

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD
CRIMINAL APPEAL NO. 268 OF 2014

1. Shyamsundar Vithal Pawle
age 63 years, occ. Agri.
2. Sharad Shyamsundar Pawle
age 26 years, occ. Agri.

R/o Gonar, Tq. Kandhar
Dist. Nanded.

Appellants

Versus

The State of Maharashtra

Respondents

Mr. Rajenderaa Deshmukh, Senior Counsel instructed by Mr. Govind A.
Kulkarni, Advocate for the appellants.
Mr. M.M. Nerlikar, APP for the State.

WITH
CRIMINAL APPEAL NO. 465 OF 2014

Madhav s/o Venkat Pawle
Age 38 years, occ. Agriculture
R/o Gonar, Tq. Mukhed
Dist. Nanded

Appellant

Versus

The State of Maharashtra

Respondents

Mr. N.S. Ghanekar, Advocate for the appellant.
Mr. M.M. Nerlikar, APP for the State.

**CORAM : S. V. Gangapurwala &
M.G. Sewlikar, JJ.**

RESERVED ON : 07th August, 2020.
PRONOUNCED ON : 11th September, 2020.

JUDGMENT : (PER M. G. SEWLIKAR, J.)

1. Criminal Appeal No. 268/2014 preferred by original accused Nos. 1 and 3 and, Criminal Appeal No. 465/2014 preferred by original accused No. 2, are being disposed of by common order as they arise out of the judgment and order dated 05.04.2014, passed by the learned Additional Sessions Judge, Kandhar, Dist. Nanded, whereby accused Nos. 1 to 3 have been convicted of the offence punishable under Section 364 read with Section 34 of the Indian Penal Code and are sentenced to rigorous imprisonment for ten years and to pay fine of Rs. 1,000/- each in default, to suffer rigorous imprisonment for six months each and, they were also sentenced imprisonment for life and to pay fine of Rs. 1,000/- each in default, to suffer rigorous imprisonment for six months for offence punishable under Section 302 read with Section 34 of the Indian Penal Code. Both the sentences are directed to run concurrently. By the said judgment, accused Nos. 1 to 3 are acquitted of the offence punishable under Section 506 read with Section 34 of the Indian Penal Code. By the same judgment and order, accused No. 4 has been acquitted of all the offences.

2. Facts giving rise to these appeals are that appellants 1 and 2 in Criminal Appeal No. 268/2014 original accused Nos. 1 and 2 (hereinafter referred to as accused Nos. 1 and 3) and appellant in Criminal Appeal No. 465/2014 original accused No. 2 (hereinafter referred to as accused No. 2) and the deceased Ananda Ganpati Pawle are the residents of village Gonar. It was the grievance of the deceased Ananda Pawle that accused Nos. 1 to 3 used to let lose cattle of accused No. 1 as a result of which, the cattle used to graze in the land of the deceased. On 31.12.2010, there was an altercation between the wife of the deceased and accused No. 1 Shyamsundar on the ground that cattle of accused No. 1 Shyamsundar grazed in the land of the deceased. On 31.12.2010, devotional songs were being sung in the temple at Gonar. Accused No. 1 Shyamsundar was present there. Deceased Ananda went there and abused the accused No. 1 and kicked him on the ground of grazing his cattle in the land of the deceased. Accused No. 1 Shyamsundar lodged First Information Report in Mukhed Police Station on 01.01.2011 at around 1.00 pm.

3. It is further the case of the prosecution that on 01.01.2011 at about 12.30 pm, deceased Ananda was standing in Lokhande square,

Mukhed. Soon thereafter, accused No.1 Shyamsundar and accused no. 2 Madhav came there on motorcycle and started slapping him on the ground of quarrel in the previous night on account of grazing of cattle and made him sit on the motorcycle and took him by Kautha Road. They took him to village Beli and at the pati (the board on which name of the village is written) beat him. Accused No. 1 beat him by means of *katti* on his both right and left elbows, right and left knees and on right foot. Accused No. 2 delivered a blow of stick on both the knees of the deceased Ananda and caused fracture to his legs. Accused No. 2 also delivered a blow of stick on his left hand and caused fracture. He also delivered a blow of stick on his head. Accused No. 3 Sharad dealt a blow of stone on the head of the deceased Ananda and accused No. 4 beat him with kicks and fist blows.

4. It is further the case of the prosecution that one Bhimrao Patil called up police station Mukhed at 3.30 pm and informed that the deceased Ananda was lying near Beli pati in injured condition. Police Inspector Kode received this call and directed PW 11 Police Naik Pundlik Bondlewad to go to the spot of the incident and check the authenticity of the information. When PW 11 Bondlewad went to the

spot, he did not find anyone and, therefore, he again called back Police Inspector Kode who gave him contact number of Bhimrao Patil of village Beli. When PW 11 Bondlewad called up Bhimrao Patil, he (Bhimrao Patil) told him that the deceased was lying on the road to Beli. When he went there, he found a person lying near the road in the pool of blood. Deceased Ananda on enquiry, told him that accused Nos. 1 to 3 assaulted him by sickle, stone and stick. His both legs were fractured. Thereafter, he took the deceased Ananda in an auto rickshaw to Government Hospital, Mukhed, where his dying declaration was recorded. This dying declaration was treated as First Information Report (Exhibit 44) on the basis of which, offence under Sections 364, 307, 506 read with Section 34 of the Indian Penal Code was registered against accused nos. 1 to 3.

5. Having regard to the critical condition of the deceased, the Medical Officer at Mukhed advised the deceased to be taken to Nanded for treatment. On reaching Nanded, the doctor declared him dead. The offence was, therefore, converted into Section 302 of the Indian Penal Code.

6. Investigation was taken up. Statements of witnesses were recorded. After having recorded statement of witnesses, it was revealed that the deceased had given oral dying declaration to the witnesses. PW 17 Investigation Officer Syed Saber Syed Ahmed visited the spot of the incident and drew spot panchanama Exhibit 26. The dead body was sent for Post Mortem. PW 9 Medical Officer Dr. Durge conducted post mortem and prepared post mortem report Exhibit 54. Accused Nos. 1 to 3 were arrested on 05.01.2011. On 06.01.2011, accused no.1 Shyamsundar volunteered to produce *katti* and, accused No. 2 Madhav volunteered to produce stick. On recovery of weapons, memorandum and recovery panchanama Exhibits 73, 74 and 75 respectively were prepared. Clothes of the accused were seized under seizure panchanama Exhibit 77. It was sent to the Chemical Analyser with PW 6 Manohar Pawar for analysis. The Chemical Analyser reported that no poison was detected and on the basis of his report the Medical Officer (PW 9), who had reserved his opinion on the cause of death, gave the opinion that the cause of death was head injury. After collection of sufficient evidence, charge-sheet was laid before the learned Judicial Magistrate First Class, Mukhed, who committed the same to the Court of Sessions, Nanded and it was made over to the Additional Sessions

Judge, Kandhar link Court Mukhed, for trial.

7. The learned Additional Sessions Judge, Kandhar, Link Court Mukhed, framed charge against the accused vide Exhibit 13. It was read over and explained to the accused. They pleaded not guilty to it and claimed to be tried. Their defence is of total denial and false implication. Accused No. 1 also took the plea of *alibi*. According to accused No. 1 Shyamsundar, at the time of the incident, he was not present at the scene of offence but was at Mukhed police station for lodging the report against the deceased Ananda.

8. After recording evidence of 18 witnesses, the learned trial Court recorded conviction against accused Nos. 1 to 3 - the appellants herein and acquitted accused No. 4. This is how the appellants – accused Nos. 1 to 3 are before this Court.

9. The State has not preferred appeal against the acquittal of accused no. 4 Gajanan Pawle.

10. Heard Shri Govind Kulkarni, the learned counsel for the

appellants in Criminal Appeal No. 268/2014, Shri Nilesh Ghanekar, the learned counsel for appellant in Criminal Appeal No. 465/2014 and, Shri Nerlikar, learned APP for the State in both the appeals.

11. Learned counsel Shri Ghanekar argued that the evidence of the prosecution is based on the dying declaration given by the deceased and recorded by PW 11 Police Naik Bondlewad. He argued that the dying declaration is not worth relying as the Medical Officer, who certified the deceased to be in sound mental condition to give dying declaration, was not examined. The prosecution has not disclosed his name also. Therefore, the prosecution is conspicuously silent about the mental condition of the deceased at the time of recording of dying declaration. He argued that the dying declaration cannot be relied upon as PW 11 Police Naik Bondlewad who recorded the dying declaration has admitted in the cross examination that the size of the words “शरद पवले याने डोक्यावर दगड मारला” is small as compared to the size of other letters in the dying declaration. He argued that this clearly shows that those words were subsequently added by PW 11 Police Naik Bondlewad. He argued that for these reasons also, no reliance can be placed on the dying declaration. He further argued that the

prosecution has not adduced evidence about examination of the deceased by the Medical Officer, Mukhed, nor the Medical Officer, Mukhed was examined by the prosecution for the reasons best known to it. He argued that in the absence of this evidence, it is difficult to gauge as to what was the mental and physical condition of the deceased at the time of admission. In the absence of this evidence, it is difficult to conclude that the deceased was in a sound mental state at the time of giving dying declaration. He further argued that the Medical Officer Shri Durge has stated that brain hemorrhage covered broca's center. Broca's center is known as speech center. If broca's center is hampered sufficiently it causes aphasia and a person cannot speak. He further stated that reference of Subarachnoid hemorrhage in clause 19(iii) of the Post Mortem report covers both lobes of cerebral hemispheres covering broca's center. He submitted that in this backdrop it is difficult to believe that the deceased was in a position to speak so as to give dying declaration to PW 11 Police Naik Bondlewad and oral dying declaration to the witnesses. He argued that, according to the prosecution, the incident took place at three places. The first place of the incident is Zanzan dhaba, the second place of the incident is Lokhande chowk and the third place is Beli pati. The prosecution has

not prepared the spot panchanama of Lokhande Chowk. He further argued that PW 14 Sambhaji Waghmare is an eye-witness. He argued that he is a chance witness as he happened to be there by chance and the evidence of chance witness has to be accepted with caution and needs to be scrutinized minutely. He submitted that the other eye witnesses are the relatives of the deceased. Their statements are also not consistent. PW 3 Manohar Dharasure did not mention the presence of accused No. 1 whereas the other witnesses have mentioned his presence. He argued that the absence of accused No. 1 from the spot of the incident has been satisfactorily proved by the accused. He argued that at the time of the incident, accused No. 1 was in Kandhar police station for lodging the complaint. The incident, as per the dying declaration, took place at 12.30 pm and the accused No. 1 was in Kandhar police station at 1.00 pm. He argued that this clearly shows that at the time of the incident, accused No. 1 Shyamsundar was in Kandhar police station and, therefore, his absence at the spot of the incident has been proved sufficiently. He further submitted that recovery of weapons at the instance of accused No. 1 and accused No. 2 is doubtful because the accused were hand cuffed right from the time of leaving the police station till they reported back. He argued that this

shows that at the time of recovery of the weapons, accused Nos. 1 and 2 were hand cuffed which clearly indicates that the statement was not voluntary but was given under pressure and duress. Therefore, recovery is not reliable. He further argued that the memorandum of recovery of weapons from accused is not worth relying as joint statement has been recorded by the Investigation Officer. He argued that the law requires that two separate statements ought to have been recorded. He argued that the recovery becomes doubtful for these reasons also. He further argued that the dying declaration also lacks corroboration in material particulars. According to learned counsel Shri Ghanekar, the post mortem report shows incised wounds on parietal region whereas the dying declaration shows that blows of *katti* were given on both knees and both hands. No injury was there on head by means of *katti*. Dying declaration shows that the deceased was beaten by means to stone on head but post mortem report does not indicate any such injury. He argued that, therefore, the dying declaration lacks corroboration and for this reason also, no reliance can be placed on the dying declaration. He argued that due to subarachnoid hemorrhage the condition of the deceased was deteriorating and, therefore, the deceased was not in a position to

speak which means, at the time of giving oral dying declaration the deceased was not in a position to speak and, therefore, oral dying declarations also need to be discarded. He argued that for all these deficiencies, the prosecution has failed to prove guilt of accused beyond reasonable doubt.

12. Learned counsel Shri Ghanekar placed reliance on the following judgments :-

1. Arvind Vs. State of Uttar Pradesh
Reported in 2019 SCC Online All 4091
2. Nallapati Sivaih Vs. S.D.O. Guntur, A.P.
Reported in 2008 AIR(SC) 19
3. Milind Ramchandra Gharat Vs. State of Maharashtra
& another
Reported in 2015 ALL M.R. (Cri) 2377
4. Laxman Keraba Patil Vs. State of Maharashtra
Reported in 2000 ALL M.R. (Cri) 1530
5. Suresh s/o Mahadeo Deshmukh Vs. State of Maharashtra
Reported in 2018 ALL MR(Cri) 3837
6. Suresh s/o Arju Dodorkar (Sonar) Vs. State of Maharashtra
Reported in 2005 ALL M.R. (Cri) 1599

13. Shri Govind Kulkarni, learned counsel for appellants in Criminal Appeal No. 268/2014 adopted the arguments of learned

counsel Shri Ghanekar. He further submitted that in Police Manual, certain guidelines are issued for the police officers for recording dying declarations. He argued that Clause (3) of Section 171 of the Manual states that if the dying declaration is recorded by the police, it should be, as far as possible, in question and answer form and in the very words of the declarant. He argued that PW 11 Bondlewad did not record the dying declaration in question and answer form and, therefore, it is not worth accepting. Learned counsel Shri Kulkarni further argued that the oral dying declaration is a weak type of evidence and should not generally be accepted and conviction should not be recorded on the basis of the oral dying declaration. He further argued that the dying declaration also suffers from several infirmities. The time of commencement of dying declaration and the time at which it was completed is not recorded on the dying declaration. The Medical Officer who endorsed on the dying declaration about the medical fitness of the deceased has not been examined for the reasons best known to the prosecution. Hence, the dying declaration is not confidence inspiring and no reliance can be placed on it. He argued that the evidence of PW 14 Sambhaji Waghmare shows that five persons were riding on a motorcycle and it is impossible to believe that

five persons can ride a motorcycle. Hence, the prosecution story is not free from doubt. He, therefore, prayed for acquittal of the appellants.

14. Shri Nerlikar, learned APP argued that the eye-witnesses have no grudge against the accused. He argued that the accused had motive to kill the deceased on account of the quarrel that took place in the previous night. He submitted that the deceased had given oral dying declaration to PW 11 Police Naik Bondlewad. The dying declaration was recorded in the Government Hospital at Mukhed. He argued that there is no requirement of law that before recording dying declaration a certificate from Medical Officer is required to be obtained about the mental condition of the deceased. He submitted that it is sufficient if the person recording dying declaration satisfies himself about the mental fitness of the declarant before recording the dying declaration. In the case at hand, there is evidence to show that the deceased was in a sound state of mind to give the dying declaration. He was in a position to speak and the eye-witnesses have testified to that effect. He argued that the eye-witnesses have deposed about the deceased being in the company of all the three accused, the acquitted accused and the deceased who was in injured condition. Their

evidence has remained unshattered. The deceased was seen last in the company of the accused and in a span of one hour, the deceased was found in injured condition near Beli Pati, which clearly shows that the accused were the authors of the crime. He argued that the incident took place at about 2.00 pm and accused No. 1 Shyamsundar was in Mukhed police station at 1.00 pm. He argued that some of the witnesses have stated the time of the incident to be between 2.30 pm to 3.00 pm. Therefore, it was possible for accused No. 1 to come to Kautha, which is around 35 km from Mukhed. He argued that the accused No. 1 had sufficient time at his disposal to come down to Zanzan dhaba from Mukhed in a span of one hour. He argued that the time stated by the witness cannot be calculated with mathematical precision. He further argued that the witnesses are the rustic villagers and they have no sense of time. Therefore, some leeway has to be given so far as calculation of time is concerned. Learned APP argued that the distance between Kandhar police station and Mukhed is 35 km. Said distance can be covered by motorcycle in a span of an hour. Therefore, the plea of *alibi* of accused No. 1 cannot be believed. He, therefore, prayed for the dismissal of both the appeals.

15. Learned APP has placed reliance on following judgments :
1. State of Uttar Pradesh vs. M.K. Anthony reported in AIR 1985 Supreme Court 48
 2. Mani @ Udattu Man and others vs. State reported in 2009 AIR (SCW) 2190.
 3. Jakki @ Selvaraj and another vs. State reported in 2007(2) Crimes 151
 4. Kishore Bhadke vs. State of Maharashtra reported in 2017(1) AIR Bom.R (Cri.) 501
 5. Mahavir Singh vs. State of Haryana reported in 2014(4) Mh.LJ(Cri) 382.
16. Prosecution evidence is divided in three categories viz.,
- 1) Dying declaration recorded by PW 11 Police Naik Bondlewad.
 - 2) Oral dying declaration given by the deceased to PW 2 Venkat Pawle, PW 7 Nilawati Pawle - wife of the deceased and PW 13 Shantabai.
 - 3) Witnesses who saw the deceased in injured condition with the accused and they are also the witnesses who had last seen the deceased in the company of the accused.
17. Shri Ghanekar placed reliance on the case of Suresh s/o

Mahadeo Deshmukh vs. State of Maharashtra reported in **2018 ALL MR (Cri) 3837**. In this case, the deceased along with his wife Maya was residing in Murtizapur. The deceased had gone to the house of the accused Suresh Deshmukh. Wife of the deceased learnt from her daughter that the deceased was lying in a pool of blood. When she went there, the accused gave her dying declaration that he was beaten by accused. The dying declaration was held suspicious as when the deceased was taken to the hospital he was found dead by the doctor. In the case at hand, there is evidence of eye-witnesses and also evidence of last seen theory. Therefore, this case is not applicable to the facts of the instant case.

18. Dying declaration of the deceased was recorded by PW 11 Police Naik Bondlewad. So far as dying declaration is concerned, the law is well settled that conviction can be recorded solely on dying declaration provided it is truthful, voluntary and inspires confidence in the mind of the Court. The dying declaration recorded under Section 32 of the Indian Evidence Act, 1872, is an exception to the general rule against the hearsay evidence. In the case of Sham Shankar Kankaria vs. State of Maharashtra reported in **(2006)13 SCC 165**, the Honourable

Supreme Court has held as under :-

“ At this juncture, it is relevant to take note of Section 32 of the Indian Evidence Act, 1872 (in short ‘Evidence Act’) which deals with cases in which statement of relevant fact by person who is dead or cannot be found etc. is relevant. The general rule is that all oral evidence must be direct viz. if it refers to a fact which could be seen it must be the evidence of the witness who says he saw it, if it refers to a fact which could be heard, it must be the evidence of the witness who say he heard it, if it refers to a fact which could be perceived by any other sense, it must be the evidence of the witness who says he perceived it by that sense. similar is the case with opinion. These aspects are elaborated in Section 60. The eight clauses of Section 32 are exceptions to the general rule against hearsay just stated. Clause (1) of Section 32 makes relevant what is generally described as dying declaration, though such an expression has not been used in any Statute. It essentially means statements made by person as to the cause of his death or as to the circumstances of the transaction resulting in his death. The grounds of admission are: firstly, necessity for the victim being generally the only principal eye witness to the crime, the exclusion of the statement might deflect the ends of justice; and secondly, the sense of impending death, which creates a sanction equal to the obligation of an oath. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of his world is gone, when every motive to falsehood is silenced, and the mind is induced to the most powerful considerations to speak the truth; a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court

of justice.”

It is further held as under :

“11. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

On these principles, it will have to be examined whether the dying declaration recorded by PW 11 Police Naik Bondlewad meets all the requirements.

19. Before advertng to the issue whether the dying declaration inspires confidence or not, it is worthwhile to ascertain whether the death of the deceased was homicidal or not. The prosecution has

examined PW 9 Dr. Durge who conducted the post mortem. He found following injuries while conducting the post mortem and they are as under :-

1. subarchonoid hemorrhage all over brain surface, red in colour.
2. Intra-parenchyman brain hemorrhage over left parietal region.
3. right lung congested having contusion of 2 cm x 2 cm over interior part of right lung, red in colour. Left lung congested.
4. Little blood in both sides of heart.

20. Medical Officer Dr. Durge has given the cause of death as brain hemorrhage due to head injury. Looking to the nature of the injuries, it is evident that the death of the deceased was homicidal. It is also not the defence of the accused that death of the deceased was not homicidal or that it was accidental.

21. Coming back to the recording of dying declaration, PW 11 Police Naik Bondlewad is the witness who first found the deceased lying near Beli Pati. According to him, Police Inspector Kode of Mukhed police station informed him at about 3.30 pm that the deceased was lying at Beli Pati. When PW 11 Police Naik Bondlewad went there, initially, he did not find the injured. Therefore, he called back Police

Inspector Kode, who gave him the number of Bhimrao Patil who had intimated the police that the deceased was lying at the spot of the incident. Since the deceased was not found at the place where PW 11 was directed to go, he called Bhimrao Patil and, on his instructions, he found the deceased lying at Beli Pati in a pool of blood. He asked the deceased as to how the deceased sustained injuries. Deceased Ananda told him that accused Nos. 1 to 3 assaulted him by a big sickle, stone and stick. He then shifted the deceased to Government Medical Hospital, Mukhed in auto rickshaw. He recorded statement of the deceased in Mukhed hospital. He obtained endorsement of doctor regarding condition of patient to give the statement. He thereafter recorded statement of the deceased. He read over the dying declaration to the deceased. The deceased stated it to be correct. The deceased put his thumb impression on it. The dying declaration Exhibit 58 is in Marathi and it is reproduced for facility of reference as under :-

दि. 1.1.2011 रोजी मी सकाळी 10 वा मी कामानिमित्त आलो. मी अंदाजे दुपारी साडे बारा वाजताचे सुमारास लोखंडे चौक मुखेड येथे थांबलो असता तेवढ्यात आमच्या भावकीचे शामसुंदर विठठल पवले व माधवराव व्यंकटी पवले हे मोटार सायकलवर आले व त्यांनी मला तू काल आमच्या सोबत वाद का केलास म्हणून झापडा बुक्याने मारहाण करून मला मोटार सायकलवर बसवून घेऊन कौठा रोड घेऊन गेले व तेथे नेवून मला बेली

गावचे पाटी जवळून बेली गावात जाणाऱ्या रस्त्याने पाटी पासून थोड्या अंतरावर घेउन गेले. व तेथे मला शामसुंदर याने तु माझ्यास सोबत का वाद केला म्हणून त्याने जवळील कत्ती काढून उजव्या हाताच्या कोपराजवळ, उजव्या पायाच्या गुडघ्याजवळ, उजव्या पायाच्या पंजावर, डावे पायाचे गुडघ्याजवळ, डाव्या हाताचे कोपरावर मारून गंभीर जखमी केले व माधव व्यंकटी पवले यांनी काठीने माझ्या दोनही पायावर गुडघ्याखाली मारून हाड मोडले व डाव्या हाताच्या मोडीत मारून हात मोडला आहे व डोक्यास मारले त्यामुळे रक्त निघाले. व शरद शामसुंदर पवले याने दगडाने डोक्यात मारले तरी आमच्या भावकीचे शामसुंदर विठठल पवले माधव व्यंकटी पवले यांनी मला काल रोजी आमच्या सोबत वाद का केलास असे म्हणून काठीने व लोखंडी कत्तीने माझ्या हातावर, पायावर, हातावर, डोक्यात मारून गंभीर जखमी करून हाताचे व पायाचे हाड मोडले आहे. मला मोटर सायकलवर बसवून लोखंडे चौकातून घेउन जात असताना बऱ्याच लोकांनी पाहीले आहे.

22. This statement shows that on 01.01.2011, the deceased was standing in Lokhande Chowk, Mukhed. At that time, accused Nos. 1 and 2 came there on motorcycle and they asked him as to why he had picked up quarrel that night. They slapped him. Then they took him on motorcycle and dropped him at Beli Pati. At that place, accused No. 1 beat him on both elbows and both knees and, accused No. 2 beat him by means of stick, owing to which, he sustained bleeding injury on head. Accused No. 3 beat him by means of a stone on his head.

23. Now, the question is whether this dying declaration inspires confidence in the mind of the Court.

24. It was vehemently argued by learned counsel Shri Ghanekar and Shri Kulkarni that the dying declaration does not inspire confidence as the Medical Officer, who made endorsement, has not been examined. The prosecution has not disclosed his name also. Therefore, the dying declaration cannot be relied upon.

25. Learned counsel Shri Ghanekar and Shri Kulkarni are right in making the submission that the prosecution has not examined the Medical Officer to prove the endorsement made by him to the effect that the deceased was conscious at the time of giving statement. In the cross-examination, the question put by accused to PW 11 Police Naik Bondlewad indicates that the deceased was in a sound state of mind and was in a position to speak. In the cross-examination, PW 11 Bondlewad has stated that he put some preliminary questions to Ananda and he gave statement in the narrative form. This cross-examination itself is indicative of the fact that the deceased was in a fit state of mind to make a declaration and was also in a position to speak. Therefore, the submission of both the learned counsel that the deceased was not in a sound state of mind and was not in a position to speak has no force.

26. Though the deceased was in sound state of mind while giving dying declaration, certain aspects of the matter make the dying declaration suspicious. In the third paragraph of the dying declaration the words “शरद पावले याने दगडाने डोक्यात मारले” appear to have been added. PW 11 Police Naik Bondlewad has also admitted in the cross-examination that the size of these letters is small in comparison to the size of the other letters in the dying declaration. Moreover, in the first part of the dying declaration, there is no reference of accused No. 3 Sharad Pawle. In the initial part of the dying declaration, it is stated that accused No. 1 and 2 came at Lokhande square where the deceased was standing. However, at the end of the dying declaration, the words “शरद पावले याने दगडाने डोक्यात मारले” appear. It can be seen with naked eyes that these words were added subsequently. Therefore, no implicit reliance can be placed on the dying declaration. Therefore, the course which needs to be adopted is to find out whether there exists corroboration to the dying declaration.

27. As indicated above, the deceased was in a position to speak as is evident from the cross-examination of PW 11 Police Naik Bondlewad.

28. The oral dying declaration has been given to three witnesses. One of them is PW 11 Police Naik Bondlewad himself. He is the first person who saw the deceased Ananda lying near Beli Pati. So far as oral dying declaration is concerned, the law is well settled that conviction can be recorded solely on oral dying declaration, if it is voluntary and inspires confidence. In the case of Milind Ramchandra Gharat vs. State of Maharashtra and another reported in **2015 ALL M R (Cri) 2377** it has been held that the oral dying declaration is primarily a weak piece of evidence and, unless the Court finds that implicit reliance can be placed on the evidence relating to oral dying declaration, no conviction can be based on the oral dying declaration.

29. Evidence will have to be now scanned to ascertain whether implicit reliance can be placed on the oral dying declarations. PW 11 Police Naik Bondlewad has stated that when he reached Beli Pati, he found a person lying near the road in pool of blood. PW 11 Police Naik Bondlewad shook that person and that person opened his eyes. He asked that person about his place of residence and he stated it to be Gonar and he stated his name as Ananda i.e. the deceased. The deceased also stated to him that accused Nos. 1 to 3 assaulted him by a

sickle, stone and stick. His both legs were fractured. In the cross-examination, the accused could not bring anything on record to discredit the testimony of this witness. Therefore, implicit reliance can be placed on the oral dying declaration.

30. Second witness is PW 2 Venkat Pawle. He has stated that on learning about the quarrel between the accused and the deceased, he went to Government Hosiptal, Mukhed along with Shivraj and Jagan Pawle. The deceased was hospitalised and was being given treatment. His both hands and legs were fractured and had injury on the head. He has further stated that deceased Ananda told him that accused No. 1 Shyamsundar, accused No. 2 Madhav and accused No. 3 Sharad assaulted him by big sickle, stick and a stone. This witness has also been cross-examined at length but nothing could be extracted from him so as to render his testimony untrustworthy.

31. Another witness is PW 7 Nilawati Pawle who is the wife of the deceased. She has stated about the quarrel the deceased had with the accused No. 1 in the temple on the ground of leaving the cattle in her field for grazing. There was altercation between the accused No. 1

Shyamsundar and the deceased Ananda. She went to Government hospital, Mukhed and found her husband lying in injured condition. She asked her husband about the injuries on the way to Nanded. He told her that accused No. 1 assaulted him by big sickle on his hands and legs and, accused No. 2 assaulted him by stick. He further told her that accused No. 3 Sharad assaulted him on his head by a stone. Despite cross examining this witness at length nothing could be extracted from her. Testimony of this witness remained unscathed.

32. PW 13 Shantabai Bhosle is another witness to whom the deceased had made oral dying declaration. She has stated that on the day of the incident, accused No. 1 Shyamsundar had been to her and she had offered tea to him but he refused saying that he would drink tea at her home only after committing murder of the deceased Ananda. Thereafter she learnt that the deceased was beaten by accused Nos. 1 to 3 and acquitted accused Gajanan by means of stone, stick and big sickle. Thereafter, she, her husband and some villagers reached Government Hospital, Mukhed and saw the deceased having suffered multiple injuries. On enquiry, the deceased told her that accused Nos. 1 to 3 and acquitted accused Gajanan beat him by stick, stone and sickle

on account of quarrel of grazing the cattle in the field of the deceased.

33. It is true that these witnesses are the related witnesses. PW 13 Shantabai is the cousin sister of deceased Ananda. PW 7 Nilawati is the wife of the deceased. However, simply because they are related witnesses or interested witnesses, their testimony cannot be discarded. Their testimony needs to be scrutinised with caution and, if, their testimony is found trustworthy and their creditworthiness is not impeached, the same can be relied upon. In the case at hand, PW 7 Nilawati is at loggerheads with the accused as the incident occurred because of letting lose the cattle in the field of the deceased for grazing, which resulted in damaging the crop of the deceased and PW 7 Nilawati. Naturally, she is interested in securing the conviction of the accused. However, as stated above, simply because she is an interested witness, her testimony cannot be thrown overboard. On careful scrutiny, it is seen that the credentials of this witness have not been impeached in the cross-examination. In the cross-examination she has stated that she talked with her husband while he was being taken to Government Hospital, Nanded in an ambulance. Nothing has been extracted in the cross-examination to discredit the testimony of this

witness. Therefore, her testimony is confidence inspiring.

34. Even if, the testimony of PW 7 Nilawati and PW 13 Shantabai is kept out of consideration for the sake of argument, there is evidence of PW 2 Venkat who is related to both, the deceased and the accused as well. Since he is related to both, he is neither interested in the accused nor in the deceased. He has stated that accused Nos. 1 to 3 are his relatives and accused No. 4 is nephew of accused No. 1. The deceased was his cousin brother. This fact has not been challenged in the cross-examination, which means the accused admit that PW 2 Venkat is their relative. Thus, this clearly shows that this witness has no axe to grind against the accused. Therefore, his testimony is confidence inspiring and can be relied upon.

35. Thus, oral dying declaration made by the deceased to these witnesses lends corroboration to the statement made in the dying declaration Exhibit 58 that accused No. 3 Sharad was present at the time of the incident and he also had assaulted the deceased. Therefore, there is ample corroboration in the form of oral dying declaration to the statement made in the dying declaration about involvement of all the

accused including accused No. 3 Sharad.

36. Learned counsel Shri Ghanekar has placed reliance on the case of Arvind Bajpai vs. State of Uttar Pradesh reported in **2019 SCC OnLine All 4091** wherein it has been held as under :-

31. As far as implication of 162(2) Cr.P.C. is concerned, as a proposition of law, unlike the excepted circumstances under which 161 statement could be relied upon, as rightly contended by learned senior counsel for the respondent, once the said statement though recorded under Section 161 Cr.P.C. assumes the character of dying declaration falling within the four corners of Section 32(1) of Act, 1872, then whatever credence would apply to a declaration governed by Section 32(1), should automatically deemed to apply with all force to such a statement though recorded under Section 161 Cr.P.C. The above statement of law would result in a position that a purported recorded statement under Section 161 Cr.P.C. of a victim having regard to the subsequent event of death of the person making statement who was a victim would enable prosecuting authority to rely upon the said statement having regard to the nature and content of the said statement as one of dying declaration as deeming it and falling under Section 32(1) of Act, 1872 and thereby commend all the credence that would be applicable to a dying declaration recorded and claimed as such.

34. PW-6, Chandra Prakas Bhatt, deposed that on 26.05.2012, he undertook investigation, recorded statement of Smt. Aneeta Bajpai (injured). He further deposed in cross-examination that dying declaration was not got recorded because she had come to her house after getting cured from hospital. He did not

take container and Match box in his possession from spot; she died after five days from the date of incident. Thus, it is very clear, when Investigator recorded statement of victim under Section 161 Cr.P.C., she was not under the expectation of death and she remained alive about two weeks. Evidently, dying declaration was not recorded by Investigating Officer before two reliable witnesses, therefore, statement under Section 161 Cr.P.C. does not fall under the category of 'dying declaration' under Section 32 of Act, 1872.

This case also does not come to the aid of the appellants as in the aboveresferred case, the deceased was alive for two weeks. However, this is the fact situation in the case at hand. The deceased died on the way to Nanded after completion of recording of dying declaration at Mukhed.

37. Shri Ghanekar argued that the prosecution has not adduced any evidence to show as to when the deceased was taken to the hospital at Mukhed. That evidence could have proved the condition of the deceased when he was taken to the hospital at Mukhed. Since this evidence has not been adduced by the prosecution, it cannot be said that the deceased was in a position to speak. This submission has no force. As stated above, cross-examination of PW 11 Police Naik Bondlewad shows that the deceased was in a position to speak.

38. Learned counsel Shri Ghanekar argued that the medical evidence does not support the statements made in the dying declaration. He submitted that the deceased had stated in the dying declaration that he had sustained injuries on both the elbows and knees by means of *katti* because of blow given by accused Shyamsundar whereas the injuries as noted by PW 9 Dr. Durge in post mortem report indicate that the deceased had incised wound on parietal bone. He argued that none of the injuries as stated in the dying declaration match with the injuries noted by the Medical Officer in the post mortem report Exhibit 54. This submission cannot be accepted. Evidence of PW 2 Venkat, PW 7 Nilawati and PW 13 Shantabai clearly indicate the presence and involvement of all the three accused. Therefore, variance between the injuries stated by the declarant in the dying declaration and the injuries noted by the Medical Officer in post mortem report does not rule out the involvement of the accused. Moreover, the prosecution has adduced the evidence of eye witnesses also which prove involvement of the accused beyond reasonable doubt.

39. Eye witnesses are PW 3 Manohar , PW 10 Raosaheb Kabir and PW 14 Sambhaji Waghmare. PW 3 Manohar is a commission agent

and has shop in Lokhande square at Mukhed. This witness knew the deceased as he used to sell his crop through him(Manohar). According to this witness, at about 2.00 pm he saw the crowd in front of his shop. Auto rickshaw of Maroti Pawle was parked in front of his shop. Deceased Ananda and two to three persons were sitting in the said auto. Accused No. 2 Madhav and accused No. 3 Sharad were in the auto rickshaw. They had caught Ananda. Clothes of Ananda were torn. Ananda was alive but there were no movements. Ananda had injury on his head, shoulder and his clothes were stained with blood. Accused No. 2 Madhav and accused No. 3 Sharad wanted to hire auto of Maroti Pawle but he refused. Both accused Nos. 2 and 3 made deceased Ananda to sit on the motorcycle and then they went away.

40. This witness stood to all tests in cross-examination. He stated in the cross-examination that neither he nor any other person present there made any effort to take Ananda to dispensary. He did not inform the incident to the family members of Ananda or to the police. It is true that this witness did not inform the family members of the deceased Ananda nor did he inform the police. Such conduct of this witness is not unusual. Now a days, nobody wants to get involved in

the rig marole of the legal procedure. People also do not want to get themselves entangled into the affairs of others. Therefore, simply because this witness did not inform the incident to the family members of the deceased or to the police, cannot lead to an inference that he was not present at the spot of the incident.

41. In the cross-examination, this witness has stated that he stated before the police that Ananda was in a sitting position and accused Nos. 2 and 3 had caught him but it is not there in the statement. Learned counsel Shri Ghanekar argued that it shows that this evidence is in the nature of improvement and, therefore, cannot be considered. The analysis of the statement under Section 161 of Cr.PC. of this witness reveals that this witness has stated that in the auto rickshaw accused Nos. 2 and 3 and two more persons were sitting and the deceased Ananda was sleeping in the auto rickshaw in injured condition. This clearly shows that this witness has stated about the presence of accused Nos. 2 and 3 and two more persons and about presence of the deceased in the injured condition in the auto rickshaw. It is true that whatever PW 3 has stated in the evidence does not appear in verbatim in the statement before the police. Mere variation between

the statement under Section 161 of Cr.P.C. and deposition before the Court in narration of the incident would not amount to contradiction. It has been held in the case of Rammi alias Rameshwar vs. State of Madhya Pradesh reported in 1999 Cri.L.J. 4561 thus :-

24. When eye-witness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But Courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

42. In the evidence before the Court, PW 3 Manohar has stated that the deceased was in injured condition and was sitting in the auto rickshaw and accused Nos. 2 and 3 had held him. Whereas, in the statement before the police, PW 3 Manohar has stated that accused Nos. 2 and 3 were there in the auto rickshaw and the deceased was sleeping in the auto rickshaw in injured condition. These two statements are not at all irreconcilable. On the contrary, they are

completely in tune with each other and, therefore, it does not amount to contradiction at all. The submission of learned counsel, therefore, cannot be sustained.

43. Learned counsel Shri Ghanekar argued that this witness has proved the defence of *alibi* of accused No. 1 Shyamsundar. Shri Ghanekar argued that PW 3 Manohar nowhere states that accused No. 1 Shyamsundar was there at the spot or not. Therefore, this clearly shows that accused No. 1 was not present at the scene of the offence. We do not agree with the submission of learned counsel Shri Ghanekar. PW 3 Manohar has nowhere stated that accused No. 1 Shyamsundar was not present at the spot. What he has stated is that along with deceased Ananda, there were two to three persons in the auto rickshaw. In the cross-examination also, it was not brought on record that this witness knew accused No. 1 Shyamsundar and despite that he did not mention his name. Therefore, his testimony nowhere suggests the absence of accused No. 1 at the spot of the incident.

44. PW 10 Raosaheb Kabir is another witness who had seen the deceased in the company of the accused persons that too in the injured

condition. It has come in the evidence of PW 10 Raosaheb Kabir that he had been to Mukhed for purchasing vegetables and other household articles. He was accompanied by one Ganpati Kamble. They completed shopping at about 2.00 pm and boarded the auto rickshaw and on their way to Sawargaon, when the auto rickshaw came near Zanzan Dhaba, he saw that quarrel was going on on the road. Therefore, the driver stopped the auto rickshaw. He saw Shyamsundar (accused no. 1) and his three colleagues assaulting Ananda. He knew the deceased as his wife hails from Sawargaon i.e. native place of PW 10 Raosaheb Kabir. He asked Shyamsundar as to why he was beating Ananda but accused No. 1 did not reply. Nothing could be extracted from the testimony of this witness. This witness shows the presence of accused No. 1 Shyamsundar and his three associates.

45. PW 14 Sambhaji Waghmare is the next eye witness. He used to ply auto rickshaw between Gonar and Mukhed. It has come in his evidence that on 01.01.2011, he had been to Lokhande square for bringing passengers. His auto rickshaw had some mechanical defect owing to which, he had parked it at Ladke garage at about 1.00 pm to 2.30 pm. The auto rickshaw of Maruti was parked in Lokhande square.

Shamsundar, Madhav and Sharad came to Lokhande square at that time. They met Maruti and boarded his rickshaw and went away towards village Jamb. They came back after about 30 minutes in Lokhande square with Ananda Pawle who was in injured condition. Maruti told them that he will not take the auto rickshaw ahead. Shyamsundar, Madhav, Sharad and one unknown person made Ananda sit on the motorcycle of red colour. Ananda was then taken away on the motorcycle towards village Kawatha.

46. Learned counsel Shri Ghanekar branded this witness as a chance witness. He argued that this witness could not account for his presence at the spot of the incident. According to learned counsel Shri Ghanekar, the evidence of chance witness is a weak type of evidence and reliance cannot be placed on it. The Honourable Supreme Court, in the case of Sachchey Lal Tiwari vs. State of Uttar Pradesh reported in **(2004) 11 Supreme Court Cases 410** has held as under:-

7. Coming to the plea of the accused that PW 2 was a “chance witness” who has not explained how he happened to be at the alleged place of occurrence it has to be noted that the said witness was independent witness. There was not even a suggestion to the witness that he had any animosity towards any of the accused. In a

murder trial by describing an independent witness as “chance witness” it cannot be implied thereby that his evidence is suspicious and his presence at the scene doubtful. Murders are not committed with previous notice to witnesses – soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere “chance witnesses”. The expression “chance witness” is borrowed from countries where every man’s home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man’s castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter of explaining their presence. The courts below have scanned the evidence of PW 2 in great detail and found it to be reliable. We find no reason to differ.

Even if it is accepted for the sake of argument that this witness is a chance witness, still the evidence of chance witness cannot be discarded simply he being a chance witness. If his testimony is otherwise trustworthy, the Court can place reliance on it. This witness has assigned reason for his presence at the spot of the incident. He was plying auto rickshaw and owing to a mechanical defect, he had brought his auto rickshaw to Ladke garage and had parked it in front of the said garage. Therefore, this witness has explained his presence at the spot

of the incident. His testimony is trustworthy. Nothing adverse to the prosecution could be extracted from this witness.

47. Learned counsel Shri Ghanekar argued that the testimony of this witness cannot be believed because he has stated that all the four accused and the deceased went away from the spot of the incident on the motorcycle. Learned counsel Shri Ghanekar argued that five persons cannot ride a motorcycle. It is true that this witness has admitted in the cross-examination that five persons cannot ride a motorcycle. This submission cannot be accepted. This witness has nowhere stated that all the five persons went away on motorcycle. What he has stated is that accused Shyamsundar, Madhav, Sharad and one unknown person made Ananda sit on motorcycle. He has nowhere stated that all the three accused, one unknown person and deceased Ananda sat on the motorcycle and went away.

48. So far as the plea of *alibi* is concerned, learned counsel Shri Ghanekar has placed reliance on evidence of PW 5 Syed Khalik Syed Ismail who is the Police Constable in police station, Kandhar. According to this witness, the accused No. 1 had come to the police station

Kandhar at 12.30 pm to lodge the complaint. Learned counsel Shri Ghanekar has invited our attention to the First Information Report (Exhibit 44) to show that the time of registration of offence was 1.00 pm. Shri Ghanekar submitted that this shows that accused No. 1 was at Kandhar police station at 1.00 pm which negatives the theory of the prosecution that accused No. 1 was present at the scene of offence at 12.30 pm. He argued that, in terms of the dying declaration, the incident took place at 12.30 pm and, at that time, accused No. 1 was in the police station. This completely rules out the probability of accused No. 1 being present at the scene of the offence. We do not agree with this submission. The dying declaration shows the time of the incident as 12.30 pm. It is pertinent to note that the deceased was injured and might not have correctly stated the time of the incident. The witnesses i.e. PW 2 Venkat, PW 10 Raosaheb Kabir and PW 14 Sambhaji Waghmare, who had seen the deceased along with accused, have stated time of the incident to be 2.00 pm to 2.30 pm. Therefore, eye-witness account will have to be preferred as they had witnessed the incident. Therefore, it was not impossible for the accused No. 1 to come back to Mukhed from Kandhar as the distance between Kandhar and Mukhed being 35 km as stated by this witness in the cross-examination.

Therefore, the plea of *alibi* of accused No. 1 cannot be believed.

49. Post mortem report shows that the deceased had subarchonoid hemorrhage all over the brain. Learned counsel Shri Kulkarni placed reliance on the case of Nallapatti Sivaih vs. S.D.O. Guntur reported in AIR 2008 SC 19, wherein it is held as under :-

32. In the circumstances can it be said that the victim was conscious and coherent and in a fit condition to give the statement ? This aspect of the matter is required to be considered in the background of victim receiving as many as 63 injuries on his body including injuries 1 to 13 and 19 on the parietal and occipital region on account of which the victim could have gone into coma. The Professor of Forensic Medicine & Medical Officer who conducted the post-mortem, examined as PW 11, is an important witness whose evidence has been altogether ignored. He found diffused subarchonoid haemorrhage present all over the brain which normally results in patient going into coma. He also expressed his opinion that the deceased must have died within one or two hours after receiving the injuries. Can we ignore this vital piece of evidence ? Do we have to accept that the victim having received 63 multiple injuries went on speaking coherently from 6.00 p.m. onwards till 7.10 p.m., for about one hour and ten minutes ? There is no evidence and details of any treatment administered to the victim. Dr. B.G. Sugunavathi, Casualty Doctor, first noticed the victim dead at 9.30 p.m. on 05.01.1998 itself. There is no positive evidence as to when the victim died even though he was admitted into the hospital with multiple injuries. These cumulative factors and

surrounding circumstances make it impossible to rely upon the dying declarations that were recorded in Ex.P-10 and Ex.P-8. These are the circumstances which compel us not to ignore the evidence of P.W. 10 – Doctor and Professor of Forensic Medicine. It is not a question of choosing between the eye-witness account as regards the condition of the victim to make a statement on the one hand and the evidence of the Professor and Doctor of Forensic Medicine. The conflict and inconsistency between the two dying declarations and the evidence of the Forensic Expert which remained unimpeached raises a very great suspicion in the mind of the court.

This case has no application to the facts of the present case as in the reported case the deceased had 63 injuries, two of them were on parietal and occipital region on account of which, he could have gone into coma. The Medical Officer had opined that the deceased must have died within one or two hours after receiving the injuries. The dying declaration was recorded by 6.00 pm onward till 7.10 pm i.e. more than one hour. The Honourable Supreme Court, therefore, did not place reliance on the dying declaration as the deceased could not have been in a position to speak coherently for more than one hour in the backdrop of so many injuries, two of them being serious.

50. This is not the fact situation in the instant case. PW 11

Police Naik Bondlewad has stated in the cross-examination that he asked deceased preliminary questions and the deceased gave the answers in narrative form. This clearly shows that the deceased was in a position to speak at the time of giving dying declaration. Therefore, it cannot be said that the deceased might have gone into coma because of the injuries on the parietal region. It is common knowledge that human body sometimes does not react in the manner stated in the textbook or in the manner the Medical Officer opines on the basis of his experience. Therefore, despite having subarchonoid hemorrhage, it cannot be said that the deceased must have gone into coma or his speech faculty in the brain might have been damaged.

51. Now the question arises as to the theory of the prosecution of the deceased being last seen with the accused. PW 3 Manohar, PW 10 Raosaheb Kabir and PW 14 Sambhaji Waghmare have stated that the deceased was in the company of the accused. It is true that there is no evidence to show as to, to which place the accused took the deceased Ananda. PW 11 Police Naik Bondlewad found him at Beli Pati. PW 3 Manohar and PW 14 Sambhaji have stated that the accused took deceased Ananda on motorcycle. According to this witness, the

incident took place between 2.00 pm to 2.30 pm and, after the incident was over, the deceased was taken by these accused towards Kawatha on motorcycle. At 3.30 pm, the deceased was found at Beli Pati. Thus, time gap between the deceased last seen with the accused and the deceased being found at Beli pati is small. Therefore, there was no possibility of intervention of any third person for the commission of the crime. Learned APP has placed reliance on the case of Mahavir Singh vs. State of Haryana, reported in **2014(4) Mh.LJ (Cri.) 382**, in which it has been held that last seen theory comes into play only when the time gap between the point of time when the accused and the deceased were seen together and when the deceased was found dead is very small. Since the gap is very small, there may not be any possibility that any person other than the accused may be the author of the crime. In the case at hand also, there is no possibility of any other person committing the crime. It is also not suggested to the witness nor it is the defence of the accused that some other person had caused the injuries to the deceased. Therefore, the time gap between the deceased found alive with the accused and the place where the deceased was found in injured condition being very small, the only logical inference that can be drawn is that the accused are the authors of the crime.

52. Next question that falls for consideration is recovery of the weapons. PW 15 Shivaji Kabir is the witness on memorandum of recovery of weapon. Exhibit 70 is the memorandum of accused No. 2 Madhav. PW 15 Shivaji has testified that accused No. 2 Madhav gave the memorandum that he had concealed the stick in the crop of toor. Accordingly, his memorandum was recorded and as led by him, the stick was recovered from the crop of toor. Accused No. 3 Sharad gave memorandum Exhibit 71 in which, he stated that he was ready to produce the stone. He stated that he had thrown the stone in the grass near the spot. At his instance as led by him, the stone was recovered. Exhibit 72 is the memorandum of accused No. 1 Shyamsundar. He stated in the memorandum that he had concealed the katti and motorcycle at his residence and as led by him, katti and motorcycle were recovered. The time of memorandum of accused No. 1 is 12.30 pm, accused No. 2 is 12.40 pm and accused No. 3 is 12.50 pm. According to learned counsel Shri Ghanekar, joint memorandum was recorded which is impermissible. As stated above, joint memorandum was not recorded as contended by learned counsel Shri Ghanekar. Even if, it is accepted for the sake of argument that it was a joint disclosure, even then, it will not cause any dent to the case of the prosecution. In

the case of Kishor vs State of Maharashtra, reported in AIR 2017 SC 279, it has been held that a joint disclosure or simultaneous disclosure per se is not inadmissible under Section 27 of the Indian Evidence Act.

53. This witness has admitted in the cross-examination that all the three accused were hand cuffed right from the time they were taken out of the police station and brought back to the police station. Learned counsel Shri Ghanekar placed reliance on the case of Suresh s/o Mahadeo Deshmukh vs State of Maharashtra reported in **2018 ALL MR (Cri) 3837** for the proposition that if the accused are hand cuffed at the time of recovery of the weapon, the said recovery cannot be relied upon as it is under duress and pressure. This witness has given a vague admission that right from the time of leaving the police station till returning to the police station, the accused were hand cuffed. He has not stated that at the time of recovery, they were hand cuffed. Therefore, a vague admission that right from leaving the police station till coming back to the police station, the accused were hand cuffed, does not go to show that the accused were hand cuffed at the time of effecting recovery. Therefore, the case relied upon by the learned counsel for the appellants is not applicable to the instant case.

54. Now the last question that needs consideration is the motive behind commission of the crime. Motive is a state of mind and sometimes it is difficult for the prosecution to prove the motive. It is settled principle of law that simply because the prosecution has failed to prove the motive will not result in throwing the case of the prosecution overboard, if the case of the prosecution is otherwise trustworthy. In the case at hand, PW 5 Shivaji Kabir has proved the First Information Report lodged by the accused, PW 2 Venkat is the witness on the quarrel which took place in the temple. He has stated that on 31.12.2010 in the temple of Vitthal at Gonar, devotional songs were being sung. The deceased came to the temple at 00.30 pm. Accused No. 1 Shyamsundar was in the temple. The deceased Ananda abused accused Shyamsundar on the ground of letting the cattle lose in his field and altercation took place between them. First Information Report Exhibit 44 bears testimony to this. The First Information Report confirms that the incident happened in the temple in the night of 31.12.2020. It further shows that accused No. 1 had given a blow of katti to deceased Ananda. Thus, the accused had the motive behind commission of crime. Thus, prosecution has proved that accused No. 1 had the motive to eliminate the deceased.

55. Learned counsel Shri Ghanekar argued that the witnesses have stated that Maruti was the auto driver in whose auto rickshaw accused had taken the deceased. He was not examined by the prosecution and, therefore, adverse inference will have to be drawn against the prosecution. Maruti was the best witness to explain the circumstance in which the incident took place. Since he has not been examined, the prosecution story becomes unworthy of credit. It is true that prosecution has not examined the witness Maruti. The record shows that the prosecutor in the Sessions Court had filed a pursis Exhibit 37 stating that he did not want to examine Maruti Pawle as he was on the same point. The prosecutor ought not to have given up this witness. It was sheer ignorance on the part of the prosecutor to give up such an important witness. Ignorance of the prosecutor cannot enure to the benefit of the accused. Therefore, non-examination of this witness will have have no adverse effect on the case of the prosecution as the prosecution has proved the incident through other witnesses.

56. Chemical Analyser's report Exhibit 17 shows that the blood group of the deceased was 'B' and blood stains of blood group 'B' were found on the clothes of the accused. Learned counsel Shri Ghanker

argued that the clothes and the weapon were not sealed and, therefore, the evidence in this regard cannot be relied upon. It is true that panchanama does not show that the articles were sealed. However, that will not have much effect on the case of the prosecution for the reason that the prosecution has proved the guilt of the accused beyond reasonable doubt through other evidence discussed above.

57. Thus, the prosecution has proved the following circumstances :-

1. There was a quarrel in the night of 31.12.2010 in the temple of Vitthal Rakhumai between the accused No. 1 Shyamsundar and the deceased Ananda and, deceased Ananda had beaten accused No. 1.
2. On 01.01.2011 at 2.00 pm to 2.30 pm, PW 3 Manohar, PW 10 Raosaheb Kabir and PW 14 Sambhaji had seen the deceased in the company of accused in injured condition.
3. The accused had taken the deceased on motorcycle towards village Kawtha.
4. One Bhimrao Patil informed the police station Mukhed about the deceased lying in injured condition at Beli Pati.
5. The deceased was found by PW 11 Police Naik Bondlewad at

village Beli Pati.

6. The deceased was taken to hospital.

7. The deceased made oral dying declaration to PW 11 Police Naik Bondlewad.

8. The deceased made oral dying declaration to PW 2 Venkat, PW 7 Nilawati and PW 13 Shantabai implicating accused Nos. 1 to 3.

9. The deceased gave dying declaration Exhibit 58 to PW 11 Police Naik Bondlewad.

58. Thus, the prosecution has successfully proved these circumstances. Therefore, we hold that the learned trial Court did not commit any error in recording conviction against accused Nos. 1 to 3 under Section 302, 364 read with Section 34 of the Indian Penal Code. Both appeals are, therefore, devoid of any substance. Hence, they stand dismissed.

(M. G. SEWLIKAR)
Judge

(S. V. GANGAPURWALA)
Judge

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