



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

CRIMINAL APPEAL NO. 672 OF 2020

Mangesh @ Balu Mallikarjun Borade
Age: 44 years, Occu: Agril.,
R/o: Sawargaon, Tq. Bhoom,
District Osmanabad

... Appellant

Versus

The State of Maharashtra

... Respondent

...

AND

CRIMINAL APPEAL NO.167 OF 2023

Navnath Baliram Borade
Age: 35 years, Occu: Agril.,
R/o: Sawargaon,
Tq. Bhoom, Dist. Osmanabad

... Appellant

Versus

The State of Maharashtra

... Respondent

...

AND

CRIMINAL APPEAL NO.685 OF 2020

Samadhan Ambrushi Borade
Age: 29 years, Occu: Agril.,
R/o: Savargaon, Tq. Bhoom,
Dist. Osmanabad

... Appellant

Versus

The State of Maharashtra

... Respondent

...

Mr. S. J. Salunke, Advocate for Appellant in Criminal Appeal
No.672/2020

Mr. V. D. Sapkal [Senior Advocate] i/b Mr. S. R. Sapkal,
Advocate for Appellant in Criminal Appeal No.167/2023

Mr. M. V. Salunke, Advocate for Appellant in Criminal Appeal
No.685/2020

Mrs. V. S. Choudhari, APP for Respondent – State in all Appeals

...

**CORAM : R. G. AVACHAT &
NEERAJ P. DHOTE, JJ.**

**Reserved on : 20th February, 2024
Pronounced On : 04th April, 2024**

JUDGMENT : [PER NEERAJ P. DHOTE, J.]

1. These Appeals are against the Judgment and Order dated 29/09/2020, passed by the learned Additional Sessions Judge, Bhoom, District Osmanabad, in Sessions Case No.173/2014 convicting the Appellant/s for the offences punishable under Section 302 read with Section 34 of the Indian Penal Code [for short 'IPC'] and sentencing them to suffer rigorous imprisonment for life and to pay fine of Rs.10,000/- each, in default of payment of fine to suffer rigorous imprisonment for one (01) year each. Hence this common Judgment.

2. Prosecution's case as revealed from the Police Report is as under :-

2.1 Deceased - Amol Bapurao Takale was the son of PW - 3 [Bapurao Pandhari Takale], who is also the Informant. Deceased - Amol Takale was residing at Pune. PW - 5 [Tanaji Limbraj Takale], who was the cousin of deceased - Amol Takale, was hospitalized due to injuries suffered in an assault. Deceased - Amol Takale came from Pune on 16/09/2014 to see PW - 5 [Tanaji Limbraj Takale]. While he was traveling in a Scorpio Jeep [four wheeler] for going to his village along with other witnesses, they saw Appellant - Navnath Baliram Borade and he stopped the vehicle. Verbal wrangle took place between them. When he boarded back the vehicle, the accused persons pelted stones on the vehicle and assaulted deceased - Amol Takale with deadly weapons such as swords. The witnesses ran

away. Due to the severe injuries, Amol Takale died.

2.2 When the Informant learnt about the incident, he reached the spot of incident where he saw his son – Amol Takale lying in pool of blood. The police prepared inquest and referred the dead body for post-mortem. The crime was registered on the report lodged by PW – 3 [Bapurao Pandhari Takale]. The spot panchnama was prepared. The swords came to be seized. The statements of witnesses were recorded. The accused persons came to be arrested. Pursuant to the discovery under Section 27 of the Indian Evidence Act, 1872 [for short ‘the Evidence Act’], the clothes of accused came to be seized at the instance of accused No.1 – Navnath Borade. The articles seized during the course of investigation came to be referred to the Forensic Laboratory for examination. On completion of investigation, Charge-sheet came to be filed against ten (10) accused persons for the offences punishable under Sections 120-B, 143, 147, 148, 149, 201 and 302 of IPC, Section 25(4) of Arms Act, 1959 and Section 135 of Bombay Police Act, 1951.

3. The learned Trial Court framed the Charge against the Appellants and acquitted accused at Exhibit – 40 for the offences punishable under Sections 120-B, 143, 147, 148, 149, 201 and 302 of IPC, Section 25(4) of Arms Act, 1959 and Section 135 of Bombay Police Act, 1951, to which, they pleaded not guilty and claimed to be tried.

4. To prove the Charge, the Prosecution examined in all Nineteen (19) witnesses and brought on record the documentary evidence. After the Prosecution closed it's evidence, statements of the Appellants and acquitted accused

came to be recorded under Section 313(1)(b) of the Code of Criminal Procedure [for short 'Cr.PC']. They all denied the Prosecution's case and evidence. On appreciation of the evidence on record, the learned Trial Court passed the impugned Judgment and Order convicting the Appellants and acquitting the co-accused.

5. Heard the learned Advocate Mr. S. J. Salunke, learned Senior Advocate Mr. V. D. Sapkal, learned Advocate Mr. M. V. Salunke for the respective Appellant/s and learned APP for Respondent – State. Perused the evidence on record.

6. It is submitted by the learned Senior Advocate and Advocates for the Appellant/s that, in totality of the evidence available on record, the Charge is not proved. The Appellants are not the aggressors. When on the basis of same evidence, some accused are acquitted, the Appellants are also entitled for acquittal on parity. The learned Trial Court read the evidence differently for the Appellants and for acquitted accused. The evidence of eye witnesses is not consistent. It is submitted that the ground of alteration after Charge is not pressed. They relied on certain Judgments, which would be considered in the later part of this Judgment. They submitted that the Appeals be allowed and the conviction and sentence imposed upon the Appellants be quashed and set aside.

7. It is submitted by the learned APP that, the evidence of eye witnesses inspires confidence and corroborates each other in respect of involvement of the Appellants. No capital can be made as to why the deceased – Amol Takale and the witnesses chose another road for going to their village. It is submitted that though some of the witnesses have not supported the

Prosecution, their evidence, which supports the Prosecution, can be accepted. The medical evidence corroborates the testimony of eye witnesses. It is submitted that no interference is called for in the impugned Judgment. Learned APP relied on Judgment on the point of alteration of Charge. As the ground of alteration of Charge is not pressed, there is no need to consider the Judgment relied.

‘ HOMICIDAL DEATH ’

8. The evidence of PW - 19 [Hanumant Bhiva Wakade] show that he was the Police Inspector and In-charge of Paranda Police Station from 19/02/2014 till 31/05/2015. On 16/09/2014, while he was at Osmanabad for official work, he received a telephonic information from Police Sub-Inspector about the murder at Savargaon. He gave necessary instructions to PSI and he left towards the spot of incident. On the spot of incident, he found one dead body on the road and on inquiry, he learnt that, the dead body was that of one Amol Bapurao Takale. He prepared the Inquest [Exhibit - 136] in the presence of two panchas. There were injuries on the head, throat, hands and other parts of the dead body. He sent the dead body for post-mortem. He prepared the spot panchnama [Exhibit - 233] in the presence of two panchas. He found two swords and two sheaths at the spot of incident, which were seized. One Scorpio [four wheeler] was also seized from the spot of incident. His evidence show that on the report at Exhibit - 142 lodged by PW - 3 [Bapurao Pandhari Takale], he registered the crime and started the investigation. His cross-examination show that an entry regarding the incident of murder was taken in the station diary. Not mentioning the name of accused in the station diary will not affect the testimony of this witness.

9. The evidence of PW - 2 [Pandurang Birmal Takale] show that on 16/09/2014, Inquest [Exhibit - 137] of Amol Takale was prepared in his presence. By which weapon the injury was caused, is not expected by this panch witness. The inquest is not seriously disputed, as seen from the cross-examination.

10. The evidence of PW - 3 [Bapurao Pandhari Takale] show that he was the father of deceased - Amol Takale and resident of village Devangra. He learnt that his son was being assaulted in front of the school by sword and so, he went on the spot of incident, which was near the water tank. He saw his son - Amol Takale in dead condition and there were several injuries on his neck. The Police prepared inquest. Thereafter, he went to Paranda Police Station and lodged the report [Exhibit - 142]. He took the dead body at Bhoom. The evidence of PW - 3 [Bapurao Pandhari Takale] is not seriously disputed.

11. PW - 14 [Prashant Atmaram Chormale] is a panch witness for the spot panchnama. His evidence show that on 16/09/2014 in between 07:30 to 08:00 pm, the Police called him at Savargaon. He reached on the spot of incident, which was near the Mahadev Temple at Savargaon. The dead boy of Amol Takale was lying on the spot. Two swords and two sheaths were also lying there with one chappal. One four wheeler - Scorpio was standing nearby with broken glasses. The spot panchnama at Exhibit - 233 was drawn in his presence and the articles were seized. Though in his cross-examination, it is brought on record that he was deposing as per the contents of panchnama as he read it, his evidence that he acted as the panchas for the spot panchnama remained unshaken.

12. The evidence of PW - 1 [Vijaykumar Rohidas Sul] show that on 16/09/2014, he was working in the Rural Hospital, Bhoom as Medical Officer. The dead body of Amol Takale was brought to his Hospital at 9:00 pm by the Police. The dead body was identified by PW - 3 [Bapurao Pandhari Takale]. The post-mortem was conducted, in which, following injuries were found:

- “1) Contused lacerated wound, over right temporal area, having size 4 cm. x 2 cm.x 1 cm., the age of injury was more than 12 hours. It was caused by sharp weapon.
- 2) Contused lacerated wound, behind right Ear, having size 3 cm. x 1 cm. x 0.5 cm., the age of injury was more than 12 hours, it was caused by sharp weapon.
- 3) Incised wound over Neck extending from left sternocleidomastoid, muscle to right sternocleidomastoid muscle, having size 6 cm. x 3 cm x 2 cm, the age of injury was more than 12 hours, it was caused by sharp weapon.
- 4) Contused lacerated wound, over right axillary area, having size 4 cm. x 2 cm. x 1 cm, The age of injury was more than 12 hours. It was caused by sharp weapon.
- 5) Contused lacerated wound, over right scapular area, having size 6 cm. x 4 cm x 1.5 cm. The age of injury was more than 12 hours, it was caused by sharp weapon.
- 6) Middle Finger, Ring finger and Little finger cut from midline.”

13. His evidence show that the death was **“due to severe hypovolemic shock due to severe hemorrhage due to penetrating injury to neck leading to cutting injuries to carotids and trachea”**. The injury no.3 was the main cause of death. All injuries were possible by Article Nos. 1 and 2 i.e. swords. The post-mortem report at Exhibit - 135 is brought on record.

14. Though the cross-examination is in respect of categories of weapons and rigor mortis, the evidence remained unshaken. The family background of this Doctor as brought in the cross-examination will be of no consequence. The post-mortem report at Exhibit - 135 corroborates the evidence of this witness.

15. From the above discussed evidence, there cannot be a slightest doubt that the Prosecution established the homicidal death of Amol Takale.

‘INFORMANT’

16. PW - 3 [Bapurao Pandhari Takale] is the father of deceased - Amol Takale. On his report, the Crime came to be registered. His report [Exhibit - 142] regarding the incident is based on hearsay information. His evidence show that on 16/09/2014, deceased - Amol Takale had come to their native place i.e. Devangra and he went to Barshi to see PW - 5 [Tanaji Limbraj Takale] since he was hospitalized. After he left the village, the Appellants came to the Informant's house and inquired about his son - Amol Takale. He told them that Amol Takale went to Barshi. The Appellants threatened him that, they will chase his son and kill him. However, his further evidence show that neither he narrated the incident of said threat to any villager nor he informed his son on the phone. Neither he informed the concerned police station about the said threat. This conduct of PW - 3 [Bapurao Pandhari Takale] not giving caution to his son - Amol Takale is strange. His evidence that the Appellants told him that they would chase his son by going to Barshi is an omission, which is duly proved in the evidence of Investigating Officer i.e. PW - 19 [Hanumant Bhiva Wakade].

17. Though, PW - 3 [Bapurao Pandhari Takale] lodged the report against the Appellants for causing the homicidal death of his son, he deposed that due to the quarrel during Pola festival of the year 2014, Sachin Patil of their village committed murder of his son. However, the said Sachin Patil is not the accused in

this case. The crux of the evidence of PW – 3 [Bapurao Pandhari Takale] is that he set the criminal law in motion.

‘EYE WITNESSES TO THE INCIDENT’

18. Prosecution examined five [05] witnesses as the eye witnesses to the incident. They are PW – 4 [Shivaji Uttreshwar Kharat], PW – 6 [Tukaram Shriram Barkade], PW – 7 [Sandip @ Lakhan Sugriva Bhosale], PW – 8 [Ram Bibhishan Barkade] and PW – 12 [Dilip Rambhau Kamble].

19. PW – 4 [Shivaji Uttreshwar Kharat] is the relative of deceased – Amol Takale. He claims to have witnessed the incident of assault by the Appellants with sword on Amol Takale at village Savargaon, while he was returning after visiting PW – 5 [Tanaji Limbraj Takale] in the Hospital at Barshi. He left the Hospital one and half hour after deceased – Amol Takale and other witnesses left the Hospital. At that time, he was travelling by a motorcycle via Savargaon. However, in his cross-examination, the topography of the villages Savargaon, Devangra, Arsoli, Wanjarwadi and roads leading to the said villages is brought on record. He is the resident of Wanjarwadi. The said topography show that the village where the incident had taken place i.e. Savargaon, was not in his way from Barshi to Wanjarwadi. This aspect is also fortified from the cross-examination of PW – 1 [Vijaykumar Rohidas Sul] who conducted the post- mortem as he was the resident of village Arsoli, Taluka Bhoom. His evidence show that he was familiar with the topography of the aforesaid villages and roads leading thereto. It is clear from his evidence that village Savargaon i.e. the place of incident, do not fall on the way between Barshi and

Wanjarwadi, or vice-versa. Nothing is brought by the Prosecution that this witness, who was going to his native, had any reason to go at Savargaon. There is nothing in his evidence to show that he had the reason to take the longer route to go Savargaon, when he was returning to his native village which is on different route. Admittedly, he is the chance witness. As per settled legal position, the evidence of chance witness is required to be evaluated with caution. His conduct, post-incident, is also required to be considered.

20. Though PW - 4 [Shivaji Uttreshwar Kharat] claims to have witnessed the incident of assault by the Appellants on Amol Takale, he kept mum. Though the Police had reached the spot of incident and he along with PW - 3 [Bapurao Pandhari Takale] / Informant was present there, he did not disclose the Police that he witnessed the incident. Strangely, his evidence show that after the body of deceased - Amol Takale was taken to Bhoom and many persons, who were known to him had gathered, he did not told them about the incident.

21. Thus, in the backdrop of the above discussion, the evidence of PW - 4 [Shivaji Uttreshwar Kharat] is required to be seen with doubt.

22. The evidence of PW - 6 [Tukaram Shriram Barkade] show that he is the relative of deceased - Amol Takale and was the resident of Devangra. He accompanied deceased - Amol Takale and others to the Hospital at Barshi to inquire about well being of PW - 5 [Tanaji Limbraj Takale] and while they were returning to their village, the father and uncle of PW - 5 [Tanaji Limbraj Takale] got down from the vehicle at Devangra and their vehicle proceeded further. When they reached village

Savargaon, they saw Appellant - Navnath Borade. Deceased - Amol Takale stopped the vehicle. There was verbal wrangle between deceased - Amol Takale and Appellant - Navnath Borade. By that time, he and other witnesses got down from the vehicle. They were asked to board the vehicle. The vehicle proceeded further and was being driven by deceased - Amol Takale. In the meanwhile, the Appellant - Balasaheb @ Mangesh Borade reached there on a motorcycle and he pelted stones, which hit the glass of the vehicle. The Appellant - Balasaheb @ Mangesh Borade caught hold the collar of Amol Takale and asked the other Appellants to bring the swords. Deceased - Amol Takale was pulled outside the vehicle by Appellant - Balasaheb @ Mangesh Borade. All the Appellants were armed with swords and others were having stones in their hands. Deceased - Amol Takale was assaulted by swords by all the Appellants on vital parts of the body and others were pelting stones. Amol Takale succumbed to the injuries. His further evidence show that he ran away. He identified all the accused as the assailants.

23. His further evidence show that after the incident, he ran towards Barkade Wasti, which was the part of village Devangra, which was the native place of deceased - Amol Takale and that of his father PW - 3 [Bapurao Pandhari Takale]. He was also the resident of said Barkade Wasti where he was residing with his family. Strangely, he neither informed about the incident to Amol's father PW - 3 [Bapurao Pandhari Takale] nor his family members. He did not meet anybody in the said village. He did not disclose about the incident to anyone. Though he felt that it was a serious incident, he did not inform the Police though he was having the phone.

24. Though this witness deposed that his statement was recorded on third day from the date of incident, the evidence of PW - 19 [Hanumant Bhiva Wakade] show that his statement was recorded on 23/09/2014 i.e. after seven (07) days from the date of incident. The cross-examination show that after the incident, he was present in the village for a period of one (01) month and there was police bandobast at the village Devangra for a period of one (01) month. He did not personally gave the information to the Police about the incident. There is no explanation for the delay in recording the statement of this witness. His evidence that the Appellant - Samadhan Borade was armed with sword, co-accused Sandip Borade and Vilas Borade were having stones in their hands and they pelted stones towards them, was an omission which is duly proved. The cross-examination in respect of the actual incident cannot be called as admission in legal sense. Though this witness claims to have gone to the Hospital to see PW - 5 [Tanaji Limbraj Takale], the evidence of PW - 5 [Tanaji Limbraj Takale] do not show the presence of PW - 6 [Tukaram Shriram Barkade] along with deceased - Amol Takale and others. Thus, in the light of above discussion, the evidence of PW - 6 [Tukaram Shriram Barkade] is required to be seen with doubt.

25. The evidence of PW - 7 [Sandip @ Lakhan Sugriva Bhosale] show that he was also the resident of village Devangra. He accompanied deceased - Amol Takale and other witnesses to the Hospital to see PW - 5 [Tanaji Limbraj Takale] on the day of incident. While returning to their village, when they reached near Doke Wasti, deceased - Amol Takale stopped the vehicle and told that they would go to Bhoom and therefore, the vehicle proceeded towards Bhoom. When they reached Savargaon,

deceased - Amol Takale wanted to have betel leaf. The Appellants were near the pan stall. Verbal wrangle took place between deceased - Amol Takale and the Appellants on account of beating PW - 5 [Tanaji Limbraj Takale]. After the wrangle, deceased - Amol Takale boarded the vehicle on the driver's seat and started proceedings towards Bhoom. Suddenly, someone pelted stones from the backside. He got down from the vehicle and noticed Balasaheb Doke coming on a two wheeler. Thereafter, he went to Bhoom along with Balasaheb Doke. He deposed that he knew nothing about the incident. His evidence show that he was cross-examined by the Prosecution. However, nothing has come in his evidence, which would help the Prosecution in proving the Charge. On the contrary, his evidence show that he subsequently learnt that Amol Takale died. Though his statement under Section 164 of CrPC was recorded and it is brought on record at Exhibit - 203, the same cannot be the substantive evidence.

26. The evidence of PW - 8 [Ram Bibhishan Barkade] show that he was also the resident of Devangra and the friend of deceased - Amol Takale. He visited Hospital to see PW - 5 [Tanaji Limbraj Takale] along with deceased - Amol Takale and others on 16/09/2014. He accompanied deceased - Amol Takale and other witnesses in the vehicle back to the village. He deposed that when they reached near Devangra Phata, deceased - Amol Takale told that they should go to Bhoom and the vehicle was stopped at the instance of deceased - Amol Takale. Deceased - Amol Takale went to the pan stall where the Appellants and acquitted accused were present. A verbal wrangle took place between Amol Takale and the Appellant - Navnath Borade on account of beating PW - 5 [Tanaji Limbraj

Takale]. Deceased - Amol Takale slapped the Appellant - Navnath Borade. Thereafter, he returned back to the vehicle and sat on the driver's seat and started the vehicle. Appellant - Mangesh came there on motorcycle and pelted stones on the vehicle, which hit on the door of vehicle. Appellant - Mangesh caught hold the collar of deceased - Amol Takale and asked to bring the swords from the stall. The other Appellants and the acquitted accused brought the swords. They pulled Amol Takale outside the vehicle and gave blows by the swords on the person of Amol Takale. He witnessed the incident by sitting in the car. As he was scared, he ran away. He learnt that Amol Takale succumbed to the injuries. He identified the Appellants and acquitted accused as the assaulter.

27. Though this witness claims to have witnessed the incident, he kept quiet on reaching village Devangra. He did not disclose the incident to anybody in the village. Though he felt that he should go to Amol's family and disclose them about the incident, he did not do so. Though he and PW - 6 [Tukaram Shriram Barkade] were the resident of same village i.e. Devangra, he met PW - 6 [Tukaram Shriram Barkade] after fifteen to twenty [15 to 20] days from the incident. His further evidence show that he met the parents and brother of Amol Takale on the next day to express condolences. He also met the villagers on the day of incident as well as next day. His evidence show that he did not personally inform the Police about the incident. This conduct of PW - 8 [Ram Bibhishan Barkade] is strange. Though his further evidence show that he met the Police after lapse of eight to nine [8 to 9] days from the incident and his statement was recorded, the evidence of PW - 19 [Hanumant Bhiva Wakade], who investigated the crime, show that his statement

was recorded on 29/10/2014 i.e. after the period of more than one and half [1 ½] month from the incident. This delay in recording the statement would be certainly fatal for the Prosecution. The cross-examination show that after the incident, he was in the village for one and half [1 ½] month. During that period, he was visiting Bhoom in relation to his work. During that period, he did not go to Bhoom Police in relation to the incident. There is no explanation at all in respect of inordinate delay in recording the statement of this witness.

28. His evidence show that he was confronted with certain parts of statement recorded by the Police under Section 161 of Cr.PC and his evidence show that he did not agree with the said portion marks in his statement. In totality of the testimony of PW - 8 [Ram Bibhishan Barkade], his evidence is required to be seen with doubt.

29. The evidence of PW - 12 [Dilip Rambhau Kamble] show that he was the resident of Pune and his four wheeler was hired by deceased - Amol Takale for coming to the village. He along with deceased - Amol Takale and his two friends came to deceased - Amol Takale's village from Pune. They visited the Hospital at Barshi to see PW - 5 [Tanaji Limbraj Takale]. On the day of incident, while they were returning to the village in the direction of Bhoom, the residents of Devangra got down. The vehicle stopped at Savargaon as deceased - Amol Takale wanted to purchase cigarette. When they again boarded the vehicle, two persons came there and pelted stones on the vehicle and some persons assaulted deceased - Amol Takale with swords. He witnessed the incident while he was on the driver's seat. On witnessing the assault on deceased - Amol Takale, he opened

the door of vehicle and ran away. The other witnesses who were sitting in the vehicle also ran away. Though in his evidence, he deposed that he can identify the persons who assaulted deceased - Amol Takale, he did not identify any of the accused persons or the Appellants. Admittedly, there is no cross-examination by the Prosecution of this witness, whereas, in the cross-examination done by the defence, it has come that, there were fifteen to twenty [15 to 20] persons armed with weapons who assaulted deceased - Amol Takale.

30. Mr. S. J. Salunke, learned Advocate for the Appellant cited the Judgment in the case of **Kanju Muhammed Alias Khumani Vs. State of Kerala, AIR Online 2003 SC 530**, wherein, the witness was not treated hostile by the Prosecution, and even then he was not declared hostile and it was observed that the benefit of such evidence should go to the accused and not the Prosecution. There cannot be any dispute on the legal position that the evidence of the witness is to be considered as a whole. For want of identification of the assailants, the evidence of this witness is of no assistance to the Prosecution to prove the Charge against the Appellants.

‘DISCOVERY OF CLOTHES’

31. Prosecution examined PW - 15 [Balaji Jalindar Chawhan], who was the panch for discovery under Section 27 of the Evidence Act at the instance of Appellant - Mangesh Borade. According to him, on 26/09/2014, he was called at Paranda Police Station where the Appellant - Mangesh was in Police lockup. Appellant - Mangesh stated that he would show the clothes of himself, and that of Appellants - Samadhan Borade and Navnath Borade. Memorandum to that effect was prepared. Thereafter, Appellant - Mangesh led them in the police vehicle

to wasti of Shivaji Borade through Waradwadi, Mankeshwar, Arsoli Phata and Devangra. The vehicle was stopped. Appellant - Mangesh led them to one agricultural land of Navnath Borade where there was a cattle shed. One cot was lying in the cattle shed. Clothes were kept below an empty bag. Appellant - Mangesh took the said clothes and handed it over to the Police, which were seized under the panchnama.

32. His cross-examination show that anybody could go to the said agricultural land and cattle shed and he could identify the Appellant - Mangesh because he was shown to him by the Police on the day of evidence. Even if the said cross-examination is ignored, the evidence of this panch witness nowhere show as to what were the said clothes and they were sealed after they were handed over to the Police. In other words, there is no substantive evidence in respect of sealing of the said clothes.

33. On the point of discovery of clothes at the instance of Appellant - Mangesh, even the evidence of PW - 19 [Hanumant Bhiva Wakade] do not show as to what were the said clothes, which were seized from the cattle shed at the instance of Appellant - Mangesh. Even his evidence nowhere show that the said clothes were sealed after its seizure. Thus, evidence of Prosecution in respect of discovery of clothes at the instance of Appellant - Mangesh is of no gain for the Prosecution.

‘SEIZURE OF CLOTHES OF THE ACCUSED’

34. The Prosecution has examined PW - 13 [Amit Navnath Kamble] who was the panch witness for the seizure of clothes. His evidence show that on 02/10/2014, he was called at Paranda Police Station where the Police showed him the clothes

of six (06) persons. His evidence show that the said clothes were seized under six different panchnamas at Exhibits - 226 to 231. His evidence show that the articles 'B' to 'M' were the said clothes, which were seized in his presence. In his evidence, he deposed that, he do not remember who produced the said clothes. His cross-examination show that the clothes were kept on the floor. Except this, there is nothing in his evidence. The evidence of this panch witness do not establish that the said clothes were that of accused persons. Thus, this piece of evidence do not take the Prosecution's case any further to prove the Charge.

'REPORTS OF THE CHEMICAL ANALYZER'

35. The evidence of PW - 19 [Hanumant Bhiva Wakade], who is the Investigating Officer, show that during the course of investigation, he obtained the blood samples of the Appellants. His evidence show that seized muddemal articles were sent for chemical examination and the reports received from the Chemical Analyzer (C.A) were at Exhibits - 276 to 286. Admittedly, the Prosecution has not examined the carrier of the articles to the C.A. Thus, there is no substantive evidence on record as to from where the seized muddemal articles were taken to C.A.

36. The CA reports show that the result of anaylsis of the blood sample of deceased - Amol Takale was inconclusive. The CA report at Exhibit - 276 which is in respect of result of anaylsis of all the articles show the human blood. Thus, the CA reports do not take the Prosecution's case any further to prove the Charge.

‘INJURY ON THE APPELLANT – MANGESH BORADE’

37. The evidence of PW – 16 [Dr. Sunil Krishna Lawate] show that he was the Private Medical Practitioner at Sangola, District Solapur since 2010. On 19/09/2014, the Appellant – Mangesh Borade came to his Hospital at 9:30 am and on examination, he noted the injury on his person as **“Fracture to right proximal phalanx of thumb”**. His evidence show that generally, in motor accident, multiple injuries may be caused and the injury mentioned in the OPD papers at Exhibit – 240 may be possible in case of fight. He was unable to identify Mangesh Borade as the person, who suffered injury and came to him for treatment.

38. His cross-examination show that the fracture was possible due to fall. The medical paper brought in evidence of this witness show the history of fall. The incident is dated 16/09/2014 and the said medical examination was done on 19/09/2014. This medical evidence on record do not establish the link between the incident and the injury suffered by Appellant – Mangesh.

‘CALL RECORDS’

39. Through the evidence of PW – 17 [Dattaram Shantaram Angre] and PW – 18 [Suryakant Mallikarjun Bhinge], who were the Nodel Officers with the Vodafone - Idea Limited and BSNL respectively, the Prosecution has brought on record the call details of the mobile phone numbers i.e. 9881181840 and 9422069729 for the period from 10/09/2014 to 20/09/2014.

40. The evidence of the said Nodel Officers show that the Mobile No.9881181840 was in the name of Ramraje Borade and Mobile No.9422069729 was in the name of Appellant –

Mangesh Borade. The certificates under Section 65(B) of the Act and the call details are brought on record in the evidence of these witnesses. From the evidence of these witnesses, the Prosecution has established that there were phone calls between these two numbers during the said period. Admittedly, the said person by name Ramraje Borade was not the accused in the case. The evidence of PW - 11 [Ramraje @ Bapu Vishwanath Borade] show that he purchased the said Mobile No. 9881181840. However, he do not support the case of Prosecution and even though he was cross-examined on behalf of the Prosecution, nothing incriminating has come in his evidence.

41. The evidence of PW - 9 [Kiran Ramhari Jadhav] show that he was the resident of Bhoom and he was having Mobile No.9422069729, which according to PW - 18 [Suryakant Mallikarjun Bhinge] was in the name of Appellant - Mangesh Borade. The evidence of this witness show that he had purchased the said sim in the year 2002. His evidence show that he did not support the Prosecution and therefore, he was cross-examined by the Prosecution. However, nothing incriminating has come in his evidence against the Appellants. Thus, this evidence of call details is of no assistance for the Prosecution sans evidence to connect it with the incident.

‘OTHER EVIDENCE’

42. The evidence of PW - 5 [Tanaji Limbraj Takale] as regards the incident is concerned is hearsay in nature. What his evidence show is that he was hospitalized at Barshi due to assault by Balasaheb Borade, Navnath Borade, Sandip Borade,

Vilas Borade and Samadhan Borade and so deceased – Amol Takale and other witnesses had come to meet him.

43. The evidence of PW – 10 [Susen @ Anna Sahebrao Jadhavar] show that he did not support the case of Prosecution, therefore, he was cross-examined on behalf of Prosecution. However, nothing incriminating has come in his evidence to prove the Charge.

‘JUDGMENTS CITED’

44. The learned Senior Advocate relied upon the Judgment in the cases of **Javed Shaukat Ali Qureshi Vs. State of Gujarat, (2023) 9 SCC 164** and **Suresh Purushottam Ashtankar Vs. State of Maharashtra and Another, 2015 (3) Mh.L.J (Cri.) 424**, in support of his contention that on similar or identical evidence against two accused, the Court cannot convict one accused and acquit the other and on scaling down of the offence. The legal position set out in the said Judgments is not in dispute.

45. Mr. S. J. Salunke, learned Advocate for the Appellant relied on the Judgment in the case of **Mallappa Vs. State of Karnataka, AIR Online 2024 SC 80**, wherein, it is observed that, the witness to the incident chose not to inform his nearby relatives about the incident and no medical treatment was provided to the injured and such conduct of witness was held to be unnatural.

‘CONCLUSION’

46. The re-appreciation of the evidence on record, as discussed above, leads us to the only conclusion that it is not possible to rely on the testimonies of the eye witnesses. Their

evidence do not give the required assurance to rely on their version. For the reasons discussed while dealing with the evidence of the eye witnesses, the testimonies of eye witnesses cannot form the basis to convict the Appellants. The conduct of the eye witnesses, post incident, as is established in their respective evidence, leads us to draw an adverse inference. The evidence in the nature of corroboration is also of no help to the Prosecution as it leads the Prosecution's case nowhere. The overall evidence as discussed above do not establish the Charge against the Appellants, though the Homicidal Death of Amol Takale is proved. Admittedly, the other accused are acquitted by the learned Trial Court. In the backdrop of above discussion, the only order which can be passed is that of acquittal of the Appellants. Resultantly, Appeals succeed. Hence, the following order:

ORDER

- (I) The Criminal Appeals are allowed.
- (II) The Judgment and Order dated 29/09/2020, passed by the learned Additional Sessions Judge, Bhoom, District Osmanabad, in Sessions Case No.173/2014 convicting and sentencing the Appellants for the offences punishable under Section 302 read with Section 34 of IPC, is quashed and set aside.
- (III) The Appellants stand acquitted of the offences punishable under Sections 302 read with Section 34 of IPC.
- (IV) The Appellants be released forthwith, if not required in any other offence.

- (V) The fine amounts, if any, deposited by the Appellants be refunded to them.
- (VI) The Record and Proceedings be sent back to the learned Trial Court.
- (VII) The muddemal articles be dealt with as directed by the learned Trial Court.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

Sameer