

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

CRIMINAL APPEAL NO. 149 OF 2012

WITH

CRIMINAL APPEAL NO. 150 OF 2012

WITH

CRIMINAL APPEAL NO. 151 OF 2012

WITH

CRIMINAL APPEAL NO. 448 OF 2012

WITH

CRIMINAL APPEAL NO. 309 OF 2016

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CRIMINAL APPEAL NO. 149 OF 2012

APPELLANTS

: 1] Hasankhan S/o Jabajkhan
Aged about 33 years, Occu. Labourer,
(Ori. accused no.2)

2] Nadimoddin S/o Najmoddin,
Aged about 21 years, Occu. Labourer,
(Ori. Accused no.4)

Both the applicants are permanent
R/o Nawabpura, Ner, Tq. Ner, Dist. Yavatmal.
(At present lodged in Central Prison, Amravati.

VERSUS

RESPONDENT

: State of Maharashtra,
Through Police Station Officer,
Police Station, Ner, Dist. Yavatmal.

with

CRIMINAL APPEAL NO. 150 OF 2012

APPELLANTS

: 1] Firozkhan alias Firdoskhan S/o Jabajkhan
Aged about 22 years, Occu. Labourer,
(Ori. accused no.3)

2] Shamiullahkhan S/o Anwarkhan,
Aged about 52 years, Occu. Driver,
(Ori. Accused no.21)

Both the appellants are permanent
R/o Nawabpura, Ner, Tq. Ner, Dist. Yavatmal.
(At present lodged in Central Prison, Amravati.)

VERSUS

RESPONDENT : State of Maharashtra,
Through Police Station Officer,
Police Station, Ner, Dist. Yavatmal.

With

CRIMINAL APPEAL NO. 151 OF 2012

APPELLANTS : 1] Ijajkhan S/o Jabajkhan Pathan
Aged about 33 years, Occu. Labourer,
(Ori. accused no.1)

2] Ziyaullahkhan S/o Jakaullahkhan,
Aged about 26 years, Occu. Labourer,
(Ori. Accused no.18)

Both the applicants are permanent
R/o Nawabpura, Ner, Tq. Ner, Dist. Yavatmal.
(At present lodged in Central Prison, Amravati)

VERSUS

RESPONDENT : State of Maharashtra,
Through Police Station Officer,
Police Station, Ner, Dist. Yavatmal.

With

CRIMINAL APPEAL NO. 448 OF 2012

APPELLANT : State of Maharashtra,
Through Police Inspector,
Police Station, Ner, Dist. Yavatmal.

VERSUS

RESPONDENT : 1] Ijajkhan Jabajkhan Pathan,
Aged about 32 years,

- 2] Hasankhan Jabanjkan,
Aged about 32 years.
- 3] Firoz Khan @ Firdoskhan Jabajkhan,
Aged about 21 years,
- 4] Nadimoddin Najmoddin,
Aged about 20 years,
- 5] Wasim @ Wasimoddin S/o Najmoddin,
Aged about 23 years,
- 6] Sheikh Arif Sheikh Rasul,
Aged about 35 years,
- 7] Imdad Husain Gulam Husain,
Aged about 25 years,
- 8] Salim @ Saimoddin S/o Najmoddin,
Aged about 23 years,
- 9] Rammikhan @ Ramijkhan Sherkhan,
Aged about 19 years,
- 10] Hodayatkhan Anwarkhan,
Aged about 62 years,
- 11] Sheikh Munaf Sheikh Gulab,
Aged about 45 years,
- 12] Sheikh Irfan Sheikh Rasul,
Aged about 27 years,
- 13] Alimkhan Talebankhan,
Aged about 20 years,
- 14] Firozkhan Talebankhan,
Aged about 22 years,
- 15] Talebankhan Salavtkhan,
Aged about 65 years,

- 16] Hafizkhan Sabjekhan,
Aged about 20 years,
- 17] Ziyaullakhan Jakaullakhan,
Aged about 25 years,
- 18] Mubarakkhan Attaulakhan,
Aged about 48 years,
- 19] Karimkhan Talebankhan
Aged about 20 years,
- 20] Shamiullakhan Anwarkhan,
Aged about 52 years,
- 21] Sharikhusain Imdadhusain,
Aged about 27 years,
- 22] Sabjekhan Attarulakhan,
Aged about 50 years,

All Respondent no.1 to 22 R/o Nababpur,
Tq. Ner, Dist. Yavatmal.

- 23] Mohammad Faim Mohd. Hafij Patel,
Aged about 43 years,
R/o Mahavir nagar, Yavatmal.

With

CRIMINAL APPEAL NO. 309 OF 2016

APPELLANT : Nasrullah Khan S/o Jabanz Khan
Aged about 37 years, Occu. Agriculturist,
R/o Nawabpura, Ner, Tq. Ner, Dist. Yavatmal.

VERSUS

RESPONDENT : State of Maharashtra,
Through Police Station Officer,
Police Station, Ner, Dist. Yavatmal.

Shri Adwait S. Manohar, Advocate for the appellants in Cri. Appeal Nos. 149/12 and 309/2016
Shri P. W. Mirza, Advocate for the appellants in Cri. Appeal Nos.150/12 and 151/12
Shri S. S. Doifode, Addl.P.P. for the appellant/State in Cri. Appeal No.448/12 and for the respondent/State in other appeals.
Shri R. J. Mirza, Advocate to assist the prosecution.
Shri P. R. Agrawal, Advocate for the respondent Nos.5 to 10, 12 to 15, 19 and 21 in Cri. Appeal No.448/12
Shri A. A. Naik, Advocate for respondent no.23 in Cri.Appel No.448/12

CORAM : SUNIL B. SHUKRE and G. A. SANAP, JJ.

Judgment Reserved on : JUNE 24, 2022.

Judgment Pronounced on : JULY 27, 2022

JUDGMENT : (Per : G. A. SANAP, J.)

1. These criminal appeals arise out of the same incident and as such those are being decided by this common judgment.
2. In this judgment, the appellants in Criminal Appeal Nos. 149/12, 150/12, 151/12 and 309/16 and the respondents in Criminal Appeal No.448/12 would be referred by their numbers and nomenclature before the trial Court.
3. Criminal Appeal No.149/2012 is filed by Hasankhan Jabajkhan (original accused no.2) and Nadimoddin Najmoddin

(original accused no.4) ; Criminal Appeal No. 150/2012 is filed by Firozkhan alias Firdoskhan Jabajkhan (original accused no.3) and Shamiullakhan Anwarkhan (original accused no.21) ; Criminal Appeal No. 151/2012 is filed by Ijajkhan Jabajkhan Pathan (original accused no.1) and Ziullahkhan Jakaullahkhan (original accused no.18) ; and Criminal Appeal No. 309/2016 is filed by Nasrullah Khan Jabaj Khan (accused in S.T. No.19/2013), challenging their conviction. Criminal Appeal No. 448/2012 is filed by the State of Maharashtra, challenging acquittal of remaining 17 accused persons and also acquittal of the appellants/accused nos.1 to 4, 18 and 21 for the offence punishable under Section 307 read with Section 149 of the Indian Penal Code.

4. In a crime bearing No. 11/2008, registered with Police Station, Ner, district Yavatmal, 24 persons were charge-sheeted. Initially, Sessions Trial No. 63/2008 was registered against all these accused persons. However, at the stage of trial, accused no.17 Nasrullah Khan was absconding and therefore, his trial was separated. Out of 23 accused persons, learned Additional Sessions Judge, Yavatmal after conducting a full fledged trial, found six accused persons, namely accused no.1 – Ijajkhan Jabajkhan Pathan, accused

no.2- Hasankhan Jabajkhan, accused no.3 – Firozkhan @ Firdoskhan S/o Jabajkhan, accused no.4- Nadimoddin Najmoddin, accused no.18 – Ziyaullahkhan Jakaullakhan and accused no.21 -Shamiullahkhan Anwarkkhan, guilty of the offences punishable under Sections 147, 148, 302 r/w 149 and 326 r/w 149 of the Indian Penal Code and convicted them for these offences by the judgment and order dated 29.02.2012. The learned Additional Sessions Judge acquitted the remaining accused persons of all the charges.

The sentences awarded to the convicted accused are as follows :

(i) The appellants/accused nos.1 to 4, 18 and 21 are sentenced to suffer imprisonment for life and to pay a fine of Rs.3,000/- each and in default to suffer simple imprisonment for three months, for the offence punishable under 302 read with Section 149 of the Indian Penal Code.

(ii) They are sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.2,000/- each and in default to suffer simple imprisonment for three months, for the offence punishable under Section 326 read with Section 149 of the Indian Penal Code.

(iii) The appellants/ accused nos.1 to 4, 18 and 21 are further

sentenced to suffer rigorous imprisonment for six months and to pay a fine of Rs.1,000/- each and in default to suffer simple imprisonment for one month for the offence punishable under Section 147 of the Indian Penal Code.

(iv) They are also sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.1,000/- each and in default to suffer simple imprisonment for one month for the offence punishable under Section 148 of the Indian Penal Code.

(vi) The learned Additional Sessions Judge has acquitted all the appellants of the offence punishable under Section 4 and 25 of the Arms Act.

5. The trial of absconding accused no.17 was separated and after filing separate charge-sheet against him, it was registered as Sessions Trial No. 19 of 2013. The learned Additional Sessions Judge, found him guilty and by judgment and order dated 15.03.2016, convicted him for the offences punishable under Sections 302 r/w Sec.149, 307 r/w Sec.149, 147 and 148 of the Indian Penal Code. He is sentenced to suffer imprisonment for life and to pay a fine of Rs.10,000/- and in default to suffer simple imprisonment for three

months for the offence punishable under Section 302 read with Section 149 of the Indian Penal Code. He is sentenced to suffer rigorous imprisonment for four years and to pay a fine of Rs.3,000/- and in default to suffer simple imprisonment for two months for the offence punishable under Section 307 read with Section 149 of the Indian Penal Code. He is further sentenced to suffer rigorous imprisonment for six months and to pay fine of Rs.1,000/- and in default to suffer simple imprisonment for one month for the offence punishable under Section 147 of the Indian Penal Code ; and to suffer rigorous imprisonment for one year and to pay a fine of Rs.1,000/- and in default to suffer simple imprisonment for one month for the offence punishable under Section 148 of the Indian Penal Code. He is acquitted of the offence punishable under Sections 4 and 25 of the Arms Act.

Being aggrieved by the impugned judgment and order, the appellants/accused as well as the State are before this Court in these appeals.

6. The facts giving rise to these appeals are as follows :-

The incident in question had occurred on 02.02.2008 at

about 2.00 p.m. Anis Khan Tayab Khan Pathan (PW1), who is the first informant, after the incident went to Police Station, Ner and reported the occurrence to the police. It is stated that on the date of the incident, at about 2.00 p.m., informant Aniskhan (PW1) along with Javedkhan (deceased), Sheikh Shafik Shaikh Mannu, Aniskhan Mustafakhan Pathan (PW5), Imrankhan Abrarkhan, Abrarkhan Afsarkhan went to saloon (barber shop) of one Banti Shrivastava, situated near old bus stand, Ner. Sheikh Shafik was shaving his beard in the saloon. Javedkhan was sitting in the next chair. Aniskhan (PW1) and his other companions were sitting on a bench outside the saloon. It is stated that at that time accused nos. 1 to 10, 12, 15 to 23 came there, armed with deadly weapons. Accused Nasrullakhan Jabajkhan was holding sword, accused Hasankhan Jabajkhan was holding Khanjir, Ziyaullahkhan Zakaullahkhan was holding knife, accused Nadim @ Nadimoddin was holding Gupti (sword stick) and accused Arifkhan Rasulkhan and Mubarakkhan Attaullahkhan were holding iron pipes. Accused persons entered into the saloon and opened the assault on Javedkhan, Sheikh Sheikh and Aniskhan Mustafakhan with the weapons carried by them. Accused

Nasrullahkhan, Ziaullahkhan, Firdozkhan @ Firozkhan, Ijajkhan, Nadim @ Nadimoddin and Hasan Khan inflicted blows with the weapons on the person of Javedkhan Wahidkhan. They inflicted blows on Aniskhan Mustafakhan with the weapons carried by them. They also inflicted blows on Aniskhan Tayabkhan and Sheikh Shafique with the weapons carried by them. The remaining accused instigated the assailants by stating “*mar dalo salonko, jinda mat chhodo*” (*kill them. Do not leave them alive*). The informant Anis Khan Tayab Khan (PW1) attempted to run away from the spot. At that time, accused Ziaullahkhan inflicted sword blow on his forehead. He therefore, ran away and hide himself near a cinema theatre.

7. It is stated that after brutal attack on Javedkhan and Shaikh Shafique in the saloon, the accused persons went towards weekly cattle market with the weapons. The informant (PW1) thereafter came back to saloon shop and saw that Javedkhan was lying in a pool of blood. He had sustained injuries on his head, back, neck and on his left arm. Palm of right hand of Javedkhan was severed from hand. He was lying dead in the saloon.

8. It is the further case of the prosecution that all the accused persons in the weekly market assaulted Nasrullakhan Afsarkhan (PW2) and Asrarkhan Afsarkhan (PW3). From weekly market, they went towards the house of Sabirkhan Wahedkhan and assaulted him with the sword.

9. On the basis of the report of Aniskhan Tayabkhan (PW1), crime bearing No.11/2008 came to be registered. PI Ram Hake (PW22) conducted the investigation. He visited the spot and drew spot panchanama. He collected blood sample of the deceased, one wrist watch, chappal, one boot and one sheath, one white scarp from the saloon. He did inquest of the dead body. He forwarded the dead body for post mortem. After post mortem, he received clothes on the person of the deceased from the Medical Officer. He recorded statements of the witnesses. He effected arrest of all the accused persons. During the course of investigation, the weapons used in commission of the crime were seized, on production of the same by the respective accused as well as discovered at the instance of the accused on the basis of their respective confessions.

10. The injured witnesses were sent to the hospital. The seized articles namely clothes, weapons and samples were forwarded to the Chemical Analyser, Nagpur for analysis. In the due course PI Hake (PW22) received the C.A. reports, Post Mortem report and medical certificates of the injured witnesses. On completion of the investigation, he filed charge-sheet against the accused in the court of learned Judicial Magistrate, First Class, Ner.

11. On committal of the case to the Sessions Court, Yavatmal, the learned Additional Sessions Judge, Yavatmal framed the charge against the accused persons for the offences punishable under Sections 147, 148, 302 r/w Sec.149, 307 r/w Sec.149 of the Indian Penal Code and under Sections 4 and 25 of the Arms Act. The accused persons pleaded not guilty. Their defence is of total denial and false implication due to enmity between them and the deceased and the witnesses.

12. In the trial of 23 accused i.e. Sessions Trial No. 63/2008, the prosecution has examined 23 witnesses and in the trial of accused Nasrullakhan Jabanzkhan i.e. Sessions Trial No. 19/2013, the

prosecution has examined 18 witnesses. The documents exhibited in S.T. No.63/2008 were relied upon by the prosecution in S.T. No.19/2013. It is to be noted that all the witnesses examined in both the Sessions Trials are common. On consideration of the evidence on record, the learned Additional Sessions Judge found accused nos. 1, 2, 3, 4, 18 and 21 in S.T. No.63/2008 and accused in S.T. No.19/2013 guilty and sentenced them as above. The remaining accused persons were acquitted. The convicted accused being aggrieved by the impugned judgment and orders are before this Court in appeal. The State of Maharashtra being aggrieved by the order of acquittal of 17 accused has also preferred an appeal.

13. We have heard learned advocate Shri A.S. Manohar for the appellants/accused nos.2 and 4 in Cri. Appeal No. 149/2012 and appellant/accused in Cri. Appeal No. 309/2016 ; learned advocate Shri Parvez W. Mirza for appellants/accused nos.3 and 21 in Cri.Appel No. 150/2012 and for accused nos.1 and 18 in Cri. Appeal No.151/2012 ; Shri S.S.Doifode, learned Additional Public Prosecutor for the State in all these appeals ; Shri P. R. Agrawal, learned advocate for respondent nos. 5 to 10, 12 to 15, 19 and 21 and Shri A. A. Naik,

learned Advocate for respondent no.23 in Cri.Appeal No.448/12. Shri R. J. Mirza, learned advocate appeared to assist the prosecution. With their able assistance we have also gone through the entire record and proceedings.

14. Learned advocate Shri A.S. Manohar submitted that in this case, the prosecution has failed to establish involvement of the accused persons in commission of the crime. The learned advocate submitted that the deceased and the witnesses had enmity with the accused persons and therefore, the accused were falsely implicated in this case. By drawing our attention towards the evidence on record, the learned Advocate Mr. Manohar submitted that on the report of accused no.7 Imdad Hussain, deceased Javedkhan and PW Nos.1, 2, 3 and 5 had been prosecuted for the offence punishable under Section 307 of the Indian Penal Code. The learned advocate took us through the contents of the spot panchanama and submitted that occurrence of the incident at three places, as sought to be made out, is totally unbelievable. The learned advocate submitted that considering the manner of attack with the deadly weapons and the injuries sustained by the deceased as well as the witnesses, there would have been a pool of

blood at the first spot of the incident i.e. saloon as well as second spot i.e. weekly cattle market and third spot i.e. in front of house of Sabirkhan. The learned advocate pointed out that except blood stains on the ground, no blood was found on the articles in the saloon, which was admeasuring hardly 8 x 10 feet. The learned advocate submitted that considering the nature of the assault with deadly weapons and the injuries sustained by Nasrullakhan (PW2) and Asrarkhan (PW3) at weekly market, there ought to have been a pool of blood at the said spot. The learned advocate submitted that these facts would indicate that the places of occurrence mentioned in the panchanama had been created by the prosecution just to create evidence. The learned advocate submitted that eye-witnesses PW1, PW2, PW3 and PW5 are on inimical terms with the accused persons and therefore, they have falsely implicated the accused persons. The learned advocate submitted that on the occurrence of incident and the role allegedly played by each accused, the evidence is inconsistent and unbelievable. The learned advocate submitted that if the incident of brutal attack at the instance of the convicted accused had taken place in the saloon, then in all probability, the clothes of the accused persons would have

soaked/smeared with blood. The learned advocate submitted that the clothes of all the accused were not seized. He further submitted that on the clothes of some of the accused, seized in the crime, there was no blood at all. The learned advocate by drawing our attention to the C.A. report (Exhibit-368) submitted that on plastic carpet the blood detected was of group 'B'. He pointed out that the blood group of Asrarkhan Pathan (PW3) was 'O'. Result of analysis of the blood group of Nasrullakhan Afsarkhan (PW2) was inconclusive. Learned advocate submitted that there was no reason to have blood of the deceased on the plastic carpet at the spot in weekly cattle market. The learned advocate submitted that therefore, a serious doubt is created about the place of actual occurrence as well as involvement of the accused persons. The learned advocate submitted that PW1, PW2, PW3 and PW5, apart from being interested witnesses, are the tutored witnesses. The learned advocate took us through the evidence of eye-witnesses and submitted that the genesis of the incident has not been established. The learned advocate submitted that proper witness to establish the genesis would have been the barber Mr. Shrivastava. The prosecution has not examined him. No plausible explanation has been

placed on record for non-examination of said barber and other injured eye-witnesses as well as other independent witnesses. The learned advocate submitted that on the basis of the available evidence, the learned Additional Sessions Judge extended benefit of doubt to the 17 accused persons. He submitted that this would indicate that those 17 accused were falsely implicated due to enmity.

15. As far as recovery of weapons is concerned, learned advocate Shri Manohar submitted that so called recovery of butcher's knife (sattur) and khanjir at the instance of accused no.1 Ijajkhan Jabanjkhan Pathan pursuant to his confession has been falsified by the evidence of panch witness Satish Dhotarkar (PW4). The learned advocate pointed out that Satish (PW4) has categorically stated that Sattur and Khanjir were lying on the spot in cattle market at the time of panchanama and the same were taken in custody by police on 02.02.2008 itself. The learned advocate, therefore, submitted that the investigation conducted in this crime was tainted.

16. Learned advocate Shri P.W. Mirza, besides adopting the above submissions advanced by learned advocate Shri Manohar,

submitted that the names of some of the accused were common and therefore, it was necessary to establish specific identity of each of the accused through the evidence of eye-witnesses, namely PW1, PW2, PW3 and PW5. There were two accused by name Firozkhan. They were not separately identified. The witnesses have simply stated that the accused present before the Court are same. The learned advocate submitted that evidence of the eye-witnesses is full of material omissions and improvements. The learned advocate submitted that therefore, relying upon such a shaky evidence, the accused cannot be convicted. According to him, the accused deserves to be acquitted.

17. Shri S.S. Doifode, learned Additional Public Prosecutor for the State submitted that the prosecution has established the motive for commission of crime. It is submitted that previous enmity was the motive for commission of this crime. The learned APP submitted that the evidence adduced by prosecution is cogent and reliable. The evidence on record, in the submission of learned APP, is sufficient to convict all 24 accused for the offences for which they had been charged. He submitted that eye-witnesses PW1, PW2, PW3 and PW5 have narrated the actual incident in great detail and therefore, their

evidence cannot be disbelieved. The learned APP submitted that the eye-witnesses had sustained injuries in the incident and therefore, the same would lend an assurance to their trustworthiness and credibility. The learned APP submitted that medical evidence corroborates the evidence of eye-witnesses. Learned APP submitted that during the course of investigation, the weapons used by the accused for commission of brutal attack, were seized at the instance of accused persons. He submitted that blood of group 'B' was detected on Khanjir and Sattur, allegedly used by accused no.2 Hasankhan Jabajkhan and accused no.1 Ijajkhan Jabajkhan, respectively. The learned APP submitted that the prosecution has proved its case beyond reasonable doubt. The learned APP took us through the impugned judgment and order passed by the learned Additional Sessions Judge and submitted that cogent reasons have not been recorded to give the benefit of doubt to the 17 accused persons. The learned APP, therefore, submitted that the appeals filed by the convicted accused deserve to be dismissed and the appeal filed by the State against acquittal of 17 accused deserves to be allowed.

18. In order to appreciate the rival submissions, we have

minutely perused the oral as well as documentary evidence and the relevant record. The learned Additional Sessions Judge has recorded a finding that the deceased died homicidal death. This finding is based on the evidence of the Medical Officer, who had conducted post mortem of the dead body and the other evidence. Dr. Vinod Pawar (PW20) had conducted post mortem on the dead body of Javedkhan. He has deposed before the Court about examination of the dead body, external as well as internal injuries found on the body and the cause of death. He has stated that on examination, he found following external injuries on the dead body of Javedkhan.

- 1] *Amputation of right hand from wrist joint separated.*
- 2] *Lacerated wound on vertex x 3 inc x 2 cm. x 2 cm. Sugital.*
- 3] *Lacerated wound on left side forehead 3 inch x 2 cm x 2 cm starting horizontal and goes vertically laterally.*
- 4] *Bleeding from both nostrils due to injury under skull.*
- 5] *Incised wound left shoulder at level of acromion process 2 inch x 2 cm x 2 cm. Horizontal.*
- 6] *Stab wound on left side just below clavicle, half inch x half inch x half inch vertical.*
- 7] *Incised wound on left scapular region on back, 2 inch x 1 inch horizontal.*
- 8] *Incised would on right shoulder 2 inch x ½ inch horizontal.*
- 9] *Incised would right forearm just above wrist joint 3 inch x 1 inch horizontal posteriorly.*
- 10] *Incised wound right forearm just above first wound [injury No.9] 2 inch x 2 inch horizontal.*

- 11] *Stab wound on left side shoulder humerus neck. ½ inch x ½ inch vertical.*
- 12] *Incised wound on left forearm just above wrist joint ½ inch x 1 cm. Horizontal.*
- 13] *Incised wound on left forearm in middle area on posteriorly. 1 inch x ½ inch x 1 cm.*
- 14] *Incised would left arm ½ inch x 2 cm.*
- 15] *Incised would on left ankle joint anteriorly 2 inch x ½ inch.*
- 16] *Incised would on right ankle joint 4 inch x 3 cm. Irregular in shape anteriorly.*
- 17] *Incised would on left ankle joint anteriorly. 2 inch x ½ inch.*
- 18] *Incised would on left poplital fossa laterally ½ inch x 4 cm. X 1 cm.*
- 19] *Fracture of right hand with amputation right hand involve radius and ulna of lower end.*
- 20] *Fracture of left wrist joint with lower end of radius ulna.*
- 21] *Query fracture outer table of vertex.*
- 22] *Query fracture of left elbow joint.*
- 23] *Query fracture of left ankle joint.*

Dr. Pawar (PW20) has deposed that on internal examination of the dead body he found injuries under the scalp. There were other internal injuries also to the vital parts of the body. He has stated that all the injuries were ante mortem. The cause of death, according to him, was haemorrhagic shock, hypovolumic shock, neurogenic shock, secondary to multiple injuries present on body due to sharp and heavy hard weapon and assault. The post mortem report is at Exhibit-395.

19. On a perusal of cross-examination of Medical Officer Dr. Pawar (PW20) vis-a-vis his opinion as to cause of death of Javedkhan,

there is hardly any challenge. What is challenged in his cross-examination is the authorship of the injuries. The line of cross-examination indicates that Dr. Pawar (PW20) might have noticed external as well as internal injuries on the dead body, however the accused persons were not responsible for the same. The prosecution has adduced other ample evidence to prove that the deceased died homicidal death.

20. In this case, there are four injured eye-witnesses. The accused persons have been convicted for the offence of attempt to murder under Section 307 of the Indian Penal code. In this context, it would be necessary to see evidence of the Medical Officer.

21. Aniskhan Tayabkhan Pathan (PW1) had sustained injuries. Dr. Pawar (PW20) had examined him on 02.02.2008. The injury certificate of Aniskhan (PW1) is at Exhibit-390. Dr. Pawar found following injuries on the person of Aniskhan (PW1) :-

Lacerated wound on vertex age 1 to 2 hours, healing history Surgeon advised G.M.C. Yavatmal. Type of injury dependents on surgeon advice. Type of weapon sharp.

Dr. Pawar deposed that said injury can be caused by weapon like sword.

22. Aniskhan Mustafakhan (PW5) is another injured in the incident. He was also examined by Dr. Pawar (PW20) on 02.02.2008. His injury report is at Exhibit-392. On examination, Dr. Pawar found following injuries on the body of Aniskhan (PW5).

- 1] *Lacerated wound on right shoulder joint 4 inch x 1 cm.*
- 2] *Lacerated wound on left thumb 2nd finger 3rd finger on middle line.*

Dr. Pawar (PW20) further deposed that age of the injury was within 1-2 hours. He has stated that the injury could be caused due to sharp and rough object.

23. Dr. Seema Mankar (PW21) is the Medical Officer, who had examined Asrarkhan Afsarkhan (PW3) on 02.02.2008. On examination, she found following injuries on the person of Asrarkhan -

- 1] *Sutured wound over frontal region 3 cm.*
- 2] *Swelling over left side of neck.*
- 3] *Swelling over right leg and foot.*

Dr. Seema has stated that X-ray of right leg showed fracture of both

bones. The medical certificate is at Exh. 403. She deposed that injury no.3 fracture of right leg was grievous in nature.

24. Dr. Vandana Gharde (PW23) is another Medical Officer, who had examined Nasrullahkhan Afsarkhan Pathan (PW2). On examination, she found following injuries on the person of Nasrullahkhan .

- 1] *Sutured wound over the left parietal region.*
- 2] *Blunt trauma left shoulder joint.*
- 3] *Blunt trauma left side of back.*
- 4] *Plastered left leg.*

The injury report of Nasrullahkhan is at Exh.427. Dr. Vandana (PW23) has stated that the injury no.1 was grievous in nature, but not sufficient to cause death.

25. On perusal of evidence of the Medical Officers, who had examined the injured witnesses, PW2, PW3 and PW5, it is seen that the history of assault, the manner of assault and the weapons used by the assailants was not recorded in the MLC reports. The Medical Officers have stated that they have not recorded the history of assault of the injured because the injured did not state it. The Medical

Officers have also stated that they did not ask the injured persons about the history of assault and the names of the assailants. Perusal of evidence of eye-witnesses PW1, PW2, PW3 and PW5 would show that they are also silent on this vital and important aspect. They have not made a positive statement in their evidence that they narrated, to the Medical Officer, the history of assault, nature of weapons used for assault and the details of the assailants. In our opinion, this important aspect would be required to be borne in mind while appreciating evidence of PW1, PW2, PW3 and PW5. This aspect would largely reflect upon the credibility of the eye-witnesses vis-a-vis involvement of the accused persons being the author of the injuries sustained by them.

26. Before proceeding to appreciate the evidence of the eye-witnesses, it would be appropriate to appreciate the evidence of Satish Dhotarkar (PW4), a panch witness to the spot panchanama and the relevant part of the evidence of PI Hake (PW22), the Investigating Officer. At the threshold, it is necessary to state that the deceased had sustained 23 grievous injuries. The eye-witnesses PW1, PW2, PW3

and PW5 have narrated the incident of assault and the weapons used by the assailants. The multiple incised wounds on the vital parts of the body of the deceased and severance of his right hand palm by itself would be sufficient to conclude that after inflicting the blows with the weapons such as swords, knife and gupti (sword stick), the blood would have gushed out from those injuries. It has come on record in the evidence that the saloon shop, where assault on the deceased took place, is measuring about 8 x 10 feet. The height of the said shop is 7 feet. As per the case of the prosecution, the deceased was sitting on a chair in the saloon at the time of brutal and merciless attack on him. It is to be noted that in this situation, the chair on which the deceased was sitting, the articles from the saloon and the floor ought to have been drenched with blood. There ought to have been a pool of blood on the floor of saloon shop. It is also to be noted that in above backdrop absence of blood on the chair and other articles in the saloon, would be an important circumstance to raise a doubt about actual occurrence of the incident in the saloon.

27. The second part of the incident, as per the case of the prosecution, took place in the weekly cattle market. The third part of

the incident, as per the case of prosecution, occurred in front of the house of Sabirkhan. As far as the spot in weekly market is concerned, there ought to have been a pool of blood on the ground inasmuch as the eye-witnesses PW2 and PW3 have categorically stated that they sustained bleeding injuries due to the blows inflicted with the sword and other weapons by the assailants. It would, therefore, be necessary to appreciate the evidence of panch witness Satish (PW4) and the evidence the Investigating Officer (PW22). The contents of the spot panchanama at Exhibit-306 would also be required to be perused.

28. Satish Dhotarkar (PW4) has stated that panchanama of the spot of the incident at three places, was drawn in his presence. He has stated that in the saloon, they found blood stains on the floor. His examination-in-chief as well as panchanama (Exh.306) is silent about presence of blood on the other articles and more particularly, on the chair from the saloon. It has been specifically mentioned in the panchanama that two chairs were seen in front of the mirror. There was one water cooler. It has been specifically mentioned in the panchanama that on the chair, there was white colour cloth. As per the

case of the prosecution, the incident occurred at about 2.00 pm. The panchanama was drawn on 02.02.2008 between 16.10 hours and 18.20 hours. This fact would indicate that within two hours from the occurrence of brutal attack on the deceased in the saloon, the police and panchas paid visit to the spot. At this stage, it is necessary to mention that the Investigating Officer (PW22) has categorically stated that immediately after receipt of the information, he visited the three spots. He has categorically stated that at the time of his visit, he had posted the guards at the saloon to guard and preserve the same. This admission given by the Investigating Officer would, therefore, rule out the possibility of someone handling, arranging or cleaning the articles after the incident. In his cross-examination, Satish (PW4) has stated that when he went to the spot, the saloon was closed. In his presence, the shutter of the saloon was opened. Perusal of the contents of the panchanama would show that Satish (PW4) has deposed consistent with the facts recorded in the panchanama with regard to the actual situation prevailing on the spot. In his cross-examination Satish (PW4) has stated that there was a mirror covering entire western wall of the saloon. He has further stated that there was a counter parallel to the

mirror having 2 feet width in the saloon. The articles in the saloon shop were properly kept at the counter. He has further stated that two iron chairs were found in front of the counter. He has stated that one water cooler and one TV was found behind the chairs. He has categorically stated that all the articles in the saloon were in good condition. In our opinion, the prevailing condition on the spot and absence of blood on the articles in the saloon would be an important circumstance to doubt the occurrence of the incident in the saloon. If the incident of brutal attack, as stated, had taken place in saloon shop admeasuring 8 x 10 feet, all the articles including the walls of the saloon, ought to have been drenched with blood. We have mentioned above that the blood would have gushed out after sustaining incised wounds as stated in the post mortem report.

29. It is the case of the prosecution that from saloon shop, after deadly attack on the deceased, the accused persons followed Nasrullakhan (PW2) and Asrarkhan (PW3) towards weekly market. It has come on record in the evidence of these eye-witnesses (PW2 and 3) that they were present on the spot and they tried to intervene in the

quarrel and save the deceased from the clutches of the accused. It is their case that therefore, the accused persons followed them and assaulted them with deadly weapons in the weekly market near their bullock cart. The injuries found on the person of PW2 and PW3, as can be seen from their respective medical certificates, were bleeding injuries. They have categorically stated that after sustaining blows with the sword and other weapons, blood started oozing from the wounds. The panchanama of said spot was also drawn within three hours from the occurrence of incident. It is seen from the panchanama as well as from the evidence of Satish (PW4) that blood stains were found on the plastic carpet lying on the said spot. It is pertinent to mention at this stage that blood was not found on the ground. Similarly, blood soaked soil was not seized as a sample from the said spot. Considering the injuries sustained by Nasrullakhan (PW2) and Asrarkhan (PW3), there would have been pool of blood at the spot of the incident at weekly market. The soil on the ground would have drenched/soaked with blood. Satish (PW4) in his examination-in-chief has stated that police seized two plastic carpets stained with blood, two iron rods and one butcher's knife (sattur) from the spot. At this stage, it would be

necessary to state that in his cross-examination, Satish (PW4) has categorically stated that butcher's knife and khanjir were also found on the spot in the weekly market. It is the case of the prosecution that butcher's knife and khanjir were discovered at the instance of accused no.1 Ijajkhan from the compound of house of one Sulemankhan, at Kohinoor Society, Yavatmal on 27.03.2008. The C.A. reports in this case indicate that blood of group 'B' was detected on butcher's knife and khanjir. The blood group of the deceased, as opined by the C.A., was 'B'. In our view, the admission given by Satish (PW4) as to the recovery of butcher's knife (sattur) and khanjir from weekly market on the date of the panchanama i.e. 02.02.2008, would be an important aspect touching the credibility of the investigation and credibility of the evidence of the witnesses examined by the prosecution.

30. According to Satish (PW4), from weekly market, they went to Nababpur area of Ner. The said spot was pointed out by Sabirkhan. On the said spot, he was assaulted by the accused and he had sustained bleeding injury. Admittedly, no blood was found on the said spot. It is pertinent to note at this stage that Sabirkhan was one of

the injured in the incident. However, he has not been examined as a witness. No plausible explanation is placed on record.

31. PI Ram Hake (PW22), Investigating Officer, is one more important witness on this point. In his cross-examination, he has stated that the articles in the saloon were lying scattered. He has further stated that chairs in the saloon shop were toppled down on the ground. No damage was caused in the saloon. Blood was found on the floor of the saloon. The Investigating Officer, in the teeth of the above, was expected to explain and elaborate on the vital aspects, which have not been established on the basis of the spot panchanama. If the incident had occurred in the manner stated by the witness, then in that event all the articles including walls of the saloon would have been drenched or soaked with blood. There would have been pool of blood on the floor. In our opinion, considering the undisputed enmity between the accused persons and the deceased and the witnesses, it was necessary for the prosecution to crystallize the above aspects. The defence of the accused is of false implication due to enmity between them and the witnesses. It is to be noted at this stage that the prosecution was required to prove the actual spot of occurrence on the

basis of cogent and concrete evidence. As per the case of the prosecution, incident of assault took place at three places. The incident of brutal attack on the deceased took place in the saloon. If evidence and circumstance on record indicate that the occurrence did not take place in the saloon, then in that event it would, to a large extent, reflect upon credibility of the eye-witnesses. It is seen from the record that the accused have denied their complicity in the commission of crime. There is hardly any dispute about the murder of the deceased and the cause of his death. Their defence is that they are not the authors of the injuries sustained either by the deceased or by the witnesses. It is also their defence that they have been falsely implicated in this case.

32. In addition to above important aspect, before proceeding to appreciate evidence of eye-witnesses namely, PW1, PW2, PW3 and PW5, it would be necessary to consider the C.A. reports. It is to be noted that none of the convicted accused had sustained injury at the time of the incident. It is not the case of the prosecution that assault on the deceased occurred at weekly market, which is the second spot of the incident. The document (Exh.369) is the C.A. report of the blood

sample of the deceased. His blood group was 'B'. It is the case of the prosecution that Nasrullahkhan (PW2) and Asrarkhan (PW3) sustained injuries at the hands of the accused at weekly market. Exhibit-370 is the C.A. report of blood sample of Asrarkhan (PW3). His blood group is 'O'. His clothes were seized. Exh.371 is the C.A. report of blood sample of Nasrullahkhan (PW2). Result of analysis of his blood group is inconclusive. His clothes stained with blood were seized during the course of investigation. Clothes of PW2 and PW3 were sent to the Chemical Analyser. The C.A. report is at Exhibit-368. The blood detected on the clothes of PW2 and PW3 was of 'O' group. This report, therefore, proved beyond doubt that their blood group was 'O' and not 'B'. The C.A. detected blood of group 'B' on the plastic carpet, which was recovered from the spot at weekly market. It is the case of the prosecution that said plastic carpet was stained with blood of PW2 and PW3. As per the C.A. report, blood detected on the plastic carpet was of 'B' group. In our considered opinion, above facts need to be borne in mind while appreciating the evidence of PW1, PW2, PW3 and PW5 on the point of actual occurrence of the incident and the place of incident.

33. This would take us to the evidence of the eye-witnesses. Aniskhan Tayabkhan (PW1) has deposed that on the date of the incident he was sitting in front of the saloon of Shrivastava with others. He has stated that the deceased was sitting on one chair in the saloon. Shaikh Shafique was sitting in another chair and barber Dinesh was shaving his beard. He has stated that at about 2.00 pm, all the accused came there with deadly weapons like sword, butcher's knife, sword-stick, knife, iron pipes and stick. He was knowing all the accused. He has stated that all the accused assaulted Javedkhan, Shaikh Shafique, Mannu and Aniskhan Mustafakhan. He has stated that accused Nasrullahkha, Ziaullakhan, Firdoskhan, Ijajkhan, Nadimoddin and Hasankhan inflicted merciless blows with the weapons carried by them on Javedkhan. They also assaulted on Aniskhan Mustafakhan (PW5) with those weapons. He has stated that other accused instigated them to kill Javedkhan and others. He has categorically stated that Ziaullakhan inflicted a blow on his head with sword. He, therefore, ran away from the said place and took shelter behind one cinema theatre. All the accused thereafter proceeded towards weekly market chasing PW2 and PW3. He has stated that

when he saw that accused had left the saloon, he came back to saloon. He saw that Javedkhan was lying dead in the saloon shop. He, therefore, went to the Police Station and reported the matter to the police. In his cross-examination, he has categorically admitted that since the time of the incident occurred on 22.08.2007, he is on inimical terms with the accused persons. He has admitted that accused Imdad Husain had lodged the report about the incident occurred on 22.08.2007 and in the case registered on the basis of said report, he is one of the accused. He has further stated that he is nephew of Nasrullahkhan Afsarkhan (PW2).

34. Admittedly, clothes of Aniskhan (PW1) were not seized by police during the course of investigation. If he had sustained injuries, as stated by him, on his head by sword, then his clothes would have stained or smeared with blood. He has not stated that he either questioned the accused persons or tried to rescue the deceased or Sheikh Shafique from their clutches. His evidence would show that he was standing outside the saloon and all of a sudden accused Ziaullahkhan inflicted blow on his head by sword. Sheikh Shafique has not been examined as a witness. Sheikh Shafique would have been

an independent witness in this case. Aniskhan (PW1) has not stated that he entered the saloon when the assault was going on and saw convicted accused inflicting blows on the deceased and Shaikh Shafique. It has come on record in the evidence of PI Hake (PW22) that when Aniskhan (PW1) with other two persons came to police station, he informed that quarrel was going on in weekly market. He did not inform about the persons involved in the assault and the weapons carried by those persons. It is further pertinent to note that barber Dinesh Shrivastava has not been examined. He has stated that 24 accused had come on the spot of the incident. Learned Additional Sessions Judge did not believe his evidence in entirety and gave benefit of doubt to 17 accused persons. Perusal of his cross-examination would show that there is mismatch on the aspect of time of actual lodging of the report and sending Aniskhan (PW1) to the Government Hospital. The first information report was registered at 2.45 p.m. His evidence is slightly contrary to the evidence of the Investigating Officer. The Investigating Officer has stated that he personally took the injured to the hospital in his Jeep. He has stated that when he went back to police station from the spot at 10.00 pm, Aniskhan Tayabkhan

(PW1), Shaikh Shafique and Sabirkhan were sitting in the police station. The time of actual visit of PW1 to the police station and from police station to the hospital does not match with the time stated by the Investigating Officer. It is not the case of this witness that for one reason or the other, he invited wrath of the accused persons and therefore, they assaulted him. He was not actually involved in the incident. He was sitting on the bench outside the saloon. He has stated that number of persons had gathered on the spot. It, therefore, goes without saying that he would have been like other onlookers on the spot. His statement that he alone went running to the police station is found to be contrary to his statement recorded by the police where he had stated that Asrarkhan (PW3) accompanied him to the police station. This omission has been proved through the Investigating Officer. In his evidence, PW1 has stated that later on he came to know about occurrence of the incident in weekly market and in front of the house of Sabirkhan. It is to be noted that if report of the incident occurred at 2.00 pm was lodged at 2.45 p.m. and he was not a witness to the incidents at weekly market and one occurred in front of house of Sabirkhan, it was highly improbable for him to know the

incidents occurred at weekly market and in front of Sabirkhan's house at the time of lodging report. In his report (Exhibit-289), he has made a reference of those incidents. On minute perusal of his evidence and the fact that his clothes were not sent to C.A. for analysis and he was not in any way involved in the quarrel that took place at the other spots, his evidence does not inspire confidence. It seen on a perusal of his evidence that he has narrated certain facts vis-a-vis the incident of assault by weapons which he could not have seen by standing outside the saloon.

35. Nasrullahkhan (PW2) is an eye-witness to the incident. His brother Asrarkhan (PW3) is another eye-witness. Perusal of their evidence would show that they were not present either in the saloon or outside the saloon when the accused persons came there with deadly weapons. Nasrullahkhan (PW2) has stated that on that day, there was weekly market. He had brought bullocks in the market. He has stated that he and his brother Asrarkhan had a tea in the canteen of Jamir, situated in front of the saloon shop of Banty. After taking tea, they were proceeding towards cattle market. After proceeding ahead at some distance, they heard the shouts from the shop of Banty as

“*bachao, bachao, mar gaya, mar gaya*”. He has stated that therefore, he and his brother went there to see actual happenings. He saw that accused Nasrullahkhan was cutting right hand of Javedkhan by sword. Ziaullahkhan was cutting left hand of Javedkhan by sword. Ijajkhan Jabajkhan was assaulting Javedkhan by butcher’s knife (sattur) and Hasankhan Jabajkhan was assaulting Javedkhan by Khanjir. Nadimoddin was assaulting Javedkhan by sword-stick (gupti). The accused Shami driver was holding sword in his hand and other accused were holding weapons like stick and iron pipes in their hands. He has stated that after sustaining the blows, Javedkhan fell down. He and his brother tried to save him. Therefore, all the accused persons rushed towards them. He and his brother ran towards cattle market. Accused chased them. He and his brother took shelter under the bullock-cart in the cattle market. Accused Nasrullahkhan pulled him and assaulted him by means of sword on his head. His clothes were stained with blood. Other accused persons inflicted blows on his leg. He sustained fracture to his leg. He has stated that accused persons inflicted blows on his brother Asrarkhkan. Police took him to Rural Hospital, Ner and from there he was sent to Government Hospital, Yavatmal. His

brother had sustained serious injuries and therefore, he was referred to the Government Hospital, Nagpur.

36. Before analysing the evidence of this eye-witnesses, it would be necessary to consider the evidence of Asrarkhan (PW3). To some extent, evidence of Asrarkhan (PW3) is on the same line as of the evidence of Nasrullahkhan (PW2). He has stated that he and his brother had gone to canteen of Jamir for taking tea. At that time, he saw that Aniskhan Tayabkhan, Aniskhan Mustafakhan and Imrankhan Tayabkhan were sitting on a bench in front of the saloon shop of Shrivastav. He had a talk with them. He has stated that Shaikh Shafique was sitting on one chair and barber was shaving his beard. Javedkhan was sitting on another chair. After talking with them, he went with his brother to the tea canteen. This part of his evidence is contradictory to the evidence of PW2. As per the version of Nasrullahkhan (PW2), they had no occasion to take stop in front of the saloon shop and talk to the persons sitting in front of saloon shop. He has stated that when they were proceeding towards cattle market after taking tea, they heard shouts from the shop of Shrivastav as '*bachao, bachao, mar gaya, mar gaya*'. Thereafter he and his brother

went there. They saw that the convicted accused were assaulting the deceased and Shaikh Shafique. He has stated that other accused persons were standing outside the saloon. They were having iron rods and sticks. He has stated that he and his brother tried to save Javedkhan. He has stated that other accused standing outside were instigating their companions to assault PW2 and PW3. Therefore, he and his brother ran away towards cattle market and took shelter under the bullock-cart. He has narrated the incident occurred in the cattle market. He has stated that accused Shami driver pulled him out and inflicted blows on his head with the sword. Other accused also beat him. He sustained bleeding injury on his head. His right leg was fractured. Vein of his leg was cut. Blood was oozing from the injury. His clothes were stained with blood. Police thereafter took him to the Government Hospital, Ner and from Ner he was initially sent to Yavatmal and from Yavatmal to Government Hospital, Nagpur.

37. Nasrullahkhan (PW2) and Asrarkhan (PW3) have admitted that they were not on talking terms with the accused persons. In short, they have admitted that on account of report lodged against them by the accused persons, they were prosecuted. Javedkhan and

injured Sk.Shafique were also prosecuted on the report of Imdad Husain, accused no.7 in this case. It is to be noted that considering the injuries stated to have been sustained by PW2 and PW3, there ought to have been a pool of blood on the spot in the cattle market. The clothes seized by the police were found stained with blood. Their clothes were not soaked with blood. Similarly, the evidence makes it abundantly clear that deceased Javedkhan was not assaulted in the weekly market. The prosecution would want this Court to believe the evidence of the witnesses that in presence of 24 accused, carrying deadly weapons and the accused having made intention writ large, they tried to enter the saloon to save the deceased. It is to be noted that the saloon is admeasuring 8 x 10 feet. As per this witnesses six accused persons, barber Shrivastav, Javedkhan and Shaikh Shafique were inside the saloon. Height of the saloon is 7 feet. Deadly weapons like sword, iron rods, sword stick etc. were used by the accused. Deceased was assaulted while he was sitting in one of the chairs. The spot panchanama (Exh.306) has proved that neither the chairs were damaged nor blood was found on the chairs and other articles in the saloon. If the brutal incident, as narrated by these witnesses, had

occurred, then the blood would have gushed out of the injuries sustained by Javedkhan and Shafique. The surroundings in the saloon would have drenched with the blood. It is the case of the prosecution that the palm of right hand of the deceased was severed. It is, therefore, apparent that vein was cut and completely exposed. The blood from the body of the deceased in this situation would have completely drained out. The panchanama records that blood stains were found on the floor of the saloon. In our view, this is a very crucial aspect to create a doubt about actual occurrence of the incident in the saloon of Shrivastava. Similarly, the manner of assault on PW2 and PW3 and the injuries sustained by them on the vital parts of the body and absence of pool of blood on the spot of incident at cattle market, would also make the said spot of incident doubtful. Evidence of PW2 and PW3 has not been corroborated by the attending circumstances. It is said that a man may lie but the circumstance cannot. Man may change his version depending upon the situation and circumstances, but the circumstance cannot change.

38. Learned Additional Sessions Judge, therefore, did not believe the evidence of these two eye-witnesses i.e. PW1 and PW2 in

entirety. The evidence was not found sufficient to prove the guilt of the 17 acquitted accused persons beyond reasonable doubt. In short, the learned Additional Sessions Judge found this evidence tainted. On appreciation of the evidence, it is seen that the witnesses tried to involve 24 persons in the crime. It is, therefore, very difficult to accept their evidence. There was enmity between them and the accused persons. They are, therefore, interested witnesses. Nasrullahkhan (PW2) has stated in his cross-examination that the blood had not spread on earth in the weekly market. The Investigating Officer (PW22) did not seize the plain soil as well as blood mixed soil from weekly market. It is to be noted that blood was not detected on any part of the bullock-cart. It is the case of PW2 and PW3 that they took shelter under the bullock-cart. If the injuries stated to have sustained by them are considered in a proper perspective, then in that event, their clothes ought to have smeared or soaked with blood. PW3 has stated in his cross-examination that when deceased Javedkhan was lying in a pool of blood, 15-16 persons were standing outside the saloon shop. He has admitted that after seeing Javedkhan in a pool of blood, he ran towards cattle market. Perusal of the evidence of these

eye-witnesses i.e. PW1, PW2 and PW3 together, would show that it is not sufficient to establish the genesis of the incident. In the given set of facts, the genesis of the incident could have been stated by barber Dinesh and Sheikh Shafique. It has come on record in the evidence of the Investigating Officer (PW22) that the statement of Dinesh recorded during the course of investigation was not included in the charge-sheet filed in the Court. It is, therefore, apparent on the face of the record that the Investigating Officer failed to place on record the actual occurrence and the place of actual occurrence. If barber Dinesh had witnessed the incident, then he would have been the first natural witness to depose about it. His statement was recorded, but it was concealed. In the backdrop of the evidence brought on record, a reasonable judicial inference drawn in the situation would be that his statement must not be supporting the case of the prosecution. It has come on record that the incident, as per the case of the prosecution, was seen by number of adjoining shop owners, but none of them has been examined. Shaikh Shafique, who according to the case of the prosecution, was privy to the incident in the saloon, has not been examined. No plausible explanation has been placed on record in that

respect. Therefore, in our opinion, evidence of PW2 and PW3 is surrounded by the clouds of suspicion. Evidence of these witnesses on the point of involvement of the accused persons in commission of the crime and the spot of occurrence of the crime, do not inspire confidence.

39. Aniskhan Mustafakhan (PW5) is one more eye-witness. His evidence is similar to the evidence of Aniskhan Tayabkhan (PW1). He along with Aniskhan (PW1), Javedkhan, Shafik, Imran and Abrar went to Chandni chowk at Ner. From there they went to the shop of barber Banti Shrivastav. Shafik went inside the shop and sat on one chair. The barber was shaving his beard. Deceased Javedkhan sat on another chair. He and his other companions were sitting outside the shop on a bench. He has stated that at that time Nasrullakhan, Hasankhan, Firdoskhan, Nadimoddin and Iijajkhan came there with deadly weapons. Accused Nasrullakhan inflicted blows with sword on the person of Javedkhan. Remaining persons also assaulted on Javedkhan. He tried to save Javedkhan from these people. He has stated that at that time Ziaullahkhan assaulted on him on his back with

sword. He sustained bleeding injury. Ziaullakhan also inflicted blow on his stomach. He sustained cut injury to his fingers and thumb of left hand. He has stated that the remaining accused were standing outside and instigating the accused in the saloon to kill them. He has stated that from the spot, he went to police station. Police referred him to the Government Hospital. He has not stated that Aniskhan Tayabkhan (PW1) also ran towards police station.

40. It is to be noted that blood sample of Aniskhan Mustafa khan (PW5) was not collected. His clothes were not sent to the CA for analysis. If he had sustained bleeding injuries, then his clothes would have been either smeared or stained with blood. There is no plausible explanation for non-collection of his blood sample and non-seizure of his clothes. He did not narrate the history of assault and the names of the assailants to the Medical Officer. It is not his case that when he went to the police station, he either informed police about the incident or narrated the incident to the police. It is further pertinent to note that PW5 has not stated that PW2 and PW3 were present on the spot and they tried to intervene in the quarrel and save the deceased. In his cross-examination, PW5 has stated that after assault, Shafik ran away

from the saloon. He has further stated that his remaining companions also ran away. He has categorically stated that he alone was present in the saloon to rescue Javedkhan. It is to be noted that if he had been in the saloon surrounded by the accused persons, he would not have been able to leave the said place. In his further cross-examination, he has stated that he was not on talking terms with accused Hasankhan and Firdoskhan. His statement was recorded for the first time on 09.02.2008. In his further cross-examination, PW5 has stated that when he went to police station, police officer was recording statement of Aniskhan Tayabkhan (PW1). He has stated that police recorded statement of PW1 in his presence. In his examination-in-chief, he has stated that without recording his statement, he was directly sent to the hospital. Perusal of his further cross-examination would show that he has admitted that he did not narrate the names of some of the accused to police, whose names he has stated for the first time in the Court. In our opinion, minute perusal of his evidence would make his evidence shaky. His evidence is not sufficient to establish that any incident, as narrated by him, indeed occurred in the saloon. If his evidence is juxtaposed with the facts recorded in the spot panchanama, it would be

sufficient to record a finding that it is unbelievable. This witness is an interested witness. Material improvements made by him before the Court have been proved as omissions. He has categorically admitted that he had not stated while recording his statement by police that Asrarkhan (PW3) had come along with Javedkhan at Chandani chowk. In our view, this has caused a dent to the evidence of this witness as well as evidence of PW3. Perusal of his evidence in entirety would show that he is an interested witness. He has come forward to support the case of the prosecution.

41. On a minute scrutiny of the evidence of the above four eye-witnesses, we are of the considered opinion that their evidence do not inspire confidence as to the place of actual occurrence as well as the places as stated by them and involvement of the accused persons. The prosecution has not examined Sabirkhan. As per the case of the prosecution, Sabirkhan was assaulted by the accused persons in front of his house. Other injured witnesses have not been examined. The clothes of other injured witness were not sent to the C.A. The C.A. reports placed on record, in stead of supporting the case of the

prosecution, create a doubt about occurrence of the incidents. The learned Additional Sessions Judge granted benefit of doubt to 17 accused persons. On re-appreciation of the evidence of four eye-witnesses, we are convinced that the learned Additional Sessions Judge was right in granting benefit of doubt to those accused. In our opinion, based on shaky and tainted evidence of the prosecution, the learned Additional Sessions Judge ought to have extended same benefit of doubt to the convicted accused persons as well.

42. The prosecution, in order to seek corroboration to the evidence of the eye-witnesses and overall case of the prosecution, heavily relied upon the evidence of recovery of the weapons used by the accused persons in the crime. As per the case of the prosecution, two swords were involved in commission of the crime. Seizure panchanama (Exhibit-358) is in respect of the Sword handed over to the police by accused no.17 Nasrullakhan on 31.01.2009. The second sword used in commission of the crime was handed over to the Investigating Officer by accused no.18 Zahirullahkhan on 31.01.2009. The same was seized under seizure panchanama (Exhibit-359). Perusal of the panchanamas (Exh.358 & 359) would show that the seizure was

effected in presence of panch witnesses. The panch witnesses to these panchanamas have not been examined by the prosecution. The documents, as can be seen from the record, were proved on the basis of the evidence of PI Vaijnath Latpate (PW17). He had arrested accused nos.17 and 18 on 31.01.2009. The incident had occurred on 02.02.2008. The record would show that accused nos.17 and 18 were initially arrested on 29.08.2008. The record would show that again on 31.01.2009 they were arrested. The evidence on record would clearly indicate that on 29.08.2008, they were remanded to police custody. At that time, the swords were not recovered. It appears that these two accused were released on bail and therefore, again on 31.01.2009, they were arrested. It is the case of the prosecution that on the very day of their arrest i.e. 31.01.2009, they handed over the swords to the Investigating Officer (PW17). In our opinion, case of the prosecution of handing over of the swords by accused nos.17 and 18 to the Investigating Officer on 31.01.2009 is completely unbelievable. Exhibit-344 is a requisition forwarded to the C.A., Nagpur by the Investigating Officer. Perusal of the same would show that the clothes of these accused were also seized on 31.01.2009. This fact would

indicate that on the date of arrest of these accused on 29.08.2008, the Investigating Officer did not even seize their clothes. The C.A. report would show that no blood was detected either on the swords or on the clothes of accused nos.17 and 18. It is the case of the prosecution that accused nos.17 and 18 inflicted blows on the deceased as well as on PW2 and PW3 with the swords. It was, therefore, expected on the part of the Investigating Officer to conduct thorough and fair investigation. In absence of cogent reasoning for not effecting recovery of the swords and the clothes of accused nos.17 and 18 on their arrest on 29.08.2008, this evidence of recovery on 31.01.2009 sought to be relied upon by the prosecution to corroborate the oral and documentary evidence, cannot be believed. This fact clearly indicates that the investigation was not fair. In absence of plausible explanation on this aspect, on the basis of such tainted investigation, an attempt has been made to believe the case of the prosecution that good sense prevailed upon accused nos.17 and 18 on 31.01.2009 without any reason and they produced the swords. Therefore, in our view, evidence of recovery of swords is hardly of any use to the case of the prosecution.

43. It is the case of the prosecution that sword-stick (gupti) and knife were recovered pursuant to the statement made by accused no.3 Firdoskhan Jabajkhan on 29.03.2008. It is the case of the prosecution that accused no.3 Firdoskhan had assaulted the deceased and the witnesses with knife and accused Nadimoddin assaulted the deceased and PW2 and PW3 with sword-stick (gupti). It is the case of the prosecution that the sword-stick, which was not used by accused Firdoskhan, was recovered at his instance. Since the weapons were allegedly recovered at the instance of accused no.3 Firdoskhan, it was necessary on the part of the prosecution to explain as to how accused no.3 Firdoskhan was instrumental in carrying the sword-stick used by accused Nadimoddin and concealing it with his weapon. In order to prove this recovery pursuant to the statement, Yusufkhan Tayabkhan (PW14), a panch witness to the memorandum and discovery panchanama, has been examined by the prosecution. He is the real brother of PW1 and PW9. In Our opinion, evidence of this witness cannot be believed and relied upon to take the case of the prosecution forward. In his cross-examination, he has stated that he does not know

anything about the incident occurred on 17.10.2007. The line of cross-examination of this witness indicates that veracity of this witness was sought to be verified being the real brother of PW1 and PW9. The Investigating Officer, in the facts and circumstances, ought to have chosen independent witness. The independent witness to such an important recovery would have completely dispelled the doubts sought to be created on behalf of the accused persons. Lastly, one more reason to discard and disbelieve discovery of the weapon at the instance of accused no.3 and the evidence of Yusufkhan (PW14) and Investigating Officer (PW22), is that there is no reason as to how accused no.3 accounted for the weapon of Nadimoddin. There is no explanation on this aspect. In our opinion, this is a serious flaw in the case of the prosecution.

44. The prosecution has examined Yusufkhan (PW14) to prove seizure of Koyta (sickle) from the possession of one Imrankhan on 09.02.2008. It is the case of the prosecution that accused no.7 Imdad Husain had inflicted blows with Koyta (sickle) on the deceased and the witnesses. It is pertinent to note that a case is sought to be

made out that Imrankhan, a witness cited in charge-sheet, had snatched Koyta from the hands of accused Imdad when Imdad attempted to inflict blow of Koyta on him and ran away. In our opinion, this recovery also cannot be believed. The incident had occurred on 02.02.2008. Accused Imdad Husain was arrested on the very day of the incident. This recovery was made on 09.02.2008. The prosecution has not examined said Imrankhan. Exhibit-339 is the seizure panchanama in respect of Koyta (sickle). The panch witnesses on this panchanama have not been examined. Seized Koyta was not sent to the C.A. for analysis. Eye-witness Aniskhan Tayabkhan (PW1) has not stated that accused Imdad was carrying Koyta (sickle), however, he has made a general statement that all the accused including Imdad had assaulted on deceased Javedkhan by means of the weapons carried by them. Nasrullahkhan (PW2) has stated that accused Imdad Husain was holding Koyta. He has not stated that accused Imdad inflicted blows with Koyta on the deceased, on him or his brother. Another eye-witness Asrarkhan (PW3) has not stated that accused Imdad was carrying Koyta (sickle). Evidence of eye-witness Aniskhan Mustafakhan (PW5) is also silent on this aspect. In our opinion, this

fact would go to show that the weapon which was not used for assault, was introduced during the course of investigation. Therefore, in our opinion, this evidence cannot be believed.

45. Next important evidence sought to be relied upon by the prosecution is with regard to the recovery of Khanjir and butcher's knife (Sattur). Investigating Officer PI Hake (PW22) has deposed that during the course of interrogation, accused no.1 Ijajkhan made a confessional statement and the said statement was recorded in the presence of panchas. Pursuant to the statement, accused no.1 Ijajkhan led them to a place where he had concealed those weapons. It is the case of the prosecution that accused no.1 Ijajkhan had inflicted blows with butcher's knife on the deceased and the witnesses ; and his brother Hasankhan inflicted blows with Khanjir on the deceased and the witnesses. It is the case of the prosecution that both these weapons were discovered at the instance of accused Ijajkhan. There is no explanation on record as to how accused no.1 Ijajkhan could account for the weapon used by his brother Hasankhan. Accused no.1 Ijajkhan was arrested on 22.03.2008. Since both the accused were in police

custody from 22.03.2008, it was expected on the part of the Investigating Officer to place a plausible explanation on record as to how accused Ijajkhan could account for the weapon allegedly used by his brother Hasankhan.

46. The prosecution has examined panch witnesses to the memorandum and discovery panchanama. He is Irshadkhan Sahebkhani (PW10). Irshadkhan has stated that the accused in his presence and in presence of another panch made a statement that he buried his khanjir and sattur belonging to his brother in the compound of house of one Sulemankhan, resident of Kohinoor Society, Yavatmal. He deposed about recording of the memorandum and subsequent discovery of khanjir and sattur at the instance of accused no.1 Ijajkhan. It is pertinent to note that the weapons Gupti and knife recovered at the instance of accused no.3 Firdoskhan on 29.03.2008 and recovery of khanjir and sattur on 27.03.2008 at the instance of accused no.1 Ijajkhan is from the compound of house of one Sulemankhan at Kohinoor society, Yavatmal. The place from where the weapons were allegedly recovered is a private property. Said Sulemankhan has not been examined. Irshadkhan (PW10) has stated that there was a gate to

the said compound. When they went there, the gate was closed. One person, aged about 35 to 40 years, came out from the house and opened the gate. It is to be noted that both the recoveries from the same place can not be said to be a co-incidence. It seems that it was a conscious attempt on the part of the Investigating Officer to create an impression that the weapons were concealed in a private property and as such the same were within the exclusive knowledge of the accused persons and the public had no access to the place. In our view, this important circumstance creates a doubt about recovery.

47. It is the case of the prosecution that stick was allegedly used by accused no.5 Wasim @ Wasimoddin. It was recovered at the instance of accused Wasim pursuant to the memorandum statement (Exh.328) on 29.03.2008 from the place shown by him. Exhibit-329 is the recovery panchanama of stick. Recovery of stick at the instance of accused no.5 Wasim @ Wasimoddin is also doubtful. Accused no.5 has been acquitted by the trial Court. It is not the case of the prosecution that stick was used by any other accused in commission of the crime. Evidence of discovery of stick at the instance of accused

no.5 was not found reliable against him. Besides, the place from where the stick was recovered, is a public place. The stick was not stained with blood. It was not sent to the C.A. for analysis. In his cross-examination, panch witness to the discovery of stick, namely Ahemadkhan Mohammadkhan (PW11) has stated that panchanama of recovery of stick was prepared in the police station. He has further stated that at about 11.00 a.m. police told him about the articles seized by them and the articles were shown to him. He has stated that writing was prepared in the police station and his signatures were obtained by police on the paper at two places in police station. In our view, the evidence of this independent witness is not sufficient to prove discovery of stick at the instance of the accused pursuant to his confession. We are, therefore, not prepared to accept this evidence as credible.

48. It is submitted that blood of group 'B' was detected on Khanjir and butcher's knife (Sattur). Admittedly, blood group of the deceased was of group 'B'. It is submitted by the learned APP that therefore, the C.A. report fully corroborates the case of the prosecution in regard to use of these weapons by the accused persons in

commission of the crime. We are not prepared to accept this submission. The recovery of Khanjir and butcher's knife on 27.03.2008 is itself doubtful. Satish (PW4) is a panch witness to the spot panchanama (Exh.305) and seizure panchanama of the articles from the spot (Exh.306). In his examination-in-chief, Satish (PW4) has categorically stated that police seized two iron rods and one butcher's knife (sattur) from weekly market. In his cross-examination, he has improved his version. He has categorically stated that butcher's knife (sattur) and khanjir were also found on the said spot. In our view, if the evidence of panch witnesses is appreciated in juxtaposition with the evidence of Irshadkhan (PW10) and the Investigating Officer, it would show that recovery/discovery of the weapons at the instance of accused no.1 Ijajkhan is itself a doubtful circumstance. In our view, therefore, serious suspicion and doubt is created in the mind of the Court about this recovery. If we go by the statement of Satish (PW4), then it would show that on 02.02.2008 itself, Khanjir and sattur were in possession of the police. Therefore, in our view, much weightage cannot be given to the C.A. report with the opinion that blood group found on these two weapons was of 'B' group.

49. On a minute scrutiny and appreciation of the evidence on record, we are convinced that proper care was not taken by the Investigating Officer while conducting investigation in the matter. The recovery and seizure seems to have been made just to create evidence. Numerous doubtful circumstances established in this case are sufficient to discard the evidence of recovery. It is further pertinent to note that number of injured witnesses have not been examined. The witnesses examined are either the relatives of the deceased or interested witnesses in the success of the prosecution. Injured Sabirkhan is brother of the deceased. It is the case of the prosecution that part of the incident had occurred in front of the house of Sabirkhan and in the said incident, he sustained serious injuries. Sabirkhan has not been examined by the prosecution. No plausible explanation has been placed on record to that effect. Sabirkhan being the brother of the deceased would not have slightest hesitation to come forward and give evidence about the incident. In our view, this is another strong doubtful circumstance against the case of the prosecution.

50. In the charge-sheet, Dinesh Shrivastava was cited as witness no.22. Though, he was cited as witness no.22 in the list of

witnesses, his statement was not filed with the charge-sheet by the Investigating Officer. In our view, this is nothing but an attempt to conceal truth from the Court. The prosecution had denied an opportunity to the accused to have benefit of the statement of Dinesh Shrivastava. The only inference that can be drawn is that the said statement must be against the prosecution and extending benefit to the accused and therefore, the same was not filed with the charge-sheet. In our view, therefore, evidence of the eye-witnesses is surrounded by the clouds of suspicion. The eye-witnesses are the interested witnesses. There was enmity between the witnesses and the accused persons. Most of the witnesses, examined in this case, are interested witnesses and relatives of the deceased and the eye-witnesses. Recovery of the weapons during the course of investigation, for want of concrete and cogent evidence and plausible explanation of certain things, has come under serious cloud of suspicion. We are, therefore, of the opinion that there is sufficient doubt about complicity of the accused in commission of the crime. Even if the case of the prosecution that death of the deceased was a homicidal death, is accepted, it would not take the case of the prosecution forward to implicate the accused persons in murder and for causing injuries to the eye-witnesses. We are

conscious of the fact that evidence of the injured eye-witnesses cannot be discarded without cogent reasons. In the earlier part of our judgment, we have recorded our reasons for disbelieving the evidence of the eye-witnesses. In the facts and circumstances, we conclude that the learned Additional Sessions Judge ought to have extended benefit of doubt to the accused/appellants, which he had extended to the 17 accused persons. We are satisfied that there is sufficient doubt about involvement of the accused persons convicted by the trial Court in commission of the crime. The guilt against the convicted accused has also not been proved beyond reasonable doubt.

51. The learned advocates for the appellants placed reliance on the reported decisions to substantiate their submissions. Learned advocate Shri A.S. Manohar, relying upon the decision in the case of *Lakshmi Singh and others .vs. State of Bihar*, reported in *AIR 1976 SC 2263*, submitted that if the evidence on record indicates conspiracy of all witnesses to implicate innocent persons, then in that situation, the truth and falsehood get inextricably mixed together and it becomes difficult to separate them. The learned advocate submitted that benefit, in such a case, has to be extended to the accused. On

appreciation of the evidence, it is found that it is not possible to disengage the truth from falsehood. It is found that truth and falsehood are so inextricably mixed together that it is difficult to separate them. If an attempt is made to do so, it would amount to reconstructing a new case for the prosecution, which would not be permissible in a criminal trial. Learned advocate Shri Manohar, relying upon the decision in the case of *Takhaji Hiraji .vs. Thakore Kubersingh Chamansingh and others*, reported in (2001) 6 SCC 145, submitted that if the best witness is not examined then an adverse inference has to be drawn against the case of the prosecution and in favour of the accused. In this case, it is held that if there is failure on the part of the prosecution to examine material witnesses, then it becomes fatal to the case of the prosecution. It is held that it is more so when the evidence available on record creates a doubt and is not sufficient to unfold the genesis of the incident or an essential part of the prosecution case. In the case on hand, it is found that the prosecution has failed to examine material independent witnesses, who could have unfolded the genesis of the incident. The witnesses examined have enmity with the accused and are interested witnesses. In support of the above submission, reliance is also placed upon the

decision in the case of *Arshad Hussain .vs. State of Rajasthan*, reported in *(2013) 14 SCC 104* . In this case, it is held that when the genesis and the manner of the incident is doubtful, the accused cannot be convicted. Suppression of the genesis and the manner of the incident is sufficient to create a doubt about the case of the prosecution. The doubt could be said to be, in such a situation, a reasonable doubt. The proposition, in our opinion, would be applicable to the present case.

52. Learned advocate Shri P.W. Mirza, relying upon the decision in the case of *Hemraj and others .vs. State of Haryana*, reported in *2005 Cri.L.J. 2152 SC*, submitted that an omission to examine independent witnesses has not been explained in this case and therefore, an adverse inference has to be drawn against the case of the prosecution, sought to be supported on the basis of related eye-witnesses. In this case, it is held that unexplained omission to examine eye-witnesses can give rise to an adverse inference. It is held that inference would get fortified when the evidence of the alleged related eye-witnesses is not found reliable and raises serious doubts on the point of their presence on the scene of occurrence. In our view, this proposition would be applicable to this case. We have discarded the

evidence of the eye-witnesses. Their evidence is found not sufficient to prove the incident at the places stated to be the places of occurrence. There is enmity between the witnesses and the accused persons. The witnesses are the relatives of each other. Their evidence, on minute scrutiny and appreciation, is found not sufficient to establish the spot of the incident and the complicity of the accused persons in the crime.

53. In view of the above, we conclude that the learned Additional Sessions Judge has failed to extend the benefit of doubt to the appellants/accused, which the learned Additional Sessions Judge has extended to 17 accused persons. On re-appreciation of the evidence, we have found that they deserve the benefit of doubt. The evidence is not cogent, credible and reliable to prove the guilt against the accused persons. There are inherent flaws in the evidence of the eye-witnesses. In our opinion, therefore, the appeals filed by the convicted accused deserve to be allowed. The learned Additional Public Prosecutor, on the basis of the material on record, has failed to persuade us to reverse the judgment of acquittal against 17 accused and to maintain conviction recorded by the learned Additional Sessions Judge against the convicted accused.

54. In the result, we pass the following order :

(i) Cri.Appeal No. 149/12 filed by accused no.2 Hasankhan Jabajkhan and accused no.4 Nadimoddin Najmoddin, ; Cri.Appeal No. 150/12 filed by accused no.3 Firozkhan @ Firdoskhan Jabajkhan and accused no.21 Shamiullahkhan Anwarkhan ; Cri.Appeal No. 151/12 accused no.1 Ijakhan Jabajkhan Pathan and accused no.18 Ziyaullahkhan Jakaullakhan and Cri. Appeal No. 309/16 filed by accused Nasrullahkhan Jabajkhan, are allowed. Their conviction and sentence are set aside.

(ii) Accused no.1 Ijakhan Jabajkhan Pathan, accused no.2 Hasankhan Jabajkhan, accused no.3 Firozkhan @ Firdoskhan Jabajkhan, accused no.4 Nadimoddin Najmoddin, accused no.18 Ziyaullahkhan Jakaullakhan and accused no.21 Shamiullahkhan Anwarkhan, stand acquitted of the offences punishable under Sections 147, 148, 302 r/w 149 and 326 r/w 149 of the Indian Penal Code

(iii) Accused Nasrullahkhan Jabajkhan stand acquitted of the offences punishable under Sections 147, 148, 302 r/w 149 and 307 r/w 149 of the Indian Penal Code.

(iv) These accused are in jail. They shall be released forthwith, if not required in any other case.

(v) Criminal Appeal No. 448/2012 filed by the State stands dismissed.

(G.A.SANAP, J.)

(SUNIL B. SHUKRE, J.)

Diwale