



Judgment

258 apeal589.06 & revn102.07

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

CRIMINAL APPEAL NO.589 OF 2006
WITH
CRIMINAL REVISION NO.102 OF 2007

CRIMINAL APPEAL NO.589 OF 2006

1. Mohd.Sadik s/o Mohd.Amir,
aged about 30 years, occupation : labour.

2. Abdul Kadar s/o Abdul Majid,
aged about 35 years, occupation : labour.

3. Sk.Bashir Sheikh Habir,
aged about 30 years, occupation : labour.

all residents of Bhaldarpura,
all residents of Bhaldarpura,
Anjangaon Surji, district Amravati. **Appellants.**

:: V E R S U S ::

State of Maharashtra, through
PSO of PS Anjangaon Surji,
district Amravati. **Respondent.**

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Shri I.S.Charlewar, Counsel for Appellants.
Ms.Soniya Thakur, Additional Public Prosecutor for the State.
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CRIMINAL REVISION NO.102 OF 2007

Mujib Khan Mustafa Khan,
aged about 28 years,
occupation : labourer,
r/o Bhaldar Pura, Anjangaon

Surji, district Amravati.

..... Applicant.

:: VERSUS ::

1. The State of Maharashtra,
through PSO Anjangaon Surji,
district Amravati.

2. Mohd. Sadik Mohd. Amir
aged about 23 years.

3. Abdul Kadar Abdul Majid
aged about 28 years,

4. Abdul Salim s/o Abdul Majid,
aged about 20 years.

5. Abdul Ajij s/o Abdul Vajir,
aged about 32 years.

6. Sk.Harun s/o Sk.Ismail,
aged about 30 years.

7. Gaffar Mirza @ Shabbir Baig
Karim Baig, aged 50 years.

8. Anwarkha s/o Sadukha,
aged about 30 years.

9. Shaikh Rauf Shaikh Gyasoddin,
aged about 40 years.

10. Shaikh Ibrahim Shaikh Hussain,
aged about 31 years.

11. Sabdar Baig Karim Baig,
aged about 38 years.

12. Chhota Bashir Baig Karim Baig,

aged about 28 years.

13. Abdul Khaliq Mojhd. Vajir,
aged about 20 years.

14. Abdul Majid s/o Abdul Jabbar,
aged about 60 years.

15. Mohd. Vajir s/o Abdul Jabbar
aged about 70 years.

16. Mohd. Ilayas Abdul Jabbar,
aged about 52 years.

17. Abdul Kadir s/o Abdul Majid,
aged about 22 years.

18. Sk. Bashir Sk. Habib,
aged about 25 years.

All Non applicants Nos.2 to 18
are r/o Bhaldarpura,
Anjangaon Surji, district Amravati. **Respondents.**

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Shri M.V.Bute, Counsel for the Applicant/Complainant.
Shri I.S.Charlewar, Counsel for R-2, 3, 18.
Ms.Soniya Thakur, Additional Public Prosecutor for R-1/State.

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CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 11/07/2024
PRONOUNCED ON : 01/08/2024

COMMON JUDGMENT

1. By Criminal Appeal No.589/2006, appellants, who are original accused Nos.1, 2 and 17, have challenged judgment and

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order of conviction and sentence dated 30.9.2006 passed by learned Ad hoc Additional Sessions Judge-2, Achalpur (learned Judge of the trial court) in Sessions Trial No.61/2000 whereby they are convicted for offence punishable under Section 324 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for two years and to pay fine Rs.2000/-, in default, to undergo simple imprisonment for three months.

2. By Criminal Revision No.102/2007, petitioner, who is complainant, has challenged the judgment impugned in the appeal as learned Judge of the trial court acquitted all accused persons i.e. accused Nos.1 to 17 (including accused Nos.1, 2 and 17 in Criminal Appeal No.589/2006) of offences punishable under Sections 147, 148, and 307 of the Indian Penal Code and 37 read with 135 of the Bombay Police Act and 4/25 of the Arms Act and accused Nos.1, 2 and 17 in Criminal Appeal No.589/2006 are convicted under Section 324 of the Indian Penal Code.

3. The prosecution case unfurled during the course of trial is as under:

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Mujib Khan Mustafa Khan, (applicant in the present criminal revision hereinafter is referred as “the complainant”), residing at Bhaldarpura, Anjangaon Surji, district Amravati is a businessman dealing in cloths. Appellants and acquitted accused also reside in the same village where as the complainant resides. When the complainant was looking for a rickshaw on road, the appellants and acquitted accused rushed towards him with deadly weapons like swords and pipes and sticks in their hands and assaulted the complainant. Appellants Mohd.Sadik s/o Mohd.Amir, original accused No.1, and Sk.Bashir Sheikh Habir, original accused No.17, gave blows with iron pipes. Whereas, appellant Abdul Kadar s/o Abdul Majid, original accused No.2, gave a blow of sword on the head of the complainant. In the assault, the complainant received bleeding injury on his head and fracture of his leg. Somehow, he rushed to the police station and lodged a report. On being taken to Anjangaon Hospital and given treatment, he was referred to the General Hospital at Amravati whereat he was indoor patient for about 15-20 days. The doctor opined that the injury the complainant received is sufficient to cause his death.

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4. On registration of the crime, the investigating officer seized relevant articles, recorded relevant statements of witnesses and, after completion of investigation, filed chargesheet against all accused persons. The police registered the crime against appellants and acquitted accused persons. The investigating officer visiting the spot of the incident and drawing spot panchanama seized simple blood stained earth.

5. Since offences for which chargesheet came to be presented against all accused persons were exclusively triable by Sessions Court, learned Magistrate in whose court the chargesheet was presented committed the case to the Court of Sessions.

6. After committal of the case, learned Sessions Judge framed charge vide Exhibit-123. All accused persons pleaded not guilty and claimed to be tried.

7. In support of the prosecution case, the prosecution examined in all nine witnesses namely Mujibkhan s/o Mustafakhan vide Exhibit-156 (PW1), the complainant; Ishakkhan s/o Ibrahimkhan vide Exhibit-159 (PW2); the eyewitness; Dildarkhan

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Sardarkhan vide Exhibit-160 (PW3), the eyewitness; Sattarkha s/o Gaffarkha vide Exhibit-161 (PW4), the pancha on spot of panchanama; Nitin More vide Exhibit-167 (PW5), pancha on seizure memo; Ahmadvkhan Hafijkhan vide Exhibit-170 (PW6), the pancha on memorandum statement and recovery of weapons; Dr.Vaishali Kadu vide Exhibit-173 (PW7), the Medical Officer; Prakashchandra Joshi vide Exhibit-177 (PW8), the Investigating Officer, and Ramkrushna Taide vide Exhibit-186 (PW9), the Investigating Officer.

8. Besides the oral evidence, the prosecution placed reliance on oral report Exhibit-157, spot panchanama Exhibit-162, seizure memos Exhibits-163 to 166, seizure memo Exhibit-168, medical certificate Exhibit-174, seizure memos Exhibits-178 to 185, memorandum statement of accused No.1 Mohd.Sadik Exhibit-187, recovery panchanama Exhibit-188, seizure memos Exhibits-89 to 199, letter to the Chemical Analyzer Exhibit-200, and the Chemical Analyzer's Report Exhibit-201.

9. On the basis of the said evidence, learned Judge of the trial court held accused Nos.1, 2 and 17 guilty of offences punishable

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under Section 324 of the Indian Penal Code and sentenced them as the aforesaid.

10. Heard learned counsel Shri I.S.Charlewar for appellants and respondent Nos.2, 3 and 18 in Criminal Revision No.102/2007, learned counsel Shri M.V.Bute for the applicant in Criminal Revision No.102/2007, and learned Additional Public Prosecutor Ms.Soniya Thakur for the State

11. Learned counsel for appellants submitted that the evidence adduced by the prosecution is inconsistent, unreliable, and suffering from omissions and contradictions. As per the charge, accused No.1 Mohd.Sadik was allegedly carrying sword, however the evidence shows that he had assaulted by means of iron pipe. The sword was not seized during the investigation. The injured sustained simple injuries. Though Medical Officer PW7 Dr.Vaishali Kadu stated that the injured sustained fracture injury, there is no evidence to ascertain that the injured sustained fracture injury and that too no X-Ray was obtained. As per the prosecution, PW2 Ishakkhan is eyewitness, who witnessed the incident from his gallery. However, he has not stated before the Investigating Officer

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that he saw the incident from his gallery. The said omission is proved by the accused persons during the cross examination of the Investigating Officer. Insofar as injuries sustained by the injured are concerned, as per the medical evidence, two injuries i.e. lacerated wound on parietal region of scalp were attributed to accused No.1. As far as injuries inflicted by other two accused persons are concerned, who allegedly assaulted the injured, are not supported by the medical certificate. The evidence as to the assault by all the accused persons is not supported. The evidence of eyewitness PW2 Ishakhan and PW3 Dildarkhan PW3 shows that accused No.2 has also given a blow of sword on the head of the complainant, however neither the sword was seized nor the injury was found on the person of the complainant by sword. Thus, the entire evidence adduced by the prosecution is inconsistent, untrustworthy and, therefore, appellants deserve to be acquitted.

12. Learned Additional Public Prosecutor for the State supported the judgment impugned and submitted that the evidence as to the assault by appellants is consistent and corroborative and no interference is called for. He submitted that

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the evidence is also supported by the medical evidence. In view of that, the appeal is devoid of merits and liable to be dismissed.

13. Learned counsel for the petitioner/complainant submitted that all accused persons formed an unlawful assembly and in furtherance of common object of that assembly assaulted the complainant. Thus, it was common act of all accused persons and, therefore, the same was a constructive liability of all accused persons. Section 149 of the Indian Penal Code, makes every member of an unlawful assembly at the time of committing of offence guilty of the offence. The Section creates a vicarious liability for the unlawful acts committed pursuant to the common object by any other member of the assembly and, therefore, all accused persons are responsible for the act of accused No.1. He submitted that learned Judge of the trial court has not considered the said aspect and erroneously acquitted the accused. The punishment imposed by learned Judge of the trial court is also a meager punishment and it shall be proportionate to the act committed by the accused and, therefore, the judgment impugned deserves to be modified and the sentence imposed upon appellants

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in the appeal as well as respondents in the revision is to be enhanced by allowing the revision.

14. After hearing learned counsel for respective parties and going through the evidence adduced, it has to be seen whether the prosecution has succeeded in proving that the accused persons formed an unlawful assembly and in pursuance of that assembly they assaulted the complainant in furtherance of their common object.

15. To prove the charge, the prosecution mainly placed reliance on the evidence of complainant PW1 Mujibkhan, the injured in the incident. As per his evidence, on the day of the incident, at about 7:00 am, he came out of his house to hire a rickshaw. At the relevant time, accused No.2 Abdul Kadar abused and assaulted him by means of sword. He gave him a blow of the sword on his head and he fell down. In the meantime, accused No.1 Mohd.Sadik and accused No.17 Sk.Bashir came there with iron pipes in their hands and they beat him with iron pipes on his left leg, right hand and his right hand and left leg were fractured due to the said assault. Accused No.8 Shaikh Rauf also came there

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and attacked him with sword stick and gave a blow of the sword stick on his chest. In the meantime, all accused came there and they also beat him. He was assaulted due to the old enmity. Prior to the incident in question also, his family members were assaulted. This incident was witnessed by neighbours. He was also hospitalized for 20-25 days and, therefore, he lodged the report.

16. The cross examination of complainant PW1 Mujibkhan shows that the spot of the incident is an open plot. The houses of accused No.1 Mohd.Sadik, accused No.13 Abdul Majid, accused No.14 Mohd.Vajir, and accused No.15 Mohd.Iliyas are in front of that open place and houses of other accused persons are far away from the said open place. It also came in his cross examination that they were not on talking terms with the accused persons. It also came in the cross examination that he is also prosecuted along with his family members under Section 307 of the Indian Penal Code and the dispute arose on account of open space property. There was old enmity between them. Thereafter some omissions are brought on record to the extent that he has not narrated before

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the Investigating Officer that accused No.2 Abdul Kadar abused him. He has also not narrated that he was assaulted on left leg and right hand. He has also not stated that accused No.2 Abdul Kadar assaulted him by means of sword and, thereafter, accused No.17 Sk.Bashir beat him with iron pipe. Thus, these material omissions show that as far as assault by accused No.2 Abdul Kadar by sword is an improvement. Moreover, assault by accused No.1 Mohd.Sadik and others on his hands and legs is also an improvement.

17. To corroborate the version, the prosecution placed reliance on two eyewitnesses namely PW2 Ishakkhan and PW3 Dildarkhan.

The evidence of PW2 Ishakhan shows that at the time of the incident, he was standing in front of gallery of his house. The accused persons beat the complainant by means of swords, sticks, and pipes and the complainant received injuries on chest, legs, and other parts of the body. Thus, he has not narrated specific role of each of accused persons. As far as the evidence is concerned, that he witnessed the incident from the gallery of his house, it is an omission which he had not stated before the investigating officer at

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the time of recording of statements. The defence of accused persons is that the complainant fell on a cement concrete stream (nali) and sustained injuries, however due to a previous enmity, they were implicated. PW2 Ishakhan admitted that he had seen the complainant near the stream.

The evidence of PW3 Dildarkhan also shows that he has not narrated the role of each accused. He stated in his evidence that all accused persons assaulted the complainant by means of swords, sticks and iron pipes. Accused No.2 Abdul Kadar had given a blow of sword on the head of the complainant. Accused No.8 Shaikh Rauf, inflicted a blow of sword on the chest of the complainant. Accused No.1 Mohd.Sadik and accused No.17 Sk.Bashir assaulted the complainant with iron pipes. His cross examination shows that he is not aware whether a civil suit is pending between the complainant and the accused persons. He admitted that after hearing a noise, he went to the spot of the incident and saw that the complainant was lying on the open space near the "Nali". Thus, his cross examination shows that he reached at the spot of the incident after the incident.

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18. Besides the oral evidence, the prosecution placed reliance on the medical evidence of PW7 Dr.Vaishali Kadu. As per her evidence, she examined the complainant and found lacerated wound on right parietal region of scalp was L shape, vertically 4 x 1 x 2 cm transversely 3 x 1 x 2 cm and lacerated wound with swelling on lower 1/3rd left lower limb size 2 x 1 x 1 cm. She stated that the above injuries may be caused by hard and blunt object. The head injury was with compound fracture left lower end of tibia and fibula. Accordingly, she issued medical certificate Exhibit-174. She further stated that injury No.2 may be possible by iron pipe and injury No.1 was sufficient to cause death in the ordinary course of nature. She further admitted that incised wound can be caused by a sharp knife razor and sword. Whereas, lacerated wound can be caused by blunt object. Injury No.1 can be caused by iron pipe. "L" shape injury is not possible by one blow of sword. There was no fracture to the scalp. She further stated that in X-Ray if no bone injury is found, it becomes is simple injury.

19. To prove the incident by way of the circumstantial evidence, the prosecution examined pancha on spot of

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panchanama PW4 Sattarkha. The said witness has admitted during the cross examination that he put his signature in all documents in the police station and he is not aware about contents of panchanama.

20. PW5 Nitin More, acted as a pancha on the memorandum statement of accused No.1 Mohd.Sadik, at whose instance the clothes of the accused were seized, has not supported the prosecution case.

21. PW6 Ahmadkhan, also acted as pancha on memorandum statement of accused No.1 Mohd.Sadik and recovery of weapons. However, the said witness has also not supported the prosecution case.

22. Investigating Officer PW8 Prakashchandra Joshi, investigated the crime partly. As per his evidence, during the investigation, he seized clothes of accused No.7 Anwarkha, accused No.8 Shaikh Rauf, accused No.10 Sabdar Baig, accused No.11 Chhota Bashir, and accused No.17 Sk.Bashir.

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23. PW9 Ramkrushna Taide, another Investigating Officer, narrated about the investigation carried out by him. As per his evidence, on 8.10.1999, accused No.1 Mohd.Sadik gave him his confessional statement and on the basis of the said statement, the iron pipe was seized from the roof of the house. The seizure panchanama is at Exhibit-188. He has also seized clothes of the complainant as well as accused No.2 Abdul Kadar, accused No.3 Abdul Salim, accused No.4 Abdul Ajij, accused No.5 Sk.Harun, accused No.6 Gaffar Mirza, and accused No.12 Abdul Khalique, and after completion of the investigation, submitted the chargesheet against all the accused persons. During his cross examination, omissions are proved by the prosecution. All incriminating articles are forwarded to the Chemical Analyzer. The Chemical Analyzer's Report Exhibit-201 shows that blood stains were found on the clothes of the accused and on iron pipes, but blood group was not ascertained.

24. On the basis of the above evidence, the prosecution claimed that all accused persons have formed unlawful assembly and in pursuance of the common object of that assembly assaulted

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the complainant. The cross examination of complainant PW1 Mujibkhan shows that only accused No.1 Mohd.Sadik, accused No.13 Abdul Majid, accused No.14 Mohd.Vajir, and accused No.15 Mohd.Iliyas are residing near the spot of the incident.

25. The expression unlawful assembly is defined in Section 149 of the Indian Penal Code and any member of such unlawful assembly is punishable under Section 143 of the Indian Penal Code. The common object has to be inferred from facts and circumstances of each case. When there is a sudden fight, the members of such groups would not form an unlawful assembly.

26. As far the contention of the complainant is concerned, it shows that accused No.2 Abdul Kadar assaulted him by means of sword and gave him a blow of the sword on his head and he fell down. Whereas, accused No.1 Mohd.Sadik and accused No.17 Sk.Bashir came there with iron pipes in their hands and they beat him with iron pipes on his left leg, right hand and his right hand and left leg were fractured due to the said assault and all accused persons came there and they also beat him. On the contrary, the evidence of eyewitness PW3 Dildarkhan shows presence of

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accused No.1 Mohd.Sadik, accused No.2 Abdul Kadar, accused No.8 Shaikh Rauf, and accused No.17 Sk.Bashir. As far as accused No.9 Shaikh Ibrahim and accused No.10 Sabdar Baig are concerned, allegation is abetting the other accused persons to kill the complainant. Regarding role of accused No.9 Shaikh Ibrahim and accused No.10 Sabdar Baig in respect of abetment, the evidence of the complainant is silent. He nowhere stated that accused No.9 Shaikh Ibrahim and accused No.10 Sabdar Baig were abetting the other accused persons to kill the complainant. As per the evidence of the complainant, accused No.1 Mohd.Sadik Khan and accused No.17 Sk.Bashir Khan assaulted him by means of iron pipes on his left leg and right hands. Whereas, as per the evidence of eyewitness PW3 Dildarkhan, accused No.8 Shaikh Rauf gave blow of sword on the chest of the complainant and accused No.1 Mohd.Sadik and accused No.17 Sk.Bashir assaulted the complainant by means of iron pipes.

27. Perusal of the medical evidence reveals that only two injuries were found on the person of the complainant i.e. lacerated wound on right parietal region of scalp and lacerated wound with

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swelling on lower 1/3rd left lower limb. The Medical Officer specifically admitted that “L” shape injury is not possible by sword and the injury sustained on the head is by hard and blunt object and not by sharp object.

28. Thus, the entire oral evidence is inconsistent with the medical evidence.

29. Insofar as presence of the accused persons at the spot of the incident is concerned, the evidence adduced is vague in nature. The oral evidence of the complainant shows that he was assaulted by all the accused persons and his right hand and left leg received fracture injuries. The opinion of the Medical Officer shows that there was head injury with compound fracture on left lower limb at the end of tibia and fibula. This is also ascertained without obtaining any X-Ray. As far as the fracture injury is concerned, there is no explanation of the Medical Officer on what basis she came to conclusion that the injured has sustained the fracture injury.

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30. Thus, the entire evidence especially the evidence of the complainant is not consistent with the medical evidence. Even, if the oral evidence of the complainant is accepted, he states that accused No.2 Abdul Kadar gave blow of sword on his head, but the Medical Officer states that injury on head is of hard and blunt object. As far as blow of sword on the chest of the complainant is concerned, no injury is found on his chest. The evidence further shows that he was assaulted by iron pipes, but only two injuries are found on the persons of the complainant.

31. As per the evidence of the complainant, quarrel started as accused No.2 Abdul Kadar abused him, but this evidence is in the nature of omission.

32. It is true that *falsus in uno, falsus in omnibus* is not applicable in India, but considering the nature of evidence, which is completely inconsistent and not inspiring confidence as to the incident, the defence of appellants, that there was a previous enmity and due that enmity they were implicated, is supported by the cross examination of witnesses as complainant PW1 Mujibkhan has admitted that there was a previous enmity and criminal

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complaints are filed against each other. No history of assault was narrated before the Medical Officer though immediately the complainant was examined by the Medical Officer. The Medical Officer has also not stated that any history of assault was narrated before her. A common object may be formed by express agreement after mutual consultation. It may be formed at any stage by all or few members of assembly, but there has to be some evidence on record to show that unlawful assembly was constituted with an common object. In the absence of the evidence, as the common object and as to the formation of the unlawful assembly the appellants are to be acquitted from charges.

33. Learned Judge of the trial court has not considered the inconsistent evidence as to the assault, which is also not corroborated by the medical evidence. Learned Judge of the trial court has also not considered that recoveries at the instance of the accused persons are not proved. Admittedly, witness acted as pancha on the memorandum statement namely PW6 Ahmadkhan has not supported the prosecution case. The evidence of the investigating officer nowhere shows that the statement of accused

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No.1 Mohd.Sadik was voluntary one. Moreover, the recovery is from the open place.

34. It is well settled that burden is on the prosecution to prove charges beyond all reasonable doubts. Considering the evidence on record, which is not consistent and inspiring confidence, as to the actual occurrence of the incident, benefit of doubt will go to the accused persons. When two views are possible, the view in favour of the accused will prevail.

35. In this view of the matter, the criminal appeal deserves to be allowed.

36. Insofar as the enhancement of the sentence is concerned, there is no satisfactory evidence to show that the appellants were present at the spot of the incident and in furtherance of their common object they assaulted the complainant. In absence of the evidence, the submissions made by learned counsel Shri M.V.Bute for the complainant deserve to be discarded.

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37. In this view of the matter, the criminal revision is devoid of merits and liable to be dismissed. Hence, following order is passed:

ORDER

(1) The criminal appeal is **allowed**.

(2) The judgment and order of conviction and sentence dated 30.9.2006 passed by learned Ad hoc Additional Sessions Judge-2, Achalpur in Sessions Trial No.61/2000 convicting accused Nos.1, 2 and 17 is hereby quashed and set aside.

(3) Accused Nos.1, 2 and 17 are acquitted for which they are charged.

(4) The criminal revision is **dismissed**.

The appeal and revision stand **disposed of**.

(URMILA JOSHI-PHALKE, J.)