

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

CRIMINAL APPEAL NO. 736 OF 2016

- . Babu S/o Dashrath Kalwane
Age: 29 years, Occ: Agri.,
R/o Hanuman Nagar, M.I.D.C. Area,
Beed, Tq. and Dist. Beed.
(Appellant is in jail) ... Appellant
(Orig. Accused)
- Versus
- . The State of Maharashtra ... Respondent

...
WITH

CRIMINAL APPEAL NO. 749 OF 2016

1. Vitthal alias Sonu S/o Prakash Kalwane,
Age: 26 years, Occupation Agriculture,
R/o: Thigale Galli, Beed,
Taluka and District Beed.
 2. Bandu S/o Dashrath Kalwane,
Age: 35 years, Occu. Agriculture,
R/o: Hanuman Nagar, M.I.D.C. Area,
Beed, Taluka and District Beed.
(Separate appeal is filed by Appellant
No.2 as per order dated 05-12-2022
in Criminal Application No.4102/2022) ... Appellants
(Orig Accused Nos.1 & 2)
- Versus
- . The State of Maharashtra
Through The Police Station Officer,
Police Station Beed (City),
District Beed. ... Respondent

...
WITH

CRIMINAL APPEAL NO. 939 OF 2022

- Bandu S/o Dashrath Kalwane,
Age: 42 years, Occu. Agriculture,
R/o: Hanuman Nagar, M.I.D.C. Area,
Beed, Taluka and District Beed. ... Appellant
(Orig. Accused No. 2)

Versus

The State of Maharashtra
Through The Police Station Officer,
Police Station Beed (City),
District Beed.

Respondent

.....

Mr. R. N. Dhorde, Senior Counsel i/by Mr. V. R. Dhorde, Advocate for the Appellant in Criminal Appeal No. 736 of 2016.

Mr. Z. H. Farooqui, Advocate h/f. Mr. T. A. Ghumare and Mr. M. P. Shinde, Advocate for the Appellants in Criminal Appeal No. 749 of 2016.

Mr. R. G. Hange, Advocate for the Appellant in Criminal Appeal No. 939 of 2022.

Mr. S. D. Ghayal, APP for the Respondent State in all three Appeals.

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

**RESERVED ON : 25 JULY, 2023
PRONOUNCED ON : 11 AUGUST, 2023**

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

1. Appellants – original life convicts for offence under Sections 302, 307 read with 34 of the Indian Penal Code (IPC) are hereby assailing judgment and order passed by learned Sessions Judge, Beed in Sessions Case No.53 of 2015 dated 11-11-2016.

FACTUAL MATRIX

2. The occurrence has a history and background. Alleged assault in question is made when deceased and PW4 Dashrath were hospitalized on

account of consumption of insecticide. Therefore, for the sake of clarity, brevity and properly comprehending the occurrence, we propose to segregate the incidents into two episodes i.e. first which took place before hospitalization and subsequently the second episode after hospitalization around 06:00 p.m. on 23-12-2014.

FIRST EPISODE

3. Parents of **PW4** Dashrath had taken land from parents of deceased for cultivation on yearly basis. During such period, deceased Sushma and **PW4** Dashrath got acquainted with each other and love relations developed between them. Their such relations were objected by family members of Sushma. Therefore, the contract and agreement of cultivation was called off and prior to the incident in question, **PW4** Dashrath, his brother and parents were beaten by appellants, of which complaint was lodged. However, subsequently, the matter was amicably settled. In spite of objection, **PW4** Dashrath and deceased continued their love relations. As relatives of deceased were searching for suitable match for her, it is alleged by prosecution that deceased and **PW4** Dashrath met in a field on 23-12-2014 and they consumed insecticide and they were thereby required to be admitted in Deep Hospital, Beed by **PW5** Dhananjay, a friend and relative of **PW4** Dashrath. **PW3** Mayuri, on receipt of above information, visited the hospital to accompany and take care of her brother **PW4** Dashrath and as such she was in his company.

SECOND EPISODE

4. Around 06:00 p.m. or so, while **PW4** Dashrath was being treated in ICU Bed no.3 and deceased Sushma being admitted and treated at Bed no.4, appellants herein forced their entry in the hospital getting armed with weapons like Sword and Koytas. First they entered compartment where injured PW4 Dashrath was undergoing treatment and they mounted assault on him and thereafter, they entered compartment of bed no.4 and deceased Sushma was done to death.

On the statement of **PW3** Mayuri, sister of PW4 Dashrath, Police registered crime against appellants. After investigation, all three accused were chargesheeted, tried and the trial culminated into conviction which gives rise to instant appeals.

RIVAL CONTENTIONS

Submissions of Mr.R.N.Dhorde, learned Senior Counsel for appellant in Criminal Appeal No.736 of 2016 :

5. Learned Senior Counsel appearing for appellant in Criminal Appeal No.736 of 2016, while criticizing the judgment would submit that, there is no evidence about participation of this appellant and even no specific overt act is attributed to him. He submitted that, evidence adduced by prosecution is ambiguous on crucial aspects like identity and as to who was holding what. The fundamental question raised by him is on what basis accused are

identified as actual assailants. Learned Senior Counsel first took us through the evidence of **PW1** Somnath and after pointing to the answers given in cross-examination, he would submit that, this witness has categorically admitted and answered that persons seen in alleged CCTV footage are unidentifiable for want of clarity. He would emphasize that the very CCTV footage allegedly seized by investigating machinery and allegedly viewed by this witness cannot be looked into, as it has been admitted that the date, time of occurrence appearing in the CCTV footage, at the outset does not match with the narration given by informant.

6. It is further pointed out that, the sole piece of evidence which prosecution was relying is the electronic evidence, however, according to him, the witness, who extracted the CCTV footage, was not competent to issue certificate and it is apparent from the answers given by **PW2** Vijay. Therefore, according to him, such electronic evidence was not worthy of credence and ought not to have been relied by the learned Sessions Judge.

7. It is his next submission that, it is doubtful whether informant had any occasion to see the actual incident, as according to him, alleged incident had taken place in two compartments and she herself stated about she being shoved off and made to fall by the so called assailants. He also invited our attention to the answers given by this witness in her cross-examination, more

particularly, the so called material omissions and contradictions which have been solicited by defence in the trial Court.

He would further submit that material witnesses i.e. sister and uncle of deceased Sushma, inspite of shown to be present, are not examined by prosecution for the best reasons known to it. Learned Senior Counsel submits that it amounts to withholding material witness.

8. Learned Senior Counsel was also vociferous on the aspect of genesis of the occurrence as according to him, there was no motive and so called previous instance leading to a complaint had already been resolved and therefore, he submits that the very genesis of the occurrence has been suppressed by the prosecution.

9. He would strenuously submit that apart from uncorroborated testimony of informant from independent corner, the very version and statement at the instance of PW4 Dashrath cannot be looked into as according to learned Senior Counsel, it has come on record from prosecution evidence and cross-examination of **PW4** Dashrath that he was already undergoing treatment on account of consumption of insecticide and was on medication including injection Atropine and as such it is submitted that it is doubtful whether **PW4** Dashrath in such state of health could at all understand who assaulted him. Thus according to him, it was not open for prosecution to rely on his evidence

and even learned trial Judge ought to have kept his testimony out of purview for above reasons.

Lastly, he submitted that infact here prosecution had not discharged its primary burden of establishing the guilt beyond reasonable doubt. That evidence of prosecution was full of discrepancies, material omissions and contradictions and as such ought not to have been accepted for returning the guilt as is done by learned trial Judge. Consequently, for the above reasons, he prays to allow Criminal Appeal No.736 of 2016.

Submissions of Mr.Z.H.Farooqui, learned Counsel on behalf of appellants in Criminal Appeal No.749 of 2016 :

10. Adopting the above submissions advanced by learned Senior Counsel for appellant in Criminal Appeal No.736 of 2017, learned Counsel appearing for appellants in Criminal Appeal No.749 of 2016 would add that here occurrence has not been established by leading cogent evidence. That it is false implication in the background of previous dispute. According to learned Counsel, evidence of PW3 Mayuri and PW4 Dashrath being inconsistent, full of material omissions and contradictions, ought not to have been accepted by the learned trial Judge. He also attacked the findings and reasons reached at by the learned trial Judge by submitting that evidence on record was not free from doubt, more particularly the so called evidence of PW5 Dhananjay. According to him, prosecution is laying hands on some CCTV footage, but

persons appearing therein are admittedly not identifiable. Apart from above weak evidence, prosecution has not adduced evidence of material witnesses. He submits that the answers given by prosecution witnesses has damaged the very foundation and case of prosecution about involvement of present appellants. Appreciation by learned trial Judge is contrary to the evidence on record and so he submits that said judgment cannot be allowed to be sustained.

Submissions of Mr. R. G. Hange, learned Counsel for the Appellant in Criminal Appeal No. 939 of 2022 :

11. Mr.Hange, learned Counsel at the outset took us through the evidence of **PW1** Somnath and **PW2** Vijay on the point of electronic evidence in the form of CCTV footage. He would point out that these witnesses have candidly admitted that persons appearing in the footage are not identifiable clearly and even the date and time mismatches with the prosecution case and according to him, by no means, such evidence was liable to be adduced and further relied. On the point of actual occurrence, he took us through the answers given by **PW3** Mayuri and **PW4** Dashrath and would submit that their evidence is false, unreliable and these witnesses being interested witnesses, their evidence ought not to have been readily accepted, more particularly, according to him, when it was not inspiring confidence. He submitted that alleged incident had taken place in a hospital and inspite of it being brought on record that there

were other patients and hospital staff available, no such independent person is examined. He also questioned about the fitness of PW4 Dashrath to comprehend the incident, being under medication. He submitted that his statement is recorded after four days and testimony of PW3 Mayuri alone as such cannot be taken recourse to, there being no corroboration. Pointing out to the evidence of investigating machinery, he also questions the credibility of prosecution story about appellants submitting and surrendering themselves to Police with weapons. He would submit that there is clear bar for consideration of so called information passed by appellants at Police Station.

12. He next pointed out that, it has come in the evidence that PW4 Dashrath was admitted and getting treated and was said to be lying on bed and I.V. being given to him. However, according to him, if this was the situation and position of PW4 Dashrath, then he posed a question as to how there could be injuries on the back portion of this witness, who was shown to be tied to the bed, thereby preventing his mobility. For the said reason, he also raised doubt about version of PW4 Dashrath. Likewise, he also questioned cause of death of deceased Sushma, as according to him, there was only a single injury that too on the cheek and hence it is his submission that death of Sushma cannot be said to be homicidal one. Lastly, questioning the evidence adduced by prosecution and judgment passed by the trial Court, he submits that the findings are not supported by cogent and sound reasons and the same being

not in consonance with the evidence on record, he prays to quash and set aside the judgment of conviction by allowing the appeal.

Submissions on behalf of State :

13. Countering the above submissions, learned APP would submit that here there is not only trustworthy, direct eye evidence in the form of testimony of PW3 Mayuri, but there is also an injured eye witness account. That PW3 Mayuri was present very near to injured victim PW4 Dashrath. Testimony of injured witness always stands on higher footing. They both are lending support to each other on the point of arrival of accused with arms and carrying out assault. Their testimonies are inspiring confidence and the core of their substantive evidence about assault having remained intact and unshaken, inspite of facing extensive cross by various defence counsel, there is no reason to doubt or discard their testimonies. Learned APP submitted that here is a case wherein direct evidence gets full support from medical evidence in the form of treating Doctor, who had treated victim and deceased. Thus, prosecution had put up full-proof case. Motive is abundantly clear from the testimonies of PW3 Mayuri, PW4 Dashrath and PW5 Dhananjay. That identification of all assailants is not only established but overt acts indulged into by them are also consistently coming from prosecution witnesses. Resultantly, just and proper appreciation resulted into conviction. Learned trial Court has not committed any illegality or error while accepting the case of

prosecution and holding accused persons responsible for the charge and so he submits that there is absolutely no need to interfere in such sound judgment.

**STATUS, ROLE AND SUM AND SUBSTANCE OF THE
PROSECUTION EVIDENCE**

14. Before re-appreciating, re-analyzing and re-examining evidence adduced by the prosecution, we deem it fit to first introduce and spell-out the status of each of the witnesses examined by prosecution which is as followed :

PW1 Somnath Laxman Gadiwan is Panch to spot panchanama Exh.34. He has also acted as Panch to the identification of accused by use of compact disc played on a DVR and its seizure Exh.35. His evidence is at Exh.33.

PW2 Vijay Anandrao Bhivsene is a Technician of Swastik Sales Services, an agency which had installed CCTV cameras at Deep Hospital, Beed. On request of Police, he retrieved data from DVR. His evidence is at Exh.36.

PW3 Mayuri Chandrakant Shinde is sister of injured PW4 Dashrath and she is the first informant. Her evidence is at Exh.38.

PW4 Dashrath Subhash Kudake is injured witness. His evidence is at Exh.41.

PW5 Dhananjay Santram Chavan is a relative and friend of PW4 Dashrath, who shifted and admitted PW4 Dashrath and deceased Sushma in Deep Hospital. His evidence is at Exh.43.

PW6 Dr.Anant Vaijinathrao Mule, who owns and runs Deep Hospital. His evidence is at Exh.44.

PW7 Dr.Mahadev Kundalik Shingane is a surgeon and treating Doctor. His evidence is at Exh.51.

PW8 Gangubai Subhash Kudake is mother of injured PW4 Dashrath. Her evidence is at Exh.54.

PW9 Dr.Poonam Rameshwarsing Lodh is Autopsy Doctor, who conducted post mortem on dead body of Sushma, prepared post mortem report and gave opinion about cause of death due to hemorrhagic shock due to injury. Her evidence is at Exh.55.

PW10 Shahaji Uddhavrao Game is uncle of deceased Sushma. His evidence is at Exh.58.

PW11 Ganesh Sahebrao Ghadge is Pancha to recovery, discovery of weapons. He did not support prosecution. His evidence is at Exh.59.

PW12 Satish Shivajirao Jadhav (API) is Police Official, who caused seizure of Sword, Motorcycle and clothes of accused Sonu Kalwane at Exh.69. He also seized Koyta and clothes of accused Bandu Kalwane at Exh.70. He registered crime and handed over investigation of PW16 Shelke (API). His evidence is at Exh.67.

PW13 Bhaskar Vitthal Jaybhaye is Pancha to seizure of Motorcycle. His evidence is at Exh.73.

PW14 Vaibhay Vinayakrao Vaidya is owner of Motorcycle. His evidence is at Exh.76.

PW15 Dr.Eknath Devsing Pawar, who treated PW4 Dashrath. His evidence is at Exh.78.

PW16 Maruti Nivrutti Shelke (API) is Investigating Officer. His evidence is at Exh.85.

Apart from above oral evidence, prosecution has adduced documentary evidence like FIR, various panchanamas, post mortem report, medical papers etc.

Here dedfence has also after answering 313 Cr.P.C. jhas adduced DW-1, who is a X-ray Technician at Edxh.115-C. This witnees claims that he was present in the hospital. According to him, only one person came with weapon from ground floor to ICU. Witness claims that he tried to obstruct him. Then he stated that three more persons came in ICU with weapons and so this witness went to one side. Those persons assaulted patient on the bed of 3 and 4 and after those persons went this witness claims that he intimated Doctor.

SUM AND SUBSTANCE OF THE ACCUSATIONS

15. Going by the story of the prosecution, it is unfolded that instant case seems to be a case of honour crime. There is a blend of honour killing as the girl who died is said to be assaulted by her own relatives. From the record, it emerges that there was love affair between PW4 Dashrath and deceased

regarding which appellants, relatives of deceased were objecting to and as they had started the process of finding suitable match for her, initially deceased consumed insecticide followed by consumption of insecticide by PW4 Dashrath and in such backdrop, they were brought to Deep Hospital for treatment by PW5 Dhananjay. According to prosecution, murderous assault was carried out by appellants in the hospital.

16. Taking into account the nature of objections and questions raised by appellants regarding credibility of prosecution evidence, we are here now called-upon to address and deal the following crucial questions :

Firstly, whether prosecution has fixed identity of actual assailants.

Secondly, whether there is trustworthy, credible direct eye witness account.

Thirdly, fitness of injured witness PW4 Dashrath to comprehend the occurrence and whether he lend support and corroborate testimony of PW3 Mayuri.

17. Before proceeding to deal with the above controversies, let us first see whether in view of charge, death of Sushma is established as homicidal one, more particularly, in the backdrop of objection raised by learned Counsel Mr.Hange. To find answer to this issue, medico legal expert's evidence assumes importance and is thereby taken up for scrutiny.

PW9 Dr.Poonam - Autopsy Doctor stated that she came across following external and internal injuries :

External Injuries as noted in post mortem report :

1. Left temporo occipital region just 3 c.m. behind the left ear, 17 X 1 c.m. (17 stitches)
2. Stitched wound left cheek extending up to back of neck (13 X 1 c.m.) 13 stitches
3. At the angle of mandible (2 stitches)
4. Back of neck on left side (9 X 1 c.m.) 9 steples
5. Left scapular region (a) 22 X 1 c.m., 2 steple, and (b) 12 X 0.5 c.m., 7 steple.
6. Clinical abrasion left shoulder, 10 X 0.5 c.m.,
7. Back side of left shoulder, 5 c.m., 14 c.m.. steples,
8. Left side of neck, 1 X 1 c.m., (1 stitch)
9. Abrasion over back 22 X 0.5 c.m.,
10. Stitched wound on dorsal aspect of right wrist, (1 X 1 c.m., - 1 stitch)
11. Stitched wound on medial aspect of elbow joint (8 X 1 c.m.,) 8 stitches.
12. Stitched wound on left palm extending to base of thumb, 9 X 1 c.m, (9 stitches)
13. Fracture of base of 1st metacarpale (left)
14. Fracture of left ramus of mandible

Internal Injuries as noted in post mortem report :

Hematoma under left fronto temporal region at size 4 X 5 c.m., Fracture left temporal bone 6 x 0.5 c.m.. Injuries Nos. 1 to 12 mentioned in column No. 17 are external injuries and injury No. 13 and 14 are internal injuries.

In her opinion, death was due to “hemorrhagic shock due to multiple injuries with unknown poisoning”.

In the light of above material on record, we too are convinced that Sushma met homicidal death and as such this issue is required to be answered in affirmative.

18. Precise case of appellant is that identity of the assailant is not established. Consequently, we proceed to deal with this aspect first.

EVIDENCE ON IDENTITY OF ASSAILANTS

On one hand, prosecution case is that the hospital where the assault took place has CCTV cameras and DVR and the footage of the same shows involvement of appellants. On the other hand, appellants have come with the case that CCTV footages are not clear to identify the actual assailants.

PW6 Dr.Mule testified that he alongwith his three partners run Deep Hospital. He has named his partners. In para 8 of examination-in-chief he deposed that, there are CCTV cameras installed in the hospital. DVR was installed in his cabin and such system was installed four years prior to the incident through a agency owned by one Shailesh Kumar Wakekar. Its maintenance was with said agency. On day of incident, DVR was functional but he added that it was showing incorrect date and time. According to him, that said fault has developed 3-4 weeks prior to incident. Police seized DVR

on the date of incident in his presence and Police drew panchanama which he claims to be signed. He also identified the DVR.

While under **cross-examination** on this point, he answered that he does not have receipt of DVR and that similar DVRs are available in the market and that there was no hospital identification mark over the DVR. He stated that he called agency to cure the defects about date and time. He stated that Police seized DVR between 10:00 p.m. to 10:30 p.m. Learned Counsel for accused no.3 also questioned about warranty of DVR. Witness answered that on call agency was sending Shailesh or his assistant to cure the defects in DVR.

Thus, from the evidence of owner of hospital, prosecution has demonstrated that CCTV cameras and DVR are installed in the hospital, which is the spot of incident.

19. According to **PW1** Somnath, who also acted as a Pancha to spot, he was called by Police at City Police Station, Beed and he accordingly visited. One Bhivsene from Aurangabad was present there. Police Officer Mr.Shelke brought machine over which there was a paper label with seal and the same was removed and machine was connected with the computer and Compact Disc (CD) was prepared by Bhivsene and thereafter, the CD was played and he was asked whether he knew Sonu Kalwane, Bandu Kalwane and Babu Kalwane and witness claims that he answered in affirmative and he assigned the reason by stating that, he was knowing them as they were adjacent land

cultivators. He also resides in the field and they also resided in their field. He claims that he was asked to identify them.

From his testimony, it is surfacing that he was made to view footages and on viewing the same, he has narrated about accused Sonu @ Vitthal, Babu, Bandu seen entering the hospital armed with weapons. He has also identified them climbing the stairs and going towards ICU. He has stated the weapons held by them respectively. He has narrated about seeing appellant Sonu, Sonu's sister, maternal uncle and maternal brother to be present in the ICU and they obstructing him. He has narrated who was leading and who was following him. He categorically stated about they first entering the compartment of bed no.3 and thereafter, after some time, they proceeding towards compartment of bed no.4. He narrated about PW3 Mayuri being pushed and they all leaving. In paragraph 7, he spoke about DVR being removed from sealed condition and it being played by use of DVR, which was connected by Technician Bhivsene and footages appearing on the screen in the Court hall. In paragraph 9, he has watched the footages and narrated about which appellant was wearing which clothes, appellant running upstairs, entering ICU and leaving the hospital. All these narrations are after watching footages in camera nos.1, 6, 8. He has also quoted the timing in minutes and seconds.

Witness has identified banyan (article 8), jeans pant (article 9), bed-sheet (article 10) wherein it was embossed "Deep Hospital", cotton blood stain

swab (article 11), blood stained top belonging to Sushma (article 12) and Odhani cut at three places also to be blood stained (article 13). According to him, seizure was stapled and sealed.

20. Then witness pointed to the accused present in the Court by raising finger and stating that he identifies Sonu, who according to this witness is also known as Vitthal. Accused confirmed his name as Vitthal. Thereafter, witness pointed to accused Babu and Bandu. He stated that accused Sonu is nephew of accused Babu and Bandu and Sushma was daughter of Prakash. Vitthal and Sushma are brother and sister. Gangubai is mother of Dashrath. Subhash is father of Dashrath and Dashrath is son of sister of this witness.

On further **re-examination** as regards to footage of camera no.8, this witness has answered that the lady present in front of compartment no.3 is Mayuri and she seen going back in the compartment and accused following her and thereafter, all three accused again coming out of compartment no.3 and entering compartment no.4.

21. We have thereafter scrutinized the **cross-examination** faced by this witness.

The material cross-examination is that, this witness answered that he was present in the hospital on 23-12-2014 at about 08:45 p.m. He answered that he has reached there around 07:00 p.m. alongwith clothes of Dashrath.

He confirmed that in footage displayed on screen on last date, near compartment of bed nos.3 and 4, maternal uncle of Sonu was present. He further stated that he was present near those compartments, when three assailants entered those compartments. He is thereafter questioned about one Swapnil Galdhar a Vice President of BJP (Youth), about Gangubai to be his sister and she to be an active member of BJP. Then he was again questioned about the Geographical location and direction of hospital, its entrance, what was located at which place and how many patients were admitted in ICU.

In **cross-examination** on the point of DVR, he answered that he did not observe date of the recording stored and displayed in the DVR. He stated that it was played for two and half to three hours. He is also questioned at which of the places there was blood.

When cross-examined by learned Counsel for accused no.3, he denied having seen DVR previously and that he was unaware of its functioning and its processing.

22. Another witness on the CCTV footage, who is examined by prosecution, is **PW2** Vijay Anandrao Bhivsene. On carefully going through his evidence, it is revealed that he is a Technician employed by the Sales and Services, who supplied and installed CCTV cameras and DVR in Deep Hospital. On being called by Police, he connected the system with Monitor and the same was viewed and shown to PW1 Somnath.

23. Even above witness is subjected to exhaustive **cross-examination**. As regards to his part is concerned i.e. on the point of CCTV footage and DVR is concerned, cross-examination is found in paragraph 7, wherein he, after watching the footage of camera no.1, has answered that face of the persons near the scene near the sliding gate is not identifiable due to pixel results. Camera installed at main gate was night vision camera and because of that, there was excess shadow and as such there was no clarity. He also stated that the faces of the persons coming inside the gate are not identifiable i.e. in camera nos.2, 5, 6, 8. In paragraphs 16 and 17 there are questions about DVR, possibility of tampering. He admitted that he did not read Section 65-B of the Indian Evidence Act and that he is not aware about the certification and so he did not carry it. However, he denied that date and time displayed on DVR to be not changed and recording to be as it is and that warranty of the unit installed at Deep Hospital had expired.

SUMMATION ON ELECTRONIC EVIDENCE

24. From the testimony of **PW6** Dr.Mule, prosecution has established installation of CCTV cameras and DVR in Deep Hospital. From the evidence of PW1 Somnath and PW2 Vijay, prosecution has further proved that footage were retrieved by extracting services of PW2 Bhivsene and the same were confronted to PW1 Somnath, who claimed to be very well acquainted with all three accused, who were his immediate neighbours. PW1 Somnath has

identified each of the accused by name, he is found to be giving description of clothes on their person and alleged weapons with which they are armed with. After watching display of footage, he has brought on record who first entered and who followed the first person since the point of entrance of the hospital, landing the stairs to ICU on the first floor, their entry with weapons initially in compartment having bed no.4 and thereafter entering compartment having bed no.3 where both PW4 Dashrath and deceased were treated in their respective compartments. Witness has narrated even their return and exit from the hospital. We have noticed from the manner of cross-examination and suggestions that there is no serious dispute about the occurrence of assault. Identification on the footage is also not rendered doubtful. It is true that the date, time is not reconciling with the day of occurrence, but except such default in the system, the system to be in order and rest of the count has remained intact. It is obvious that for a Technician from Aurangabad, faces may not be clear but as stated above, PW1 Somnath has pinpointed who is who and who was wearing what and further who was armed with what.

25. Consequently, in the light of above discussion, we find no substance and merit in the arguments raised before us by each of the learned Counsel that prosecution had failed to identify the assailants and thereby we discard their said submission. Resultantly, we answer the above issue noting that identity of assailants is cogently proved by prosecution.

(II) Second and Third issues/objections raised before us are that there is no cogent, credible and trustworthy eye witness to the occurrence and that there is no further corroboration from independent witness.

OCULAR EVIDENCE

Before sifting ocular account, we propose to deal with the settled principles, which are to be borne in mind while appreciating ocular evidence in a criminal case and the same are dealt by the Hon'ble Supreme Court in the ruling of *Balu Sudam Khalde and Another v. The State of Maharashtra* (Criminal Appeal No.1910 of 2010) reported in 2023 SCC OnLine SC 355. These principles are culled out by the Hon'ble Apex Court from its own previous rulings viz. *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*, 1983 Cri LJ 1096 : (AIR 1983 SC 753); *Leela Ram v. State of Haryana*, AIR 1995 SC 3717 and *Tahsildar Singh v. State of UP* (AIR 1959 SC 1012) and the principles could be summarized as under :

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

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

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

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

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

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

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

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

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

X. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

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

XII. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by

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

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

26. Now let us get satisfied about availability of direct eye witness account. According to prosecution, **PW3** Mayuri and **PW4** Dashrath are star witnesses. PW3 Mayuri is real sister of PW4 Dashrath injured. We propose to analyze their testimonies and also reproduce it for better appreciation.

According **PW3** Mayuri, her brother PW4 Dashrath was studying in College. She deposed about love affair between her brother and deceased. She deposed that relatives of deceased learnt about it and there was an incident in which her parents and brothers were assaulted and Police complaint was lodged, but it was further withdrawn as matter was amicably settled. She stated that on 23-12-2014, while she was in the house around 04:00 p.m., she received call from PW5 Dhananjay and he informed that PW4

Dashrath and deceased Sushma consumed insecticide and were brought to Deep Hospital and therefore, she went there. She stated that PW4 Dashrath was admitted in Intensive Care Unit (ICU). Deceased was in Bed No.4 and PW4 Dashrath was in Bed No.3, whereas sister of deceased, her maternal uncle and his son were also present in the hospital. She testified that while she was talking to PW4 Dashrath, at that time Sonu Kalwane, Bandu Kalwane and Babu Kalwane i.e. appellants came there armed with weapons. According to her, Sonu was armed with Sword and Bandu and Babu were armed with Koytas. Babu hurled abuses and pushed her. Babu addressed to PW4 Dashrath that he had given understanding to him thousand times and that he did not listen and that now last stage has reached. According to this witness, all three of them started assaulting to PW4 Dashrath and after assaulting PW4 Dashrath, all three of them went towards Bed No.4. There they assaulted deceased and thereafter, they went away. According to her, PW4 Dashrath suffered injuries on head, neck, both hands and waist, whereas deceased Sushma has sustained injuries over her cheek. According to her, incident in the hospital took place between 06:00 p.m. to 06:30 p.m. Police visited, made enquiry with her. She had informed Mr.Shelke, Police Officer, who had recorded statement. She has stated that she gave details of incident i.e. whatever she has witnessed and thereafter she claims that she signed it. She identified report Exh.39. She identified all three accused saying that she knew

them and they are present before the Court. She further stated that her statement was recorded under Section 164 of the Code of Criminal Procedure.

27. Learned Counsel for accused nos.1 and 2 **cross-examined** above witness. On the point of occurrence, cross-examination is found in paragraph 10 wherein she has answered that she was pushed outside the compartment of PW4 Dashrath after giving abuses. She denied that she fell. She further answered that due to fear, as assailants were armed with weapons, she did not attempt to obstruct. She denied that because of push being given to her, she came out of ICU passage. It seems that she is asked where she was and she answered that she was in front of ICU after push. She has answered that hospital Nurse was present at her sitting place at counter and in standing position. She answered that she went to her and requested her to come to rescue. She is asked how many other patients were in the ICU and she answered that she did not remember whether there were two ladies and three male persons. To a question, she answered that when assailants came, she was sitting on stool in the compartment. She answered that at that time, PW4 Dashrath was resting on bed on his back and his both toes were tied with rope to the cot but his hands were free. She was asked when assault was made, whether Dashrath tried to defend himself and she has answered that he did not bring forwards his hands to defend himself. He did not try to assault the assailants. She has admitted that after the commencement of incident till its

end, PW4 Dashrath was on the cot. She confirmed and admitted that Dashrath was not assaulted on face, chest, abdomen and he did not remain in same position after arrival of assailants till they went away. She denied that four persons came near the bed of PW4 Dashrath.

28. Omissions and contradictions are brought on record regarding four persons coming near the bed, about her brother had not slept but was on saline. She stated that immediately after the assault, she did not go near him to see injuries. She is asked as to how many blows were inflicted and she answered that in her estimation about 10 to 12 blows were inflicted on PW4 Dashrath. She is asked where her statement was recorded and she answered that at Aurangabad Hospital. She is unable to state that why portion marked "A" is appearing in her statement. She answered that after the incident, she alone remained in ICU and when the appellants went away, Doctor has not come. According to her, Police reached to Hospital at 07:00 p.m. to 07:30 p.m. She denied that she told Doctor that some unknown persons assaulted PW4 Dashrath. She admitted that at the time of incident, Sarika, maternal uncle, maternal aunt and their sons were present in the hospital.

Omission is brought in her statement recorded under Section 164 of the Cr.P.C. as regards to "Talking of witness with PW4 Dashrat at that point of time". Omission is also brought as regards to Bandu to be armed with Koyta. Omission is also brought in the statement to Police about Babu addressing

PW4 Dashrath that thousand times understanding has been given but he did not listen and now that it is last stage. Then she is questioned about incident with deceased in paragraph no.13, wherein she has answered that Sushma was lying on the cot facing the roof. She is unable to state whether Sushma was awake or sleeping. She answered that she saw while she was assaulted on cheek and hand and she stated that at that time nobody was present there. She denied that she was not present in the hospital. She has answered that she was present at the time of preparation of panchanama. Suggestion about love marriage of appellant Sonu is admitted by her. She was asked where her statement was recorded, to which she answered that Police recorded her complaint near ICU Unit near other compartment bed.

When **cross-examined** by learned Counsel by accused no.3, she stated that she was sitting near the compartment of PW4 Dashrath. She stated that she was sitting near head side of PW4 Dashrath and his head was towards south side. She admitted that she did not give information about episode of poisoning to Police. She answered that PW4 Dashrath was on saline and in her presence, he has omitted.

Again learned Advocate for accused nos.1 and 2 brought omission in the statement recorded under Section 164 of the Cr.PC. about “while she was talking with PW4 Dashrath, at that time, Sonu, Bandu and Babu came with weapons.”

29. Now let us visit the evidence of another star witness i.e. **PW4** Dashrath. He is an **injured eye witness**. At this juncture, we also wish to briefly summarize the legal principles to be borne in mind while appreciating evidence of an injured eye witness. These principles are also culled out by the Hon'ble Apex Court in the above ruling of *Balu Sudam Khalde and Another* (supra) and these could be summarized as under :

(a) The presence of an injured eye-witness at the time and place of the occurrence cannot be doubted unless there are material contradictions in his deposition.

(b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not allow the real culprits to escape and falsely implicate the accused.

(c) The evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly.

(d) The evidence of injured witness cannot be doubted on account of some embellishment in natural conduct or minor contradictions.

(e) If there be any exaggeration or immaterial embellishments in the evidence of an injured witness, then such contradiction, exaggeration or embellishment should be discarded from the evidence of injured, but not the whole evidence.

(f) The broad substratum of the prosecution version must be taken into consideration and discrepancies which normally creep due to loss of memory with passage of time should be discarded.”

In his evidence **PW4** Dashrath at Exh.41, he has narrated about his affair with deceased and on 23-12-2014 they both consuming insecticide and he informing PW5 Dhananjay, who according to him, brought him and deceased and admitted them in the Deep Hospital and they were treated in ICU. He stated that fingers of both hands were tied to the bed and both his toes were also tied. He stated that his sister PW3 Mayuri visited hospital during the treatment and deceased Sushma was in the adjoining compartment. He stated that Bandu and Babu, who were uncles of deceased came to Hospital, but they went away. Then he stated that when he was resting on the bed, he heard loud shouting and Sonu, Bandu and Babu came and they started assaulting him. According to him, Sonu was armed with Sword whereas Bandu and Babu were armed with Koytas and they assaulted him on head, both arms, neck and back by these weapons. He started shouting. His sister was pushed while she was shouting. He stated that while leaving the compartment, accused Sonu inflicted blow of Sword on his head and thereafter they entered compartment of Sushma. He stated that thereafter, he was only hearing loud shouts of deceased Sushma and his sister. He stated that he was on a baniyan and a Pant and he gave its description. According to him, clothes got blood

stained. He stated that he new Vitthal, Bandu, Babu since childhood and he identified them in the Court. He also identified Koytas and Sword. He stated that he was shifted to Aurangabad, where he took treatment for 10-15 days and thereafter taken to Krishna Hospital, Satara and then to Mumbai as his left hand was paralyzed.

30. While under **cross-examination** at the hands of learned Counsel for accused nos.1 and 2, in paragraph no.12 of cross-examination, questions are put about incident in question. He is asked about the location of bed nos.3 and 4 and whether there was transparent glass and whether there was view of the surroundings while in sleeping condition and to which side of the partition was his bed. He is asked whether the assailants stood on his bed and he answered it in negative. He denied that there was assault on him from behind his back on head side. Omissions are brought about his fingers tied to the bed. He is asked whether he was conscious or sleeping by closing his eyes. He has answered that after treatment the feeling of discomfort had stopped. He denied that Doctor has administered him sedatives for relieving pain. Again omission is brought in his statement before Magistrate regarding appellants visiting to the hospital and going, about PW3 Mayuri being pushed by the appellants, about stating name of Sonu, hearing loud shouts of Sushma and his sister and clothes on his person and description of the clothes. He admitted that he did not give description of weapons in his statements before

Police and Magistrate. He denied that assault was made from his north direction. He admitted that he has not seen actual assault. He is asked about when he gain consciousness. He answered that Police did not record his statement in hospital, rather after four days, his statement was recorded by Police in the hospital. He admitted that after incident till his statement being recorded by Police, he has not shared the incident with anybody. He flatly denied about giving false deposition.

When **cross-examined** by learned Counsel for accused no.3, virtually there is no cross on actual incident in the hospital.

SUMMATION OF OCULAR EVIDENCE

31. On carefully re-appreciating, reanalyzing testimonies of PW3 Mayuri, PW4 Dashrath and PW5 Dhananjay, it has clearly come on record that PW3 Mayuri (informant) and PW4 Dashrath (injured) were in Deep Hospital in the evening of 23-12-2014. Occurrence has taken place between 06:00 p.m. to 6:30 p.m.. PW3 Mayuri is care taker of her injured brother PW4 Dashrath and her evidence clearly shows about appellants coming armed, assaulting PW4 Dashrath while he was on his bed and pushing and removing PW3 Mayuri from their way and thereafter, going towards deceased and assaulting her with Sword and Koytas respectively. PW3 Mayuri has categorically stated who was holding what. The manner of cross-examination and suggestions of above three witness i.e. PW3 Mayuri, PW4 Dashrath and PW5 Dhananjay itself shows

that there is no serious dispute about the occurrence. PW3 Mayuri and PW4 Dashrath were both knowing appellants since beginning. Therefore, ocular account of PW3 Mayuri and PW4 Dashrath on the point of occurrence deserves to be accepted without hesitation. Reason for admission of PW4 Dashrath and deceased is substantiated by PW5 Dhananjay. PW3 Mayuri, being sister of PW4 and having come to take care, is a natural witness. Therefore, their testimonies do inspire confidence. Hence, for above reasons, there is no hesitation to hold availability of trustworthy, direct and credible eye witness account, which is inspiring confidence.

32. Reliance is also placed by prosecution on the testimony of **PW5** Dhananjay. On going through his evidence, it is emerging that on receipt of information from PW4 Dashrath about deceased and he consuming poison, he went and brought them and admitted them in Deep Hospital. He has also informed PW3 Mayuri and thereafter, she had come to Deep Hospital. His evidence suggests that when he had been to bring clothes for PW4 Dashrath, he learnt about some incident in the hospital from his friend and therefore, he called up PW3 Mayuri and he claims that while talking with her, he realized that she was shouting and weeping. Therefore, he and his companion rushed to the hospital and they saw deceased and PW4 Dashrath being assaulted and blood near their beds.

Though he has also faced extensive **cross-examination**, in our opinion, his testimony has not been rendered doubtful. Resultantly, his evidence lends support to case of prosecution about PW4 Dashrath and deceased being admitted and PW3 Mayuri to be present in the hospital for taking care of PW4 Dashrath.

Other witness like mother, being apparently hearsay information, is not of much use, except she throwing light on the aspect of annoyance of appellants in the backdrop of love relation between PW4 Dashrath and deceased.

OTHER GROUNDS AND OBJECTIONS RAISED BY APPELLANTS

33. Much emphasis is lead on the testimony of PW4 Dashrath, injured on the ground that as he was under treatment for consumption of poison, he was under heavy medication and therefore, it is impossible for him to comprehend the assault. That medical witness had confirmed that he was administered injection Atropine and therefore, his evidence ought not to have been relied.

In the light of above doubt and objection on the point of fitness of PW4 Dashrath to give statement regarding occurrence, we have gone through the evidence of **PW6** Dr.Mule, who had treated both PW4 Dashrath and deceased since their admission on complaint of consumption of poison. This witness did state that he had administered same treatment to deceased as well as PW4 Dashrath. According to this witness, Atropine and Pan medicines were

administered for reducing the rigors of poison. According to him, it is anti-dote.

In **cross-examination** this witness has answered that both patients were shifted to ICU. He flatly denied about any pain-killer or sedative administered to the PW4 Dashrath and deceased. In paragraph 14 of the cross-examination, on being confronted about intimation forwarded to Police regarding admission Exh.50, it was conveyed that patients were not in condition to give statement. He has also admitted that due to side effect of Atropine injection, patient's mental condition does not remain to give statement. He answered that effect of Atropine and Pan injections remains for 24 hours.

34. From above material, it is worth taking note that suggestion about PW4 Dashrath to be administered with sedative or pain-killer has been categorically refuted by medical expert. Though Atropine injection is administered, it is a mere anti-dote given to patient on consumption of insecticide. It has not been brought from the medical expert that because of Atropine injection, PW4 Dashrath was unable to understand or give any statement. Though there is intimation to Police vide Exh.50, it is in the backdrop of position to give statement regarding the occurrence. There is nothing on record to show that PW4 Dashrath was incapacitated, drowsy or not in position to comprehend the events taking place with him. Moreover, his statement regarding occurrence is recorded after four days wherein he has narrated entire occurrence in detail.

Consequently, even the above submission, though sounds attractive at first blush, we do not find any merit in the same. For above reasons, there is no need to question the fitness of PW4 Dashrath to comprehend and reproduce the incident which took place with him.

35. Another objection raised by learned Senior Counsel and other both learned Counsel representing each of the accused is that, in all medical papers, history of the incident is noted as assault by unknown persons. That such documentary evidence also renders case of prosecution doubtful.

We refuse to entertain such objection for the simple reason that appellants are strangers to the hospital authorities. PW6 Dr.Mule and other two medical experts have rushed to the hospital on being intimated about the incident and they have undertaken treatment with priority. Therefore, they are not expected to know name or identify of the assailants. Therefore, obviously on medical papers drawn by hospital staff, name of assailants is least likely to be appearing, unless hospital authorities had got the said information from relatives of the patient. Therefore, there is no force in the above objection and we discard it from consideration.

36. Here there is also no dispute that accused no.1 - Vitthal alias Sonu Prakash Kalwane (appellant no.1 in Criminal Appeal No.749 of 2016) and accused no.3 - Babu Dashrath Kalwane (appellant in Criminal Appeal No.736

of 2016) produced themselves before Police alongwith the weapons. The Police Official, who was on duty on that day, is examined by prosecution and he has testified to that extent. Weapons are also seized by Police. Therefore, by taking recourse to Section 8 of the Indian Evidence Act, such evidence can safely be applied to tie the appellants for their involvement.

CONCLUSION

37. To sum up, from above discussion, animosity has been succinctly brought from the testimony of none other than PW3 Mayuri and PW4 Dashrath, who are party and victim to assault respectively. PW5 Dhananjay and PW8 Gangubai, mother of injured PW4 Dashrath, are lending support about annoyance of appellants, who are relatives of deceased. From evidence of PW1 Somnath, PW2 Vijay and PW6 Dr.Mule, electronic evidence is substantiating visit of accused with deadly weapons and mounting assault. Assault on injured PW4 Dashrath is also narrated by him and PW3 Mayuri - informant, whose presence is not rendered doubtful and she has also stuck to her testimony throughout. Their testimonies are found to be of impeccable character and thereby inspiring confidence. Though **DW1** Siddheshwar Dilip Gayake has been examined and an attempt has been made to show that there were more than three persons, in our opinion, by examining this witness assault is itself got confirmed and assured. This witness claims that he heard shouts at 05:30 p.m but infact other witnesses and other evidence, clearly

show that alleged incident had taken place around 06:30 p.m. to 7:00 p.m. Even otherwise apart from PW3 Mayuri, there was other hospital staff also in the hospital. Therefore, even if it is accepted that DW1 Siddheshwar was present, his evidence does not render case of prosecution doubtful. Consequently, even we are of the considered opinion that case of prosecution deserves to be accepted as proved.

38. After going through the impugned judgment, we have come across that each and every legal aspects is tested in the light of legal requirements. Evidence of PW3 Mayuri and PW4 Dashrath on the point of occurrence is correctly appreciated and rightly held to be inspiring confidence. Even testimonies of PW1 Somnath and PW2 Vijay are rightly relied to fix identity and responsibility. No perversity or non-appreciation of evidence is brought to our notice so as to interfere. Resultantly, finding no merits in the appeals, we proceed to pass following order :

ORDER

Criminal Appeal Nos.736 of 2016, 749 of 2016 and 939 of 2022 are hereby dismissed.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)