

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

CRIMINAL APPEAL NO. 853 OF 2015

Kailas s/o Sopan Jade,
Age : 30 years, Occu. Labourer,
R/o Yashwant Nagar, Bhadgaon,
Tq. Bhadgaon, Dist. Jalgaon.

... Appellant

Versus

The State of Maharashtra
Through Police Station,
Parola, Tq. Parola,
District Jalgaon.

... Respondent

. . .

Mr. H. P. Randhir, Advocate h/f. Mr. N. L. Choudhari, Advocate for the
Appellant.

Mrs. P. V. Diggikar, APP for the Respondent-State

. . .

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

DATE : 05.01.2023

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

1. Aggrieved by the Judgment and order passed by the learned Additional Sessions Judge, Amalner in Sessions Case No.44 of 2014 dated 12-10-2015, thereby convicting appellant accused for commission of offence under Sections 302, 307 and 452 of Indian Penal Code (IPC) and sentencing him for life imprisonment and to pay fine, provisions under Section 378 of Code of Criminal Procedure (Cr.P. C.) are pressed into service by the appellant, praying

to quash and set aside the impugned judgment and order.

STORY OF PROSECUTION IN BRIEF

2. Deceased Kalpana and PW2 Sunandabai are real sisters. Daughter of Kalpana was married to brother of accused namely Namdeo. There was marital discord. On 03-06-2014, PW3 Vishakha, her mother-in-law deceased Kalpana, maternal mother-in-law Sunandabai, sister-in-law Dhanashre and one Aishwarya were available in the house i.e. of PW3 Vishakha.

On 03-06-2014 around 11:15 a.m. when all above incumbents of the house were watching television, an unknown person falling in the age group of 25 to 30 years entered the house. Initially, he slapped Kalpana and thereafter, whisked out knife and gave several blows on her person and when Sunanda tried to run, she was also chased and blows were also inflicted by that person on her head, hands and thereby both Kalpana and Sunandabai suffered bleeding injuries. Out of fear, Vishakha and Aishwarya hide themselves in separate bed rooms. After the person ran away, they informed neighbours and both injured were taken to the hospital. This account was narrated to Police at Parola Police Station by PW3 Vishakha at around 12:30 p.m. which gave rise to registration of Crime No.141 of 2014 for commission of offence under Sections 452 and 307 of Indian Penal Code (IPC). While undergoing treatment, Kalpana succumbed to injuries and crime was converted for offence under Section 307, 302 and 452 of IPC.

3. Investigating Officer of Parola Police Station undertook investigation during which steps like visiting spot, drawing spot panchanama, recording statements of witnesses, gathering blood and other articles from the spot, were taken. Enquiry was made with PW2 injured Sunandabai. Medical papers to her extent were gathered and made part of investigation. After declaration of death of Kalpana , autopsy was got done and autopsy report was made part of investigation. Seizure articles were despatched to Chemical Analyzer and after completing investigation, charge-sheet was filed.

Case being triable exclusively by Court of Sessions, learned Judicial Magistrate First Class committed the case to the Sessions Court and the challan came up before learned Additional Sessions Judge, Amalner. Learned Additional Sessions Judge, Amalner, after framing charges, undertook trial.

4. At the trial, prosecution adduced evidence of in all seven witnesses. Documentary evidence was also laid. Learned trial Judge at the conclusion of trial, heard State as well as defence and on appreciating their submissions and on examining oral and documentary evidence, held accused guilty for offence under Sections 302, 307 and 452 of IPC and accordingly, sentenced accused for the same.

5. Exception has been taken by the accused appellant before this Court on various grounds mentioned in the appeal memo. This being first appeal, in

view of Judgment of Hon'ble Apex Court in the case of *Ishvarbhai Fujibhai Patni vs. State of Gujarat* reported in (1995) 1 SCC 178, this Court is expected to **re-appreciate, re-evaluate** and **re-examine** the oral and documentary evidence to ascertain sustainability and legality of the Judgment of conviction. Hence, we proceed to undertake the said exercise.

6. We propose to first spell out the status and role of each of witnesses examined and relied by the prosecution.

First set : PW2 Sunandabai (injured witness), PW3 Vishakha (complainant) are eye witnesses. Their evidence is at Exhibits 18 and 19 respectively.

Second set : PW5 Dr.Suresh (first Doctor, who examined deceased and issued medical certificate) and PW6 Kapileshwar (Assistant Professor participated in post mortem). Their evidence is at Exhibits 27 and 29 respectively.

Third set : PW1 Suresh is Spot panch and PW4 Sharad is Panch to memorandum of disclosure and seizure of blood stained clothes and knife under Section 27 of the Evidence Act. Their evidence is at Exhibits 16 and 21 respectively.
PW7 Ashok is Investigating Officer and his evidence is at Exhibit 32.

SUBMISSIONS ON BEHALF OF APPELLANT

7. Learned Advocate for the appellant, while questioning the legality and sustainability of the Judgment and conviction, would point out that prosecution has utterly failed to establish case against accused without reasonable doubt. That prosecution has not proved its case by leading firm and cogent evidence and there are various shortfalls in the prosecution case, but still learned trial Judge has recorded guilt of the accused. Taking us through the evidence of prosecution, it is pointed out that at the outset FIR is against unknown person and therefore, prosecution has failed to prove that it is only the accused who is responsible for death of deceased Kalpana. Therefore, according to him, there is every reason for false implication.

8. Taking us through the evidence of PW2 Sunandabai and PW3 Vishakha, it is his submissions that their testimonies are also not free from doubt. Apart from being inconsistent on the manner of assault, their versions are not inspiring confidence. It is tried to be submitted that infact prosecution has not established the very motive behind the incident and according to him motive tried to be attributed is not cogently proved by adducing cogent evidence. Therefore, it is his submission that very essential requirements for bring home the charge are missing in the case of prosecution. Learned Advocate took us through the evidence of panchas and it is tried to be submitted that their testimonies in the Court also do not inspire confidence to show that they have

participated in the exercise of drawing panchanama, rather it seems that they have signed over already prepared panchanama.

Again learned Advocate would emphasize that when identity of assailant was not established in FIR as accused appellant was not named therein, it was imperative for the investigating machinery to get identification fixed by conducting T.I. parade. But even that has not been done by the investigating machinery.

9. Inviting our attention to the cross-examination of medical witnesses i.e. PW5 Dr.Suresh and PW6 Kapileshwar, it is submitted that the answers given by these witnesses are also not firm and clear. There is doubt, as alleged by prosecution, that there is use of sharp weapon like knife, but autopsy Doctor's findings are indicating something else and further autopsy Doctor has admitted that knife would necessarily cause cut injury but there is no finding about it on the person of deceased and injured suffering such type of injuries.

Taking us through the evidence of Investigating Officer, more particularly his cross-examination, it is tried to be submitted that there are several lacuna and defects in the investigation. Learned Advocate for the appellant submits that the case being of murder investigation ought to have been flawless. However, no due care is taken and in absence of concrete evidence about involvement of appellant still he is charge-sheeted and further learned trial Court has failed to consider and appreciate the defence raised by

accused in the trial Court and straightway accepted the case of prosecution and recorded guilt of accused and he prays to grant prayers by setting aside the impugned judgment and order.

SUBMISSIONS ON BEHALF OF PROSECUTION

10. Canvassing in favour of prosecution and judgment passed by the trial Court, learned APP submitted that incident had taken place in broad day light. Though informant had failed to name accused in the FIR, it is her submission that it is not at all fatal. She would add that infact informant had already seen accused in a marriage ceremony but failure on her part, that too after a decade or so, to name him specifically would not help accused or accused cannot derive benefit of the same. She points out that PW3 Vishakha has specifically named accused appellant. Both direct eye witnesses have also identified accused in the Court and they have also identified knife with which there was assault on PW2 Sunandabai and deceased Kalpana.

11. Taking us through the evidence of medical expert, it is her submission that in view of charge under Section 302 of IPC prosecution discharged its primary burden to prove that death of Kalpana was homicidal one. She took us through the injuries mentioned in the post mortem, more particularly, column 17, which indicates injuries and its impact stated by autopsy Doctor in the witness box. It is, therefore, her submission that taking into account the

nature of injuries, site of injuries and opinion of Doctor, there is no hesitation to hold that death of Kalpana is only and only homicidal and not otherwise.

12. Learned APP took us through the evidence of PW2 Sunandabai and PW3 Vishakha i.e. their examination in chief and submitted that both the witnesses are consistent and corroborated each other in narrating the incident about forceful entry in their house and how accused mounted assault on PW2 Sunandabai and deceased Kalpana and at which place. It is her submission that defence could not render the credibility of eye witness account doubtful inspite of lengthy cross and therefore, trial Court has not made any error in appreciating their evidence.

She further took us through the evidence of panchas PW1 Suresh and PW4 Sharad at Exhibits 16 and 21 and submits that even their testimonies remained unshaken on the points of spot panchanama and seizure at the instance of accused i.e. under Section 27 of the Evidence Act.

While concluding her submissions, she submitted that there is impeccable evidence on behalf of prosecution in the trial Court. Apart from direct eye witness account, there is trustworthy oral and ocular account which is consistent and corroborating each other and therefore, no error has been committed by the learned trial Court in recording guilt of accused. No case is made out to disbelieve the case of prosecution and so only conclusion that can be drawn is that accused is responsible for homicidal injuries on deceased

Kalpana and injuries endangering the life of PW2 Sunandabai injured eye witness. Resultantly, she prays that reasons and findings reached and recorded by learned trial Judge, being just, legal and proper, are not required to be interfered with.

ANALYSIS

13. In the light of charge framed against the appellant accused, it is first to be seen whether prosecution has at all established death of deceased Kalpana to be homicidal one. To answer such question, it is imperative for us to visit the evidence of medical expert i.e. **PW6** Kapileshwar, whose testimony is at Exh.29. On carefully going through his evidence, it is emerging that this witness while posted as a Assistant Professor in Government Medical College, Dhule, received dead body of Kalpana Sudhakar Bagul alongwith inquest panchanama for autopsy and his version in the witness box is that he found following injuries and he duly noted the same in column No.17.

- 1) Chop injury present over left side of face, 3 cm lateral to right eye lateral canthus size - 05 cm X 0.5 cm X bone deep, vertically placed.
- 2) Stab injury present just above right ear tragus, size - 01 cm x 0.5 cm x bone deep, obliquely placed.
- 3) Stab injury present over right lateral end of upper lip, size – 03 cm X 0.6 cm X oral cavity deep, obliquely placed.
- 4) Chop injury present over left shoulder, 01 cm medical to the

shoulder tip, size 07 cm X 04 cm X bone deep, horizontally placed.

- 5) Stab injury present over lateral aspect of mid portion of left arm, size - 02 cm x 0.3 cm x muscle deep, obliquely placed.
- 6) Abrasion present over lateral aspect of upper third of left arm , size - 03 cm X 0.1 cm, red, obliquely placed.
- 7) Multiple contused abrasions present medially over mid portion of left forearm and left elbow; size - 03 cm X 0.2 cm to 03 cm X 02 cm, red.
- 8) Chop injury present over front of right forearm, 07 cm below the elbow; size - 11 cm X 10 cm X bone deep, directed downwards.
- 9) Incised injury present over front aspect of right wrist over medial border, size - 02 cm X 0.5 cm X muscle deep, obliquely placed.
- 10) Incised injury present over front aspect of right wrist over mid portion; size 01 cm X 01 cm X muscle deep, obliquely placed.
- 11) Chop injury present between index finger and middle finger of right palm, size - 03 cm X 02 cm X bone deep.
- 12) Incised injury present over lateral aspect of proximal phalanx of middle finger of right hand, size - 02 cm X 0.5 cm X muscle deep, obliquely placed.
- 13) Incised injury present over lower thenar region of right palm, size - 02 cm X 0.88 cm, muscle deep, obliquely placed.
- 14) Abrasion present over medial aspect of right forearm, 08 cm above wrist joint; size - 05 cm X 0.2 cm red, obliquely placed.
- 15) Abrasion present over back of mid portion of right forearm; size 04 cm X 2 cm red, obliquely placed.
- 16) Stab injury present over medial aspect of mid portion of right forearm, size - 03 cm X 02 cm X muscle deep, obliquely placed.
- 17) Stab injury present over epigastric region of abdomen, 08 cm

above and left lateral to umbilicus and 07 cm from midline; size - 03 cm X 0.2 cm x cavity deep, vertically placed.

18) Stab injury present over left hypogastric region of abdomen, 09 cm above and left lateral to injury no.(17); size - 02 cm x 0.8 cm x muscle deep, obliquely placed.

19) Abrasion present over left lumbar region of back, size - 05 cm x 01 cm, obliquely placed.

14. Learned APP confronted witness with post mortem report. He has identified the contents to be true and correct and his signature over the post mortem report, as a result of which the post mortem report was marked as Exh.30. He further stated that he had issued certificate of provisional cause of death under his signature and so the said certificate was marked as Exh.31. Autopsy Doctor has opined **cause of death** as “**Hemorrhage and shock due to injuries sustained**”.

Defence was called upon to **cross-examine** this witness in which initially there was question about time taken to develop rigor mortis and then further he has admitted that on the strength of condition of the body, time of death can be ascertained. Doctor has flatly denied that injuries noted in column 17 are not possible due to hard and blunt object. However, he admitted that weapon was not confronted to him for his opinion. This much is the only cross of autopsy Doctor.

15. With such material on record on the point of mode of death, when

autopsy Doctor's crucial evidence about nature of injuries, site of injuries is not rendered doubtful and having found multiple stab injuries, multiple incised injuries, multiple contused lacertaed abrasions, chop injuries of various measurements, the clear and only finding that crops up is that death is not only unnatural but clearly shown to be homicidal one. Hence, we hold that prosecution has established death of deceased Kalpana to be **homicidal one**.

16. Having held point on mode of death in affirmative, we are now required to further ascertain as to whether as alleged by prosecution, accused is author of such injuries. It seems that prosecution is equipped with and has heavily relied on ocular account i.e. in the form of evidence of PW2 Sunandabai and PW3 Vishakha. Therefore, we proceed to examine their evidence minutely and carefully.

PW2 Sunandabai is the star witness. In her substantive evidence she stated that deceased, who is her sister had come to her house on 03-06-2014. At that time, call was received from Kailas Jade i.e. accused saying that forcibly their daughter has been given in house of accused and he threatened to kill them. Thereafter, her sister's daughter Yogita also gave telephone call and disclosed that her mother in law was assaulting and her brother in law always saying that he would kill us. She further stated that Yogita told this witness that accused Kailas was giving threats to kill them. Around 11:30 a.m. when this witness and her sister Kalpana were sitting in the hall and watching

television, all of sudden, accused Kailas Jade entered their house and slapped her sister. Thereafter, he caught-hold hands of her sister and took out a knife from his pocket and assaulted her sister by said knife four times. So she tried to go to her rescue. Even Aishwarya and Vishakha came on the spot. She clarified that at such time only ladies were present in the house. Then, according to her, accused abused this witness and also chased her and caught her by her hair and assaulted her with the knife. There was scuffle between her and accused. Then again accused assaulted on her neck and head causing bleeding injuries. She claims that Aishwarya rushed to her rescue and she told her to call other persons. Thereafter, accused ran away from the spot and she fell unconscious. She identified the accused in the Court. She also identified Article 'A' - the clothes worn by the accused at the time of incident, Article 'B' – saree worn by her at the time of incident and Article 'C' - knife used by the accused. She has stated that her statement was recorded by Police in presence of Doctor in the hospital. She clarified that as she was unable to give signature, Doctor obtained her thumb impression on her statement.

Above witness in **cross-examination** states that Police never showed her knife during investigation and she had not given description of the knife to Police, but she flatly denied about seeing knife for the first time in the Court. She answered that she was conscious in between 11:30 p.m. to 12:00 midnight. She denied that Executive Magistrate recorded her statement at 08:00 a.m. It is stated that on 4th June, 2014 Police visited to record her

statement. She is unable to state whether she was admitted in Civil Hospital, Dhule or not, but she claims that she was referred to Shwas Hospital, Dhule. She denied that she was unconscious at the time of recording her statement. In further cross, she has admitted that Yogita was married with the brother of accused 7 to 8 years back and there was dispute between Yogita and her husband i.e. brother of accused. She denied that she had no concern with the said litigation, but answered that her statement was recorded in said litigation, which she further admitted that it resulted into a compromise. She denied that Yogita was residing with her husband. In further cross, she answered that Vishakha and Aishwarya were having acquaintance with accused and that accused was on visiting term with her sister at Parola and then she was questioned about house where incident took place and she has admitted all suggestions to that extent, but she denied that what was going on was not visible from place of kitchen and place of worship i.e. whatever happened in the hall. She answered that accused was in the house for 15 minutes and on being questioned as to on whom was the first assault, she has stated that first assault was on her sister. She is asked in what position her sister was standing and how many times accused assaulted her sister. She answered that accused assaulted her sister about 5 to 6 minutes. She denied that as soon as Aishwarya and Vishakha saw the accused, one proceeded towards kitchen and another towards bedroom.

17. Following omissions are brought in the testimony of above witness :

- (a) that she did inform Executive Magistrate regarding Yogita told her that Kailas would kill them.
- (b) that accused gave threats to kill them.
- (c) that accused came and slapped her sister and caught-hold of her sister's hands and assaulted her.
- (d) that four blows being given by accused.
- (e) that she being caught by her hair and being assaulted on her lips and ears.

18. Now let us turn to evidence of complainant i.e. **PW3** Vishakha.

According to prosecution, she too is a eye witness. In her evidence at Exh.19, she narrated that on 03-06-2014 Kalpana and Sunanda were present in the hall of the house. At that time, one unknown person came in the house and slapped her mother in law Kalpana. The said person took out knife from his pocket and assaulted Kalpana. Thereafter, he chased Sunanda. These witness and Aishwarya took shelter in bedrooms. The doors of the bedrooms were knocked by the unknown person. Later on when she and Aishwarya shouted, the said person ran away. After 5 to 10 minutes, she opened the door and call was given to the persons. She stated that the said unknown person assaulted Sunanda 3 to 4 times. Then she visited Police Station immediately and disclosed the facts to the Police authority and lodged complaint Exh.20,

which she identified. She further stated that Police had called her for identification of the accused and she identified accused to be present in the Court.

Even this witness is extensively **cross-examined** by defence. She answered that Yogita is her husband's sister. That Yogita's marriage was performed 15 years back. She answered in cross that before the incident she had seen accused at the time of marriage of Yogita. She admitted that FIR was lodged against unknown person, but further stated that she had given detail description of the unknown person to the Police. She denied that Police disclosed her that accused is responsible for the incident and so she identified accused. She has further clarified that she had no difficulty to give the name of accused at the time of lodging complaint, however, she clarified that at that time, she did not remember the name of accused, hence, she has not named him in the report. Then, she is questioned about in which part of the house she was, where her mother in law was standing and where she was assaulted. Above is the only cross on material aspects.

SUMMATION OF EVIDENCE OF DIRECT EYE WITNESSES

19. Therefore, on carefully analyzing the evidence of PW2 Sunandabai and PW3 Vishakha, it is clearly brought on record that, on the day of occurrence these two witnesses were very much present in the house. In spite of cross-examining them at length, their presence has not been rendered doubtful.

Secondly, both these witnesses have spoken about assailant entering in the house, first catching hold of deceased Kalpana, inflicting knife blows on her and thereafter, chasing PW2 Sunandabai and inflicting blows on her with the same knife. This witness PW2 Sunandabai is infact a injured eye witness.

This witness PW2 Sunandabai has infact narrated what preceded the actual occurrence about receiving call from Yogita, regarding accused issuing threat to kill. This witness has particularly named about entry of accused Kailas. She too has narrated sequence of events of assault on first Kalpana and then on herself by chasing her and thereafter attempting to enter the bedrooms where Aishwarya and Vishakha were hiding themselves from accused and that he attempted to open the door and thereafter, accused ran away from the spot. Defence tried to elicit from her cross that knife has not shown to her during the investigation and she candidly admitted that. However, it is pertinent to note that she has identified the very knife when it is confronted to her by learned prosecutor and therefore, article knife put to use is also identified by this witness. She claims that after occurrence, she was unconscious and therefore, obviously she does not know what happened and how she was shifted to Shwas Hospital. Infact because of such condition, her statement was recorded on 04-06-2014 and only when Police visited her. In paragraph 4 of the cross-examination, she is questioned about marriage of Yogita with brother of accused to which she has answered that their marriage was performed 7 to 8 years back. There is clear suggestion about dispute

between Yogita and her husband i.e. brother of accused. She has denied that present accused has no concern with the said litigation.

Therefore, testimonies of PW2 Sunandabai and PW3 Vishakha are lending support to each other on crucial aspect of entry of accused and mounting assault on deceased Kalpana and thereafter on PW2 Sunandabai. PW3 Vishakha who had seen occurrence had rightly set law in motion. Though, she had not named accused specifically, she has clarified that she had seen him in a marriage, which has taken place 15 years back and she did not remember name of deceased at that time. She claims that due to this reason she did not name the accused. Therefore, here there is trustworthy and creditworthy direct eye witness account on the point of occurrence of assault, which has not been dislodged, disturbed or given dent to inspite of grueling cross.

20. From above discussion, it is clear that accused assaulted deceased Kalpana and her death is already established to be homicidal one. There is injured eye witness account in the form of PW2 Sunandabai. Therefore, the involvement of accused has been clearly established by prosecution. To lend support to the case of prosecution about assault to be by use of knife, Investigating Officer has succeeded in recovering the same weapon from memorandum of disclosure while in custody of Police. Such memorandum is noted in presence of independent panch **PW4** Sharad. He has spoken about

being called upon by Police and in his presence statement of accused was recorded. They visited the spot and accused handed over his shirt and knife having blood stains and the same were seized by Police in his presence and therefore, even the circumstance of recovery is remained intact and cogently proved by prosecution.

As discussed above, autopsy Doctor while in witness box has opined that injuries found by him at the time of autopsy are possible by article knife. Therefore, even apart from authorship of injuries, the very article used for assault is also laid hands on by the investigating machinery. Consequently, charge of commission of offence under Section 302 of IPC regarding murder of deceased Kalpana has been brought home by the prosecution.

21. Accused is also facing charge of commission of offence under Section 307 of IPC i.e. for attempting to commit murder of PW2 Sunandabai. Before advertng to the evidence available on record, it would be desirable to discuss in brief the settled legal position for attracting charge of Section 307 of IPC.

By catena of Judgments, the Hon'ble Apex Court has squarely and fairly settled legal requirements for attracting this charge and has held that for the purpose of conviction under **Section 307** of IPC, prosecution is bound to prove following essentials :

- (i) That accused did some act, by which death of human being was attempted.

- (ii) Said act done was with intention or knowledge coupled with *mens rea*. That such act was done with intention of causing death; or that it was done with intention of causing such bodily injury;
 - (a) the accused knew to be likely to cause death; or
 - (b) was sufficient in the ordinary course of nature to cause death, or that accused attempted to cause death by doing an act known to him to be so imminently dangerous, that, it must in all probability cause, [a] death or [b] such bodily injury as is likely to cause death, the accused having no excuse in incurring or causing such death or injury.

Thus, in order to justify conviction under **Section 307** of IPC prosecution is bound to prove the following :

Firstly, accused did an act.

Secondly, the said act was done with intention and knowledge and under the circumstances that if he by said act cause death, he would be guilty of murder.

Resultantly, the ratio culled out from various pronouncements of the Hon'ble Apex Court is that, to justify conviction under Section 307 of IPC, there has to be presence of intention coupled with some overt act in execution thereof. It is clarified that it is not always necessary that bodily injury capable of causing death should have been inflicted. Although nature of injury caused may often give considerable assistance in arriving to a finding as regards to the intention of the accused and further intention can also be gathered from the available circumstances. The determinative question thus is intention,

knowledge coupled with *mens rea* and not the nature of injury.

The above propositions are succinctly spelt out in series of Judgments and few of them are as under;

- (i) ***State of Maharashtra vs. Balram Bama Patil and Ors.*** reported in (1983) 2 SCC 28.
- (ii) ***Girija Shankar vs. State of U.P.*** reported in (2004) 3 SCC 793.
- (iii) ***State of Madhya Pradesh vs. Saleem @ Chamaru and Anr.*** reported in (2005) 5 SCC 554.
- (iv) ***State of M.P. vs. Kashiram and Others*** [Judgment dated 02-02-2009 in Criminal Appeal 191 of 2009].

22. In the background of above legal requirements, we proceed to ascertain whether as held by the learned trial Court, offence under Section 307 of IPC also has been proved by the prosecution or not.

We have already discussed testimony of injured witness PW2 Sunandabai wherein she has stated that she intervened to rescue while her sister deceased Kalpana was assaulted. At that time, accused abused her and chased her and initially caught her by hair and assaulted her with knife on neck, which was followed by scuffle between herself and accused and thereafter, accused assaulted on her head and lips and she was required to be treated.

The Doctor **PW5** Dr.Suresh, who treated PW2 Sunandabai is also examined by the prosecution at Exh.27. This Doctor, who was posted at Parola

Cottage Hospital, stated in the witness box that one Sunanda Sonar was admitted in his hospital while he was attached to the hospital on 03-07-2014. He stated that he noticed injuries on her body because of sharp pointed weapon. He treated her and further referred her to Civil Hospital, Dhule. He issued medical certificate Exh.28 under his signature and he has identified the same.

In his **cross**, he has admitted that injuries are lacerated one. He denied that injuries might have been caused by hard and blunt object. He also denied that by use of sharp object always incised wounds are sustained. In his opinion, injuries were simple and he admitted that weapon was not sent for his opinion. Above is the only cross-examination. Exh.28 medical certificate issued by him shows that injured PW2 Sunandabai suffered following injuries :

- a) Laceration : right temporal area left side of head 9x2x2 cm.
- b) Laceration : 2x2x1 cm above upper lip on right side.
- c) Laceration : on back left supraclavicular area 3x1x1 cm.
- d) Laceration : on back right side scapular area. Lateral aspect 4x2x1 cm.
- e) Laceration : on back 2.5x2x1 cm. Eight lower thoracic area :
Congestion of conjunctiva on left side.
Blunt trauma on chest left lower and right side whole.

23. As discussed above, for attracting the offence under Section 307 of IPC, prosecution is duty bound to establish that :

Firstly, accused did an act.

Secondly, the said act was done with intention and knowledge and under the circumstances that if he by said act cause death, he would be guilty of murder.

Here bearing in mind the above discussed settled legal provision for attracting offence under Section 307 of IPC and by applying the said in present case, it is clearly emerging that firstly accused was annoyed because of strained marital relations between his brother and daughter of deceased Kalpana. He had come armed with knife. Out of several injuries, one injury is on neck part. Therefore, essential ingredients for attracting offence under Section 307 of IPC are very much available in the prosecution evidence i.e. in the form of evidence of injured witness.

24. Apart from this, after causing recovery it seems that Investigating Officer PW7 Ashok has despatched the seizure of knife, blood stained clothes of accused and deceased for analysis. Result of analysis shows that blood group of PW2 Sunandabai, who is injured witness is 'B'. Blood group of deceased Kalpna is 'O'. Blood stained shirt of accused, which was seized had analyzed and its result shows blood on shirt carries blood group-B. However, even blood group of accused is reported to be of 'B' group. But admittedly he has not suffered any injury and therefore, his own blood would not appear at his own shirt. Therefore, only inference that can be drawn is that while

assaulting injured Sunandabai, there was scuffle between them and blood of injured Sunandabai must have come on shirt of accused. This is also strong incriminating evidence, which has not been explained or denied by the defence.

25. In appeal before us, challenge to the Judgment and order of conviction is on the following grounds :

GROUND RAISED IN APPEAL

- (i) Motive is not established.
- (ii) Appellant is not named in the FIR and FIR is against unknown person.
- (iii) Evidence of prosecution is full of material omissions, inconsistencies and contradictions.
- (iv) Failure of prosecution to examine Yogita and Aishwarya, who were material witnesses.
- (v) T.I. parade is not conducted.

Therefore, it becomes incumbent upon this Court to equally deal with the above objections and grounds raised before us.

26. The **first** defence is that motive is not established.

This ground has no substance and warrants no consideration. Direct eye witnesses i.e. PW2 Sunandabai - sister of deceased Kalpana has spelt out details behind the occurrence. This witness spoke about Yogita, who called her and told that accused gave threats to kill them. Such threats apparently are being executed by carrying out assault on deceased Kalpana and PW2 Sunandabai. There are suggestions about strained relations between Yogita and her husband, who is brother of accused. Exhibits 26A and 26B clearly show that there was previous disputes between the parties. Therefore, there are reasons for accused to entertain motive. Even otherwise in the light of availability of direct eye witness account, prosecution is not bound to cogently establish motive behind the occurrence.

27. **Second** defence is that appellant is not named in the FIR and FIR is against unknown person :

Learned Advocate for the appellant would strenuously submit that law has been set in motion on same day, however, apparently it is against unknown person. True it is that both in FIR at Exh.20 and as well as in evidence of PW3 Vishakha at Exh.19 informant speaks about unknown person entering the house and carrying out the assault. This aspect of assault by unknown person is also taken up in cross-examination, more particularly, in paragraph No.3 wherein it is tried to be suggested that she does not know accused. However, witness has answered that before the incident, she had

seen accused at the time of marriage of Yogita, which has allegedly taken place 15 years back. Admitting that she lodged complaint against unknown person, she had added that she had given description of unknown person. Therefore, it is obvious that she had merely seen accused 15 years back and there may not be any occasion for her to know him specifically by name. But she has identified accused in the Court. She has given explanation in the cross-examination. She has answered in cross-examination that she has no difficulty to give name of accused in FIR as she knew his name but she further explained that she did not remember his name and hence, she has not named in the report. There is no further cross after such answer. Therefore, obviously explanation given by PW3 Vishakha seems to be plausible. Therefore, non-mentioning of name of accused in FIR is for aforesaid reasons. Even otherwise law is fairly settled that in FIR it is not necessary to name assailant as FIR is not an encyclopedia. That its purpose is very limited for setting law into motion and for purpose of contradiction and omission. Thus, in our opinion, mere failure to name accused in FIR is not at all fatal to the prosecution and so it is not sufficient to render entire case of prosecution doubtful.

28. **Third** defence is put forth by learned Advocate for appellant is that evidence of prosecution is full of material omissions, inconsistencies and contradictions.

However, except raising such plea, it has not been pointed out to us as

to how the evidence is inconsistent, contradictory and is full of omissions. No material omissions and contradictions are brought to our notice, which are so sufficient that they go to the root of case of prosecution to disbelieve it.

We derive support to assert such view in the backdrop of ruling of Hon'ble Apex Court in the case of *Brahm Swaroop and Another vs. State of U.P* reported in (2011) 6 SCC 288. Resultantly, the above objection is also without any substance.

29. **Fourth** defence is that prosecution is failed to examine Yogita and Aishwarya, who were material witnesses.

In this regard, it is clearly emerging from evidence on record that there is direct eye witnesses i.e. PW3 Vishakha and PW2 Sunandabai injured. Yogita was not shown to be present. Aishwarya was present but out of fear she was hiding herself in bedroom . She is a girl of adolescence / teenage and therefore, she may not have been examined. No oblique motive suggested for such laps on the part of Investigating Officer. Even otherwise in the light of availability of direct eye witnesses, prosecution is not expected to examine other witnesses. Law is clearly and fairly settled and it is not quantity rather it is quality that matters. Here quality evidence in the form of injured and complainant is on record and being injured, testimony of PW2 Sunandabai stands at higher pedestal and so consequently, non-examination of above witnesses is not at all essential or fatal and hence, above ground also holds no

force.

30. **Fifth** defence is that T.I. parade is not conducted and therefore, identification of accused is doubtful. More particularly, FIR is against unknown person.

We fail to understand that when injured eye witness named accused and even when complainant has stated in her evidence that she was knowing accused even when she had seen the accused 15 years back, in our opinion, there was no necessity for conducting T.I. parade at all. The purpose of T.I. parade is achieved only when accused are unknown persons. Here it is not so. Infact apart from knowing name of accused, injured eye witness had scuffle with accused and therefore, there was clear opportunity to look at the accused with close proximity. As stated above, there is identification of accused in the Court at the time of trial. Such identification is well recognized one. On this point, we propose to seek reliance on the ruling of Hon'ble Apex Court in the case of ***George and Others Vs. State of Kerala and another*** reported in AIR 1998 SC 1376 and we further propose to reproduce the observations appearing in para No.25 of the said Judgment :

“ law is well settled that identification of an accused in Court is the substantive evidence of the person identifying and his earlier identification in a T.I. parade corroborates the same. In other words, want of evidence of earlier identification in a T.I. parade does not affect the admissibility of evidence of identification in Court.”

Likewise, in another ruling of Hon'ble Apex Court ***Kanta Prasad v. Delhi Administration***, reported in AIR 1958 SC 350 in para 5 it is held "It would no doubt have been prudent to hold a test identification parade with respect to witnesses who did not know the accused before the occurrence, but failure to hold such a parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification would be a matter for the Courts of fact and it is not for this Court to reassess the evidence unless exceptional grounds were established necessitating such a course." (emphasis laid).

Similar view is reiterated in the cases of (1) ***Surendra Narain v. State of U.P*** [(1998) 1 SCC 76 / 1997 AIR SCW 4156] ; (2) ***Jadunath Singh v. State of U.P*** [AIR 1971 SC 363] ; (3) ***Harbhajan Singh v. State of Jammu and Kashmir*** [(1975) 4 SCC 480] wherein it is reiterated that absence of T.I. parade is not necessarily fatal. In our view, in this case also there is no necessity to conduct any test identification parade.

Therefore, the above objection is also rendered insignificant.

31. Having dealt with all objections raised before us by the learned Advocate for the appellant, none of the ground raised herein is so sufficient so as to disbelieve or doubt the prosecution case. Therefore, for all above

reasons, we are convinced that accused is the author of homicidal injuries on the person of deceased Kalpana and also attempted to commit murder of PW2 Sunandabai and therefore, finding the evidence to be worthy of credence, in our opinion, conviction has been rightly recorded.

32. As regards Judgment and order under challenge is concerned, we find that learned trial Judge has properly considered and appreciated oral and documentary evidence adduced on behalf of prosecution. Legal requirements are dealt with and decided by assigning sound reasons. In our opinion, the conclusion reached at by the learned trial Court is the only possible view that would emerge with such quality of material on record. Therefore, we refrain ourselves from disturbing such findings and accordingly pass following order :

ORDER

(I) Criminal Appeal stands dismissed.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)