

The State of Maharashtra and Others Vs. Rajkumar and Others

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Court : Mumbai Aurangabad

Decided On : Jul-24-2015

Judge : S.S. Shinde & a.I.S. Cheema

Appeal No. : Criminal Appeal No. 413 of 2005 with Criminal Revision Application Nos. 97 of 2005, 102 of 2005

Appellant : The State of Maharashtra and Others

Respondent : Rajkumar and Others

Judgement :

A.I.S. Cheema, J.

1. The State has filed the present Criminal Appeal No.413 of 2005 against acquittal of Respondent “ original accused Rajkumar Dhanade. Criminal Revision No.97 of 2005 came to be filed by Laxman Karande, the father of deceased Victim Nilesh Karande, while Criminal Revision No.102 of 2005 was filed by injured PW-3 Anup Mundada. The Respondent accused was prosecuted for the murder of Nilesh Karande and attempt to commit murder of PW-3 Anup, in Sessions Case No.41 of 2002 and was acquitted of both the charges by Ist Adhoc Additional Sessions Judge, Beed on 30th December 2004.

Case of Prosecution

2. In a nutshell the case of prosecution is as under:

(A). On 10th January 2002 victim Nilesh was brought to the Rural Hospital Georai, Dist Beed. Doctor at Georai found Nilesh to be dead when he was brought to the hospital in auto rickshaw. In another auto rickshaw, injured PW-3 Anup Mundada was also taken to the same hospital but looking to his injuries, Doctor forwarded him to Government Hospital at Beed. Police Inspector Ramesh Ghorale (PW-21) reached the hospital at Georai and came to know about victim Nilesh to be brought dead. He got the Inquest Panchanama (Exhibit 15) done and took steps to get Postmortem done. He came to know that colleague of the dead, in injured condition, had been taken to Government Hospital, Beed. P.I. proceeded to Beed. At Beed, the injured PW-3 Anup was operated upon. In the course of night after the operation, P.I. Ghorale recorded statement of injured Anup at about 1.10 a.m. after the doctor examined and certified him. The said statement was then forwarded to the P.S.O. at Police Station, Georai and in the same night offence came to be registered at 4.30 a.m. (vide Exhibit 28). In the morning of 11th January 2002 P.I. Ghorale recorded Spot Panchanama (Exhibit 24) between 7.00 “ 8.00 a.m. Inter alia blood stained mud was collected from spot. Before recording the Spot Panchanama, between 5.30 “ 6.00 a.m. police seized the blood stained clothes of injured Anup (vide Panchanama Exhibit 51). Statements of witnesses were recorded. In the afternoon at 12.00 noon, the blood stained clothes of the victim Nilesh were also seized vide Panchanama Exhibit 53 by the Police Inspector.

(B). The accused came to be arrested on 14th January 2002 at about 15.15 hours and he was taken in the custody. The blood stained clothes of the accused were also seized (vide Panchanama Exhibit 55). When the accused was in custody, on 18th January 2002 he gave discovery of the blood stained knife used at the time of incident. Vide Memorandum Exhibit 57A the statement of accused was recorded and vide Panchanama Exhibit 57B, the knife came to be discovered.

(C). The postmortem was done on the dead body of the victim Nilesh on 10th January 2002 itself between 10.30 “ 11.30 p.m. He had died due to stab injury. Police collected the postmortem report (Exhibit 60). When the accused was arrested on 14th January 2002, he was also got examined for his injuries from one Dr. Vinod at Civil Hospital, Beed. It was found that he had injuries which were

possible in scuffle. Police also collected medical certificate (Exhibit 69) of injuries of the injured Anup from Civil Hospital, Beed from Dr. Upendra Kulkarni (PW-18).

(D). In the course of investigation, police came to know that the accused after the incident which took place near gate of the Shetkari Sahakari Ginning Mill, which also had Cotton Federation in same premises at Georai, had run up to another mill namely Somani Ginning Factory at Padalshingi and taking help from some persons there, had travelled in Jeep to Beed where he also called for his family. Police recorded statements of persons with whose help the accused had gone to Beed and met an Advocate through a friend Ganesh. Police collected evidence from one Madhuban Lodge, Beed where in the concerned night accused went and stayed for some time with his family.

(E). Regarding the actual incident, prosecution found in the investigation that the deceased Nilesh wanted receipt regarding cotton he had supplied and accused, who was working at the Federation as a grader, was not available on the day concerned when Nilesh went to the factory and Nilesh was waiting there. At that time PW-3 Anup, who had acquaintance with the deceased and who lives in Aurangabad, had gone to Georai for his work and went to meet the deceased. As they had to wait for accused, they went and had food at Hotel Gulmohar, which is near the factory. At about 6.00 p.m. when the deceased and PW-3 Anup went back to the factory, the accused was standing near heap of cotton. Deceased Nilesh asked regarding the receipt of cotton. At that time exchange of words started between the deceased and the accused. Accused was saying that he would grade the cotton on lower side and cause loss to the deceased. After the quarrel started, the deceased, the accused and PW-3 came outside the gate of the factory. Near the gate also the quarrel continued and in the course of the quarrel, accused slapped Nilesh and PW-3 Anup reacted, giving back two slaps to the accused. Then the accused took out a button knife from his pocket and hit Nilesh with the same in his chest. Blood started oozing out. When the accused was about to assault the deceased again, PW-3 Anup intervened and in the result, the accused hit knife in the abdomen of victim Anup causing bleeding injury. His intestine came out. Anup tried to catch hold of the accused and at that time the accused gave another knife blow to Anup on his ribs. Thereafter the accused ran

away. The incident was seen by the watchman of the gate of the mill, PW-4 Suresh @ Baban Tonpe, who ran to nearby STD Booth which was near Gulmohar Hotel, at which place already supervisor of the mill Ankush Mulay (PW-5) was there dialing and told him about the incident. PW-4 Suresh, PW-5 Ankush Mulay and PW-6 Kailas Sutar and others who were there near the spot noticed accused running away.

Chargesheet filed

3. The prosecution found sufficient evidence to charge sheet the accused and the chargesheet was filed and the case came to be committed to the Court of Sessions. Charge was framed under Section 302, 307 of Indian Penal Code, 1860 ("I.P.C." in brief). The accused pleaded not guilty. The defence of the accused, in brief, is that the deceased Nilesh and PW-3 Anup along with two other persons were at the Beer Bar near the mill and they had consumed liquor and quarrel took place between them. They had come out of the Beer Bar and near the factory, the incident took place wherein those two other persons caused the injuries which (according to the defence) are being attributed to the accused.

4. The trial Court recorded evidence of 21 witnesses. The accused examined one defence witness Naib Tahsildar Ganpat Yedke, who recorded dying declaration of Anup on 11th January 2002 in the morning. After considering the oral and documentary evidence, the trial Court acquitted the accused of all the charges.

Arguments

5. We have heard counsel for both sides in these matters. The State, injured Anup as well as father of the victim, who have filed these matters, claim that the Judgment of acquittal is not at all maintainable. According to them, the evidence has not been properly appreciated. There was no reason to discard the cogent and reliable evidence brought on record by the prosecution. There was direct evidence available of PW's 3 to 6 regarding incident. PW-4 had witnessed the complete incident while PW's 5 and 6 had partly seen the same. The documentary and medical evidence fully supported the prosecution. There was evidence regarding extra judicial confessions made by the accused after he ran away to

Padalshingi and hiring a jeep went to Beed where, with the help of a friend, he had contacted an Advocate for advice. There was no reason for so many persons to speak against the accused. PW3 Anup was grievously injured in the incident and had no axe to grind against the accused and there was no reason to disbelieve him. There was no enmity between the witnesses and the accused for the witnesses to speak against the accused. Presence of PW's 3 to 6 near the spot was natural. The incident suddenly occurred and trial Court wrongly discarded the evidence. People who gathered at the spot after the incident had helped the deceased and injured to take first aid to the Primary Health Center Georai. Doctor had rushed the injured Anup to Beed and the persons helping the injured, took him to hospital at Beed. The people who helped, did not even know the injured at that time. While admitting PW-3 Anup at the hospital at Beed, in the record name of one Praveen Sharma was recorded as a person who brought him. The victim did not even know this Praveen Sharma but defence had been taken as if this Praveen Sharma and one businessmen of cotton at Georai had grievance against the accused and they brought about false case against the accused. The learned Special Public Prosecutor for the prosecution has submitted that the Appeal needs to be allowed and the accused should be convicted of the offences.

6. The learned counsel for the Respondent accused submitted that the case of the prosecution was not reliable. One Praveen Sharma and other businessmen who were dealing in cotton at Georai, had differences with the accused and after the incident occurred for which two unknown persons were responsible, the blame has been put on the accused. It has been submitted that the FIR was not registered in the concerned night between 10th 11th January 2002 and it was created subsequently because copy of the FIR was sent to the J.M.F.C. only on 14th January 2002 and not within 24 hours as required by Section 157 of Code of Criminal Procedure, 1973 (for short "Cr.P.C."). The learned counsel for the accused submitted that the witnesses were not reliable. PW-3 Anup was not knowing the accused and although accused was named in the FIR which was recorded in the night at about 1.00 a.m., he did not name the accused in the dying declaration which was recorded by the Naib Tahsildar in the morning at about 9.00 a.m. Although PW-3 Anup claimed that when victim was stabbed, his shirt got torn, the shirt before the Court did not have such tear. The trial Court rightly discussed

the evidence and found that there were various contradictions and omissions and the witnesses were not found to be reliable. The trial Court has discarded the evidence of the witnesses from Somani Ginning factory also. The extra judicial confession is weak type of evidence and should not be relied on. The witness from Madhuban Lodge PW-16 Kishor Kadam had not supported the prosecution and was hostile. The learned counsel supported reasonings recorded by the trial Court to claim that the reasonings recorded by the trial Court are possible view and thus according to the counsel, the Appeal and Revisions deserve to be rejected.

7. The counsel for the accused referred to the case of **State of Orissa vs. Mr. Brahmananda Nanda**, reported in A.I.R. 1976 S.C. 2488(1), the case of **Peddireddy Subbareddi and others vs. State of A.P.**, reported in 1991 Cri. L.J. 1391, the case of **Anok Singh vs. State of Punjab**, reported in A.I.R. 1992 S.C. 598, the case of **Rama Gopal Pawar vs. State of Maharashtra**, reported in 2004 All M.R. (Cri) 2393, and the case of **Mukteshwar and another vs. The State**, reported in 2004 Cri. L.J. 1335, to submit regarding appreciation of the evidence of witnesses and delay in F.I.R. . We have gone through these Judgments, which are based on the facts of those matters.

8. The counsel for accused further referred to the case of **Murlidhar alias Gidda and another vs. State of Karnataka**, reported in 2014 Cri. L.J. 2365. The counsel submitted that this Court should not disturb the findings of the trial Court if the findings were possible view of the evidence. In this Judgment of the Hon'ble Supreme Court, after referring to the earlier Judgments, it has been observed in Para 12 as under:

"This Court has consistently held that in dealing with appeals against acquittal, the appellate Court must bear in mind the following: (i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court, (ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal, (iii) Though, the power of the appellate court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate court is generally loath in disturbing the

finding of fact recorded by the trial court. It is so because the trial court had an advantage of seeing the demeanour of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial Court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified, and (iv) Merely because the appellate court on reappreciation and reevaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate court in the judgment of the trial Court."

We are keeping the above observations of the Hon'ble Supreme Court in view. In the matter of **State of U.P. vs. Anil Singh, reported in A.I.R. 1988 S.C. 1998(1)**, the observations of the Hon'ble Supreme Court show that the Supreme Court could look into the facts whether the acquittal is perverse in the sense that no reasonable person would come to those conclusions, or if the acquittal is manifestly illegal or grossly unjust.

Opportunity given to address on Sentence

9. At the time of arguments, we had asked the counsel for both sides to address the Court in the alternative also. We had told the counsel that suppose we come to the conclusion that offence is proved, what would they like to submit regarding the sentence. We gave opportunity to the counsel for both sides to address on the said count also.

10. Having heard counsel for both sides, we have carefully gone through the whole record of this matter.

The Points for Consideration are:

(1) Whether prosecution proved that the accused committed murder of Nilesh Karande and also attempted to commit murder of PW-3 Anup Mundada?

(2) Whether the Judgment of the trial Court is maintainable and if not what should be the Order?

The Incident

11. Material witnesses regarding incident are PW's 3 to 6. For better appreciation, the evidence of these witnesses needs to be considered together. Evidence of PW-3 Anup shows that he was knowing deceased Nilesh since 4-5 years. Anup resides at Aurangabad. He is a graduate and is a businessman. He and Nilesh used to meet each other whenever Anup used to go Georai or Nilesh used to go to Aurangabad. They had friendly relations. Anup is in business of iron racks. On 10th January 2002 he had gone for this purpose to the place of one Bandu Seth Somani at Georai. He finished his work at that place at about 2.30 “ 3.00 p.m. and went to the house of Nilesh. From family, he came to know that Nilesh had gone to the ginning factory. PW-3 Anup also came to the ginning factory which is to the south of Georai. Anup has deposed that he saw that Nilesh was standing at the gate of the ginning factory. They met and talked. As they had not taken meal, they went to Gulmohar Hotel, a Dhaba which was nearby, at about 3.30 p.m. They sat at the hotel till about 6.00 p.m. as the accused grader Dhanade was not available and was to come by that time. According to PW-3 Anup they were at that hotel for about 2 “ 2 hours and thereafter on motorcycle they came back to the ginning factory which was at about one furlong. It was about 6.30 p.m. by this time. PW-3 Anup states that they saw the accused standing near a heap of cotton. PW-3 Anup identified the accused before the Court. According to him, he and Nilesh went near the accused. Coolies were working there. Nilesh had shown the accused who was grader to this witness. He deposed that time was about 6.45 p.m. and there was light in the premises. The evidence is that Nilesh demanded receipt from the accused and the accused told Nilesh that he would grade the cotton at lower level and cause damage to Nilesh. There was exchange of words between the accused and victim Nilesh. This happened when they were near the heap of cotton. This quarrel attracted PW-4 Suresh @ Baban Tonpe who was at gate of the ginning mill/factory as well as PW-5 Ankush Mulay, the supervisor who had come for work at the ginning factory. PW-4 Suresh @ Baban has deposed that at about 6.00 p.m. He put on all the lights of the ginning premises and he was near the gate. He has

deposed that at about 6.30 p.m. he noticed Nilesh along with his friend was there and Nilesh was demanding receipt from accused Rajkumar Dhanade, standing near heap of cotton. According to this witness, the accused told Nilesh that he would not give receipts. Then there were abuses and catching and pushing between them. This watchman started proceeding towards the spot where such incident was taking place but then saw that Nilesh along with his friend (PW-3) and accused were proceeding towards the gate and all of them came to the gate and also came out of the gate. Now if the evidence of PW-5 Ankush is perused, it corroborates, as even this witness says that although on that day ginning mill was not working as machine work was going on, he had come for work. He deposed that he was sitting in his office doing work when he heard noise from outside. Time was about 6.00 “ 6.30 p.m. The noise of quarrel was going on and he noticed that there were three persons, the victim Nilesh Karande, his friend and accused. Even this witness has stated that while so quarreling these persons came outside the gate.

12. The evidence further is that outside the gate of the ginning factory also the quarrel continued. The evidence of PW-3 Anup is that there was exchange of words and abuses were going on and the accused slapped on the cheek of Nilesh and because of which he got angry and in return this witness gave two slaps to the accused. PW-3 has deposed that when this incident occurred, they were at about 30 “ 35 ft. from the gate. PW-3 Anup has deposed that after such exchange of slaps, the accused took out the knife from his pocket and assaulted on the right middle side of the chest of Nilesh and then withdrew the knife from the chest where after blood came out and the shirt had got cut. This evidence of PW-3 is corroborated by PW-4 Suresh who has deposed that he tried to resolve the quarrel from some distance after these persons had come out of the gate. He has also deposed that accused gave slap to Nilesh and the friend of Nilesh (PW-3) got angry and gave two slaps to accused and accused took out knife from his pocket and gave stab in the chest of Nilesh causing injury to Nilesh.

13. Evidence of PW-3 and PW-4 further shows that when the accused stabbed Nilesh, PW-3 tried to rescue, at which time the accused gave knife blow to the abdomen of PW-3 causing injury. PW-3 tried to catch hold of the accused and the

accused gave another blow by knife on the left rib of PW-3 Anup. Thereafter the accused started running away from the spot.

14. When the incident of stabbing as above was taking place, PW-5 Ankush who had earlier seen accused quarreling, had already proceeded to the STD Booth which is nearby. The evidence of PW-5 is that when he saw that the quarrel is going on and these persons came outside the gate, he could not bear it and proceeded to STD Booth in order to give ring to the house of Nilesh. When he was ringing on phone at that time PW-4 Suresh @ Baban rushed towards this witness and informed him that the accused had stabbed Nilesh and also his friend. PW-4 has also deposed that when he saw the stabbing, he rushed towards the STD Booth but noticed PW-5 to be there and told him about the incident which was unfolding. At this point of time, PW-6 Kailas Sutar who is labourer and was near Hotel Deepali, got attracted. PW-6 has deposed that he was in front of the hotel when PW-4 Suresh @ Baban rushed from the side of ginning factory and told about the incident to PW-5 Ankush who was on the STD Booth, telling him that in the quarrel between Nilesh, his friend and Dhanade (accused), Nilesh was lying on the earth. Evidence of PW-5 and 6, both, shows that when PW-4 so rushed towards PW-5 and told about the incident taking place, they noticed the accused running away from near the spot towards Mondha Naka. The evidence of PW's 3 to 6 further makes it clear that after Nilesh was stabbed, he fell to the ground with bleeding injury and PW-3 Anup who had been stabbed in the stomach, sat down holding his wound. The evidence shows that blood was coming out from the injuries of both these persons and their clothes got blood stained. Evidence is that PW-5 Ankush called for rickshaw and Nilesh was put in the auto rickshaw. PW-5 with the help of PW-4 Suresh @ Baban, one Jeevan Dabhade and PW-6 Kailas lifted and put Nilesh in auto rickshaw and proceeded to Rural Hospital at Georai. Evidence of PW-4 Suresh @ Baban shows that coolies from the federation put PW-3 Anup in another auto rickshaw and proceeded towards Rural Hospital, Georai. Evidence of PW-4 Suresh @ Baban shows that he however remained near the spot for discharge of his duties (being watchman).

15. The cross-examination of PW-5 Ankush brought on record the fact that after admitting Nilesh at the hospital, this witness was there for about half an hour.

According to the witness, he had thereafter come home. It was suggested to him that after returning home he came to know that due to the injury on chest, Nilesh has expired. The witness had accepted the suggestion. The witness however, was unable to name the person who told him at his house about the death of Nilesh. The cross-examination of this witness shows that after the incident, many people had gathered at the hospital and they were discussing amongst themselves about the incident.

Police reach Hospital

16. In the evidence of PW-19 Head Constable Bansi Jadhav, defence brought on record Exhibits 71 to 73, the Station Diary Entries. Exhibit 71 is entry dated 10th January 2002 of 8.15 p.m. recording that the hospital had informed that dead body of Nilesh Karande had been brought at the hospital. There is entry of the time of 9.15 p.m. to arrange for Bandobast at the federation. PW-21 P.I. Ghorale has deposed that Nilesh had been brought to the hospital and was declared as brought dead by the doctor. According to him, consequently he held Inquest Panchanama Exhibit 15. PW-21 Ghorale has deposed that after Inquest Panchanama, the body was sent for postmortem. He came to know that there was colleague of the deceased who was injured and had been sent to the Government Hospital, Beed. According to him, he consequently proceeded to the hospital at Beed.

Now coming back to the evidence of PW3 Anup, he has deposed that near the spot of incident, there was Deepali Hotel and 10 “ 12 persons rushed to the spot. Those persons took Nilesh to the hospital in auto rickshaw and some of the persons who gathered, took him to the hospital in another auto rickshaw. He deposed that when he was taken to the hospital, the time was about 7.15 “ 7.30 p.m. Anup and Nilesh both had been taken to Rural Hospital, Georai. His evidence is that seeing his injuries, doctor advised that he should be shifted to Beed. He was taken to Civil Hospital, Beed. According to him, he was operated there for his injuries to the abdomen. His evidence is that in that night between 1.00 “ 1.15 a.m., PW-21 P.I. Ghorale came there and recorded his statement. According to him, when the witness came home, he inquired and came to know that Nilesh had died. The evidence of PW-3 is that when P.I. Ghorale recorded his statement,

doctor was present in the ward. Anup has deposed that the FIR Exhibit 28 was recorded as per his say and he signed the same. He has also deposed that the doctor has signed the endorsement on the FIR. He did not know the name of the doctor but deposed that endorsement was made by doctor in his presence. This evidence is corroborated by P.I. Ghorale also, who deposed that he took opinion of the medical officer if Anup was in condition to make his statement and thereafter recorded Exhibit 28. Even the P.I. has proved the endorsement of the doctor. The endorsement of the doctor even after recording of the statement has been proved by P.I. Ghorale.

Discussing Evidence of PW's 3 to 6

17. The learned counsel for the accused referred to the cross-examination of PW's 3 to 6 to argue that there were various contradictions and omissions and the conduct of these witnesses was such that they were not reliable. This argument appears to have weighed with the trial Court. As such, it would be appropriate to discuss the evidence of these witnesses.

18. Re: Hole or not in Shirt Article 9: In the course of evidence, PW-3 deposed that when Nilesh was stabbed, his shirt got cut. The witness identified the clothes of Nilesh as well as himself and the accused in the course of his evidence. The learned counsel for the accused confronted the witness with shirt Article 9 which was stated to be of Nilesh, to bring an admission on record that there was no hole on the right front side of the said shirt. From this, it is argued that when the witness stated that the stab was to the right front side of the chest, the hole was not there. If the evidence of PW-11 Panch Arun Govindrao is perused, which relates to the seizure of clothes of deceased Nilesh and Panchanama Exhibit 53 is seen, the police did seize shirt of Nilesh which had a cut where knife was stabbed on the front side. The shirt concerned did not have any special marks is matter of record. We have seen record of trial Court. Exhibit 2 filed by Police is list of Properties which Police produced in trial Court. In it, the description of this shirt clearly records that the shirt has a tear in front due to knife blow and that there is hole. Property received appears to have been entered in Court records. No objection regarding description was raised. Police cannot be blamed if after property is

deposited in Court some wrong takes place or mischief is done. Trial Court did not check its own records and did not put its own house in order and conveniently picked the cross on this count in pursuit to pick holes in prosecution case. We do not agree with this. Prosecution evidence on this count cannot be doubted.

19. Re: Unreasonable expectations/wrong appreciation of evidence: Learned counsel for the accused then submitted from cross-examination of PW-3 Anup that in the cross-examination various details were asked to the witness regarding which the witness was unable to say. The counsel submitted that the trial Court noticed that in the examination-in-chief the witness posed himself to be very smart person with photographic memory and gave various details of the incident as well as the clothes and knife perfectly, but in the cross-examination when he was asked further details, he pleaded ignorance. The learned counsel submitted that the witness is thus not reliable.

Now when we peruse the evidence of PW-3 Anup, he appears to have been asked in a grueling cross examination details like, does he have an idea if police officials (as named in the cross-examination) had come to the Rural Hospital; had the persons who were taking him to the hospital asked him about the incident; could he say in which jeep he was carried and who was the owner of the jeep and whether the police had carried him in jeep from Georai to Beed; can he identify the persons who brought him to Beed Hospital; what was asked by the doctor at Beed Hospital etc. etc.

These type of various details were sought from the witness and when he has stated that he could not tell about those details, the trial Court declared (in Para 19 of the Judgment) that the witness was evasive and although gave minute details of the events from afternoon till the incident, was avoiding details in cross-examination and that had he given the details it would be against prosecution. We find that the approach of the trial Court was not correct. One has to put himself in the place of the victim. The details regarding before stabbing taking place and when the actual stabbing was taking place could have been registered in the mind of the witness. It is rare occasion when a person gets entangled in such incident and main incident may leave an impact on the mind of the person. Details of the

main incident can get embossed on the mind. The same thing cannot be said for part of the incident after the witness was stabbed and was in bad condition. It cannot be forgotten that the witness had been stabbed in his stomach and rib and had bleeding injury where he was holding his stomach. In fact in the cross-examination of PW-3 Anup, he was referred to his MLC papers and an endorsement, where consent was being sought by the doctor that his small intestine had come out and he was willing for the operation. The MLC papers put up to the witness show that by 8.00 p.m. this injured had been reached to the hospital at Beed. Medical Certificate Exhibit 69 and evidence of PW-18 Dr. Upendra shows that intestine of PW-3 Anup was seen from the injury. With the injuries he had, it is too much to expect that he would remember details of time and persons around him who were not even known to him, when he was being rushed from point to point in injured condition. PW-3 Anup was asked (in Para 21) and he deposed that when 10 - 15 persons gathered, he had told that grader Dhanade had assaulted him. He was then asked if when he was taken to hospital, he felt that FIR should be filed. The witness stated that he did feel that FIR should be filed but he volunteered that his condition was not good and so he did not give it. It would be inhuman to expect that a person who has received stab injury in his stomach and who has been injured in his rib by knife and who is being rushed to the Rural Hospital Georai and from there being taken to Civil Hospital, Beed at about 32 K.M.s because of the nature of his wound, should first register FIR instead of seeing the doctor. Person in such condition, after he has been so injured, may not have been in a position to note the various details as the accused wanted to know. By this itself, we are not ready to disbelieve the witness as the trial Court has done. The trial Court in its Judgment (Para 20) observed with reference to Para 15 and 16 of the cross-examination of PW-3 Anup and reading the same with the evidence of PW-21 P.I. Ghorale, recorded that there were over a dozen improvements and some were very material. So observing, the trial court concluded that the witness does not deserve any credit. It further observed that although the witness was in full senses, he did not try to lodge complaint in which he himself and his friend Nilesh were brutally assaulted?. Thus, the trial Court was aware that there was brutal assault, but still went on expecting that the complaint should have been first filed. As regards the alleged improvements, we have also

gone through the evidence of Para 15 and 16 of the cross-examination of PW-3. Before referring to what has been branded as material improvements?, it would be appropriate to refer to the contents of the FIR.

Contents of FIR and PW-3 Anup

20. If the FIR Exhibit 28 is perused, after the introductory part, it recorded that on 10th January 2002 at about 3.00 p.m. complainant had come to Georai. He was knowing Nilesh since 45 years as they had met in a marriage and were on visiting terms. He went to the house of Nilesh and as Nilesh was not at home he inquired as to where he had gone. He came to know that Nilesh is at federation and so he went to the federation, which is near a Beer Bar. Nilesh was standing in front of the gate of the federation. Thereafter he and Nilesh went to the Dhaba which was nearby and they had food there and thereafter on motorcycle came back to the federation, as Nilesh had to get receipts of cotton. When they went there, Nilesh asked Dhanade grader (accused) regarding the weighing of cotton. Accused did not give any value to Nilesh and insulting him he stated that he will grade the cotton on the lower side and started quarreling. There was oral exchange of words between Nilesh and Dhanade grader. Then all three of them came to the gate of the federation. There in front of the gate Dhanade slapped Nilesh because of which he (i.e. PW-3) gave two slaps to Dhanade, where after Dhanade took out sharp instrument like knife and stabbed Nilesh in the chest and grievously injured to PW-3. At that time when accused was about to give second blow, PW-3 Anup went near and the stab was received in his stomach and when he tried to hold accused, accused gave blow in the left rib by the sharp instrument like knife and Anup was injured and thereafter accused ran away towards Georai. Thereafter 2-3 persons from Deepali Hotel and labourers from federation came there and they brought them to the Government Hospital. The incident took place at about 7.00 p.m. He was taken to Beed Government Hospital. Later on he came to know that Nilesh has died at Georai due to the assault by knife by grader.

Now if the above FIR is kept in view and the evidence of PW-3 Anup, which we have already discussed, is perused, what is tried to be shown by the accused as material contradictions or omissions when considered, it can be seen that these

are matters more of details than the actual incident. FIR is not an encyclopedia. Nor is it Examination-in-chief in advance. But the accused, however went into hairsplitting in the cross-examination of PW-3 Anup. Accused claimed that witness had not told the police that they were at Dhaba till 6.00 p.m. as Dhanade was not available till 6.00 p.m. Now if the FIR is read as a whole and the details stated are considered, the time when the victim and PW-3 met the accused would be around 6.00 p.m. Another contradiction is claimed from the evidence that it was not stated that when these persons went near the accused, he was standing near the heap of cotton. We do not think that this is a material contradiction or omission. PW-3 was asked and he claimed that he had told police that there were lights all over the premises. This may be material but loses its significance looking to the other evidence available on record of PW-4, the watchman who deposed that he had put on all the lights of the ginning mill premises at 6.00 p.m. Spot Panchnama shows that the Ginning Factory had wire fencing as boundary and incident took place near gate. In the cross-examination of PW-4 Suresh @ Baban, it cannot be said that he has been questioned regarding his evidence that he had put on all lights of the premises. Apart from PW-4, the other evidence has also been lost sight of by the trial Court regarding visibility. It cannot be forgotten that the spot of incident was not an isolated place on any highway away from the city or in a jungle. It was a ginning factory with cotton federation. The Spot Panchanama Exhibit 24 proved by PW-1 and 2, in the description of the actual spot where incident took place, shows that on the northern side there was an electric pole beyond which there was Deepali Beer Bar. The evidence of PW-3 shows that the Hotel Gulmohar is to the south of the ginning factory at about one furlong. Evidence of PW-4 Suresh @ Baban shows that near the ginning factory there is Deepali Beer Bar and near the Beer Bar there is STD Booth. PW-4 further deposed that these Hotels, Gulmohar and Deepali, remain open till 12.00 O'Clock in the night. Thus it was not an isolated place and only because PW-3 has not mentioned in his FIR regarding light, and omission on that count is proved, it cannot be said that it is fatal to the prosecution case. Trial Court (in Para 35 of its Judgment) declared as Judicial Note that on 10th January 2002 there would have been Sunset "long before" the time of incident of 6.30 6.45 p.m. Trial Court forgot that it was not a hit and run case. Evidence showed incident starting some time after 6.00 p.m. and continuing

from inside to outside the Ginning Factory. Evidence of witnesses shows that incident must have taken place between 6.00 to 7.00 p.m. As discussed, PW-3 had been reached to Hospital at Beed 32 KMs. away by 8.00 p.m. after a hop at Rural Hospital Georai. Information in "Panchang" and Internet would show Sunset in Beed District at 06.06 p.m. on 10th January 2002. Available ancient as well as modern technological system of keeping data should have been kept in view. Judicial Note should, when possible, be based on science and public data available rather than surmises.

Another portion of evidence of PW-3 which is claimed to be material omission, is that he had not stated that he saw the grader Dhanade running away in the light of electric light. The FIR shows that Anup did state that accused after the incident ran away. He did not tell about electric light would not be that material looking to above factors. There are further details sought from PW-3 if he had told while giving FIR that Nilesh had fallen on the earth and that he had sat down on the ground holding his abdomen. We do not find that this is material. To repeat, FIR is not an encyclopedia. When the FIR mentions that Nilesh was stabbed in the chest and this witness was stabbed in the stomach, these other details are fringe details which are not material. Omission is tried to be shown that PW-3 did not state in the FIR that he came to know about the death of Nilesh from P.I. Ghorale. When the P.I. (PW-3) himself was recording the FIR, if he had told the fact to PW-3 Anup, it is inappropriate to expect that the complainant would state that I have learnt this fact from you the P.I. who is recording my FIR. We have already referred to the contents of the FIR which say that at the time of FIR the complainant had been told that Nilesh had died due to stab injury.

21. Re: Materials put up as Omissions though none existed: It is argued for accused that PW-3 did not tell police that when they had gone to the ginning factory some coolies were working there. If the FIR is perused, it does record that when the incident took place some labourers came from the federation to help, taking the injured to the hospital. In spite of such reference in the FIR, the trial Court recorded the evidence as if there was an omission. Similarly, another omission is tried to be shown that PW-3 had not told the police that accused had told Nilesh that he will cause his loss. The FIR shows that the accused had told

Nilesh in the argument that he will grade his cotton on the lower side. This led to the quarrel. When this is so, to say that there is omission in this regard, must be said to be hairsplitting. Yet another omission was allowed to be brought on record by the trial Court that at the time of giving of FIR, PW-3 had not stated that there was exchange of words. The FIR does record that there was "HINDI? i.e. oral exchange of words. . Another omission recorded of PW-3 is that he had not told that there was catching and pushing between Nilesh and accused. This, no doubt is not mentioned in the FIR. However, it is not significant as in this regard there is evidence of PW-4 Suresh @ Baban also, where he has deposed that there was catching and pushing between these persons. In the cross-examination, there was no denial and PW-4 could not be shattered and there are no contradictions and omissions brought on record in the evidence of PW-4 Suresh @ Baban. It has been then argued that in the FIR, like evidence, it was not mentioned that the stab was given to Nilesh on the right side of his chest and that after giving the stab, the knife was taken out (i.e. withdrawn) from the body of Nilesh. The FIR does mention that knife was stabbed in the chest. If at the time of evidence PW-3 stated that it was to the right middle side of the chest, this was a matter of details. When the evidence is that by the same knife after hitting Nilesh, accused stabbed PW-3, it is a simple matter that after stabbing Nilesh the same knife was withdrawn from the body of Nilesh and PW-3 was attacked. It was not necessary to record in the FIR that after stabbing Nilesh the knife was withdrawn. This by itself cannot be said to be material omission.

22. While appreciating the evidence of witnesses, we have kept in view observations of Hon'ble Supreme Court of India in the matter of **State of U.P. vs. Shanker, reported in A.I.R. 1981 S.C. 897**. The Supreme Court observed in Para 32 and 38 as under:

"32. But the mere fact that the witness had not told the truth in regard to a peripheral matter would not justify a wholesale rejection of his evidence. Time and again, this Court has pointed out that in this country it is rare to come across the testimony of a witness which does not have a fringe or an embroidery of untruth although his evidence may be true in the main. It is the function of the Court to separate the grain from the chaff and accept what appears to be true and reject

the rest. It is only where the testimony of a witness is tainted to the core, the falsehood and the truth being inextricably intertwined, that the Court should discard his evidence in toto."

"38. To sum up, the mere fact that P.W.7 and some other witnesses did not admit or had expressed ignorance about certain collateral facts was hardly a ground to reject their ocular account when there was general agreement among them with regard to the substratum of the prosecution case. In short, all the arguments employed by the High Court in rejecting the evidence of the eyewitnesses and other material witnesses examined by the prosecution were, with respect, clearly unsustainable, whereas those given by the trial Court in accepting the evidence of these eyewitnesses were weighty and sound."

23. PW-3 was confronted by accused with what was recorded as a dying declaration by DW-1. PW-3 was shown the document in his cross-examination and he accepted that the statement was recorded by the Tahsildar on 11th January 2002. He was confronted with the contents and accepted that the name as such of the accused was not written in the statement. No doubt the document as Article "D" does not refer to the accused by name but it referred to him as Saheb? and that he was grader. Rather Article "D" which was recorded in the morning of 11th January 2002 at about 9.00 a.m. gives more details of the incident which are now being tried to be shown by the accused as omissions in FIR. The FIR was registered in the night itself in which PW-3 had given name of the accused. No doubt in Article D, name as such of the accused is not mentioned, but if the evidence of DW-1 is perused and Article D is seen, it is clear that DW-1 did not record the said statement in the words of the witness. He admitted in the cross-examination that he went on putting questions to which PW-3 Anup went on giving answers. DW-1 did not keep any record as to what questions he had asked. It is not clear if DW-1 had asked PW-3 regarding name of accused. Thus, only because in Article D name of the accused was not mentioned, does not make the evidence of PW-3 unreliable. Article D is not dying declaration under Section 32 of the Evidence Act. It is not statement to Police under Section 161 of Cr.P.C. It is also not statement to Metropolitan Magistrate or Judicial Magistrate under Section 164 of Cr.P.C. It could be referred at the most under Section 157 of the Evidence

Act to "corroborate" the testimony of the witness. Like Section 158, this section does not refer to "contradict or to corroborate" and so as per Section 157 of the Evidence Act it can be used to only "corroborate". Still, even if it was to be given any value, although PW-3 may not have known earlier, there are witnesses like PW's 4 to 6 who knew the accused from before and who have also identified the accused. Thus, going through the cross-examination of PW-3, although the learned counsel for accused made much efforts to show that PW-3 is unreliable, we are not in agreement with the counsel for the accused. The reasonings recorded by the trial Court to disbelieve the PW-3, we find to be unconvincing.

In this regard, reference can be made to the case of **Paresh Kalyandas Bhavsar vs. Sadiq Yakubhai Jamadar and others, reported in A.I.R. 1993 S.C. 1544**. It was a case relating to communal riots. In that matter (see Paras 9 and 10), some dying declarations were recorded of the injured who survived. The Hon'ble Supreme Court discussed the evidence regarding dying declarations recorded by Executive Magistrate of PW's 5 and 6 of that matter. In that matter, the witness had not given out names of accused in the dying declaration. The Hon'ble Supreme Court discussed the evidence and found that the fact that PW-5 therein was under influence of general anesthesia and that he was not coherent were some of the important aspects that were required to be kept in mind. Hon'ble Supreme Court found in the facts of that matter that the Executive Magistrate had not inquired from PW-5 about alleged assailants. In present matter also, the above discussion shows that there is no material to show that DW-1 examined by the accused had inquired from PW-3 if he knew the name of the officer he was referring to. For such reasons, as mentioned in the earlier paragraph, we are not finding fault with the evidence of PW-3.

Discussing PW-4 Suresh @ Baban Tonpe

24. We have referred to the evidence of PW-4 Suresh @ Baban Tonpe, which corroborates PW-3 Anup. This watchman, when he came on duty, put on all lights of the ginning premises. He saw the incident from the time when the quarrel started inside the ginning mill premises and when he was approaching to the victim, accused and PW-3, he saw them coming out and after they came outside

the gate, when the incident occurred of stabbing, this witness has seen the same and deposed to corroborate PW-3. The learned counsel for accused submitted that the witness was not reliable as he had come to the Court in the car of the father of the victim at the time of giving of evidence and his conduct showed that he could not be relied on, which has been discussed by the trial Court. When we peruse the reasonings recorded by the trial Court with reference to this witness, the trial Court raised doubts about this witness by expressing that it was not explained as to how this witness could say that the victim Nilesh was accompanied with his "friend". One look at the persons and the incident could have made the witness assume that they were friends. But trial Court wanted explanation. Trial Court then observed that the witness did not explain as to who he intended to give phone call when he rushed towards the STD Booth; that he did not explain why he did not make the telephone call; that he did not explain why he did not inform the relatives or police on telephone; or that, he did not explain the basis for identifying the knife. The trial Court doubted the evidence of this witness when he did not accept in the cross-examination that he had earlier discussed the matter with the father of the victim although he came in his car. We find that when such incident suddenly takes place, there could be various turmoils in the mind of a witness, who may in split second take a step to do something and in another split second get diverted to something else. Here this witness when he saw the incident taking place, rushed towards the STD Booth. May be he wanted to make a call. But then at the STD Booth he saw PW-5 Ankush already trying to make a call and immediately witness told him the incident and PW's 4 to 6 then appeared to have got diverted seeing the accused running away from near the spot. If the veracity of the witness was to be doubted by asking such questions that the witness has not explained this or that conduct of his, it would be raising doubts for the purpose of raising doubts. Had the witness on his own given the explanations, he would have then been criticized for omissions and improvements. The details as were being searched by the trial Court, were apparently not with reference to the main incident. A watchman like PW-4 may not have risen so as to call up the relatives or police. By that itself the witness does not become unreliable. The trial Court questioned that the witness did not explain on what basis he could identify the knife before the Court and it was difficult for anyone to know particulars of a

weapon from a distance. Now if the Spot Panchanama proved by PW's 1 and 2 is perused (which evidence we will discuss later), it can be seen that the spot of incident of stabbing from the gate of ginning mill was hardly at a distance of about 35 ft. PW-4 deposed (in Para 4) that he tried to resolve the quarrel from some distance. Thus he was between these 35 feet. Although the trial Court criticized the witness claiming that he could not have noted the particulars of the weapon, if the evidence of PW-4 Suresh @ Baban is perused (in Para 7) when asked, he deposed that he could identify the knife if shown. The knife was shown and the witness accepted that it was the same knife. Thereafter the Court on its own recorded particulars of the knife in bracketed portion. In Judgment, however, the trial Court criticized that the witness could not have noted the particulars. The witness never stated about particulars but accepted when the knife was shown to him that it was the same. Witness may recall the instrument by general impressions also which he may recall. The trial Court declared that the witness was interested recording that the interest of the witness appeared to be flowing from the fact that young deceased was vice president of the Municipal Council of Georai. But then, the evidence of PW-4 nowhere refers that he had any knowledge whether or not the deceased held any such post. The witness is being doubted because he came to the Court in the car of the father of the victim. The evidence of PW-4 shows that he admitted that he come to the Court in the car of the father of the victim. Distance between Georai to Beed is about 32 K.M.s. If this PW-4 who is a mere watchman at the gate of the factory and apparently not a rich person, took a lift, it would be too insulting to brand him as unreliable only because he had taken the lift. There is no material that State took care to provide for transport of the witness. It is a matter of common knowledge that people are reluctant to come forward as witnesses. This is something which is cutting through the administration of criminal justice. Although the witness is criticized, we find that if the witness was not honest or had he been tutored, he would not have given any such admission. The admission rather shows that the witness is honest, truthful and reliable. The trial Court further criticized this witness declaring that the witness claimed that on day of incident victim had delivered cotton to the federation but was unable to say what was the quantity and in whose name it was provided. It was forgotten that questions on this count were asked in the cross-examination by

the accused and in that course he had stated that cotton of Nilesh was received on that day. The witness was not given opportunity to explain the basis of his knowledge and when asked further details, he deposed that he did not know in whose name and how much quantity of cotton was given by Nilesh. We are unable to accept the reasons recorded by the trial Court for discarding the evidence of this witness. The approach on this count, cannot be maintained. The accused was unable to bring on record any contradictions or omissions in the evidence of this witness. The main evidence of this witness regarding putting on lights of the whole premises and seeing the incident from inside the premises till the stabbings taking place at short distance from the gate can hardly be said to be questioned or shattered.

Discussing PW-5 Ankush Mulay

25. Coming to the evidence of PW-5 Ankush Mulay, the supervisor, we have already referred to his evidence earlier regarding incident. In short, his evidence is that he is supervisor at the ginning mill and was on duty on the day concerned although the ginning was closed on that day as machine work was going on. The witness has not stated that it was a holiday as such. The witness deposed that at the time of incident, he got attracted due to the noise of quarrel and saw the victim, accused and friend of the victim proceeding towards the gate and that they were quarreling and then outside the gate quarrel continued because of which he went to the STD Booth to give a phone call to the house of victim, at which time PW-4 Suresh @ Baban rushed to him and told about the stabbing and they saw the accused running away from near the spot. The trial Court has disbelieved even this witness. Trial Court observed that this witness did not claim that he had seen the actual stabbing but still deposed that the friend of Nilesh was stabbed with "knife". But then when the evidence is that PW-4 Suresh @ Baban had rushed to this witness and told him that the accused had stabbed the victim with knife, there is nothing surprising if the witness accepted this to say that there was injury by knife. In the cross-examination of this witness, trial Court allowed it to be recorded (in Para 3) that he had not stated before the police that on 10th January 2002 he was working in his office. Trial Court referred to this as an omission for criticizing the evidence of this witness. Now, if the original record is perused and the

statement dated 11th January 2002 of this PW-5 Ankush is seen, Para 2 of the statement to police opens with the line:

HINDI?

This is another instance in the matter which shows that at the time of recording of the evidence, the trial Court was not careful when alleged contradictions or omissions were tried to be brought on record. Apart from the Public Prosecutor, it is duty of the Court also to have the concerned statement before its eyes if something is tried to be shown as omission or contradiction. It is wrong practice being noticed in Courts to record complete sentence as not told when, while recording in Court Hall the emphasis given to witness or the contradiction or omission is only about a part or word. It is duty of Court to high light while recording, the part or word concerned by putting it in inverted commas and explaining in bracket. When what has been deposed is also appearing in Statement to Police, Courts should not allow asking if it was so stated to police. Witness is not under any memory test. Courts are under duty to record notes in bracket in evidence where necessary comparing evidence visavis statement to police for proper appreciation. Similarly a fact not told in say FIR but stated in Supplementary Statement recorded soon thereafter, gets highlighted and made capital of because Court concerned does not make a note in bracket while recording evidence. For its own remembrance and benefit of appellate Courts factual notes need to be kept by trial Courts in evidence, in interest of justice.

In present matter, without referring to police statement by Court, or drawing attention of witness, the Advocate for accused was allowed to bring in the evidence of PW-5 something which did not match with the record. Trial Court failed to follow directions of Hon'ble Supreme Court in the matter of **Tahsildar Singh and another vs. State of U.P., reported in A.I.R. 1959 S.C. 1012**, where Hon'ble Supreme Court painstakingly laid down how contradictions and omissions are to be proved. After referring to a few examples, it was observed in Para 27 that:

"27. The aforesaid examples are not intended to be exhaustive but only illustrative. The same instance may fall under one or more heads. It is for the trial Judge to

decide in each case, after comparing the part or parts of the statement recorded by the police with that made in the witness box, to give a ruling, having regard to the aforesaid principles, whether the recital intended to be used for contradiction satisfies the requirement of law."

Thus, it was duty of the trial Court to itself compare. It failed to do so is apparent.

Trial Court criticized PW-5 on the basis that he had deposed that police personnel had come to the hospital but this witness did not explain as to why he did not disclose the incident to police. If the evidence of PW-5 is perused, although he refers to police personnel coming to the hospital, there is no evidence that police personnel came when he was still present. The witness has deposed that after taking the victim to the hospital, he was there for half an hour and then he had returned home. Looking to the time of the incident and Station Diary Entry Exhibit 71, the cross-examination cannot be so read that the police had already reached when the witness was at the hospital. The witness is criticized by the trial Court that he did not disclose the incident to the people who had gathered. The record shows that immediately on 11th January 2002 statement of this witness was recorded by police. We do not think that for reasons recorded by the trial Court, the evidence of the witness could be discarded.

Discussing PW-6 Kailas Sutar

26. The evidence of PW-6 Kailas Sutar who was at the STD Booth and got attracted to the incident when PW-4 rushed to the STD Booth and informed about the incident to PW-5 Ankush, has deposed that he had seen the accused running away from near the spot. The evidence of this witness also has been ignored by the trial Court observing that it was unnatural that after PW-4 saw the incident and came to PW-5 and told him about the incident and then this witness could have seen the accused running away from near the spot. If the evidence of this witness PW-6 is perused, he has deposed that he was in front of Hotel Deepali. The STD Booth was near this Hotel. The witness deposed that at that time PW-4 Suresh @ Baban "rushed" from the ginning and told Ankush about the occurrence and then when they saw towards Mondha Naka, they saw the accused running away. Logically appreciated, when the spot of incident and the STD Booth near Hotel

Deepali were at short distance, if PW-4 rushed and told PW-5 Ankush about the incident which was taking place, the time factor for PW's 4 to 6 would be overlapping to some extent and in quick succession to some extent, and there is nothing surprising if in culmination, simultaneously they could notice the accused running away from near the spot. We do not find anything unnatural in the evidence of PW-6 Ankush when he deposed that he saw the accused running away from near the spot.

The evidence of this witness PW-6 Kailas has been discarded by the trial Court on the basis that he was not a person who was providing cotton to ginning mill and that he does not know any coolies, labourers at that place and he has no concern to visit that place. When the witness, who is labourer and resident of the small place like Georai, there is nothing unnatural if in the evening he comes to a hotel or is near the hotel. His presence cannot be questioned merely because he is not supplier of cotton to the nearby ginning mill. His evidence was discarded by the trial Court observing that it was his version before the police in statement that he had come to know that Nilesh was assaulted with knife on his chest and as such he died, later on. We find that in the cross-examination of this witness, the counsel for accused read over portions which were not deposed to by the witness in his examination-in-chief and portion was marked as "A" and then has been proved in the evidence of I.O. as Exhibit 94. All this exercise was done when it was not necessary and the witness when asked in the cross-examination, said that he had indeed told the police that subsequently he had come to know that Nilesh had demanded receipts of cotton from Dhanade and grader Dhanade avoided to give receipts and quarreled with Nilesh. When witness accepts he told a fact to police and it has been so recorded, there is no further question of going on to mark and prove portion "A". This is clearly not in consonance with what is laid down in matter of "**Tahsildar Singh (supra)**". In the flow of putting up portion which the witness was not even denying, in evidence the witness was further asked and he stated that he had narrated before the police the fact that after sometime he came to know that as Nilesh was assaulted with knife on his chest, so he died. What witness was telling was regarding he getting knowledge about death due to incident and not that he came to know about incident itself later on. The trial Court clearly misread the evidence and came to perverse findings on this count.

Subsequent Conduct of Accused

27. Apart from the direct evidence of PW's 3 to 6, there is other evidence also available like subsequent conduct of the accused. There is evidence of PW-7 Vajinath Kale. He was manager of Somani ginning factory at Padalshingi, which is part of same Taluka Georai. The evidence of this witness and PW-8 Ramesh Gholap, the watchman of Somani ginning factory at Padalshingi, shows that when the accused ran from the spot, he reached this Somani ginning factory. The evidence of PW-7 and PW-8 shows that the accused reached that ginning factory and went and met one clerk Jadhav. PW-7 Vajinath has deposed that at about 8.00 p.m. of 10th January 2002 he was called by that clerk Jadhav and he saw that the accused was sitting with said T.G. Jadhav. At that time said Jadhav informed PW-7 Vajinath that the accused had a quarrel with Nilesh Karande (victim) and that the accused wanted to go to Beed and so wanted a jeep to be called.

The evidence of PW-8 Ramesh Gholap is that on 10th January 2002 at about 8.00 p.m. he was working at Somani ginning factory when the accused reached that factory and went to clerk T.G. Jadhav. The evidence of PW-8 is that Jadhav asked him to bring a jeep on hire as the accused wanted to go to Beed. Jadhav told this witness also that there had been quarrel between accused and Nilesh and so the accused wanted to go to Beed. PW-8 has deposed that at this time when he saw the accused, the accused appeared to be frightened and that there were blood stains on the shirt and pant of the accused. PW-7 and PW-8 have deposed that they both went to the bus stand at Padalshingi and jeep was hired. PW-9 Kachru Chavan was the driver.

PW-9 Kachru has deposed that on 10th January 2002 he was at the bus stand of Padalshingi and PW-7 Vajinath and PW-8 Gholap came to him and wanted that their officer should be dropped at Beed. The evidence shows that PW's 7 to 9 then came by jeep to Somani ginning factory and the said officer i.e. accused went and sat in the jeep. The evidence shows that these four persons then travelled by Jeep MH-23-C-659 to Shahunagar at Beed and on the way the accused met a friend and told the said friend that there was quarrel between him and Nilesh Karande

and to go and bring his family members (i.e. of the accused) to the room of his (another) friend Ganesh. Accused expressed that he wanted to go to his village and so the family was required to be brought. The evidence of these witnesses shows that PW-7 to PW-9 along with accused then went to the place of one Ganesh. The evidence of PW-7 and PW-8 is that when the accused met Ganesh, he told Ganesh about the occurrence of quarrel between him and Nilesh. Then they met landlord of Ganesh who was Advocate. Advocate advised accused to lodge FIR to police station or be prepared for his arrest. It appears that after this, the accused paid the hire charges of the jeep and PW-7 to PW-9 returned. The evidence of PW-7 Vajinath records that when they went to house of Ganesh, they took tea there and the accused informed entire incident to Ganesh about the occurrence of quarrel between him and Nilesh. Thus, the evidence of these witnesses brought on record by the prosecution discloses that after running away from the spot, the accused took help at Somani ginning factory to go to a friend Ganesh at Beed and consult an Advocate. In the course of such taking of help, he appears to have made extra judicial confession about his quarrel with victim Nilesh. We are aware that extra judicial confession is a weak type of evidence and in this matter the witnesses have not stated specific words used by the accused. However, what is material is the conduct of accused brought on record by the prosecution which discloses his guilty conscience and also connects him to the incident. The accused had reached Somani ginning factory with blood stains still on his clothes.

28. The cross-examination of PW-7 Vajinath brought on record the fact that even before incident there were occasions when this witness had called for and used jeep of PW-9 Kachru for travelling between Georai and Beed. The crossexaminer wanted to test the knowledge of this witness and the witness gave him the number of the jeep when asked. The cross-examination of PW-7 further shows that the accused was acquainted with grader Bookwala of Somani ginning factory and so he used to go there and so he was known to the witness. Distance between Beed to Padalshingi appears to be 19 Kilometers. PW-7 was unable to tell the name of the Advocate. The cross-examination of PW-7 confirmed that in the presence of this witness, the accused had told the incident to Ganesh, and Ganesh had called the Advocate. The full expanse of the incident however came to be known by this

PW-7 only on 11th January 2002 from the newspaper. This can be seen in view of the details brought on record in the cross-examination. Thus the evidence is natural and shows that when accused was seeking help he told broad factors about the incident. In spite of the cross-examination, the witness could not be shattered regarding the fact that he was involved in the travelling of accused from Padalshingi to Beed and the extra judicial confessions of involvement of the accused.

29. Similarly cross-examination of PW-8 watchman Ramesh Gholap also did not elicit any material on the basis of which the witness could be disbelieved regarding the travel of accused to Beed and the statements made by the accused as well as evidence that the accused appeared to be frightened and there were blood stains on his shirt and pant. PW-9 driver Kachru was also cross-examined. He was questioned to test his memory regarding where he had taken his jeep on 10th, 11th and 12th January 2002. The witness could not say. It was suggested to him that he did not know what police wrote in his statement. The witness accepted the suggestion. The witness was referred to his evidence that at the house of Ganesh the accused had told about the quarrel. The omission was brought on record in cross-examination that it was not told to police that such statement was made at the house of Ganesh. Looking to the other evidence available and the fact that PW's 7 to 9 have no reason to depose against the accused, we find the evidence of these witnesses also to be reliable. The trial Court discarded evidence of these witnesses terming the same as unnatural that a friend of accused like Jadhav would inform his subordinate (?) Kale (PW-7) and colleague Gholap (PW-8) that his friend was involved in a quarrel. The evidence of PW's 7 and 8 does not disclose that Jadhav was any friend as such of the accused. Rather the evidence is that accused was acquainted with one grader Bookwala and so he used to come and thus was known. The evidence of PW's 7 to 9 was questioned by the trial Court also on the basis that their evidence did not disclose as to which friend the accused met on the way before going to Ganesh. If while going along, the accused told somebody known to him to bring his family members and if these witnesses do not know that person by name, by that itself the veracity of these witnesses cannot be termed to have been shaken. As the witnesses appeared to be corroborating the evidence of each other, the trial Court dubbed the same as

cyclostyled and has ignored it. We are not as such in agreement with trial Court for discarding the evidence of PW's 7 to 9 who have withstood the cross-examination and nothing material has been brought on record to show that they had any special interest against the accused. The accused, after the incident, was in trouble and may have reached Somani ginning factory for help and once he was there, he may not have been able to avoid PW-7 and PW-8 from coming to know about the incident. He may have harboured hope that as an officer he would get help at the place concerned.

Stay at Lodge at Latur that night

30. Evidence of P.I. Ghorale (PW-21) shows that in the investigation he came to know that the accused after running away from the spot, had gone and stayed at a lodge in Latur. Consequently, the witness says that he had sent PW-20 P.S.I. Radhakishan Thakur for search of record. There is evidence of PW-20 Radhakishan Thakur. He has deposed that on directions of PW-21, he on 21st January 2002 took along the accused and went to Latur. They had gone to Madhuban Lodge. PW-20 P.S.I. Thakur deposed that at the said lodge, he found entries in the register regarding staying of four persons under the leadership of name given as "Vishvas Patil". PW-20 P.S.I. Thakur says that he got extract of entry of the register xeroxed and also prepared Panchanama. The witness proved the Panchanama at Exhibit 75.

31. Prosecution examined PW-16 Kishor Kadam, serving at Madhuban Lodge. PW-16 deposed that in the night of 11th January 2002, in the night a man, a woman and a child had come to the lodge at about 2.00 2.30 a.m. They were charged Rs.250/-. They however left lodge at 5.00 a.m. in the morning itself. At the time of evidence, this Kishor claimed that he could not identify if the accused before the Court was the same person. The Special Public Prosecutor declared the witness hostile and cross-examined him. The witness, however, claimed that he does not remember if the person who had come, gave his name as Vishwas Patil and it was the person brought along by Police (i.e. accused). PW-20 P.S.I. Thakur proved contradiction in the statement which he had recorded of PW-16 Kishor Kadam at Exhibit 76. Contradiction shows that PW-16 is not a person who

would stand by truth.

Criticism of FIR baseless

32. The learned counsel for the accused argued that the FIR said to be recorded in the night concerned in the matter Exhibit 28 is doubtful as in the dying declaration given to DW-1 in the morning of 11th January 2002 did not record the name as such of the accused, while in the FIR recorded in the middle of the night he had mentioned the name of the accused. The learned counsel also doubted the same on the basis that the FIR was not sent to the Court within 24 hours as required by Section 157 of Cr.P.C. Reference was made to the copy of FIR sent to the Court which has endorsement of the JMFC about receipt in the date of 14th January 2002. The offence was registered vide Exhibit 28 in the night between 10th and 11th January 2002 at about 4.30 a.m. Section 157 of Cr.P.C. requires sending report to Magistrate forthwith. The investigation shows various urgent steps taken by the Investigating Officer on 11th January 2002 regarding the investigation. PW-3, the complainant Anup could not be shaken in cross-examination regarding his evidence that Exhibit 28 was recorded in the same night. The evidence of PW-3 Anup as well as P.I. Ghorale (PW-21) shows that when Exhibit 28 was recorded, the P.I. had taken opinion of doctor and got the doctor also to endorse Exhibit 28. The endorsement of doctor has been proved by both these witnesses. No doubt, prosecution did not examine the doctor but Exhibit 28 does show endorsement of doctor regarding the condition of the PW-3 at the time of recording of statement which was converted into FIR. There is evidence of PW-19 Head Constable Bansi Jadhav who has also deposed that he was on duty in the night of 10th 11th January 2002 and P.I. Ghorale had brought the statement of PW-3 Anup which he registered as FIR and the said document is at Exhibit 28. Regarding late sending of FIR to the Court, the learned Special Public Prosecutor submitted that the offence was registered on 11th January 2002, and 12th and 13th January 2002 happened to be second Saturday and Sunday and thus the Court was closed and thus according to the Special Public Prosecutor, the copy of FIR was possible to be submitted to the Court of JMFC only on 14th January 2002, which cannot be said to be delayed as no system of receiving copy of FIR on holidays is shown.

33. Apart from the above, there is evidence of PW-1 Ravindra Wadkar as well as PW-2 Sunil Babasaheb, the Panchas of the Spot Panchanama Exhibit 24. The evidence of these witnesses shows that PW-21 P.I. Ghorale had called them at the ginning factory for Spot Panchanama on 11th January 2002 between 7.00 8.00 a.m. Their evidence brought on record details of the Spot in Panchanama, which came to be prepared. The Spot Panchanama Exhibit 24 shows that it was recorded on 11th January 2002 between 7.00 8.00 a.m. The Spot Panchanama contains brief reference to the FIR No.8 of 2002 which had already been registered. There is no reason for PW-1 and PW-2 to depose falsely that they were called early morning of 11th January 2002 for the Spot Panchanama. When the Spot Panchanama shows the reference to the FIR No.8 of 2002 which was already registered and there is evidence of these witnesses, we do not find that there is any substance in the doubts being raised by the accused regarding the fact that the offence was registered in the same night of 10th 11th January 2002.

The counsel for accused submitted that Panch PW-1 accepted that Nilesh was his friend. Merely because PW-1 was friend of Nilesh, does not mean that the witness would be giving false evidence. Apart from that, there is no reason why PW-2 also would be deposing regarding the Spot Panchanama recorded between 7.00 8.00 a.m. of 11th January 2002. PW-1 and PW-2 were cross-examined at length. They gave all the necessary details regarding the spot. It cannot be said that they were shattered as such regarding their evidence in respect of the spot. In the cross-examination, the evidence of these witnesses that Spot Panchanama was recorded between 7.00 8.00 a.m. of 11th January 2002 the date and time was not denied.

Apart from that, there is evidence of PW-10 Panch Amar Khandagale. He was a student at the concerned time residing at Georai. The evidence of PW-10 Amar shows that at about 4.00 4.30 a.m. police had come to him and asked him to come along to the Government Hospital. The police took him for Panchanama from Georai to Beed to the Hospital for seizure of clothes of PW-3 Anup. The accused has questioned as to why the witness was taken from Georai and why Panch was not taken from Beed itself. PW-10 was a student of B.Sc. final and may not have objected to the police. By that itself the witness does not become unreliable. The

Panchanama of seizure of clothes of the victim Exhibit 51 shows that it was recorded between 5.30 - 6.00 a.m. of 11th January 2002. Even this Panchanama refers to the already registered Crime No.8 of 2002. Looking to such evidence available and so many unconnected witnesses deposing about the Panchanamas recorded, only because the copy of FIR reached the Magistrate on 14th January 2002, would not be a reason to throw out the case of prosecution when overwhelming evidence is available. Compliance of Section 157 of Cr.P.C. would have to be judged and read keeping the proved facts of the matter in view.

34. In the matter of **Paresh Kalyandas Bhavsar**, referred supra, also the Hon'ble Supreme Court dealt with criticism raised in the facts of that matter (see Para 7) that the FIR dated 8th April 1990 reached the Magistrate after some days i.e. on 17th April 1990 and thus it showed that the same was brought in existence at later stage. Hon'ble Supreme Court considered the evidence of PW-4, the complainant in that matter and PW-5 and considering the evidence and contents of the FIR, still found the report to be true and observed that even if it was to be accepted that there was some delay in sending the report to the Magistrate, that is not a ground to doubt the genuineness of the report. In the present matter also, for reasons we have discussed in the earlier paragraphs, we do not doubt the FIR which was filed in this matter by PW-3.

Seizure of Clothes

35. The evidence of PW-10 Amar Khandagale shows that police had seized the blood stained clothes, Articles 6 and 7 from the person of victim PW-3 Anup. This witness was asked if he could give details regarding number of patients who were there in the ward and who was the doctor treating PW-3. The witness was unable to give answers to such questions testing his power of observation. That does not make the witness suspect. The counsel for accused tried to create doubt by suggesting to the witness that between the portion of names of Panchas (in Panchanama Exhibit 51) and the body of the Panchanama, there was a gap. The witness denied the suggestion. We have perused the Panchanama. It cannot be said that there is any such gap which should create any suspicion. The witness accepted that the father of the deceased who was an Advocate, was sitting in the

Court Hall at the time of evidence. So? The witness denied that he was deposing under any pressure. Going through the cross-examination of the witness, it cannot be said that he is shattered. Prosecution established seizure of blood stained clothes of PW-3 Anup.

36. The clothes of deceased were seized by the police vide Panchanama Exhibit 53 by bringing on record evidence of PW-11 Arun Govindrao. The evidence shows that the blood stained clothes of the deceased were seized by the police on 11th January 2002. Then there is evidence of PW-12 Vinod Jagtap which shows that after the accused was arrested, police seized the clothes of accused also vide Panchanama Exhibit 55. There is evidence of PW-17 Constable Bhagwan Khade, who has deposed that on 31st January 2002 on the directions of PW-21 P.I. Ghorale, he had taken the articles in this matter to C.A. The evidence is that the articles were in sealed condition. The articles were sent along with letter and PW-17 obtained acknowledgment of C.A. The evidence of PW-21 P.I. Ghorale is that the Muddemal articles which required chemical analysis, were sent to C.A. for analysis. He has proved letter Exhibit 84 in this regard. The letter Exhibit 84 read with C.A. Reports Exhibits 106 to 108 shows that blood group of PW-3 Anup was group "O". Blood group of the deceased Nilesh was also "O", while the blood group of the accused was "B". C.A. Report Exhibit 109 shows that on the clothes of the accused blood stains were of group "O". The present matter contains direct evidence of the incident which can be relied on with or without the support of this forensic evidence. Incidentally, the forensic evidence also supports the prosecution.

Discovery of Knife

37. Evidence of PW-21 P.I. Ghorale is that he arrested the accused on 14th January 2002. While the accused was in custody, he was interrogated. The evidence of PW-21 Ghorale and evidence of PW-13 Subhash Mule discloses that while the accused was in custody, on 18th January 2002 the accused stated that he would show where the concerned knife relating to the incident is. In this regard, Memorandum Panchanama Exhibit 57A was drawn which (after excluding inadmissible portions), shows that the accused informed the police that the knife

concerned with the offence he will show where it is hidden at Padalshingi. The evidence of PW-13 and PW-21, further discloses that the police along with Panchas and the accused by jeep went to Padalshingi as per the say of the accused and they went near Somani ginning mill. The accused showed a cart track going from near the mill, which cart track was to the east of the said mill. After getting down from the jeep, the accused took the police and Panchas to a distance of about one furlong away from the road. From a spot where there was grass and bushes to the east of the cart track, the accused produced knife Article 15, taking the same out from the grass. Thus the instrument was discovered. Regarding this Panchanama Exhibit 57-B was recorded. This knife has been identified in the evidence by PW's 3 and 4 as the instrument by which the deceased was stabbed and PW-3 was injured. As per C.A. Report Exhibit 109, the knife also had stains of blood of group "O".

38. In the cross-examination, PW-13 Subhash Mule accepted that he was knowing the victim since childhood and that he had good relations. However, there is nothing to show that this witness had any strained relations with the accused to depose against the accused. Detail cross-examination was taken, however the evidence read as a whole, shows that the witness was indeed aware of all the details of the place where the accused had taken the police party and gave discovery of knife.

In the matter of "**Paresh Kalyandas Bhavsar**" (supra) a criticism was raised (see Para 6 of that Judgment) that brother of the injured witness figured as Panch. Hon'ble Supreme Court found that it could not be a valid ground to doubt the veracity of the witness. In present matter only because PW-13 Subhash had good relations with the victim is no ground to doubt him.

Scuffle Injuries on person of Accused were there

39. Prosecution has proved another circumstance. There is evidence of Dr. Vinod Ostwal, PW-15, which shows that on 14th January 2002 he had examined the accused. The accused had the following injuries:

"(1) Laceration over left side forehead admeasuring 0.5 cm. X 1 cm. limual in length.

(2) Laceration over L/t side of the cheek admeasuring 0.5 cm. X 2 cms.

(3) Laceration right side of neck admeasuring 2.5 cms. X 0.5 cm. Linial in length."

According to the doctor, history given was of assault on 10th January 2002. In the opinion of the doctor, the Injury No.1 was possible by nail and Injury Nos. 2 and 3 were possible by nail or pin. The injuries were possible in scuffle. Accordingly, certificate Exhibit 63 was issued. The doctor denied suggestion in the cross-examination that the accused did not give the history as recorded by the doctor. Thus, there is substance in the submission of learned Special Public Prosecutor that the injuries on the person of accused show that he did indulge in a quarrel with the victim and PW-3 in which the incident took place.

Injuries of PW-3

40. The evidence of PW-18 Dr. Upendra Kulkarni from Civil Hospital Beed, brought on record injuries suffered by PW-3 vide medical certificate Exhibit 69 from the Civil Hospital, Beed. It also shows that PW-3 was required to be given blood group "O". According to Dr. Upendra Kulkarni, PW-3 Anup had the following injuries:

"1. Stab wound on chest infra axillary region on left side in 7th intercostol space, admeasuring 2 cms. X 2 cms. X 2 cms., edges were sharp. The wound was caused within 24 hours next before my examination with a sharp object. Nature of the injury was simple.

2. A stab wound on left ilia fossa interstinal coils were seen. The injury was admeasuring 3 cms. X 3 cms. and had sharp edges. This injury was also caused within 24 hours next before my examination with a sharp object. Nature of the injury was grievous."

It is clear that intestinal coil had become visible and PW-3 in the course of incident had suffered serious injury in his abdomen. The evidence of PW-18 Dr. Upendra is

that the injuries of PW-3 were sufficient, in the ordinary course of nature, to cause death. The doctor opined that the injuries of PW-3 were possible by knife which was before the Court.

Injuries of Victim

41. As regards the victim Nilesh, there is evidence of PW-14 Dr. Vijay Sickchi who did postmortem, report of which is at Exhibit 60. As per this doctor, Nilesh suffered following injury:

"Stab wound on chest (Rt) side towards the sternum at the level of 4th ICs of size 3 cm. X 1 and 1/2 cm. deep to lung tissue.

Oblique in fibre, both tail ends present."

As per the postmortem report, the death occurred due to this stab injury on the chest. PW-14 deposed that he had collected blood sample of the deceased for chemical analysis. According to the witness, the injury was possible by knife. In the cross-examination of this doctor also, the accused tried to create doubt to suggest that certain words were inserted in Column 17 of the postmortem report. The doctor denied. We have seen the postmortem report and we do not find any force in such cross-examination. The doctor denied that the injuries of the victim were not possible by the knife which was before the Court.

Search of Trial Court for Witnesses of Periphery

42. Judgment of the trial Court shows that it doubted which ever witnesses prosecution examined, while it went on to search for this or that witness who would at the most have given hearsay evidence. Trial Court doubted PW's 4 to 6 (in Para 31 of the Judgment) on the basis that although they claimed to have seen incident they did not show the spot to the Police and one Navnath had pointed out the scene of occurrence. On that basis, the trial Court observed that it could be safely concluded that Navnath had knowledge of incident and he has not been examined. Trial Court observed that Praveen Sharma who took PW-3 to hospital was not examined and no explanation is there for the same. Trial Court observed that people who took the injured to the hospital, they should have extracted the

information from PW-3 and why they had not lodged complaint. Trial Court observed that such persons had been kept away from the Witness Box. Ignoring the evidence of PW-6 Kailas Sutar who was near hotel near STD Booth, trial Court observed that it had come in evidence that some of the employees of the hotel had rushed to the scene of occurrence. The trial Court observed that prosecution should have collected their evidence and adduced it before the Court. Similarly, it observed that father and brother of the victim who had reached the hospital after incident, should have been examined and they could have told as to what they came to know after the incident. Thus, the trial Court went on searching for people who would have given what would be hearsay evidence. Observations of the Hon'ble Supreme Court in the matter of **Appabhai and another vs. State of Gujarat, reported in A.I.R. 1988 S.C. 696** show the various difficulties investigating agencies go through. It has been observed in Para 11 of the Judgment as under:

"It is no doubt true that the prosecution has not been able to produce any independent witness to the incident that took place at the bus stand. There must have been several of such witnesses. But the prosecution case cannot be thrown out or doubted on that ground alone. Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The Court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any, suggested by the accused. The Court, however, must bear in mind that witnesses to a serious crime may not react in a normal manner. Nor do they react in uniformly. The horror stricken witnesses at a dastardly crime or an act of egregious nature may react differently. Their course of conduct may not be of ordinary type in the normal circumstances. The Court, therefore, cannot reject their evidence merely because they have behaved or

reacted in an unusual manner."

It has been further observed in Para 13 as under:

"We have, however, also examined the relevant evidence. It is true that there are many contradictions in the evidence of Devji. He has not attributed overt acts to individual accused in his statement before the police whereas he has attributed such overt acts in his evidence before the Court. But that is no ground to reject his entire testimony. It must not be forgotten that he was a victim of the assault. Fortunately he has survived. He must, therefore, be considered as the best eyewitness. The court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The Court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the Court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy."

Looking to the above, we find the approach of the trial Court to the evidence wholly unpractical. If one sits down to doubt whatever is brought before him, nothing would be convincing. In present matter the evidence is much better than what was referred by Hon'ble Supreme Court in above matter. We decline to uphold the unrealistic and unreasonable approach of trial Court to discard appealing evidence in present matter.

43. It has been argued by the learned counsel for the accused that the evidence shows that the job of accused was only to grade the product brought and not to issue receipts and so the evidence that the victim went to ask for receipts to the

accused has no substance. The trial Court (in Para 31 of the Judgment) accepted such argument to observe that the prosecution story was unnatural. We are not impressed. If the receipt would get issued after the grading of the cotton, the supplier of the cotton would naturally go and pursue the matter further where the process has stopped.

CONCLUSION

44. We have already discussed the evidence. We find no reason to doubt the evidence of PW3 who could have suffered death in the incident. His presence at the time of incident cannot be doubted. There is no reason why he would omit the real culprit. Reliance can be placed on the case of **State of Maharashtra vs. Tulshiram Bhanudas Kamble and others, reported in A.I.R. 2007 S.C. 3042**. It was observed in Para 29 as under:

"29. Each of the reasoning assigned by the High Court, in our opinion, is contrary to the well settled legal principle. The witnesses examined on behalf of the prosecution, apart from being eyewitnesses, were injured witnesses. Their presence at the place of occurrence, therefore, cannot be doubted. Only because they were inimical to the respondents, the same by itself cannot be a ground to discard their evidences. Although in accepting the same, some amount of caution is required to be maintained."

Present matter PW-3 was not even inimical. He incidentally got involved and was so badly injured. There is no reason to doubt his evidence.

In the cross-examination of witnesses, defence taken is that some businessmen and Praveen Sharma had grievance against the accused. We do not find any substance in such defence. It is unlikely that so many witnesses, unconnected with each other who had no axe to grind against accused, would stand up to depose against the accused merely on the say of some imaginary businessmen and name of Praveen Sharma, picked up from the medical papers. Name of a person who may have out of human considerations helped PW-3 to reach the hospital, is appearing to be unnecessarily dragged. We do not find any substance in such defence although the same has been accepted by the trial Court.

While appreciating the evidence, we have ignored minor discrepancies and we have considered the evidence on broad spectrum. Discrepancies can be due to normal errors of perceptions or observations or due to loss of memory. There are no set rules in which people react in such sudden shocking incidents in which the persons may find themselves sucked. As such on imaginary reasonings sitting in the Court, witnesses cannot be doubted on the basis of supposed expectations of behaviours. The evidence of witnesses cannot be discarded on the basis that they did not react in A or B manner as long as the manner in which they reacted is possible if one puts himself in their shoes. Evidence cannot be discarded on unrealistic and imaginary expectations. If PW-4 Suresh @ Baban did not leave his point of duty as a watchman, to go and file FIR or PW-5 preferred to go home after reaching the victim to the rural hospital, the witnesses cannot be doubted for their versions of incident. Many people for various reasons do not want to get involved, and may not come forward and file FIR even if they have seen incident. For such reasons, if their evidence is discarded, the accused would be most happy persons and the victims who were struggling for life or were already dead, would suffer great injustice.

45. For appreciation of evidence, we have kept in view, the following observations of the Hon'ble Supreme Court in the matter of **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat, reported in (1983) 3 Supreme Court Cases, 217:**

"(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him. Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

The observations we have made in this Judgment while appreciating the evidence, are influenced by the above and thus we have ignored minor discrepancies.

46. As discussed, Trial Court did not take care at the time of recording evidence to ensure that indeed contradictions or omissions were there and if yes to what extent. The accused was given a free hand and without strictly following mandate of "**Tahsildar Singh**", the record was allowed to be burdened and Judgment influenced.

47. For such reasons, we find the approach of the trial Court to the evidence wholly untenable and the same is perverse for various reasons we have already

discussed.

Murder and Attempt to Commit Murder

48. We find that Nilesh Karande suffered homicidal death due to the stab injury given by the accused. We also find that accused attempted to commit murder of PW-3 Anup. As regards the culpable homicide of Nilesh, the question now before us is, whether the same could be said to be murder.

49. As per part "2ndly" of Section 300 of Indian Penal Code, culpable homicide would be murder if the act is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused. In this regard, however, the Exception 4 reads as under:

"Exception 4. - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation. " It is immaterial in such cases which party offers the provocation or commits the first assault."

50. In the present matter also for petty reasons the quarrel started and in the heat of passion without premeditation, the accused who had the knife with him (for reasons best known to him) suddenly took out the same and stabbed Nilesh in the chest. He did intend to cause bodily injury which he knew to be likely to cause death. Thus it is a case of culpable homicide not amounting to murder. In this view of the matter, the accused is liable to be punished under Section 304 Part I of the Indian Penal Code.

51. As regards sentence to be imposed, we find that the accused was working as a grader and was in Government service. In the moment of heat due to quarrel suddenly the incident took place. Prosecution has not shown any material which would show that the accused had criminal tendencies or that he had any criminal record. In this view of the matter, it would be appropriate not to award imprisonment for life as provided by Section 304 Part I of I.P.C. which is one of the

options. It would be appropriate to pass sentence of imprisonment for ten years which would be justified in the facts and circumstances of the matter. Similarly, for the offence under Section 307 of I.P.C. also, the sentence should be of ten years.

52. For the above reasons we pass following order:

ORDER

(A) The Criminal Appeal No.413 of 2005 filed by the State is partly allowed.

(B) The Judgment of acquittal passed by the 1st Adhoc Additional Sessions Judge, Beed in Sessions Case No.41 of 2002, dated 30th December 2004 is quashed and set aside.

(C) The Respondent original accused Rajkumar Kerba Dhanade is held guilty for offence punishable under Section 304 (Part I) of the Indian Penal Code, 1860 and is sentenced to suffer rigorous imprisonment for 10 (ten) years and to pay a fine of Rs.5000/- (Rupees Five Thousand). In default of fine, he shall suffer further rigorous imprisonment for the period of 6 (six) months.

(D) The Respondent original accused Rajkumar Kerba Dhanade is further convicted for offence punishable under Section 307 of the Indian Penal Code, 1860 and is sentenced to suffer rigorous imprisonment for 10 (ten) years and to pay a fine of Rs.5000/- (Rupees Five Thousand). In default of fine, he shall suffer further rigorous imprisonment for the period of 6 (six) months.

(E) Both the sentences of imprisonment shall run concurrently.

(F) The accused shall be entitled to set off as admissible under Section 428 of the Code of Criminal Procedure, 1973.

(G) The bail bonds of the Respondent accused are cancelled. He shall surrender to the Bail Bonds immediately. Trial Court to ensure compliance of these orders.

(H) Criminal Revision Application No.97 of 2005 filed by Petitioner Laxman Karande, father of the victim and Criminal Revision Application No.102 of 2005 filed by PW-3 Anup are allowed in above terms.

