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Court : Mumbai

Decided On : Mar-08-1985

Reported in : 1985(2)BomCR168

Judge : A.D. Tated and ;S.P. Kurdukar, JJ.

Acts : Indian Penal Code (IPC), 1860 - Sections 34, 300 and 304; Code of Criminal Procedure (CrPC) , 1973 - Sections 154, 154(1) and 313

Appeal No. : Criminal Appeals Nos. 376 and 98 of 1983

Appellant : Dasu and Others

Respondent : State of Maharashtra

Judgement :

Tated, J.

1. These two criminal appeals arise out of the judgment and order D/- 17th February, 1983 passed by the learned Additional Sessions Judge, Greater Bombay in Sessions Case No. 141 of 1982 convicting the appellants in Criminal Appeal No. 376 of 1983 (accused Nos. 1 and 2) of the offence under S. 302 read with S. 34 I.P.C. and sentencing them to suffer imprisonment for life, and convicting the appellant in Criminal Appeal No. 98 of 1983 (accused No. 3) of the offence under S. 325 read with S. 34 I.P.C. and sentencing him to suffer R.I. for

two years and to pay a fine of Rs. 300/-, or, in default, to suffer further R.I. for two months.

2. The prosecution case is that the three appellants-accused as well as deceased Wilson resided in a zopadpatti at Kranti Nagar, Kurla, Bombay. On 15th December, 1981 while the complainant Saiba Baly Damre (P.W. 2), deceased Wilson and one Chandya were near Wadia Estate Naka, a police-officer at the instance of accused Nos. 1 and 2 caught hold of Chandya and took him to the Kurla Police Station. The complainant Saiba and deceased Wilson with the help of one Patil, who was the head of the branch of Shiv Sena in that locality, tried to get Chandya released, but they did not succeed. They also contacted Sunder Peter Karkada (P.W. 4) known as uncle. Sunder also tried to help them to get Chandya released from the police, but he did not succeed. Thereafter they went to Corporator Madhukanta and requested him to use his good offices for releasing Chandya. Madhukanta declined to accompany them to the police station, but he contacted the police station on telephone. He also did not succeed in getting Chandya released. Thereafter Sunder went to his residence. Saiba and deceased Wilson were proceeding to their homes. Saiba was walking ahead and Wilson was following him. When they were at a short distance from the hut of Wilson, Saiba heard the sound of attack on Wilson who was following him at a distance of about two paces. On hearing the sound Saiba looked behind and found that Wilson was being assaulted by all the three accused. He noticed that the accused Nos. 1 and 2 were armed with iron bars and the accused No. 3 had a bamboo stick and all of them were giving blows with those weapons to Wilson. He saw the attack by the accused on deceased Wilson in the moonlight. At that time it was about 2.15 a.m. Saiba, feeling that he may also be assaulted, ran away and went to the house of Jakina Francis Fernandes (P.W. 3), the aunt of deceased Wilson. Wilson resided with Jakina. On knowing from Saiba that Wilson was being assaulted by the three accused, Jakina and her nephew George along with the complainant Saiba rushed to the place of assault. There they found that Wilson was lying dead in a pool of blood with several injuries on his person and the culprits had already left the place. Saiba, George and Jakina in a taxi took the dead body of Wilson to Kurla Police Station. P.S.I. Ramesh Uttam Jadhav (P.W. 10), who was at the police station, asked Saiba to get down the taxi and asked the remaining persons to proceed to

Sion Hospital. Accordingly, Wilson was taken to the hospital and there he was declared dead by the doctor on duty. P.S.I. Jadhav informed P.I. Sudhakar Chandrakant Bharambe (P.W. 11), who was also at the police station, about this incident. P.I. Bharambe recorded the report of Saiba and treated it as F.I.R. It is at Ex. 11.

3. P.I. Bharambe (P.W. 11) and P.S.I. Jadhav (P.W. 10) along with their staff went to the Sion Hospital. P.S.I. Jadhav held inquest on the dead body and prepared the panchanama Ex. 23. At the time of the inquest he seized the clothes (Arts. 3, 4, 5 and 6) stained with blood from the person of the deceased. Thereafter P.S.I. Jadhav and P.I. Bharambe along with their staff returned to the police station. Aunt Jakina (P.W. 3) and her nephew George also followed them to the police station. P.S.I. Jadhav left in search of the accused. He apprehended the accused No. 1 at Bail Bazar, Kurla, and took him to the police station. At the police station from the person of the accused No. 1 the shirt stained with blood (Art. 7) was seized. The accused No. 3 was arrested in a zopadpatti at Kranti Nagar and he was also taken to the police station.

4. The dead body of Wilson was received by Dr. Subhash Anant Khanolkar (P.W. 7) attached to the Additional Coroner's Court, Juhu, Bombay, for autopsy at 4.15 p.m. on 16th December, 1981. He held the autopsy on the dead body between 1 and 2.30 p.m. on 17th December, 1981. On examination he found the following ante-mortem injuries on the dead body of Wilson :-

'(1) Contused lacerated wound on right frontal region near hair margin 1.5 cms. x 1 cm. skin and muscle deep. Underlying bone fracture.

(2) Abrasion below lateral part of right eye 1 cm. x 1.5 cms.

(3) Abrasion on right cheek bone 2.5 cms. x 1 cm.

(4) Abrasion near right angle of mouth 2 cms. x 1 cm.

(5) Abrasion on supraclavicular region on right side 1.5 cms. x 1 cm.

(6) Contused abrasion on left side of face 4.5 cms. x 3.2 cms.

(7) Abrasion on chin 1 cm. x 0.5 cm.

(8) Contusion over palmar aspect of right thumb 1.5 cms. x 1 cm.

(9) Abrasion on back of right shoulder joint 1 cm. x 0.5 cm.

(10) Multiple parallel linear marks on back and waist.

(11) Parallel linear abrasions on right elbow back lateral side.

(12) Abrasion on back of right wrist 0.5 cm. x 0.2 cm.

(13) Abrasion on back of right hand between index and middle fingers 1 cm. x 0.2 cm.

(14) Extensive contused lacerated wound on right parietal and occipital regions. Irregular margins. Dimensions 8 cms. x 3.5 cms. Traversing of fibres from one side to another. Hair-follicles not cut but depressed. Skin and muscle deep. Fractured depressed bone pieces exposed.

(15) Lacerated wound on right region 2 cms. x 1 cm. skin and muscle deep, fractured and bone pieces exposed.'

On internal examination he found the following injuries on the dead body of Wilson :-

'Head :- Blood clots below scalp left temporal region.

Vault : Fracture of right frontal bone, right parietal and right occipital and left parietal into pieces. Bone depressed pieces and brain coming out.

Base :- The base fractured into many pieces.

Brain :- Severely lacerated. Subdural and subarachnoid blood clots found more on under surface of brain.'

In the opinion of Dr. Khanolkar, each of the internal head injuries was sufficient in the ordinary course of nature to cause the death of the deceased. He opined that

the acute head injuries with the fractures in the skull and intracranial haemorrhages caused the death of the deceased. According to him, the internal injuries in the head and the brain were the result of external injuries Nos. 1, 14 and 15. He recorded the post-mortem notes which are at Ex. 19. In the opinion of Dr. Khanolkar, those injuries could be caused with the weapons, the bamboo stick (Art. 1) and the iron rod (Art. 2).

5. P.S.I. Jadhav (P.W. 10) on 16th December 1981 at 1 p.m. interrogated the accused No. 1 in the presence of pancha Keshav Tatya Telange (P.W. 5) and another. The accused No. 1 gave information that he had kept the iron bar at his residence and he would show the place and produce it. The accused No. 1 led the police and the panchas to his hut at Kranti Nagar and produced from underneath the table the muddemal iron bar (Art. 2) which was attached under the panchnama Ex. 15. At the time of the seizure of the iron bar some blood stains were noticed thereon and a note to that effect was made in the panchnama. On the same day at about 3 p.m. the accused No. 3 was interrogated by P.S.I. Jadhav in the presence of the panchas, Murlidhar Pilaji Desai (P.W. 8) and another, and he gave out that he had kept the bamboo stick at his residence and he would produce it. He led the police and the panchas to his residence at Kranti Nagar and produced the bamboo stick (Art. 1) stained with blood. The panchnama Ex. 23 was drawn up and the bamboo stick was seized. P. I. Bharambe (P.W. 11), on returning from the hospital, recorded statements of witnesses and in the morning he proceeded to the scene of offence and drew up the panchnama Ex. 17. The place of offence was shown by the complainant Saiba (P.W. 2). At that place blood was found. The blood-stained earth was collected and it was seized under the panchnama Ex. 17. The accused No. 2 was arrested on 22nd December, 1981 at Mhaswad in Satara District. On 19th January, 1982 P. I. Bharambe sent all the eight articles seized during the investigation to the Chemical Analyser, Bombay. The forwarding letter sent under the signature of the Assistant Commissioner of Police is at Ex. 26. In that letter the description of all the articles sent to the Chemical Analyser is given. The Chemical Analyser, on examining the articles, found that the clothes of the deceased (Arts. 3, 4, 5 and 6) were stained with human blood of 'A' Group. He also found that the full shirt (Art. 7) seized from the accused No. 1 was stained with blood of 'A' Group. The iron bar (Art. 2) was found stained with human blood

and the bamboo stick (Art. 1) was found stained with human blood of 'A' Group. The Chemical Analyser's report is at Ex. 27. After completing the investigation on 17th March, 1983 P. I. Bharambe sent charge-sheet against the three accused to the Court of the Additional Chief Metropolitan Magistrate, Kurla, Bombay, who committed the case to the Court of Session, Greater Bombay.

6. The learned Additional Sessions Judge who tried the accused framed charge against them for the offence of murder punishable under S. 302 read with S. 34 I.P.C. The accused pleaded not guilty and claimed to be tried. The defence as disclosed in the examination of the accused under S. 313 Cr.P.C. is of complete denial. The accused No. 1 states in his examination under S. 313 Cr.P.C. that he gave a complaint against Chandya at the Kurla Police-Station and Chandya was brought to the Kurla Police-Station. He states that deceased Wilson was also known as Philson and that the complainant Saiba (P.W. 2) and Chandya were his friends. He also states that deceased Wilson was residing with aunt Jakina (P.W. 3) and Sunder (P.W. 4) is also known as uncle in that zopadpatti and Madhukanta is a Corporator. He denied that he took part in assaulting deceased Wilson. He denied that he gave information and produced the iron bar (Art. 2). He states that during Ganesh festival the complainant Saiba accused him for picking up mischief with the girls in the Garba dance. He refuted the charge and challenged the allegations of Saiba, and on that account Saiba implicated him in this crime. Thus the accused No. 1 abjured the guilt. The defence of the accused No. 2 is of total denial. The accused No. 3 denied that he took part in the incident and assaulted deceased Wilson with a bamboo stick. He denied that he gave information to the police and led the police and the panchas to his house and produced the bamboo stick (Art. 1). His defence is also of total denial. None of the accused led any defence evidence.

7. The learned Additional Sessions Judge, on considering the evidence adduced by the prosecution, found that the prosecution satisfactorily proved that the accused Nos. 1 and 2 with iron bars and the accused No. 3 with a bamboo stick assaulted deceased Wilson and caused the injuries found on his person. He found that the assault on deceased Wilson was in furtherance of the common intention of all the accused. He held that Wilson died as a result of assault by the accused. He

found that the accused Nos. 1 and 2 committed the offence punishable under S. 302 read with S. 34 I.P.C. and the accused No. 3 committed the offence under S. 325 read with S. 34 I.P.C. He convicted all the accused for those offences and imposed the sentences mentioned above. Feeling aggrieved, the accused Nos. 1 and 2 preferred Criminal Appeal No. 376 of 1983 and the accused No. 3 preferred Criminal Appeal No. 98 of 1983. Both these appeals are heard together, and this common judgment disposes both of them.

8. The learned Counsel for the appellants in Criminal Appeal No. 376 of 1983 (accused Nos. 1 and 2), Mr. A. H. Desai, contends that the conviction of the appellants rests solely on the testimony of Saiba (P.W. 2). According to the accused, Saiba is a friend of deceased Wilson and he along with the deceased on the night of the incident made joint efforts for getting Chandya released from the custody of the Kurla Police Station. The learned Counsel submits that Saiba being an interested witness the conviction of the appellants could not be based on his sole testimony. The learned Counsel for the appellant in Criminal Appeal No. 98 of 1983 (accused No. 3), Mr. P. K. Nair, contends that the learned trial Judge was wrong in treating the report Ex. 11 as F.I.R. According to him, there have been overwritings in the timings in the form of F.I.R. and the report of Saiba appears to have been written sometime subsequently after the commencement of the investigation. He submits that the report of Saiba which was treated as F.I.R. should have been written on the F.I.R. form and as it has not been written in the F.I.R. form it should be taken with a pinch of salt. He also submitted that P.S.I. Jadhav (P.W. 10) was the Station House Officer when Saiba had been to the police station and, therefore, the F.I.R. should have been recorded by P.S.I. Jadhav and not by P. I. Bharambe (P.W. 11) and as it has been recorded by P. I. Bharambe it should be totally excluded from consideration.

9. First we propose to deal with the objections raised by Mr. Nair to the admissibility of the report Ex. 11 of Saiba (P.W. 2) as F.I.R. His contention that the F.I.R. should have been written only by the Station House Officer and not by any other police-officer cannot be accepted as valid. P. I. Bharambe (P.W. 11), who is a senior officer than P.S.I. Jadhav (P.W. 10), was also on duty at the Kurla Police Station and it is P. I. Bharambe who after recording the F.I.R. of Saiba investigated

into the crime and P.S.I. Jadhav assisted him. The material provisions of S. 154 Cr.P.C., which provide for recording of information in cognizable cases, read as follows :-

'154. (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.'

When the complainant Saiba had been to the Kurla Police Station on the night between 15th and 16th December, 1981 P.S.I. Jadhav was the Station House Officer. P. I. Bharambe at that time was at the police-station and he was working as a Supervising Police Inspector. He, being a senior officer, at the instance of Station House Officer P.S.I. Jadhav, recorded the F.I.R. and registered the offence and himself took over the investigation. Under the provisions of S. 154 Cr.P.C. it is not incumbent that the Station House Officer himself should record the F.I.R. It can be written by him or by any other officer under his direction. Consequently, we are unable to accept the contention of the learned Counsel that as the report was not reduced to writing by the Station House Officer it could not be admitted in evidence as F.I.R.

10. The second objection of the learned Counsel that it should have been written on the F.I.R. form also stands answered by the provisions of S. 154(1) Cr.P.C. reproduced above. As per the provisions of S. 154(1) Cr.P.C. it is not necessary that the whole report should be in the F.I.R. form. Only the substance thereof has to be entered in the F.I.R. form, and in this case it has been done. Therefore, we do not find any substance in the contention of the learned Counsel that the report of Saiba (P.W. 2) having not been recorded in the F.I.R. form it cannot be treated as F.I.R.

11. The third and the last objection of the learned Counsel to the admission of the report of Saiba (P.W. 2) as F.I.R. is that there is some overwriting in the timings

noted in the F.I.R. form. According to the learned Counsel, the timings therein have been inserted later on. P. I. Bharambe (P.W. 11) rejected the suggestion made to him to that effect during his cross-examination. He denied that the time of reporting of the offence was written in different ink. He also denied that the figure '2.50' was overwritten. He also denied that the time of occurrence was subsequently written in different ink. We have seen the original F.I.R. Ex. 11 and we see no reason to doubt the testimony of P. I. Bharambe on this point. We do not find anything to doubt the genuineness of the F.I.R. Ex. 11.

12. The learned Counsel for the appellant-accused No. 3, Mr. Nair next contends that the complainant Saiba (P.W. 2) has been contradicted on material points by his earlier report which is recorded at Ex. 11 and there is nothing on record to indicate that there was any source of light when the incident is alleged to have taken place and, therefore, the testimony of the complainant Saiba that he witnessed the incident in the moonlight could not be relied upon. It is true that there are certain inconsistencies in the evidence given by Saiba and the F.I.R. lodged by him immediately after the incident. It is necessary to consider all those inconsistencies and the contradictions in order to decide whether his testimony could be safely relied upon.

13. Before taking up the consideration of those inconsistencies, it may be mentioned that each and every contradiction or inconsistency does not affect the credibility of an eye-witness. No one can expect a witness giving evidence two years after the incident to describe the incident without any inconsistency with his earlier statement recorded immediately after the incident. Only tutored witnesses will be able to give evidence two years after the incident without any inconsistency or contradiction. In this connection, a reference may be usefully made to the following passage from the Supreme Court decision in Narotam Singh v. State of Punjab, : 1978 CriLJ1612

'Discrepancies do not necessarily demolish testimony; delay does not necessarily spell unveracity and tortured technicalities do not necessarily upset conviction when the Court has had a perspicacious, sensitive and correctly oriented view of the evidence and probabilities to reach the conclusion it did. Proof of guilt is

sustained despite little infirmities, tossing peccadilloes and peripheral probative shortfalls. The 'sacred cows' of shadowy doubts and marginal mistakes, processual or other, cannot deter the Court from punishing crime where it has been sensibly and substantially brought home.'

14. The learned Counsel pointed out that in the F.I.R. Ex. 11, which was lodged by the complainant Saiba (P.W. 2) on 16th December, 1981, Saiba did not mention that there was moonlight, but in the witness-box he gave out that there was moonlight and in the moonlight he saw the incident. It is true that in the F.I.R. lodged by Saiba soon after the incident he did not mention that there was moonlight and in the moonlight he witnessed the incident, but in the witness-box he gave out that there was moonlight and in the moonlight he saw the incident. In order to see whether there is a contradiction by omission it is necessary to find out whether the two statements cannot stand together. It is also necessary to see whether the statement which the witness has made in the witness-box should have been made by him while reporting the matter soon after the incident. If the two statements made by the witness cannot stand together and the statement in the Court is such that the witness would necessarily have made at the time of his earlier statement, then alone omission thereof can be considered to be a contradiction. While contradicting a witness with his earlier statement it is necessary to follow the provisions of S. 145 of the Evidence Act, 1872. The said section reads as follows :-

'145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used or the purposes of contradicting him.'

It is well settled that before using any prior statement of a witness to contradict him, attention of the witness should be drawn to the relevant portion and he should be given an opportunity of explaining any apparent discrepancy. This is more so in the case of contradiction by omission. In the present case while contradicting the witnesses by their earlier statements they were not asked to explain the alleged

inconsistencies or contradictions. The learned Counsel Mr. Nair states that the learned trial Judge did not allow him to put questions to the witnesses seeking their explanation for the contradiction, either positive or by omission. We are unable to accept the aforesaid submission of the learned Counsel. From the record we do not find that any question in that respect was put by the learned Counsel and was disallowed by the learned trial Judge. It is noticed that whenever the learned Counsel wanted to take any objection to the admissibility of the evidence, he has taken those objections and they have been duly recorded by the learned trial Judge. Therefore, we are unable to accept the submission of the learned Counsel that he was prevented by the learned trial Judge to put such questions to the witnesses in the witness-box.

15. It is not disputed before us that on the night between 15th and 16th December 1981 deceased Wilson met with homicidal death. The dispute is only with regard to the complicity of the appellants in the crime. The prosecution for proving the complicity of the appellants relies on the testimony of solitary eyewitness Saiba (P.W. 2). Saiba gave evidence that on 15th December 1981 he returned from work at about 10 p.m. and that he, deceased Wilson and Chandya had been to the Naka of Wadia Estate. He states that the accused Nos. 1 and 2 brought one police-officer and he at their instance took away Chandya to the Kurla Police-Station. The fact that Chandya was taken to the police-station on that night is also deposed to by P.S.I. Jadhav (P.W. 10) during his cross-examination. He states that Chandya was detained on the night between 15th and 16th December, 1981 at the Kurla Police-Station for inquiry. According to him, he was detained up to about 2 a.m. Thus the testimony of Saiba that Chandya was taken by some police-officer to the Kurla Police-Station on that night finds support from the above statement of P.S.I. Jadhav during his cross-examination by the learned Counsel for the accused Nos. 1 and 2. The testimony of the complainant Saiba that he and deceased Wilson made efforts on that night to get Chandya released from the police custody but they did not succeed finds support from the testimony of Sunder (P.W. 4). Sunder gave evidence that at about 10 p.m. on 15th December, 1981 Saiba and deceased Wilson had been to him and Wilson told him that his friend Chandya was taken in custody by the Kurla Police-Station and that he should try for his release. Thereupon he, accompanied by the complainant Saiba and Wilson,

went to the Kurla Police-Station. Wilson tried for the release of Chandya, but he was not successful. He further states that thereafter they went to Corporator Madhukanta to seek his help for releasing Chandya, but there also they were not successful and thereafter he went to his residence. Thus the testimony of Saiba that on that night Chandya was arrested by the police and he, deceased Wilson and Sunder made efforts to get him released finds full support from the testimony of Sunder.

16. It is in the evidence of Saiba (P.W. 2) and Sunder (P.W. 4) that deceased Wilson vas interested in Chandya, being his friend, and, therefore, on the night between 15th and 16th December, 1981 deceased Wilson made efforts for the release of Chandya from the police custody. The accused No. 1 had lodged a report against Chandya and on that report and at his instance Chandya was arrested. Therefore, it is but natural that the accused did not like the efforts of deceased Wilson to get Chandya released. This was the motive for the accused to assault deceased Wilson on that night.

17. The testimony of the complainant Saiba (P.W. 2) that while he and deceased Wilson were returning home all the three accused assaulted Wilson and caused the injuries found on his person finds support from the F.I.R. Ex. 11 lodged by the complainant Saiba immediately after the incident. There was hardly any time to concoct a false report at that odd hour of the night while the complainant Saiba, aunt Jakina (P.W. 3) and her nephew George took deceased Wilson in a taxi from the scene of offence to the police-station. At the police-station P.S.I. Jadhav (P.W. 10) asked the complainant to get down the taxi and asked the other persons accompanying him to take the injured Wilson to the hospital. Saiba who was left at the police-station gave there report Ex. 11 and it was recorded by P. I. Bharambe (P.W. 11). Thus the report Ex. 11 was lodged by the complainant immediately after the incident and it fully supports the testimony of the complainant that deceased Wilson was assaulted by all the three accused, the accused Nos. 1 and 2 being armed with iron bars and the accused No. 3 being armed with a bamboo stick, and caused the injuries found on his person.

18. In order to see whether there could be moonlight at the time of the incident in question the learned trial Judge had looked into the almanac and found that the night between 15th and 16th December, 1981 was Marghashirsh Panchami of the fortnight and the moonrise was at about 9.23 p.m., and the incident having taken place at about 2.15 a.m. there was a moonlit night and it was possible for the complainant Saiba (P.W. 2) to see and identify the assailants and the weapons they had. In this connection, reference may be had to paragraph 25 of the judgment of the trial Court. We also sent for Nirnaysagar Deendarshika, that is, calendar for 1981, and as per this calendar we are also satisfied that at the time of the incident it was a moonlit night and the moonlight was sufficient to identify the assailants and their weapons. The complainant was at a distance of two or three paces only (about four or five feet) from the place where the assailants mounted attack on deceased Wilson and, therefore, he could very well see the assailants and the weapons in their hands. The complainant is very positive in his evidence that the accused Nos. 1 and 2 had iron bars with them and the accused No. 3 had a bamboo stick and all of them assaulted Wilson with those weapons. His testimony is fully supported by the F.I.R. Ex. 11. The conduct of the complainant immediately after the incident also fully supports his testimony. On seeing a massive attack mounted on Wilson by the three accused, he rushed to the house of aunt Jakina (P.W. 3) with whom Wilson resided and informed her that the three accused were assaulting the deceased. Jakina has fully supported the testimony of the complainant Saiba. She states that at about 2 a.m. she heard knocks at the door and heard the voice of Saiba calling her 'aunty, aunty'. She further states that the complainant cried that Wilson was assaulted. Thereupon she opened the door and asked the complainant where Wilson was assaulted. The complainant told her that the three accused had assaulted Wilson. Thereafter the complainant, Jakina and her nephew George together rushed to the scene of offence which was at a distance of about 25 feet from the residence of Jakina. On reaching the place they found Wilson lying in a pool of blood and the assailants had already left the place. The complainant helped Jakina in carrying deceased Wilson in a taxi to the police-station and at the police-station he waited for giving the F.I.R. and the taxi was sent to the hospital and at the hospital Wilson was declared dead. All those well established circumstances fully support the eye-witness account of Saiba.

19. The learned Counsel for the accused No. 3, Mr. Nair, pointed out that in the F.I.R. Ex. 11 the complainant did not state that the accused No. 2 hit deceased Wilson on the head with an iron bar and, therefore, his testimony in the witness-box to the above effect was an improvement. He submitted that no iron bar or any other weapon was recovered from the accused No. 2. According to the learned Counsel, as the complainant Saiba (P.W. 2) made improvement in the witness-box on the point the part played by the accused No. 2 in the incident, it was not safe to rely on his testimony that he saw the accused No. 2 taking part in the assault on deceased Wilson. We have carefully considered the above contention of the learned Counsel, and on going through the evidence of Saiba and the F.I.R. Ex. 11 lodged by him immediately after the incident wherein he has referred to the presence of the accused No. 2 with an iron bar and having raised that iron bar at the time of the incident, we have no hesitation in accepting the testimony of the complainant that the accused No. 2 was also present, armed with an iron bar, at the time of the incident and he took part in the assault. The fact that no weapon was recovered from the accused No. 2 cannot in any way discredit the testimony of the complainant that he had seen the accused No. 2 assaulting Wilson with an iron bar. The learned Counsel also pointed out that in the F.I.R. Ex. 11 the complainant did not state that the accused No. 2 tried to chase him and, therefore, his testimony in the witness-box to that effect could not be relied upon. It is in the evidence of the complainant that on seeing the assault he ran away to the house of aunt Jakina (P.W. 3). When he left the scene of offence the accused were assaulting Wilson, and, therefore, it was not possible for the complainant to see the whole assault so as to enable himself to narrate how many blows each accused gave and on what part of the body of Wilson. When the complainant along with aunt Jakina and her nephew George returned to the scene of offence, Wilson was found lying dead in a pool of blood. Sunder (P.W. 4) deposed that George immediately after the incident informed him of the incident and he had also accompanied George and saw Wilson lying in a pool of blood on the road. At that time aunt Jakina was also present there. Sunder further states that the complainant Saiba brought a taxi and in that taxi the injured Wilson, who was unconscious, was taken to the police-station and at the police-station P.S.I. Jadhav (P.W. 10) asked him to take the taxi with Wilson therein to the Sion

Hospital. Sunder had been in that taxi to the Sion Hospital, and he deposed that at the Sion Hospital doctors examined Wilson and declared him dead. It is true that the complainant did not state in the F.I.R. Ex. 11 that he had seen the accused No. 2 giving a blow with an iron bar on the head of the deceased, but at the same time he did not state therein that the accused No. 2 had raised an iron bar to assault Wilson. Thus the earlier statement of Saiba appearing in the F.I.R. Ex. 11 fully corroborates his testimony in the witness-box that the accused No. 2 took part in the assault and at that time he was armed with an iron bar. On what part of the body of Wilson the accused No. 2 gave blows with the iron bar is of little importance, as the three accused entertained a common intention to assault Wilson.

20. Thus, considering the evidence of the complainant Saiba (P.W. 2) in the light of the criticism levelled against it by the learned Counsel for the appellants, we do not find anything to doubt his testimony, and consequently, we conclude that the learned trial Judge was right in believing the testimony of the complainant Saiba.

21. The prosecution, besides the evidence of the eye-witness, relied on the recovery of the iron bar (Art. 2) on the information given by the accused No. 1 on 16th December, 1981 at about 1 p.m. P.S.I. Jadhav (P.W. 10) gave evidence that he interrogated the accused No. 1 on 16th December, 1981 at 1 p.m. in the presence of the panch Keshav (P.W. 5) and another, and at that time he gave information that he had kept the iron bar at his residence and he would produce it. Keshav, a panch to the panchnama Ex. 15, has fully supported the testimony of P.S.I. Jadhav. The evidence of P.S.I. Jadhav and that of the panch Keshav shows that the accused No. 1 took the police and the panchas to his hut at Kranti Nagar and produced from underneath the table the iron bar (Art. 2). It had blood stains and it was seized by the police after drawing up the panchnama Ex. 15.

22. On the same day, that is, 16th December, 1981, at 3 p.m. P.S.I. Jadhav (P.W. 10) states that he interrogated the accused No. 3 and he gave out that he had kept the bamboo stick at his residence and that he would show the place and would produce the same. Accordingly, he took the police and the panchas to his residence and from the loft at his residence he produced the bamboo stick (Art. 1).

The panch Murlidhar Desai (P.W. 8) has fully supported the testimony of P.S.I. Jadhav. Nothing has been brought out in the cross-examination of the two panch witnesses to discredit their testimony. The learned Counsel for the appellants Nos. 1 and 2 pointed out that Saiba (P.W. 2) during his cross-examination by the learned Counsel for the accused No. 3 admitted that he had shown the weapons, the iron bar and the bamboo stick, at the room of the accused No. 1 soon after his statement was recorded at the police-station. The learned Counsel submits that in view of the aforesaid statement of Saiba the evidence of P.S.I. Jadhav and that of the panchas Keshav (P.W. 5) and Murlidhar Desai (P.W. 8) was liable to be discarded. He also pointed out that P.S.I. Jadhav admitted during his cross-examination that his statement was recorded by P. I. Bharambe (P.W. 11) and in his statement he did not state that at the instance of the accused Nos. 1 and 3 the iron bar (Art. 2) and the bamboo stick (Art. 1) were seized from their respective houses.

23. The alleged admission regarding the property in the cross-examination of Saiba (P.W. 2) reads as follows :-

'Muddemal iron bar and a bamboo stick were not shown to me at the police station. When the bamboo stick and iron bar were recovered. I was asked to identify them. The bamboo stick and iron bar were recovered on the very night. They were recovered after my statement was recorded. At about hour after my statement was recorded, these weapons were recovered by the police. P. I. Bharambe had shown me these weapons viz. muddemal iron bar and bamboo stick. P. I. Bharambe asked me as to where he would get the weapons of assault. I took the police where the muddemal weapons were lying. Muddemal iron bar and the bamboo stick were in the room of accused No. 1 Dasu.'

The evidence of Saiba is not recorded in the question and answer form, and, therefore, it is not possible to know what leading questions were put to him for obtaining the above statement. Saiba was not a witness on the recovery of weapons from the accused Nos. 1 and 3. During his examination-in-chief he does not state a word about the recovery of weapons from the accused Nos. 1 and 3. It is only in his cross-examination that the above reproduced material was obtained

from him. The learned trial Judge rejected this part of the evidence of Saiba. The only question to be considered is whether the learned trial Judge was right in rejecting that part of the evidence and in not using the said material to discredit the testimony of the panchas Keshav (P.W. 5) and Murlidhar Desai (P.W. 8) and P.S.I. Jadhav (P.W. 10). It is pertinent to note that it was never suggested during the cross-examination of Keshav, Murlidhar Desai and P.S.I. Jadhav that the weapons (Arts. 1 and 2) were shown by Saiba to the police at the house of the accused No. 1 on the night of the incident. Saiba, as has been deposed to by P.S.I. Jadhav, was at the police-station up to about 3.30 a.m. P.S.I. Jadhav went in search of the accused No. 1 and he arrested him at Bail Bazar, Kurla, at about 5.30 a.m. and brought him to the police-station. Similarly, the accused No. 3 was arrested and brought to the police-station. Before the accused Nos. 1 and 2 were brought to the police-station, there is nothing on record to show that P.S.I. Jadhav had taken the complainant Saiba to the house of the accused No. 1. Consequently, we find that the learned trial Judge was perfectly right in rejecting the above statement of Saiba. The testimony of P.S.I. Jadhav and that of the panchas Keshav and Murlidhar Desai, therefore, could not be discredited on the aforesaid statement of Saiba. Similarly, the testimony of P.S.I. Jadhav cannot be discredited on the ground that in his statement before P. I. Bharambe (P.W. 11) recorded on 17th December, 1981 he did not state certain facts. The facts which he is said to have omitted to state in the earlier statement before P. I. Bharambe are not such that they cannot stand with his evidence in the Court. No explanation for the alleged omissions in his previous statement was sought from him. The omissions brought about during his cross-examination and which find place in paras 9 and 10 of his deposition cannot be used as contradictions to discredit his testimony.

24. The learned Counsel for the accused No. 3, Mr. Nair, next pointed out that the Investigating Officer on seizure of the weapons (Arts. 1 and 2) did not cover them with some wrapper and did not seal them. He pointed out that the shirt of the accused No. 1, alleged to have been seized by P.S.I. Jadhav (P.W. 10) at the time of his arrest, was not put in a packet and the packet was not sealed in the presence of the panchas. It is true that in this case there is no mention either in the panchnama or in the evidence of the Investigating Officer that the clothes and the weapons were properly wrapped and sealed in the presence of the panchas. In

order that there should not be any tampering with the articles which are said to be stained with blood the investigating officers are expected to put them in a proper cover and to seal them in the presence of the panchas and to forward them to the chemical analyser with proper seals. The forwarding letter issued by the investigating Officer to the Chemical Analyser in this case is at Ex. 26. In that letter it is mentioned that all those articles were wrapped in brown papers and were duly sealed, but there is no evidence as to when they were wrapped and sealed. The non-sealing of the articles immediately after the seizure in the presence of the panchas is bound to affect the probative value of the findings of the Chemical analyser.

25. The learned Counsel for the accused No. 3, Mr. Nair, submits that the learned trial Judge was not right in admitting the report of the Chemical Analyser in evidence, as he had taken objection to its validity and admissibility. According to him, the learned trial Judge before admitting on record the report of the Chemical Analyser and using it in this case should have summoned the concerned Chemical Analyser and should have examined him touching the report Ex. 27 made by him. We are unable to agree with the learned Counsel. S. 293 Cr.P.C. reads as follows :-

'293.(1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.

(3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.

(4) This section applies to the following Government scientific experts, namely :-

(a) any Chemical Examiner or Assistant Chemical Examiner to Government;

(b) the Chief Inspector of Explosives;

(c) the Director of the Finger Print Bureau;

(d) the Director, Haffkeine Institute, Bombay;

(e) the Director, Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;

(f) the Serologist to the Government.'

It is true that when the report of the Chemical Analyser was sought to be admitted on record the learned Counsel for the accused No. 3, Mr. Nair, raised objection to its admission on record. Beyond putting an objection for its admission on record the learned Counsel has done nothing in the matter. He never moved the trial Court to summon the concerned Chemical Analyser. He also did not at any time demonstrate in what respect the report was deficient and necessitated the calling of the Chemical Analyser before admitting it in evidence. In the absence of any request from the learned Counsel for summoning the Chemical Analyser and also in the absence of his showing in what respect the report was deficient and needed further elucidation before admitting it in evidence, in our opinion the learned trial Judge was right in admitting the report of the Chemical Analyser in evidence and in using it as evidence in this case.

26. Having considered the prosecution evidence in the light of the criticism levelled by the learned Counsel Mr. Nair, as stated earlier, we find that the complainant Saiba (P.W. 2) has given true versions of the incident and the learned trial Judge was perfectly right in placing reliance on his testimony. Under the law it is not necessary that there should be more than one witness to prove any fact. If the Court finds that a single witness examined by the prosecution is a truthful witness, the conviction can be based on the sole testimony of that witness. Relying on the testimony of Saiba, we find that all the three accused in furtherance of their

common intention assaulted deceased Wilson and at the time of the assault the accused Nos. 1 and 2 were armed with iron bars and the accused No. 3 was armed with a bamboo stick. We have already reproduced the injuries found by Dr. Khanolkar (P.W. 7) on the dead body of Wilson and his opinion that the injuries mentioned above were sufficient in the ordinary course of nature to cause death. Taking into consideration the nature of the weapons, the part of the body on which blows were given, the severity with which they were given and the large number of blows, the offence committed by the accused would certainly fall within secondly of S. 300 I.P.C. However, the learned trial Judge, taking into consideration that the accused No. 3 was armed with only a bamboo stick, which according to the learned trial Judge was not as dangerous as the iron bar, and as the complainant Saiba did not state how many blows the accused No. 3 gave with the bamboo stick, he found him guilty of the offence under S. 325 read with S. 34 I.P.C. and the accused Nos. 1 and 2 were found guilty under S. 302 read with S. 34 I.P.C. The State has not come up in appeal against the acquittal of the accused No. 3 for the offence under section 302 read with S. 34 I.P.C., and, therefore, we are not called upon to decide whether the learned trial Judge was right in convicting the accused No. 3 only of the offence under S. 325 read with S. 34 I.P.C. and not under S. 302 read with S. 34 I.P.C.

27. In the result, we find that there is no substance in the appeals against conviction in both the cases. The learned Counsel for the accused No. 3, Mr. Nair, submits that the accused No. 3 at the time of the incident was 23 years of age and he is now gainfully employed, and, therefore, instead of sending him to the prison again he may be released on probation of good conduct on obtaining bond for good behaviour from him. The learned Counsel states that the accused No. 3 has left Bombay permanently and has gone to his native place and has taken to agriculture, and this according to him is a good ground for not sending him to the prison again. We do not find this to be a good ground for releasing the accused No. 3 on probation of good conduct on his executing a bond. In fact, the accused No. 3 has been already dealt with very leniently by the learned trial Judge by convicting him under S. 325 read with S. 34 I.P.C. and by imposing lesser sentence on him. In our opinion, no further leniency in the circumstances of the case is called for.

28. The learned Counsel for the accused Nos. 1 and 2, Mr. Desai, submitted that it was not proved who gave the blows with the iron bar on the head of deceased Wilson, which proved fatal, and, therefore, their conviction under S. 302 read with S. 34 I.P.C. was not proper. According to him, they should have been convicted under S. 304, Part II I.P.C. We are unable to agree with the learned Counsel. The assault on deceased Wilson was a premeditated assault with heavy iron bars like the iron bar (Art. 2). The nature of the injuries noticed by Dr. Khanolkar (P.W. 7) on the dead body of Wilson shows that the blows with heavy force were given on vital organs and he was mercilessly beaten to death. On considering the nature of the injuries, the medical evidence and the circumstances attending the crime, we find that the case squarely falls within secondly of S. 300 I.P.C. and, therefore, the learned trial Judge was right in convicting the accused Nos. 1 and 2 under section 302 read with S. 34 I.P.C.

29. In the result, there is no substance in both the appeals and they are dismissed. The accused No. 3 shall surrender to bail.

30. Appeals dismissed.

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