

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

CRIMINAL APPEAL NO.861 OF 2015

. Govind s/o Babarao Thite
Aged : 32 years, Occu.: Agriculture,
R/o. Warud (Narsinha), Tq.Jintoor,
Dist.Parbhani.

..Appellant
(Original Accused No.10)

VERSUS

. The State of Maharashtra
Through the Police Station Jintoor,
Dist.Parbhani.

..Respondent

...

WITH

CRIMINAL APPEAL NO.890 OF 2015

- 1). Dnyanoba alias Dnyaneshwar
S/o. Shrirang Tate
Age: 53 years, Occu.: Agriculture
- 2) Laxman s/o Shrirang Tate
Aged : 65 years, Occu.: Agriculture,
- 3) Murli Dnyanoba alias Dnyaneshwar Tate
Age : 22 years, Occu.: Agriculture,
all r/o. : Warud (Narsinha),
Tq.Jintoor, Dist.Parbhani.
- 4) Sheshrao s/o Bapurao Dombe
Age: 63 , Occu.: Agrilcuture,
R/o. Kasba Galli, Near Ram Mandir,
Jintoor, Dist.Parbhani.

..Appellants

VERSUS

. The State of Maharashtra
Through Police Inspector,
Police Station Jintoor, Tq.Jintoor,
Dist.Parbhani.

..Respondent

...
Mr.V.D.Sapkal, Senior Counsel i/b. Mr.S.R.Sapkal, Advocate for Appellant in
Criminal Appeal No.861/2015

Mr.PS.Paranjape, Advocate for Appellants in Criminal Appeal No.890/2015
Mr.S.J.Salgare, APP for Respondent – State

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

**RESERVED ON : 21 AUGUST, 2023
PRONOUNCED ON : 11 SEPTEMBER, 2023**

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

1. Both above appeals are directed against judgment and order of conviction passed by the learned Additional Sessions Judge, Parbhani in Sessions Trial No.103 of 2012 dated 05-11-2015. By the impugned judgment, original accused no.10 (appellant in Criminal Appeal No.861 of 2015) and original accused nos.1, 2, 5 and 7 (appellants in Criminal Appeal No.890 of 2015) are held guilty and sentenced as spelt out in the operative part of the impugned judgment.

FACTUAL BACKGROUND LEADING TO TRIAL

2. Jintur Police registered Crime bearing no.78 of 2012 on 06-05-2012 under Sections 143, 147, 148, 302, 307, 324, 323, 504 read with 149 of the Indian Penal Code (IPC), under Section 4(25)(1)(A) of the Indian Arms Act and under Section 37(1)(3)/135 of the Bombay Police Act, on the basis of statement given by PW1 Mahadeo Haribhau Tate, alleging that daughter of his

relative namely Anita was married to Onkar Laxman Tate four years back. However, subsequently, said Onkar @ Narhari, i.e. a year prior to the incident in question, performed second marriage. As a result of it, Anita initiated proceedings in the Court of law at Jintoor. Informant himself and deceased Devidas Tate were said to be the witnesses in the said proceedings. Matter of Anita was posted for evidence on 05-05-2012 and hence they both had visited Jintoor Court. However, as matter stood adjourned, they both returned back to village.

At around 07:00 p.m. Laxman Shrirang Thite, father-in-law of Anita, one Dnyanoba Thite, Govind Baburao Thite reached house of informant and started hurling abuses. Devidas also reached there. Laxman, Dnyanoba and Govind questioned them for becoming witnesses in the Court and threats were issued to Devidas. According to informant, Devidas was beaten, pushed and taken towards house of one Ramrao Kodre and he was assaulted. When informant, Vishnu Tate, Rajendra Tate and Ambadasrao went to the rescue, at that time, accused Govind Tate, Onkar Tate, Murli Dnyanoba Tate, Datta Dnyanoba Tate, Baburao Thite and Ranjeet Wagh mounted assault on Devidas and others by means of iron rods, knife etc. Devidas collapsed and the assailants took to heels.

Injured were taken to Civil Hospital, Jintoor and further referred to Civil Hospital, Parbhani, where statement of injured PW1 Mahadeo was recorded and on its strength crime was registered.

Investigation was entrusted to **PW24** Nikam, Investigating Officer, who on completing the same, chargesheeted accused and they were made to face trial before learned Additional Sessions Judge, who after framing charge and on its denial, permitted prosecution to open the trial, during which prosecution has examined as many as 24 witnesses. Documentary evidence was also simultaneously adduced. Incriminating material was shown to the accused persons and answers thereto were duly recorded and after according hearing to both sides and on analyzing the evidence, learned trial Judge held offence proved against accused no.1 – Dnyanoba, accused no.2 – Laxman, accused no.5 – Murli, accused no.7 – Sheshrao and accused no.10 – Govind under Sections 143, 147, 148, 323/149, 302/149, 307/149 of the Indian Penal Code (IPC) and awarded sentence and fine.

The above conviction is assailed before us by filing above two distinct appeals, which are heard at the same time and are therefore, taken up for decision by way of common judgment.

SUBMISSIONS

On behalf of appellant in Criminal Appeal No.861 of 2017 :

3. Mr.V.D.Sapkal, learned Senior Counsel for the appellant, while questioning the impugned judgment, would submit that judgment is based on surmises, conjunctures, assumptions and presumptions. That there is no proper appreciation of prosecution evidence. He pointed out that on the same

set of evidence, almost half of the accused are acquitted including accused Datta against whom there was accusation of assault by knife. According to him, evidence of PW1 Mahadeo, PW2 Ambadasrao and PW3 Changoji is full of material omissions, contradictions, improvements and he invited our attention to the cross examination of these witnesses and would submit that therefore, their evidence was unworthy of credence. That there is variance in their testimonies on various counts. He pointed out that very genesis of occurrence is not proved by the prosecution. He would submit that inspite of alleged incident taking place at Jintoor, statements of alleged injured are recorded at Parbhani that too after inordinate delay. That infact Jintoor Police Station was at a stones throw distance from the village. He pointed out that inspite of availability of adequate medical facilities at Civil Hospital, Jintoor itself, he questions why injured and deceased were taken to Civil Hospital, Parbhani and that there is no explanation by prosecution. According to him, even Doctors at Jintoor had not issued any referral letter and therefore, according to him, all such circumstances are mysterious in nature thereby casting doubt on the story of prosecution. According to him, it was a clear attempt to manufacture and concoct a story to falsely implicate the accused. He also pointed out that apart from delay in lodging FIR and recording statements, there is no explanation as to why inspite of presence of Police, immediately after the alleged occurrence, no efforts are done by so called Police personnel including Police Officer to immediately record the statements.

Thus according to him, the entire case of prosecution comes under shadow of doubt.

4. He next submitted that inspite of prosecution evidence regarding presence of over more than 50 persons, none of the independent witnesses are examined. He also submitted that even important witnesses are deliberately withheld by prosecution including other injured. He would strenuously submit that witnesses to recovery and discovery have apparently not supported prosecution. Further according to him, on one hand prosecution claims that investigating machinery has seized weapons on the spot at the time of spot panchanama, why at all then there was need of recovery, discovery under Section 27 of the Indian Evidence Act. Consequently, he submits that such quality of evidence, being inherently weak and unreliable, ought not to have been accepted by learned trial Judge for recording guilt. Resultantly, according to him, there is total non-application of mind apart from improper appreciation of evidence. For all above reasons, he prays to allow the appeal.

On behalf of appellants in Criminal Appeal No.890 of 2015 :

5. Even Mr.PS.Paranjape, learned Counsel for appellants reiterated that inspite of alleged occurrence taking place in the jurisdiction of Jintoor Police Station, no crime is registered immediately at Jintoor Police Station inspite of Police being aware to that extent. He further reiterated that without reference

by Medical Officer at Civil Hospital, Jintoor, injured are shifted to Civil Hospital, Parbhani that too in a private vehicle. So according to him, time is deliberately spent to concoct and fabricate a story to falsely implicate appellants. Further according to him, evidence of PW1 Mahadeo, PW2 Ambadasrao and PW3 Changoji clearly shows that they are attributing over acts to even acquitted accused persons and therefore, it is his submission that judgment under challenge is patently erroneous and due to faulty appreciation of evidence. He pointed out that State has not preferred any appeal against so called acquittal. Even according to him, importance witnesses like Vishnu Tate and Rajendra Tate are deliberately not examined by prosecution and according to him, even when it was a case of prosecution that there were six injured, only three are examined by prosecution. It is his submission that there is deliberate attempt to withhold witnesses. According to him, deliberately pick and choose policy has been adopted to examine only those witnesses who have supported prosecution. He would pose a question as to when so called injured are claiming to have concealed themselves out of fright, then how prosecution could claim them to be eye witnesses. According to him, as Police had lifted and shifted deceased and injured including informant to Civil Hospital, Jintoor. But they all on their own shifted and got admitted in Civil Hospital, Parbhani. According to him, statement given at Civil Hospital, Parbhani cannot be termed as FIR as it is hit by the provisions under Section 162 of the Code of Criminal Procedure (Cr.P.C.). Lastly he submitted that evidence of prosecution

is full of ambiguities and actual occurrence and its genesis having not come on record, he submits that learned trial Court ought not to have held appellants guilty and so he seeks interference at the hands of this Court.

On behalf of State :

6. In answer to above, learned APP would point out that there is strong clinching, trustworthy evidence on behalf of prosecution. Evidence of informant and injured has unfolded the actual occurrence. According to him, accused persons were annoyed with deceased Devidas for becoming a witness in a case lodged by relative of PW1 Mahadeo namely Anita in the backdrop of some matrimonial dispute. Thus, according to him, there being annoyance, there was motive. Informant injured and independent witnesses PW2 Ambadasrao and PW3 Changoji are all consistent about accused persons coming armed and forming unlawful assembly and mounting attack on deceased Devidas and others. Therefore, there is direct eye witness account. Such ocular account is finding support from medical evidence. Accused are apprehended while they were all together hiding in a house and there is disclosure regarding weapons used in the assault and same are recovered in presence of independent Panchas. Though according to him, some of the Pancha witnesses have not supported prosecution, it is pointed out that said Panchanamas got proved through Investigating Officer. According to him, as there was overwhelming evidence, learned trial Judge has, on correct

appreciation, convicted only those accused against whom there is reliable evidence. Resultantly, there being no merits in the appeals and appellants having failed to point out perversity, he prays to dismiss the appeals.

7. Being First Appellate Court and exercising powers under Section 374 of the Code of Criminal Procedure, we re-appreciate, re-analyze and re-examine the entire prosecution evidence to ascertain whether there is merit in the appeals or not.

On doing so, we have noticed that in support of its case, prosecution has examined in all 24 witnesses and their brief introduction is as under:

EVIDENCE ON BEHALF OF PROSECUTION

Admittedly only three witnesses are crucial i.e. PW1 Mahadeo, PW2 Ambadasrao and PW3 Changoji and therefore, we proceed to deal with their evidence by reproducing the sum and substance of their testimonies.

PW1 Mahadeo Haribhau Tate is the informant. His evidence is at Exh.49. The sum and substance of his evidence is that, his relative Anita was married to Onkar Laxman Tate. However, after one year, said Onkar performed second marriage and therefore, Anita initiated proceedings in the Court at Jintoor. In the said proceedings, this witness himself and deceased Devidas were witnesses on behalf of Anita. According to him, on 05-05-2012, initially there was abuse by accused Sheshrao Dombé and he was hurling

abuses questioning why this witness and Devidas had acted as witnesses in the proceedings. In this backdrop, accused persons had gathered and were prepared to raise quarrel. According to him, the above circumstances were informed to the Police through one Manoj and as such a Jeep of Police had arrived in the village and had proceeded towards Maroti temple and seeing Police arrived, this witness, who was with others on the terrace of Police Patil Ashroba, came down to go to their houses. According to this witness, when he was in the house, he heard noise of quarrel, therefore, he came out and he saw accused Datta Tate, Murli Tate and Dnyanoba Tate assaulting Vishnu and Devidas. Accused Datta was armed with Suri, accused Sheshrao was armed with a stick, accused Laxman was holding a Gupti, accused Govind and Onkar were armed with iron rods, whereas accused Dnyanoba was armed with knife and they all gathered and mounted assault on this witness, Devidas, Ambadas, Rajendra and Vishnu as a result of which Devidas fell down. Police reached the spot and therefore, accused persons ran away and Devidas and injured were taken to Civil Hospital, Jintoor and from there to Civil Hospital, Parbhani. Devidas was declared dead, whereas all other witnesses were treated at Civil Hospital, Parbhani and while undergoing treatment, this witness gave report Exh.50. He identified the same. He also identified accused, articles and clothes.

PW2 Ambadasrao Prakashrao Tate claims that, he knew informant as

well as accused. Regarding the occurrence, it is his evidence that on that day, he was in village Warud in the temple of Narsinha. PW1 Mahadeo and deceased Devidas had gone to Jintoor Court. He went to the field. Shortly, his father and one Munjabhau came there. In his presence, his father received a phone call from a villager stating that relative of Laxman Tate namely Sheshrao Dombé is hurling abuses in open space in front of his house. His father informed this witness as well as Munjabhau and they went back to the village and saw accused Sheshrao hurling abuses. They went on roof of Police Patil Ashroba. His father even called Changoji Tate, Raosaheb Tate, Mahadeo Tate, Rajendra Tate, Udhav Tate and Devidas Tate on roof. His father asked Manoj to inform Police. After some time, on seeing Police Jeep coming, they all came down and while they were going towards their house, at that time, accused Dnyanoba Tate, Murli Tate and Datta Tate came and caught hold of Devidas. Accused Datta was having Suri in his hand. He assaulted Devidas from the front side. Devidas shouted and ran towards house of Ramrao Kodre and while Devidas was in front of house of this witness, accused Sheshrao assaulted on the hand of Devidas by means of stick. Accused Dnyanoba and his two sons namely Datta and Murli as well as Laxman, Govind and Narhari pushed Devidas. Govind was armed with Gupti, Ranjeet was armed with sword and Babarao was armed with iron rod. When this witness intervened to rescue Devidas, Onkar assaulted with iron rod on his head and therefore, he went inside house of Ramrao Kodre, but still Onkar followed him. According

to him, accused Laxman had caught hold of Devidas and Govind assaulted Devidas with Gupti in his chest. Accused Dnyanoba assaulted Devidas on his stomach and thigh by means of knife, as a result of which, he suffered injuries and fell on ground. Police arrived and assailants ran away. Devidas and other injured were taken to hospital in Police Jeep. After giving first aid at Civil Hospital, Jintoor, Devidas was declared dead and other injured were thereafter shifted to Civil Hospital, Parbhani and were in that hospital for five days. He identified his clothes and articles shown to him in the Court.

PW3 Changoji Ashroba Tate also claimed that he knew accused persons. Regarding occurrence dated 05-05-2012, he stated that at around 06:00 p.m. Mahadeo Tate, Devidas Tate, Udhav Tate, Vishnu Tate, Raosaheb Tate, Ambadas Tate, Prakash Tate, Vithal Tate and Bharat Tate had come on his terrace and he joined them. They saw accused Sheshrao standing in front of house of accused Laxman and hurling abuses to Mahadeo Tate and Devidas Tate. Both sons of accused Laxman were also present there. At around 07:00 p.m. when all persons from Terrace came down and were proceedings towards Tate Galli, at that time, accused Laxman, Onkar, Govind, Sheshrao, Dnyanoba and his two sons namely Datta and Murli were at Tate Galli. According to him, accused Laxman was armed with Gupti, accused Dnyanoba was armed with knife, accused Datta was armed Suri, accused Murli was armed with iron rod and they all stated to catch hold of Devidas and not to leave him. Accused

Ranjeet was armed with sword, Baburao was armed iron rod and Govind was armed with Gupti. Accused persons initially pushed Devidas towards house of Ramrao Kodre. Accused Murli assaulted PW1 Mahadeo with iron rod. This witness ran but he was followed by accused Ranjeet and Ranjeet assaulted him with sword. After one minute, this witness heard siren of the Police Jeep and so he came out of Wada and saw Devidas lying on the ground in pool of blood. He also saw PW1 Mahadeo, Rajendra, Ambadas and Vishnu having sustained injuries and they were initially taken by Police to Civil Hospital, Jintoor and thereafter, he learnt about death of Devidas. That injured were taken to Civil Hospital, Parbhani. He also identified articles and clothes shown to him.

PW4 Ganesh Laxman Ghule is Pancha to spot panchanama **Exh.74**, inquest panchanama **Exh.75** and seizure panchanama of clothes of deceased **Exh.76**.

PW5 Subhash Vitthal Makode is Pancha to Seizure Panchanama of clothes of Mahadeo **Exh.79**, Seizure Panchanama of clothes of Vishnu **Exh.80** and Seizure Panchanama of clothes of Rajendra **Exh.81** and Seizure Panchanama of clothes of Ambadas **Exh.82**.

PW6 Pramod Rambhau Ambhore is Pancha to disclosure memorandum of Laxman and Dnyanoba.

PW7 Suresh Ramchandra Wallamwad is Pancha to seizure of clothes of accused Dnyanoba. He did not support prosecution.

PW8 Rustum Marotrao Dhale is Pancha to seizure of clothes of accused Govind. He did not support prosecution.

PW9 Pralhad Shankar Khade is Pancha to seizure of mobile phones of accused. He did not support prosecution.

PW10 Datta Ramrao Mudhe is Pancha to seizure of clothes of accused Babarao. He did not support prosecution.

PW11 Ramprasad Manjiram Maghade is Pancha to seizure of weapon from accused Dnyanoba Tate and Laxman Tate. He did not support prosecution.

PW12 Gauttam Kundlikrao Ghansawant is Pancha to disclosure statement of weapon from Ranjit Wagh. He did not support prosecution.

PW13 Deepak Munjaji Shendre is Pancha to disclosure statement from Ranjeet Wagh. He did not support prosecution.

PW14 Laxman Kamble is Police Naik, who was alongwith PW23 Borde (API) in the vehicle. He stated that when they were proceeding towards village Warud, they met accused Govind Thite and Baburao Thite, who greeted PW23 Borde (API). After short while, PW23 Borde (API) received a call from Manoj Thite regarding one Sheshrao Dombé shouting in the village under influence of liquor and therefore, they went there. Seeing a gathering, they went to said spot. There they found 5-6 persons in injured condition and one was lying on ground and with the help of neighbours, all were taken in Police Jeep to Civil Hospital at Jintoor. The person lying on the ground was declared

dead at Civil Hospital, Jintoor. He identified accused Govind and Baburao, who were present in the Court.

PW15 Dr.Abhijit Suryakant Chaundke, who initially examined injured at Civil Hospital, Jintoor, referred them to Civil Hospital Parbhani. He issued MLC of Mahadeo, Vishnu, Rajendra, Bhagwat, Changoji and Ambadas, who he claimed to have examined and he gave evidence about noticing injuries on the person of deceased Devidas and issuing post mortem report and sending viscera to Chemical Analyzer (CA). He was confronted with the articles by the learned APP and he answered about its capacity to cause injury. He identified injury certificates issued by him.

PW16 Gulab Dnyanoba Nahatkar is Photographer, who snapped photographs of the dead body and the injuries thereupon.

PW17 Raman Vyantatesh Parpille **PW18** Motiram Namdeo Barge are carrier of the Muddemal.

PW19 Shashikant Bhagwanrao Takras is Police Nayak, who was attached to Out-Post Police Chowki, Civil Hospital, Parbhani. On receipt of wireless message from Nanalpeth Police Station, he went to Civil Hospital, Parbhani and recorded statement of PW1 Mahadeo Haribhau Tate.

PW20 Dr.Zikre Mudassir Ahemad is also a Medical Officer, who examined injured at Civil Hospital, Parbhani

PW21 Chetan Shivdas Patil is Nodal Officer of Airtel Company

PW22 Francis Parera is Nodal Officer of Vodafone Company

PW23 Kishor Borde is API, who carried out investigation

PW24 Vikas Nikam is Second Investigating Officer, who completed investigation and chargesheeted accused.

DW1 Minakshi Jadgav is Defence witness.

8. Before adverting to so called ocular account, we wish to get ourselves satisfied that death of Devidas is shown by the prosecution to be homicidal one.

To find answer to the same, we are required to visit evidence of **PW15** Dr.Abhijit Suryakant Chaundke, Autopsy Doctor. His evidence shows that apart from initially examining injured, he examined Devidas and even declared him dead and on request of Police, he conducted autopsy. As regards to post mortem findings, his evidence is reflected in paragraph 9 of the examination-in-chief, wherein he has quoted following external injuries noticed by him and taken note of the same by him in column 19 of post mortem report.

“[a] Injury No.1: Wound of entry, a stab injury, 4 cms in length, 0.75 cms in width, wedge shaped, with clean cut inverted borders situated in mid clavicular line, on right anterior chest wall, 6 cms lateral to sternum and 7 cms below clavicle which on tracing with probe, traced upto back of chest indicated as injury No.2, which is wound of exit.

Age of injury was within 12 to 18 hours. Weapon used. Probably hard, sharp and linear with beveled edges.

[b] Injury No.2: Wound of exit, injury No.1 is traced to injury No.2, labelled as wound of exit, 2 x 0.5 cms, clean cut everted edges, situated on back, right scapular in mid clavicular line, 7 cms lateral to midline and 10 cms below superior border of right scapula.

[c] Injury No.3 : a clean incised wound 3 cms in length, 0.5 cms in depth, tapering to tail on abdomen, left side, 4 cms lateral from midline and 10 cms above umbilicus.

Age of injury was within 12 to 18 hours. Weapon used; sharp and pointed.

[d] Injury No.4 : A clean incised wound, 5 cms in length, 0.5 cms in depth, tapering to tail on left thigh, middle 1/3rd oblique. Age of injury was within 12 to 18 hours. Weapon used; sharp and pointed.

[e] Injury No.5 : Linear abrasion on distal phalanx on right thumb, palmer surface, verticle 1.5 cms in length.”

The signs of healing of the injuries were present.”

He is very categorical that injuries are ante mortem in nature. After deposing about preserving viscera for C.A., he stated about forming of opinion about cause of death due to “Cardio pulmonary arrest due to hypo volumic shock due to stab injury to vital organ the right lung”. He identified post mortem notes authorized by him at Exh.138. Learned APP seems to have posed questions in paragraph 12, which are as under and Doctor has answered as under.

“Q. Whether the injuries, serial Nos.1 and 2, in postmortem notes [Exh.138] are possible due to assault with a Gupti?.

Ans. Yes.

Q. Whether the injuries, serial Nos.3 and 4, in postmortem notes[Exh.138] are possible due to assault with a knife?.

Ans. Yes.

Q. Whether the injury, serial No.5, in postmortem notes [Exh.138] is possible if a person holding sharp weapon like Gupti or knife in his hand, catches hold of hands of another person from backside?

Ans. Yes. ”

9. On going through the **cross-examination** of above witness, we have noticed that there is extensive cross-examination but on other factors like procedure to be undertaken while issuing injury certificate, about nature of injuries, about shape, size of injury, description of articles. It is evident that the aspect of opinion of the medico legal expert has not been touched during entire cross nor the opinion has been rendered as not worthy of credence. However, even before us during appeal neither the learned Senior Counsel for appellant in Criminal Appeal No.861 of 2015 nor the learned Counsel for appellants in Criminal Appeal No.890 of 2015 have raised any dispute or issue questioning the mode and manner of the death. Resultantly, there being no serious challenge to this issue, we too hold death of Devidas to be homicidal one.

ANALYSIS

10. Therefore, we go to the next level to ascertain whether appellants are author of the fatal injuries.

We have already introduced witnesses and their role in the aforesaid paragraph. It is emerging that **PW1** Mahadeo is an injured witness, **PW2** Ambadasrao and **PW3** Changoji are eye witnesses. Entire story of the prosecution hinges on the testimonies of these three witnesses.

11. On meticulously analyzing and comparing the testimonies of **PW1** Mahadeo, **PW2** Ambadasrao and **PW3** Changoji, it is emerging that **PW1** Mahadeo is an injured witness. As regards to **PW2** Ambadasrao and **PW3** Changoji are concerned, they are residents of the same locality and their presence has not been rendered doubtful and even there is no suggestion to them that they were not present at the relevant time at the spot of incident. We have also noticed that the role and overt acts allegedly attributed to appellants have also not been rendered doubtful. Weapons / articles held by them are not doubted. Therefore, we do not hesitate to hold that there is credible, trustworthy and reliable evidence of these three witnesses. We have also noticed that there is no serious cross-examination in the trial Court of these witness about either presence of appellants or roles played by them. On examining their evidence with strict legal lens, their evidence can be said to be having ring of truth. Their testimonies are not brought under cloud, more

particularly, on the point of occurrence and assault.

12. The principal argument on behalf of Mr.Sapkal, learned Senior Counsel is regarding evidence of these three witnesses to be full of material omissions,, contradictions, improvements and exaggerations. In support of said objection, he invited our attention to paragraph nos.23, 24, 25, 26, 27, 29 and 30 of the testimony of PW1 Mahadeo and therefore, the same needs to be visited and assessed with caution. Resultantly we carefully went through the said paragraphs. The omissions that we found are enumerated as under :

- (i) About reaching village, deceased alighting from Motorcycle, he himself going to field.
- (ii) About Ankush informing regarding accused Sheshrao hurling abuses and asking to come out.
- (iii) About he not going home and rather going to terrace of Police Patil
- (iv) About accused Datta having cleaver, he holding deceased Devidas saying that he should not be spared.
- (v) Regarding accused Sheshrao hitting stick on the hand of deceased.
- (vi) About Sagarabai asking accused Sheshrao not to assault on deceased and he in turn asking her to move aside.
- (vii) He admitted about not stating regarding Laxman saying not to leave deceased.
- (viii) About Laxman holding Gupti, Govind and Onkar having iron rods,

Dnyanoba having knife and Murli having iron rod.

(ix) He admitted about not stating that there was gathering and there was no noise, Govind coming from the side of the well, accompanied by Ranjeet and Baburao and they too armed with sword and iron rod respectively,

In paragraph no.26 he is found to be answering as follows :

Admitting regarding not stating about deceased being pushed, about Murli hitting rod on his head, whereas Onkar hitting Ambadas, Ranjeet assaulting Rajendra and Govind assaulting Vishnu.

In paragraph no.27, it seems to be repetition of above, except addition regarding not stating about Dnyanoba assaulting in stomach of Devidas with knife at the time of arrival of Police.

In Paragraph no.28, omissions are brought regarding accused running when Police Jeep arrived, Police taking this witness and other injured to Civil Hospital Jintoor in Police Jeep and there to be day light at the time of occurrence of the incident. PW1 Mahadeo has volunteered that he has not stated so as Police did not ask.

In paragraph no.29, there are following omissions in so called supplementary statement.

(i) About Govind not assaulting Devidas with Gupti on the right side of the chest; about not stating assault on the stomach; about weapon of assault if shown he can identify;

In paragraph 30 about not stating in complaint / supplementary

statement about things lying on the spot; about not giving relation of Bharat Uttarmaro Thite and Ganesh Laxman Ghule.

In paragraph 31 he admitted that he did not show spot of incident in front of house of Ramdas Kodre.

13. Similarly, Mr.Sapkal, learned Senior Counsel would also strenuously submit that evidence of **PW2** Ambadasrao is also full of material contradictions. On this count, he invited our attention to statement of PW2 Ambadasrao recorded on 06-09-2013, more particularly, to portion marked **“A”, “B”, “C”, “D”** and **“E”**.

Accordingly, we visited his testimony and found that portion marked **“A”** i.e. “in the evening time, my father and Munjabhau Dukandar also came to the field”, portion marked **“B”** i.e. “he has not stated in his Police statement that Vitthal Tate had sustained and suffered injuries, portion marked **“C”** i.e. “I had not stated in my Police statement that my father had called Vitthal Tate @ Mankar and Bharat Thite”, portion marked **“D”** i.e. “It did not happen on 08-05-2012, I stated to Police that accused are from Congress Party and we are from N.C.P.” and portion marked **“E”** i.e. “I do not remember whether I stated in my statement before Police that Dnyanoba Tate made assault by knife on the stomach and thigh of Devidas and caused injuries to him.”

14. Likewise Mr.Sapkal, learned Senior Counsel also would try to submit

that evidence of **PW3** Changoji is also full of material omissions and contradictions as he does speak about seeing incidence from terrace, and he is not attributing role to Govind. That in paragraph no.8 omissions are brought that “I stepped down from the terrace for serving water and tea”; “there is way through the Wada of my brother to go to Tate Galli; “we all proceeded to Tate Galli from the way which passes through Wada of my brother.; “accused had stated to catch-hold of Devidas and not to leave him; “Gupti in the hand of Laxman, knife in the hand of Dnyanoba, Suri in the hand of Datta and iron rod in the hand of Murli Tate”.

15. To sum up on above objection about material omissions, contradictions, improvements reproduced above, we are of the considered opinion, that on re-assessment and re-evaluation of substantive evidence of above three witnesses i.e PW1 Mahadeo, PW2 Ambadasrao and PW3 Changoji, the core of the prosecution case about assault mounted on Devidas and other injured has not been disturbed or shattered. No doubt there are certain omissions and contradictions, however, on carefully considering the same, we do not think the same to be so material so as to render their entire testimony doubtful. It is trite law that there are bound to be discrepancies due to normal error of observation, mental disposition of the witness on seeing an assault and more particularly, when witness himself is an injured one. Witness is not expected to take mental note of each and every overt act and reproduce it in same

manner in which he had stated in the complaint or statement to Police i.e. after some gap. It is virtually impossible to reproduce entire version in same sequence or in same manner for the second time, more particularly, when there is extensive and lengthy cross-examination.

We fortify our such view on the basis of judgment of Hon'ble Apex Court in the case of State of *Rajasthan v. Smt. Kalki and Another*; AIR 1981 SC 1390, *State Rep. By Inspector of Police v. Saravanan*; (2008) 17 SCC 587, *Mahendra Pratap Singh v. State of U.P.*; (2009) 11 SCC 334, *Sunil Kumar Sambudayal Gupta (Dr.) v. State of Maharashtra*; (2010) 13 SCC 657 and *Bihari Nath Goswami v. Shiv Kumar Singh* (2004) 9 SCC 186.

Very recently, the Hon'ble Apex Court in the case of *Vahitha v. State of Tamil Nadu*; 2023 SCC Online 174, in paragraph nos.48, 49 and 50 has recapitulated and enunciated legal position regarding inconsistencies, discrepancies, serious contradictions and omissions, which would materially affect the prosecution case. In paragraph no.48 of the said judgment, observations of selfsame Court in the case of *Shyamal Ghosh v. State of W.B.*; (2012) 7 SCC 646 are reproduced observing as under :

“68. From the above discussion, it precipitates that the discrepancies or the omissions have to be material ones and then alone, they may amount to contradiction of some serious consequence. Every omission cannot take the place of a contradiction in law and therefore, be the foundation for doubting the case of the prosecution. Minor contradictions, inconsistencies or

embellishments of trivial nature which do not affect the core of the prosecution case should not be taken to be a ground to reject the prosecution evidence in its entirety.”

16. The Hon’ble Apex Court, referring to the case of ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarath***; AIR 1983 SC 753, has observed that witnesses cannot be expected to pose photographic memory; a witness is likely to be overtaken by events, particularly, of unanticipated occurrence; the power of observations defer from person to person; by an large people cannot accurately recall the conversations or the sequence of events and witness howsoever truthful is liable to be overawed by the Court atmosphere and the piercing cross-examination.

“Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious :

(1) 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.

(2) 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.

(3) 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.

(4) 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.

(5) 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.

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

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made 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- Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.”

Further, in paragraph no.50 of the judgment of **Vahitha** (supra) reliance is taken on case of **Gangadhar Behera v. State of Orissa**; (2002) 8 SCC 381 which were highlighted in the case of **Krishna Mochi v. State of Bihar**; [(2002) 6 SCC 81] as under :

“15. Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in Krishna Mochi v. State of Bihar [(2002) 6 SCC 81].”

17. Here it is noticed, as stated above, that presence of PW1 Mahadeo, PW2 Ambadasrao and PW3 Changoji has not been seriously challenged or rendered doubtful inspite of subjecting them to excessive and extraordinary cross. Moreover, PW1 Mahadao is himself an injured witness. It is also fairly settled position that testimony of injured witness always remains at higher pedestal and should not be overlooked or discarded unless it is shown to be patently unbelievable. Testimony of injured witness has its own relevancy and efficacy and hence, on numerous times, testimonies of injured witnesses are accorded special status. Law to this extent is clearly spelt out in landmark cases of *Jarnail Singh v. State of Punjab*; (2009) 9 SCC 179 and *Balraje @ Trimbak v. State of Maharashtra*; (2010) 6 SCC 673;

PW2 Ambadasrao and PW3 Changoji, who are independent witnesses, have also lend support to the version of PW1 Mahadeo on the point of

presence of accused, they to be armed with respective articles and the over acts indulged into by them. Failure to give detailed account of a occurrence, involving several persons assaulting more than two persons, should not be viewed as fatal in view of above discussed settled legal position. Seeing an assault of such magnitude, all of a sudden, even a bystander is taken by surprise and may not be so organized as to state the role or name the articles with exactitude or precision.

18. Here on the contrary, paragraph 33 of the cross-examination of PW1 Mahadeo - informant shows that there was already animosity between the parties. Accused party was annoyed on deceased Devidas for becoming witness in a matrimonial dispute. It is pertinent to note that in paragraph 31 by asking whether assault was made while Devidas was in standing position, itself shows that there is no serious dispute on the point of assault. This witness seems to have asked whether Devidas attempted to run. Witness has volunteered that he did not run because he was caught-hold of. It is also suggested that this witness did not attempt to snatch the weapon and that he did not catch-hold of accused persons. He seems to be asked as to on which all places incident took places and witness has answered that accused persons beat Devidas in front of his own house as well as in front of house of Ramrao Kodre. Therefore, above manner of cross-examination also itself suggests that there is no serious challenge to the very occurrence and assault.

Resultantly, we do not find any force in the above objection raised about testimonies of PW1 Mahadeo, PW2 Ambadasrao and PW3 Changoji to be full material omissions and contradictions and hence their entire evidence to be unworthy of credence. In our opinion, we reiterate that the core of prosecution case on assault has remained intact.

19. The second ground of challenge is that inspite of alleged incident taking place at around 06:30 p.m., FIR is lodged after inordinate delay i.e. on next day 06-05-2012. That prosecution evidence suggests presence of Police shortly after the alleged occurrence, but neither any person from the huge gathering or even the Police officer had set law into motion. That inspite of better medical facility also available at Civil Hospital, Jintoor, without any referral by Doctor, injured are shifted to Civil Hospital, Parbhani in private vehicle for the best reasons know to them and therefore, according Mr.Sapkal, learned Senior Counsel and Mr.Paranjape, learned Counsel there was ample scope for complainant party to develop a case to falsely implicate appellants. That even statements of injured are recorded after 2-3 days.

In the light of above objection, we have carefully sifted the prosecution evidence. It appears that around twilight time i.e. approximately between 06:30 p.m. to 07:30 p.m. on 05-05-2012 occurrence has taken place. PW23 Kishor Borde (API) and PW19 Shashikant (Police Naik) had already reached the village Warud initially for personal reason i.e. for Darshan, but on receipt

of telephone from Manoj, these two persons seem to have proceeded to the spot. PW23 Borde (API) speaks about seeing one injured lying and other 5-6 injured present there. No doubt he has not made enquiry with injured or persons around there and he has taken injured in his vehicle to Civil Hospital, Jintoor, but it seems that priority has been given to shift injured to hospital rather than making enquiry or taking down any statement. Evidence shows that on examination at Civil Hospital, Jintoor, deceased Devidas was declared dead and PW15 Dr.Abhijit at Civil Hospital, Jintoor, claims that he referred injured to higher center i.e. Civil Hospital, Parbhani. At that juncture, PW23 Borde does not seem to be present there as he claimed in his evidence, about learning regarding injured to be referred to Civil Hospital, Parbhani. Resultantly, at Civil Hospital, Jintoor, statements were not recorded. PW23 Borde speaks about intimating Police Chowki at Civil Hospital, Parbhani to record statements i.e. on learning about injured being shifted there.

PW19 Shashikant (Police Naik) posted at Out-Post Police Chowki, Civil Hospital, Parbhani claims to have received a wireless message. According to him, his duty was from 08:00 a.m. on 05-05-2012 to 08.00 a.m. on 06-05-2012. Exh.50 carries certificate of Doctor about fitness of PW1 Mahadeo to give statement. This certification carries timing 11:25 p.m. of 05-05-2012. PW19 Shashikant has deposed about he going to Civil Hospital, Parbhani, recording statement and forwarding the same alongwith his report to Jintoor Police Station. PW23 Borde claims that on receipt of statement, he

recorded crime at around 04:20 a.m. on early morning of 06-05-2012. It is thus emerging that recording of statement, though has taken place at Parbhani Civil Hospital, report was despatched to Jintoor Police Station and on receipt of report, crime has registered at Police Station Jintoor that too within 4-5 hours of receipt of report. It seems that, either PW19 Shashikant gave timing as 10:00 to 10:30 a.m. inadvertently or it could be a typing mistake for the simple reason that, duty hours of PW19 Shashikant, as deposed by him in his evidence, are from 08:00 a.m. on 05-05-2012 to 08:00 a.m. on 06-05-2012 and therefore, there seems to be confusions about timing.

In the light of above material, we are of the opinion that there is no inordinate delay in registering crime as claimed by appellants. Infact in the same night crime is registered and as such it is not fatal.

20. It is true that, statements of injured are recorded after 3-4 days and no efforts are apparently done by PW23 Borde (API) in either enquiring about the occurrence while lifting and shifting deceased and injured till being taken to Civil Hospital, Jintoor and even thereafter. However, merely not questioning injured persons at the earliest opportunity, will not be itself sufficient to raise doubt and hold that deliberately time was killed to give twist to the real occurrence. PW23 Borde seems to have accorded priority to shift injured party to the Hospital. One on examination at Civil Hospital Jintoor is declared dead. It is also worth mentioning that in paragraph 19 of

the cross-examination, PW23 Borde, Investigating Officer, seems to have offered some explanation by stating that he did not record complaint as wife of deceased, his relatives and injured were not in the state to give complaint. He further stated that he was not having complete knowledge of the incident and therefore, he did not lodge complaint on behalf of the state. He further deposed that he has asked injured to give complaint, but according to him, they replied that they were not in a position. Resultantly, in the light of above material, it cannot be said that statements of injured were not recorded immediately without any plausible explanation and as such there is inordinate delay and hence fatal. There could have been some substance in above submission, had it been that there was no plausible explanation at all.

21. Case of prosecution is also questioned by Mr.Sapkal, learned senior Counsel and Mr.Paranjape, learned counsel by submitting that prosecution's own evidence suggests that weapons were already lying on the scene of occurrence itself and in presence of Pancha, articles and weapons were allegedly seized and so it is their submission that if it was so, then what was the necessity of recording disclosure statements at the instance of accused and show recovery at their end.

In the light of above, we have carefully examined the evidence of Investigating Officer. It shows that spot panchanama was drawn at around 06:00 a.m. on 06-05-2012 and seizure of three wooden rafters, one stick, two

iron rods, one shoe and one chappal is effected. Consequently, no Gupti or knife is seized from the spot. Evidence of PW23 Borde, shows that he took accused persons in custody at around 10:00 p.m. on 05-05-2012 itself. Thereafter, accused Laxman and Dnyaneshwar seem to have given memorandum of disclosure on 11-05-2012 viz. Exhibits 206, 207 and they took Police, Panchas to the house of Laxman and seizure of Gupti and knife is caused at their instance vide panchanama Exhibits 208 and 209. Though, Panchas to memorandum of disclosure and recovery have not supported prosecution, the same are got exhibited in trial Court through Investigating Officer. Resultantly, there is memorandum of disclosure and recovery of these two weapons subsequently. Accused persons are shown to be apprehended after receipt of information about they hiding in the house of accused Laxman. Both above weapons are recovered from the said spot. Consequently, even the above objection pales into insignificance.

22. It is also vehemently submitted that no independent witness is examined and even Manoj, Vishnu and Rajendra are not examined. They were important witnesses and are deliberately withheld.

As regards to above objection is concerned, admittedly, so called Manoj, Vishnu and Rajendra are not examined. However, it is not the quantity of witness, rather it is the quality of evidence that matters. Evidence of PW1 Mahadeo, PW2 Ambadasrao and PW3 Changoji, in our opinion, is acceptable

and worthy of credence. Though there might be several other persons present at and around the spot, here PW1 Mahadeo, a injured and PW2 Ambadasrao and PW3 Changoji, are residents of same village and they have not only supported prosecution story, but are found to be even lending support to each other on crucial aspect of assault.

23. True it is that role of accused Datta is also coming on record and even Doctor does speak about injury to be possible by article like knife, but unfortunately, learned trial Judge has acquitted him holding that there is no injury with article knife. However, surprisingly there is no appeal by State in that regard and therefore, our hands are tied.

24. As regards to objection of appellants that on the same set of evidence, half of the accused are acquitted and half are convicted and as such there is no proper appreciation of evidence, here learned APP has sought reliance on the ruling of the Hon'ble Apex Court in the case of ***Surajit Sarkar v. State of West Bengal***; (2013) 2 SCC 146, Placitum-E (Paragraph 57 to 61), wherein Hon'ble Apex Court held that *"Acquittal of co-accused/some accused/Benefit of their acquittal – Effect – Five out of six accused given benefit of doubt – Held "merely because other accused were either not identified by eyewitnesses or no role to play in assault on deceased, cannot absolve appellant in view of cogent and reliable evidence of a witness who had categorically stated about*

assault on deceased”.

Taking support of above ruling, in the case in hand also, there is convincing and reliable evidence as against present appellants are concerned. Hence, there is no substance in the above submission.

25. We have carefully gone through the impugned judgment. Except finding as regards to accused Datta, in our opinion, evidence regarding involvement of appellants herein, is found to be full-proof. There is correct appreciation to that extent and therefore, we do not intend to interfere in the judgment of the trial Court. Accordingly, we proceed to pass following order :

ORDER

Criminal Appeal Nos.861 of 2015 and 890 of 2015 are dismissed.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)