



Judgment

apeal 735.19+2

IN THE HIGH COURT OF JUDICATURE AT BOMBAY :
NAGPUR BENCH : NAGPUR.

CRIMINAL APPEAL NO. 359/2021

WITH

CRIMINAL APPEAL NO. 735/2019

WITH

CRIMINAL APPEAL NO. 152/2020

CRIMINAL APPEAL NO. 359/2021

Brayan @ Ebrahim Keneath Bastiyan,
Aged about 25 yrs., Occ. Driver,
Presently in Jail (on furlough leave
since 07.05.2021), R/o. Martin Nagar,
E-Block, Nagpur.

... **APPELLANT**
(On furlough leave
since 07.05.2021)

VERSUS

State of Maharashtra,
through Police Station Officer,
Police Station, Gittikhadan,
Nagpur, Dist. Nagpur.

... **RESPONDENT**

Mr. Shashi Bhushan Wahane, Advocate for appellant
Mr. S. S. Doifode, APP for respondent.

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WITH

CRIMINAL APPEAL NO. 735/2019

Sachin @ Anna Palti Danial Gabrel,
Aged about 26 yrs., Occ. Labour,
R/o. Martin Nagar, Nagpur.

... APPELLANT
(In Jail)

VERSUS

State of Maharashtra,
through Police Station Officer,
Police Station, Gittikhadan,
Nagpur, Dist. Nagpur.

... RESPONDENT

Mr. R.M. Patwardhan, Advocate for appellant
Mr. S. S. Doifode, APP for respondent.

WITH

CRIMINAL APPEAL NO. 152/2020

Ashish @ Maddy s/o Virendra Rathod,
Aged about 34 yrs., Occ. Driver,
R/o. Swalambi Nagar, Nagpur.

... APPELLANT
(In Jail)

VERSUS

State of Maharashtra,
through P.S.O., Gittikhadan,
Nagpur.

... RESPONDENT

Mr. A. S. Mardikar, Sr. Advocate with Mr. S. Joshi, Advocate for
appellant.
Mr. S. S. Doifode, APP for respondent.

CORAM : **VINAY JOSHI AND**
VALMIKI SA MENEZES JJ.

JUDGMENT RESERVED ON : **07.09.2023**
JUDGMENT PRONOUNCED ON : **30.11.2023**

ORAL JUDGMENT (PER VINAY JOSHI, J.) :

The Judgment and order of conviction dated 17.09.2019 in Sessions Trial No. 430/2015 led three appeals raising the similar challenge to the impugned judgment and order, whereby all the appellants have been convicted for the offences punishable under Section 302 read with Section 149 and Sections 143, 147, 148 of the Indian Penal Code. All appellants have been sentenced to undergo imprisonment for life, along with fine under different counts. Gruesome murder of one Mohit Martin Peter dated 26.06.2015 led the Police to investigate, and file charge-sheet against several accused. Some of the accused were initially arrested whilst others after some interval. Resultantly, it led three trials vide Sessions Trial

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No.430/2015 against accused Nos. 1 to 11, Sessions Trial No. 220/2017 against accused Shubham s/o. Gautam Shendre and Sessions Trail No. 366/2017 Mahendra @ Taklya s/o Mansing Sonone. The Trial Court vide impugned common judgment and order dated 17.09.2019 disposed of all three trials by convicting five accused of principal trial in Sessions Trial No. 430/2015. For the sake of convenience, we have noted that accused No.1 James @ Tambi Kelmant @ Bablu Gabrel, accused No.2 Brayan @ Ebrahim Keneath Bastiyan, accused No. 4 Sachin @ Anna Palti Danial Gabrel and accused No.5 Ashish @ Maddy s/o Virendra Rathod have been convicted whilst rest were acquitted by the learned Trial Judge.

2. The State has neither challenged the acquittal of accused Nos. 1, 2, 4 and 5 for remaining charges, nor challenged the clean acquittal of rest of the accused from the levelled charges. Though in all four accused have been convicted, however accused No.1 Tambi has not called in question his conviction by filing appeal. Accused No.4 Sachin filed Criminal Appeal No. 735/2019, accused No. 5 Ashish filed Criminal Appeal No. 152/2020 whilst accused No. 2 Brayan challenged his conviction vide Criminal Appeal No.

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359/2021. Thus, these appeals pertain to the extent of legality and sustainability of the conviction of accused No.2 Brayan, accused No. 4 Sachin and accused No.5 Ashish.

3. Heard Mr. Mardikar, senior counsel for accused No.5 Ashish, Mr. Wahane, learned counsel for accused No.2 Brayan and Mr. Patwardhan, learned counsel for accused No.4 Sachin. Mr. Doifode, learned Additional Public Prosecutor (APP) has defended the conviction by making exhaustive submission. Perused the entire record and proceeding, as well as gone through the reported decisions cited by the parties.

4. At the instance of First Information Report ('FIR') (Exh. 112) dated 26.06.2015, the Police of Gittikhadan Police Station, Nagpur, Dist. Nagpur registered offence vide Crime No. 305/2015, and carried the investigation. Informant Mikhil Maichel Francis (PW-1) is the eye-witness to the occurrence. The informant along with his cousin deceased Mohit Peter was indulging into business of supply of building material from the office situated on the ground floor of Jagdamba Heights, Mankapur, Nagpur under the name and style

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“Marline Building Material Supplier.” PW-1, Mikhil was residing on the upper floor in the same building. On 26.06.2015, as usual informant Mikhil has opened the office around 10.00 a.m. Deceased Mohit arrived in to the office. After sometime, Sheikh Taj Sheikh Gaffur Badshah (PW-12) also came to the office. While all three were seated in the office, around 01.30 p.m. about 10 to 12 persons barged in the office armed with sharp edged weapon like sword, knife, big axe (Farsa) etc. Some of the assailants were known to the informant Mikhil, who were accused No.1 James @ Tambi Kelmant @ Bablu Gabrel, accused No.2 Brayan @ Ebrahim Keneath Bastiyan, accused No.4 Sachin @ Anna Palti Danial Gabrel and accused No.5 Ashish @ Maddy s/o Virendra Rathod.

5. Initially accused No.1 Tambi threw chilly powder in the eyes of Mohit, whilst accused No.2 Brayan, accused No.4 Sachin and accused No.5 Ashish started assaulting Mohit by means of dangerous weapons. Accused No.1 Tambi was holding sword, accused No.2 Brayan was armed with Farsa, accused No.4 Sachin was holding knife whilst accused No.5 Ashish was holding big size knife. All of them repeatedly dealt blows to Mohit in which, he fell down. They

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have continuously assaulted at the hands, legs, stomach, face, head of Mohit by sharp weapons. Informant Mikhil tried to intervene, however accused No.4 Sachin by means of knife and accused No.1 Tambi by sword attacked on him. While accused No.4 Sachin was assaulting, his knife was broken and fell down. In the said deadly assault, Mohit sustained sever bleeding injuries all over the body, PW-12 Sheikh Taj immediately went and brought PW-2 Mithun who was younger brother of deceased Mohit. Both of them shifted Mohit in injured condition to the Mayo Hospital, where Mohit was declared dead.

6. The informant stated that the assailants also snatched his gold chain and caused damage to the belongings. The informant stated that accused No.1 Tambi was doing illicit liquor business for which one month preceding to the incident, the Police took action against him. Accused No.1 Tambi was carrying impression that deceased Mohit and PW-2 Mithun made a complaint to the Police and for said reason, they had quarrel before one month. According to the informant, out of said grudge, deadly assault was made.

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7. Injured Mohit was declared dead on admission at Mayo Hospital. Informant Mikhil was treated at Mayo Hospital by Dr. Nitin Alaspurkar (PW-14). The informant was taken to the Police Station where his report was registered by PW-19 API Ms. Rupali Bawankar. The Police rushed to the place of occurrence and drew panchanama of the scene of occurrence. Few articles and bloodstains were collected from the spot. On the same day in between 5.10 p.m. to 7.20 p.m. Postmortem was carried on dead body by PW-11 Dr. Sachin Giri. Medical Officer has noted total 79 injuries on the person of deceased which were mentioned in column No. 17 of postmortem report. (Exh. 164). The cause of death was as "Haemorrhage and shock due to injuries sustained". The Medical Officer has opined that external injuries 1 to 27, 32, 34, 38 and 42 mentioned in column No. 17 along with its internal damage mentioned in column Nos. 19 and 20 are sufficient in the ordinary course of nature to cause death.

8. Time to time, several accused were arrested. Bloodstained clothes and Weapons used in the commission of crime were seized at the instance of some of the accused. During course of

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the investigation Investigating Officer Avadhesh Tripathi PW-27 has recorded statement of various witnesses. Seized articles were sent for chemical analysis and DNA profile. Since some of the accused were unknown to the witnesses, test identification parade was conducted in which some of the assailants were identified. On completion of the investigation, final report have been filed.

9. In order to establish the guilt of accused, the prosecution has examined as many as 27 witnesses. The prosecution evidence mainly consists of eye-witnesses, panch witnesses, medical officers and Police personnel. Besides that, the prosecution also banks upon several documents like FIR, spot panchanama, inquest panchanama, postmortem report, seizure memo, chemical analysers report etc. On the basis of said oral and documentary evidence, the prosecution endeavoured to bring home the guilt of the accused. As noted above, the Trial Court has recorded conviction against accused No.1 Tambi, accused No.2 Brayan, accused No. 4 Sachin and accused No.5 Ashish only. At the cost of repetition, we may say that accused No.1 Tambi has not challenged the order of conviction.

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10. Though the prosecution case rests on the direct as well as circumstantial evidence, the main emphasis is led on the evidence of eye-witnesses namely PW-1 Mikhil (Exh.111) who is informant, PW-2 Mithun (Exh.123) who is brother of deceased, and PW-12 Sheikh Taj (Exh.180) who was present at the time of occurrence. PW-1 Mikhil and PW-2 Mithun supported the prosecution case, whilst PW-12 Sheikh Taj remained back footed in the Court. He has not only denied the participation of convicted accused, but tried to shield them by giving some favourable admissions.

11. Since the prosecution mainly relied on the direct evidence, circumstantial evidence takes back seat. We have carefully examined the evidence of these two important prosecution witnesses and considered the criticism made by the defence touching to the credibility of their evidence. We have considered their evidence on the background facts of the case.

12. Deceased Mohit was a business partner of PW-1 Mikhil. Both were doing business of supply of construction material from the said office. It is the evidence of PW-1 Mikhil that on the day of

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incident, he along with deceased Mohit and PW-12 Sheikh Taj were seated in the office discussing the business affair. Around 01.30 p.m., 10 to 12 young boys entered in to the office who were holding deadly weapons. PW-1 Mikhil has identified some of them who were accused No.1 Tambi, accused No.2 Brayan, accused No.4 Sachin and accused No.5 Ashish. Informant Mikhil stated that those assailants were friend of his elder brother, that is why he was knowing them.

13. On the actual occurrence, Mikhil deposed that initially accused No.1 Tambi threw chilly powder in the eyes of deceased Mohit. Accused No.1 assaulted Mohit at his head by means of sword. The remaining started to assault Mohit by the weapons they carried. Particularly he deposed that accused No.2 Brayan assaulted Mohit by means of big axe, accused No.4 Sachin assaulted by means of small knife whilst accused No.5 Ashish by means of big axe. He stated that accused No.1 was saying that "I am Don, I am Don". Mohit was shouting loudly, while, he was assaulted at his head, stomach and all over the body. Mohit fell on the ground (floor). PW-1 Mikhil tried to intervene, but accused No.4 Sachin assaulted him by knife and accused No.1 Tambi by sword. He deposed that accused No. 4

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Sachin stuck his knife on the table, on which its handle was broken and fell down. The assailants snatched gold chain of Mikhil and decamped. Later on, PW-12 Sheikh Taj called brother of deceased Mithun (PW-2) and both shifted injured Mohit to the Mayo Hospital, where he was declared dead on admission.

14. Contextually, we prefer to deal with the evidence of another eye-witness namely PW-2 Mithun who was real brother of deceased Mohit. It is his evidence that he knows accused No. 1 Tambi and accused No.2 Brayan as they were residing in his locality. Accused No.4 Sachin was brother of accused No.1 Tambi who was also residing in said locality. On the point of actual occurrence, he deposed that on 26.06.2015 around 11.00 a.m., deceased Mohit left the house for office by his motorbike. Around 01.00 to 1.45 p.m. PW-12 Sheikh Taj hurriedly came to his house and asked to accompany him to the office. PW-12 Sheikh Taj was in frighten condition. He disclosed that accused No.1 Tambi and accused No.2 Brayan were assaulting Mohit and they were accompanied by their associates armed with deadly weapons. Immediately PW-2 Mithun rushed to the spot by riding a motorbike. When he reached near the

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office (place of occurrence), he saw accused No.1 Tambi, accused No.2 Brayan, accused No.4 Sachin and accused No.5 Ashish while fleeing with big weapons. Then he entered into the office and saw that blood was splashed everywhere. Mohit had sustained injuries all over the body, and was profusely bleeding. Mohit was shifted to the Mayo Hospital by car of one Mr. Shahu.

15. Evidence of these two eye-witnesses has been criticized by defence by every possible mode. Particularly, evidence of PW-2 Mithun was questioned on the ground of improbability. It is argued that as per evidence of PW-2 Mithun, he has not witnessed the actual occurrence. His evidence is only to the extent of seeing accused No.1 Tambi, accused No.2 Brayan, accused No.4 Sachin and accused No.5 Ashish while fleeing from the spot. Moreover, it is argued that as per prosecution case itself, after assault, PW-12 Sheikh Taj went to the house of PW-2 Mithun which was at some distance. Therefore, it was not possible that, till his return the assailants remained on the spot itself.

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16. Moreover, it is argued that as per case of PW-2 Mithun, he has lifted injured Mohit while carrying to the Mayo Hospital. Therefore, non-finding of bloodstains on his clothes improbably his presence on the spot. True, bloodstained clothes of Mithun have not been seized.

17. Though it is the prosecution case that the house of Mithun was at short distance but the submission made by defence carries substance. As per the prosecution case, when the incident was over PW-12 Sheikh Taj left the place by motorbike towards the house of PW-2 Mithun. He has informed to PW-2 Mithun about the occurrence and then both of them came back to the place of occurrence by riding on motorbike. It is not the prosecution case that house of PW-2 Mithun was in very close proximity. Rather use of motorbike itself indicates that there was some distance. Thus, certainly period of 10 to 15 minutes would have been taken by them to return to the spot. There is every possibility that before their arrival, assailants have decamped. Considering the said material aspects coupled with non-seizure of his bloodstained clothes raises

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serious doubt about his presence. Therefore, it is risky to rely on his words particularly when he was closely related to the deceased.

18. In the result, the entire thrust of the prosecution remains on the evidence of PW-1 Mikhail who is informant and eye-witness to the occurrence. We have carefully examined his entire evidence. He was residing at upper floor in the same building, rather it is admitted by the defence during cross-examination. It is not disputed that PW-1 Mikhail was carrying business activities with deceased Mohit from the same office. Thus, there is nothing to suspect about the presence of Mikhail in the office at the relevant time, rather his presence at his own office with business partner was quit a natural which cannot be doubted at all.

19. PW-1 Mikhail has given a detail account of the entire episode. He has specifically stated about the arms held by each of the convicted accused along with their particular role. It is not challenged that the convicted accused were known to the informant Mikhail. It requires to be noted that Mikhail has also sustained the injuries in the same occurrence. In this regard, the prosecution has

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examined PW-14 Dr. Nitin who has examined Mikhil in Mayo Hospital on the same day. Contextually, we have gone through the evidence of PW-14 Dr. Nitin. It has come in his evidence that on the very day around 09.30 p.m. he has examined PW-1 Mikhil and found fresh injuries on his person. The prosecution has produced Medico Legal case paper (Exh. 190) which strongly corroborates that Doctor found incise wound on upper 1/3rd part of left scapula along with one abrasion. Medico Legal Certificate (Exh. 192) also discloses that PW-1 Mikhil sustained incise wound of left scapula. It was fresh injury caused by sharp and point object. The defence tried to bring on record certain inconsistencies like absence of history, overwriting in the case paper etc. However, there is no reason to doubt the evidence of PW-14 Dr. Nitin, who is independent witness. The minor inconsistencies are insignificant. More particularly, his evidence is strongly supported by case paper as well as Medico Legal Certificate. Medical evidence strongly corroborates the evidence of witness about his presence.

20. It has been argued that PW-1 Mikhil has not specified the nature of weapon and injuries. However, one has to remember

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that in his presence his partner was murdered mercilessly. The assault was so gruesome that total 79 incise/chop wounds were found on the person of deceased. In the circumstances, one has to understand his state of mind and therefore, some inconsistencies about the nature of weapon, the manner of attack is of no significance. Rather minor inconsistencies are bound to occur as witness must have been terribly frightened. Broadly, his evidence about sustaining fresh bleeding injuries supported by the medical evidence gives assurance about his presence on the spot. Though his bloodstained clothes have not been seized, however on the background that he has sustained injuries in the same occurrence, his presence was quite probable. Minor lapses on the part of Investigating Agency would not weaken the prosecution case to the extent of discarding his reliable testimony.

21. The learned counsel appearing for defence took us through the evidence of PW-12 Sheikh Taj who was present at the time of occurrence. It is argued that admissions given by PW-12 Sheikh Taj falsifies the presence of PW-1 Mikhil. Our attention has been invited to his evidence where in chief-examination itself he

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stated that after assailants left the spot, he went to call Mikhil. Moreover, during cross-examination, he admits that Mikhil sustained injuries at his leg due to fall from staircase. On that basis, it is argued that the presence of PW-1 Mikhil was doubtful since he arrived on the spot after assailants leaving the place and the injuries were by fall. We are not acceding such tactics adopted by the defence. Already this witness has exposed his hostility by departing from his previous statement. Whatever stated by the witness who has leaned to the defence cannot be considered, as already he has lost the credibility. The defence cannot muster strength on such tricky admissions obtained through the hostile witness.

22. Learned senior counsel appearing for defence has criticized the reasoning of the Trial Court by submitting that the Trial Court has failed in error in considering the statement of PW-1 Mikhil recorded under Section 164 of the Code of Criminal Procedure ('Code'). True, the Trial Court has considered the statement of witness, however that was a small bit of the reasoning. PW-1 Mikhil has not stated the occurrence in detail in his statement recorded by the Magistrate in terms of Section 164 of the Code. However, it

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requires to be noted that his statement was recorded by the Magistrate after gap of few months. Though he has not stated the incident in detail, however he was specific on the point that accused No.1 Tambi, accused No.2 Brayan, accused No.4 Sachin and accused No. 5 Ashish assaulted Mohit by means of deadly weapons. Thus, the core evidence on the point of actual role of convicted accused has not been shattered which rather corroborates oral testimony. Besides that, it is a matter of appreciation that on the same day within few hours FIR was registered narrating the detail account of the role played by each accused which assumes significance. Always law prefers quick lodgement of FIR which eliminates the chances of concoction, therefore submission in that regard is not worthy of acceptance.

23. Learned defence counsel would submit that the incident as narrated by PW-1 Mikhil itself is improbable. In this regard, our attention has been invited to the panchanama of the scene of offence. Admittedly, the place of incident is a small office-room measuring 10 x 20 ft. which was divided into two rooms by glass partition. It has been argued that offence was too small and due to

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false ceiling, its height was reduced. Moreover, two luxury chairs, one table, computer and two other chairs have been kept in the small room. In this regard, it is argued that it is highly impossible that 10 to 12 persons would enter into such small room full of furniture and would attack by long weapons. On mere assumption and speculation, the direct evidence cannot be discarded. The witness never says that all 10 to 12 persons have entered into inner compartment. Some of the assailants might have stayed at outer portion. It is not necessary that each one shall simultaneously attack. When the injured Mohit was lying on the floor, it was easy for the culprit to attack by leaning towards him. We cannot visualise the manner of actual attack for which there can be no set pattern. In the circumstances, on the basis of mere hypothesis and some equation, the direct credible evidence of PW-1 Mikhail (injured) cannot be discarded.

24. Mr. Patwardhan, learned counsel appearing for the accused No.4 Sachin would submit that site plan does not show the place where the eye-witness was sitting and thus, it materially affects the credibility of evidence. In support of said contention, reliance is placed on the decision of the Supreme Court in case of **Pratap Singh**

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and another Vs. State of M.P (2005) 13 SC 624. In the said decision, it has been observed that the site plan was not prepared at the instance of eye-witness depicting place from where the witnesses have seen the occurrence. The said case is distinguishable on facts. In the said case, the incident took place on the river bank. The eye-witness claimed to have seen the incident from the distance of 50 ft. from a mound. In the circumstances, it has been observed that the site plan does not disclose the existence of mound where from the witness has allegedly saw the occurrence. In such circumstances, adverse inference was drawn against the prosecution. In case at hand, the entire occurrence was in a small cabin measuring 10 x 10 ft. only. Site plan was already prepared showing the place where the belongings were kept. Having regard to the small size of place of occurrence, non-mentioning of the exact place where witness was present makes no difference. Therefore, being distinct fact, above decision would not assist the defence in any manner.

25. Mr. Patwardhan, learned counsel relied on the decision of the Supreme Court in case of **State of Rajasthan Vs. Mahaveer and ors., AIR 1998 SC 1752** to contend that the presence of eye-witness is

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highly improbable. In the said case, the assailants have barged into the house of one Babu where they shot dead three persons. It is the prosecution case that the assailants had searched the house and shot dead the deceased. The eye-witnesses claimed that they were also in the house from where they have seen the occurrence. In the situation, it has been observed that the presence of eye-witnesses was doubtful as their residence was elsewhere. As per the prosecution, the house was searched by assailants and thus, it was found improbable that the assailants have not noticed the witness. In such peculiar facts, those eye-witnesses have been discarded. In case at hand, deceased Mohit was only targeted by the assailants. It is not the case of the prosecution that PW-1 Mikhil was hiding somewhere rather the presence of Mikhil on the spot was quit natural as he was business partner of deceased Mohit and was residing upstairs. Thus, no assistance could be derived from the above decision for the benefit of accused.

26. The evidence of first informant Mikhil itself exposes the motive behind the commission of crime. It assumes significance because within few hours, of the occurrence motive has been also

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stated in the FIR. It is not denied that accused No.1 Tambi was indulging into liquor business and the Police took action against him. PW-1 Mikhil has specifically stated that one month preceding to the occurrence, there was quarrel in between them. It is argued that the earlier quarrel was not in proximity. Rivalry may be from long and the reflection may be after few months by looking an opportunity. The variety of factors are to be looked into as it is not a rule that the retaliation must be within specific time frame. Though motive is not a *sine quo non* to establish the crime, herein the prosecution succeeded in establishing motive which lends assurance to the prosecution case. Besides that the immediate lodging of FIR is an additional feature to fix the assailants. Though it has been argued that the station diary's initial entry has not been produced, however that does not carry much substance as the FIR was lodged within few hours. As per FIR, the information was reached to the Police at 2.10 p.m. whilst crime was registered at 3.45 p.m. meaning thereby within two hours from the occurrence.

27. The prosecution has also relied on seizure of bloodstained clothes, weapons and chemical analyser's report. The

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Trial Court has not relied on the said material. We note that there are certain discrepancies in establishing the sealing, seizure, safe custody and chain of custody, hence the chances of tampering cannot be ruled out. Therefore, we are also not inclined to rely on the said evidence. We do not feel it necessary to deal with the evidence of test identification parade as the concerned unknown assailants have already been acquitted.

28. Evidence of PW-1 Mikhil an injured eye-witness is cogent, reliable and inspires full confidence of the Court. There is no difficulty in basing conviction on the sole testimony of his ocular evidence which is trustworthy and fully reliable.

29. On re-appreciation of entire material, we are of the considered opinion that the prosecution has firmly establishes that accused No.2 Brayan, accused No.4 Sachin and accused No.5 Ashish have participated in the deadly assault which took life of Mohit. We have not considered the case of accused No.1 Tambi as he has not filed appeal. It is very disturbing to note that there were 79 injuries on the person of deceased. Most of the injuries were incise or chop

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wounds obviously caused by deadly weapon. The intention behind causing such injury is loud and clear, rather there can be no other possibility than to hold that the intention was to cause death in all circumstances. The Trial Court has dealt all the aspects in appropriate manner rather the Trial Court has dealt with all the arguments in convenience manner. In substance, on careful scrutiny, we hold that the prosecution has duly established the guilt of accused No.2 Brayan, accused No.4 Sachin and accused No.5 Ashish with certainty. The impugned judgment is well reasoned which calls no interference.

30. In view of above, all appeals stand dismissed.

(VALMIKI SA MENEZES, J.)

(VINAY JOSHI, J.)