

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 158 OF 2013

Baliram S/o Hausaji Ingole,
Age : 67 years, Occu.: Labour,
R/o. Pardi (Bagal), Tq. Basmat,
Dist. Hingoli

APPELLANT
(Ori. Accused No.1)

VERSUS

The State of Maharashtra
Through Police Station Kurunda,
Tq. Basmat, Dist. Hingoli (M.S.)

RESPONDENT

AND

CRIMINAL APPEAL NO. 205 OF 2013

Prakash s/o Baliram Ingole,
Age : 34 years, Occ.: Labour,
R/o.: Pardi (Bagal), Tq. Basmat,
Dist. Hingoli

APPELLANT
(Ori. Accused No.2)

VERSUS

The State of Maharashtra,
Through Police Station,
Kurunda, Tq. Basmat,
Dist. Hingoli (M.S.)

RESPONDENT

Mr. Vikram R. Dhorde, Advocate for the appellant
in both the Criminal Appeals
Mr. D.R. Kale, A.P.P. for respondent/State
in both the Criminal Appeals

CORAM : S.S. SHINDE AND
SANGITRAO S. PATIL, JJ.

Reserved on : 24th AUGUST, 2016

Pronounced on : 15th SEPTEMBER, 2016

JUDGMENT (PER : SANGITRAO S. PATIL, J.):

Appeal No.158 of 2013 has been preferred by original accused no.1 - Baliram Hausaji Ingole while Appeal No.205 of 2013 has been preferred by accused no.2 - Prakash Baliram Ingole, challenging their conviction and sentences passed against them by the learned Additional Sessions Judge, Basmat District-Hingoli on 14th March, 2013 in Sessions Trial No.4 of 2012. Since both these appeals have arisen out of the same criminal case, they are being disposed of by this common judgment.

2. For the sake of convenience, the appellants are herein-after referred to by their original nomenclature i.e. accused no.1 and accused no.2. There were two more accused persons who have been acquitted by the trial Court. They also are referred to by their original nomenclature i.e. accused no.3 and accused no.4, wherever, their reference would be necessary.

3. Accused No. 2 and accused No. 3 are the sons, while accused No. 4 is the wife of accused No. 1. The deceased Kishan Tukaram Ingole was the husband of the

informant namely Radhabai. The house of the informant is to the East of the house of the accused, situate at village Pardi (Bk.), Taluka Basmat, District Hingoli. It is facing towards West. Thus, the accused are the neighbours of the informant.

4. The case of the respondent (prosecution), in brief, is that on 12th September, 2011 at about 8.00 p.m., the deceased Kishan, aged about 75 years, was lying on the verandah (osri) that was in front of his house. The informant was inside the house. At that time, accused No. 1 came in front of the house of the informant and started hurling abuses on the say that the waste water from the iron-sheet roof of the house of the informant was falling in his house. Then accused No. 2 also came there armed with an iron bar. He gave blows of iron bar on the head, near both the ears, on the right hand and legs of the deceased Kishan. The deceased Kishan sustained serious injuries. His right hand got fractured. Accused Nos. 3 and 4 also hurled abuses against the deceased Kishan. Accused Nos. 1, 3 and 4 beat the deceased Kishan by fists and chappals. The informed raised shouts whereon, her neighbours Janabai

Chanduji Narwade, Kundlik Tukaram Ingole, Kavita Suresh Bhutkar and others came there and intervened to pacify the incident.

5. The deceased Kishan was taken to Kurunda Police Station from where he was referred to P.H.C., Kurunda and then was shifted to Sub-District Hospital at Basmat. After extending preliminary treatment at Basmat, he was referred to the Civil Hospital at Nanded. The informant had accompanied the deceased Kishan. She lodged the First Information Report ("the report", for short) in respect of the incident in Police Station, Kurunda on 15th September, 2011 at about 7.10 p.m. On the basis of that report, Crime No. 68 of 2011 came to be registered against accused Nos. 1 to 4 for the offences punishable under sections 325, 326, 323, 504 read with section 34 of the Indian Penal Code (for short, "I.P.C.").

6. The investigation followed. The spot panchanama came to be prepared. The clothes of the deceased Kishan came to be seized. Accused Nos. 2 and 3 came to be arrested on 16th September, 2011, while accused Nos. 1 and 4 on 17th September, 2011. An iron rod came to be

seized from accused No. 2 under a panchanama on 16th September, 2011. The statements of the witnesses were recorded.

7. The injured Kishan expired during treatment in the Government Hospital at Nanded on 22nd September, 2011. The postmortem of his body was conducted on the same day between 12.30 p.m. and 1.30 p.m. The Autopsy Surgeon found six external and corresponding internal injuries on the body of the deceased Kishan. He opined that Kishan died due to head injury associated with blunt trauma to chest. He sent viscera of the deceased Kishan for chemical analysis. No poison was detected therein.

8. After the death of Kishan, the offence punishable under section 302 of the I.P. C. came to be added in the above numbered crime. The inquest of the deceased Kishan came to be prepared. The statements of the witnesses were recorded. The blood stained clothes of the deceased Kishan and his blood samples collected from the Autopsy Surgeon were sent for chemical analysis.

9. After completion of the investigation, accused Nos. 1 to 4 came to be chargesheeted in the Court of Judicial Magistrate First Class (3rd Court) at Basmatnagar.

10. Since the offence punishable under section 302 of the I.P.C. was exclusively triable by the Court of Session, the case was committed to the Sessions Court at Basmatnagar.

11. The learned Additional Sessions Judge, Basmat framed charges against accused Nos. 1 to 4 vide Exh-17 for the offences punishable under sections 302, 326, 325, 323, 448 and 504 read with section 34 of the I.P.C. and explained the contents thereof to them in vernacular to which they pleaded not guilty and claimed to be tried. Their defence is that of total denial and false implication on account of previous dispute.

12. To establish guilt of the accused, the prosecution examined in all ten witnesses and produced certain documentary evidence. After evaluating the said

evidence, the learned Additional Sessions Judge found that no offence was proved against accused Nos. 3 and 4. Therefore, he acquitted them of all the offences. The learned Judge found accused No. 2 guilty of the offences punishable under section 302 and 448 of the I.P. Code. He, therefore, convicted him for the said offences and sentenced him to undergo imprisonment for life and to pay a fine of Rs. 3000/-, in default to suffer rigorous imprisonment for six months for committing the offence punishable under section 302 of the I.P.C. and rigorous imprisonment for six months and a fine of Rs. 500/-, in default to suffer rigorous imprisonment for one month in respect of the offence punishable under section 448 of the I.P.C. The learned Judge convicted accused No. 1 for the offences punishable under sections 323 and 448 of the I.P.C. and sentenced him to suffer simple imprisonment for six months and to pay a fine of Rs. 500/-, on each count, in default to suffer simple imprisonment for one month, on each count. He directed that the substantive sentences shall run concurrently. These convictions and sentences are under challenge in these appeals filed by accused Nos. 1 and 2, respectively.

13. The learned counsel for the appellants submits that there is delay of three days in filing the FIR, which has not been satisfactorily explained by the respondent. He further submits that there is delay in recording the statements of the alleged eye witnesses which also has not been explained. In the circumstances, according to him, the oral evidence of the informant and that of the alleged eye witnesses cannot be relied on. He submits that the spot of the incident is situate in a thickly populated area. A number of independent witnesses must be available. No independent witness has been examined to corroborate the version of the informant who is an interested witness. He submits that there is concoction, embellishment and improvement made by the witnesses of the respondent. The history of assault has not been disclosed from the medical papers of the deceased Kishan. He further submits that the alleged motive behind the incident itself has not been established. From the evidence of the witnesses, it is clear that there were no rains prior to the incident and therefore, there was no question of falling of water from the roof of the house of the informant into the

house of the accused. As such, according to him, the very reason for occurrence of the incident was not in existence. He further submits that there is no circumstantial evidence also to connect the accused with the incident in question. The learned Trial Judge did not believe the evidence of the informant, Kavita (PW2) and Janabai (PW3) to hold accused Nos. 3 and 4 guilty of any offence. Therefore, on the basis of the evidence of the same witnesses, the learned Trial Judge was not justified in convicting accused Nos. 1 and 2. He prays that the appeals may be allowed and accused Nos. 1 and 2 may be acquitted of the above mentioned offences.

14. In the alternative, the learned counsel for the appellants submits that the deceased Kishan was aged about 75 years, he survived for about ten days after the incident, there was no premeditation on the part of accused No. 2 to commit murder of the deceased Kishan, he had not taken any dangerous weapon with him, the incident seems to have taken place on the spur of the moment and the cause of the incident appears to be very trifle. In the circumstances, the case against accused No. 2 would fall within the ambit of section 299 and not

section 300 of the I.P. Code. Therefore, at the most, he can be convicted for the offence of committing culpable homicide not amounting to murder, punishable under section 304 Part-II of the I.P.C.

15. As against this, the learned A.P.P. submits that the informant was with the deceased Kishan in the hospital for ensuring his proper care and medical treatment. Her priority was to take care of the deceased Kishan in the hospital after the incident. Therefore, she could not lodge the report immediately after the incident. She has properly explained the delay in lodging the report. He submits that there was no reason for the informant to lodge false report against the accused. The same was the position of the ocular witnesses Kavita (PW2) and Janabai (PW3). Though they are related to the deceased Kishan, they cannot be said to have deliberately involved accused Nos. 1 and 2 in the incident of murder of Kishan. He submits that accused Nos. 3 and 4 came to be acquitted because the evidence against them was very vague and general. Accused Nos. 1 and 2 cannot reap any benefit of acquittal of accused Nos. 3 and 4. According to him,

there is specific positive and dependable evidence to prove guilt of accused Nos. 1 and 2 for the above mentioned offences. The medical evidence supports the case of the respondent. He submits that giving a blow of iron bar on the vital part of the body of the deceased Kishan i.e. head, by accused No. 2 itself would be sufficient to indicate his intention to cause death of Kishan. Therefore, he has rightly been convicted for the offence punishable under section 302 of the I.P.C. According to him, the learned Trial Judge has rightly convicted accused Nos. 1 and 2 for the above mentioned offences. He supports the impugned judgment and order passed against accused Nos. 1 and 2 and prays that the appeals may be dismissed.

16. At the threshold, we would like to mention that the respondent has not challenged the acquittal of accused Nos. 3 and 4 of the offences alleged against them. Moreover, the acquittal of accused No. 1 of the offence punishable under section 302 of the I.P.C. also has not been challenged by the respondent. The impugned judgment to the extent of the above referred acquittal of accused Nos. 1, 3 and 4 has got finality. Therefore,

we would scrutinize the evidence in order to see whether accused Nos. 1 and 2 have been rightly convicted or otherwise for the offences referred to above.

17. The respondent has relied on the ocular evidence of the informant – Radhabai i.e. the widow of the deceased Kishan (Exh-47), her granddaughter Kavita (PW2) (Exh-51) and Janabai (PW3) (Exh-52), who is the sister of the deceased Kishan. The informant deposes that on the day of the incident at about 8.00 p.m., the deceased Kishan was lying on the verandah of his house. Kavita (PW2) was playing in front of the house and the informant herself was inside the house. Accused No. 1 came to the house of the informant and started abusing the deceased Kishan on the ground that the roof water of the house of the informant was falling into his house. Then accused No. 2 also came there armed with an iron bar (Art. 4). Accused No. 2 gave blows of iron bar (Art. 4) on the head, behind the ear, both the hands and chest of the deceased Kishan. The deceased Kishan sustained bleeding injuries. His hand was fractured. Accused No. 1 assaulted the deceased Kishan by fists and kicks. The informant states that she raised shouts. At

that time, Janabai (PW3), one Kundlik, Ambaji and Kavita (PW2) came there and intervened. The deceased Kishan had sustained serious injuries. He was taken to Kurunda Government Hospital from where he was shifted to Sub-District Hospital at Basmat and then to the Government Hospital at Nanded, for treatment. The version of the informant in respect of the overt acts committed by accused nos. 1 and 2 has been materially corroborated by the contents of the FIR (Exh-48) lodged by her in Police Station, Kurunda on 15th September, 2011 at about 7.10 p.m. Her version is further substantially supported by Kavita (PW2) and Janabai (PW3). The learned Trial Judge believed the evidence of these witnesses, which, according to him, was consistent and reliable.

18. The learned counsel for accused Nos. 1 and 2 assailed the ocular evidence on the ground that though the spot of the incident is situate in a thickly populated area and the other independent witnesses had the occasion to witness the incident, none of such witnesses has been examined. He further submits that there is delay in lodging the report as well as recording the statements of Kavita (PW2) and Janabai

(PW3) which has not been satisfactorily explained. Therefore, relying on the judgments in the cases of State of **Andhra Pradesh Vs. M. Madhusudhan Rao (2008) 15 S.C.C. 582** and **Balakrushna Swain V. The State of Orissa AIR 1971 S.C. 804**, he submits that the evidence of the ocular witnesses, who are interested witnesses, in the absence of independent corroboration thereto, cannot be believed, more particularly when the delay in recording the report as well as recording the statements of these witnesses has not been explained. According to him, there is every possibility of concoction, embellishment, exaggeration and false implication of the accused in this case. He submits that the learned Trial Judge did not believe the evidence of these ocular witnesses as against accused Nos. 3 and 4. Therefore, the learned Trial Judge was not right in relying on the evidence of the same witnesses for holding accused Nos. 1 and 2 guilty.

19. The incident took place on 12th September, 2011 at about 8.00 p.m. The report (Exh-48) has been lodged in Police Station, Kurunda on 15th September, 2011 at about 7.10 p.m. As such, there is delay of three days

in lodging the report. Indisputably, the deceased Kishan had sustained serious injuries and had been admitted in the Government Hospital, Nanded as an indoor patient for treatment. The informant explains that she was paying attention towards medical treatment of the deceased Kishan and therefore, she could not lodge the report earlier in Kurunda Police Station. The explanation given by the informant appears to be satisfactory. It was but natural on her part to give priority to the medical treatment of her husband instead of leaving the hospital at Nanded and proceed to Kurunda to lodge the FIR. The informant is an illiterate person. In all probabilities, she must not be knowing the importance of taking care to see that the FIR has to be lodged in the Police Station at the earliest possible opportunity. Even otherwise, from her evidence, in paragraph 12 of her cross-examination, it has come on record that the deceased Kishan was taken to Police Station, Kurunda at about 8.30 p.m. after the incident. At that time, she narrated the police as to who and in what manner, assaulted the deceased Kishan. It has come in paragraph No. 2 of the cross-examination of P.H.C. Pandit (PW6) (Exh-61) that the informant had come to the

Police Station at Kurunda with the deceased Kishan on the day of the incident at 8.30 p.m. It has further come in his cross-examination in paragraph 3 that he obtained the information from the informant that Kishan was injured because of beating and that a cognizable offence had taken place. However, he did not note the said fact in the Station Diary. This evidence of P.H.C. Pandit (PW6) supports the version of the informant that she had narrated the incident to him on the day of incident itself when the deceased Kishan was taken to the Police Station. It was the duty of P.H.C. Pandit (PW6) to record whatever was stated by the informant to him in respect of the occurrence of the incident. It is obvious that he failed to perform his duty. The failure on the part of P.H.C. Pandit (PW6) in performing his duty of recording the FIR at the earliest point of time after receiving the information in respect of occurrence of the incident from the informant, cannot be used as a device to throw suspicion on the version of the informant on the ground of delay in lodging the report (Exh-47).

20. The Station Diary entry (Exh-88) taken by

P.H.C. Pandit (PW6) shows that the deceased Kishan was produced in the Police Station in the injured condition. He had sustained head injuries. He was not in a position to speak. He was referred to the Sub-District Hospital at Basmat. It was further mentioned that on his return after taking medical treatment, further steps would be taken. P.H.C. Pandit (PW6) states that he did not mention in the Station Diary about the cause of the injuries sustained by the deceased Kishan though the informant had narrated before him the said cause. As stated above, it was the duty of P.H.C. Pandit (PW6) to note in the Station Diary the cause of the injuries sustained by the deceased Kishan as narrated by the informant. It was sheer negligence on his part to perform his duty in this regard. However, the version of the informant cannot be discarded by attaching doubt thereto only because the duty of recording her FIR was performed by P.H.C. Pandit (PW6) after three days of the incident.

21. The injury certificate of the deceased Kishan issued by the Medical Officer, who examined him on the day of the incident at about 10.30 p.m. in the Sub-

District Hospital at Basmat on receiving the reference from the Police Station Officer (P.S.O.), Kurunda i.e. P.H.C. Pandit (PW6) contains the history behind the injuries found on the person of the deceased Kishan as assault at about 8.00 p.m. on 12th September, 2011. This fact supports the case of the prosecution that the deceased Kishan had sustained injuries due to the physical violence and not otherwise.

22. There was no reason for the informant to spare the real culprits and falsely involve the appellants/accused in the incident in question. The evidence of the informant is very natural and probable. It has come in paragraph 8 of her cross-examination that there was no previous enmity between her family and that of the appellants. If that be so, the possibility of false implication of the appellants in the incident in question would get ruled out. There is no material omission or contradiction in the evidence of the informant which would indicate that she had the tendency of speaking false and inclination to involve the appellants falsely in the incident in question. Consequently, the delay in recording the FIR (Exh-48)

cannot be attached with any importance so as to brush aside her evidence. In the facts and circumstances of the present case, the decision cited by the learned counsel for the appellants in the case of **Andhra Pradesh V. Madhusudan Rao** (supra), wherein there was delay of one month and four days in lodging the FIR by the informant against her husband and inlaws, more particularly when she decided to lodge the FIR as no-one from the family of the accused persons had gone to her to inquire about her welfare, was held to be fatal to the prosecution, would not be of any help to present accused No. 1 and 2 in the case at hand to discard the evidence of the informant on the ground that there was delay of three days in lodging the FIR (Exh-48).

23. In so far as the roles of accused Nos. 1 and 2 are concerned, the evidence of Kavita (PW2) and Janabai (PW3) is quite consistent. It fully corroborates the version of the informant. Kavita (PW2) being granddaughter of the deceased Kishan, her presence at the time of incident was quite natural. Janabai (PW3) states that her house is at the distance of fifteen feet from the house of the deceased Kishan. As such, it was

not difficult for her to see what was happening in the front portion of the house of the deceased Kishan and to witness the incident. No omission and contradiction has been elicited in the cross-examination of Kavita (PW2) and Janabai (PW3) in respect of the roles played by accused Nos. 1 and 2.

24. The learned counsel for accused Nos. 1 and 2 submits that there has been delay in recording the statements of Kavita (PW2) and Janabai (PW3), which has not been explained by the prosecution. Moreover, both of them are close relatives of the deceased Kishan. Therefore, in the absence of any independent evidence, it will be risky to rely on the evidence of these witnesses. In support of this contention, he relies on the judgment in the case of **Balakrushna Swain** (supra), wherein there was delay of 10 to 11 days in recording the statements of the witnesses though they could have been examined prior to that.

25. As stated above, there were laches on the part of P.H.C. Pandit (PW6) in recording the FIR of the informant. Had he recorded the FIR of the informant on the day of the incident itself when the informant had

narrated him about the incident in Police Station, Kurunda, at about 8.30 p.m., the investigation would have been set in motion and the statements of the witnesses would have been recorded at the most on the next day of the incident. When P.H.C. Pandit (PW6) did not record the FIR of the informant, did not register the crime though he realised that the cognizable offence had taken place, the investigation did not commence and consequently, the statements of Kavita (PW2) and Janabai (PW3) could not be recorded until the crime was registered after receiving the FIR (Exh-48) from the informant on 15th September, 2011 at 7.10 p.m. There is specific reference about presence of Kavita (PW2) and Janabai (PW3) in the evidence of the informant as the persons who had the occasion to witness the incident. In the circumstances, the delay on the part of the Investigating Officer in recording the statements of these witnesses would not be fatal to the prosecution case, more particularly when nothing is brought in the evidence of these witnesses to show any exaggeration or embellishment on their part.

26. The learned counsel for accused Nos. 1 and 2

submits that the informant as well as Kavita (PW2) and Janabai (PW3) are the close relations of the deceased Kishan. He pointed out the evidence on record showing that there were houses of other persons and a road frequently used by many persons near the spot of incident. Some other persons also had come to the spot of incident after hearing the commotions. He submits that none of the independent witnesses who were present at or near the spot of incident when the incident took place, has been examined by the prosecution. Therefore, the evidence of these witnesses – relatives of the deceased Kishan would not be sufficient to connect accused Nos. 1 and 2 with the incident in question.

27. It is true that some persons other than the present ocular witnesses also could have been examined by the prosecution. However, it is common knowledge that now-a-days, the tendency has grown up amongst the citizens to avoid to appear as witnesses in such incidents. Coming forward as witnesses to state the factual position is generally construed by the accused persons to mean that such witnesses are their rivals. The witnesses, therefore, are subjected to the wrath of

the accused and have to face the difficulties created by the accused persons with a view to pressurize them so that they should not stand as witnesses on behalf of the victim or his/her family members. In the circumstances, it is rather difficult to get independent witnesses though available. It is well settled that only because the witnesses happen to be the relatives of the victim, their evidence cannot be discarded. However, the rule of caution demands that their evidence should be scrutinized carefully, cautiously and thoroughly. As stated above, there is no material omission or contradiction in the evidence of Kavita (PW2) or Janabai (PW3). Therefore, only because they are relatives of the deceased Kishan, their evidence cannot be discarded. We find both of these witnesses trustworthy. Their evidence creates great confidence.

28. The deceased Kishan was examined by the Medical Officer, Sub-District Hospital, Basmat on the day of the incident i.e. on 12th September, 2011 at 10.30 p.m. He noted contused abrasion over right mastoid region behind right ear pinna having size 1" x 1" and a contused lacerated wound over left mastoid region, having size 1"

x 1/2", which was skindeep. He noted bleeding from left ear of the deceased Kishan. He accordingly issued injury certificate (Exh-99) wherein it was mentioned that the injuries found on the body of the deceased Kishan were caused by hard and blunt object within six hours of his examination. Thereafter, the deceased Kishan was admitted in the Government Hospital at Nanded for treatment. He succumbed to the injuries sustained by him in the incident on 21st September, 2011 at about 9.10 p.m. The inquest panchanama (Exh-56) of the body of the deceased Kishan came to be prepared on 22nd September, 2011 between 11.15 a.m. and 12.00 noon. The injuries were noted on the head and both of his hands.

29. Dr. Take (PW4) (Exh-53) conducted the postmortem of the body of the deceased Kishan on 22nd September, 2011 between 12.30 p.m. and 1.30 p.m. and found the following external injuries.

(i) Healed injury with fallen scab present on right frontal prominence, size 2 cm X 1 cm pale scar.

(ii) Lacerated wound with blackish scab present on left mastoid region, size 2 cm X 2 cm. X bone deep.

(iii) Abraded contusion present on right clavicular region, size 4 cm X 3 cm. Brownish.

(iv) Contusion present on right wrist and hand posterior aspect, size 12 cm X 10 cm. Brownish.

(v) Lacerated wound with fallen scab present on right subcostal margin, in mid clavicular line, size 3cm X 2 cms.

(vi) Contusion with swelling present on left foot and ankle, size 12 cm. X 11 cms Brownish.

30. Dr. Take (PW4) further found the following internal injuries sustained by the deceased Kishan.

(i) Under the scalp heamatoma present on right temporal region 7 cms X 7 cms and left mastoid region, size 3 X 2 cms. Brownish.

(ii) Skull-Intact, no fracture to the vault. Base fracture horizontally and mid-cranial fossa on right side.

(iii) Brain : Meninges, intact, congested, sub-arachnoid hemorrhage present all over brain surface, red, CSF-redish- brain congested, edematous, compression effect present on right side.

(iv) Contusion- with blood and blood clot present in left cerebral parenchyma about 100 gms.

(v) 4th and 6th rib fractured on left side anteriorly. Left lung was intact, congested, edimatous, contusion present on anterior lateral aspect of both lobes. Other organs were congested.

31. Dr. Take (PW4) deposes that the injuries found on the body of the deceased Kishan were ante-mortem and were caused within 7 to 10 days prior to the postmortem. In his opinion, Kishan died because of head injury associated with blunt trauma to chest. He prepared the memorandum of postmortem (Exh-54). He preserved the viscera of the deceased Kishan and sent it for chemical analysis. The report thereof showed absence of poison. He further states that external injury Nos. 1 and 2, referred to above, correspond to the injuries caused to ribs and the lungs of the deceased Kishan. He opined that the external injuries found on the body of the deceased Kishan were possible by forceful blows of iron bar (Art. 4) and were sufficient in the ordinary course to cause his death. The evidence of Dr. Take (PW4) fully corroborates the evidence of the ocular witnesses on the point of the cause of the injuries sustained by the deceased Kishan.

32. It has come in paragraph 7 of the cross-examination of Dr. Take (PW4) that the doctor, who initially treated the deceased Kishan, would be in a

position to depose whether external injury No. 1 found on the right frontal prominence of the deceased Kishan, was possible by the blow of iron bar (Art. 4). On the strength of this statement, the learned counsel for accused Nos. 1 and 2 submits that in absence of the evidence of the doctor who treated the deceased Kishan initially, it cannot be said that the injury sustained to the head of the deceased Kishan was possible by the blow of iron bar (Art. 4). We are not inclined to accept this contention. It is well settled that when there is cogent, consistent and dependable ocular evidence about the cause of the injuries sustained by the victim, the medical evidence, which is an opinion evidence, would get secondary status. In the present case, there is consistent, cogent and dependable evidence of the ocular witnesses that accused No.2 inflicted a blow of iron bar on the head of the deceased Kishan. Therefore, even if the doctor, who initially examined the deceased Kishan, is not examined as a witness, the evidence of Dr. Take (PW4) that the injuries found on the head of the deceased Kishan could be caused by forceful blow of iron bar (Art. 4) cannot be disbelieved.

33. The evidence of the ocular witnesses is corroborated by the medical evidence. We do not find any reason to disbelieve the said evidence which clinchingly established that accused No. 2 gave blows of iron bar on the person of the deceased Kishan and caused him serious injuries to which he ultimately succumbed on 21st September, 2011. This evidence further proves beyond doubt that accused No. 1 gave fist blows to the deceased Kishan.

34. It has come in the evidence of Gangadhar (PW7) (Exh-62), who happens to be a panch to the spot panchanama (Exh-63), that the incident took place on the verandah which is in the front portion of the two rooms of the house of the deceased Kishan. The rough sketch of the house of the deceased Kishan has been given at page 4 of the panchanama (Exh-63). It shows that the verandah is a part and parcel of the house of the deceased Kishan. There are stairs to the western side of the verandah through which one can step up for going into the house of the deceased Kishan. The incident took place on the said verandah which is a part and parcel of

the dwelling house of the deceased Kishan. Consequently, the provisions of Section 448 of the I.P.C. would get attracted to the facts of the present case.

35. The evidence of the other witnesses is of formal nature. We find the evidence of the informant, Kavita (PW2), Janabai (PW3) and Dr. Take (PW4) to be the material evidence to establish the guilt of accused Nos. 1 and 2 for the above mentioned offences.

36. It is the contention of the learned counsel for accused Nos. 1 and 2 is that on the basis of the same evidence, accused Nos. 3 and 4 have been acquitted by the learned Trial Judge and therefore, the said evidence cannot be used to convict accused Nos. 1 and 2. We are not inclined to accept this contention. The evidence of these witnesses against accused Nos. 3 and 4 is very vague and general. None of the witnesses states as to on what part of the body of the deceased Kishan and by what means, accused Nos.3 and 4 assaulted him. Because of this vague and general evidence, accused Nos.3 and 4 have been given the benefit of the doubt. It is not

that the learned Trial Judge characterized the evidence of the ocular witnesses as false in respect of accused Nos. 3 and 4. In the circumstances, accused Nos. 1 and 2 cannot derive any benefit from the fact that accused Nos. 3 and 4 have been acquitted by the learned Trial Judge, particularly when there is positive, a clinching and dependable evidence of the ocular witnesses about the specific roles played by them in the commission of the above mentioned offences.

37. The learned counsel for accused Nos. 1 and 2 submits that the incident is said to have taken place because accused No. 1 expressed his grudge against the deceased Kishan on the count that the roof water from the house of the deceased Kishan was falling into his (accused No. 1's) house. However, the informant specifically states in her cross-examination that on the day of the incident, there were no rains. According to him, the very cause for occurrence of the incident, which would be the motive behind the incident, was non-existent. Hence, the case of the respondent cannot be believed.

38. It is true that there were no rains prior to the incident. However, the possibility cannot be ruled out that the roof of the house of the deceased Kishan must be in such a condition that in the event of raining, the rain water would fall in the house of accused No. 1. Therefore, accused No.1 must have gone to the deceased Kishan to express his grievance. Albeit, it is well settled that when there is direct evidence on the occurrence of the incident, the motive would lose its importance. In the present case, there is direct evidence of the ocular witnesses to show the involvement of accused Nos. 1 and 2 in the incident in question. Therefore, the contention of the learned counsel for accused Nos. 1 and 2 that the prosecution failed to establish the motive behind the incident and therefore, the case of the prosecution is liable to be discarded, cannot be accepted.

39. As stated above, there is sufficient, cogent, consistent and dependable evidence to establish that accused No. 1 gave fist and kick blows to the deceased Kishan by entering into the verandah of the house of the deceased Kishan. We subscribe to the findings of the

learned Trial Judge to the extent of holding accused No. 1 guilty of the offences punishable under sections 448 and 323 of the I.P.C.

40. The learned counsel for accused No. 2 submits that the deceased Kishan was aged about 75 years at the time of the incident. The incident took place without any premeditation to kill the deceased Kishan. No deadly weapon was used by accused No. 2 at the time of incident. The deceased Kishan survived for about ten days after the incident. There was no intention on the part of accused No. 2 to cause death of Kishan. Under the circumstances, he submits that accused No. 2 cannot be said to have committed murder of the deceased Kishan, made punishable under section 302 of the I.P.C. He submits that the case would fall within the II part of section 304 of the I.P.C. i.e. culpable homicide not amounting to murder. He, therefore, prays that the conviction of accused No. 2 for the offence punishable under section 302 of the I.P.C. may be converted into the conviction for the offence punishable under section 304 Part-II of the I.P.C. In support of this contention, he relied on the judgment in the cases of

Suresh s/o Ghanshyamrao Chopade Vs. The State of Maharashtra and another 2014 ALL MR (Cri.) 3894 and an unreported judgment dated 10th August, 2016, delivered by the Bombay High Court, Bench at Nagpur in **Criminal Appeal No. 458 of 2014 (Giridhar s/o Keshav Kohapare Vs. The State of Maharashtra)**.

41. As seen from the evidence of the informant, there were no serious disputes between the accused on one hand and the deceased Kishan and his family on the other, prior to the incident. There may be some dispute on the ground of falling of roof water from the house of the deceased Kishan into the house of the accused or on account of allotment of the house to the deceased Kishan under Gharkul scheme, but the nature of the said dispute certainly was not such that accused No. 2 would have intended to commit murder of the deceased Kishan. The learned Trial Judge has not accepted the theory that accused Nos. 1 and 2 participated in the commission of the alleged offence in furtherance of their common intention. This finding of fact recorded by the learned Trial Judge has not been challenged by the respondent. The said finding suggests that there was no

premeditation on the part of accused No. 2 to commit murder of the deceased Kishan. No deadly weapon was used by him. A single blow of iron bar was given on the head of the deceased Kishan. Accused No. 2 did not take any undue advantage of the situation. The deceased Kishan was aged about 75 years. He succumbed to the injuries after about nine days of the incident while taking medical treatment. All these facts would indicate that accused No. 2 had no intention to cause death of the deceased Kishan. Considering these facts as well as the law propounded in the above referred two judgments cited by the learned counsel for accused No. 2, we are of the view that the ingredients of the offence of murder as defined in section 300 of the I.P.C. are not satisfied from the facts and evidence of the present case. Accused No. 2 cannot be attributed with the intention of causing the death of the deceased Kishan though he can be said to have the knowledge of likelihood of the death of Kishan consequent upon the blow of iron bar inflicted by him on the head of the deceased Kishan. The case against accused No. 2, therefore, would fall under Part-II of section 304 of the I.P.C. and he is liable to be held guilty for the

offence of culpable homicide not amounting to murder.

42. Since the incident in question took place on the verandah which was a part and parcel of the dwelling house of the deceased Kishan, accused No. 2 is liable to be held guilty for the offence punishable under section 448 of the I.P.C. as well.

43. Considering the serious consequences of the acts committed by accused No.2 i.e. the death of Kishan, we are not inclined to extend him the benefit of probation. In our view, it would be just and proper if he is sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs. 20,000/-, in default to suffer rigorous imprisonment for three months for committing the offence punishable under section 304 Part-II of the I.P.C. and further rigorous imprisonment for six months and to pay a fine of Rs. 500/-, in default to suffer rigorous imprisonment for one month, in respect of the offence punishable under section 448 of the I.P.C.

44. It is proved beyond doubt that accused No. 1 entered into the verandah of the dwelling house of the deceased Kishan and beat him by fists and kicks as stated above and thereby committed the offences punishable under sections 448 and 323 of the I.P.C. Accused No. 1 has not been connected with the acts committed by accused No. 2 with the aid of section 34 of the I.P.C. The learned Trial Judge has acquitted accused No. 1 of the offence of causing death of Kishan. This finding of fact has got finality since the respondent has not challenged the same by filing appeal. In our view, accused No. 1 being the father of accused No. 2 should have effectively controlled accused No. 2 at the time of the incident and should have refrained him from assaulting the deceased Kishan by means of an iron bar. Since accused No. 1 did not do so, we are not inclined to extend the benefit of probation to him.

45. Accused No. 1 was detained in connection with the present crime from 17th September, 2011 to 1st December, 2011 i.e. for 75 days. Considering the age of accused No. 1 which is now 70 years and the nature of the offences established against him, we are of the view

that the ends of justice would be satisfied if he is sentenced to suffer imprisonment for the period which he has already undergone and ordered to pay a fine of Rs. 500/- each for the offences punishable under sections 323 and 448 of the I.P.C., in default to suffer simple imprisonment for one month on each count. Out of the amount of fine, if deposited by the accused, an amount of Rs. 20,000/- will have to be ordered to be paid to the widow of the deceased Kishan, namely, Radhabai, as compensation.

46. Accused No. 2 is in jail since 16th September, 2011. He is entitled to get set-off from 16th September, 2011 till today vide section 428 of the Code of Criminal Procedure.

47. In the above facts and circumstances of the case, we allow the appeals partly with the following order:-

O R D E R

(i) The appeals are partly allowed.

(ii) The impugned order of conviction and sentence of the appellant – Prakash Baliram Ingole (original accused No. 2) for the offence punishable under section 302 of the Indian Penal Code is hereby set aside. Instead, he is convicted for the offence punishable under section 304 Part II of the Indian Penal Code and sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs. 20,000/- (rupees twenty thousand), in default to suffer rigorous imprisonment for three months.

(iii) The impugned order of conviction and sentence of the appellant Prakash Baliram Ingole (original accused No. 2) for the offence punishable under section 448 of the Indian Penal Code is confirmed.

(iv) The substantive sentences awarded against appellant Prakash Baliram Ingole (original accused No. 2) shall run concurrently.

(v) The appellant Prakash Baliram Ingole shall be given set off for the period from 16th September, 2011 till today vide Section 428 of the Code of Criminal

Procedure, 1973.

(vi) The impugned order of conviction of the appellant Baliram Hausaji Ingole (original accused No. 1), for the offences punishable under sections 323 and 448 of the Indian Penal Code is confirmed. However, the substantive sentences of imprisonment awarded against him vide the impugned order, for the offences punishable under sections 323 and 448 of the Indian Penal Code, are modified and he is ordered to suffer imprisonment for the period which he has already undergone and to pay a fine of Rs. 500/- (rupees five hundred) on each count, in default to suffer simple imprisonment for one month on each count.

(vii) The bail bonds of the appellant — Baliram Hausaji Ingole shall stand cancelled.

(viii) Out of the amount of fine, if recovered from the appellants, an amount of Rs. 20,000/- (rupees twenty thousand) be paid to Smt. Radhabai widow of Kishan Ingole, resident of Pardi (Bagal), Taluka Basmat, District Hingoli as compensation.

(ix) The amount of fine of Rs. 4500/-, deposited by the appellants (original accused Nos. 1 and 2) before the Trial Court on 14th March, 2013 be appropriated towards the amount of fine due and payable from them as ordered hereinabove.

(x) Both the appeals stand disposed of in the above terms.

Sd/-
[**SANGITRAO S. PATIL**]
JUDGE

Sd/-
[**S.S. SHINDE**]
JUDGE

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