1 Rama for assaulting by sword. He would strenuously submit that his name is not stated in the FIR and is rather appearing for the first time in supplementary statement on 04.12.2013 i.e. almost after 4 to 5 days since the date of occurrence dated 29.11.2013. For the said reason, he submits that implication is after due deliberation and is apparently false.

6. Learned counsel also invited our attention to the answers given by informant PW2 Laxman in cross and submitted that the same are full of material omissions, more particularly answers given in para 16, 17 and 23 of the cross examination.

7. Learned counsel further submitted that deceased accidentally fell and suffered injuries, however, such defence raised has not been considered and appreciated by learned trial Judge.

8. Similarly, taking us through the testimony of PW3 Vilas, brother of deceased, it is submitted that in spite of claiming to have accompanied deceased Ganesh, apparently he did not intervene to save his brother from the assault and rather, he chose to remain a mute spectator. Thus it is stated that his conduct is unnatural and unbecoming of a brother. It is pointed out that even his statement

under Section 161 of Cr.P.C., substantive evidence and statement under Section 164 of Cr.P.C. are inconsistent. Therefore, learned counsel even doubts the very veracity of his version.

9. Same attack is made on the testimony of PW4 Shubham, a resident of the same locality, and it is submitted that all above witnesses are interested witnesses. Therefore, only on the strength of such evidence, it is submitted that, story of prosecution cannot be said to be substantiated and charges cannot be held to be proved.

10. Finding fault in the procedure of recovery of alleged weapon, learned counsel submits that so-called evidence on recovery is also not convincing and so, unsafe for reliance.

11. He next submitted that even otherwise, there is weak evidence against accused no.1 Rama, accused no.4 Jyoti and accused no.5 Rani. It is submitted that still they are roped in along with other accused and are held guilty for offence under Section 323 of IPC. According to learned counsel, appreciation and finding of learned trial Judge to that extent is also against law.

Lastly, he submitted that for above reasons, there being false implication and erroneous appreciation of evidence, appeals deserve to be allowed.

On behalf of State:

12. In answer to above submissions, learned APP would also take us through the evidence, more particularly that of PW2 Laxman [father], PW3 Vilas [brother], PW4 Shubham and PW5 Arun, residents of same locality. According to learned APP, PW4 Shubham and PW5 Arun are independent witness. Reading the evidence in chief of above witnesses, he submits that, they are all consistent about the occurrence which took place during quarrel and subsequently, accused party again coming to house of deceased, abusing him and inviting him to their house and as a result of which, deceased going there and then he to be assaulted and killed on the spot. Learned APP submitted that ocular account is finding support from medical evidence. Medical expert has confirmed the injuries to be due to articles like sword and knife. There is clinching evidence about accused Rushi responsible for murder by stabbing and accused Rama, who was armed with sword, inflicting grievous injury. It is submitted that, learned trial court has rightly appreciated the ocular account, medical account and even taking into consideration the recovery at

the instance of accused, he submits that, guilt has been rightly fastened. It is submitted that law has been correctly appreciated and applied. Finding evidence of prosecution convincing and acceptable, guilt has been recorded and for said reasons, he submits that conviction of accused nos. 1, 3, 4 and 5 cannot be faulted at.

13. However, learned APP has taken exception to the findings of learned trial Judge for acquitting accused nos. 1, 2, 4 and 5 from the charge under Section 302 of IPC. Learned APP further submitted that on same set of evidence, guilt of accused no.3 Rushi is recorded under Section 302 of IPC, however, accused no.1 Rama, accused no.4 Jyoti and accused no.5 Rani have been convicted only for offence under Section 323 of IPC and clean chit has been unfortunately given to accused no.2 Digambar. Thus it is submitted that it is a fit case for re-appreciation and re-analysis of the entire evidence in an appeal at the instance of State.

On behalf of appellant in Criminal Appeal No. 124 of 2017 preferred by informant [father of deceased] :

14. Learned counsel representing original complainant also is questioning the acquittal of accused nos. 1, 4 and 5 for the charge under Section 302 of IPC. The sum and substance of his argument is

that there is clinching, clear, cogent evidence regarding the assault on deceased Ganesh. It is submitted that presence of all accused has been established in the trial court by prosecution. However, there is no proper appreciation as regards to accused no.1 Rama, accused no.4 Jyoti and accused no.5 Rani and they have been convicted only for offence under Section 323 of IPC in spite of convincing evidence available against them. He would strenuously submit that in view of charge under Section 149 of IPC, all were liable and responsible for the homicidal death and therefore, all ought to have been convicted, however, as the same has not happened, he prays for allowing the appeal and convicting such accused also for all the charges for which they were made to face trial.

**SUM AND SUBSTANCE OF THE EVIDENCE ON BEHALF OF
PROSECUTION IN THE TRIAL COURT**

- PW1** Gajanan Kale, pancha to spot panchanama. He has identified panchanama Exhibit 47 and according to him, the spot is on the road, 7 to 8 feet away from the house of accused Rushi.
- PW2** Laxman Yeole, informant and father of deceased Ganesh, stated about occurrence to be of 29.11.2023 at 7.00 p.m.. The sum and substance of his testimony is that, while he was in the house, he heard shouts and therefore, he and his family members ran towards the temple and they saw Ganesh

being assaulted. They saw Rushi and Rama assaulting Ganesh with knife and sword respectively, and other accused giving fist and kick blows. His son was shifted to the hospital and when declared dead, he lodged report Exhibit 51.

PW3 Vilas Laxman Yeole, brother of deceased Ganesh, deposed about reason of quarrel between his brother and Rushi. That, mother of Rushi coming with her son in law and abusing Ganesh and challenging him to come to their house and hence Ganesh going towards their house to question them for abuse. This witness claims that he also followed and he also saw assault on Ganesh by Rushi with knife and by Rama with sword and other accused beating Ganesh and after Ganesh collapsing ,they all fleeing.

PW4 Shubham Jogdand stated that on 29.11.2013, initially there was dispute between deceased and accused no.3 Rushi. After the matter was resolved and deceased went, mother of Rushi and her son in law visiting house of Ganesh, abusing him, daring him to come to their house and so Ganesh going there. He also narrated the occurrence of assault on deceased by Rushi and Rama with knife and sword and beating by other accused.

PW5 Arun Bhalekar, shop owner claims that incident took place in front of the house of accused and his shop is opposite to the house of accused. He narrated whatever he saw.

- PW6** Mahesh Bhalekar is pancha to seizure of clothes of deceased. He identified the panchanama Exhibit 64.
- PW7** Purushottam Dhawale, pancha to seizure of clothes of Vilas i.e. brother of deceased. He identified the panchanama Exhibit 66.
- PW8** Satish Tarmale, pancha to memorandum of disclosure at the instance of accused Ram regarding recovery of sword. The memorandum panchanama and recovery panchanama are at Exhibits 69 and 70.
- PW9** Lakhan Rajput, pancha to memorandum of disclosure at the instance of accused Rushi regarding handing over khanjir/knife, has not supported prosecution.
- PW10** Dr. Rajendra Shejule, autopsy doctor, who opined death to be due to injury to heart (penetrating stab injury) caused by sharp edged weapon.
- PW11** Ramchandra Khalse, Police Constable, acted as carrier of muddemal.
- PW12** Dr. Govind Patil, who examined Ganesh and declared him dead.
- PW13** API Shubhangi Suryawanshi, who noted the information at the instance of PW2 Laxman and registered crime.

PW14 PSI Suresh Bhale is the Investigating Officer, who narrated about all steps taken by him during investigation.

15. Here, we are called upon to ascertain whether conviction of original accused no. 3 Rushi for the offence under Section 302 IPC and that of accused nos. 1 Rama, 4 Jyoti and 5 Rani under Section 323 of IPC is just, legal and proper. Further, we are also required to get satisfied whether acquittal of accused nos. 1 Rama, 2 Digambar, 4 Jyoti and 5 Rani from charge under Section 302 of IPC is justified. 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.

16. Prosecution came with a case of availability of direct evidence i.e. in the form of ocular account of PW2 Laxman, PW3 Vilas, PW4 Shubham and PW5 Arun. That, ocular account finds support from medical evidence.

17. First, let us get satisfied as to whether death of Ganesh is demonstrated to be homicidal one. For this, we need to visit evidence of PW10 Dr. Rajendra Shejule, autopsy doctor.

18. PW10 Dr. Rajendra Shejule, autopsy doctor, in his evidence at Exhibit 78 narrated receiving dead body of Ganesh, he examining and noting external injuries as under:

1. Evidence of stab wound over chest left, horizontal, 7 cm below left nipple, elliptical shape, edges sharp, end pointed, blood clots present, size 6 cm x 2.5 cm about 20 cm deep.
2. Evidence of incised wound over neck left side oblique, size 5 x 0.5 x 05 cm, edges sharp.
3. Incised wound over left hand, size 1.5 x 0.5 x 0.5 cm. edges sharp.
4. Two incised wounds over left foot 5 x 2 x 0.5 cm. and 6 x 4 x 0.5 cm., edges sharp.

All above injuries are ante mortem caused with sharp edged weapon.

Thereafter, on undertaking autopsy, he claims to have come across following internal injuries:

1. Fracture of 8th rib left side.
2. Evidence of penetrating injury to the wall of right atrium of heart, edges sharp, size 5 x 1 cm, all chambers of heart empty.

The above internal injuries correspond with the external injury at Sr. No. 1.

Finally, he has concluded that death of Ganesh is due to “injury to head (penetrating stab injury) caused by sharp edged weapon”.

19. We have gone through the cross faced by autopsy doctor PW10 Dr. Rajendra Shejule. He seems to be questioned about cause and effect of injuries, its size, sites, whether injuries are possible by single weapon or more than one weapon; that, whether weapon with which injuries are caused should have sharp edges on both sides and whether when the blade penetrates body, ridges would be visible. He admitted that exact position of injury no.3 is not mentioned. He also admitted about difference between stab injury and puncture injury. Doctor has flatly denied that if a person is holding a knife and if there is scuffle and if such person is pushed and he happens to fall, then external injury No.I could be caused.

On analyzing above substantive evidence of autopsy doctor, it is seen that medico legal expert has confirmed death due to injury no.I, which, according to him, is possible by article no.9 knife. All questions and suggestions put to him have been answered and explained by

assigning reasons. Therefore, here, prosecution has shown that death of Ganesh is because of stab injury to the heart and as such, it is nothing but homicidal one.

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

ANALYSIS

21. PW2 Laxman, who is father of deceased, in his evidence has stated about alleged occurrence taking place at 7.00 p.m. on 29.11.2013. According to him, on hearing shouts and noise, he came out of the house along with his wife and daughter-in-law and went towards the temple, and when they reached the house of accused, he has marked the presence of his son Vilas, one Anil Jadhav, Radhakishan Jogdand, Rameshwar Bhalekar and others. According to him, accused no.3 Rushi, accused no.1 Rama, Rushi's mother i.e. accused no.4 Jyoti and his wife accused no.5 Rani as well as Rama's son-in-law accused no.2 Digambar were showering fist blows and kicks on Ganesh. Then he stated that accused no.1 Rama gave blow with sword on leg of Ganesh, whereas accused no.3 Rushi gave knife blow on his abdomen and so Ganesh fell down. According to this witness, Ankush Shere, Vilas Yeole, Shubham, Akshay and Bhalekar

lifted Ganesh and took him to hospital. His further testimony shows that by way of supplementary statement dated 04.12.2013, he has specified that Ram used sword and Rushi used knife on being held by others.

Above witness has been subjected to extensive cross, however, we wish to deal with only material part, wherein he has candidly admitted that earlier there were good relations with all accused. He is questioned about geographical location of his house and directions therein and he is asked if anybody talks loudly from the temple, then, whether it is audible inside his house. He admitted that if there is quarrel in front of Maroti temple, then, it is audible in his house. This witness has admitted that he does not know that 30 to 45 minutes prior to the above fight, there was any quarrel and exchange of abuses between accused no.3 Rushi and his son Ganesh, but he stated that before fight, Shubham, his sons Vilas and Ganesh had come to their house and had informed him about the quarrel. He answered that it was revealed that quarrel was on account of contribution. He stated that his son went out and he remained in the house. Quarrel is got confirmed by suggesting that it was on account of rent towards the amplifier to be paid and that deceased was insisting accused to pay it. He denied that there was quarrel and abuse between his son

and accused Rushi in front of his house. He admitted that on hearing noise only, he went towards the temple. He denied seeing the house of accused from inside. He admitted that witnesses Ankush Shere, Shubham Jogdand, Arun Bhalekar, Radhakishan Jogdand and Rameshwar Bhalekar are from his community but he denied them to be his relatives. He answered that he alone went to lodge report but when he went to give supplementary statement, his son Vilas had accompanied him. Omissions are brought in para 16 and 17 on the point of running to the spot, about going near the house of accused and about seeing the incident in the light of bulb of the house of accused and of the shop. He admitted that in the report he did not tell that accused no.1 Rama hit his son on leg, rather, he told it during recording supplementary statement. He candidly admitted that he did not see knife with which his son was assaulted and therefore, he could not identify it. He further answered that accused no.1 Rama gave blow with sword with one hand and he had seen him hitting but he is unable to state whether it was with or without force. Case of defence suggested in para 23 is denied by him. Rest is all denial.

22. PW3 Vilas Yeole is the brother of deceased Ganesh, also stated that there was dispute between his brother Ganesh with accused Rushi regarding contribution to be paid for the amplifier. After some

time, mother of accused Rushi, namely Jyoti [accused no.4] and his brother in law Digambar [accused no.2] came to their house and abused them. He stated that accused no.4 Jyoti said to Ganesh as to why he is sitting in the house like eunuch and challenged him to come to their house and therefore, at 7.00 p.m., his deceased brother Ganesh went to question why he was abused. This witness stated that as his brother went alone, he also followed him and while going, accused no.3 Rushi brought his motorcycle across this witness. Thereafter, accused no.3 Rushi stabbed with knife in the abdomen of Ganesh and Rama hit with sword on leg of Ganesh, whereas, Rushi's mother Jyoti (accused no. 4), his wife Rani (accused no.5) and brother in law Digambar (accused no.2) all started slapping and giving fist blows to his brother Ganesh. Because of said assault, he collapsed and thereafter, accused ran away. His brother was taken to hospital in a rickshaw, but on reaching hospital, he was declared dead. He claims to have given statement to police as well as before JMFC Court, Jalna.

In the initial cross, omissions are brought in the statement under Section 164 of Cr.P.C. about "T" shirt to be smeared with blood and he changing it subsequently. According to him, abuses lasted for two to three minutes near the temple and there, quarrel was pacified

and Rushi went to his house. He admitted that house of accused is not visible from their house. He further answered that when he was going behind his brother, at that time, he was 10 to 15 feet away from him. He denied that at that time his father, mother and sister-in-law came with him. Omission is brought about Rushi putting motorcycle across him. He also admitted that there was dispute with his brother and Rushi on account of payment of rent of amplifier. To a question he answered that abuses were also given at 7.00 p.m. and it lasted for two to three minutes, whereas giving slaps and fist blows lasted for one to two minutes. He has admitted that there is chamber in front of house of accused. Rest all is either immaterial omissions or denials.

23. PW4 Shubham Jogdand claims to be a resident of the same locality where accused and deceased lived. According to him, the incident took place on 29.11.2013 at 6.30 p.m. when he was in front of Hamunam Mandir and there, a dispute was going on between deceased and accused no.3. Deceased had borrowed amplifier on rent and its money was to be paid by accused no.3 Rushi and therefore dispute was going on. The matter was then settled and deceased was sent back. After some time, accused no.4 Jyoti and accused no.2 Digambar came towards the house of Ganesh and gave abuses. Accused no.4 Jyoti said to deceased that if he has courage, then come

to their house. Therefore, after a short while, deceased went after them and this witness claims that he too went. There, they saw Jyoti, Digambar, Rani and Rama beating Ganesh with fist and kick blows and then accused Rushi stabbing Ganesh with knife over the abdomen and accused Rama assaulting with sword on his leg and running from the back door.

In cross, he confirmed that he was friend of Ganesh and Vilas. He admitted that he, Vilas [PW3] and Arun [PW5] had been to he house of Ganesh, but he denied that three of them again went towards the house of accused. He is questioned whether blows with knife were given first or whether blow of sword was given first and he has answered that both were given at the same time. He answered that Ganesh was caught by all and that catching, abusing, giving kicks and fist blows and giving blows with knife and sword was all done in two minutes. He answered that knife blows are given two to three times. He answered that only one blow was given with sword. He is asked whether article was knife or khanjir and he answered it to be khanjir.

24. PW5 Arun Bhalekar, also a resident of the same locality, narrated the occurrence which took place at 7.00 p.m. on 29.11.2013.

He claims that he was present in his grocery shop and his shop is just opposite to the house of accused. He narrated that he saw Rushi made his motorcycle fell across the road and Rama, Digambar, Rushi, Jyoti and Rani abusing deceased Ganesh and beating him with fist and kick blows. This witness stated that at that time, he came near the motorcycle from his shop and that time, accused no.3 Rushi inflicted knife blow over the abdomen of Ganesh and accused no.1 Rama gave blow with sword on his leg and thereafter all accused ran.

On the occurrence, he is questioned in para 6. He answered that motorcycle fell across the road and as such the lane was got blocked. Due to beating with fist and kicks, deceased Ganesh fell but he immediately stood up and that time Digambar, Jyoti and Rani caught Ganesh. Accused Digambar caught his waist from backside, Jyoti and Rani caught his hands and they were also beating him. To a question regarding when Ganesh was caught by above three accused, whether other accused Ram and Rushi were only seeing, witness has answered that Ram and Rushi had been immediately beating him. Rushi gave two blows in the abdomen and one on neck of Ganesh with knife. The blows in the abdomen were given with force and so he was taken to hospital. He has denied that he is falsely deposing and he was not in the shop.

SUMMATION ON OCULAR ACCOUNT

25. Before reproducing the sum total of testimony of PW3 Vilas, PW4 Shubham and PW5 Arun, we wish to throw light on the principles to be followed while appreciating ocular account. The same are recently dealt by the Hon'ble Apex Court in the case of ***Balu Sudam Khalde and another v. The State of Maharashtra*** [Criminal Appeal No. 1910 of 2010], reported in 2023 SCC OnLine SC 355, wherein, in para 25, the following observations are made:

“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)]”

26. Keeping in sight above principles, on critical analysis of testimony of PW3 Vilas, PW4 Shubham and PW5 Arun, we are of the firm view that occurrence and role of each of the accused is distinctly brought on record. PW3 Vilas is both, party to initial quarrel, its settlement, visit of Jyoti and Digambar to the house of deceased for challenging him and he accepting the same and going to the house of accused persons. PW3 Vilas has followed this witness. Even PW4 Shubham is very categorical about going and seeing the occurrence. PW5 Arun, who is natural witness by virtue of being shop owner of the shop which is located exactly opposite to the scene of occurrence, has also spelt roles of each of the accused. Though they have faced extensive cross, their account of occurrence has not been rendered doubtful. It is also pertinent to note that when defence has been taken in examination under Section 313 of Cr.P.C. by the appellant about scuffle, it goes without saying that there is no dispute at all as regards to assault is concerned. Therefore, ocular account deserves not only to be accepted but also to be relied.

27. Role of accused no.3 Rushi about stabbing is consistently stated by all witnesses. He has already made his intentions explicit by using knife in stabbing deceased on the vital part like heart. Therefore, his assault is murderous one.

Though accused Rama is attributed with the role of using sword, but injury by the same is at ankle of deceased. Therefore, it cannot be said that it was an assault with intention to commit attempt to murder. We have already noticed that even recovery of sword is not free from doubt. However, presence of accused Rama is consistently stated by all the witnesses. Therefore, he can definitely be imputed with the charge of commission of offence under Section 323 of IPC along with accused Jyoti and Rani. No role is attributed to accused no.2 Digambar.

28. Having formed opinion about existence of reliable ocular account, we wish to state that as stated above, autopsy doctor has already confirmed death to be homicidal one. The sites of injuries targeted are confirmed by autopsy doctor and the same is finding place in his substantive evidence as well as PM notes. Resultantly, here is a case wherein ocular account finds support from medical evidence thereby fortifying the charge under Section 302 of IPC as against accused no.3 Rushi.

29. Now let us touch the objections and grounds raised before us during appeal. It is pointed out that PW2 Laxman, who has set law into motion, did not name convicts but after three to four days, in

supplementary statement, their names are appearing with roles allegedly played. Thus, it is tried to be submitted that FIR is apparently false or it is after due deliberation.

30. We have tested the above objection in the light of available evidence. We wish to state that informant is almost 68 years old man. Secondly, incident has taken place in the late evening. It needs to be considered that such incidence when watched by related witnesses, and more particularly of such age, naming them and specifying the roles in detail may not happen as is expected. He is a father who has witnessed assault on his young son. Therefore, failing to name and define roles cannot be a ground to question his entire evidence. Even otherwise, law is fairly settled that FIR not being an encyclopedia, it is not expected that every event is to be accounted. Further, in our opinion, presence of accused persons is not only marked by brother but also by witnesses who are neighbours and residents of same locality. It is not a case that their version and version of informant differs on this count. Note of the fact also is required to be taken that except not stating about assault by Rama with sword, names of rest all are finding place in the FIR. Resultantly, in our opinion, the said objection has no force.

31. While arguing, learned counsel for the appellant also brought to our notice that recovery of weapons is not free from doubt. In the light of such objection, we have scrutinized the evidence of panchas to memorandum and recovery. It transpires that pancha witness PW8 Satish Tarmale, pancha to recovery of sword, though deposed about being party to the memorandum and accused taking them to his house and producing sword from the tin shed of the bathroom, this witness in cross para 8 seems to have answered that when he asked police officer why he was called, witness stated that, Bhale told him that “sword is seized and you wait”. Therefore, there is substance in the argument that recovery of sword is not free from doubt. However, as regards to recovery of knife is concerned, though PW9 Lakhan did not support prosecution, recovery of knife at the instance of accused no.3 is confirmed by Investigating Officer PW14 PSI Suresh Bhale and therefore, there is no reason to doubt his testimony, more particularly in absence of any serious infirmity.

32. At the time of drawing panchanama of scene of occurrence, blood seems to have been gathered and even dispatched to the Chemical Analyzer. Analysis of blood of deceased Ganesh is reported to be of group “A”. Whereas Exhibit 96 i.e. analysis of knife article A is reported to be carrying “A” blood group, including clothes of

deceased. Therefore, even scientific evidence is forthcoming so as to connect appellants.

33. On minute scrutiny of the evidence, here, though charge is framed under Section 149 of IPC, we too are skeptical whether such charge could be invoked for the simple reason that going by the evidence of PW3 Vilas, he is found to be deposing that, at about 7.00 p.m., deceased went to the house of accused to question why they had abused him. His evidence does not disclose which of the accused were questioned and as to whether they were all together at that point of time. Straightway he is found to be deposing that on the way, accused no.3 Rushi alone intercepted by use of motorcycle and prevented this witness and then he speaks about assault by accused no.3 Rushi with knife on Ganesh. However, none of the witnesses have stated that accused had formed a gathering. Admittedly, arms are only with accused Rushi and accused Rama. We have already raised doubt about recovery of sword. Only knife is proved to be recovered. Nothing has been brought on record to show that they had formed an unlawful assembly with the common object to commit crime. Proper sequence is not narrated by PW3 Vilas and therefore, in our considered opinion, ingredients of Section 149 of IPC being patently missing from the testimony of PW3 Vilas and even PW4

Shubham and PW5 Arun, we are afraid whether said provision could at all be brought into play.

34. It is also pertinent to note that going by the sequence as narrated by above witnesses, after settlement on initial quarrel and after visit of accused Jyoti and Digambar, deceased seems to have himself gone to their house. The incident has taken place in front of house of accused. This being the fact, which is not disputed, even it cannot be said that presence of accused in front of their house was an unlawful assembly.

Resultantly, as like trial court, we are also of the considered opinion that it has not been satisfactorily shown that accused no.1 Rama, accused no. 4 Jyoti and accused no.5 Rani were aware about accused no.3 Rushi carrying arm with him. However, there are other injuries apart from stab injury. Therefore, they are liable for offence under Section 323 of IPC.

35. In the light of above material on record, no fault can be found in the appreciation and analysis and conclusion reached at by learned trial Judge. In appeal, learned APP could not point out that learned trial court erred in appreciating the available evidence and erred in acquitting accused no.2 Digambar from all charges and in acquitting

accused no.1 Rama, accused no.4 Jyoti and accused no.5 Rani from charges under Sections 143, 147, 148, 302, 504 and 149 of IPC, Sections 4/25 and 7/25(1)(A) of the Arms Act and Section 135 of the Maharashtra Police Act.

36. Likewise, even learned counsel for the original informant also could not demonstrate as to how judgment under challenge is patently perverse and illegal.

37. Resultantly, we find no merit in respective appeals. No interference is called for and the judgment and order passed by learned Additional Sessions Judge needs to be kept intact and maintained. Hence, we proceed to pass the following order:

ORDER

I. All appeals are hereby dismissed.

II. In view of dismissal of main appeal, nothing survives for consideration in Criminal Application No.5645 of 2016 and the same also stands disposed off.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]