

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.352 of 2007

1. Balgonda Daulata Patil,
Age 64 years, Occ.Agriculture.
2. Vidyyasagar @ Chotya Balgonda Patil,
Age 30 years, Occ.Agriculture.
3. Pradyumn @ Gotya Balgonda Patil,
Age 27 years, Occ. Agriculture.

All resident of Vasagade,
Tal. Palus, Dist.Sangli.
(All at present District Prison,Sangli.)

...Appellants.

versus

The State of Maharashtra.

...Respondent.

WITH

CRIMINAL APPEAL NO.215 OF 2008

The State of Maharashtra
Through API, Palus Police Station,
Taluka Palus, Dist. Sangli.

versus

Jangounda Daulata Patil,
Age 55 years, Occupation- Service,
R/o. Vaagade, Taluka Palus,
District Sangli.
At present resident of 12th Lane,
Sujata Park, Jysingpur,
District Kolhapur.

.....

Mr.P.R.Arjunwadkar,Advocate for Appellant No.1 in Criminal
Appeal No.352 of 2007.

Mr. Yug Mohit Chaudhary, Advocate for Appellant Nos. 2 and 3 in Appeal 352/2007.

Mrs.A.S.Pai,APP. for the State in both the appeals.

Mr.R.S.Kavle,Advocate for Respondent in Criminal Appeal No.215 of 2008.

.....

CORAM : SMT V.K. TAHILRAMANI, Acting
C.J.&
A.S. GADKARI, J.

Reserved on : 01st September 2015
Pronounced on: 20th November 2015.

JUDGMENT :(Per A.S.GADKARI, J.)

The appellants, original accused Nos. 1 to 3 have challenged the Judgment and order dated 9.3.2007 passed in Sessions Case No.128 of 2005 by the learned Additional Sessions Judge-II, Sangli thereby convicting the appellants under Section 302 read with Section 34 of the Indian Penal Code and sentencing them to under go imprisonment for life. The appellants have also been convicted under Section 324 read with 34 of the Indian Penal Code and have been sentenced to suffer Rigorous Imprisonment for 3 months. The appellants have also been convicted under Section 506 read with 34 of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for 2 months. The appellants have been further convicted under Section-201 read with 34 of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for 3 months. The Trial Court has

directed that all the substantive sentences to run concurrently.

By the same Judgment and order dated 9.3.2007, the Trial Court was pleased to acquit the original accused No.4 Jangonda D. Patil from all the charges framed against him.

The State of Maharashtra has preferred an appeal No.215 of 2008 against the acquittal of original accused No.4 Jangonda D.Patil from all the charges framed against him. The State of Maharashtra has therefore, impugned that part of the said Judgment and order dated 9.3.2007 acquitting the original accused No.4 Jangounda D. Patil from all the charges.

2) The facts which can be enumerated from the record and are necessary to decide the present appeal can briefly be stated as under:-

i) The date of incident is 17.3.2005 and the alleged incident took place between 7.00 to 7.45 p.m. That, the Appellant No.1 (accused No.1) Balgounda D. Patil and original accused No.4 Jangounda D.Patil (acquitted accused) are real brothers and they have two more brothers namely Appasaheb D. Patil (P.W.No.5) and Annasaheb D. Patil. Ashwinkumar (deceased) was the son of Annasaheb. The said four brothers were having ancestral land and there was a partition amongst the said brothers inter-se approximately 35 years ago. The land which came to the share of accused No.4-Jangounda was lying vacant

and fallow. There was a dispute between all the accused on one side and Annasaheb Patil on the other side on the point of way through the land and a suit pertaining to the same was pending in the Civil Court. Accused No.4 Jangounda D. Patil had given the land which had come to his share to accused No.1 Balgounda and his sons i.e. Appellant No.2 and 3 (Original Accused Nos. 2 and 3) for the purpose of cultivation.

ii) As there was a dispute pertaining to the way/passage through the said land Ashwinkumar (deceased) and his brother Ashishkumar (P.W.No.1) had filed a civil suit bearing Regular Civil Suit No.29 of 2005 against the appellant No.1-Balgounda and original Accused No.4 Jangounda on 1.3.2005 in the Court of Civil Judge, J.D., Tasgaon, District Sangli. In the said suit, an order of injunction was passed by the Trial Court. Prior to 3 to 4 days from the date of incident, the accused No.4 Jangounda had gone to Village Vasagade at the house of accused No.1-Balgounda D. Patil. There was a talk amongst the accused persons and it was decided that the land of accused No.4 to be cleared by removing bushes in the said land and if anybody obstructs for the same the said person be killed.

iii) That, on 17.3.2005 at about 7.00p.m. the work of removal of bushes with the help of excavator in the field of accused No.4 Jangounda was going on. Ashwinkumar (deceased)

and his wife Aarti (P.W.No.2) had come to the said village for attending the birthday function of the grand son of complainant (P.W.No.5) Appasaheb D. Patil. At about 7.45 p.m. the complainant P.W.No.5- Appasaheb and deceased Ashwinkumar were standing on the road near their house and were talking interse. At that time appellants came there and said to the deceased Ashwinkumar that why he was behaving in high handed manner and how is he concerned with their land. Ashwinkumar (deceased) told the appellants as to how they are concerned with it. The appellants started assaulting the deceased Ashwinkumar with the sword like weapon saying that they will teach him lesson. At that time the appellant No.1 Balgounda was instigating the appellant Nos. 2 and 3 to beat Ashwinkumar and to cut him into pieces. Due to the said assault Ashwinkumar (deceased) sustained injuries and he fell down. The complainant P.W.No.5 Appasaheb D. Patil tried to intervene in the said fight but he was also assaulted by the appellants. P.W.No.5 Appasaheb D. Patil was hit over his face, cheek and left arm. The appellant No.1 was carrying sickle in his hand. On hearing commotion, the family members of the complainant Appasaheb, Aarti (PW No.2) wife of deceased Ashwinkumar rushed to the spot and when they were also assaulted.

iv) P.W.No.5-Appasaheb thereafter lodged complaint with

the Police Station on 18.3.2005 at about 00.45 a.m. The said complaint was treated as First Information Report and CR bearing No.24/2005 under Sections 302, 323, 324, 504 read with 34 of the Indian Penal Code was registered. The Investigating Officer i.e. Police Sub Inspector Ashok Choudhari (P.W.No.11) took over the investigation. The dead body of Ashwinkumar(deceased) was brought to the Civil Hospital, Sangli. Dr. Smt. Archana Sharad Sawant (P.W.No.6) conducted the post mortem examination on the dead body. The post mortem report is at Exh.73. During the course of investigation P.W.No.11 PSI Shri Choudhary recorded the statements of various witnesses. He also recorded the spot panchanama. The weapons used by the appellants were discovered at their instance by effecting the necessary discovery panchanamas from appellant Nos. 1 and 2. After receipt of the necessary documents and after completion of investigation the Investigating Officer (P.W.No.11) filed charge sheet against the appellants in the Court of J.M.F.C., Tasgaon, Sangli on 15.6.2015 for the offence punishable under Section 120B, 201, 302, 323, 324 and 506 read with 34 of the Indian Penal Code.

v) The learned Judicial Magistrate First Class, Tasgaon committed the case to the Court of Sessions as contemplated under Section 209 of the Criminal Procedure Code. After

committal of the case, the Trial Court on 1.7.2005 framed the charge below Exh.6 against the appellants and original accused No.4 Jangounda D. Patil under Sections-201, 302, 323,324,506 read with 34 of the Indian Penal Code and under Section 120-B read with 34 of the Indian Penal Code. The contents of the said charge were read over and explained to the accused persons in vernacular language to which they pleaded not guilty and claimed to be tried. The defence of the appellants was of total denial. During the course of trial the appellants under Section 294 of the Criminal Procedure Code admitted the documents such as Inquest Panchanama dated 17.3.2005 (Exh.22), Panchanama of seizure of clothes of deceased dated 18.3.2005 (Exhibit-23), Advance Death certificate of deceased Ashwinkumar (Exh.74) and the spot panchanama dated 18.3.2005 (Exh.76).

3) The prosecution in support of its case examined in all 11-witnesses. The learned Trial Court after recording the evidence and after hearing the parties to the said case was pleased to convict the appellants as stated herein below. By the same impugned Judgment and order dated 9.3.2007 the Trial Court was pleased to acquit the original accused No.4 Jangounda D.Patil. As stated above the State of Maharashtra has preferred Appeal No.215 of 2008 against the acquittal of the said original accused No.4 Jangounda D. Patil.

4) Heard Dr. Yug Mohit Chaudhary, learned counsel for the appellant Nos. 2 and 3, Shri. P .R. Arjunwadkar, learned counsel appearing for Appellant No.1 and Mrs. A.S.Pai, the learned A.P.P. for the State and with the assistance of the learned counsel appearing for the respective parties we have perused the entire record pertaining to the present case. The learned Counsel for the Appellants advanced various submissions in detail to which we will deal in the later part of this judgment.

5) With a view to appreciate the submissions advanced by Dr. Chaudhary and Mr. P.R.Arjunwadkar, learned counsel for the appellants and Mrs. A.S.Pai, learned A.P.P. for the State, it is necessary to advert in brief, the evidence of prosecution witnesses.

6) P.W.No.1 is Ashishkumar Annasaheb Patil the brother of victim. Ashishkumar Patil (P.W.No.1) in his testimony has stated that accused No.1 Balgounda and accused No.4 Jangounda are his paternal uncles. Appellant No.1 original Accused No. 4, his father and one Appaso were the brothers inter-se. Appellant Nos. 2 and 3 are his cousin brothers and are the sons of Appellant No.1 Balgounda. Deceased Ashwinkumar was his real elder brother. Deceased Ashwinkumar was teacher at Village Tardal but was residing at Sangli along with his wife. That, his father and his brothers i.e. his uncles were residing separately

since the year 1980. His father was a S.T. Driver at Miraj. Accused No.1 and Appaso were the farmers. Original Accused No.4 Jangounda was Bank Inspector at Gadhinglaj Co-op. Sugar Factory. Since the year 1980 there was a partition of the agricultural land amongst the said four brothers. About 16 Gunthas of land was in common usage between the said four brothers. Out of that 16 Gunthas of land 4 Gunthas was purchased by original accused No.4 Jangounda from the Appellant No.1 Balgounda Patil. When Appasaheb Patil was constructing a cattle shed on the common land, original accused No.4 Jangounda D. Patil had filed a civil suit in Tasgaon Court against Appasaheb Patil and Annasaheb Patil pertaining to the common land. That, all those suits are still pending. P.W.No.1 has deposed that he along with others filed Regular Civil Suit No.29/2005 against Balgounda D. Patil (Appellant No.1) and Jangounda D. Patil (Original Accused No.4) restraining them from constructing way going towards the land bearing Gut No.624 from Gut No.625A. The Civil Court had granted status quo order in favour of P.W.No.1. That the land of original accused No.4 was fallow land. As the Civil Court had passed the Status quo order in that suit both the Appellant No.1 and original Accused No.4 were annoyed against P.W.No.1 and his family members.

P.W.No1 has deposed that on 17.3.2005 was the birth

day of his nephew Ravikiran and hence, P.W.No.1, his wife, Ashwinkumar (deceased) and his wife Aarti (P.W.No.2) had been to village Vasagade to celebrate the birthday. At about 7.00p.m. on that day while P.W.No.1 was present at his field (Mala) his brother Ashwinkumar (deceased) came to him. At that time one excavator had been to the land of accused No.4 Jangounda Patil for removing the trees (shurbs).The said excavator was removing the trees and keeping the same on the way and was also digging the same. P.W.No.1 and Ashwinkumar (deceased) went there and asked the driver of the excavator to stop the work and not to dig the way as there is an order passed by the Civil Court. P.W.No.1 thereafter snapped one photograph. Then driver of the excavator stop the work and went to inform his employer. P.W.No.1 and Ashwinkumar (deceased) returned to the field (Mala) and decided to go to the police station after taking xerox copy of the stay order of the Court. P.W.No.1 went to Bhilwadi for taking xerox and his brother Ashwinkumar (deceased) went to his house at Vasagade for keeping the milk pot. P.W.No.1 was waiting for his brother Ashwinkumar for about 20 to 25 minutes and thereafter gave a call on his mobile. As nobody accepted the said phone call P.W.No.1 gave a call on the telephone at their house at Vasagade when Anita (PW-8) wife of his elder brother informed him that appellants assaulted his brother Ashwinkumar and

Appasaheb Patil by swords, scythe and sickle and they were shifted to the dispensary of Civil Hospital, Sangli. P.W.No.1 therefore, rushed to the Civil Hospital Sangli. He saw that his brother Ashwinkumar had suffered injuries on his person. That, while taking treatment Ashwinkumar succumbed to the injuries. The statement of P.W.No.1 was recorded by the police on 18.3.2005.

P.W.No.1 was cross examined at length by the appellants. In his cross examination P.W.No.1 has admitted that original accused No.4 Jangounda Patil was in the service of Maharashtra State Co-op. Bank and he was at Mumbai. That, there was talk between his brother and the driver of the excavator for about five minutes. That, the distance between Bhilwadi Police Station and the place of zerox machine is about 50ft. He did not find it necessary firstly to approach the police station instead of going to hospital. He had not taken police to show the place where the excavator was working. That excavator had worked for about half an hour. At about 7.45 p.m. Ashwinkumar (deceased) returned to village after bringing milk. This witness had denied the suggestion that he himself and Ashwinkumar (deceased) assaulted the driver of excavator. He has further admitted that in the night the police had been to Civil Hospital, Sangli. He did not inform to the police about the

incident. He has admitted that he is not the eye witness to the actual incident.

7) P.W.No.2 is Smt. Aarti Ashwinkumar Patil- wife of deceased Ashwinkumar. P.W.No.2 has deposed that deceased Ashwinkumar was working as teacher in Village Tardal. This witness has also stated about the enmity between the accused persons on the one hand and the deceased and his family members on the other hand over the right of way. P.W.No.2 has further deposed that on 17.3.2005 she had gone to Village Vasagade for celebration of the birthday of Ravikiran son of Mahavir i.e. husband of P.W.No.8 Anita Patil. The birthday celebration was over at about 5.30p.m. At about 6.30p.m. her husband was going to the field for bringing the milk and then left the house. Her husband returned at about 7.45p.m. with milk. Her husband told her that they will have to go to Sangli immediately. At that time her husband received call on mobile phone and therefore, he went outside the house for talking on it. Her cousin father-in-law Appasaheb Patil was also standing there. At that time P.W.No.2 and other family members of her family heard hue and cry and therefore, P.W.No.2, Smt. Sushila (cousin mother in law of P.W.No.2) and Smt. Anita (P.W.No.8) cousin sister in law of P.W.No.2) came out of the house. They saw that Appellant Nos. 1 to 3 were abusing her husband and threatened

him. At that time her husband was keeping his mobile hand set inside the cover. Appellant No.3 Pradyumn gave blow of scythe which he had hidden under the front portion of his shirt, on the neck of her husband. At the same time, appellant No.2-Vidyasagar @ Chotya started giving blows of the sword on the person of her husband. Appellant No.1-Balgounda had also given blows with the help of sickle on the person of her husband. Her cousin father-in-law Appasaheb Patil tried to save her husband but the appellant No.2 Vidyasagar @ Chotya assaulted the Appasaheb Patil with sword on his face and hands. Her cousin mother-in-law was shouting that her son was no more. At the same time P.W.No.2 was requesting appellant Nos. 2 and 3 not to assault her husband as he was having two children but the appellants did not stop. At that time, appellant No.1 Balgounda pushed her by holding her hair. P.W.No.3- Sushila and P.W.No.8- Anita tried to help her husband but accused appellant No.2 assaulted with the help of sword on the finger of P.W.No.8. That, appellant No.1 Balgounda was insisting appellant No.2 Vidyasagar @ Chotya and appellant No.3 Pradyumn @ Gotya to finish her husband. Due to the said assault, her husband sustained injuries and collapsed on the ground. Accused persons thereafter left the place. P.W.No.2 has further deposed that while her husband was taking treatment at Civil Hospital, Sangli he

succumbed to the injuries at 10.00p.m. and Doctor declared him dead. Police recorded her statement on the next day in her field.

In the cross examination of this witness, she has admitted that after the birthday ceremony her deceased husband, her brother-in-law Mahavir and children took dinner. After dinner her husband went to the field for bringing milk. That, she had also taken dinner before deceased went to bring the milk. This witness has further admitted that there were blood stains on the clothes but did not produce clothes before the police. An omission to the effect that though she had stated to the police about all the weapons only 'sword' has been mentioned in her statement. No other material which is beneficial to the appellants has further been elicited in her cross examination.

8) P.W.No.5 is Appasaheb D. Patil- real brother of appellant No.1-original accused No.4 and uncle of deceased Ashwinkumar. P.W.No.5 in his testimony has stated that appellant No.1-and original accused No.4 are his real brothers while appellant Nos. 2 and 3 are his cousins who are sons of appellant No.1. That, they all were residing separately. Ashwinkumar (deceased) was the son of Annasaheb Patil. Annasaheb was his real brother. That, as there was partition amongst the brothers on the basis of the suit filed by appellant

No.1, all the brothers were residing separately since the year 1980. He was not in talking terms with appellant No.1 and original accused No.4 Jangounda. That, the original accused No.4 was in service and was residing at Jaysingpur. That, the rest of the accused persons were his neighbors at Vasagade. Deceased-Ashwinkumar was residing with his wife and children at Sangli. His brother Annasaheb was residing in his field. Ashwinkumar (deceased) was residing in the house of P.W.No.3. That, the incident in question took place on 17.3.2005. On 17.3.2005 there was birthday of Ravikiran his grand son. Ravikiran was the son of Mahavir. Ashwinkumar (deceased), his wife and children were present to attend the said birthday ceremony. On that day, at about 7.00p.m. P.W.No.5 had gone to his field and saw that the work of excavation was going on in the field of original accused No.4. After sometime, he returned back to his house. Then, Ashwinkumar went to the field to bring milk. Ashwinkumar returned and told to P.W.No.5 that he had asked the driver of the excavator not to dig the way. After that Ashwinkumar (deceased) was talking on his mobile phone outside the house at about 7.00p.m. At that time, the appellants came there and asked Ashwinkumar as to why he was so aggressive when he had no concern with the land. Ashwinkumar (deceased) told the appellants that they had no concern with it. The appellants

threatened Ashwinkumar (deceased). Then, appellant Nos. 2 and 3 started assaulting with the help of weapon like sword to Ashwinkumar (deceased). At that time, appellant No.1 Balgounda instigated the appellant Nos. 2 and 3 to cut Ashwinkumar in pieces. While appellant Nos. 2 and 3 were assaulting to Ashwinkumar (deceased), he fell on the gutter. After seeing that P.W.No.5 tried to rescue Ashwinkumar and therefore, he held the sword in his hand which was with appellant No.2. At that time, appellant No.3 gave blow of sickle on his left hand and appellant No.1 assaulted him with sickle on the face. P.W.No.5 further deposed that Ashwinkumar was lying on the ground, appellant Nos. 2 and 3 assaulted him by weapons like sword and sickle. That, his wife, wife of Ashwinkumar (P.W.No.2), wife of Mahavir (P.W.No.8) rushed outside the house. In the said incident, wife of Mahavir (Anita), P.W.No.8 suffered injury to the last finger of her left hand. That, appellant No.1 pushed his wife and the wife of Ashwinkumar. Then his son Mahavir came there with whom the appellants started scuffling therefore, Mahavir ran away. This witness has identified the weapons namely one big sword, one small sword and sickle in the court.

In the cross examination, this witness has stated that he had never seen those weapons during the course of investigation. That, he had not given the description of each

weapon to the police. That, deceased Ashwinkumar was assaulted with the help of all the three weapons when he was standing at the first instance and at that time he was injured and there was profused bleeding. P.W.No.5 has further admitted that there is no necessity to go through the land of any of the accused persons for reaching to his land. That, for some period the land of accused No.4 was uncultivated before the death of Ashwinkumar. That, excavator was in the field of Jangounda and was at a distance of 50ft. from the vasti of Annasaheb Patil- father of deceased Ashwinkumar. That, the excavator was brought just to cut the shrubs and other material. In the cross examination this witness had admitted that his son Mahavir and deceased Ashwinkumar and others did not take dinner after the birthday function of his grand son was over. In further cross examination this witness had admitted that he was an accused in one criminal case in respect of kidnapping and abduction of a woman and a minor girl and he was convicted in that case. That, he had undergone imprisonment at Kalambe Jail. (It appears to us that this antecedent of P.W.No.5 has been brought on record by the appellants with a view to show that he is not a man of repute and in fact suffers from moral turpitude). P.W.No.5 has further admitted that accused No.2 Vidyasagar was holding long weapon and P.W.No.5 held the same by both hands, at that time accused

No.2 snapped weapon from his hands, accused No.2 succeeded from snapping the weapon from his hands. That during that scuffle he suffered injuries to his both palms. P.W.No.5 has admitted that he has not shown those injuries to the Doctor. Certain other omissions and contradictions have been brought on record by the appellants which according to us are not material while deciding the present appeal.

9) P.W. No.8 Smt. Anita Mahavir Patil is the sister-in-law of deceased Ashwinkumar and eye witness to the incident. P.W.No.8 in her testimony has deposed about the alleged conspiracy which was hatched between the accused persons and the original accused No.4 Jangounda in the house of appellant No.1. However, we may note here itself that Trial Court has disbelieved the theory of conspiracy in Paragraph 51 of its Judgment and therefore, we refrain ourselves from narrating the same in the testimony of P.W.No.8 Anita. P.W.No.8 has further deposed that deceased Ashwinkumar and his wife and their children had been to her house for the function of birthday of her son. Her husband Mahavir was not examined. Ashwinkumar took the food and thereafter Ashwinkumar (deceased) left the house to bring the milk from the field. That, at about 7.45p.m. Ashwinkumar returned to house after collecting milk from the field. After keeping milk in the house he asked his wife that they will have to

go to Sangli. At that time, Ashwinkumar received call on the cellphone and he went outside the house where his father-in-law Appasaheb was standing. At that time she heard hue and cry. P.W.No.8, her mother-in-law namely Smt. Sushila, Aarti wife of deceased Ashwinkumar came out of the house and they saw the dispute between the appellants and the deceased was going on. At that time appellant No.2 Vidyasagar threatened Ashwinkumar (deceased) and took out sword which he had hidden under the shirt and gave its blows to Ashwinkumar. At the same time, appellant No.2 also started assaulting with sickle to Ashwinkumar. Appellant No.1 Balgounda was also assaulting Ashwinkumar with the help of sickle. Hence, P.W.No.8, her in laws and the wife of her brother requested the appellant Nos. 2 and 3 not to assault Ashwinkumar. While she was helping Ashwinkumar, appellant No.2 Vidyasagar inflicted one blow of sword on the finer of her left hand. At that time appellant No.1-Balagounda was instigating appellant Nos. 2 and 3 to finish Ashwinkumar. Appellant No.2 also pulled her hair and pushed aside. That, appellants assaulted her father-in-law on his left cheek and over left hand. Ashwinkumar was profusely bleeding to the said injuries and he fell in the gutter. In spite of the same the appellants were assaulting deceased Ashwinkumar. That, after some time, her husband Mahavir came to the spot and took

P.W.No.8 in the dispensary of Dr. Suhas Patil.

In the cross examination this witness had admitted that there was no talk between herself and her husband while they were going to the hospital. That, the telephone which was at her residence was in working condition at the relevant time and neither herself nor her husband informed about the incident to the police. P.W.No.8 has further admitted that other persons from the Village were not present at the place of incident. This witness has categorically denied that on 18.3.2005 at about 6.00p.m. electric supply was cut off. This witness has further denied that there was rush in the said evening near the hair cutting saloon which was near to her house. Apart from what is stated herein above, in our view, minor discrepancies and omissions which were brought on record by the appellants, no other useful material has been elicited from the lengthy cross examination of this witness.

10) P.W.No.9 is Prakash Balgounda Patil an independent witness to the incident. P.W.No.9 Prakash in his testimony has stated that he was permanent resident of Village Vasagade. He knew all the appellants and other witnesses. That, on 17.3.2005 at about 7.30p.m. he was sitting on the Katta of Jain Vasti of Village Vasagade. At that time, accused Nos. 2 and 3 were hurriedly walking. After 10 to 15 minutes he heard hue and cry

and saw that there was scuffle going on the road in front of the house of Appasaheb (P.W.No.5). At that time, he saw accused Nos. 1 and 2 assaulting with the help of sword and sickle to deceased Ashwinkumar. Accused No.1 was assaulting Ashwinkumar with sickle and accused No.2 Vidyasagar was assaulting with the help of sword and accused Pradumnya was assaulting with the help of sickle to the Ashwinkumar. Ashwinkumar fell near the gutter. At that time Appellant No.1 was instigating his sons i.e. appellant Nos. 2 and 3 by saying not to leave and to finish Ashwinkumar. P.W.No.9 has stated that he saw the said incident from a distance of about 14 to 15 ft. He did not rescue Ashwinkumar as the appellants were holding weapons and therefore, he frightened. He has further deposed that he saw the incident for about 2 to 3 minutes. After the assault accused ran away. He then went to Ashwinkumar and saw that Ashwinkumar was profusely bleeding and having injuries on his body. Ashwinkumar was having injuries on his stomach, chest, waist and on the head. That, one Appasaheb (P.W.No.5) and one Kaku (aunt) was also injured.

In the cross examination this witness has stated that he was sitting in the Mandir which is surrounded by other houses. That, it was Jain temple. The height of the said wall is about 6 to 7-ft. That, if a person has to go to the place of the incident from

the temple he has to go from the eastern side of the door then he has to proceed towards the southern side on the north south road then he had to proceed further east west and has further to meet east west road and then to at a distance of about 60 to 70 ft. from the west side. P.W.No.9 further admitted that he was in the temple at about 7.30p.m. when electric supply was cut off.

11) P.W.No.3 is Harishchandra Shivaji Patil, a panch witness to the discovery panchanama at the instance of appellant No.1 wherein a scythe was discovered from him. The said discovery panchanama is at Exh.63. Appellant No.1 thereafter in presence of P.W. No.3 also pointed out the place where he burnt the clothes which were on his person at the time of commission of offence. At the said place, police found ash mixed with soil. The said panchnama is at Exh.64. P.W.No.4 is Bajrang Dhondiram Patil a Panch witness to discovery of sword and sickle at the instance of appellant No.2 Vidyasagar @ Chotya. The said panchanama is at Exh.67. Accused No.2 -Vidyasagar @ Chotya also pointed out the place where he burnt the clothes which were on his person at the time of commission of offence. The police found ash mixed with soil at the said place. The said panchanama dated 24.3.2005 is at Exh.68.

12) P.W.No.6 is Dr. Archana Sharad Sawant, Medical officer who examined P.W.No.5 Appasaheb Daulata Patil and also

conducted the post mortem examination of Ashwinkumar Anna Patil (deceased). P.W.No.6 in her testimony has deposed that she was then working as Medical Officer and was attached to the Civil Hospital, Sangli. That, on 17.3.2005 at about 8.30p.m. she examined Appasaheb who was brought by his daughter in law Aarti Patil with the history of assault at about 7.45 p.m. at Village Vasagade with sword. She found that the said patient was conscious. She found following injuries on his person.

- 1) CLW over right cheek, admeasuring 6x1x1 cm. Bleeding present.
- 2) Abrasion over the left arm laterally 3x1 cm. and it was red in colour.

She found that there were no bone injuries to the said Appasaheb Patil. She opined that the cause of injury was hard and blunt object and the age of the injuries was within six hours. The nature of injuries was simple. Accordingly, she issued the Medico Legal Certificate, Exh.72.

On the same day P.W.No.6 also examined one Mr. Ashwinkumar Anna Patil who was brought by his wife Aarti Patil in the hospital. She narrated the history of assault at about 7.45p.m. with sword at Village Vasagade. On examination she found general condition of the patient was poor, semi conscious pulse 140 per minute and the blood pressure was 70. She examined him and admitted in surgery department. The said

patient while taking treatment expired at about 10.00 p.m. She received corpse of Ashwinkumar at about 12.00 in the mid night and she performed autopsy. On external examination she found following injuries on his person.

- 1) Incised wound over the left ear of size 14x5x4c. deep splitting whole of the external and middle ear upto inner ear read elliptical.
- 2) Incised wound 10x4x6 cm, size just below the left ear extending from angle of mandible posteriorly upto mid-line cutting occipital bone, cervical vertebrae No.1 and 2 extending upto spinal cord, red elliptical.
- 3) Incised wound of size 4x2x2 over left occipital region red.
- 4) Incised wound of size 8x2x2 extending from thyroid cartilage upto lateral border of neck left side cutting jugular veins red, elliptical.
- 5) Incised wound over left shoulder 9x4x1 cm. size red.
- 6) Incised wound of 4x2x2 cm. size near left shoulder on backside, red.
- 7) Incised wound 7x2x2 cm. over lateral aspect of neck near left shoulder elliptical red.
- 8) Incised wound of 2x2x2 cm. over left arm laterally red.
- 9) Incised wound of 5x1x1 size at left elbow red.
- 10) Sutured wound at base of index middle ring finger of 6 cm. length dorsally left hand.
- 11) Sutured wound at base of left thumb dorsally

of 4 cm. length.

12) Sutured wound over left side of chest of 3cm. in length in the 6th inter costal space (on explanation this would have extended left lung pleura).

13) Sutured wound over left chest of 2cm. length would be no.12 in 5th inter costal space.

14) Incised wound over left back of 3x2x2 cm. in 5th inter costal space, red.

15) Incised wound of 3x2x2 cm. size at the interscapular region, red.

16) Incised wound of 6x2x1 cm. size at left interior angle of scapula, red.

17) Incised wound of 1x1x1 cm. at right interior angle of scapula, red.

18) Sutured wound over right arm of 3 cm. length laterally.

19) Incised wound near right shoulder of 4x2x2 cm. red.

20) Sutured wound near right hand at base of thumb extending upto ring finger of 4 cm. length, palmar side, red.

21) Incised wound on right forearm 3x1x1 cm. ventral side, red.

22) Horizontal stab injury over right hypochondriac region of size 9x5 peritoneum deep traversing stomach, Omentum, liver, elliptical oozing present.

23) Incised wound of size 3x2x2 cm. at lumbar region, right side, red.

Age of injury : Within 12 hours.

Object causing: Injury Nos. 12 and 22 pointed sharp edged object.

Rest injuries : Sharp edged object.

On the internal examination she found following injuries.

1) Evidence of brain stem injury, transected partially.

2) Regarding the Thorax, the left side lung and pleura damaged at the level of 6th and 7th inter costal space and there was evidence of haemothorax of left side corresponding to injury No.12 and 13.

3) Regarding abdomen, there is bomoperitonecism left present. in the column of stomach, evidence of stab over anterior wall of stomach of 4x3 cm. size extending over peritoneum and anterior surface of left lobe of liver corresponding to injury no.,22. Regarding liver, there is incised wound over anterior surface of left lobe of 4x2 cm. corresponding to injury no.22. Rest organs were oale. Regarding the spine and spinal cord there is palpable fracture over C-1 and c-2 vertebra with partial transaction of spinal cord at this level.

13) P.W.No.6 opined that probable cause of death was "Shock due to injuries to vital organs".She prepared the memorandum of post mortem examination of Ashwinkumar (deceased) at Exh.73. She further opined that injuries mentioned in column No.17, 12 and 22 were vital injuries. Injury Nos. 12 and

22 were stab injuries. She has further stated that all the said injuries at Sr. Nos. 12 to 22 can be possible due to the said three weapons before the court. She has further stated that Injury Nos. 2 and 4 can be possible by weapon Article 12 i.e. sickle . Injury No.12 can be possible by weapon- Article No.11 i.e. sword. Injury N.22 can be possible by sickle Article No.14. P.W.No.6 also produced diagram along with certificate which is at Exh.73.

In the cross examination P.W.No.6 has admitted that injury Nos. 1 and 2 are not possible by sharp edged weapon. She has further admitted that Injury No.22 can be possible by any curved pointed weapon. She has further stated that she had not mentioned regarding the contains of stomach in column No.21 in the post mortem notes.

14) P.W.No.7, Doctor Anil Suryawanshi had examined P.W.No.8 Anita Mahavir Patil and her husband Mahavir Appasaheb Patil. It is to be noted here that as the prosecution has not examined Mahavir Appasaheb Patil, we do not feel necessary to narrate the injuries caused to him and the treatment given by P.W.No.7. P.W.No.,7 has deposed that on 19.3.2005 at about 10.30p.m. one Anita Mahavir Patil was brought by police along with police yadi. Smt. Anita complained about the history of assault. On examination P.W.No.7 found that her general condition was good. He found following injuries on her person.

- 1) CLW to the left hand fourth finger measuring 3x1x1cm. having 3 stitches.
- 2) CLW to the left third finger measuring 3x1x1 cm. having three stitches.
- 3) CLW injury to left second finger measuring 1x1/2 c.m. deep to skin.

The nature of injuries are simple and they are within 48 hours and cause of injury was hard and blunt object.

Accordingly. he issued Medical Certificate which is at Exh.79. He has further deposed that Anita was already treated and hence there were three stitches on injury No.2.

In the cross examination this witness has admitted that injuries mentioned in Certificate Exh.79 are possible if a person was working in the field.

15) P.W.No.10 Ganpat Dinkar Pingle, Assistant Police Inspector then attached to Palus Police Station. P.W.No.10 has deposed that on 13.8.2005 at about 9.45p.m. he received the message from constable of Vishrambag Police Station who was attached to Civil Hospital, Sangli that there was scuffle at Village Vasagade and therefore, P.W.No.10 directed to Police Sub Inspector Choudhary to visit the Civil Hospital, Sangli. P.W.No.10 came to know that offence was registered at Palus Police Station about the incident which took place at Village Vasagade. Police Sub Inspector Shri. Choudhary started investigation in the said

crime bearing No.24/2005. P.W.No.10 and drew the memorandum panchanama Exh.62 of accused No.1 Balgounda Patil wherein he expressed his willingness to produce the weapon and to show the place where he burnt the clothes which were on his person at the time of commission of offence. In pursuance of the memorandum statement (Exh.62) accused No.1 Balgounda Patil produced a sickle (Article A). Accordingly, P.W.No.10 effected memorandum panchnama Exh.63. Accused No.1-Balgounda Patil also showed the place where he burnt the clothes and the ash which was lying at the said place was attached under panchanama which is at Exh. 64. In his cross examination no material which is useful to the appellants has been elicited.

16) P.W.No.11 is Ashok Shankarrao Choudhary, Police Sub Inspector the Investigating officer of the present crime. P.W.No.11 has deposed that he was then attached to Palus Police Station. At about 10.30 p.m. on 17.3.2005 API-Pingle (P.W.No.10) informed him that at Village Vasagade one Ashwinkumar and Appasaheb Patil were beaten and they have been taken to Civil Hospital, Sangli. API. Paingle (P.W.No.10) directed him to proceed there. P.W.No.11 along with his writer and two constables went to Civil Hospital, Sangli at about 11.15p.m. At that time he saw Appasaheb Patil (P.W.No.5) in injured condition sitting in the

casualty department. P.W.No.11 enquired with Appasaheb Patil when P.W.No.5 informed him that Ashwinkumar was no more. At that time he came to know that police from Vishrambag Police Station were performing inquest panchanama. Thereafter, he took his complaint which is at Exh.70. P.W.No.11 in his testimony has further deposed about the various steps which he had taken during the course of investigation and upto submitting the charge sheet in the Court.

In his cross examination P.W.No.11 has admitted that he interrogated Prabhavati Suryawanshi, Kalpana Chandrakant Suryawanshi and Vijaya Narayan Suryawanshi who were neighbours of deceased and recorded their statements being eye witnesses to the incident. He has further admitted that he sent the muddemal articles to the Chemical Analyer but till then it was in the custody of muddeal clerk. No other material beneficial to the appellants has been brought on record in the further cross examination.

17) Mr. Chaudhary, learned counsel appearing for the appellants submitted that the testimony of P.W.Nos. 2 and 8 is not reliable as these two witnesses in their testimony have deposed that the victim had taken food prior to the incident but the medical evidence is contrary thereto. He submitted that Column No.20 of the post mortem notes is silent about the same.

He submitted that in almost all the criminal cases, it is invariably mentioned in Column No.20 (stomach contents) of the post mortem notes about the existence of the food contained therein. He further submitted that it is also generally mentioned whether the food is in semi digested or digested state and yet this is one exceptional case . That procedure has been departed for the best reasons known to the prosecution. He therefore, contended that prosecution witnesses namely P.W.No.2 and P.W.No.8 who have stated that the deceased had taken food prior to the incident are not telling the truth before the court and therefore, safe interference can be drawn that the deceased in fact did not take food in their presence. He further contended that as the testimony of these two witnesses is contrary to the medical evidence and in particular, the noting of the Medical Officer in Column No.20 of the post mortem notes it cannot be relied upon. In support of his contention, he relied on the following decisions of the Supreme Court

a) Chandrakant Balakrishna Gadankush and anr. Vs.

State of Maharashtra Criminal Appeal No.529 of 2006
decided on 30th March 2015 (Para 15 to 18)

b) State of Uttar Pradesh vs. Ashok Kumar and ors.

(1979) 3 SCC 1 (Para 5).

c) Bhimappa vs. State of Karnataka (AIR 1993 SC 1469)

AIR 1993 SC 1469 (Para 7 & 8).

- d) Moti and others vs. State of UP (2003) 9 SCC 444 (Para 14) (2003) 9 SCC 444.

It is to be noted here that P.W.No.6 Dr. Archana Sawant in her cross examination has only stated that she had not mentioned regarding the contains of stomach in Col. NO.20 of the post mortem notes. The record discloses that the appellants have failed to bring on record the fact that stomach was in fact empty at the time of conducting the post mortem. There is no such statement or any admission given by P.W.No.6 Dr. Archana Sawant. in the entire testimony. We are of the considered opinion that it can utmost be treated as an error on the part of P.W.No.6 i.e. Medical Officer who conducted autopsy in not mentioning the contents in the stomach. However, the benefit of the same cannot be given to the appellants by disbelieving the other version of the said two eye witnesses.

18) The learned counsel for the appellants thereafter contended that the testimony of P.W.No.8 Anita Patil is not reliable. Though she mentions the presence of her husband Mr. Mahavir, the said Mahavir has not been examined by the prosecution and therefore, adverse inference has to be drawn about the said fact. A minute perusal or the scrutiny of evidence of Anita Patil leads us to believe that her testimony is truthful and

she is reliable witness. Her presence at the scene of offence was very natural and her evidence can safely be relied upon.

19) The learned counsel for the appellants thereafter submitted that the testimony of P.W.No.9, an independent witness cannot be relied upon as other witnesses namely P.W. Nos. 2, 5 and 8 have not deposed about his presence either at the time of commission of the offence or soon thereafter and therefore, P.W.No.9 Prakash Patil is a got up witness. We are of the considered opinion that even if we do not take into consideration the ocular evidence of Prakash Patil (P.W.No.9), the testimony of P.W.No.2 Aarti Patil, P.W.No.5 Appasaheb Patil and P.W.No.8 Anita Patil is trust worthy and reliable and the same is sufficient to base conviction of the appellants.

20) The learned counsel for the appellants then contended that the testimony of P.W.No.5-Appasaheb Patil is contrary to the medical evidence. He claims that he was assaulted by sword and sickle however, the medical evidence clearly shows that the injuries caused to P.W.No.8 are not possible by sharp weapon produced before the court. That, there was presence of incised wounds on his palms which she claims to have caused when he held the sword of accused No.2-Vidyasagar @ Chotya. The learned counsel further contended that P.W.No.5 Appasaheb Patil admitted in his cross examination

that he did not mention anything about the sword to the doctor at the time of his treatment. The learned counsel therefore, submitted that when the ocular evidence is completely inconsistent with the medical evidence, it cannot be relied upon and in support of his contention the learned counsel relied upon the following two authorities of the Supreme Court.

a) Mani Ram and others vs. State of U.P.

1994 Supp(2)SCC 289 (Para 9)

b) State of Rajasthan vs. Bhanwar Singh

2005 SCC (Cri.) 73 (Para 6).

After minutely scrutinizing the evidence of P.W.No.5, it appears to us that the version about holding of sword in his hands at the time of attack by accused No.2 Vidyasagar @ Chotya, is an exaggerated version. It is by now settled position of law that many a times the injured witness try to magnify the incident with a view to gain sympathy. However, we are of the considered opinion that if the exaggerated version of P.W.No.5 is deleted from his testimony his other ocular evidence of the facts which took place at the time of incident can safely be relied upon.

21) The learned counsel for the appellants thereafter would contend that in the present case it is the grave and sudden provocation which had led to the occurrence of the present crime

and therefore, the appellants cannot be held guilty of an offence under Section 302 of the Indian Penal Code but at the most can be convicted under Section 304 Part II of the Indian Penal Code. In support of his contention he relied upon following three decisions of the Supreme Court.

a) Akhtar vs. State

AIR 1964 All 262 (Para 11)

b) Baba @ Gulaam Raza Hussain Hadi vs. State of Maharashtra

2000 (1) Mah.L.J. 164 (Para 13A)

c) Sukhbir Singh vs. State of Haryana

AIR 2002 SCC 1168 (Para 19)

21) We have minutely perused the evidence of the eye witnesses namely P.W.No.2 Smt. Aarti Patil wife of the deceased Ashwinkumar, P.W.No.5-Appasaheb Patil injured witness, the brother of accused No.1 and No.4, P.W.No.8 Anita Patil and P.W.No.9 Prakash Patil. As stated herein above, even if, we keep aside the evidence of P.W. No.9 Prakash Patil, according to us the testimony of P.W.Nos. 2, 5 and 8 is fully reliable and trust worthy. It is the prosecution case that several litigations were pending between the appellants and the victim's family. The previous history of litigations has been aptly narrated by P.W.No.1 Ashishkumar Patil the brother of the victim. The incident which

occurred at about 7.30p.m. on 17.3.2005 has to be considered in the background of this long standing family dispute between the said two groups over their land. P.W. No.1-Ashishkumar stopped the work of excavator on the land of accused No.4 Jangounda Patil after there were talks between the deceased and the driver of the excavator for about 5 minutes and thereafter the driver left to inform his employer in that behalf. P.W.No.5 Appasaheb Patil has admitted that neither he nor his brother had any concern with the land where the excavation work was going on. In our opinion, the stopping of the work by the victim Ashwinkumar on the land owned by the accused persons would have caused the basic provocation. P.W.No.2 Aarti in her deposition has stated that on the day of incident at about 7.30p.m. her husband came from the field with milk pots and told her that they have to go to Sangli immediately. This shows that all was not well in the field and there was every possibility that victim had not only obstructed the driver of the excavator from doing the work but there had been something more than mere obstruction in the field, as was suggested by the defence to P.W.No.1 in his cross examination. In our considered opinion a conjoint reading of the evidence of P.W. Nos.1,2,5 and 8 demonstrate that, as the victim Ashwinkumar stopped the work of excavation of the land to which he was not having any

concern, the appellants got enraged for the same and as soon as the driver of excavator informed the said fact to the appellants they rushed to the house of deceased Ashwinkumar with a view to question him of his said act. The testimony of P.W.No.5 Appasaheb Patil also demonstrates that the appellant Nos. 1 to 3 after coming to the spot first questioned the victim Ashwinkumar as to why he was so aggressive as he had no concern with the land to which Ashwinkumar replied them that the appellants have no concern with it and thereafter there were alterations amongst them and the incident of assault ensued thereafter. In the present case, the prosecution did not examine the driver of the said excavator to bring on record the exact incidence which took place in the field. However, after taking into consideration the facts of the present case, we are of the opinion that due to the threats administered by deceased Ashwinkumar while stopping the excavator work driver could not come forward. The evidence of P.W.No.1 Ashishkumar is clear that there were heated arguments before the fight started, which ultimately lead to the injuries on the person of victim Ashwinkumar and other witnesses. In view of the above, we are of the considered opinion that the present incident took place due to grave and sudden provocation and the appellants were deprived of their self control when the deceased Ashwinkumar questioned about the

authority of the appellants about their own land and thereafter appellants caused injuries to the deceased Ashwinkumar and other witnesses and therefore, the present case would fall under Section 304 Part II and not under Section 302 of the Indian Penal Code. We therefore, partly allowed the appeal by holding that the appellants are guilty of an offence punishable under Section 304 Part II of the Indian Penal Code. We confirm the conviction and sentence of the appellants under Section 324 read with 34 of the Indian Penal Code and under Section 201 read with 34 of the Indian Penal Code. As far as Criminal Appeal No.215 of 2008 is concerned which has been preferred against the acquittal of original Accused No.4 Jangounda Daulata Patil. The detailed scrutiny of the entire evidence available on record shows that the Trial Court after taking into consideration the facts of the said case has rightly acquitted the said accused. We find no merits in the said appeal and the same is accordingly dismissed.

ORDER

- a) Appeal is partly allowed.
- b) The conviction and sentence of the appellants under Section 302 read with 34 of the Indian Penal Code is hereby set aside and they are convicted under Section 304 Part II of the Indian Penal Code and are sentenced to suffer rigorous

imprisonment for 10 years with a fine of Rs.1000/- each. In default of payment of fine the appellants shall under go further rigorous imprisonment of three months.

c) The conviction and sentence of the appellants awarded by the Trial Court under Section-324 read with 34 and under Section-201 read with 34 of the Indian Penal Code is hereby maintained.

d) The conviction and sentence of accused No.1- Balgonda Patil and Appellant No.2 Vidyasagar @ Chotya Patil under Section 201 read with 34 of the Indian Penal Code is also maintained.

e) All the substantive sentences of the appellants Nos. 1 to 3 shall run concurrently.

f) Appeal is partly allowed in the aforesaid terms.

g) Criminal Appeal No.215 of 2008 is hereby dismissed.

(A.S. GADKARI, J.)

(ACTING CHIEF JUSTICE)d.