

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 596 OF 2011

- 1] Bapu s/o. Vithalrao Jadhav,
Age: 28 Years,
R/o. Shahinsha Nagar, Beed,
Tq. & Dist. Beed.
- 2] Laxman s/o. Marotirao Baswant,
Age: 29 Years,
R/o. as above.
- 3] Raju s/o. Mohanrao Tak,
Age: 30 Years,
R/o. as above.

APPELLANTS
[Orig. Accused]

VERSUS

- 1] State of Maharashtra,
Through Police Station,
Beed, Dist. Beed
Copy to be served on [P.P.].
- 2] Uttam s/o. Rambhau Oval,
Age R/o. Ashok Nagar,
Barshi Naka, Beed, Dist. Beed
[Added as per leave of Court
dtd.11.11.2011].

RESPONDENTS

WITH

CRIMINAL APPEAL NO. 437 OF 2014

Uttam s/o. Rambhau Oval,
Age 35 Years, Occ. Business,
R/o. Barshi Naka, Beed,
Tal. & Dist. Beed.

APPELLANT
[Orig. complainant]

VERSUS

- 1] The State of Maharashtra,
Through Police Inspector,
Police Station, Beed,

Tal. and Dist. Beed
 [Copy to be served on P.P.
 High Court of Judicature of
 Bombay Bench at Aurangabad]

- 2] Bapu s/o. Vitthalrao Jadhav,
 Age 28 Years, R/o. Shahinsha Nagar,
 Beed, Tal. & Dist. Beed.
- 3] Laxman s/o. Marotirao Baswant,
 Age 29 Years, R/o. Ganesh Nagar,
 Beed, Tal. & Dist. Beed.
- 4] Raju s/o. Mohanrao Tak,
 Age 30 Years, R/o. as above
- 5] Santosh s/o. Vitthal Jadhav,
 Age 20 Years, R/o. As above.
- 6] Bharat s/o. Marotirao Baswant,
 Age 19 years, R/o. As above.

RESPONDENTS

[Resp.Nos.2 to 6 are orig.
 Orig. Accused]

...
 Mr. R.G.Hange, Advocate, h/f. Mr. C.V. Thombre, Advocate
 for the Appellants in Criminal Appeal No.596/2011.
 Mr. Amol R. Gaikwad, Advocate for the Appellant in Criminal
 Appeal No.437/2014.
 Mr. V.D.Godbharle, APP for the Respondent – State

...
**CORAM : S.S. SHINDE &
 A.I.S.CHEEMA, JJ.**

Reserved on : 07.07.2015
 Pronounced on: 22.09.2015

JUDGMENT [Per S.S.Shinde, J.]:

- 1] Criminal Appeal No.596/2011 is filed by the
 original accused and Criminal Appeal No.437/2014 is filed
 by the original complainant, praying for enhancement of

the sentence. Since both these Criminal Appeals are arising out of the Judgment and Order dated 10.10.2011 passed by the Additional Sessions Judge-3, Beed in Sessions Case No.40/2011, both these Criminal Appeals are being heard together.

Facts of the prosecution case, in brief, are as under:

2] One Uttam Rambhau Ovhal [hereinafter referred as 'the complainant'] lodged the complaint with City Police Station, Beed, stating therein that, he is the resident of Barshi Naka, Beed. In his house, there are his parents, one brother namely Gautam and three sisters and all of them reside together. He is employed in daily '*Dainik Marathwada Sathi*', since last 7 years prior to the date of incident, he is working as a Recovery Agent. The complainant is doing the work of collecting money for the aforesaid daily news paper since then and gets Rs.1500/- per month as his salary.

3] The complainant has alleged that, on 07.03.2008, he had collected Rs.2000/- from Balasaheb Chavan, resident of Shahunagar, Beed towards

advertisement charges and Rs.1000/- from Manik Baburao Waghmare. Thereafter, at about 8.30 p.m. the complainant, after collecting aforesaid amount, proceeded to his office namely '*Dainik Marathwada Sathi*' so as to deposit the said amount in the office. But, when he reached the office, he found that, Sub-Editor namely Sandip Bendre was not available in the office. Therefore, he carried the said amount along with him and proceeded towards his house on his bicycle.

4] The complainant has further alleged that, at about 9.00 p.m. he was proceeding from the District Stadium to go to his house and was passing from Suraj Gold Shop situated near Swami Smarth Temple, at that time accused no. 1 Bapu Jadhav came in front of him, and abused in filthy language on the caste of the complainant, and asked complainant as to how much money did he want. He further asked complainant, why he went to the house of the accused, and thereafter, started assaulting the complainant. At that time, other accused namely Santosh Jadhav, Laxman Baswant, Bharat Baswant and Raju Tak had come and they also started assaulting the complainant with hockey stick and *Kukries* and gave blows on both hands,

legs, neck and also on left ear, causing serious injuries to him. The accused also gave blow on his face, as a result one tooth was dislocated. Thereafter, said accused persons robbed from him his money and mobile phone and fled away.

5] The complainant has further alleged that, thereafter, Sub-Editor was called on phone and he took him in the rickshaw to the Police Station, and thereafter to the Hospital. His statement was recorded in the Hospital on 08.03.2008.

6] On the basis of his statement, the offence came to be registered, punishable under Section 395 of IP Code and under Section 3 [1] [x] of the Scheduled Castes and Scheduled Tribes [Prevention of Atrocities] Act, 1989 [in short 'Atrocities Act'], vide Crime No.29/2008.

7] Since the offence pertains to the Atrocities Act, the investigation came to be carried out by the Assistant Superintendent of Police. During the course of investigation, the Investigation Officer conducted the spot panchanama and recorded the statement of the witnesses.

8] During the course of investigation, the accused persons challenged the First Information Report before the High Court vide Criminal Application No. 972/2008. The High Court partly allowed the Criminal Application of accused persons and quashed the FIR in respect of the offence under Section 3 [1] [x] of the Atrocities Act, vide its order dated 25.04.2008. The High Court, however, observed that, prosecution can continue for alleged offences punishable under IP Code.

9] After completing the investigation, the Investigation Officer submitted charge-sheet before the Judicial Magistrate First Class, Beed, for the offence punishable under Section 147, 148, 149, 324, 325 of I.P. Code. All the offences mentioned in the charge sheet are triable by the Magistrate. However, since the Magistrate found that the statements of the witnesses and the First Information Report show that, the offence under Section 395 of IP Code is attracted, and since the offence under Section 395 is triable by the Court of Sessions, he committed the case to the Sessions Court vide committal order dated 15.02.2010.

10] After appearance of the accused and hearing both the sides, the Sessions Court framed charge under Section 147, 148, 149, 324, 325 and 395 of the IP Code. The contents of the charge were read over and explained to the accused persons in vernacular. The accused persons pleaded not guilty and claimed to be tried.

11] The trial Court, after full-fledged trial, convicted the original accused Nos. 1 to 5 i.e. appellants in Criminal Appeal No.596/2011. The accused Nos. 1 to 5 are convicted for the offence punishable under Section 147 of IP Code and sentenced to undergo R.I. for 3 months. The accused nos. 1 to 5 are further convicted for the offence punishable under Section 148 of IP Code and sentenced to undergo R.I. for 3 months. The accused Nos. 1 to 5 are further convicted for the offence punishable under Section 324 r/w. 149 of IP Code and each of them is sentenced to undergo R.I. for 6 months and to pay fine of Rs.2,000/- [Rs.Two Thousand only] by each, in default, undergo R.I. for one month. The accused Nos. 1 to 5 are further convicted for the offence punishable under Section 325 r/w. 149 of IP Code and each of them is sentenced to undergo R.I. for 6 months and to pay fine of Rs.2000/- [Rs.Two Thousand

only] by each, in default, undergo R.I. for one month. However, the trial Court acquitted the accused for the offence punishable under Section 395 of IP Code. Instead of sentencing accused Nos. 2 and 4 namely Santosh Vitthal Jadhav and Bharat Marotirao Baswant, they were directed to be released on probation on executing a bond of Rs. 1000/- by each with one surety in the like amount, to maintain good behaviour for a period of one year, failing which they will be called upon to receive the sentence which has been imposed on them. The trial Court further ordered that, the substantive sentences of imprisonment of accused nos. 1, 3 and 5 shall run concurrently. The set off under Section 428 of Criminal Procedure Code was also ordered. The trial Court further ordered that, 50% of the fine amount be paid to the complainant namely Uttam s/o. Nanabhau Ovhal, towards compensation. Hence this Appeal.

12] The learned Advocate Mr.R.G.Hange, instructed by Advocate Mr. C.V.Thombre appearing for the Appellants in Criminal Appeal No.596/2012 submits that, the High Court has already quashed charge under Section 3 [1] [x] of the Atrocities Act against the appellants. It is submitted

that, the trial Court acquitted the appellants for the offence punishable under Section 395 of IP Code, and there are no any cogent and convincing grounds to interfere in acquittal of the appellants from the offence punishable under Section 395 of IP Code. It is submitted that, there was delay of one day in lodging the First Information Report. The alleged incident had taken place on 7th March, 2008 at 9.00 p.m., but the complaint was lodged on 8th March, 2008 at 9.00 p.m. The said delay has not been explained by the prosecution. It is further submitted that, PW-1 and PW-2 i.e. *Panch* witnesses have turned hostile so also PW-3 was also declared hostile. The testimony of the complainant is self-contradictory. It is submitted that, the complainant deposed before the Court that, the amount was taken from his pocket and then accused persons assaulted him. However, it is stated in the complaint that, first he was assaulted and then the amount was withdrawn from his pocket. He further stated that, due to assault, he became unconscious. But, previously, he stated that, he called Sandip and Santosh on the spot. The complainant further stated that, after lodging the complaint he went to the Hospital, however, the complaint was lodged on next day at 9.00 p.m. In his cross examination, he stated that, he went

to the house of the accused namely Bapu Jadhav, and immediately thereafter, he himself denied the same. Though the complainant stated that, the accused used weapon '*Kukri*' while assaulting him, however, the medical evidence shows none of the injuries are caused by the pointed weapon. Though the complainant stated that, his shirt button was broken and the clothes were blood stained, however, the report of Investigation Officer is contrary to it. He stated that, he shouted for help, but there was no response. However, upon perusal of the evidence of PW-4 Sandeep, it is abundantly clear that, the spot of incident is crowded place. It is further submitted that, if the evidence of PW-5 is considered, in its entirety, same deserves to be disbelieved. It is further submitted that, PW-4 did not mention the name of the accused except the accused no.1. His evidence is hearsay. PW-6 stated that, he has given Rs. 1,000/- to the complainant, however, the complainant stated that, PW-6 had given Rs.2,000/-. Though the complainant claims that, PW-7 has given Rs.1,000/-, but said witness stated that, he gave Rs.2,000/- to the complainant. PW-8 in his evidence stated that, except filing of charge-sheet, he is not aware about any other thing. It is submitted that, testimony of PW-9 Prabhakar Manoharrao

Belsare clearly demonstrated that, there was delay of one day in filing the First Information Report.

It is further submitted that, if the testimony of PW-10 Dr. Baban Jadhav, Medical Officer, is considered in its entirety, same is not consistent with the version of the complainant. In fact, in his cross examination, he stated that, he did not mention the colour of the injury in the medical certificate so also he has to verify probable weapon so as to mention directions and the age of the injuries, but the same is not followed in the instant case so also it was necessary to verify the clothes of the injured, but this is also not followed by the PW-10. It is further submitted that, during the course of examination of the Medical Officer, he stated that, it is possible that if any body comes in contact with the rough surface, there is possibility of simple injury. The learned counsel further invited our attention to the evidence of PW-9 Prabhakar Manoharrao Belsare and in particular his cross examination and submits that, it is not mentioned in the complaint that, along with Bapu Jadhav others have also removed amount of Rs.3,000/- from the persons of the complainant. Further there is no mention in the complaint that, accused attacked the

complainant with wooden sticks. It is not mentioned in the complaint that, because of assault upon him, he became unconscious and sustained grievous injuries.

13] The learned counsel appearing for the appellants – original accused pressed into service exposition of the Supreme Court in the case of ***Marudanal Augusti Vs. State of Kerala***¹ and submits that, so far acquittal of the accused from the offence punishable under Section 395 of I.P. Code is concerned, same deserves no interference, since the view taken by the trial Court was possible view. The learned counsel pressed into the service another exposition of the Supreme Court in the case of ***Lallu Manjhi and another Vs. State of Jharkhand***² and submits that, in case the evidence of the eye witness not wholly reliable or wholly unreliable, and same is not fully corroborated by medical evidence, same needs to be disbelieved.

14] On the other hand, the learned counsel appearing for the original complainant submits that, the trial Court ought to have awarded maximum sentence for

1. AIR 1980 SC 638

2. AIR 2003 SC 854

the offences for which the appellants are punished. It is further submitted that, the version of the complainant and other prosecution witnesses clearly demonstrated that, at the relevant time, the complainant was having Rs.3,000/- with him and same were removed by the accused persons from his pocket, and therefore, the accused should have been punished for the offence punishable under Section 395 of I.P. Code.

15] The learned APP appearing for the Respondent – State invited our attention to the findings recorded by the trial Court and submits that, the trial Court has rightly convicted the accused. The trial Court ought to have convicted the accused for the offence punishable under Section 395 of I.P. Code. Therefore, he further submits that, Criminal Appeal filed by the original complainant may be allowed, and Criminal Appeal filed by the original accused deserves to be dismissed.

16] We have given careful consideration to the submissions of the learned counsel appearing for the appellants – original accused, and the learned APP appearing for the Respondent – State. With their able

assistance, we have perused the entire evidence. Upon perusal of the evidence of PW-1 to PW-3, the same is not helpful to the prosecution inasmuch as all three witnesses turned hostile and nothing useful to the prosecution, has been brought on record during their cross examination by the learned APP.

17] The prosecution examined Sandeep Shriram Bendre as PW-4. In his examination in chief, he stated that, at the relevant time, he was working as Sub-Editor of '*Dainik Marathwada*'. Uttam Ovhal was working as Collection Agent. He was working with them since 7 to 8 years prior to the incident. On 07.03.2008, he came to his office at 10.20 a.m. and he was working till 7.30 p.m. in his office. He received phone call at about 9.00 p.m. from his office. At that time, some shopkeepers came and told him that, near Shivaji Stadium his collection agent Uttam Ovhal has been assaulted. He immediately proceeded towards the spot of incident and found Uttam Ovhal was injured and sitting in unconscious state. He was taken to the City Police Station in Rickshaw, and thereafter, the concerned Police Officer gave him a paper, and thereafter, he took the said injured Uttam to Civil Hospital, Beed. He inquired from the

injured Uttam about the incident wherein he was told that, one Bapu Jadhav and other persons, who were along with him, assaulted him. When he did ask Bapu Jadhav about payment, at that time Bapu Jadhav said to him that, why he did go to his house to ask money, Bapu Jadhav and some other persons assaulted him.

18] During his cross examination, he admitted that, he knows accused Bapu Jadhav since he is a Vice-President of Nationalist Congress Party. Bapu Jadhav is also active in social functions. He is a respectable person of Beed City. The defence has brought on record during his cross examination that, spot of incident is in crowded locality.

19] The complainant was examined as PW-5 [Uttam Rambhau Ovhal]. In his examination in chief, he stated that, he has worked as Collection Agent at '*Dainik Marathwada*'. In his house, there are 4 sisters, one brother and father and mother and he himself. They all stay together. He was doing the work as Collection Agent, preceding 7 Years to the date of incident. He further stated that, he got Rs.1500/- per month towards his salary. On 7th of 2008, he cannot say in which month, he had been to

Balasaheb Chavan, resident of Shahu Nagar, for collecting Rs.1000/- from him towards the amount of advertisement, and also he went to Manik Waghmare to collect Rs.2000/- towards advertisement, total amount of Rs.3000/- which was collected by him from the aforesaid two persons with him. He, thereafter, went to the office of Dainik Marathwada for depositing the said collected amount at around 8.30 p.m. At that time, Sandeep Bendre was not in the office. Since he did not deposit the money in the office and carried the said amount along with him and went towards his home on his bicycle. He was driving his bicycle near by the shop of Suraj Gold, situated near Swami Samarth Temple. At that time, he was stopped by Bapu Jadhav and Santosh Jadhav, Laxman Baswat, Bharat Baswat and Raju Tak. Accused Bapu Jadhav said to him that, how much money you wanted, and why did you go to his house. Said Bapu Jadhav and aforesaid persons snatched his money from his pocket and started assaulting him. They assaulted him with hockey stick, Kukari and sticks. They attacked him on his left and right hand and as a result of which he sustained grievous injuries, and was operated on his left hand wherein rod is inserted. Due to said assault, he also lost one of his teeth. He also sustained injuries to

his leg. Thereafter, the said persons took away his money and his mobile phone. Thereafter, Sandeep Bedre and Santosh Shethe were called on the spot of incident by informing them on phone. Due to the said assault, he became unconscious on the spot of incident. The said assault was continued up to half an hour. Said Sandeep Bedre lifted him from the spot of incident and put him in rickshaw and took him to the City Police Station on lodging complaint, he was taken to the Civil Hospital, Beed. In the City Hospital, his complaint was recorded by the City Police Station Officer. The same was recorded as per his say. The same complaint bears his signature, the said was read over to him. The contents of said complaint are true and correct. Thereafter, he was examined by the Medical Officer. He identified all the persons before the Court, who assaulted him on the date of incident.

During his cross examination, he denied suggestion that, he is a member of Republic Party of India. He stated that, he was knowing the accused persons since one month prior to the incident. He has further stated details about the relationship between the accused *inter se*. He denied the suggestion that, since he fell from the cycle

and sustained injuries. He again stated that, the accused has removed mobile from his pocket. The said fact was stated to the Police Officer, but said statement was not appearing in his statement recorded by the Police. He further stated that, he stated in his complaint that, he became unconscious due to assault by the accused persons, but the same is not written in his complaint. He cannot assign any reason for the same.

20] The prosecution did examine Manik Baburao Waghmare as PW-6. In his deposition, he stated that, he had given one advertisement in '*Daily Marathwada*' news paper, and he paid the amount of Rs.1,000/- towards advertisement charges. PW-7 Balasaheb Shankarrao Chavan has also stated in his deposition before the Court that, he had given Rs.2,000/- to the Uttam Ovhal for giving an advertisement in '*Daily Marathwada*'.

21] The prosecution examined Somnath Shivaji Kolhe as PW-8. In his deposition, he stated that, he was posted at Police Station [City] Beed as PSI, since 2007. He has received papers from ASV Shri Suvethaq and the said papers forwarded to him for investigation after registering

the crime. File was forwarded to him for recording supplementary statements of witnesses on 30.05.2008. On 11.08.2008, he has recorded the statement of complainant, Ganesh Bhosale, Sandeep Bedre and Ashok Rodge, as per their say. After completion of investigation, charge-sheet was submitted by him before Judicial Magistrate First Class on 28.11.2008. He identified the accused persons, who are present in the Court, against whom he has filed charge sheet.

During his cross examination, he admitted that, he did not do anything during the investigation, except filing the charge-sheet.

22] The prosecution examined Prabhakar Manoharraro Belsare as PW-9. He was attached with Police Station Beed since 14.06.2007, and was working there till 2009. On 08.03.2008, the Police Inspector Shri Abale told him that, one person namely Uttam Rambhau Ovhal is admitted at Civil Hospital, Beed and directed him to go and record his statement accordingly. After receiving the instruction from the Police Inspector, he proceeded towards Civil Hospital, Beed, to record the statement of the said

person namely Uttam Rambhau Ovhal. Thereafter, he recorded his statement as per his say. The statement was recorded as per his say, and thereafter, signed the complaint. Complaint is shown to him is the same. It bears signature of complainant and he himself and its contents are true and correct, which is at Exh.41. Thereafter, he came to the Police Station and recorded their contents about the same in the station diary. Accordingly, the offence was registered vide Crime No. 21/2008 under Sections 395 of IP Code and under Section 3 [1] [x] of SC & ST [Prevention of Atrocities] Act. The endorsement on the complaint is in his own handwriting. Contents are true and correct. The endorsement bears his signature, which is at Exh.48. He knew and identified the complainant.

23] During his cross examination, he stated that, it is not mentioned in the complaint that, Bapu Jadhav has removed mobile phone from the pocket of the complainant. He further stated that, it is true that, it is not mentioned in the complaint that, along with Bapu Jadhav others have also removed amount of Rs.3,000/- from the complainant. He further stated that, there is no mention in the complaint that, accused attacked the complainant with wooden sticks.

It is not mentioned in the complaint that, because of assault upon him, the complainant became unconscious and sustained grievous injuries.

24] The prosecution examined Dr. Baban Laxmanrao Jadhav as PW-10. In his examination in chief, he stated that, he was in the Civil Hospital, Beed from the period 2003 to 2009 as an Medical Officer. On 07.03.2008, on that day, he was on duty at Civil Hospital, Beed as C.M.O. Uttam Rambhau Ovhal was brought in the Hospital on 07.03.2008. In the history, he has stated that, about alleged assault, which took place on him on 07.03.2008 at about 9.00 p.m. He has examined the victim Uttam Ovhal at 9.30 p.m. During examination, he found following injuries on the person of Uttam:

1] Contusion with abrasion : Over left Upper Arm of size 4x3 cm caused within 24 hours, probable weapon is hard and blunt object, simple in nature.

2] Contusion: Over right Upper Arm of size 2x3 c.m., within 24 hours, probable weapon is hard and blunt object, simple in nature.

3] Abrasion: Over right upper arm, of size 1x1/2

cm, probable weapon is hard and blunt object, simple in nature.

4] Contusion: Over occipital region, of size 3x2cm, probable weapon hard and blunt object, caused within 24 hours, simple in nature.

5] Abrasion: Over left lower leg of size 3x1 cm, within 24 hours, probable weapon is hard and blunt object, simple in nature.

6] Fall of tooth: Right upper canine, bleeding plus, caused within 24 hours, weapon hard and blunt, grievous in nature.

7] X-ray No.1044 and 1045 dated 10.03.2008 shows fracture of right radius middle shaft caused within 24 hours, weapons hard and blunt, grievous in nature. X-ray No.1784 and 1785 dated 17.03.2009 shows fracture of right radius middle shaft caused within 24 hours, weapon hard and blunt, grievous in nature.

8] X-ray No.973 and 974 dated 7/3/2008, shows fracture of left ulna shaft, caused within 24 hours, caused by hard and blunt object, grievous in nature.

Along with:-

X-ray No.990 and 991 dated 8/3/2008 shows montaggia fracture dislocation and chif fracture of lower 1/4th of left humar caused, within 24 hours, caused by hard and blunt object, grievous in nature.

The said injury certificate is issued by him under his handwriting, and the same bears his signature. The contents are true and correct, same is issued on 02.04.2008, which is at Exh. 53. Injuries mentioned at Serial Nos. 1,2,5,6,7,8 in certificate are possible by the use of hockey stick.

It is true that, during his cross examination, he admitted that, for the assessment of the age of the injury, colour is necessary factor to determine the age of injury. In the MLC issued by him, he has not mentioned the colour. He further stated that, he has not come across any other injury on the victim other than the injuries mentioned in the M.L.C. He further stated that, out of 8 injuries mentioned in the M.L.C. none of them are inflicted by sharp and pointed weapon. It is true that, rough surface is hard and blunt. It is possible that, if any body comes in contact with the rough surface, there is possibility of simple injury. Injury mentioned in column no. 6, its verification and examination is conducted through Dental Department. It is true that, injuries at serial no.7 and 8 are the X-rays, which are taken from the Radiology Department. He also admitted that, in serial no.6 injury, he has not mentioned as to how many

teeth were there in the upper jaw and in the lower jaw. However, he specifically stated that, it is not possible when a person is riding on bicycle and his foot get struck in the chain, and he fallen down, such type of injuries are possible.

25] The prosecution did examine Mohd. Suvez Haque as PW-11. He was working as an Assistant S.P. at Beed from September, 2007 to February, 2009. Since one of the offences alleged was under the provisions of Section 3 [1] [x] of the SC & ST [Prevention of Atrocities] Act. He undertook the investigation. However, it appears that, the charge framed by the trial Court to try the accused for the offence under the provisions of the said Act, was quashed by the High Court, and therefore, the trial was restricted only to the offences punishable under the provisions of Indian Penal Code.

26] It appears that, the defence examined Chanchal Bapu Jadhav as PW-1. In her deposition before the Court, she stated that, her husband's mobile phone number is 9850297745. Her husband used to tell her that, some persons used to call him giving impression that, the

voice of the said person is of female. On 7th March, 2008, her husband received a phone call at about 4.45 p.m. on his phone, thereafter, phone was disconnected. Again at 5.45 p.m. a phone call was received on the aforesaid mentioned cell phone. The caller started abusing in filthy language. The caller told his name as Uttam Ovhal and then phone was disconnected. Thereafter, she waited for her husband, but he did not come. Thereafter, she along with other relatives, went to the Police Station and at about 9.30 p.m. she lodged the complaint in the Police Station. She denied suggestion, during her cross examination that, she did not receive call.

27] We have discussed the evidence of all the prosecution witnesses and also defence witness. Upon careful perusal of the evidence of PW-4 and PW-5, and also the Investigating Officer, there is no doubt that, the incident had taken place on the relevant date. The evidence of PW-1 i.e. Chanchal Jadhav would make it abundantly clear that, she received the phone call and caller told his name as Uttam Ovhal.

28] The trial Court has discussed in para 64 about

the motive for commission of offence and upon independent scrutiny of the evidence, we find that, the trial Court has rightly held that, there was motive for commission of the alleged offence.

29] It is true that, the Medical Officer and also the complainant have given some admissions during their cross examinations, which would certainly help the defence. However, if the evidence of the prosecution witnesses read in its entirety and in particular the evidence of PW-4, PW-5 and the Medical Officer, it is abundantly clear that, the incident had taken place.

30] So far offence under Section 395 is concerned, the trial Court in para 76 of the Judgment has given cogent reasons for acquitting the accused from the said offence, and we do not see any reason to interfere in the said findings, since those are in consonance with the evidence brought on record, and in particular the evidence of the Investigation Officer.

31] For the above reasons, we find that no fault can be found with the conviction imposed by the trial Court on

the accused persons. This takes us to the sentence passed by the trial Court. The final order passed by the trial Court reads as under :

ORDER

1) *Accused nos.1 to 5, are hereby convicted u/sec.235(2) of Cr.P.C. for the offence punishable U/sec.147 of I.P.C. and sentenced to undergo R.I. for (3) months.*

2) *Accused nos.1 to 5 (are) further convicted U/sec.235(2) of Cr.P.C. for the offence punishable U/sec. 148 of I.P.C. and sentenced to undergo R.I. for (3) months.*

3) *Accused nos.1 to 5 (are) further convicted U/sec.235(2) of Cr.P.C. for the offence punishable U/sec.324 r/w 149 of I.P.C. and each of them is sentenced to undergo R.I. for (6) months and to pay fine of Rs.2,000/- (Rs.Two thousand only) by each, in default, undergo R.I. for one month.*

4) *Accused nos.1 to 5 (are) further convicted U/sec. 235(2) of Cr.P.C. for the offence punishable U/sec. 325 r/w 149 of I.P.C. and each of them is sentenced to undergo R.I. for (6) months and to pay fine*

of Rs.2,000/- (Rs. Two thousand only) by each, in default, undergo R.I. for one month.

5) Accused nos.1 to 5 are hereby acquitted U/sec. 235(1) of Cr.P.C. for the offence punishable U/sec. 395 of I.P.C.

6) Instead of sentencing accused nos.2 and 4 namely Santosh Vithal Jadhav and Bharat Marotirao Baswant, they be released on probation on executing a bond of Rs.1,000/- by each with one surety in the like amount, to maintain good behaviour for a period of one year, failing which they will be called upon to receive the sentence which has been imposed on them.

7) The substantive sentences of imprisonment of accused nos.1, 3 and 5 shall run concurrently.

8) Accused nos.1 to 5 shall surrender to their bail bonds.

9) Accused nos.1,3 and 5 are entitled for set off, as per Section 428 of Cr.P.C. for the period of detention, if any, undergone by them, during investigation.

10) Out of the fine amount deposited in this Court, 50% of the fine

amount be paid to the complainant Uttam s/o. Nanabhau Ovhal, towards compensation, towards injury sustained by him, U/sec. 357 of Cr.P.C., after appeal period is over..”

It is clear that although the trial Court wanted to release accused no.2 – Santosh s/o Vithal Jadhav and accused no.4 – Bharat s/o Marotirao Baswant, aged about 20 and 19 years respectively, on probation, it passed order of sentence including punishment of imprisonment as well as fine as can be seen from paragraph nos.1 to 4 of the order and passed contradictory order in paragraph no.6, stating that instead of sentencing accused nos.2 and 4 they are to be released on probation. When the provisions of Section 4 of the Probation of Offenders Act, 1958 are perused it is quite clear that while invoking the provisions of the Probation of Offenders Act under Section 4, it was mandate of the law that “instead of sentencing” accused “at once to any punishment” the Court was required to direct that the accused be released on “entering into a bond” with or without sureties and “to appear and receive sentence when called upon during such period not exceeding three years, as the Court may direct and in the

meanwhile keep peace and be of good behaviour". In view of Section 6 of the Probation of Offenders Act, there are restrictions on imprisonment of offenders under 21 years of age. We are not interfering with the application of Offenders Act to accused nos.2 and 4, however, the order suffered in simultaneous passing of the sentence of imprisonment and fine. For these reasons, the sentence imposed of imprisonment and fine as against accused no.2 – Santosh s/o Vitthal Jadhav and accused no.4 – Bharat s/o Marotirao Baswant in above paragraph nos.1 to 4 of the trial Court order is quashed and set aside.

32] We have to now consider the sentence passed against the appellants in Criminal Appeal No.596/2011 i.e. original accused Nos.1, 3 and 5. If the reasons recorded by the trial Court are perused for not invoking the provisions of the Probation of Offenders Act as regards these appellants are seen, the trial Court reiterated facts of the offences which had been committed and merely observed that as these accused persons are "quite major", they are not entitled to the benefit of Probation of Offenders Act. We do not find that the trial Court recorded appropriate reasons while not invoking the Probation of Offenders Act. Criminal

Manual issued by the High Court in Chapter XI paragraph 4 has given guidelines under the Probation of Offenders Act as under :-

“4. The Act lays down three distinctive methods of treatment for different classes of offenders :-

(a) Section 3 deals exclusively with first offenders, who are convicted of an offence punishable with not more than two years' imprisonment. It provides for release of such offenders after due admonition. This method of treatment is likely to be effective only for a small number of offenders, as it provides neither for bonds nor sureties and merely sends the offender back, without any constructive help, to live in the same conditions, in which he lived when he committed the offence.

(b) Section 4 (1) provides for release on probation. It lays down that the offender should enter into a bond and he may also be required to give sureties. It would normally be advisable to take sureties in addition to personal bonds, as sureties are themselves a guarantee of some efforts towards reform and a safeguard against the

offender removing himself outside the jurisdiction of the Court and breaking the conditions of the bond entered into by him.

(c) Section 4 (2) provides for release under the supervision of a Probation Officer. This is the most constructive type of treatment. Experience has proved that offenders are far more likely to make good, when placed under the guidance of a Probation Officer. It is, therefore, advisable that even in the case of first offenders, they should be dealt with under Section 4(2) in preference to discharge after admonition under Section 3.

(d) Under Section 4(3), the Court has power, while making a supervision order, to direct additional conditions to be inserted in the bond to be entered into by the offender under Section 4(1), and in doing so the Court must have regard to the particular circumstances of each individual case.

The terms and conditions of the supervision order shall be explained to the offenders and one copy of the supervision order shall be furnished forthwith to each of the offenders, the sureties, if any, and the Probation Officer concerned. The form of

supervision order has been prescribed under the Rules made under the Act.

(e) In suitable cases, the offender may be directed under Section 5 to pay compensation and cost of proceedings to the person to whom loss or injury has been caused.

(f) During the period of his probation, the offender has to keep away from crime and maintain good behaviour. If he fails to do so, he may be sentenced for the offence of which he was convicted, or on such first time failure, a penalty of fine not exceeding fifty rupees may be imposed upon him under Section 9 (3) of the Act.

(g) According to the mandatory provision of Section 6, when any person under 21 years of age is found guilty of an offence punishable with imprisonment (not for life), before passing any order of sentence of imprisonment, the Court shall call for a report from the District Probation Officer, consider such report, if any, and then record its reasons and pass such order to sentence of imprisonment (except for life), as it deems fit in the circumstances of the case."

33] Keeping in view these guidelines as well as the provisions of the Probation of Offenders Act, being major is not a disqualification for consideration under the Probation of Offenders Act. If the person has not been found guilty of the offence punishable with death or imprisonment for life, the provisions of the Act need to be considered, specially when the accused is first time offender. The facts of the case, social background and personal factors of the accused are relevant. Under the proviso to Sub Section 1 of Section 4 of the Probation of Offenders Act, the Court is required to ascertain whether the accused has a fixed place of abode or regular occupation. Sub Section 2 of Section 4 lays down that the Court “shall” take into consideration the report, if any, of the probation officer concerned in relation to the case. Thus, calling of the report of probation officer is necessary while considering the provisions of the Probation of Offenders Act, 1958. In the present matter, the judgment of the trial Court does not show that it called for the report of probation officer.

34] Even for accused nos.2 and 4, the Court should have called the report before invoking Section 6 of the Probation of Offenders Act. We have however refrained

from interfering with that part of the order of the trial Court, keeping in view the fact that the offence is old one and the period specified for the probation is also over.

35] We have called the report of the probation officer as regards to the accused in Criminal Appeal No. 596/2011. The pre-sentence reports under Rule 17 of the Maharashtra Probation of Offenders Rule, 1966 have been received. We have now gone through those reports, as regards appellant no.2 – Laxman s/o Marotirao Baswant and appellant no.3 – Raju s/o Mohanrao Tak. The reports are positive and show that these appellants-accused are residents of Bahirwadi, Taluka and District Beed and Jawheri Lane at Beed and having families. The reports show that these two appellants are first time accused. There are no earlier other cases against them. The probation officer has recommended that they should be dealt with under Section 4 (1) of the Probation of Offenders Act. Looking to the facts of the present matter, the offences which are proved against these accused, their family background and the fact that they are first time offenders, we find even these appellant nos.2 and 3, original accused nos.3 and 4 deserve to be dealt with under the Probation of Offenders

Act. In addition to bond, they should be made to pay compensation under Section 5 of the Act.

36] As regards appellant no.1 – Bapu s/o Vithalrao Jadhav, the report of the probation officer shows that against him there were four earlier offences registered regarding which he has faced trials. The offences were under Sections 326, 504, 324, 323, 506 and also Section 354 of Indian Penal Code. There was a case under Section 135 of the Bombay Police Act which came to be closed. The report shows that in the IPC offences with which the accused was charged, in three matters the accused has been released.

37] No doubt the probation officer has mentioned that there is no earlier conviction against this appellant accused no.1 Bapu and for him also recommended that he may be dealt with under Section 4 (1) of the Probation of Offenders Act. However, looking to the fact that this accused had four earlier prosecutions against him out of which in three of the matters, there were criminal offences involving physical hurt, it appears that repeated filing of criminal cases has not deterred this accused from involving

himself in further crimes of physical assault. Probably he has developed an impression that nothing ultimately happens. Looking to the facts of the present matter where this accused no.1 led others from the front when he stopped the complainant asking him how much money he wants and why he had gone to his house and then attacked the complainant causing grievous hurt, we do not find that this appellant/accused no.1 Bapu s/o Vithalrao Jadhav deserves to be dealt with under the Probation of Offenders Act.

For the above reasons, we pass the following order.

A] Criminal Appeal No.596/2011 is rejected as far as regards appellant no.1 – Bapu s/o Vithalrao Jadhav is concerned. Bail bonds of this accused are cancelled. He shall surrender forthwith. The trial Court shall ensure that the sentence as passed against him is executed forthwith.

B] Criminal Appeal No.596/2011 as regards appellant no.2 – Laxman s/o Marotirao Baswant and appellant no.3 – Raju s/o Mohanrao Tak (original accused nos.3 and 5 respectively) is partly allowed. The sentence of

imprisonment and fine as imposed by the trial Court against these appellants is quashed and set aside. The conviction of these accused under Sections 147, 148, 324 read with 149 and under Section 325 read with 149 of Indian Penal Code is maintained. However, instead of sentencing them immediately to any punishment, it is directed that they shall be released on depositing compensation of Rs.25,000/- (Rupees Twenty Five Thousand Only) each under Section 5 and on their entering into bond under Section 4 (1) of the Probation of Offenders Act, 1958, with one surety each, to appear and receive sentence when called upon, during the period of one year next, and in the meantime, keep peace and be of good behaviour. The bond shall be executed before the trial Court within a period of 15 days from the date of this judgment and order. Till then the bail bonds of these appellants shall remain valid. In addition, supervision order under Section 4 (3) shall also be issued and the appellant no.2 – Laxman s/o Marotirao Baswant and appellant no.3 – Raju s/o Mohanrao Tak (accused nos.3 and 5) shall remain under the supervision of the probation officer to be named by the trial Court for a period of one year. The appellant nos.2 and 3 shall also enter into a bond with one surety each under Section 4 (4)

of the Probation of Offenders Act, 1958 and observe the conditions of the bond and shall not involve themselves in any criminal offence.

The amount of compensation directed shall be deposited in trial Court. The fine if paid earlier by these accused Nos.3 and 5, be adjusted in the compensation amount to be deposited. The amount of compensation, on deposit shall be paid to complainant Uttam Rambhau Oval. The trial Court shall secure the presence of appellant nos.2 and 3 for compliance of these orders and shall explain the terms and conditions of the orders and bonds to be executed. The appellant nos.2 and 3 shall appear before the trial Court on 5th October, 2015.

C] Criminal Appeal No.437/2014 stands dismissed for the reasons assigned in para 30 of the Judgment.

Sd/-

[A.I.S.CHEEMA, J.]

Sd/-

[S.S. SHINDE, J.]