



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

CRIMINAL APPEAL NO.344 OF 2019

1. Sachin Vitthal Suryawanshi,
Age : 39 years, Occu : Agriculture,
R/o. Kerul, Tq. Ashti, Dist. Beed
2. Nitin Sanjay Shinde
Age : 32 years, R/o. Bayejabai Jeur,
Ahmednagar
3. Sayyad Gaus Sayyad Noor .. (As per directions of the Hon'ble High
Court's order dated 05.01.2024, separate
Appeal is filed)
4. Bhausahab Mohan Sable,
Age : 35 years, R/o.Kerul,
Tq. Ashti, Dist. Beed
5. Mahendra Sevakram Mahajan,
Age : 31 years, R/o. Kerul,
Tq. Ashti, Dist. Beed ... Appellants

Versus

1. State of Maharashtra
Through Police Inspector,
Police Station, Peth Beed
Tq. & Dist. Beed
2. Pushpa w/o. Balu @ Ravindra Khakal
Age : Major, Occu : Household,
R/o. Khakalwadi, Tal. Ashti, Dist. Beed ... Respondents

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Shri. R. G. Hange and Shri. A. R. Hange, Advocate for the Appellants in
Criminal Appeal No.344 of 2019 and for Applicant in Criminal
Application No.265 of 2024

Shri. S.D. Ghayal, Addl. P.P. for the Respondent / State

Shri. S. J. Salunke, Advocate for Assist to PP and for Respondent No.2 in
Criminal Appeal No.344 of 2019, and for Respondent No.2 in Criminal
Application No.265 of 2024

....

WITH

CRIMINAL APPLICATION NO.265 OF 2024

IN

CRIMINAL APPEAL NO.344 OF 2019

....

AND

CRIMINAL APPEAL NO.39 OF 2024

Sayyed Gaus Sayyed Noor

Age : 33 years, Occu : Nil,

R/o. Surya Nagar, Pipeline Road,

Ahmednagar, Dist. Ahmednagar

.. Appellant

Versus

1. The State of Maharashtra

2. Pushpa w/o. Balu @ Ravindra Khakal,

Age : 38 years, Occu : Household,

R/o. Khakalwadi, Tq. Ashti, Dist. Beed

.. Respondents

....

Ms. Ashwini A. Lomte, Advocate for Appellant in Criml Appeal No.39 of 2024 and for Applicant in Criminal Application No.168 of 2024

Shri. S.D. Ghayal, Addl. P.P for the Respondent / State

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WITH

CRIMINAL APPLICATION NO.168 OF 2024

IN

CRIMINAL APPEAL NO.39 OF 2024

....

AND

CRIMINAL APPEAL (ST.) NO.585 OF 2019

The State of Maharashtra

Through : Police Inspector,

Police Station, Peth Beed,

Tal. & Dist. Beed

.. Appellant

Versus

1. Sachin Vitthal Suryawanshi,
Age : 32 years, Occu : Agriculture,
R/o. Kerul, Tal. Ashti, Dist. Beed
 2. Nitin Sanjay Shinde
Age : 25 years, R/o. Bayejabai Jeur,
Ahmednagar
 3. Sayyad Gaus Sayyad Noor,
Age : 22 years, R/o. Surya Nagar,
Aurangabad Road, Ahmednagar
 4. Bhausahab Mohan Sable,
Age : 28 years, R/o. Kerul, Tal. Ashti,
Dist. Beed
 5. Mahendra Sevakram Mahajan,
Age : 24 years, R/o. As above.
- .. Respondents.

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Shri. S.D. Ghayal, Addl. P.P. for the Appellant / State
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WITH
CRIMINAL APPLICATION NO.1863 OF 2019

IN
CRIMINAL APPEAL (ST.) NO.585 OF 2019

.....
WITH
APPLICATION FOR LEAVE TO APPEAL BY STATE NO.124 OF 2019

The State of Maharashtra
Through Police Inspector,
Police Station, Peth Beed,
Taluka & Dist. Beed

.. Applicant

Versus

1. Rajaram Appana Mane
Age : 57 years, R/o. Ghogde Wasti,
Bhawani Peth, Solapur

2. Sachin Vitthal Suryawanshi
Age : 32 years, occu : Agriculture,
R/o. Kerul, Tal. Ashti, Dist. Beed
3. Dinesh Vitthal Kekan,
Age : 32 years, Occu : Agriculture,
R/o. Hanuman Nagar, Manmad,
Tal. Nandgaon, Dist. Nasik
4. Sahikh Adam Sk. Akbar,
Age : 37 years, R/o. Shivneri Colony, Ranjangaon,
Shembapunji, Tal. Gangapur,
Dist. Aurangabad
5. Krushna Mohan Sable,
Age : 24 years, R/o. Kerul,
Tal. Ashti, Dist. Beed
6. Sandeep Murlidhar Kale,
Age : 20 years, R/o. As above.
7. Dadasaheb Haribhau Phalle,
Age : 25 years, R/o. As above.
8. Nitin Sanjay Shinde,
Age : 25 years, R/o. Bayejabai Jeur,
Ahmednagar
9. Sayyad Gaus Sayyad Noor,
Age : 22 years, R/o. Surya Nagar,
Aurangabad Road, Ahmednagar
10. Bhausahab Mohan Sable
Age : 28 years, R/o. Kerul,
Tal. Ashti, Dist. Beed
11. Mahendra Sevakram Mahajan
Age : 24 years, R/o. As above.
12. Ashok Haribhau Phalle,
Age : Major, R/o. As above.

.. Respondents

.....

Shri. S.D. Ghayal, Addl. P.P. for the Applicant / State

.....

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

**RESERVED ON : 08.05.2024
PRONOUNCED ON : 04.07.2024**

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

. These Appeals and Applications arise out of the Judgment and Order dated 19.03.2019 passed by the learned Additional Sessions Judge, Beed in Sessions Case No.16/2012 convicting and sentencing the Accused Nos. 4, 11 to 14 for the offence punishable under Sections 147, 148, 302 r/w. Sec.149 of the Indian Penal Code (for short, 'I.P.C.') and acquitting Accused Nos.3 to 9 and 11 to 15 for the offence punishable under Sections 109, 120B, 201, 212, 307 of the IPC and for the offence punishable under Sections 3 r/w. Sec. 25, 4 r/w. Sec. 25 of the Arms Act and for the offence punishable under Sections 37 (1)(3) r/w. Sec. 135 of the Maharashtra Police Act. The case against Accused No.17 is dropped on the basis of report under Section 169 of the Code of Criminal Procedure (hereinafter referred to as the 'Cr.P.C.'). The Police Station Peth, Beed was directed to file separate Charge-sheet against absconding Accused Nos.10 and 16, on their arrest. The fine amount of Rs.1,00,000/- (Rupees One Lakh Only) is directed to be paid to the wife of deceased as compensation *vide* Section 357 of the Cr.P.C.

2. Criminal Appeal Nos. 344 of 2019 and 39 of 2024 are under Section 374 (2) of the Cr.P.C. by the convicted Accused Nos.4, 11, 13, 14

and convicted Accused No.12, respectively. Application for Leave to Appeal by State No.124 of 2019 is against the acquittal recorded by the Trial Court. Criminal Application No.1863 of 2019 is for condonation of delay by the State in preferring the Appeal under Section 377 of the Cr.P.C. for enhancement of punishment awarded by the Trial Court.

The Prosecution's case as revealed from the Police Report is as under :

2.1. In the elections of Grampanchayat of village Sheri (bk.), Tal. Ashti, Dist. Beed held on 30.08.2010, panel of Accused No.1 - Sunil Narayan Nath and Accused No.2 - Sunil Baburao Suryawanshi (both discharged by this Court *vide* order dated 07.04.2014 and 21.10.2013, respectively) lost the election and the panel of deceased Balu @ Ravindra Khakal (hereinafter referred to as 'deceased Balu') was elected. Both the said discharged Accused conspired with Accused No.3 to eliminate deceased Balu. The said conspiracy was hatched in one hotel in village Kerul on 10.09.2010 wherein the Accused Nos.4, 13, 15, 16 and Sunil Baburao Suryawanshi were present.

2.2. On 26.09.2010 in village Kerul, quarrel took place between deceased Balu on one side and Accused No.4 on the other side which turned violent. Accused No.4 lodged the Report for the said incident against deceased Balu and others with the Ashti Police Station and Crime No.122/2010 came to be registered for the offence punishable

under Sections 147, 148, 149, 326, 452, 324, 504, 506 of the I.P.C. r/w. Section 25 (1) of the Indian Arms Act. For the said incident, deceased Balu lodged the Report with Ashti Police Station against Accused No.4 and others and Crime No.123/2010 came to be registered for the offence punishable under Sections 147, 148, 149, 326, 324, 504, 506 of the IPC r/w. Section 25 (1) of the Indian Arms Act. The Accused No.3, who was posted as Assistant Police Inspector at Ashti Police Station, filed Charge-sheet in the aforementioned Crime No.122/2010 and submitted 'B' summary report in the aforesaid Crime No.123/2010.

2.3. One Crime bearing No.124/2010 was registered against deceased Balu for the offence punishable under Section 302 r/w. 34 of the IPC with the Ashti Police Station on the report lodged by Vitthal Dhondiba Suryawanshi for murder of wife of Accused No.4. Due to that there was enmity between deceased Balu and Accused No.4. The discharged Accused Sunil Nath and Sunil Suryawanshi, by taking benefit of the said rivalry, successfully made Accused No.4 to be on their side.

2.4. On 10.10.2010 Accused No.3 and the discharged Accused hatched conspiracy and instigated Accused Nos.4, 11, 12, 13, 14, 15 and 16 by informing them about the conspiracy.

2.5. On 11.10.2010 between 19:00 hrs and 19:30 hrs when deceased Balu along with witnesses had gone for offering prayers at the

temple in village Kerul on the day of *Kojagiri Purnima* and reached near Ambika Dairy, Accused Nos.4, 11, 12, 13, 14, 15 and 16 arrived on the spot in four wheeler and two wheeler with Pistol, Sword, Kukri, Iron Pipe and Knife and assaulted deceased Balu and the witnesses. Due to the assault, Balu died on the spot. Since it was the time of *Yatra* (fair) public gathered and the Accused persons fled.

2.6. The police were informed about the incident. The police came on the spot and shifted the dead body of Balu to the hospital. Inquest was conducted. Eye witness – Pravin Gondkar lodged the Report with Ashti Police Station in respect of the said incident and Crime No.149/2011 came to be registered for the offence punishable under Sections 302, 307, 109, 147, 148, 149, 323, 120B, 212, 201 of the IPC, Sections 3 r/w. 25, 4 r/w.25, 5 r/w. 27 of the Indian Arms Act and Section 135 of Bombay Police Act against the known and unknown Accused persons.

2.7. During the course of investigation, the body was sent for Post-mortem, the Spot Panchanama was drawn, the statement of the witnesses came to be recorded, the clothes of deceased came to be seized, the Accused (except absconding Accused) came to be arrested, the vehicles used in the crime came to be seized, the weapons used in the crime came to be seized at the instance of the Accused, the clothes of

the Accused persons came to be seized, Test Identification Parade (T.I.P) was conducted for the unknown Accused, mobile phones of some of the Accused came to be seized, the Post-mortem Report and the Injury Certificates of the injured witnesses came to be collected, the Call Detail Records (CDRs) of mobile phones of some of the Accused and others were collected, the Sanction to prosecute Accused No.3, being the public servant was issued, the muddemal was sent to the Chemical Laboratory and on completion of the investigation, the Charge-sheet and Supplementary Charge-sheet came to be filed.

2.8. On committal, the learned Additional Sessions Judge framed the Charge against Accused Nos.3 to 9, 11 to 16 *vide* Exh.131/C, 146/C and 151/C for the offence punishable under Sections 302 r/w. 149, 147, 148, 109 r/w. 149, 212 r/w. 149, 201 r/w. 149, 307 r/w. 149, 120-B of the IPC, Sections 25 (3), 4/25 of the Indian Arms Act and Sections 37 (1)(3) r/w. Section 135 of the Bombay Police Act. The Charged Accused pleaded not guilty and claimed to be tried. To prove the Charge, Prosecution examined in all thirty four (34) witnesses and brought on record the documents. After the Prosecution closed their evidence, the learned Trial Court recorded the Statement of Accused persons under Section 313 (1)(b) of the Cr.P.C. The Accused persons denied the Prosecution's case. On appreciating the evidence on record the learned Trial Court passed the impugned Judgment and

Order.

3. Heard learned Advocate for the convicts / Appellants and learned Addl. P. P. for the State / Prosecution. Their submissions and authorities relied upon by them would be considered at the relevant time while appreciating the evidence in the later part of Judgment.

4. It is submitted by the learned Addl. P. P. that there is ample evidence on record which establishes the Homicidal Death of Balu. The Homicidal Death of Balu is not seriously disputed by learned Advocates for the Appellants as seen from their submissions. On this point, the Prosecution is relying upon the evidence of Inquest Panch and the Medical Officer who conducted the Post-mortem.

5. Evidence of PW2 – Santosh Baban Shelke show that on 11.10.2011 he was called to Civil Hospital at Ashti where body of deceased Balu was shown to him. Dead body was identified by Pravin Gondkar (PW11). There were twenty nine (29) injuries on the dead body. The injuries were on forehead, chest, stomach etc. The Inquest at Exh.169 was prepared upon which he signed. He identified the said inquest. His cross-examination show that he was not the relative of the deceased. The tenor of cross-examination show that drawing of Inquest in the presence of this witness in the hospital was not seriously disputed. He denied the suggestion that his signature was taken in the police

station. Nothing has come in the cross-examination to discard this piece of evidence.

6. The evidence of PW19 – Nitin Subhash Ninal show that he was qualified as M.B.B.S. and M.D. in Forensic Medicine. On 12.10.2011 he was serving as P.G. student at Ghati Hospital, Aurangabad and body of deceased Balu was referred by ASI B. B. Jadhav from Ashti Police Station for Post-mortem examination. On that day at about 09:15 a.m. the body was identified by Pravin Gondkar (PW11). The Post-mortem was conducted by him and others between 01:40 p.m. and 02:40 p.m. He found twenty six (26) surface injuries on the dead body which were mentioned in Column No.17 of the Post-mortem notes. He noticed the internal injuries which were mentioned in Column Nos.19 to 21 of Post-mortem notes which were corresponding to external injuries. All the injuries were ante mortem. The viscera was reserved for chemical analysis. The cause of death was '*shock and hemorrhage due to injury to vital organs*'. He identified the Post-mortem Report at Exh.427 and also identified provisional Post-mortem Report-cum-Death Certificate at Exh.428. He deposed that all the injuries were possible by sharp weapon like Sword, Kukry and Knife and were sufficient to cause death. He identified letter at Exh.429 seeking his opinion by the Investigating Officer and the letter at Exh.430 upon which he gave his opinion that the injuries were possible by the weapons like Sword, Kukry and iron

pipe. He deposed that the injuries were possible by Article 20 i.e. Sword.

7. The tenor of cross-examination of PW19 – Nitin Subhash Ninal show that the injuries on the dead body and possibility of the same being caused by sharp weapon were not seriously disputed. He denied the suggestion that he was not sure about the probable cause of death and therefore, the viscera was sent for histopathological examination. Through this evidence on record the Prosecution has established the injuries on the dead body and the cause of death. The Post-mortem Report show that the injuries referred therein were incised wounds, chopped wounds, stabbed wounds and lacerated wounds.

8. From the above discussed evidence on record, the Prosecution has established that death of Balu was due to the injuries suffered by him. No more discussion is required on this point. From the above referred clear evidence on record, the Homicidal Death of Balu is proved by the Prosecution.

9. It is submitted by the learned Advocates for the convicts / Appellants that the witnesses examined by the Prosecution as the eye witnesses are in fact not the eye witnesses as is clear from the evidence on record. The witnesses examined as the eye witnesses are the interested and inimical witnesses. The First Information Report is

written by the relative of the deceased who was in the police department and the same is shown to be given by Pravin Gondkar (PW11). The medical evidence in respect of the injury to Pravin Gondkar (PW11) is not trustworthy. No description of unknown persons was given in the FIR. There was no immediate disclosure of the incident, though Pravin Gondkar (PW11) claimed to have witnessed the incident and there was delay of six (6) hours in lodging the Report. There is no substantive evidence by examining the Executive Magistrate to prove that the T.I.P. was conducted. From the evidence of eye witnesses it becomes clear that they have not witnessed the incident and are shown to be so. The place of incident was public place and though the public had gathered on the spot of incident, no independent witness was examined. There was no electricity at the relevant time where the incident had taken place and therefore, no reliance can be placed on the testimony of the eye witnesses. The learned Trial Court has rightly discarded the testimony of eye witnesses, however convicted the Appellants on the basis of blood stains on their clothes. Leaned Advocates for the convicted Appellants relied on the following Judgments in support of their contentions:

(a) Hem Raj and Others vs. State of Haryana, AIR 2005 SC 2110

wherein it is observed as follows:

‘the fact that no independent witness though available, was examined and not even an explanation was sought to be given

for not examining such witness is a serious infirmity in the Prosecution case. Amongst the independent witnesses one who was very much in the know of things from the beginning was not examined by the Prosecution. Non-examination of independent witness by itself may not give rise to adverse inference against the Prosecution. However, when the evidence of the alleged eye-witnesses raise serious doubts on the point of their presence at the time of actual occurrence, the unexplained omission to examine the independent witness would assume significance.”

(b) Sunil Kundu and another vs. State of Jharkhand, 2013 AIR SCW

2278 wherein it is observed as under:

‘the evidence of eye witnesses was that the Accused fatally assaulted deceased with fire arms, knife and iron rod and also resorted to blank firing to drive away people. However, neither gun shot injury was found on body of deceased nor any cartridge was recovered from the place of incident. The evidence of eye witnesses as to weapons used by each Accused was inconsistent which was held to be not minor inconsistency and eye witnesses were the relatives of deceased and their presence was held to be doubtful’. It is further held that, ‘the testimony of eye witnesses was totally inconsistent with the medical evidence and suffering from improvements and therefore the rule that ocular evidence has precedence over medical evidence cannot be applied. The Prosecution has to prove its case beyond reasonable doubt and it cannot take support from the weaknesses of the defence case.’

(c) Shivaji Dayanu Patil vs. State of Maharashtra, AIR 1989 SC 1762

wherein it is observed thus:

‘the conduct of the wife of deceased who was examined as the eye witness was found unnatural as she did not name the assailant to anybody after seeing the incident and disclosed only when her statement was recorded by the Investigating Officer and her statement recorded during investigation was different from her statement given at Trial’.

(d) Ashraf Hussain Shah vs. State of Maharashtra, 1996 CRI.L.J. 3147

wherein it is observed as follows:

‘the Informant and the P.W. No.2 who were friends of the deceased, their conduct in not reporting to the police the incident, although

they were at the police station for 1 ½ hours, was held to be highly unnatural and improbable. The said conduct was held to be sufficient to hold that they did not see the incident.’

(e) **Ramesh Prasad Thakur & Anr vs. Ramchandra Singh, AIR 1997**

SC 3818 wherein it is observed as under:

‘it was the Prosecution’s case that the deceased and the persons with him were attacked by the assailants and two injured had received three minor injuries. It was found that none of the said injuries was caused by a weapon with a sharp edge and the contention of defence that the injured could not have escaped unhurt and two injured witnesses would have received more injuries’.

(f) **Criminal Appeal No.705 of 2011, Sk. Bilal vs. the State of**

Maharashtra, wherein the observations in the case of **Rana Partap vs.**

State of Haryana [(1983) 3 SCC 327] in respect of behaviour of the

witnesses are reproduced as under:

“20. In **Rana Partap v. State of Haryana [(1983) 3 SCC 327 : 1983 SCC (Cri) 601]**, while dealing with the behaviour of the witnesses, this Court has opined thus: (SCC p. 330, para 6)

“6. ... Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.”

21. In **State of H.P. v. Mast Ram [(2004) 8 SCC 660 : (2010) 1 SCC (Cri) 1165]** it has been stated that there is no set rule that one must react in a particular way, for the natural reaction of man is unpredictable. Everyone reacts in his own way and, hence, natural human behaviour is difficult to prove by credible evidence. It has to be appreciated in the context of given facts and circumstances of the case. Similar view has been reiterated in **Lahu Kamlakar Patil v. State of Maharashtra [(2013) 6 SCC 417 : (2012) 12 Scale 710]**.

22. Thus, the behaviour of the witnesses or their reactions would differ from situation to situation and individual to individual. Expectation of uniformity in the reaction of witnesses would be unrealistic but the court cannot be oblivious of the fact that even taking into account the unpredictability of human conduct and lack of uniformity in human reaction, whether in the circumstances of the case, the behaviour is acceptably natural allowing the variations. If the behaviour is absolutely unnatural, the testimony of the witness may not deserve credence and acceptance."

(g) **Ashraf Hussain Shah vs. State of Maharashtra**, 1996 Cri.L.J. 3147

wherein the observations in the case of Ganesh Bhawan Patel vs. State of Maharashtra, AIR 1979 SC 135 in respect of the delay are reproduced as follows:

"15 Delay of a few hours, simpliciter, in recording the statements of eye-witnesses may not by itself, amount to a serious infirmity in the Prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eye-witnesses to be introduced."

"18. Normally, in a case where the commission of the crime is alleged to have been seen by witnesses who are easily available, a prudent investigator would give to the examination of such witnesses precedence over the evidence of other witnesses."

(h) **Badam Singh vs. State of M.P.**, AIR 2004 SC 26 wherein it is

observed as under:

'the mere fact that the witnesses are consistent in what they say is not a sure guarantee of their truthfulness. The High Court being final court of fact who critically scrutinize the evidence in some detail. If the Court comes to the conclusion that the conduct of the witnesses is such that it renders case of the Prosecution doubtful or incredible, or that their presence at the place of occurrence as eye witnesses is suspect, the Court may reject their evidence.'

(i) **Rajeevan and Another vs. State of Kerala**, (2003) 3 SCC 355

wherein the observations in respect of delay in lodging the FIR and its consequences discussed in the case of **Thulia Kali vs. State of T.N.**, (1972) 3 SCC 393 are considered and it is observed that :

‘First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the Accused: The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained.’

10. It is submitted by learned Addl. PP. that the Prosecution’s case is based on direct evidence. The eye witnesses are also the injured witnesses and their evidence would stand on higher pedestal and cannot be ignored. One of the eye witnesses is independent witness and consistent with the first Informant. The eye witnesses have seen the assailants from short distance. Though some of the assailants were unknown persons, the eye witnesses had the opportunity to observe them closely and they were identified in the TIP. In view of Section 291A of the CrPC, TIP is admissible in evidence without formal proof by the Executive Magistrate concerned. Though the evidence on record show that there was no electric supply in village at the time of the

incident, it was the *Kojagiri Purnima* and the incident was seen by the eye witnesses in the headlights of the vehicles. The testimony of the eye witnesses is corroborated by medical evidence. The evidence on record also show the enmity between the parties. The learned Trial Court has committed an error in discarding the testimony of the eye witnesses. The evidence on record establishes the Charge against all the Accused persons.

11. Learned Advocate appearing for Respondent No.2 i.e. the wife of the deceased in Criminal Appeal No.344 of 2019 supported the submissions made by learned Addl. PP

12. Learned Addl. PP and learned Advocate for Respondent No.2 in Criminal Appeal No.344 of 2019 relied on the following Judgments in support of their submissions:

- (a) **Criminal Appeal Nos.487, 525, 528 of 2018 dated 21.06.2023 of the Nagpur Bench of Bombay High Court**, wherein the evidence of eye witness was believed and the conviction was maintained.
- (b) **Criminal Appeal No.1986 of 2008, Shiv Murat Kol vs. State of Madhya Pradesh dated 07.05.2018 decided by the Hon'ble Madhya Pradesh High Court** holding that the evidence of T.I.P cannot be discarded on the ground that the concerned Executive Magistrate was not examined to prove the

proceedings of T.I.P. in view of the provisions of Section 291A of the Cr.P.C. which prescribes that such documents can be considered in evidence without formal proof by the Executive Magistrate concerned.

(c) **Ashok Debbarama @ Achak Debbarama vs. State of Tripura, 2014**

AIR SCW 1628 in Para No.28, it is observed as follows :

“28. In *Commonwealth v. John W. Webster* 5 Cush. 295, 320 (1850), Massachusetts Court, as early as in 1850, has explained the expression “reasonable doubt” as follows:

“Reasonable doubt ... is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction.”

In our criminal justice system, for recording guilt of the Accused, it is not necessary that the Prosecution should prove the case with absolute or mathematical certainty, but only beyond reasonable doubt. Criminal Courts, while examining whether any doubt is beyond reasonable doubt, may carry in their mind, some “residual doubt”, even though the Courts are convinced of the Accused persons’ guilt beyond reasonable doubt. For instance, in the instant case, it was pointed out that, according to the Prosecution, 30-35 persons armed with weapons such as fire arms, dao, lathi etc., set fire to the houses of the villagers and opened fire which resulted in the death of 15 persons, but only 11 persons were charge- sheeted and, out of which, charges were framed only against 5 Accused persons. Even out of those 5 persons, 3 were acquitted, leaving the appellant and another, who is absconding. Court, in such circumstances, could have entertained a “residual doubt” as to whether the appellant alone had committed the entire crime, which is a mitigating circumstance to be taken note of by the court, at least when the court is considering the question whether the case falls under the rarest of rare category.”

(d) **Dalip Singh and Ors. v. The State of Punjab (AIR 1953 SC 364)**

wherein following observations are made:

“26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the Accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause' for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.

27. This is not to say that in a given case a Judge for reasons special to that case and to that witness cannot say that he is not prepared to believe the witness because of his general unreliability, or for other reasons, unless he is corroborated. Of course, that can be done. But the basis for such a conclusion must rest on facts special to the particular instance and cannot be grounded on a supposedly general rule of prudence enjoined by law as in the case of accomplices.”

13. There cannot be any dispute in respect of the legal proposition enumerated in the above referred Judgments. In the case in hand, from the evidence available on record, there is no dispute on the following aspects:

- (i) The deceased Balu was the maternal uncle of the Informant (PW11 – Pravin Gondkar).
- (ii) Father of informant (PW11 – Pravin Gondkar) and brother of deceased Balu were working in the police department as Police

Sub Inspector and Police Head Constable, respectively and posted at Ahmednagar.

- (iii) Due to grampanchayat elections, deceased Balu and some of the Charge-sheeted Accused i.e. Accused Nos.1, 2 and 4 were on inimical terms.
- (iv) Prior to the incident in question, the incident of assault had taken place on 26.09.2010 between deceased Balu and Sunil, Suresh, Satish and eight others and counter First Information Reports were registered for the said incident.

14. Prosecution examined PW11 – Pravin Gondkar, PW12 – Shaikh Shaker Shaikh Hidayat, PW13 – Sachin Devidas Gore and PW14 – Chagan Waman Jagdale as the eye witnesses. The Prosecution's case largely hinges on the testimony of these four witnesses.

15. PW11 - Pravin Gondkar's evidence show that deceased Balu was his maternal uncle and was residing at Khakalwadi. He was running workshop at Pune. He came to know that on 26.09.2010 there was incident of assault by Sunil, Suresh, Sachin and eight others on deceased on account of defeat in grampanchayat elections and FIR of that incident was lodged and the crime was investigated by Accused No.3 – API Mane. API Mane filed 'B' summary in respect of the said crime which was registered at the instance of deceased Balu.

15.1. In his further evidence he deposed that in the morning of 11.10.2011 he had come to Khakalwadi from Pune and as there was *Yatra* (fair) of Goddess on the eve of Kojagiri Purnima he along with five persons proceeded on two motorcycles from Kada at 05:30 p.m. for Darshan of Goddess. He was accompanied by Shaker Shaikh (PW12), Ajit Ghule, Arun Ovhal, Sachin Giri (PW13) and deceased Balu. They all took the Darshan of Goddess and after the Darshan they talked with Shakher Shinde and Chhagan Jagdale and thereafter they came near Ambika Milk Dairy at Kerul at about 07:30 p.m. His motorcycle was in front. One Indica Car bearing Registration No. MH-12-AQ-9274 came in front of him and one two wheeler speedily came behind his vehicle. Accused No.4 got down from the Indica car with Pistol in his right hand and Kukri in his left hand. Accused No.13 got down from the Indica car with Revolver in his right hand and Sword in left hand. Behind him, Accused Nos.14 and 15 got down from the vehicle with Swords. He asked deceased Balu to run away. Accused No.4 fired in their direction. Deceased got down from his motorcycle. Accused No.4 came running towards them and gave blow of Kukri in the stomach of deceased Balu. Accused Nos.13 to 15 gave blow of Sword on deceased Balu. Accused No.4 fired another shot towards deceased Balu. Thereafter, unknown persons (Accused Nos.11 and 12) came on motorcycle and started beating him and Accused No.13 had shown them the Revolver and therefore they could not move. The unknown persons started beating

deceased Balu. Some persons came from Kada side and after seeing the incident, they shouted. The assaulters started running by saying that Sunil Nath (discharged Accused No.1), Sunil Suryawanshi (discharged Accused No.2) and Mane (Accused No.3) were behind them and they will look into the matter as per the earlier matter and their work is over and the assaulters ran away leaving their vehicles. He ran towards deceased who was having injuries on face and all over body and blood was oozing. Movements of deceased were stopped. Deceased Balu died on the spot. Ajit Ghule gave information to Ashti Police Station on phone and the police came. His further evidence show that, the panchanama of the dead body was prepared and dead body was sent to Government Hospital, Ashti. He went with the dead body. The police called him near dead body at 09:00 p.m. for identifying the dead body for inquest. Thereafter, he went to the police station and lodged the First Information Report which was at Exh.233. As he was injured, police gave him the letter for medical examination and therefore, he went to Government Hospital, Ashti and received treatment from the doctor. He sustained injuries on left hand little finger, left leg and tenderness over the body.

15.2. His further evidence show that on 12.10.2011 at about 04:00 p.m. he was called by the Deputy Superintendent of Police in Ashti Police Station to show the spot. He had shown the spot which was on Khilad road in front of Ambika Milk Dairy. His supplementary

statement was recorded on 14.10.2011 wherein he gave the description of the three unknown persons. His further evidence show that on 04.11.2011 he was called in District Prison, Beed for T.I.P. wherein he identified Accused Nos.11 and 12. Again his supplementary statement was recorded. He identified the Sword and Pistol which were Articles-20 and 12 as the same. He identified the Accused who were present in the Court.

15.3. From the above discussed evidence of PW11 - Pravin Gondkar, it is seen that according to PW11 - Pravin Gondkar, Report was lodged at his instance. However, in his cross-examination he deposed that he did not get the crime number of incident dated 26.09.2010 and he was not knowing in which police station and under what section the crime was registered in respect of the incident dated 26.09.2010. His cross-examination show that crime number and section of the incident dated 26.09.2010 were mentioned in the Report which he was unable to tell from where he got that information. He deposed that he did not tell the police about the crime number and section while lodging the Report and he was unable to tell on what basis the police mentioned the same. It is thus clear that the aforesaid contents of the Report were not as per the Informant (PW11 – Pravin Gondkar). It is the case of defence / Accused, as seen from the suggestions given, that the said Report was written in the handwriting of Sandeep Khakal (brother of deceased Balu) who was in the police department. The Prosecution has not

examined the Policeman who scribed the Report at Exh.233. In the light of said cross-examination, it was necessary for the Prosecution to examine the Policeman who scribed the said Report. It is needless to state that the report is to be taken as per narration of the informant. When some thing, not reported by the informant finds place in the reports, the report falls within the cloud of suspicion.

15.4. Though PW11 - Pravin Gondkar deposed of witnessing the incident, in cross-examination he admitted that he was standing near dead body, police came on the spot and he did not make any complaint before police. He deposed that he was unable to tell whether the police made any enquiry about the incident with the people who had gathered on the spot. He further admitted that dead body of Ravindra was taken to Ashti Police Station in the police vehicle and he was present in the vehicle and they reached Ashti Civil Hospital between 08:30 to 09:00 p.m. He further admitted that he did not make any complaint to police who were present in the Ashti Hospital in respect of the incident. His further cross-examination show that he lodged the Report with Ashti Police on next day after 03:30 a.m. From this, it is clear that though the police had come on the spot of incident and carried the dead body in the police vehicle to the hospital and PW11 – Pravin Gondkar was with the police all throughout, he did not utter anything in respect of the incident to the police. This conduct of PW11 – Pravin Gondkar who was closely related to deceased and not reporting the incident to the police who

were very much present for considerable time, creates reasonable doubt about he being the eye witness to the incident.

15.5. In evidence of PW11 – Pravin Gondkar, he deposed of firing from the firearm by Accused No.4 twice, first one in their direction and second one towards deceased. However, the medical evidence do not show any firearm injury to deceased Balu. The evidence of PW19 – Nitin Ninal, who conducted the Post-mortem on the body of Balu, in clear terms deposed that while conducting Post-mortem he did not notice any firearm injury. Further, in his cross-examination the letter at Exh.431 was confronted to him on which he deposed that he had gone through the said letter issued by ASI B. B. Jadhav dated 12.10.2011 and admitted that in the said letter history of assault was mentioned as assault by firing near neck. The Prosecution has not examined the said ASI B.B. Jadhav, who was the author of the said letter for the best reasons known to them. Further, the evidence of PW21 – Jyoti Kshirsagar, the Investigating Officer who conducted the Spot Panchanama it has come that two cartridges were not found on the spot of incident.

15.6. As regards the evidence of PW11 - Pravin Gondkar regarding assault on him by the unknown assaulters, in his cross-examination he admitted that he was injured in the night of incident and so he took treatment in the hospital and at that time he told the

doctor as to who had caused the injury and its reasons and the doctor had written down the said information. The said admission do not lead to the only inference that the defence admitted the injury on PW11 – Pravin Gondkar in the very incident, as contended by learned Addl. P. P.

15.7. The Prosecution has brought on record medical evidence in respect of the injury on PW11 - Pravin Gondkar by examining PW17 – Balaji Pandurang Gutte, who was the Medical Officer at Rural Hospital, Ashti. In his evidence he deposed that PW11 – Pravin Gondkar had come to the clinic where he examined him and found three injuries in the nature of abrasion on right index finger, left leg upper 1/3rd and left ankle joint which were simple in nature and age of injuries was within 24 hours. The Injury Certificate at Exh.410 is brought on record in the evidence of this witness which was issued by him. Though in his evidence PW17 – Balaji Gutte deposed that history narrated to him was assault on 11.10.2011 at 07:30 p.m. the same is not corroborated by Exh.410 wherein the history of assault is shown as on 07.11.2011. He admitted that as per Medical Jurisprudence of Dr. Parikh it is mandatory to mention in the MLC brief history of the case as alleged beaten by whom, with what, when and where and further admitted that all the facts were not mentioned in the MLC at Exh.410. He further admitted that the injuries mentioned in MLC at Exh.410 were not visible and it could be seen on careful examination. His cross-examination further show that the date of issuance of MLC was not mentioned on the

certificate i.e. Exh.410 and it was not issued immediately after making entry in MLC register and after examining the injured. He admitted that after seeing the nature of injury, they mention that it is fresh within 6 (six) hours, within 12 (twelve) hours etc. As seen from his evidence, he deposed that the injuries were within 24 (twenty four) hours. Had the injury been caused in the incident which according to PW11- Pravin Gondkar took place at 07:30 p.m., there would have been mentioned about the freshness and age of injuries within 6 (six) or 12 (twelve) hours. Thus, the evidence in respect of injury on PW11 – Pravin Gondkar is shaky and do not conclusively establish that it was caused only and only in the incident.

15.8. Though PW11 - Pravin Gondkar deposed of identifying Accused Nos.11 and 12 in the T.I.P. in District Prison, Beed on 04.11.2011, admittedly there is no T.I.P. memo in evidence. It is true that pursuant to the provisions of Section 291A of the Cr.P.C. the said document is admissible, however, the said exercise of bringing the said document in evidence by giving exhibit number is not done. It was the duty of the Prosecution and / or of the learned Trial Court. Thus, the evidence in respect of identification by PW11 – Pravin Gondkar of unknown assaulters in T.I.P. is liable to be rejected for want of substantive evidence of the witness who conducted the T.I.P.

16. Evidence of PW12 – Shaikh Shaker Shaikh Hidayat show

that he knew deceased Balu and also PW11 – Pravin Gondkar. The incident occurred between 07:00 and 07:30 p.m. on 11.10.2011 in front of Ambika Dairy, Kerul and at that time he accompanied deceased Balu, Pravin Gondkar (PW11), Ajit Ghule, Arun Ovhal and Sachin Veer. After the *Darshan*, he, Pravin and Balu were proceeding to the house of Pravin (PW11) on motorcycle. Ajit Ghule and Arun were following them on another motorcycle. When they reached near Ambika Dairy, one Indica car abruptly came and blocked their way. Accused No.4 got down from the car and he was possessing Revolver in his left hand and Kukri in right hand. PW11 – Pravin Gondkar asked deceased Balu to run away from the spot. Accused No.4 rushed towards deceased Balu and assaulted him on stomach with Kukri. Accused No.4 also fired one round towards him and PW11 - Pravin Gondkar. Thereafter, Accused No.13 got down from the car and he was having Pistol and Sword in his hand. Thereafter, Accused Nos.14, 15 and 16 got down from the car. They all were possessing Swords in their hands. Accused No.13 assaulted deceased Balu on right side of stomach with the Sword and also pointed his Pistol towards them. Accused No.15 and Accused No.16 assaulted on both the thighs of deceased Balu by knives. Thereafter, three unknown persons came on motorcycle on the spot. Out of the three unknown persons, one assaulted deceased Balu with Sword on his right shoulder and head, the second unknown person assaulted deceased Balu by Sword on his right chest and third unknown person

assaulted him and PW11 – Pravin Gondkar by iron pipe on back, shoulder and wrist. After deceased Balu fell down, Accused No.14 sat on his chest and assaulted him on his eyes, neck and chest by Sword and so Balu died on the spot. Thereafter, all the Accused along with their weapons went towards water tank road. The said incident took place due to the grampanchayat election. In his evidence he identified the Accused who assaulted him. He deposed that Accused No.9 and Accused No.8 were not present at the time of the incident. He identified Sword and Pistol which were Articles – 20 and 12, respectively as the same which were used in committing the crime.

16.1. His further evidence show that on 13.10.2011 the police recorded his statement. On 04.11.2011 he was called in the jail wherein he identified two (2) Accused persons out of twelve (12) persons in the identification parade. His statement was recorded on 05.11.2011 wherein he told the names of the Accused to whom he had identified in identification parade. On 03.01.2012 his statement under Section 164 of the Cr.P.C. was recorded before the concerned Magistrate, which was at Exh.370.

16.2. Though PW12 – Shaikh Shaker Shaikh Hidayat deposed of witnessing the incident, he remained silent for two days. He admitted that after he saw Balu Khakal was dead, police came there after half an hour and at that time he did not give any information to the police

regarding the incident. He further admitted that the body of deceased Balu Khakal was carried in ambulance in which he also went to the Ashti Hospital where police were present and he did not give any information to the police regarding the incident. He further admitted that he attended the funeral of deceased Balu Khakal and police were present at that time. His evidence show that even while recording his statement on 13.10.2011 i.e. after 2 days, the persons by name Arun Ovhal, Sachin Gire, Ajit Ghule and Chagan Jagdale were present in the Police Station. Suggestion is given that since he was not the eye witness to the incident and reached the spot when incident was over, therefore he did not inform the police immediately. This conduct of PW12 – Shaikh Shaker Shaikh Hidayat gives rise to reasonable doubt about his presence on the spot of incident.

16.3. His cross-examination show that, his evidence that, the Accused No.4 got down from the car, he rushed towards deceased Balu and assaulted him, then he fired one round towards him and Pravin (PW-11), thereafter Accused No.13 stepped down from the Indica car, thereafter Accused Nos.14, 15 and 16 stepped down from the car and three unknown persons came on motorcycle and one of them assaulted Balu by Sword and the person stepped down from Indica car was possessing Sword in his hand, were the omissions in his statement given to the police. Thus, the said evidence on material aspects is not corroborated by his previous statement.

16.4. Further, the evidence of PW12 - Shaikh Shaker Shaikh Hidayat that he was the witness in the case filed by deceased Balu against Accused No.4 establishes that this witness was on inimical terms with Accused No.4.

16.5. Evidence of PW12 - Shaikh Shaker Shaikh Hidayat that he and PW11 – Parvin Gondkar were assaulted by unknown persons with iron pipe on back, shoulder and wrist is contrary to the medical evidence. The evidence of PW17 - Balaji Gutte who was the Medical Officer at the relevant time at Rural Hospital, Ashti show that he examined PW12 - Shaikh Shaker Shaikh Hidayat on 12.10.2011 around 03:15 a.m. and found one simple injury in the nature of contusion on right forearm middle 1/3rd, size 1/4th c.m. x 1/4th c.m. The age of the said injury was within twenty four (24) hours caused by hard and blunt object. The Injury Certificate at Exh.411 is brought on record in the evidence of this Medical Officer. PW17 -Balaji Gutte, Medical Officer admitted that the injury mentioned in MLC at Exh.411 was not visible and it can be seen on careful examination. PW12 – Shaikh Shaker Shaikh Hidayat in his evidence deposed that he had muffled injury. PW17 - Balaji Gutte admitted that all the facts are not mentioned in MLC at Exh.411 and he was aware that as per the medical jurisprudence of Dr. Parikh it was mandatory to mention in the MLC brief history of the case as alleged beaten by whom, with what, when and where. He further admitted that he had not mentioned the date of issuance of the

said MLC certificate. He further admitted that each doctor is having separate MLC book and MLC does not bear the serial number.

16.6. Further, the evidence of PW19 – Nitin Subhash Ninal, who had conducted the Post-mortem on deceased Balu, show that, if any person assaults by iron pipe with force, then wheel marks may appear on body corresponding to the size of iron pipe. The evidence in respect of injuries on PW11 – Pravin Gondkar as dealt above do not correspond to the injuries which may be suffered due to assault by iron pipe. Thus, evidence of PW12 - Shaikh Shaker Shaikh Hidayat about assault on him and PW11 – Pravin Gondkar by iron pipe by unknown assaulters is required to be seen with doubt.

16.7. Further, evidence of PW12 - Shaikh Shaker Shaikh Hidayat show that on the day of incident he and PW11 – Pravin Gondkar were together from 03:00 p.m. to 06:30 p.m. According to PW11 – Pravin Gondkar the incident occurred at about 07:30 p.m. From this the presence of PW12 - Shaikh Shaker Shaikh Hidayat on the spot of incident further becomes doubtful.

16.8. PW12 – Shaikh Shaker Shaikh Hidayat's evidence show that for the identification parade he came to Beed along with PW11 – Pravin, PW13 – Sachin Girhe, Ajit Ghule and Arun Ovhal. He deposed that he identified two Accused persons in the T.I.P, he admitted that they knew that they have to identify Accused No.11 and Accused No.12 in

identification parade. This admission of PW12 - Shaikh Shaker Shaikh Hidayat show that the witnesses knew as to whom they were to identify in the identification parade. Further his evidence do not show as to which Accused he identified at the time of recording his evidence, to whom he identified in the TIP. Thus, the evidence of PW12 – Shaikh Shaker Shaikh Hidayat regarding identification melts down.

17. PW13 - Sachin Devidas Gore deposed that the incident took place on 11.10.2011 in front of Ambika Dairy, Kerul at about 07:15 p.m. to 07:30 p.m. He came from Choba Nimbgaon for Darshan at about 05:30 p.m. He reached at Ambedkar Chowk, Kada and saw Arun Ovhal and Ajit Ghule in the chowk. They both were going for Darshan. At that time, deceased Balu, PW11 – Pravin Gondkar and PW12 – Shaikh Shaker came on one motorcycle. He, Arun Ovhal and Ajit Ghule proceeded on one motorcycle and deceased Balu, PW11 – Pravin Gondkar and PW12 – Shaikh Shaker proceeded on another motorcycle for Darshan of goddess at Kerul. At about 06:30 p.m. they reached village Kerul and took Darshan and thereafter came out of temple at about 07:00 p.m. One Shekhar Shinde and Chagan Jagdale met deceased Balu. Thereafter they proceeded towards Gondkar vasti. By proceeding on the motorcycles they reached Ambika Dairy where he saw Accused No.4 holding Pistol in one hand and blood stained Sword in another hand. They parked motorcycles near electric pole. At that time one unknown healthy person was manhandling PW11 - Pravin and he

gave blow of Sword on the head and right shoulder of deceased Balu. At that time Accused No.15 and Accused No.16 gave blow of knives on both the thighs of deceased Balu. Thereafter unknown person stabbed deceased Balu on his left chest by Sword and deceased Balu fell down. Thereafter Accused No.13 stabbed deceased Balu in the stomach by his Sword. He pointed Pistol towards them. Thereafter, Accused No.14 sat on the chest of the deceased Balu and assaulted him with Kukri on neck, chest and face.

17.1. His further evidence show that on 13.10.2011 he was called at Ashti Police Station where his statement was recorded. On 04.11.2011 he was called at Central Prison, Beed for identification parade. In the identification parade, he identified Accused No.4 and Accused No.8 amongst 12 persons. After identification parade, his statement was recorded. On 05.11.2011 he was called at Ashti Police Station where the police showed him Article-12 Pistol and Article-20 blood stained Sword. He identified the said Articles as the same which were used in the crime. His supplementary statement was recorded. On 03.01.2012 his statement under Section 164 of the Cr.PC. was recorded. He deposed that he identified the Accused to whom he identified in the TIP and he knew rest of the Accused persons in the Court.

17.2. Evidence of PW13 – Sachin Devidas Gore nowhere show that firing had taken place at the time of incident, unlike PW11 – Pravin

Gondkar and PW12 – Shaikh Shaker. Further his evidence is completely silent in respect of assault by unknown persons on PW11 – Pravin and PW12 – Shaikh Shaker. His cross-examination show that when police came on the spot after half an hour, he was present and neither police enquired with him nor he disclosed anything to the police. He admitted that he did not disclose the incident to anybody, before disclosing to the police after two (2) days of the incident. This conduct of PW13 – Sachin Gore appears strange. Further, he deposed that he was unable to tell whether he had seen deceased Balu in injured condition when he reached Ambika Dairy. His evidence recorded before the learned Trial Court in respect of identification is vague. Recording by the learned Trial Court in Para No.5 of the testimony of PW13 – Sachin Gore that, the witness has identified the Accused with their names present before the Court as per their sitting serial number and their names are confirmed, is completely vague. Evidence do not show as to which Accused this witness had identified. Thus, the evidence of PW13 - Sachin Devidas Gore is required to be seen with doubt.

18. PW14 – Chagan Waman Jagdale deposed that he knew deceased Balu and knew of the incident dated 11.10.2011. His evidence nowhere show that he witnessed the incident. His evidence show that on 11.10.2011 when he was going for Darshan in village, deceased Balu met him who was accompanied with PW12 – Shaikh Shaker and PW11 – Pravin Gondkar and paid condolence to him in respect of death of his

brother Dattu. Thereafter, they all three went on the motorcycle and he proceeded for the temple. After he came out of temple, he received information that incident took place near Ambika Dairy. He went there and saw deceased Balu was lying in the pool of blood and PW11 - Pravin Gondkar and PW12 – Shaikh Shaker were standing nearby. The police came on the spot. His statement was recorded on 13.10.2011.

18.1. His cross-examination show that his evidence that he went for Darshan in the temple, was an omission in his police statement which was proved through the Investigating Officer who recorded his statement. In his cross-examination, the topography of the village Kerul is brought on record. It show that there were two temples of goddess in their village. There is no clear evidence as to in which temple the deceased Balu and witnesses had gone.

19. The above discussed evidence of three witnesses i.e. PW11 – Pravin Gondkar, PW12 – Shaikh Shaker and PW13 – Sachin Gore, who are examined as the eye witnesses, is neither concrete nor give the required assurance that they were eye witnesses to the incident. Though PW14 – Chagan Jagdale deposed of meeting deceased, PW11 – Pravin Gondkar and PW12 – Shaikh Shaker, his evidence nowhere show at what time they came across. Evidence of PW21 – Jyoti Laxman Kshirsagar, SDPO who investigated the crime show that she was confronted with the document and she deposed that as per the

document there might be no electricity supply at the time of incident. It is the case of the defence that there was no electric supply in the village at that point of time, as seen from the suggestions given to the witnesses. Though the evidence on record show that on the day of the incident there was Kojagiri Pornima, that is not sufficient to give the required assurance about the identification of the assaulters. Even for the sake of argument, it is accepted that the above witnesses were the eye witnesses to the incident, their identification evidence cannot be accepted in the light of evidence about no electricity at the relevant time. When the testimony of the eye witnesses is found to be shaky and doubtful, the evidence of PW14 – Chagan Jagdale will not take the case of Prosecution any further. On evaluation of evidence of the above referred four witnesses, we come to the conclusion that their evidence cannot form the basis to hold that the Prosecution has proved the Charge.

20. The other evidence brought on record by the Prosecution is in respect of discovery / recovery during the course of investigation. It is submitted by learned Addl. P. P. that the Prosecution has brought on record the evidence of discovery / recovery of clothes, vehicle, weapons at the instance of convicted Appellants. He submitted that this evidence of discovery / recovery becomes relevant under Section 27 of the Indian Evidence Act (for short, 'Evidence Act') and goes to prove the Charge.

21. It is submitted by learned Advocates for the convicted Appellants that the evidence in respect of the discovery / recovery is neither trustworthy nor fulfills the requirement of Section 27 of the Evidence Act. They relied on the following Judgments in support of their submissions:

(a) **Bodh Raj vs. State of Jammu and Kashmir, 2002 AIR (SC) 3164** wherein it is observed that,

‘The statement which is admissible under Section 27 of the Evidence Act is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the Accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the Accused and Prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events’.

(b) **The Hon’ble Supreme Court of India in Criminal Appeal No. 985 of 2010, Babu Sahebagouda Rudragoudar vs State of Karnataka**, has observed thus:

‘when the Investigating Officer steps into the witness box for proving such disclosure statement, he would be required to narrate what the Accused stated to him. The Investigating Officer essentially testifies about the conversation held between himself and the Accused which has been taken down into writing leading to the discovery of incriminating fact(s).’ It is further observed that, *‘Similar view was taken by the Hon’ble Apex Court in the case of **Ramanand @ Nandlal Bharti vs. State of Uttar Pradesh**, wherein this Court held that mere exhibiting of Memorandum prepared by the Investigating Officer during investigation cannot tantamount to proof of its contents. While testifying on oath, the Investigating Officer would be required to narrate the sequence of events which transpired leading to the recording of the disclosure statement’.*

(c) **The Hon’ble Supreme Court of India in Criminal Appeal No.2143 of 2024 (arising out of SLP (Cri.) No.4626 of 2024) Hansraj vs. State of Madhya Pradesh** decided on 19.04.2024 held as under:

‘in the case of Ramanand alias Nandlal Bharti v. State of Uttar Pradesh has postulated that for proving a disclosure memo

recorded under Section 27 of the Indian Evidence Act, 1872 at the instance of the Accused, the Investigating Officer would be required to state about the contents of the disclosure memo and in absence thereof, the disclosure memo and the discovery of facts made in pursuance thereto would not be considered as admissible for want of proper proof.' It is further observed that, 'It is also important to note that the Prosecution did not lead any evidence to show that the recovered articles were sealed at the time of recovery or that they were kept secure in the malkhana.'

22. In the case in hand PW5 – Keshav Vishnu Jagtap deposed that on 21.10.2011 he was called to the Police Station, Ashti by PW21 – Jyoti Kshirsagar, Dy.S.P. The Accused No.4 was brought before him. The Accused No.4 disclosed that clothes were kept in one lodge and weapons were thrown in the river and he was ready to show both the places. Exh.201 Memorandum was prepared. Thereafter, Accused No.4 led them in the Government vehicle which proceeded as per the directions given by Accused No. 4. While proceeding towards Manmad, he pointed towards river near Dhorgaon where the vehicle was stopped and they all got down. The police searched in the river but due to heavy water nothing was found. Thereafter they all went to one Residency lodge at Manmad wherein Accused No.4 pointed towards one room, which was opened by the lodge owner and one red colour full shirt, one jean pant and other five to six clothes were produced by Accused No.4 which were having blood stains. The said clothes were seized under the Panchanama at Exh.202.

23. PW21 – Jyoti Kshirsagar, SDPO, who investigated the crime

also deposed of the statement given by Accused No.4 and the said Accused leading them to one river at Dhorgaon from where nothing was found. Thereafter they went to one Monut lodge at Manmad from where the said Accused produced the clothes which were seized under the said panchanama.

24. Both PW5 – Keshav Jagtap and PW21 – Jyoti Kshirsagar identified clothes at Articles-13 to 19 as the same clothes. Their evidence nowhere show that the said Articles were sealed when they were made available by the Accused No.4. In her evidence PW21 – Jyoti Kshirsagar admitted that before the panchanma at Exh.202 at Munot lodge, Police had visited the said lodge on 14.10.2011 and while preparing the said panchmana at Exh.202 they had knowledge about the lodge. She further admitted that on 14.10.2011 after putting their lock to the said room, its keys were with her. This clearly establishes that the said room was in the possession and control of the police prior to the disclosure statement and police knew the said place. Therefore, the said evidence in respect of the discovery / recovery at the instance of Accused No. 4 cannot be held to be relevant and is liable to be rejected.

25. The evidence of PW6 – Ganesh Dattatraya Kakade show that on 22.10.2011 he was called in the police station wherein PW21 – Jyoti Kshirsagar, Dy.S.P. was present. One vehicle was seized in his presence under the panchanma at Exh.204. On the contrary, the

evidence of PW21 – Jyoti Kshirsagar show that, under the said panchanama at Exh.204, the motorcycle was seized from the house of Accused No.11. There is contrary evidence in respect of the seizure of the said vehicle under Exh.204 and thus, it is discarded. Moreover, how the said vehicle was connected with the crime is not proved by the Prosecution.

26. Further, evidence of PW6 – Ganesh Kakade show that again on 01.11.2011 he was called at Police Station wherein PW21 – Jyoti Kshirsagar was present and Accused No.11 was brought before him and he made statement that his clothes were at his house and he was ready to produce the same and accordingly, the Memorandum at Exh.205 was prepared and thereafter the said Accused led him and police in police vehicle to his house in village Jeour from where the clothes at Articles-21 and 22 were seized under the Panchnama at Exh.206. His cross-examination show that on 01.11.2011 he was called at about 07:30 p.m. and he proceeded to his village at 09:00 p.m.

27. PW21 – Jyoti Kshirsagar, Investigating Officer deposed that Accused No.11 gave statement that he was ready to produce the clothes and Memorandum at Exh.205 was prepared to that effect and the clothes Articles-21 and 22 were seized at his instance from Jeour which were seized vide panchanmaa at Exh.206. Her evidence nowhere show

as to from where the said Articles i.e. clothes were seized. Further, in her cross-examination it has come that on 01.11.2011 she left Georai (which was place of her actual posting) and she did not reach Ashti till 12 noon. She admitted that it was mentioned in Exh.205 Memorandum panchanama that she was present. There is no dispute that the said Exh.205 Memorandum show the timing 10:30 to 10:45. From this, it becomes clear that PW21 – Jyoti Kshirsagar was not present when the said Memorandum was prepared. Moreover, the timing of coming to Police Station and leaving for his village as considered in the above para show that she was also not present at the time of preparing the Exh.205 and 206. Thus, her evidence in respect of seizure of clothes from Accused No.11 pursuant to Memorandum at Exh.205 and 206 is liable to be rejected. Moreover, the evidence of PW6 - Ganesh Kakade and PW21 - Jyoti Kshirsagar nowhere show that the said clothes were sealed, even if their evidence is accepted for the sake of argument.

28. The evidence of PW7 – Laxmikant Maroti Kadam show that he was called by the police on 24.10.2011 where PW21 – Jyoti Kshirsagar, S.D.P.O. was present. The Accused No.12 was brought outside the locker and he gave statement that he had thrown the weapon and was ready to produce it and Memorandum at Exh.208 was prepared. He further deposed that at the instance of the said Accused, the weapon like Sword at Article-20 was seized from the grass on the

eastern side of the road at village Chinchpur which was seized under the panchanama at Exh.209. Regarding such disclosure and seizure PW21 – Jyoti Kshirsagar deposed that Accused No.12 gave statement that he was ready to produce the weapon and Memorandum at Exh.208 was prepared. Article-20 weapon like Sword was produced by the said Accused from near village Chinchpur which was seized under the Panchanama at Exh.209.

29. The evidence of PW21- Jyoti Kshirsagar is completely silent as to from which place the Article-20 was seized at the instance of Accused No.12. Further, the above evidence of PW7 – Laxmikant Kadam and PW21 – Jyoti Kshirsagar is completely silent about presence of any blood or stains on the said Article and it was sealed after it was seized. Further, this evidence gets severe blow by the admission of PW21 – Jyoti Kshirsagar that on 24.10.2011 she left Georai at 07:00 a.m. and was not able to tell the exact time when she reached Ashti on that day. She admitted that on that day she was not in Ashti at 07:30 a.m. She further admitted that it was mentioned in Exh.208 Memorandum that she was present at Ashti. Admittedly, the said Memorandum at Exh.208 show the time 07:30 to 07:40 pm. Thus, it is clear that the said Memorandum was prepared in absence of PW-21 - Jyoti Kshrisagar. Thus, this evidence of discovery / recovery at instance of Accused No.12 – Syed Gaus is rejected.

30. The evidence of PW8 – Satish Vitthal Takale show that on 22.10.2011 he was called at Ashti Police Station by PW21 – Jyoti Kshirsagar. Accused No.4 was brought before him. The said Accused gave disclosure statement that the Pistol and cartridges were hidden in the field of Limbaji Prabhu Suryawanshi and was ready to produce it. The Memorandum at Exh.221 was prepared. He further deposed that the said Accused led the police and panchas in government vehicle on Nagar road and the vehicle was stopped near southern side of electric DP on Kinhni phata. The Accused took them in the crop of *Jowar* in the field of Limbaji and produced one Pistol which was hidden under the earth in green colour plastic bag along with two cartridges which were seized under Exh.222.

31. PW21 – Jyoti Kshirsagar also deposed that Accused No.4 produced the Pistol and Memorandum at Exh.221 was prepared and Article-12 (collectively Pistol, two empty cartridges and two fire bullets) were seized at his instance from field of Limbaji situated at village Kerul.

32. The above discussed evidence in respect of the seizure of the fire arm and other cartridges will not take the case of Prosecution any further since there is no evidence that deceased Balu suffered fire arm injury. Mere recovery / discovery of the weapon is not sufficient to

prove the offence. Its use in the crime is required to be proved by the Prosecution.

33. The evidence of PW9 – Kailas Ramesh Dhonde show that on 18.10.2011 he was called at Police Station and Police had shown two vehicles which were seized in his presence under the Panchanama at Exh.202 and 204, respectively. He deposed that he did not know as to how both the said vehicles had come in the police station. The said evidence do not take the case of Prosecution any further.

34. The evidence of PW10 - Santosh Bhimrao Ajbe show that he was called at Ashti Police Station on 13.10.2011 wherein one Krishna Sable (Accused No.7) was present. There were Articles like one silver colour Sword, two wooden Sticks and one Tata Sumo (four wheeler). The said Articles were taken out from the said four wheeler and were seized under the Panchanama at Exh.230. His cross-examination show that the vehicle was standing in the premises of police station and the doors of the said vehicle were opened in his presence and those were not locked at that time. This evidence also do not take the case of Prosecution any further.

35. The evidence of PW4 – Mahesh Janardhan Sonawane show that on 11.11.2011 he was called at Ashti Police Station where one Arun Anarse produced one memory card which was seized under the

Panchanama at Exh.182 (memory card at Article 29). He was again called on 15.10.2011 in Police Station wherein one Nitin Kadam, Dinesh Kekan (Accused No.5) and Shaikh Adam (Accused No.6) were present and mobile phones at Articles-25 to 27 were seized from their possession under the panchanama at Exh.183. He was again called on 22.10.2011 at Ashti Police Station wherein mobiles at Articles-30 and 31 were seized from the possession of Nitin (Accused No.11) and Syed Gaus (Accused No.12) under the Panchanama at Exh.184.

36. The Prosecution examined Nodal Officers of mobile companies i.e. PW22 – Jitendra Nagpal, PW23 – Dattaram Shantaram Angre, PW24 – Dhananjay Dattatraya Yadao, PW25 – Gokul Rambhau Rasal, PW26 – Rajesh Sampatrao Gaikwad, who were working in Bharati Airtel Company, Idea Company, TATA Teli Services, BSNL and Reliance Teli Communication, respectively. In their evidence CDR's of several mobile phone numbers are brought on record. Perusal of their evidence only Indicate as to in whose name the mobile numbers were registered. Nothing is pointed out from the Prosecution side as to how this evidence would lead in establishing the Charge. Neither the learned Addl. P.P. nor the Advocates for the convicted Appellants referred the said evidence at the time of the arguments. Thus, the said evidence of seizure of mobile phones and call details takes the case of Prosecution no further.

37. The evidence of PW3 – Sainath Baban Dhobale show that he was the panch for the panchanama at Exh.172 under which the clothes of deceased Balu were seized.

38. The evidence of PW20 – Ganinath Surwase show that he was running the Hair Saloon near the spot of incident. His evidence show that he did not support the Prosecution. Though he was cross-examined by the Prosecution, nothing material, which would help the Prosecution in establishing the Charge against the convicted Appellants, came in his evidence.

39. The evidence of PW29 – Nilesh Nandu Sonawane and PW30 – Rahul Bharat Bhise show that since they did not support the case of Prosecution, they were cross-examined by the Prosecution, however nothing material which would help the Prosecution in establishing the Charge against the convicted Appellants came in their evidence.

40. The evidence of PW31 – Pradeep Bhingardive show that he was dealing in purchase and sale of vehicles and Accused No.7 was working as driver with him on Tata Sumo vehicle. He further deposed that he purchased the motorcycle from Ganesh Palve and he sold both

the vehicles to Accused No.7. In his cross-examination he admitted that he was not the legal owner of both the said vehicles and the transaction of both the said vehicles with Accused No.7 was not legal. Even his evidence will not take the case of the Prosecution any further.

41. The evidence of PW32 – Arjun Bhola Chavan show that he was serving in the Maharashtra State Road Transport Corporation. In December-2010 he was having Tata Sumo vehicle and Accused No.7 was driver on the said vehicle. He further deposed that he handed over sim card to him for a period of four to five months and the said Accused did not return it to him and left the services. Since the evidence of phone call detail is of no assistance to the Prosecution, this evidence will lead the case of Prosecution nowhere.

42. The evidence of PW33 – Ganesh Raosaheb Palve show that he was in the business of Auto Finance and used to purchase and sale two wheelers. In June-2011 he sold motorcycle bearing No. MH-16/AH-7519 to Bhingardive from Nagare. He admitted that he had no legal document to show that he purchased and sold the said motorcycle.

43. The evidence of PW27 – Yuvraj Bayaji Ajetrao show that he was working as the Deputy Secretary in Department of Home, Mantralaya and processed the proposal received from the Director

General of Police, Mumbai seeking permission to prosecute the Accused No.3 and he issued the sanction order at Exh.562.

44. The evidence of PW1 – Shaikh Alim Jan Mohd. show that he acted as the Spot Panch of the Spot Panchanama at Exh.163 from where motorcycle and Indica car were seized. His cross-examination show that on 11.10.2011 it was stormy and rainy weather in the evening.

45. If we see the evidence of PW2 – Santosh Baban Shelke who acted as the Panch witness for the Inquest that the inquest was carried between 9:00 p.m. and 10:00 p.m. Admittedly, crime was not registered when the said Inquest was prepared. Admittedly, the Police Officer who prepared the said Inquest is not examined by the Prosecution. In Column No.2 of the said inquest, which is for act and section, 302, 34 IPC is written. On this it is the submission of learned Advocate for the convicts / Appellants that this clearly show that the assaulters were less than five (5). The Prosecution could not throw light on this aspect.

46. The evidence of PW15 – Popat Sheshrao Jadhav show that in the year 2011 he was serving as driver at Ashti Police Station and Accused No.3 was In-charge of the said police station. On 10.10.2011 at about 09:30 p.m. they started patrolling from Ashti towards Kada and

stopped at Genning of Surnil Suryawanshi at village Sheri. Said Accused No.3 decided to take lunch and since he (PW15 - Popat) was on fast, he purchased groundnut and waited for Accused No.3. Thereafter, they returned to Ashti Police Station. This evidence takes the case of Prosecution nowhere.

47. The evidence of PW16 – Shriram Patil Sonawane show that on 10.10.2011 he stopped at Raj Dhaba while coming back home after visiting ‘Santkrupa Agency’. At that time Accused No.3 came to the dhaba in sumo jeep along with driver. He took tea and left the dhaba. Since he did not support the case of Prosecution, he was cross–examined by the Prosecution, however nothing material has come which would further the case of Prosecution.

48. The evidence of PW28 – Akhilesh Kumar Singh show that from 15.10.2011 to 21.01.2013 he was the In-charge of Ashti Taluka and this crime was handed over to him for investigation on 29.03.2012. The earlier investigation was carried out by PW21- Jyoti Kshirsagar. His evidence show that on 31.03.2012 he filed Charge-sheet against Accused No.3 - Mane and took steps in respect of absconding Accused.

49. The evidence of PW18 – Mahesh Sarjerao Jagtap show that he knew deceased Balu. He deposed about enmity between deceased

Balu and Sunil Nath, Sachin Suryawanshi and Sunil Suryawanshi due to grampanchayat elections. He deposed that Accused No.3 had called deceased Balu Khakal, him and Mukund Navale at the Kada Police Station, wherein Sunil Nath and Sunil Suryawanshi were present. Accused No.3 threatened deceased Balu that next time he will be finished and he will see how the Charge-sheet is filed. Thereafter, they drove them out of police station. His cross-examination show that he was not the witness to the incident of assault which had taken place after the grampanchayat election. Though he deposed that he reached the spot of incident where Balu Khakal was lying dead, he did not disclose the police who were present there that the Accused No.3 had threatened deceased Balu to kill him. His evidence at the most show enmity between deceased Balu and Accused No.3, Accused No.4 and nothing more.

50. The evidence brought on record by the Prosecution is evaluated as discussed above. The evidence of witnesses examined as eye-witenss do not inspire confidence about they being the actual eye witnesses to the incident. Their evidence cannot form the basis to uphold the conviction. Admittedly, the learned Trial Court disbelieved the testimony of the eye witnesses. Other corroborative piece of evidence in the nature of discovery / recovery is discarded being untrustworthy and not in accordance with the law. There are C.A.

Reports brought on record by the Prosecution at Exhs.449, 450, 451, 452, 453, 454, 455 and 456. The said C.A. Reports show human blood on all the Articles which comprise of earth, pair of chappels, scrappings in the polythene, bunch of hair, clothes and Sword, except Article No.11 which is full open shirt. The said C.A. Reports further show that the Articles earth, pair of Chappels, bunch of hair, full jean pant, full short shirt, sandow baniyan, nicker, Sword, half open shirt, full short shirt, half T-shirt and full pant were having stains of blood group 'B'. The C.A. Reports further show that the blood of deceased was 'B'. The blood group of Accused No.4 was 'inconclusive'. The blood group of Accused No.13 was 'AB'. The blood group of Accused No.12 was 'A'. The blood group of Accused No.14 was 'B'. The blood group of Accused No.11 was 'B'. When the evidence of discovery / recovery of the clothes and weapons at the instance of convicted Appellants is discarded, the said C.A. Reports would not be of any assistance for the Prosecution. Moreover, the blood group of deceased Balu and some of the Appellants is similar. Thus, learned Trial Court in our considered view erred in recording conviction on the basis of C.A. Reports by virtue of Section 106 of the Indian Evidence Act. No doubt, the provisions of Section 106 of the Indian Evidence Act shifts the burden on the Accused to explain, however, it is for the Prosecution to first establish its case and discharge their burden and only thereafter the provisions of Section 106 of the Indian Evidence Act would come into play for the matters which are

exclusively within the knowledge of accused persons. Further, the Charge under the Arms Act and the Maharashtra Police Act fails for want of evidence in respect of required Sanction and promulgation of required Notification.

51. In view of the above discussion, it is not possible to maintain the conviction recorded by learned Trial Court. The evaluation of the evidence do not warrant interference in the order of acquittal recorded by learned Trial Court. Eventually the Appeals filed by the convicts / Appellants succeeds and the Appeal filed by the State against the acquittal fails. Resultantly, we proceed to pass the following order:

ORDER

(i) Criminal Appeal Nos.344 of 2019 and 39 of 2024 filed by the convicts are allowed.

(ii) Criminal Appeal (St.) No.585 of 2019 and Application for Leave to Appeal by State No.124 of 2019 are dismissed.

(iii) Judgment and Order dated 19.03.2019 passed by the learned Additional Sessions Judge, Beed in Sessions Case No.16/2012 convicting and sentencing the Appellants - Sachin Vitthal Suryawanshi, Nitin Sanjay Shinde, Bhausahab Mohan Sable and Mahendra Sevakram Mahajan in Criminal Appeal No.344 of 2019 and Appellant – Sayyed Gaus Sayyed Noor in Criminal Appeal No.39 of 2024 for the offence

punishable under Sections 147, 148, 302 r/w. Sec.149 of the Indian Penal Code is hereby quashed and set aside.

(iv) Appellants - Sachin Vitthal Suryawanshi, Nitin Sanjay Shinde, Bhausaheb Mohan Sable and Mahendra Sevakram Mahajan in Criminal Appeal No.344 of 2019 and Appellant – Sayyed Gaus Sayyed Noor in Criminal Appeal No.39 of 2024 are acquitted of the offence punishable under Sections 147, 148, 302 r/w. Sec.149 of the Indian Penal Code.

(v) Appellants - Sachin Vitthal Suryawanshi, Nitin Sanjay Shinde, Bhausaheb Mohan Sable and Mahendra Sevakram Mahajan in Criminal Appeal No.344 of 2019 and Appellant – Sayyed Gaus Sayyed Noor in Criminal Appeal No.39 of 2024 be released forthwith, if not required in any other crime.

(vi) Record & Proceedings be sent back to the Trial Court.

(vii) Pending Criminal Application/s, if any, stands/stand disposed of.

(NEERAJ P. DHOTE, J.)

(R. G. AVACHAT, J.)