

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL APPEAL NO. 25/2017

WITH

CRIMINAL APPEAL NO. 44/2017

WITH

CRIMINAL APPEAL NO. 66/2017

WITH

CRIMINAL APPEAL NO. 219/2017

WITH

CRIMINAL APPEAL NO. 42/2019

WITH

CRIMINAL APPEAL NO. 615/2017

CRIMINAL APPEAL NO. 25/2017

Akash @ Bittu S/o Jaikumar Sarojkar,
Age 20 yrs., Occ. Labour,
R/o. Indira Nagar Zopadpatti,
behind Petrol Pump, Nagpur.
(In Jail)

APPELLANT

VERSUS

1. State of Maharashtra,
PSO Police Station Jaripatka,
(Nagpur).

RESPONDENT

Mr. R. M. Daga, Advocate for appellant.
Mrs. Mayuri Deshmukh, APP for State.

WITH

CRIMINAL APPEAL NO. 44/2017

Kunal S/o Bharat Goswami,
Age 23 yrs., Occ. Labour,
R/o. Indira Nagar Zopadpatti,
behind Petrol Pump,
Galli No.1, Nagpur.
(In Jail)

APPELLANT

VERSUS

State of Maharashtra,
PSO Police Station Jaripatka,
(Nagpur).

RESPONDENT

Mr. Y. B. Mandpe, Advocate for appellant.
Mrs. Mayuri Deshmukh, APP for State.

WITH

CRIMINAL APPEAL NO. 66/2017

Kamesh Ravindra Jambhulkar,
Aged 33 yrs., Occ. Labour,
R/o. Kaushalya Nagar, Nagpur.
(In Jail)

APPELLANT

VERSUS

State of Maharashtra,
(Through P.S.O. PS Jaripatka,
Dist. Nagpur)

RESPONDENT

Mr. Mir Nagman Ali, Advocate for appellant.
Mrs. Mayuri Deshmukh, APP for State.

WITH

CRIMINAL APPEAL NO. 219/2017

Shekhar S/o. Prakash-Ambulkar,
Aged about 25 yrs., Occ. Labour,
R/o. Indira Nagar Zopadpatti,
behind Petrol Pump, Nagpur.
(In Jail)

APPELLANT

VERSUS

State of Maharashtra,
Through Police Station Officer,
Police Station Jaripatka,
Nagpur.

RESPONDENT

Mr. R. M. Daga, Advocate for appellant.
Mrs. Mayuri Deshmukh, APP for State.

WITH

CRIMINAL APPEAL NO. 42/2019

Sandesh @ Golu S/o Venu Naik,
Aged about 26 yrs., Occ. Labour,
R/o. Hudco Colony, LIG Quarter No.1,
Building No. 3/21, Nagpur.
(In Jail)

APPELLANT

VERSUS

State of Maharashtra,
Through P.S.O., PS Jaripatka,
Nagpur.

RESPONDENT

Mr. Mir Nagman Ali, Advocate for appellant.
Mrs. Mayuri Deshmukh, APP for State.

WITH

CRIMINAL APPEAL NO. 615/2017

Smt. Jyoti Janardhan Kale,
Age ___yrs., Occ. ____,
R/o. C/o. Kishor Nimkar House,
Jaripatka Police Station,
Hudko Colony, behind Sai Mandir,
Nagpur.
(Victim, Mother of deceased)

APPELLANT**VERSUS**

1. State of Maharashtra,
Through Police Station Officer,
Police Station, Jaripatka, Nagpur.
(Original respondent)
2. Rajesh S/o Anthony Haritswami,
Age about 34 yrs., occ. Labour,
R/o. Sant Martin Nagar, Nagpur.
(Original accused No.1)
3. Shailesh S/o Vijay Mukherjee,
Aged about 30 yrs., Occ. Labour,
R/o. Kaushalya Nagar, Kukde
Layout, Nagpur.
(Original accused No.6.)

RESPONDENT

Mr. Amit Kukday, Advocate (appointed) for appellant.
Mrs. Mayuri Deshmukh, APP for State.
Mr. Mir Nagman Ali for respondent No.2.
Mr. Ashwin Wasnik, Advocate for respondent No.3.

CORAM**: VINAY JOSHI AND
MRS.VRUSHALI V. JOSHI JJ.****JUDGMENT RESERVED ON : 20.10.2022****JUDGMENT PRONOUNCED ON : 04.05.2023****JUDGMENT : (PER VINAY JOSHI, J.)**

Heard.

2. Total seven accused were tried for the offence punishable under Section 302 read with Section 149, 143, 147, 148 of the Indian Penal Code in Sessions Trial No. 223/2014. After full-fledged trial, the

Trial Court has convicted accused No. 2 Sandesh @ Golu, accused No. 3 Kamesh, accused No. 4 Akash @ Bittu, accused No. 5 Kunal and accused No. 7 Shekhar for the offence punishable under Section 302 read with Sections 149, 143, 147, 148 of the Indian Penal Code whilst acquitted accused No. 1 Rajesh and accused No. 6 Shailesh from all the charges. The convicted accused have been sentenced to undergo imprisonment for life along with fine, for the offence punishable under Section 302 read with Section 149 of the Indian Penal Code. They were separately punished for the offence punishable under Sections 143, 147, 148 of the Indian Penal Code. The Trial Court directed that all sentences shall run concurrently. The judgment and order of conviction dated 07.01.2017 led convicted accused to file five separate appeals under Section 374 of the Code of Criminal Procedure challenging the order of conviction. Likewise, acquittal of accused Nos. 1 and 6 has been quashed by the victim (mother of deceased) in Criminal Appeal No. 615/2017.

3. The prosecution case in brief is that the accused have formed unlawful assembly and in pursuance of common object of the assembly, committed murder of one Rupesh @ Pappu Kale by means of sharp edged weapons on 14.01.2014 around 08.30 p.m. Crime was registered at the instance of report lodged by PW-9 Avinay Ganwir on 14.01.2014 around 10.10 p.m. The informant stated that on 14.01.2014, around 08.30 p.m., he was with his friend PW-3 Pravin Bobate, at later's

residence at Indira Nagar, Jaripatka, Nagpur. At the relevant time, deceased Rupesh came and fell in front of the house of Pravin in seriously injured condition. Deceased was followed by assailants who again assaulted him. They were accompanied by four unknown persons. The informant and his friend PW-3 Pravin came out of the house, and saw that the assailants beat Rupesh by means of sharp edged weapons and fled. The informant identified the assailants as accused No. 4 Akash @ Bittu, accused No. 5 Kunal and accused No. 7 Shekhar. The injured Rupesh sustained several bleeding injuries all over his body. Immediately, informant and his friend Pravin, shifted injured Rupesh to Mayo Hospital by auto-rickshaw. Thereafter, informant went to concerned Jaripatka Police and lodged report. On the basis of said report regarding commission of cognizable offence, the Police registered Crime No. 24/2014 and carried investigation.

4. The Police visited the place of occurrence and drew Panchanama of the scene of offence. Injured Rupesh succumbed to the grave injuries on 16.01.2014. The Police have arrested accused. Inquest Panchanama was drawn. Autopsy was conducted on the dead body. Clothes of deceased and accused were seized. At the instance of some of the accused, blood stained weapons and clothes were seized. All seized articles and blood extracted from accused were sent for chemical analysis. During the course of investigation, Test Identification ('TI)

Parade was conducted. The statement of relevant witnesses have been recorded. On completion of investigation, final report is filed.

5. The learned Trial Court has initially framed charges against six accused on 17.03.2015. It was followed by framing charge against accused No. 4 Akash @ Bittu on 22.06.2015. Accused have adjured the guilt and put the prosecution to the task of establishing levelled charges with requisite standard of proof. The defence of the accused is of total denial and false implication. The defence has not led evidence.

6. The prosecution has examined as many as 15 witnesses to bring home the guilt of accused. The prosecution also banks upon several documents of which contextual reference is made. The learned Trial Court believed the evidence put-forth against accused No. 2 Sandesh @ Golu, accused No. 3 Kamesh, accused No. 4 Akash @ Bittu, accused No. 5 Kunal and accused No. 7 Shekhar and sentenced them as aforesaid mentioned. However, the Trial Court held that the prosecution remained unsuccessful in establishing the guilt against accused No. 1 and 6 which led to their acquittal.

7. Heard Mr. Mir Nagman Ali, learned counsel for accused No. 2 Sandesh @ Golut and accused No. 3 Kamesh, Mr Daga, learned counsel for accused No. 4 Akash @ Bittu, and accused No. 7 Shekhar, whilst Mr. Mandpe, learned counsel for accused No. 5 Kunal. Heard the

learned Additional Public Prosecutor Mrs. Mayuri Deshmukh for State as well as Mr. Amit Kukday, learned counsel for informant in resistance to the appeal against conviction, as well as in his appeal challenging the order of acquittal of two accused. Written submissions as well as several reported decisions filed by the parties have been considered.

8. The defence has not challenged the homicidal death of Rupesh @ Pappu. We have gone through the evidence of PW-12 Dr. Tingare who has conducted autopsy, along with postmortem examination report (Exh. 108). It was revealed that deceased Rupesh sustained 27 external injuries and 4 internal injuries as described in the postmortem report. Most of the injuries were on the vital part of the body, caused by sharp edged weapons. The cause of death is opined as “left side hemothorax due to stab injury to left lung associated with the head injury”. The defence has not challenged the evidence of the Medical Officer or the postmortem report. From the very nature of incise and chop wounds on the vital part of the body, it is evident that Rupesh met with homicidal death. At least there is uniformity amongst all about the homicidal death of Rupesh which is prerequisite to establish the charges.

9. It is the prosecution case that all accused in furtherance of that common object, assailed Rupesh by means of sharp edged weapons and done him to death. The incident is in two parts. Initially assailant threw

chill powder at the face of deceased and started to assault. Deceased some how escaped and came running up till the house of PW-3 Pravin. The assailant chased him and again inflicted blows by sharp weapons at said place. The prosecution evidence consists of eye-witnesses, TI Parade, seizure of articles at the instance of accused, rather the said material led the Trial Court to convict the aforesaid accused. The main thrust of the prosecution is on the evidence of eye-witnesses i.e. PW-1 Shimon (Exh. 52), PW-3, Pravin (Exh.57), PW-7 Meena (Exh.84), PW-9 Avinay (Exh.88) and PW-14 Abhay (Exh.114). Needless to say that if the ocular evidence is found to be fully reliable, trustworthy and unimpeachable then the corroborative evidence loses its significance.

10. Crime was registered at the instance of report lodged by PW-9 Avinay Ganvir. It is his evidence that on 14.01.2014 around 08.30 p.m., he was at his friend's house (Pravin) at Indirangar Zopadpatti. He saw that Rupesh Kale (deceased) came in injured condition and fell in front of the house of Pravin. The assailants followed him. He has identified three of them who are accused No. 4 Akash @ Bittu, accused No. 5 Kunal and accused No. 7 Shekhar. The rest of the assailants were unknown, but he was in a position to identify them. He saw that the assailants beat Rupesh by means of weapons and fled. By noting serious bleeding injuries all over the body of Rupesh, with the help of other, he took Rupesh along with Pravin to Mayo Hospital. He immediately went

to the Police Station and lodged report (Exh.89). The witness has identified accused No. 2 Sandesh, accused no. 4 Akash @ Bittu, accused No. 5 Kunal and accused No. 7 Shekhar. His evidence also consists of the process of prior TI Parade to which we are coming after a short-while.

11. The prosecution has examined PW-3 Pravin who is another eye-witness named in the First Information Report ('FIR'). It is his evidence that on the date of occurrence, he was at his house with PW-9 Avinay (informant). He heard the noise as '*wachwa whachwa*'. Hence, he came out of the house with Avinay. He saw in the light that Rupesh was coming towards his house followed by the assailants, particularly he deposed that accused No. 5 Kunal and accused No. 7 Shekhar assaulted him by means of weapons like a knife. He stated that accused No. 2 Sandesh @ Golu and accused No. 4 Akash @ Bittu also beat Rupesh by means of fist blows and kicks. He saw that at the relevant time, accused No. 2 Sandesh @ Golu also assaulted deceased by means of sword.

12. The prosecution laid evidence of PW-1 Shimon who has witnessed the earlier incident. He stated that at the relevant time, programme of Shir-khurma was arranged in the vicinity. He sat with deceased Rupesh and some other. Around 08.00 to 08.30 p.m. accused No. 5 Kunal and accused No. 7 Shekhar arrived at said place. Accused No. 5 Kunal threw chilly powder in the eyes of Rupesh. Later, both of

them took out knife and started to stab Rupesh. He saw that accused No. 2 Sandesh @ Golu and accused No. 4 Akash @ Bittu also accompanied them with armes.

13. The next reliance is on the evidence of PW-7 Meena who has arranged the programme of Shir-khurma. It is her evidence that at the relevant time, deceased Rupesh was sat with some other in street light near house of Sultan. At that time, accused No. 5 Kunal came and picked up quarrel with deceased Rupesh. She saw that accused No. 5 Kunal was holding knife whilst his companions were holding sword. All of them started to beat Rupesh. Particularly accused No. 5 Kunal assaulted deceased by means of knife and others by sword. Though the prosecution also led evidence of her husband PW-14 Abhay, however his statement was recorded after 15 days from the occurrence. He has equally stated that at the relevant time, accused No. 5 Kunal threw chilly powder in the eyes of Rupesh and assaulted him by means of knife. Accused No. 2 Golu assaulted him by sword and rest by fist blows, kicks and stones.

14. The defence has strongly criticized the evidence of eye-witnesses. The learned counsel appearing for the accused would submit that, delay in recording statements of witnesses is fatal to the prosecution. In this regard, reliance is placed on the decision of this

Court in case of **Laxman Bapurao Ghaiwane Vs. The State of Maharashtra, 2012 ALL MR (Cri) 3605**, wherein it is observed that delay in recording statement despite of ample opportunity to the Investigating Officer to record the statement makes it doubtful. In the said decision itself, it has been observed that delay in recording statement of witnesses in all cases is not necessarily fatal, but it depends upon the facts and circumstances of each case. It is submitted that the witnesses were very much available, the Police went on and often to the place of occurrence, however there is delay in recording statements. We are not ready to accept the submission as regards to the eye-witnesses except the statement of PW-14 Abhay which is recorded after considerable delay. Pertinent to note that PW-9 Avinay in the FIR lodged on the very day has specifically named accused No. 4 Akash @ Bittu, accused No. 5 Kunal and accused No. 7 Shekhar with unknown assailants. Though the incident took place on 14.01.2014, however Pravin died on 16.01.2014 which assumes significance. Moreover, eye-witnesses stood the test of credibility during cross-examination. We are mindful that the people would react in different ways after looking horrifying incident, therefore only on account of some delay, their evidence cannot be jettisoned unless a reasonable doubt is created.

15. The learned APP responded by stating that the conduct of eye-witnesses in not disclosing incident in proximity cannot be unnatural.

For this purpose, reliance is placed on the decision of this Court in case of **Raju Maruti Dhumal & anr. Vs. The State of Maharashtra, 2015 ALL MR (Cri) 2636** and **Rammi alias Rameshwar Vs. State of M.P, with another matter, (1999) 8 SCC 649**. No doubt, the conduct of a person who witnessed the murderous attack varies from person to person. There is no universal rule of law stating in which manner the witness behaves after watching occurrence. Therefore, non disclosure of incident immediately to the Police is not a sure criteria for discarding the testimony of eye-witness if otherwise found credible.

16. Mr. Daga, learned counsel appearing for the accused relied on the decision of this Court in case of **Mohamed Kasam Shamshuddin Shaikh & anr. Vs. State of Maharashtra, 2007 ALL MR (Cri) 659** to contend that there is difference between “may be” and “must be”. Certainly, the word “may” speak about a mere probability whilst the word “must” connotes a certainty. We are aware about the well settled principle of high standard of proof required in criminal cases. We have examined the material by wearing said lens.

17. Though the defence has criticized the evidence of eye-witnesses on account of close relationship, it is settled position of law that merely on the criteria of close relations, the evidence of eye-witnesses cannot be discarded. In this regard, learned APP relied on the

decision of the Supreme Court in case of **Waman and Ors. Vs. State of Maharashtra, AIR 2011 SC 3327**, wherein it is observed that the evidence of related witness can be relied, if their testimony found to be convincing and trustworthy. Concededly, the evidence of these witnesses requires to pass a strict scrutiny. The prudence requires to scan their evidence from every angle to pass the test of reliability. We are unable to find any glaring circumstance which could take front seat for discarding their ocular evidence.

18. Evidence of PW-9 Avinay is specifically about the participation of accused No. 4 Akash @ Bittu, accused No. 5 Kunal and accused No. 7 Shekhar. PW-3 Pravin at whose doorstep the second part occurred, has stated about the role of accused No. 2 Sandesh @ Golu, accused No. Akash @ Bittu, accused No. 5 Kunal and accused No. 7 Shekhar. Particularly, he deposed about the assault by means of knife by accused No. 5 Kunal and accused No. 7 Shekhar. He also spoke that accused No. 2 Sandesh @ Bittu was armed with sword at the relevant time. PW-1 Shimon who is another eye-witness is in agreement with the role played by the accused No. 5 Kunal and accused No. 7 Shekhar in assaulting deceased by means of knife. He has also seen accused No. 2 Sandesh @ Golu and accused No. 4 Akash @ Bittu participating in the assault. PW-7 Meena has stated about the assault by accused No. 5 Kunal by means of knife. The testimony of these eye-witnesses has passed the test of

reliability.

19. The evidence of these eye-witnesses is consistent as regards to the role played by accused No. 2 Sandesh @ Golu, accused No. 4 Akash @ Bittu, accused No. 5 Kunal and accused No. 7 Shekhar. As regards to accused No. 3 Kamesh is concerned, PW-3 Pravin has only stated about his participation by means of stone and has identified accused No. 3 Kamesh in the Court. Though the other eye-witnesses have not stated the role of Kamesh, however we would see whether evidence against him led by PW-3 Pravin is supported by any corroborative material. As regards to the rest, the evidence is consistent about their participation in assault by means of sharp edged weapons.

20. The next limb of prosecution evidence is of identification of assailants in prior TI Parade. In this regard, the prosecution has relied on the evidence of PW-10 Kambre (Special Judicial Magistrate) coupled with evidence of PW-4 Rahul who is Panch to the TI Parade. The defence has strongly criticized the evidence of prior TI Parade for non-compliance of procedural aspect and some other lapses. Mr. Ali the learned counsel by placing reliance on the decision of this Court in case of **Dharmendra s/o. Laxman Sahare Vs. The State of Maharashtra, 2014 ALL MR (Cri) 3196** would submit that the TI Parade held in defective manner against guidelines cannot form the basis for conviction. On the

similar line, Mr. Daga, learned counsel relied on the decision of the Supreme Court in case of **Dana Yadav Alias Dahu and others Vs. State of Bihar, (2002) 7 SCC 295**, wherein the use and purpose of prior TI Parade is explained. In this regard, the learned APP also relied on the decision of the Supreme Court in case of **D. K. Rajendran and Ors. etc. Vs. State of T.N., AIR 2010 SC 3718**, wherein the worth of TI Parade has been explained. It is well settled that TI Parades are held ordinarily for the purpose of enabling the Investigating Agency to see that the investigation is on right track. The substantive evidence of witnesses is his statement in the Court, but the purpose of TI Parade is to test the evidence. The witnesses regarding the accused who are strangers generally requires corroboration which should be in the form of prior TI Parade. If witnesses identify accused in the Court first time, as a rule of prudence it requires corroboration from the prior TI Parade.

21. Basically, the very concept of TI Parade is based on the fact that assailants are unknown to the victim or witnesses. In that case, only TI Parade carries importance otherwise it is useless exercise. In case at hand, all seven accused were put on prior TI Parade. We fail to understand that most of the accused are known to the witnesses still the Investigating Officer proceeded in putting them all in the TI Parade. We can understand that TI Parade is held about the unknown assailants who had accompanied to the named one. With the said prologue, we have

examined the evidence of TI Parades which was conducted on 19.02.2014 in the Central Jail. It was conducted in four rounds. The first round consists of TI Parade of accused No. 2 Sandesh @ Golu and accused No. 7 Shekhar, second round about accused No. 3 Kamesh and accused No. 6 Shailesh (acquitted), third round about accused No.4 Akash @ Bittu and accused No. 5 Kunal whilst the last fourth round about accused No. 1 Rajesh (acquitted).

22. PW-1 Shimon, PW-7 Meena and PW-9 Avinay who are the eye-witnesses were summoned in TI Parade to identify the assailants. We have reverted to the evidence of PW-9 Avinay who is informant. He has specifically stated in the evidence that he saw accused No.4 Akash @ Bittu and accused No. 5 Kunal and accused No. 7 Shekhar at the time of incident which he reported within few hours to the Police. Since he has stated the names of assailants, the TI Parade to that extent is meaningless.

23. PW-1 Shimon was called for TI Parade who has also stated names of some of the assailants i.e. accused No. 5 Kunal, accused No. 7 Shekhar, accused No. 2 Sandesh @ Golu and accused No. 4 Akash @ Bittu. Thus, assailants were known to these witnesses. There was no requirement in law to seek corroboration from the exercise of conducting TI parade. Likewise, PW-7 Meena has also stated the name

of Kunal in her statement itself.

24. Apart from that, we have meticulously gone through the evidence of PW-10 Kambre (Special Judicial Magistrate) along with the evidence of PW-1 Shimon, PW-7 Meena and PW-9 Avinay who participated in the identification process. It emerges in the first round of TI Parade that accused No. 2 Sandesh @ Golu and accused No. 7 Shekhar were made to stand amongst 12 dummy persons. PW-9 Avinay has identified both of them in the first round of identification process. PW-7 Meena has identified accused No. 7 Shekhar whilst PW-1 Shimon identified both of them. Contextually, we have gone through the evidence of PW-4 Rahul (panch) who has corroborated the evidence to that extent.

25. In second round, accused No.3 Kamesh and accused No. 6 Shailesh (acquitted) were put in the TI Parade. PW-9 has identified accused No. 6 Shailesh whilst PW-1 Shimon identified accused No. 3 Kamesh only. PW-7 Meena has not identified any one of them. At this juncture, we may note that the participation of accused No. 3 Kamesh was stated by PW-3 Pravin only which got corroboration from the identification of Kamesh by PW-9 Avinay which is supported by panch witnesses. Thus, catching the thread of relevancy, we may express that the presence of accused No. 3 Kamesh is also established.

26. The third round of TI parade pertains to accused No. 4 Akash @ Bittu and accused No. 5 Kunal. All three witnesses i.e. PW-1 Shimon, PW-7 Meena and PW-9 Avinay identified them correctly. As a matter of fact, these witnesses have already stated name of Kunal as an assailant in the Police statement. Therefore, as regards to accused No. 5 Kunal is concerned, the said exercise was in-fact unwarranted. Identification of accused No.4 Akash @ Bittu by PW-7 Meena carries significance since he was unknown to her. In fourth round of litigation, accused No. 1 Rajesh was placed amongst 7 dummies, however, none of the witness has identified him. He is acquitted by the Trial Court. To summarize the position, these three witnesses have identified accused No. 2 Sandesh @ Golu, accused No. 3 Kamesh, accused No. 4 Akash @ Bittu, accused No. 5 Kunal and accused No. 7 Shekhar in the prior TI parade.

27. While criticizing the procedural aspect, it has been submitted that in first three rounds of parade, two accused were made to stand in one parade which is improper. We do not find any legal force in said submission since Chapter I Rule 16(g) of the criminal manual permits to hold identification of two suspects in one parade provided that 12 dummies shall be used. It is argued that same dummies have been used for most of the rounds of TI Parade. True, most of the dummies are same, but in some parades, the dummies have been changed which is evident from the TI Parade Panchanama (Exh. 53). It is argued that the

dummies were of different complexion. We do not find supporting material on said count. TI Parade was conducted by PW-10 Kambre in presence of two panch witnesses.

28. We have minutely examined TI Parade Panchanama prepared in the handwriting. The said panchanama bears the reference about the precaution taken by the holder of parade. It is stated that while conducting TI Parade, precaution was taken that no Police Officer shall be allowed to enter, witnesses shall not be allowed to see the suspects by making necessary arrangement. All the time, choice was given to the suspects to choose their position in row and change the clothes. It also reveals from Panchanama that sometime the suspects have changed their position. The evidence of TI Parade was supported by PW-4 Rahul who is panch witness. On fact, we see that TI Parade was conducted in proper manner by taking due care. Therefore, the evidence on this count to the extent of unknown assailants corroborates the identification of accused first time made in the Court. Contextually, we may refer that PW-1 Shimon has identified accused No.2 Sandesh @ Golu, accused No. 5 Kunal and accused No. 7 Shekhar in the Court. PW-9 Avinay has identified accused No. 2 Sandesh @ Golu, accused No. 4 Akash @ Bittu, accused No. 5 Kunal and accused No. 7 Shekhar in the Court. Thus, the evidence of eye-witnesses about the presence of accused No. 2 Sandesh @ Golu, accused No. 3 Kamesh, accused No. 4 Akash @ Bittu, accused

No. 5 Kunal and accused No. 7 Shekhar stated by eye-witnesses gains assurance from the evidence of prior TI Parade to the extent of unknown assailants for some of the witnesses.

29. It takes us to the aspect of seizure of incriminating articles. The prosecution has examined PW-2 Tushar, in whose presence accused No. 2 Sandesh @ Golu expressed his willingness to show the place where he has concealed the sword used in commission of crime. Accordingly, the Police have prepared memorandum panchanama (Exh.55). Accused No.2 Sandesh @ Golu led the Police team to one Kaccha Road and took out a sword which was concealed in thorny bushes. There were blood stains on the sword which was seized by the Police vide panchanama (Exh.56). Likewise, prosecution has examined PW-6 Mahendra, in whose presence, accused No. 5 Kunal expressed his willingness to produce the knife. Accordingly, memorandum panchanama (Exh.76) was drawn. At the instance of accused No.5 Kunal, the Police seized knife as well as clothes from his house which were seized under Panchanama (Exh.77) on 23.01.2014. The seized articles were deposited in Malkhana and latter sent for chemical analysis on 01.04.2014. Expert report has been received on 23.05.2014.

30. The defence has challenged the evidence of seizure on various counts. It is submitted that the knife was seized from open place, which creates reasonable doubt. In this regard, the prosecution has relied on the decision of the Supreme Court in case of **Yakub Abdul Razak Memon Vs. State of Maharashtra thr. CBI Bombay, with connected cases, (2013) 13 SCC 1** to contend that even if the recovery is made from open or accessible place, however if weapon was hidden, then the recovery cannot be held doubtful.

31. According to the defence, accused No. 5, Kunal was arrested on 16.01.2014 whilst alleged discloser and consequential recovery of knife was made after seven days i.e. on 23.01.2014, hence it is doubtful. In this regard, defence relied on the decision of this Court in case of **Bhalchandra Namdeo Shinde Vs. State of Maharashtra, 2003 ALL MR (Cri) 1149**, wherein on account of delay in making discloser while in Police custody, the discloser is held to be doubtful.

32. Moreover, it is argued that the prosecution has not adduced evidence of sealing weapon, clothes and about its safe custody. It is evident that the seized articles were lying in Malkhana till 01.04.2014, when they were forwarded for chemical analysation. Moreover, analysation report is sent on 17.05.2014. In absence of evidence of sealing of seizer of articles, it is doubtful. In this regard reliance is

placed on the decision of this Court in case of **Lalchand Cheddilal Yadav Vs. State of Maharashtra, 2000 ALL MR (Cri) 1485**. True, we do not find any material in panchanama stating that the articles were sealed at the time of seizure. On the background of absence of evidence on sealing, it is worthwhile to note that the seized articles were lying at Malkhana for near-about three months and therefore, the chances of tampering cannot be ruled out. We agree with the submission made by the defence in this regard and are not inclined to rely on the said material.

33. On the point of seizure, it is argued that the incident occurred on 14.01.2014 whilst after two to three days, accused No. 3 Kamesh was arrested with blood stained clothes. According to defence, it is hardly possible to wear the same blood stained clothes by accused for some days. To substantiate said contention, reliance is placed on the decision of this Court in case of **Sadashiv Basappa Madgyal Vs. The State of Maharashtra, 2019 ALL MR (Cri) 5038** and **Sallauddin @ Bablu Nizamuddin Shaikh Vs. The State of Maharashtra, 2017 ALL MR (Cri) 982**. However, in above part, we have already shown our reluctance to accept the evidence of seizure and consequential report of chemical analyser.

34. The learned counsel appearing for the appellants would submit that the evidence of eye-witnesses in particular PW-3 Pravin and PW-9 Avinay is doubtful for the reason that though they allegedly shifted injured to the Hospital, their clothes having blood stains were not seized. In this regard, defence relied on the decision of the Supreme Court in case of **State of Rajasthan Vs. Teja Singh and others, 2001 ALL MR (Cri) 994**. In the said decision the evidence of eye-witnesses was held to be doubtful for one of the reason that even though they lifted body of deceased, the Investigating Officer failed to recover the clothes of the witnesses. In-fact, the said conclusion was drawn on various factual aspects of the case. On the other hand, the learned APP by placing reliance on the decision of the Supreme Court in case of **Harpal Singh Vs. State of Haryana, AIR 1997 SCC 2914** would submit that non-seizure of blood stained clothes of witnesses is omission of the Investigating Agency, but it cannot be a reason for jettisoning the testimony of eye-witnesses. True, the lapses of the Investigating Officer if not fatal, cannot be used to reject the evidence of eye-witnesses which otherwise inspires full confidence. At the cost of repetition, we may say that the evidence of eye-witnesses as detailed above remained intact and found to be reliable and trustworthy.

35. It is argued that while lodging FIR, the informant has not disclosed the nature/kind of weapon. On perusal of FIR (Exh.89), it is

seen that the informant has stated that the deceased was assaulted by means of weapons. Though particular kind of weapon has not been described, however FIR bears a clear reference that weapons were used in commission of crime. IN catena of decisions, it has been held that FIR is not an encyclopedia. Moreover, FIR speaks about use of weapon, therefore, there is no substance in said contention.

36. It is submitted that as per prosecution case, initially accused No. 5 Kunal thrown chilly powder at the face of deceased, but no chilly powder was recovered from the place of occurrence. For this purpose, we have been taken through the panchanama of the scene of offence. We see no reason to discard the entire evidence on the said sole ground. It depends upon the volume of chilly powder used in the commission of crime and time period of carrying spot panchanama. Obviously, if a little quantity of chilly powder was used, naturally by flow of wind or for other reasons, it is not possible to find the same while drawing panchanama. Therefore, the said submission does not confine us to any extent. Likewise the case of non-finding of chilly powder on the clothes of deceased.

37. The defence has doubted the very presence of eye-witnesses by stating that initial intimation regarding the incident (Exh.91) does not bear the reference of names of assailants. We have gone through the

said report named as “Meyo Suchana”, by which intimation was given by Police regarding admission of injured in the hospital within few hours from the occurrence. It says that PW-9 Avinay has accompanied the injured and accordingly, on duty Police of Hospital gave intimation about admission of patient. True, the said intimation does not bear the names of assailants, however according to us it is not a decisive factor, since it was a mere intimation given by Police about admission of injured into the hospital. The same cannot be treated as a statement of informant since there was only reference that informant Avinay has accompanied the injured. Therefore, said submission does not hold any water.

38. It reveals that the alleged incident took place around 08.30 p.m. on 14.01.2014 whilst FIR was lodged around 10.10 p.m. on the very day. Though the defence has named it as delay in lodgement of FIR, by placing reliance on the decision of this Court in case of **Raju s/o. Durgaparasad Gupta & Ors. Vs. State of Maharashtra, 2017 ALL MR (Cri) 798**, however, we do not consider it as a delay. On the facts, it reveals that there was a deadly assault on the person of deceased who was admitted in the hospital and then within two hours, FIR has been lodged with specific names. Though inordinate delay in lodging of FIR is matter of suspicion, however in case at hand, there was rather quick

lodgement of FIR which has eliminated the chances of false implication.

39. Though the informant in his appeal seeks for conviction of accused No.1 Rajesh and accused No. 6 Shailesh, we do not find convincing evidence about their presence. The learned counsel appearing for informant has attracted our attention to the aspect that blood of 'A' group was found on the clothes of accused No.1 Rajesh which was blood group of deceased, however none of the eye-witnesses stated about the presence of accused No.1 Rajesh as well as he was not identified in the TI Parade by either of the witness. Besides that in above part, we hold that the evidence of seizure is not worthy of credit. Therefore, the submission about complicity of accused No.1 Rajesh is unacceptable. It is also argued, there was enmity between accused No.6 Shailesh and deceased. PW-4 Rahul (panch) stated that PW-9 Avinay has identified accused No.6 Shailesh. However, we have gone through the evidence of PW-9 Avinay who has not stated that he has identified accused No.6 Shailesh. Besides that none of the witness has identified accused No.6 Shailesh nor his name was stated, therefore, reasonable doubt belongs to him. We are not convinced about the complexity of accused No.1 Rajesh and accused No.6 Shailesh.

40. The learned counsel appearing for accused No.4 Akash @ Bittu would submit that mere presence of Akash @ Bittu is not sufficient to

fasten the liability. It is submitted that the allegation of assault are against accused No.5 Kunal and accused No.7 Shekhar. Thus, the role assigned to accused No.4 Akash @ Bittu is at the most of beating by fist blows and kicks. By placing reliance on the decision of this Court in case of **Shrirang Namdeo Chandanshive & ors. Vs. The State of Maharashtra, 2016 ALL MR (Cri) 3804**, it is argued that mere presence is not enough to fasten the vicarious liability by invoking the provision of Section 149 of the Indian Penal Code. The facts of said case were quit distinct. In said case, deceased went to the field after hearing noise, where the assailants were cutting trees. In the quarrel, some of the assailants used axe whilst other gave kicks and fist blows. The said occurrence was at the spur of moment and therefore, in given facts, it was observed that mere participation in the form of giving fist blows and kicks does not attract the common object. The case in hand is quit distinct, all accused have formed unlawful assembly. They have carried deadly weapons and assaulted deceased. Some how deceased escaped and started to run, but the assailants followed and again beat him. The said course of conduct is sufficient to infer the common object of the assembly of eliminating the deceased. Therefore, the above submission is of no avail.

41. For the reasons stated above, we are satisfied that the order of conviction of accused No. 2 Sandesh @ Golu, accused No.3 Kamesh,

accused No.4 Akash @ Bittu, accused No.5 Kunal and accused No.7 Shekhar recorded by the Trial Court is based on sound reasons. The prosecution has adduced reliable evidence as regards to the complexity of convicted accused, therefore, the appeals filed by the accused calls for no interference. Likewise, we do not see any perversity committed by the Trial Court while acquitting accused No.1 Rajesh and accused No. 6 Shailesh. In this regard, the law is fairly well settled that merely another view is possible, the order of acquittal cannot be reverted. In view of that appeal filed by Mrs. Jyoti Janardhan Kale (victim's mother) also deserves to be dismissed.

42. In view of above, we dismiss all appeals.

43. Fees to the Mr. Amit Kukday, learned appointed advocate be paid as per rules.

(MRS.VRUSHALI V. JOSHI, J.)

(VINAY JOSHI, J.)