

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

CRIMINAL APPEAL NO. 69 OF 2000

CRIMINAL APPEAL NO. 185 OF 2000

CRIMINAL REVISION APPLICATION NO. 86 OF 2000

CRIMINAL APPLICATION NO. 990 OF 2016

CRIMINAL APPEAL NO.69 OF 2000

Gatya @ Laxmikant Kotalwar
Age-21 years, Occu-Education,
R/o. Bhajimandai, Udgir,
Tq. Udgir, Dist. Latur

.. Appellant
Ori.Accused No.1

VERSUS

The State of Maharashtra

.. Respondent

Mr. Ashok Mundargi, Sr. Counsel with Mr. A.D.Ostwal,
Advocate for the appellant
Mr.M.M.Nerlikar, APP for the respondent/State

WITH

CRIMINAL APPEAL NO.185 OF 2000

The State of Maharashtra

...Appellant

VERSUS

1. Gattya @ Laxmikanth S/o. **...Respondents**
Chandrakant Kotalwar
Age-22 years, Occu-Education,
R/o.Bhajimandi, Udgir
2. Tinku @ Saiprakash S/o. Bhagwat Parsewar,
Age-21 years, Occu-As above
R/o.Swarodaya Society, Udgir
3. Yunus Sayed S/o. Mohammadsab Sayed,
Age-21 years, Occu-as above
R/o.Paiganpura, Udgir
4. Sunil S/o. Sureshchandra Kautikwar,
Age-21 years, Occu-Labour (Munim)
R/o.Khatib Galli, Udgir
5. Vikas S/o. Machindra Chidrewar,
Age-21 years, Occu-Business,
R/o.Valugalli, Nideban Bes, Udgir

All R/o. Udgir, Dist. Latur

Mr.M.M.Nerlikar, APP for the appellant/State

Mr.Ashok Mundargi, Sr. Advocate i/b Mr.A.D.Ostwal,
Advocate with Mr.S.G.Rudrawar, Advocate for respondent
Nos. 1 & 2

Mr.R.N.Dhorde, Sr. Counsel i/b Mr.V.R.Dhorde, Advocate
for respondent Nos.3 to 5

WITH

CRIMINAL REVISION APPLICATION NO.86 OF 2000

Smt.Sunita Anteshwar Hude
Age-22 years, Occu-Household,
R/o.Udgir, Tq. Udgir,
Dist. Latur.

...Applicant

VERSUS

1. The State of Maharashtra

...Respondents

2. Tinku @ Saiprakash S/o. Bhagwat Parsewar,
Age-21 years, Occu- Education

3. Yunus Sayed S/o. Mohammadsab Sayed,
Age-21 years, Occu-Education

4. Sunil S/o. Sureshchandra Kautikwar,
Age-21 years, Occu-Labour (Munim)

5. Vikas S/o. Machindra Chidrewar,
Age-21 years, Occu-Business,

Respondent Nos. 2 to 5
R/o. Udgir, Dist. Latur

Mr.M.S.Deshmukh, Advocate h/f Mr.U.L.Momale, Advocate for
the applicant

Mr.M.M.Nerlikar, APP for the respondent No.1/State

WITH

CRIMINAL APPLICATION NO.990 OF 2016

IN

CRIMINAL APPEAL NO.185 OF 2000

Tinku @ Saiprakash S/o. Bhagwat Parsewar **...Applicant**
Age-37 years, Occu-Education,
R/o.Udgir, Tq. Udgir,
Dist. Latur.

VERSUS

1. The State of Maharashtra **...Respondents**
2. Gattya @ Laxmikant S/o.
Chandrakant Kotalwar,
Age-38 years, Occu-Education
3. Yunus Sayed S/o. Mohammadsab Sayed,
Age-37 years, Occu-Education
4. Sunil S/o. Sureshchandra Kautikwar,
Age-37 years, Occu-Labour (Munim)
5. Vikas S/o. Machindra Chidrewar,
Age-37 years, Occu-Business,

Respondent Nos. 2 to 5
R/o. Udgir, Dist. Latur

Mr.R.N.Dhorde, Sr. Counsel with Mr.V.R.Dhorde, Advocate
for the applicant
Mr.M.M.Nerlikar, APP for the respondent/State

**CORAM : A.V.NIRGUDE &
INDIRA K. JAIN, JJ.
RESERVED ON : 15.03.2016
PRONOUNCED ON : 07.04.2016**

JUDGMENT [PER: A.V.NIRGUDE, J.] :-

1. All these proceedings arise from judgment dated 21.01.2000 delivered by the learned Additional Sessions Judge, Latur in Sessions Case No.98 of 1998. This case was tried against four accused for offences punishable under Sections 147,148,323,324 and 302 read with Section 149 of the Indian Penal Code. The learned Sessions Judge by the impugned judgment acquitted accused Nos.2 to 5 on one hand and convicted accused No.1 for offence punishable under Section 302 and was sentenced to suffer life imprisonment and to pay fine of Rs.5000/- with a default clause. He was also convicted for offence punishable under Section 324 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment for six months and to pay fine of Rs.1000/- with a default clause.

2. Criminal Appeal No.69 of 2000 is filed by the

accused No.1 challenging his conviction under Sections 302 and 324 of the Indian Penal Code. Criminal Appeal No.185 of 2000 is filed by the State of Maharashtra for challenging acquittal of accused Nos.2 to 5.

3. Criminal Revision Application No.86 of 2000 is filed by the victim's wife challenging the impugned judgment to the extend of acquittal of accused Nos.2to5.

4. The prosecution case, in short, can be stated as under:-

5. The accused Nos. 2 to 5 formed unlawful assembly on 05.05.1998 at about 8:30 p.m. near the shop of accused No.1 at Udgir town and using deadly weapon like iron rod, scissors, etc. they attacked complainant and his companions and caused death of one Anteshwar delivering stab on his chest and causing simple injuries to other accused either utilizing iron rod or seizures like weapon. This incident occurred because on the same day during afternoon there occurred quarrel between accused Nos. 1 and 2 on one side and P.W. No.9- Rafiq Khan and his companion Sachin who happened to be nephew of deceased Anteshwar. It was alleged that accused Nos. 1 and 2 slapped P.W.No.8 and his companion Sachin, abused and slapped due to an eve-teasing incident. The

complainant and his three companions learnt that accused were making preparation for launching further assault on Sachin. They rushed to the scene of occurrence and as said above the accused attacked them.

6. The prosecution depended on 16 witnesses out of which prosecution witnesses No.9,10 and 12 are most important for their presence at the scene of occurrence cannot be doubted. They sustained injuries during incident. We would therefore enumerate their evidence one by one.

7. P.W.No.12 Amrut Patil is the first informant. He lodged the complaint of the incident. The gist of his deposition along with admissions he had given during cross-examination can be narrated as under:-

8. On 05.05.1998 at about 6:30 p.m. he went to shop of Anteshwar (who died during the incident). At about 7:00 p.m. Anteshwar, Ashok P.W.No.10 and one Ramrao came there in a maruti van. Ramrao was in need of a motorcycle. He told that Sachin-Anteshwar's nephew and Rafiq Khan P.W.No.9 were seen using the motorcycle at a particular spot in the town. So, Anteshwar said to them that they should go to Rafiq Khan's room for getting the motorcycle. They all came to Rafik Khan's room using the

car. They found motorcycle there. They also met Sachin.

9. Sachin told Anteshwar that Gatya Kotalwar-accused No.1 and Saiprakash accused No.2 had assaulted him on a false ground over a girl. Anteshwar asked Sachin not to pickup quarrel as there was wedding proposed in the family. Anteshwar asked Sachin that he should go to home assuring him that he would convince accused Nos.1 and 2 that they should not continue quarrel. Ramrao and Sachin then left Rafiq's room using motorcycle. Remaining persons i.e. he, Anteshwar, Ashok and Rafiq Khan went to shop of accused No.2 in the maruti van. They found accused No.2 in his shop. Anteshwar called him and told him and that they should not quarrel. Accused No.2 agreed that there would be no quarrel. Thereafter they all went to a restaurant to have a meals. Pintu another relative of Anteshwar came there and told them that some boys had assembled for launching attack on Sachin. Hearing this, Anteshwar told him to go home. Anteshwar said to others that they should go and try to convince the boys. They all went to accused No.2's shop, but the shop was found closed. They then went to shop of accused No.1 by maruti van. They reached the shop at about 8:30 p.m., Anteshwar was driving the van. Rafiq Khan P.W.No.9 was sitting next to him. On reaching the shop of accused No.1, Anteshwar asked Rafiq to see if accused No.1 was in the shop.

Anteshwar also told Rafiq that they would convince him. There were two shutters to the shop of accused No.1. Bigger one was closed and smaller one was still open. Rafiq went towards smaller shutter and stood there. Accused No.1 came out of the shop. He had some talk with Rafiq. Accused No.1 went back in the shop and came back holding a knife in his hand. Rafiq started retracting. Accused No.1 was brandishing knife. Rafiq sustained a knife blow. Accused No.1 came towards the maruti van. Anteshwar was stepping out of the maruti van. At that time, accused No.1 gave a forcible blow of knife to Anteshwar on his chest. Anteshwar sustained injury on his chest. Ashok P.W.No.10 stepped down from the maruti car from back side and tried to hold Anteshwar. Accused No.1 assaulted him too. He sustained injury on his hand due to knife blow. He also got down from the maruti van. He told accused No.1 by holding his hand that they had come there to pacify them. But accused No.1 assaulted him also with knife. He sustained injury on his waist on left side. This was a bleeding injury. Thereafter, Ashok shifted Anteshwar on the other seat of the maruti van. Ashok took over driving.

10. At that time he saw accused No.2 and two unknown persons were assaulting Rafiq. Accused No.2 was holding a steel rod. He was beating Rafiq using the same. Ashok

started the maruti van. Rafiq came to the maruti van and got in it. He was holding his head in his hand. One Suresh came there and told Ashok that he should take the maruti van to Baheti Hospital. Thereafter Ashok took the maruti van to Government hospital. Ashok took Anteshwar in the hospital. Rafiq took him in the hospital. Doctor treated them. Anteshwar expired in the hospital within twenty minutes. Police came there. The Police Officer Shri Gutte enquired with him. The time was about 9:30 to 9:45 p.m. He narrated the incident to Police Officer Shri Gutte, who recorded it. After recording the complaint it was read over to him and he put his signature on it. The Doctor of Udgir referred him to Latur Civil Hospital. He was admitted there for 10 to 12 days. On 11.05.1998 the Police recorded his supplementary statement at Latur.

11. During the investigation he also attended the test identification parade. He identified two assailants of Rafiq Khan viz. accused Nos.3 & 4 in the test identification parade. He identified accused No.1 and accused No.2 in the Court. He also identified the weapon used at the time of assault (witnesses was then showed a bent knife-Article No.10 and iron rod-Article No.16 and he identified them as the weapons which were used at the time of incident). In the cross-examination, the witness gave following admissions which are relevant for

appreciating his testimony.

He admitted that his place of residence village Mogha is about 9 to 10 km. away from Udgir and he came to Udgir for work in a S.T.bus.

At the time of incident he was sitting on the rear side in the maruti van. He had no occasion to see accused Nos. 1 and 2 prior to the incident. He did not know name of accused No.1 prior to the incident. He mentioned name of accused No.1 in his complaint because witness Rafiq Khan told him name of accused No.1 as Gatyia Kotalwar. After the incident he did not come to know the name of accused No.2 and that he could see accused No.2 for the first time in the Court.

At the time of incident some people gathered but they were standing at a distance at about 10 feet.

In his complaint there is no mention of a "knife" being used by accused No.1 at the time of attack.

Our observations on this deposition

12. This witness though is the complainant is practically useless for the prosecution because prior to

the incident he did not know accused Nos.1 and 2. He did not identify them even in the test identification parade mostly because he was not given an opportunity to identify them in such parade. At the time of recording his statement as complainant the Police Officer probably did not know that this witness had no acquaintance with accused Nos.1 and 2 and yet he was mentioning the name of accused No.1 in his complaint. No explanation was sought at that time from this witness. In normal course this witness ought to have mentioned in his complaint that 'an unknown person came out from the shop having knife in his hand etc'. This witness identified accused No.1 for the first time in the Court. Such identification has practically no probative value. This deposition can be utilized only for corroborating the other depositions of injured witnesses.

13. Witness No.9 is the next important prosecution witness. He stated in his deposition that on 05.05.1998 at about 5:30 p.m. when he was leaving his shop, his friend Sachin called and invited to have fruit juice at Shivaji Chowk. Both of them then went to Shivaji Chowk and had fruit juice. At that time Sachin told him that he was required to go to Dal-Mill (Anteshwar managed this Mill). Sachin had a motorcycle and both of them used his motorcycle to go towards Dal-Mill. On the way they

noticed that accused Nos.1 and 2 were talking to a girl standing by side of the road. Thereafter, accused Nos. 1 and 2 riding on motorcycle came after his motorcycle and asked Sachin to stop the motorcycle. Accused No.2 then caught collar of his shirt and abused him. He also asked as to why he was behind that girl. Sachin asked him which girl he was talking about. Accused Nos.1 and 2 then told him that he was talking about a girl by name Dongare. He(this witness) intervened and said they should not fight. Accused No.1 delivered a slap to him. On the other hand accused No.2 started beating Sachin. A girl by name Dongare then came there and asked accused Nos.1 and 2 that their action was unnecessary. She even told them that the boy who had teased her had already gone away. Accused Nos.1 and 2 then stopped their assault.

14. Thereafter this witness and Sachin continued their journey towards Dal-Mill. From the Dal-Mill they came to market yard and noticed that 2-3 boys were sitting in front of accused No.2's shop. He told Sachin to stop the motorcycle so that he would convince accused No.2 (not to fight). Sachin stopped the motorcycle. This witness asked accused No.2 as to why he had unnecessarily assaulted them. Accused No.2 aggressively told him that he should come inside the shop and that he would beat him. He also threatened them that unless they go away

quietly he would break their limbs. Accused No.2's friend pacified but accused No.2 was still threatening him that he should do whatever he wanted. Thereafter witness Sachin came to this witness's room using Sachin's motorcycle at about 7:30 p.m. At that time Anteshwar, Ashok, Amrut and Ramrao came there in maruti van. This maruti van was quietly commonly used and has peculiar sitting arrangement. It has four doors. Rear doors slide back when they are open.

15. Anteshwar then asked Sachin to hand over motorcycle key. Sachin told Anteshwar that accused Nos.1 and 2 had unnecessarily assaulted on the false ground over a girl. Anteshwar told Sachin that he would pacify accused Nos.1 and 2 as they two were businessmen. Thereafter Sachin and Ramrao left using Sachin's motorcycle. Thereafter this witnesses Anteshwar, Ashok and Amrut using a maruti van went to the shop of accused No.2 which is situated in market yard. They intended to pacify him. Accused Nos.2 and 3 were present in the shop. Anteshwar and Amrut got down from the maruti van and asked as to who was accused No.2(it appears that they did not know accused No.2's identity). The accused No.2 came forwarded. Anteshwar asked him why he was unnecessarily picked up a quarrel and told him that as a businessman and residing in neighbourhood they should not quarrel.

Accused No.2 assured Anteshwar that there would be no quarrel.

16. Thereafter, this witness, Anteshwar and his other two companions went to the restaurant. After reaching there, within 2-3 minutes Pintu @ Yashwant came there and informed them that accused Nos.1 and 2 were planing to assault Sachin. Anteshwar told Pintu @ Yashwant that he should go to home and he would pacify accused Nos.1 and 2. Pintu @ Yashwant left. Thereafter Anteshwar asked his companions that they should first go and pacify accused Nos.1 and 2 and thereafter they would have meals. So all of them boarded maruti van and went towards accused Nos.2's shop. The shop was closed so they went to accused No.1's shop. The shop was open with small shutter. Anteshwar told him that there could be businessmen sitting inside the shop and this witness should go and call accused No.1 outside so that he would pacify him. He got down from the maruti van and went to the small shutter of the shop. Accused No.1 was sitting inside the shop with his clerk. He asked him to come out to have a talk with Anteshwar. Accused No.1 said to him that he would come. Accused No.1 then made a phone call. Thereafter he came outside the shop. He saw the situation outside his shop and then went back inside his shop. He came out again with a knife in his hand. This witness

told him that he had not come for quarrel. He also said to him that he would settle the dispute. Accused No.1 was moving knife in his hand in air. He was brandishing it. Accused No.1 came near him he sustained a blow of knife on his chest on left side. He moved away to avoid further assault. At that time Anteshwar was stepping down from the driver seat of the maruti van. Suddenly accused No.1 delivered forcible blow on Anteshwar's chest. He was about five feet away from the maruti van. At that time three more persons came there and started beating him using kicks and fists. Accused No.2 also came there with a steel rod in his hand and delivered a blow on his right shoulder, he fell down. Accused No.2 dealt one more blow of steel rod on his head. He sustained bleeding injury. He kept sitting down. He saw accused No.2 was throwing the steel rod in his hand inside the maruti van in which he had come there. Ashok started maruti van. He boarded the same. He noticed injuries to Amrut, Anteshwar and Ashok and drove the maruti van ultimately to the Government hospital. All of them were admitted in the hospital. The Doctors treated them. Thereafter, after some time Sachin and Pintu @ Yashwant came to hospital. They had talk with him. They asked him as to what happened. I told them that accused No.1 assaulted Anteshwar. Anteshwar expired within short time. He and other injured witnesses were then referred to Latur Civil

Hospital. He was hospitalized for three days.

17. This witness also stated that at the time of incident he had occasion to see one Suresh. This witness also identified Article No.16-steel rod and knife-article No.10 being weapons utilized by accused Nos.1 and 2. This witness further stated that he had occasion to attend the identification parade but does not add as to what happened in such parade. He identified the accused Nos.1 and 2 in the Court. In the cross-examination he admitted following facts.

18. He was close friend of Sachin who called him Bhaiya. Prior to the date of incident he had no occasion to have talk with accused Nos.1 and 2 but he knew that they were resident of Udgir town.

19. At the time of incident of beating on the road due to the cause of an eve-teasing. He admitted that he did not retaliate because accused Nos.1 and 2 belong to rich families. But he felt insulted due to assault. He and Sachin thereafter had talk about quarrel and were wondering and were saying as to why they were unnecessarily beaten up. During the incident that took place in the shop of accused No.2, he admitted that he too express his displeasure over the incident to accused

No.2.

20. At the time of assault, accused No.1 was holding a knife which had straight blade. The incident of assault lasted for about five minutes. Because of blow on his head he felt giddiness. In his police statement there is no mention about accused No.2 throwing the steel rod in maruti van. Some people from nearby chowk came running to the spot at the time of incident. While he was in Udgir Hospital after the incident the Police did not make inquiry with him. The Police recorded his statement. After 2-3 days he was discharged from Latur Hospital.

COMMENTS ON THIS DEPOSITION OF WITNESS NO.9

21. Presence of these witness on the scene of occurrence was quite natural, who was assaulted and humiliated earlier by accused Nos. 1 and 2. He told Anteshwar about earlier incident. He accompanied Anteshwar and others to go to shops of accused No.2 first and then to accused No.1. He took lead to go and call accused No.1 prior to the incident. He stood outside the shop. He saw accused No.1 coming out from his shop holding a knife in his hand. But he exaggerated and lied about knife blow and injury caused by it. The medical evidence did not support his case that accused No.1

delivered a knife blow on his chest. Specifically he did not state how accused No.1 assaulted witnesses Amrut and Ashok. He said that he sustained a blow of rod on head and he sat down and thereafter got into the maruti van. After he entered the maruti van he learnt that other two witnesses also sustained injuries. Witness No.10 is Ashok. He stated that he knew accused Nos.1 and 2. He told, on that day he and his companions had gone to restaurant by name "Simran Dhaba" where they had dinner. Pintu @ Yashwant came there and told that some boys had assembled for assaulting Sachin. Therefore, Anteshwar told that they should go and persuade the boys not to quarrel. Accordingly, they all boarded the maruti van and went in front of shop of accused No.1. Anteshwar was driving the maruti van. It was about 8:30 p.m. Anteshwar asked Rafiq Khan to call accused No.1 so that he would talk to him and convince him that they should not pickup quarrel. Accused No.1 came outside his shop, went back and came with a knife in his hand. He assaulted Anteshwar with knife on his chest. He was sitting on the rear seat of the maruti van. At that time, Anteshwar asked him to drive the maruti van. Therefore he stepped down. While he was helping Anteshwar accused No.1 assaulted him on his left hand. He sustained bleeding injury. Amrut Also stepped down from the maruti van. Accused No.1 assaulted him with knife on his waist. He saw Rafiq Khan was being

beaten up by 3-4 persons, amongst them was accused No.2. He was holding a steel rod. He started the maruti van and carried others to hospital and ultimately reached the Government hospital. At the hospital he lifted Anteshwar and took him inside the hospital. The Police came there. Anteshwar expired after some time. The Doctors treated him and then sent him to Latur Civil Hospital, where he was admitted for 2 days. This witness also could identify in the Court that knife-Article No.10 which is bent blade of 90 degree and he identified them as the weapon which was used at the time of incident. He said that the knife which was used by Accused No.1 at that time knife's blade was straight. In the cross-examination following observations could be brought on record. This witness admitted that there was crowd at the time of incident. But he could not know as to from where people gathered there. When they arrived in front of accused No.1's shop there was no one present in front of the shop. The medical evidence in respect of injuries indicated that this witness had sustained two injuries i) incised wound on left elbow joint. Size 2x1x1 cm. & ii) Contusion on left forearm lower end. Size 3 x 2 cm. Both the injuries were simple. First one was caused by sharp object.

22. P.W.11 and P.W.13 are also examined eye witnesses. But it is apparent that they are not only

chance witness but they are patently got up witnesses too. Their depositions did not inspire confidence and we are inclined to reject their depositions altogether.

23. The next part of the prosecution case is nature of injuries and cause of death of Anteshwar. The prosecution witness No.3 Dr. Pawar stated that on 05.05.1998 at about 9:30 p.m. four injured persons were brought to his hospital. He examined Anteshwar and found his condition very serious. There was incise wound on middle part of chest, i.e. on sternum. The wound was measuring 5 x 3 cm into deep to thoracic cavity. The injury was grievous in nature, caused by sharp and cutting object like knife. The age of injury was within 12 hours. The patient was unconscious. Though treatment was given for half-an-hour Anteshwar died at about 10:00 p.m. There was another injury on the person of Anteshwar. It was abrasion on left elbow joint.

24. The prosecution witness No.1 Dr. Onkar Swami deposed that he conducted Postmortem examination of Anteshwar's body. He told that Anteshwar was about 28 years old, he was well nourished. External injury found on Anteshwar's body of 2 1/2" x 1 1/4", X organ deep on the body of sternum in between 4th and fifth ribs. The direction of the wound was transverse-oblique in

directions. On internal examination he noticed that there was incise lacerated wound on pleura of lung size 3" x 1" over right middle lobe. Injury to right lung was 3" x 1" X 1/2" over the right middle lobe with tear of bloods of vessels viz. pulmonary artery and vein.

25. In cross-examination he admitted that the injury described above was not possible by the knife which was produced before the Court as article No.10. He also opined that the cause of death was due to hemorrhagic shock due to injury to right lung. This deposition clearly indicated that Anteshwar died due to one solitary stab wound caused to his chest. Stab went up to his lung. Due to this stab the lung pulmonary artery and vein were cut.

26. The learned Judge of the lower Court disbelieved the prosecution case partly. The learned Judge held that Anteshwar was stabbed to death by accused No.1. But he also held that accused No.2 and other accused were not proved to be present at the time of incident.

27. We heard submissions. On one side the learned Sr. counsel for the accused No.1 argued that the entire prosecution evidence is not trustworthy and same should be disbelieved. Secondly, he, in the alternative

submitted that accused No.1 apparently used weapon in self-defence and therefore he deserves acquittal. In alternative he also argued that, if the the Court comes to conclusion that accused No.1 committed culpable homicide, it would fall within exception 4 of Section 300 of the Indian Penal code. He also asserted that the accused No.1 could not be held to have intention to cause injury which was sufficient to cause death.

28. On the other hand learned A.P.P. and Shri Deshmukh who was allowed to argue in support of prosecution case tried to point out that there was ample evidence against at least accused No.2 and he should be convicted. In addition to this submission they submitted that this was not a case of self-defence or a case falling under four corners of Exception 4 of Section 300 of Indian Penal code.

29. Following questions arose for our consideration :-

i] Whether the evidence on record could probablise that accused No.1 had right of private-defence at the time of incident and could justifiably caused injury to his victims and death of one of the victim.

ii] If we hold that accused No.1 had right of private defence at the time of incident whether he exceeded such right?

iii] Whether the evidence on record would indicate probablise that it was a case falling within four corners of exception 4 of Section 300 of the Indian Penal Code?

Point No.I:

30. In order to examine this point we must first read provisions of Indian Penal Code in respect of right of private defence Sections 96 to 106. We must also keep in mind principles regarding right of private defence laid down by Supreme Court in case of **Darshan Sing Vs. State of Punjab and another (2010 Volume-II SC Page No.333).**

Following are principles regarding right of private defence :

"(i) Self-preservation is the basic human instinct and is duly recognised by the criminal jurisprudence of all civilised countries. All free, democratic and civilised countries recognise the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to

put the right of self-defence into operation. In other words, it is not necessary that there should be an actual omission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is coterminous with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self-defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened."

31. On careful perusal all the provisions and above quoted principles we have to examine evidence and find out as to whether accused No.1 could show on probability

that right of private defence commenced in his favour at the time of incident, if the answer is in affirmative whether his case would fall within parameter of Section 100.

We would now turn to facts.

32. It is an admitted fact that accused Nos. 1 and 2 showed their aggression in the afternoon of that day against Sachin and Witness No.9. It is an admitted fact that accused Nos.1 and 2 slapped, assaulted and abused Sachin and witness No.9. There is an indication that this incident of beating took place in presence of a girl. Witness No.9 and Sachin did not retaliate because they felt that they were not sufficiently strong in front of accused Nos.1 and 2. Witness No.9 admitted that he felt insulted because of this incident. Young men are quite sensitive to such incidents which occur over alleged eve-teasing. If they are beaten up in presence of the girl involved they would feel extremely humiliated. We have no doubt in our mind that witness No.9 and Sachin must have felt insulted. Their ego was got hurt. And they said that accused Nos. 1 and 2's attack was unjust as they were not guilty of eve-teasing. It was therefore probable that they felt resentment and anger.

33. They narrated this incident to their elder i.e.

Anteshwar, who is little older than them. He is uncle of Sachin and naturally Sachin could make grievance of incident to his uncle. It has come in evidence that uncle Anteshwar tried to pacify his nephew. This also indicates that Sachin-nephew was furious and probably urged his uncle that he should help him avenge the insult and humiliation. The incident narrated by witness No.9 however on the other hand does not create an impression that accused Nos.1 and 2 were angry and had reason to initiate further confrontation with Sachin. They already had upper hand in the conflict. Therefore when the witnesses stated that Anteshwar repeatedly announced that he would go and pacify accused Nos.1 and 2. We have our own doubt about truthfulness of this statement. Probably Anteshwar had no need to pacify accused Nos.1 and 2. He had ample reason to ask them as to why they had slapped his nephew and humiliated him in presence of a young girl. At least they owed him an explanation. Anteshwar therefore was most probably angry with accused Nos. 1 and 2. Sooner he learnt about this humiliating incident he thought of going and meeting accused Nos.1 and 2. After he sent his nephew Sachin home, he and his companions proceeded in a Maruti van towards shop of accused No.2. They found few boys sitting in front of the shop. Anteshwar did not know as who amongst the boys was accused No.2. The evidence simply indicated that

Anteshwar asked accused No.2 that no further quarrel should take place. But before such warning could be given, it was but natural that Anteshwar would ask as to why accused No.2 insulted and humiliated his nephew. Accused No.2 having regard to his age at the time of incident had no alternative but to admit that he would take the quarrel further. This indicates that accused No.2 was unable to have confrontation with Anteshwar.

The prosecution case that Anteshwar was elderly man and that he went to accused No.2 to pacify him is not at all acceptable to us. Anteshwar was not elderly, he was young man of 28 years having well build-body. He was also a businessman having a car etc. So, it was more likely that he would start asking explanation to the tormentors of his young nephew. The prosecution case that Anteshwar only pacified accused No.2 is therefore not believable. It is more believable that Anteshwar had asked explanation to accused No.2 and warned him. It is only after such warning accused No.2 agreed not to continue the dispute. It was more probable that after having this conversation with accused No.2 Anteshwar himself felt pacified and then he decided to have dinner. He accordingly took his companions to a restaurant (Dhaba). But no sooner there they learnt that there was further provocation and that some boys had assembled near shop of accused No.2. Without waiting for food, Anteshwar

commanded his companions to go and again "pacify" accused Nos.1 and 2. We are not at all inclined to believe this part of the prosecution case that Anteshwar left the restaurant for bringing about re-conciliation etc. He was most probably angry and wanted to teach a lesson to accused Nos.1 and 2. He further most probably left the restaurant in anger and drove his Maruti van himself. When he did not find any one near accused No.2's shop he ought to have returned to the restaurant. The information he had received earlier that the some boys were assembled near accused No.2's shop was found to be incorrect. He should have gone back but this admittedly did not happened. He continued his procession towards shop of accused No.1. Even here admittedly he did not see anyone outside accused No.1's shop. It was about 8:30 p.m. In the night the business was already closed. The shop was half closed. Apparently there was no preparation from side of the accused to launch an attack and cause injury to his nephew. In these circumstances Anteshwar ought to have felt satisfied that there was no possibility of further quarrel and fights between boys of the age of his nephew. He ought to have returned at least from there, but he did not. He asked one of his companions to go and call accused No.1 from the shop. He also said that there could be some businessmen in sitting inside the shop and probably wanted to avoid incident

inside the shop in front of businessmen. He wanted to talk with accused No.1 outside his shop. Accused No.1 in such situation came outside. He was not aware as to how many people had came to visit him. He could only see witness No.9 Rafiq Khan outside his shop telling him that Anteshwar wanted to talk with him. At this time accused No.1 was almost alone. Accused No.2 and others were not with him, their support was not with him. He knew that Anteshwar would ask him explanation as to why he had humiliated his nephew. He must have sensed danger. This was probable. He came outside unarmed. He noticed witness No.9 was standing in front of his shop and others were sitting (according to the prosecution version) in the Maruti van were probably ready to get down. Anteshwar admittedly wanted to talk with him. This probably gave him anxiety. He must probably have frightened and in such fright he got panicked. He probably thought that he would face dire consequences if all occupants of the car would come seeking his explanation. He thus had an apprehension that he would be at least beaten up. He tried to make a phone call but apparently did not get positive response. He must have felt that he was cornered. So in such situation and due to panic he picked up a knife like weapon lying in his shop.

34. Even the weapon he used at the time of incident

is a doubtful subject of prosecution case. Before the trial could begin, the prosecution alleged even in the charge framed against accused that a pair of scissors was used for assaulting the deceased and others. The prosecution witness No.12 Amrut- first informant while narrating the incident he did not make mention of knife as weapon seen in the hand of accused No.1. We have therefore strong doubt as to whether accused No.1 had knife in his hand. Again the knife that was produced before the Court as murder weapon is doubtful article. It is a knife with blade bent in 90 degrees. We found such weapon useless for launching an assault. If such weapon is used for attack, the assailant himself would get seriously injured. The bent blade would first cause injury to his own hand. Eye witnesses on the other hand confidently deposed that the weapon that they saw in the hand of the accused No.1 had straight blade. And yet they deposed that weapon produced before the Court was the same weapon. No one explained as to how this weapon produced before the Court was blunt and damaged. Nonetheless we are not holding that accused No.1 had no weapon in his hand at the time of incident he did have some weapon which he had used.

35. We hold that the accused No.1 looking to his age and the gravity of situation probably developed

apprehension in the mind of the accused No.1 that he would be beaten up and that he had no escape route. He also realized that no-one would come to support or protect him in such situation.

36. We hold that the accused No.1 had sufficient apprehension which would give rise to a right of private defence. This right commenced, the moment he saw witness No.1 and others sitting in the van in front of his shop. We may not however say this apprehension was of death. He had apprehension of getting cornered, detained, wrongly restrained and getting beaten up. Such situation as said above amounted to commencement of right of private defence of accused No.1's body. Picking up a weapon in his hand thus was quite justifiable. What happened thereafter is another story.

37. Thereafter he started brandishing the weapon in his hand. He most probably wanted to show the visitors that he was armed and they should not come near him. Brandishing weapon was an attacking posture of his self-defence. He most probably challenged witness No.9 and others who were sitting in the van. Seeing him in such mood probably disheartened witness No.9. He started going back. At this point of time Anteshwar instead of calling witness No.9 back to the van thought that he could get

down from the van. He probably got down to protect witness no.9. The situation was serious. Anteshwar was elder to accused No.1. When he saw accused No.1 brandishing, he ought to have called witness No.9 back to the van and he ought to have left the place. He ought to have realized that accused No.1 was not in proper frame of mind to listen his conciliatory words. But on his own he thought it fit that he should get down from the van. The moment he got down from the van, accused No.1 probably took that action as an attacking posture. He probably felt further panicked. It is in this situation we have appreciate as what happened thereafter. Accused No.1 then rushed to the Anteshwar and before anything could happen between them, he stabbed him. After this stab other two witnesses namely Amrut and Ashok probably thought that they should get down from the van and intervene. They probably thought they should stop accused No.1 from continuing his attack or/and to help Anteshwar who had already sustained injury. In such situation, it was more likely that they would try to stop accused No.1's attack. In order to stop accused No.1, they would go near him and catch his weapon wielding hand. Had they attempted to do so there would have been a scuffle. In such scuffle they could have sustained injuries. They did sustain such injuries but were superficial ones. This indicates that accused No.1 most

probably caused them such injuries in the scuffle. The accused No.1 did not cause further injuries.

38. What happened thereafter according to the witnesses is further noteworthy. Witness Ashok took charge of drivers seat and could also push Anteshwar on the seat next to him. In the mean time even witness No.9 boarded the van. The prosecution witnesses are not stating as to what at that time accused No.1 was doing. It was more probable that after an assault and seeing Anteshwar's in injured condition and the others witnesses trying to escape, the accused No.1 stopped his attack. It is at this time the right of private defence stopped continuing.

Point No. 2:-

39. Use of excessive force is not permissible, as per the provision of Section 99. We held above that picking up a knife like weapon at the time of incident after apprehension leading to panic was justifiable. The question is whether accused No.1 was justified in using such weapon for causing stab injury to the person whom he thought to be his assailant. It can be said that Anteshwar had no reason to get down from the maruti van. The moment he got down from the maruti van, he created

impression in the mind of accused No.1 that he had got down from the maruti van in order to launch to counter attack. There is nothing on record to indicate that Anteshwar had any weapon. Yet considering the age difference between accused No.1 and Anteshwar and a physique of Anteshwar, it can be said that accused No.1 felt apprehended and to stop him from launching his assault, he preempted stab which unfortunately caused victim's death.

40. The question would still arise as to whether despite of apprehension of attack and possibility of getting hurt due to beating by Anteshwar and his companions, the accused No.1 used excessive force than was necessary? Accused No.1 had many other ways to protect himself. He would have simply closed the door of his shop or he could have talked to Anteshwar and could have convinced him that whatever he had done earlier in the day was not culpable etc. On the other hand he could have adopted defensive approach by begging pardon of Anteshwar and his companions. But we must also keep in mind principles regarding right of private defence laid down by Supreme Court in case of **Darshan Sing Vs State of Punjab and another** (supra).

41. In this case accused No.1 had not taken specific

defence that he acted in private defence. He took a defence that when he came out of the shop he saw Rafiq Khan, Anteshwar and other occupants standing in front of his shop. He suggested that all of them launched assault on him due to which he sat down protecting his head and therefore could not see what happened thereafter. He suggested that thereafter some unknown persons came and assaulted Anteshwar and others. We do not find this defence truthful. We have already recorded our findings that accused No.1 apprehended that he would be assaulted by Anteshwar and others, and that he had no time to call for help and that he therefore was entitled to use force to protect his person. We have also given a finding that accused No.1 due to his inexperience, age of 19 years got panicked, picked up a sharp edge weapon and came out from the shop. He probably thought that aggression could be a better defence. He might not have acted even without thinking as to what would be the consequences of his action. We are not inclined to discuss as to whether his conduct was good or bad. But in a situation we hold that his conduct was permissible in law. He was justified in picking up a weapon and pointing it out to his possible assailant. His case thus fell in Clause-II Secondly of Section 100 of Indian Penal Code. He apprehended that grievous hurt would be caused him if Anteshwar and others had launched attack on him.

42. As quoted above now law is settled that if the accused does not plead self defence it is still open to the Court to examine evidence and consider even rather belatedly a plea of self defence on the basis of evidence. The learned Senior counsel for the appellants placed reliance on point No.10 quoted above from the Supreme Court judgment. He argued that his client was in eminent and reasonable danger of losing at least his limb was entitled to use force in self defence. While doing so his client was even entitled to cause death of his assailant. In our view, this argument is available to the accused No.1 only if he could show that the force he used was not disproportionate to the eminent danger. The burden to show this was on accused No.1. He made no positive attempt to indicate this.

43. As said above he took, if not false but incomplete and weak defence. Had he taken a bold defence by entering into witness box and stating as to why he panicked, frightened and picked up a deadly weapon, he could have explained it. This was in his special knowledge alone. He could have also deposed as to why he targeted Anteshwar in particular and at what point of time. Whether he attacked him while he (Anteshwar) was getting down from the van. Or whether Anteshwar had got

down from the van and had started walking towards him?

44. In view of a particular defence already taken even the cross-examiner was unable to bring on record this aspects.

45. We are therefore inclined to hold that accused No.1 had no justification for using such force with which he used while stabbing Anteshwar. In other words he could have caused lessor injury to deter Anteshwar from coming towards him. We hold that accused No.1 had intention on his part which was likely to cause Anteshwar's death. But he had no such intention to cause his death.

46. The question now arises as to - what is the culpability of accused No.1? A similar situation arose before the Supreme Court of India in the case of Yogendra Morarji Vs State of Gujrat (1980)2 Supreme Court Cases 218. This judgment delivered by three Judges Bench of the Supreme Court of India examined similar case of right of private defence of body. The question before the Supreme Court of India was when the right of private defence of body accrues, when it extends to voluntarily causing death and when such causing of death is an excess of right.

47. The facts of the case were quite peculiar and somewhat similar to the facts of the present case. The accused was a businessman who had purchased a piece of land and had employed deceased and few others for digging well. A dispute regarding payments due culminated in the workers collectively approaching the accused when he visited the village and was staying in his Manager's house. In the course of their discussion a hot altercation ensued. The accused refused to pay and asked the workers to leave his house. This enraged the deceased and his companion workers. They left the house of the accused but lingered on out side near the field. When the accused started his journey at about 9.00 p.m. the deceased and his companions raised their hands signaling him to stop the vehicle. The accused either stopped or slowed down the vehicle and put out his hand which held a revolver. He fired three rounds in quick succession without aiming at any particular person. The last fire hit the deceased causing his death. Subsequently the accused surrendered and thereafter he was tried. The Supreme Court observed in that the principle question was whether death was caused in exercise of right of private defence. The Supreme Court observed thus:

"The Code excepts from the operation of its penal clauses" large classes of acts done in

good faith for the purpose of repelling unlawful aggression but this right has been regulated and circumscribed by several principles and limitations". The most salient of them concerning the defence of body are as under:-

i] Firstly, there is no right of private defence against an act which is not in itself an offence under the Code;

ii] Secondly, the right commences as soon as and not before a reasonable apprehension of danger to the body arises from an attempt or threat to commit some offence although the offence may not have been committed and it is coterminous with the duration of such apprehension (Section 102). That is to say, the right avails only against a danger imminent, present and real;

iii] Thirdly, it is a defensive and not a punitive or retributive right. Consequently, in no case the right extends to the inflicting of more harm than it is necessary to inflict for the purpose of the defence (Section 99). In other words, the injury which is inflicted by the person exercising the right should be commensurate with the injury with which he is threatened. At the same time, it is difficult to except from a person exercising this right in good faith, to weigh "with golden scales" what maximum amount of force is necessary to keep within the right. Every reasonable allowance should be made for the bonafide defender "if he with the instinct of self-preservation strong upon him, pursues his defence a little further than may be strictly necessary in the circumstances to avert the

attack". It would be wholly unrealistic to except of a person under assault, to modulate his defence step by step according to the attack;

iv] Fourthly, the right extends to the killing of the actual or potential assailant when there is a reasonable and imminent apprehension of the atrocious crimes enumerated in the six clauses of Section 100. For our purpose, only the first two clauses of Section 100 are relevant. The combined effect of these two clauses is that taking the life of the assailant would be justified on the plea of private defence; if the assault causes reasonable apprehension of death or grievous hurt to the person exercising the right. In other words, a person who is an imminent and reasonable danger of losing his life or limb may in the exercise of right of self defence inflict any harm, even extending to death on his assailant either when the assault is attempted or directly threatened. This principle is also subject to the preceding rule that the harm or death inflicted to avert the danger is not substantially disproportionate to and incommensurate with the quality and character of the perilous act or threat intended to be repelled;

v] Fifthly, there must be no safe or reasonable mode of escape by retreat, for the person confronted with an impending peril to life or of grave bodily harm, except by inflicting death on the assailant;

vi] Sixthly, the right being, in essence, a defensive right, does not accrue and avail where there is "time to have recourse to the

protection of the public authorities"
(Section99)."

48. The Supreme Court then discussed the facts and came to the following conclusion :

49. It was not improbable that after deceased and his companions were turned out house of the accused, these aggrieved persons stood and lingered on for sometime outside his house and could have vented their indignation by abusing and threatening to teach a lesson. The deceased and his companions attempted to intervene and stop the vehicle of the accused and that they were not peaceful. They had a common object of recovery of money from the accused, they were likely to put him in fear of physical harm. As soon as the deceased and his companions raised their hands to stop the vehicle of the accused, it was not unreasonable for the accused to apprehend mere physical harm at their hands. So, right of private defence of the body accrued to the accused as provided under Section 102 of the Indian Penal Code. The deceased and his companions were not carrying any arms. Even though they had pelted stones on the vehicle of the accused the inmates of the car could not reasonably apprehend death or grievous hurt as a result of stone throwing. When the deceased and his companions encircled the vehicle, the accused could have accelerated his

vehicle and escaped. The accused should not have fired all three rounds in quick succession, he should have waited for some time after one round fire to see the effect on the persons attempting to encircle him. But mere fact that he did not assess the necessity of fire each successive shot does not negate good faith on his part in exercise of right because a persons placed in peril is not expected to weigh in golden scales what amount of force is necessary to keep within right. Thus this is a case in which the accused had exceeded his limit of right of private defence available to him under Section 101 of the Indian Penal Code. The Supreme Court of India upheld the judgment of High Court that the offence committed by the accused was under Section 304 Part-II of Indian Penal Code and did not amount to murder under any of the four clauses of the definition given in Section 300 of the Indian Penal Code. The Supreme Court also reduced the length of sentence to six months rigorous imprisonment and imposed fine of Rs.10,000/-, with default clause. Fine, if paid, was made payable to the widow of the deceased.

50. Following the judgment of the Supreme Court we hold that in this case also the accused exceeded his right of private defence when he stabbed the victim. We also hold that this case would not fall within four clauses of the

definition given in Section 300 of the Indian Penal Code and therefore we hold that accused No.1 should be convicted for the offence punishable under Section 304 Part-II of the Indian Penal Code. We are applying Part-II of Section 304 of the Indian Penal Code mainly because the accused had no intention to cause death but had knowledge that his act might cause death of the victim. We set aside his conviction for the offence punishable under Section 302 of the Indian Penal Code.

51. We now decide as to what sentence should be imposed upon accused No.1. There are some mitigating circumstance in favour of the accused. He was about 20 years old at the time of incident. He had no criminal antecedents. The appeal remained pending for more than 15 years. Now in the mean time we are told the accused has completed his education and has started legal practice. He is also married and having kids. In these circumstances the following order is would suffice the ends of justice.

ORDER

i] Criminal Appeal No.69 of 2000
and Criminal Appeal No.185 of 2000 are
partly allowed.

ii] Conviction of accused No.1-Gattya @ Laxmikant S/o. Chandrakant Kotalwar u/s 324 and 302 of the Indian Penal Code is set aside. He is convicted under Section 304, Part-II of the Indian Penal Code and sentenced to suffer rigorous imprisonment for three years with a fine of Rs.50,000/- (Rupees Fifty Thousand), in default, he shall suffer rigorous imprisonment for one year. The fine amount shall be deposited within one month from today.

iii] The fine amount, if deposited, shall be paid as compensation to the widow of the deceased by name Sunita Anteshwar Hude or to the immediate legal heirs of deceased Anteshwar.

iv] Accused No.1-Gattya @ Laxmikant S/o. Chandrakant Kotalwar shall surrender to serve out the remaining sentence within two weeks from today.

v] The bail bonds of the remaining accused shall stand canceled.

vi] Criminal Revision Application No.86 of 2000 stands dismissed.

vii] Criminal Application No.990 of 2016 in Criminal Appeal No.185 of 2000 does not survive and disposed of accordingly.

Sd/-

[INDIRA K. JAIN, J.]

Sd/-

[A.V. NIRGUDE, J.]

Vishalk/criapl69.00

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Vishal R. Kamble
Clerk