(2010) 02 BOM CK 0020

Bombay High Court (Aurangabad Bench)

Case No: Criminal Appeal No. 409 of 1997

Rajendra Harakchand Bhandari, Pradip Harakchand Bhandari, Sunil Sheshrao Garje and Sopan Pandurang Kharade		APPELLANT
	Vs	
The State of Maharashtra		RESPONDENT

Date of Decision: Feb. 3, 2010

Acts Referred:

- Penal Code, 1860 (IPC) - Section 141, 146, 147, 148, 149

Hon'ble Judges: P.R. Borkar, J

Bench: Single Bench

Advocate: R.N. Dhorde, for the Appellant; B.V. Wagh, Assistant Public Prosecutor, for the Respondent

Judgement

P.R. Borkar, J.

This is an appeal preferred by original accused Nos. 1,2,5 and 6 being aggrieved by the judgment and order passed by 2nd Additional Sessions Judge, Shrirampur District Ahmednagar, in Sessions Case No. 271 of 1991 decided on 10.12.1997, whereby the appellants are convicted of the offences punishable under Sections 307, 332, 353 all read with Section 149 of Indian Penal Code, so also of offences punishable under Sections 147 and 148 read with Section 149 of I.P.C. For offence u/s 307 read with Section 149 of I.P.C, each accused is sentenced to suffer rigorous imprisonment for five years and fine of Rs. 5000/= each. For each of offences punishable under Sections 332 read with Section 149 and 353 read with Section 149, each accused is sentenced for one year and fine of Rs. l000/=. For offence punishable u/s 147 read with Section 149 of I.P.C. rigorous imprisonment of six months is awarded to each accused and for offence punishable u/s 148 read with Section 149 of I.P.C. each accused is sentenced rigorous imprisonment for six months.

2. It appears that the learned Additional Sessions Judge did not realise that offences punishable u/s 147 of I.P.C. is individual offence committed by whoever is guilty of rioting as defined u/s 146 of I.P.C. Similarly, offence u/s 148 of I.P.C. is individual in nature committed by the person who is guilty of rioting being armed with a deadly weapon or with anything which, if used as a weapon or offence, is likely to cause death. Therefore, there cannot be conviction for offences under Sections 147 read with 149 and 148 read with Section 149 of IPC, but only for offences under Sections 147 and 148 of IPC in individual capacity, if the same are proved.

3. Briefly stated, the prosecution case as per the complaint (Exh.68) lodged by PW-8 Keshav Darandale, on 17.5.1991 he was working as clerk in Block Office of Bhenda Cooperative Sugar Factory Limited, Bhenda (Bk.) (hereinafter referred to as "the sugar factory"). At about 11.00 a.m. accused No. 2 Pradeep Bhandari came to the office and requested PW-8 Keshav to take entry of sugarcane planted by him. PW -8 Keshav pointed out to accused No. 2 Pradip that there was an endorsement of injunction on the V.F.I x 12 extract of his land and, therefore, he should take permission of the head of the block i.e. Oversear (PW-7 Lahanu Garje). However, accused No. 2 Pradeep abused PW-8 Keshav, held his collar, tore his clothes and beat him. At that time PW-5 Balasaheb Wable, Narayan Dale, PW-7 Lahanu Garje and Sarpanch Kumar Deshmukh came and intervened and stopped the quarrel. Accused No. 2 Pradip Bhandari went away.

4. It is further stated by PW-8 Keshav in the complaint (Exh.68) that thereafter he went to the head office of the sugar factory at Bhenda along with PW-7 Lahanu Garje and gave report. At that time, Satish Bhandari and Vjay Bhandari who were brothers of accused No. 2 Pradip Bhandari came there and started abusing. However, Garad Guruji and Kakasaheb Shinde who were the Agricultural Officers persuaded Satish and his brother Vijay and so they went away. PW-8 Keshav gave report to his superiors who told PW-8 Keshav to lodge complaint with Kukana Police Out Post. Security Officer Shri Tanaji Datir (PW-10) was asked to accompany PW-8 Keshav. Accordingly, both went to Kukana Police Outpost.

5. It is further stated in the complaint (Exh. 68) that at the police outpost, Kukana, Head constable Yadav Satpute (PW-4) was present. PW-8 Keshav lodged report regarding incident. He signed the complaint. At that time, appellants and two more persons (original accused No. 3 Sunil Deshmukh and accused No. 4 Bandu Deshmukh) came there. It was about 1 to 1.30 p.m. Accused No. l Rajendra (appellant No. l) was armed with sword and others were having sticks. Accused No. l Rajendra asked PW-8 Keshav to come out, but he refused. Thereafter, accused No. l gave blow with sword on the head of PW-8 Keshav who sustained bleeding injury. Thereafter, other accused persons started beating PW-8 Keshav. At that time, Kumar Deshmukh, Gorakh Rindhe came running and intervened. It is also stated that during the said incident, appellant No. 3 Sunil Garje (accused No. 5) and appellant No. 2 Pradip Bhandari (accused No. 2) beat PW-4 Head Constable Satpute with sticks

and all the accused went away by abusing. Thereafter, the injured were taken to the government hospital in a jeep. It is also the prosecution case that the accused persons had also injured PW-10 Tanaji Datir, who was security officer accompanying PW-8 Keshav to the out-post.

6. After the incident, PW-4 Head Constable Satpute informed the incident to the Police Station, Newasa and Investigating Officer API Shri Pansare (PW-14) along with staff came to the incident. The complaint of PW-8 Keshav was registered. Statement of PW-4 Satpute was also recorded; panchanama of spot was drawn; statements of various witnesses were also recorded. Accused Nos. 1 to 3 were absconding. They obtained anticipatory bail. They surrendered on 2 9.5.1991 and produced the sword and sticks which were attached under separate panchanamas. After usual investigation, charge-sheet was sent to the court.

7. The prosecution in all examined 14 witnesses. The defence examined three eye witnesses to show that accused No. l Rajendra Bhandari was present at village Patharwal and attended an election rally at about the time when the alleged incident took place. However, defence evidence was discarded by the learned Sessions Judge and relying upon the evidence of the prosecution witnesses, original accused Nos. 1,2,5 and 6 (present appellants) were convicted as afore stated. Benefit of doubt was given to accused Nos. 3 and 4 and they were acquitted. Accused Nos. 1,2,5 and 6 being aggrieved by the order of conviction and sentence have filed the present appeal.

8. Heard Shri R.N. Dhorde, learned Counsel for the appellants and Shri B.V. Wagh, learned A.P.P. for the Respondent-State. Together, both have taken me through the entire record.

9. PW-4 Head Constable Satpute and PW-8 Keshav Darandale have deposed as per complaint lodged by PW-8 Keshav. It is argued by Advocate Shri Dhorde before this Court that at the time of alleged incident, parliamentary elections were being held and due to political rivalry false complaint is filed.

10. Before we go to the eye witness account, we may consider circumstantial evidence. Dr. Firodia, the Medical Officer then attached to Primary Health Center, Kukana, is examined as PW-2 at Exhibit 23. He stated that on 17.5.1991, he examined PW-8 Keshav at about 1.45 p.m. and following eight injuries were found on his person.

(1) Incised wound 5-1/2 c.m.x 2 cm. x muscle deep on the right parietal region, on the head near the occipital region oblique in direction, bleeding present.

(2) C.L.W. 4 cm. x 1 c/m. x skin deep on the right parietal region mid point, transverse in direction.

(3) C.L.W. 3 cm. x 1 cm. x skin deep, on the left occipital region on the head.

(4) C.L.W. 3 cm. x 1 cm. x skin deep on the left parietal region posteriorly.

(5) C.L.W. 1-1/2 cm. x 1 cm. x skin deep on the left side of head on the parietal region, above No. 4 injury.

(6) C.L.W. 1-1/2 cm. x 1 cm. x skin deep on the left parietal region near No. 5 injury.

(7) C.L.W. 2-1/2 cm. x 1 cm. x skin deep on the parietal region on the head near injury No. 6.

(8) Contusion 4 cm. x 1-1/4 cm. on the right thigh lower part.

According to Dr. Firodia, injury No. 1 was caused by sharp substance. He opined that the said injury was possible with article No. 8 (sword). Initially, doctor was hesitant. He has stated that the lower part of article No. 8 sword was not sharp enough, but then stated that it was possible to cause injury No. 1 with the same. According to doctor, injury Nos. 2 to 8 were possible by hard and blunt substance like sticks such as article Nos. 9 to 11. He also stated that patient gave him history of injuries with sword. He was producing case papers in respect of PW-8 Keshav which were in his handwriting and the same are marked as Exhibit 26. He also made endorsement on the FIR which is given Exhibit No. 27. It is argued before me that it is not known who has made endorsement on complaint Exh.68, regarding PW-8 being conscious, but there is clear evidence of PW-2 Dr. Firodia who proved the endorsement Exh.27.

Dr. Firodia has further stated that he examined PW-10 Tanaji Datir and found following five injuries on his person.

(1) Scratch 3 cm. x 1/2 cm. on the right leg potliteal region.

(2) Contusion 4 cm. x l/l/2cm. on the left leg potliteal region.

(3) Contusion 2.cm. area on the left side of back near below scapula.

(4) Contusion 2 cm. area on the right side of back below scapular region.

(5) Pain in left hand little finger.

According to the doctor, all the injuries were caused by hard and blunt substance. Medical certificate is proved at Exh. 28. Dr. Firodia also stated that patient Tanaji Datir gave history of injuries caused to him with sticks. The doctor has stated that on 17.5.1991 he also examined PW-4 Head Constable Satpute and found following injuries on his person.

(1) Contusion 14 cms. x 1 cm. x on the left side of back. Scapular region above down words.

(2) Swelling and tenderness on the left hand near the little finger.

(3) Contusion 21 cm. x 2 cm. on the chest oblique in direction passing sternum.

According to the doctor, above injuries were caused within six hours and those were caused by hard and blunt substance. In the cross examination, the doctor has stated that in the exhibited documents, history was not stated. It may be noted that injury No. l on the person of PW-8 Keshav was incised wound of 5-1/2 cm.x 2 cm. x muscle deep on the right parietal region on head near the occipital region oblique in direction and bleeding present. Almost seven injuries which were incised and C.L.Ws. were on the head and one injury was on thigh. So, from injuries intention to cause his death was clear. In paragraph 11 of cross examination of PW-2 Dr. Firodia it is brought on record that injury No. 1 caused to PW-8 Keshav was simple in nature but it was opinion formed on the basis of the result of the injury on the date of deposition. The doctor also stated that the dangerousness of the head injury can be considered from the inner damage caused by the said injury than the external injury caused over the head. Law is well settled that for offence punishable u/s 307 of I.P.C., the intention is more important and here in the present case, besides incised wound was caused on the head, there were other six injuries on the head. Therefore, intention could not be to cause only simple injury or grievous hurt.

11. We may also refer to spot panchanama dated 17.5.1991, which is at Exh.22. The same is proved by PW-1 Eknath Kachare. Panchanama clearly shows that inside the police outpost, there were blood stains on the door frame, on the calender which was lying in torn condition, on the bench, on the floor and even on the wall below window. It is stated that even hair of the complainant were cut and they were found on the spot. It is said that the complainant did not state about cutting of his hair. But, injury No. 1 was such that some hair might have been cut and fallen on the ground. Absolutely, there is no reason to disbelieve the spot panchanama indicating that the incident did take place inside the police outpost.

12. PW-8 Keshav Darandale is examined at Exhibit 75. He mainly deposed in terms of his complaint which is reproduced earlier. It does not appear from the cross examination of PW-8 Keshav that there was any previous enmity between appellants and PW-8 Keshav nor there is anything on record to show that PW-8 Keshav was in any way involved in election canvassing or was belonging to any particular political group or party. It has come in the evidence that appellant No. l Rajendra was a political worker and had supported candidate Shri Vikhe Patil. Merely because the Chairman of the sugar factory was one Mr. Tukaram Gadakh, it cannot be inferred that PW-8 Keshav was belonging to the party of Yashwantrao Gadakh who was contesting the election against Balasaheb Vikhe Patil. Some incident did take place prior to the main incident and that is also clear from earlier reports filed with the police.

13. PW-13 Head Constable Shri Shinde who was Police Station Officer at Police Station, Newasa at the relevant time. He stated that on 17.5.1991, he received occurrence report Nos. 104, 105 and 106 from Kukana Police outpost which are proved at Exhibits 67,68 and 69. He had also taken entries in the station diaries

regarding those reports which he proved at Exhibits 86,87 and 88. He registered the main FIR (Exh.68) and took entry thereof in station diary at Exh.89. Exhibit 66 is the complaint lodged accused No. 2 Pradip Bhandari (appellant No. 2) at about 11.30 a.m. on 17.5.1991, complaining that Kanta Darandale (which is also the name of PW-8 Keshav Darandale) had refused to take entry of sugarcane plantation and abused and beat him. So, Exh.66 which is a complaint lodged by appellant No. 2 clearly proves that at 11.00 a.m. there was some incident between him and PW-8 Keshav regarding taking entry of plantation of sugarcane. So, it cannot be said that the incident had not taken place and that the complaint by PW-8 Keshav is a concocted story.

14. Head constable Satpute (PW-4) examined at Exhibit 65 proved complaint lodged by appellant No. 2 Pradip Bhandari at Exh. 66. Exhibit 67 is the occurrence report produced by PW-4 Police Head Constable Satpute on earlier complaint by PW-8 Keshav for abusing and beating him for not taking entry of sugarcane plantation as asked by accused No. 2 Pradip. Exhibit 69 is the occurrence report about the main incident.

15. In fact, PW-4 Head Constable Satpute is an independent witness. There is nothing to show that he had any enmity with any of the appellants or original accused persons. His evidence clearly shows that on 17.5.1991, initially accused No. 2 Pradip Bhandari came and lodged complaint at about 11.00 a.m. against PW-8 Keshav alias Kanta who was then working as clerk in the office of the sugar factory. On the basis of that complaint, occurrence report (Exh.66) was prepared. PW-8 Kanta alias Keshav lodged complaint about incident that took place at 11.00 a.m, which PW-4 Satpute reduced to writing. The occurrence report (Exh.67) regarding said complaint lodged by PW-8 is just prior to the main incident. Thereafter appellants came and assaulted PW-8 Keshav.

16. Police Head Constable Satpute (PW-4) stated that accused No. l Rajendra Bhandari had sword and others were armed with sticks. They asked PW-8 Keshav to come out, but he refused. So, accused entered the outpost and gave blows to him with sword and sticks. Then he intervened, but he was also given stick blows. He stated that accused No. 2 Pradip and accused No. 5 Sunil (appellant Nos. 2 and 3) gave him blows with sticks. Due to said blows, sword snatched by him from the hands of accused No. 1 had fallen on the ground. P.W.10 Tanaji Datir and others intervened. Thereafter accused No. 1 took the sword and went away in a jeep. It is argued that the registration number of the jeep could not be told by the witness. However, it is to be noted that when PW-8 Keshav and PW-4 Satpute themselves were beaten and injured inside the outpost, we cannot expect them to be in a state of mind to note down the registration number of the jeep in which the accused ran away. It is also argued that the owner of the jeep in which injured were taken to the hospital, was not examined. However non examination of driver of owner of the jeep is neither a material piece of evidence nor it is a link. What was important at

that time was to take the injured to the hospital immediately. Therefore, the injured were taken to the hospital in the vehicle then immediately available without bothering as to who was the owner or driver of the same and what was its number.

17. PW-10 Tanaji Datir has half heartedly supported the prosecution case. He deposed that he was injured by some unknown persons, when he had accompanied PW-8 Keshav to the Police Outpost at Kukana, Kukana and when PW-4 Head Constable Satpute was reducing the complaint of PW-8 Keshav. When the complaint was being recorded and signature of PW-8 was obtained, one person came and asked PW-8 Keshav to come out. No body had accompanied the said person. Thereafter, according to PW-10 Tanaji, PW-8 Keshav went out abusing that man and then he also went out. According to PW-10 Tanaji, two persons caught both the hands of PW-8 Keshav and third man was assaulting on forehead of Keshav with stick. As a result, Keshav fell down and thereafter this witness attempted to pull back that assailant, but he was also assaulted with stick. This witness says that he attempted to see as to who were those persons, but he saw about 25 persons around him. He was not conscious enough to see the assailants. So, he ran towards road side, but those people chased and beat him with sticks. Thereafter, he told the crowd that he had no enmity with the assailants and he was performing his duty. Thereafter, he went away on his motorcycle to the sugar factory and reported the incident to the chairman and at the directions of the chairman, took six watchmen with him and came back to the police outpost Kukana. There is nothing to suggest that PW-10 Tanaji was acquainted with any of the accused prior to incident. Due to sudden assault he appeared to be flabbergasted.

18. PW-10 Tanaji was declared hostile by-prosecution and was confronted with his statement before police particularly the portions marked "A" to "F" from the same. Witness denied those portions. So, here is a person who has turned hostile. However, one thing is very clear that the incident had taken place in which this witness was also injured, although he was not ready to tell the whole truth. The evidence of Dr. Firodia clearly shows that one of the injuries on the head of PW-8 Keshav was incised wound which was not possible with stick.

19. PW-5 Balasaheb Wable, PW-6 Narayan Dale, PW-7 Lahanu Garje and PW-9 Gorakshanath Rindhe were witnesses to the incident which preceded main incident at the police outpost at Kukana.

20. PW-12 Suresh Nikam is a witness to the main incident. He deposed that he has bicycle repairing shop and hair cutting saloon at Kukana. At about 1.00 p.m., he was working in his bicycle repairing shop and on hearing shouts, he came out and saw that PW-8 Keshav was injured, his clothes were torn, there was crowd of people. This witness has stated that appellant No. l Raju Bhandari, Garje,Kharade and Deshmukh were present on the spot. Raju Bhandari was armed with something, but witness could not see it specifically. Thereby, witness wants to say that it was not a stick. Thereafter, appellant Rajendra Bhandari and others ran away. So, this witness, who

has his bicycle shop at a distance of about 200 ft. from his hair cutting shop, has stated that the incident did take place in which accused No. 1 and others had taken part and PW-8 Keshav was injured. Absolutely there is no reason to disbelieve his evidence.

21. On the other hand, accused have examined DW-1 Ashok Khate at Exhibit 109, DW-2 Dattatraya Navthar at Exhibit 114 and DW-Balasaheb Rasne at Exhibit 115 in support of the defence. These three witnesses stated that accused No. l Rajendra Bhandari was present at village Patharwal with them in a meeting on 17.5.1991. It is brought on record that all these witnesses are from the same political party to which accused No. l Rajendra Bhandari belonged and that in the elections of 1991, they were supporting the candidature of Shri Balasaheb Vikhe Patil. Absolutely, there is no independent evidence brought by accused in support of their defence and the evidence of these three defence witnesses is clearly of interested witnesses. Therefore, the learned trial judge did not believe their evidence regarding plea of alibi and believed the prosecution evidence as the same was so overwhelming and convincing as compared to evidence of said interested defence witnesses.

22. Learned Counsel for appellants and learned A.P.P. for Respondent-State cited some authorities.

23. Learned Counsel Shri Dhorde for the appellants first relied upon the case of Sevi and Another Vs. State of Tamil Nadu and Another, . In that case, it was the defence of the accused that the original F.I.R. was suppressed by police and was substituted by another. There was failure on the part of police officer to produce the F.I.R. book in court notwithstanding the directions of the court. General diary at police station was also not produced. Inference drawn was that the original FIR was suppressed and so the prosecution case had become suspicious. The Supreme Court observed that the entire evidence was of partisan character and held in paragraph 3 as under:

Where the entire evidence is of partisan character impartial investigation can lend assurance to the court to enable it to accept such partisan evidence. but where in a murder case, the investigation itself is found to be tainted, in the sense that the original FIR was suppressed by the police, it becomes difficult for the court to sift the evidence, and the evidence of partisan eye witnesses cannot be accepted.

In the present case, there were immediate actions, such as occurrence reports, spot panchanama etc. The spot panchanama clearly indicates that blood stains were found on the doorsteps, wall, calender and floor in the police outpost. There was also immediate medical treatment which is apparent from evidence of Medical Officer Firodia. The small difference in the evidence regarding timing was pointing out, but in my opinion the same is insignificant and immaterial.

24. The second case which learned Advocate Shri Dhorde relied upon is Meharaj Singh (L/Nk.) Vs. State of U.P., . In the cited case, none of the alleged eye witnesses had actually seen the occurrence. They were introduced as eye witnesses after

thoughtful deliberations and considerations. Authenticity of FIR was lost being ante-timed and had not been recorded till inquest proceedings were over at spot. There was no evidence to show as to when the copy of FIR, special report was actually dispatched to the Magistrate. The alleged ocular testimony was contradicted by medical evidence and thus there was failure on the part of prosecution to prove guilt beyond reasonable doubt. For these reasons, the accused were given benefit of doubt. In the present case, it is argued that the copy of the FIR was not sent to the Magistrate and the only basis to this argument is that there was no entry in the station diary produced on record regarding sending of FIR to the Magistrate. I am not impressed by the said argument. It is true that the Head Constable Shri Shinde has proved the entry (Exh.90) which is regarding telephonic message received from the Head Constable Satpute (PW-4) about the incident and entry was taken at about 2.30 p.m. It shows that Sunil Garje (appellant No. 3) and other 4-5 persons had beaten in front of Kukana police outpost and immediately police help was required to be sent. So, Police Inspector Shri Pansare and others proceeded to Kukana. Thus, it was a very short message and therefore, it was mentioned therein that the incident had taken place in front of Police outpost, Kukana. As per evidence on record incident took place both inside and outside the outpost. Immediate complaint, spot panchanama and evidence of eye witnesses are enough to show that part of incident had also taken place inside the police outpost, so far as beating to PW-4 Head Constable Satpute and PW-8 Keshav is concerned, though PW-10 Tanaji was beaten outside the police outpost. I am not satisfied that this is a case filed out of election rivalry and the incident itself had not taken place.

25. The next case relied upon by learned Advocate for the appellants is Shaikh Nabab Shaikh Babu Musalman and others Vs. State of Maharashtra, . In that case, eye witnesses were highly interested and partisan and were not coming with true version. Witnesses had not attributed any overt act to co-accused and therefore, there was likelihood of co-accused being falsely implicated and hence the accused were acquitted. So, there were reasons for acquittal. That is not case before us.

26. AIR 2008 SCW 1276 (Babu Ram v. State of Punjab) and more particularly paragraph 13 thereof is relied upon by learned Advocate Shri Dhorde for the appellant in support of his argument that non examination of independent witness raises doubt about truthfulness of prosecution case. However, in that case, independent witness was not examined. Overall evidence probabilised defence version. There was injury on the person of accused. There was non explanation of the same. The wife of the accused had sustained grievous injury and it was held that the accused could be said to have apprehended danger to his and his wife''s life and therefore infliction of a single injury by accused with cobblers weapon was held to be in exercise of private defence. So, the facts of that case are different than those in our case and, therefore, said judgment is not applicable to the facts of the case on hand.

27. Learned A.P.P. Shri Wagh cited the case of State of Raiasthan v. Nana 2007 (5) Supreme 760. In that case, the Supreme Court held that merely because there was some difference in the version of PW-1 so far as his statement in the court vis-a-vis statement in the FIR is concerned, that does not in any way affect the credible and cogent evidence of PWs.2 and 3. In our case, merely because PW-10 Tanaji chose not to tell the whole truth, that by itself would not affect the credibility of evidence of PW-4 Head Constable Satpute and PW-8 Keshav.

28. The second case cited by learned A.P.P. is Dudh Nath Pandey Vs. State of Uttar Pradesh, . So far as plea of alibi and private defence is concerned, in para.19 following observations are made:

19. ...The plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea can therefore succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed.

It is pointed out that distance between Kukana and Patharwal is 12 km. as stated by DW-2 Dattatraya Navthar and so it was possible to reach Patharwal within 10-12 minutes in a jeep and attend a meeting. Moreover, timings given by defence witness of the meeting are approximate. They are interested witnesses. There is no independent corroboration to their evidence.

29. In the present case, there is overwhelming evidence against appellants-accused which clearly falsifies the interested version of defence witnesses. I am satisfied that this is not a case where accused-appellants are entitled to benefit of doubt.

30. In this case, out of original six accused, two are acquitted and there is no appeal against their acquittal. It is not a case that there were more than six accused persons, but doubt arose regarding identification of original accused Nos. 3 and 4 and, therefore, they were acquitted. Acquittal of accused Nos. 3 and 4 is because of certain admissions given by PW-8 Keshav in his evidence at Exhibit 75. PW-8 Keshav in paragraph 10 of his cross examination admitted as follows;

10. It is correct that the Mala of accused Nos. 3 and 4 is adjacent to the police out post, Kukana. It is correct that the house of accused Nos. 3 and 4 is adjacent to the Shevgaon Newasa road on northern side in front of the police station. It is not correct that the accused Nos. 3 and 4 came there after hearing the noise of quarrel from the police out-post Kukana. It is correct that 5 to 6 persons came to police out-post Kukana besides Kumar Deshmukh and Rindhe. I did not see that accused Nos. 3 and 4 were amongst those 5 to 6 persons. I did not see that the accused Nos. 3 and 4 came from the field and they had sugarcane in their hands for eating. It is correct that the three persons who beat me do not include the accused Nos. 3 and 4.

31. PW-4 Police Head Constable Satpute in his cross examination admitted that he had not disclosed names of accused No. 4 Bandu Deshmukh as one who had assaulted PW-10 Tanaji Datir. He has also not stated in his statement before police that all accused were asking PW-8 Keshav alias Kanta to come out of the police outpost.

32. My attention was drawn to the charge framed at Exhibit 4 and it is argued that it is not a case wherein charge is framed against original six accused persons and some more unknown persons. Charge was that the six accused persons before the court formed unlawful assembly and committed rioting and caused injuries and attempt of murder in furtherance of common object of unlawful assembly formed by them. Thus, the acquittal of accused Nos. 3 and 4 was recorded by the trial court, because it was not proved that they were the members of unlawful assembly and they shared the common object of such unlawful assembly.

33. Shri R.N. Dhorde, learned Counsel for the appellants cited three cases before me. In K. Nagamalleswara Rao and others Vs. State of Andhra Pradesh, . In para 8, following observations are made.

8. However, the learned Judges overlooked that since the accused who are convicted were only four in number and the prosecution has not proved the involvement of other persons and the Courts below have acquitted all the other accused of all the offences, Section 149 cannot be invoked for convicting the four appellants herein. The learned Judges were not correct in stating that A-l, A-2, A-3 and A-ll "can be held to be the members of the unlawful assembly along with some other unidentified persons" on the facts and circumstances of this case. The charge was not that accused 1, 2, 5 and 11 "and others" or "and other unidentified persons" formed into an unlawful assembly but it is that "you accused 1 to 5" who formed into an unlawful assembly. It is not the prosecution case that apart from the said 15 persons there were other persons who were involved in the crime. When the 11 other accused were acquitted it means that their involvement in the offence had not been proved. It would not also be permissible to assume or conclude that others named or unnamed acted conjointly with the charged accused in the case unless the charge itself specifically said so and there was evidence to conclude that some others also were involved in the commission of the offence conjointly with the charged accused in furtherance of a common object.

The situation before this Court is same. It cannot be said that present four appellants can be held to be members of unlawful assembly along with some other unidentified persons. On the facts and circumstances of the case, charge was not that the accused "and others" or "other unidentified persons" formed unlawful assembly, but it is "you accused Nos. 1 to 6" who formed unlawful assembly. In the present case, prosecution has not proved involvement of original accused Nos. 3 and 4 beyond reasonable doubt and, therefore, they were acquitted. So, in the facts and circumstances, it cannot be said that unlawful assembly was formed by only

four appellants before the court and, therefore, the appellants will have to acquitted for offences punishable under Sections 147 and 148 of IPC and they cannot be convicted for the said offences with the aid of Section 149 of IPC. However, they can be convicted for offences committed with the help of Section 34 of I.P.C. Hence, the appellants will have to be convicted for offences punishable u/s 307 read with Section 34, 332 read with Section 34 and 353 read with Section 34 of I.P.C.

34. The second case cited is Musakhan and Others Vs. State of Maharashtra, for proposition that mere innocent presence in an assembly of persons, as for example a bystander, does not make the accused a member of an unlawful assembly, unless it is shown by direct or circumstantial evidence that the accused shared the common object of the assembly.

35. The last case cited is Subran alias Subramanian and Others Vs. State of Kerala, . It is observed in paragraph 10:

10. ...The effect of the acquittal of the two accused persons by the High Court and without the High Court finding that some other known or unknown persons were also involved in the assault, would be that for all intent and purposes the two acquitted accused persons were not members of the unlawful assembly. Thus, only four accused could be said to have been the members of the assembly, but such an assembly which comprises of less than five members is not an unlawful assembly within the meaning of Section 141, IPC. The existence of an unlawful assembly is a necessary postulate for invoking Section 149, IPC. Where the existence of such an unlawful assembly is not proved the conviction with the aid of Section 149, IPC cannot be recorded or sustained.

36. At the time of arguments, it was submitted that the incident had taken place 19 years ago and, therefore, leniency be shown. I am, however, not satisfied that there is any special reason to show leniency. Here are the accused persons who had dared to enter into the police outpost and assault the person lodging complaint to the police against them with sword and sticks and attempt to kill him. Not only that, the appellants-accused did not spare even the Head Constable (PW-4) Satpute doing his public duty or even PW-10 Tanaji Datir who had come to the police outpost just to accompany PW-8 Keshav on the directions of the chairman of the sugar factory. The incident took place in broad day-light in presence of several villagers. Only motive could be to create terror, that too during election period. So, the conduct of the appellants-accused is such that they do not deserve any leniency.

37. So, in the facts and circumstances stated above, the appeal is partly allowed. The order of conviction and sentence for offences punishable under Sections 147 and 148 is hereby set aside. So far as other offences are concerned, the conviction of the appellants with the aid of Section 149 of IPC is set aside and in stead, they are convicted of offences under Sections 307 read with Section 34, 332 read with Section 34 and 353 read with Section 34 of I.P.C. The order of sentence passed by the trial

judge is hereby set aside and modified as follows:

Each of the appellants is sentenced to suffer rigorous imprisonment of five years and to pay fine of Rs. 5000/= for offence u/s 307 read with Section 34 of IPC. Each of the appellants is also sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs. 1000 for each of the offences punishable u/s 332 read with Section 34 of IPC and for offence u/s 353 read with Section 34 of IPC. All substantive sentences are to run concurrently. Appellants are directed to forthwith surrender to their bail for undergoing remaining terms of sentences awarded. If the appellants have paid excess fine, the same may be refunded to them.

The appeal is accordingly disposed of.