

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.622 OF 2012

- 1) Krishnarao S/o Gangarao Maske,
Age-75 years, Occu:Agriculture,
- 2) Kondbarao S/o Krushnarao Maske,
Age-29 years, Occu:Agriculture,
- 3) Baban @ Uttam S/o Keshavrao Maske,
Age-27 years, Occu:Agriculture,

All R/o- Paroda, Tq. & Dist-Hingoli.

...APPELLANTS

(Ori. Accused Nos.1, 4 & 9)

VERSUS

The State of Maharashtra

...RESPONDENT

...

Mr. Joydeep Chatterji Advocate for Appellants.
Mr. M.M. Nerlikar, A.P.P. for Respondent.

...

WITH

CRIMINAL APPEAL NO.625 OF 2012

- 1) Goprao S/o Marotrao Maske,
Age-36 years, Occu:Agriculture,
R/o-Hingoli, Tq. & Dist-Hingoli,

- 2) Marotrao S/o Kanbarao Maske,
Age-74 years, Occu:Agriculture,
R/o-Parda, Tq.-Hingoli,
Dist-Hingoli,
- 3) Waman S/o Madhavrao Maske,
Age-44 years, Occu:Agriculture,
R/o-Parda, Tq. & Dist-Hingoli.

...APPELLANTS

(Ori. Accused Nos.8, 10 & 11)

VERSUS

The State of Maharashtra,
Through Police Inspector Basamba,
Tq. & Dist-Hingoli.

...RESPONDENT

...

Mr. M.A. Tandale Advocate for Appellants.
Mr. M.M. Nerlikar, A.P.P. for Respondent.

...

WITH

**CRIMINAL APPLICATION NO.5160 OF 2013
IN
CRIMINAL APPEAL NO.625 OF 2012**

Gopurao Marotrao Maske,
Age-40 years, Occu:Agriculture,
R/o-Parda, Tq. & Dist-Hingoli.

...APPLICANT

VERSUS

The State of Maharashtra.

...RESPONDENT

...
Mr. M.A. Tandale Advocate for Applicant.
Mr. M.M. Nerlikar, A.P.P. for Respondent.
...

WITH

CRIMINAL APPEAL NO.633 OF 2012

- 1) Santosh S/o Laxman Bangar,
Age-24 years, Occu:Agri.,
R/o-Hingoli, Tq. & Dist-Hingoli,
- 2) Shriram S/o Laxman Bangar,
Age-26 years, Occu:Agri.,
R/o-Hingoli, Tq. & Dist-Hingoli
(At present are in jail).

...APPELLANTS
(Ori. Accused Nos.6 & 7)

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr. N.S. Ghanekar Advocate for Appellants.
Mr. M.M. Nerlikar, A.P.P. for Respondent.
...

WITH

CRIMINAL APPEAL NO.179 OF 2014

The State of Maharashtra,
Through Police Station, Basamba,
Tq-Hingoli, Dist-Hingoli.

...APPELLANT

VERSUS

- 1) Keshavrao S/o Dattrao Maske,
Age-60 years, Occu:Agri.,
R/o-Parda, Tq.-Hingoli,
- 2) Santosh S/o Nanarao Maske,
Age-22 years, Occu:Agri.,
R/o-Parda, Tq.-Hingoli.

...RESPONDENTS**(Ori. Accused Nos.2 & 5)****...**

Mr. M.M. Nerlikar, A.P.P. for Appellant.
Mr. Joydeep Chatterji Advocate appointed as
Amicus Curiae for Respondent Nos.1 and 2.

...

**CORAM: A.V. NIRGUDE AND
 A.I.S. CHEEMA, J.**

DATE OF RESERVING JUDGMENT : 5TH JULY, 2016

DATE OF PRONOUNCING JUDGMENT: 19TH SEPTEMBER, 2016

JUDGMENT [PER A.I.S. CHEEMA, J.] :

1. I have had the advantage of going through the Judgment being passed by Hon'ble Shri Justice A.V. Nirgude. With deep respect, I have differing views on certain aspects and thus proceed to pass this Judgment.

2. For convenience of reference and to avoid

reproducing names constantly, I am recording here the names of the 11 accused against whom the Sessions Trial No.15 of 2008 was instituted. Their names are as under:-

- 1] Krishnarao s/o Gangrao Maske,
- 2] Keshavrao s/o Dattrao Maske,
- 3] Nanarao s/o Gangrao Maske,
- 4] Kondbarao s/o Krishnarao Maske,
- 5] Santosh s/o Nanarao Maske,
- 6] Santosh s/o Laxman Bangar,
- 7] Shriram s/o Laxman Bangar,
- 8] Goprao s/o Marotrao Maske,
- 9] Baban @ Uttam Keshavrao Maske,
- 10] Marotrao s/o Kanbarao Maske,
- 11] Waman s/o Madhavrao Maske.

3. Senior Judge Hon'ble Shri Justice A.V. Nirgude has already referred to the introductory parts of the matter and the Appeals which have been carried. Reference is already been made to the case of prosecution which was brought and the

evidence regarding the incident as well as the other relevant prosecution evidence like postmortem, scene of occurrence etc. and conviction of some accused as well as the acquittal of some of the accused.

4. I will thus only make brief reference to the case of prosecution and facts as are necessary for the view I am taking.

5. The date of incident is 23rd February 2007. PW-2 Suresh Torkad, the nephew of deceased victim Vithalappa filed F.I.R. dated 23rd February 2007 (Exhibit 82) on which crime was registered at Basamba police station vide No.11 of 2007 at 2.30 p.m. for the incident which occurred in that morning. In short, he mentioned in his F.I.R. that the victim Vithalappa had purchased field property in 1986 from Krishnarao Gangrao Maske to the extent of 4 Acres and 8 Gunthas situated at village Parda, Tq. and Dist-Hingoli. Around Dasehara, accused No.1 Krishnarao started claiming

that 20 Gunthas of his land has got included in the purchase made by Vithalappa and land to that extent should be returned by Vithalappa to accused No.1 Krishnarao or else the turmeric crop sown in that year would be taken away by him. Vithalappa asked accused No.1 Kirshnarao to get Government measurement done and if extra land is found, he can take it. The disputes had thus arisen and accused No.1 Krishnarao along with people from his brotherhood had started making claims which were being resisted. On 23rd February 2007 at about 11.00 a.m. accused Nos.1 to 5 and 8 to 11 (as named in the F.I.R) entered the field of victim Vithalappa (hereafter referred as "victim") and having committed the encroachment, started claiming that they will be taking the turmeric crop and the victim should not take it and if victim removes the same he would be killed. The victim tried to explain to them but the accused phone called at Hingoli and called for Bangar group who reached there at about 12.00 - 12.30 noon by Jeep and motorcycle. They included accused

No.6 Santosh Laxman Bangar and accused No.7 Shriram Laxman Bangar and one Sachin Bangar. Other people also came with them and quarrel took place. In that, accused No.8 Goprao Marotrao Maske hit axe on the head of the victim who fell down and immediately accused No.9 Baban Keshavrao Maske followed the assault by hitting by stick on the back of the victim. The victim became unconscious. By that time police Jeep reached and the complainant PW-2 Suresh Torkad alongwith Annapurna Torkad (PW-4) picked up the victim and brought him to the hospital where he was declared dead by the doctor.

6. PW-16 A.P.I. Ramkrushna Chate investigated the offence. The Inquest Panchnama was recorded and postmortem of the victim was got done. The Spot Panchnama was recorded which showed that the accused persons had dropped their sticks and axe on the spot and run away. One tractor which turned turtle was lying on the spot as well as Commander Jeep was there. Motorcycle was also

found. The instruments of offence were seized and Panchnama Exhibit 41 was carried out. Statements of witnesses were recorded. The clothes of victim were seized. Concerned articles and samples were sent to C.A. and reports were obtained. 7 X 12 extract of the land was also obtained and proved at Exhibit 117. Postmortem report Exhibit 91 showed that the victim died due to assault. Charge-sheet came to be filed.

7. Charge was framed under Sections 147, 148, 302 read with 149, 447 of the Indian Penal Code, 1860 ("I.P.C." in brief) as well as Section 37(1)(3) of the Bombay Police Act. Prosecution brought on record evidence of 16 witnesses. The defence of the accused as appearing from the evidence is of denial. The trial Court after considering the evidence, acquitted accused Nos.2, 3 and 5 of the offences with which they had been charged. Accused Nos.1, 4, 6, 7, 8, 9, 10 and 11 came to be convicted under Section 302 read with 149 of I.P.C. and were directed to suffer

imprisonment for life and fine of Rs.5000/- each and in default to suffer rigorous imprisonment for six months. Accused Nos.1, 4 and 6 to 11 were also sentenced to suffer rigorous imprisonment for six months for offence under Section 447 read with Section 147 of I.P.C. and to pay fine of Rs.1000/- each and in default to suffer rigorous imprisonment for one month. These accused were further convicted under Section 147 of I.P.C. and sentenced to suffer rigorous imprisonment for three months and to pay fine of Rs.500/- each and in default to suffer rigorous imprisonment for one month. These accused i.e. accused Nos.1, 4 and 6 to 11 have been further convicted under Section 148 of I.P.C. and sentenced to suffer rigorous imprisonment for three months and to pay fine of Rs.500/- each and in default to suffer rigorous imprisonment for one month. Similar sentence under Section 149 of I.P.C. has also been imposed against these accused Nos.1, 4, 6 to 11.

8. Against the conviction of the accused

persons, they have filed Appeals. The State filed Criminal Appeal No.179 of 2014 against the acquittal of accused Nos.2 and 5.

9. The impugned Judgment was passed on 15th October 2012. In the record of the trial Court, there is also copy of Judgment of same date in the counter case having Sessions Trial No.9 of 2008 which was under Section 143, 147, 148, 307, 149, 325, 338, 427 read with 149 of I.P.C. as well as under Section 37(1)(3) read with 135 of Bombay Police Act against 7 accused. Copy of Judgment shows PW-5 Gajanan Torkad as accused No.1, PW-13 Santosh Torkad as accused No.5 and PW-15 Raju Torkad as accused No.6 in that matter.

10. Advocate Mr. Joydeep Chatterji for the Appellants in Criminal Appeal No.622 of 2012 and Amicus Curiae for Respondents in Criminal Appeal No.179 of 2014 referred to the evidence and submitted that the evidence on record of the witnesses does not show acts on the part of the

accused other than accused Nos.8 and 9 to be sufficient enough so as to convict them for offence of murder. The counsel was unable to defend the blows given by accused No.9 Baban who followed up on heels to hit the victim immediately after the victim was hit by axe by accused No.8 Goprao. The counsel stated that the other accused however deserved to be dealt with separately and should not be saddled with having common object of causing death of the victim.

11. The arguments of the learned counsel for the Appellants in Criminal Appeal No.622 of 2012 were adopted by Advocate Mr. Ghanekar who appeared for original accused Nos. 6 and 7 in Criminal Appeal No.633 of 2012. The learned counsel stated that there was absolutely no evidence against original accused Nos.6 and 7 and trial Court wrongly convicted them referring to the cross case.

12. Advocate Mr. Tandale for the Appellants

in Criminal Appeal No.625 of 2012 submitted that original accused No.8 Goprao should be treated as having given only one blow and did not repeat and thus should not have been held guilty under Section 302 of I.P.C.

13. The learned A.P.P. submitted that the State examined 6 eye witnesses of the incident, out of which some were even injured witnesses. According to the A.P.P., the accused once entered the field and then threatened and went back and came armed with weapons. The threats given earlier showed that the victim and his family were alarmed because of which PW-3 Gangadharappa Torkad went to the police station to seek help but in the meanwhile the accused persons returned and carried out the threat which had been given which was to commit murder if they were obstructed from taking crop from the portion of land they claimed to be theirs. According to the A.P.P., the witnesses partly turned hostile with reference to the involvement of Bangar group but the over all

evidence showed that conviction as awarded by the trial Court against the accused who are convicted needs to be maintained while the acquitted accused Nos.2 and 5 also deserved to be convicted. The A.P.P. submitted that when the evidence showed that accused persons had collectively committed encroachment in the field of the victim and threatened and went back and came back armed with weapons, it showed unlawful assembly and it was not necessary to prove overt-act on the part of each accused and it was not necessary that each accused must be attributed overt-act so as to convict. There was sufficient evidence on record to show that the victim was not only owner of the land but had even constructed a house and was residing there and the accused persons were aggressors. Thus, according to the A.P.P., the conviction of the accused persons should not be disturbed and accused Nos.2 and 5 should be convicted.

14. The evidence of PW-2 Suresh Torkad read

with F.I.R. shows that the land which was earlier belonging to one Krishnarao Rangrao Maske was purchased by the victim from Ratanbai (the wife of Krishnarao) and one Kanbarao more than 10 years before the incident. It appears that accused No.1 Krishnarao was claiming that his 20 Gunthas land had been taken over by the victim in that sale deed and he was claiming back the said portion of the land. The evidence of PW-2 Suresh is that from Dashehara of 2006 accused No.1, accused No.2 (who had his land adjoining - see para 13 of evidence of PW-5), accused No.4 and accused Nos.9 and 10 (as named in evidence) started claiming that the land which had been sold to the victim, from that land 20 Gunthas was of their share which had been merged and they were claiming back the land. PW-2 Suresh deposed that victim told accused persons that they should get the land measured and if it is found that their land has been merged, victim would return the same to them. Regarding this dispute, there is reference by other witnesses also and it does

appear from the record that the accused persons had been raising such dispute with the victim. Thus, the motive.

15. Regarding the incident, the evidence of PW-2 Suresh, nephew of the victim, is that the incident initially started at about 10.00 - 11.00 a.m. He was present on the road near the land. His evidence shows that at that time accused No.1, accused No.2, accused Nos.8 to 11 came in the said field where turmeric crop was sown. At that time PW-3 Gangadharappa, PW-5 Gajanan - son of PW-3, PW-14 Santosh Kishanappa Torkad and other persons mentioned in the evidence were present. PW-2 Suresh deposed that these accused persons started saying to the victim that this time they would collect the crop of turmeric. They also threatened that if the victim will take the crop, they will kill him. The victim started convincing them but they declared that they would kill him and went back towards their house. PW-2 Suresh has further deposed that at such time he had gone in the field

of his uncle. At that time Bhagwanappa, Subhashappa and PW-3 Gangadharappa decided that they will inform the police and they proceeded to the police station. Evidence of PW-2 Suresh is that thereupon the "aforesaid" accused persons came back with axe and sticks and started giving abuses. The Marathi version of evidence shows that this happened at about 12.00 - 12.30 noon. When PW-2 Suresh deposed that the aforesaid accused persons came back, he again named the accused persons and while naming them, made reference also to accused No.4 - Kondbarao whom he had missed to refer earlier.

16. The evidence of PW-2 Suresh gets support from the evidence of PW-3 Gangadharappa, PW-4 Annapurna, PW-5 Gajanan Torkad, PW-13 Santosh Gangadharappa Torkad, PW-14 Santosh Kishanappa Torkad as well as PW-15 Raju Torkad. The evidence of all these witnesses when read, makes it clear that on the day of incident at about 10.00 - 11.00 a.m. initially accused Nos.1, 2, 4 and 8 to 11 did

enter the field of victim. The evidence shows that along with victim, there was his wife and other family members were also there in the field. The evidence of witnesses shows that at such time when initially these accused entered the field, they had threatened the victim that they would be taking away the crop and if obstructed, the victim would be killed.

17. PW-3 Gangadharappa has stated that at such time he was present in the house and when the aforesaid seven accused persons entered the field, he himself, his father, mother, uncle and cousin brothers came out of the house. These seven accused started claiming that they would take away crop of turmeric and that the victim and these persons should not take the same. PW-3 Gangadharappa had deposed that these seven accused claimed that if they were obstructed, they would kill the person who obstructs. It was stated "*JO MADHE YEYEEL TYACHA MURDA PADU*" i.e. whoever intervenes would be killed. PW-3 Gangadharappa has

deposed that accused Nos.8 and 9 abused them and after giving such threats, they went towards the road.

18. Evidence of PW-5 Gajanan Gangadharappa Torkad is that when these accused persons entered the field they started claiming that they would pluck the crop of turmeric and their 20 Gunthas land is there and they would see that who obstructs them and they would kill him who obstructs. Similar evidence is there of PW-13 Santosh Gangadharappa, PW-14 Santosh Kishanappa and PW-15 Raju Bhimaappa also.

19. I have gone through the cross-examination of the witnesses but do not find that the witnesses are shattered in their evidence. The counsel for the accused persons did not point out any specific material on the basis of which the witnesses who have come on record, speaking regarding the incident could be said to be shattered. No doubt the witnesses partially did

not support the prosecution, but taking overall conspectus of the evidence, the same appears to be inspiring confidence.

20. The evidence discussed above shows that the accused persons had a motive for the attack and initially they came to be field threatening that they should not be obstructed and that if they are obstructed from taking away the crop from portion of field they claimed to be belonging to accused No.1, they had threatened to kill Victim or whoever obstructs. The evidence in this regard deserves to be accepted.

21. The evidence of PW-2 Suresh Torkad and the evidence of PW-3 Gangadharappa then shows that after these seven accused initially came and threatened and went back, the victim and his family members did feel that there was a real threat. PW-3 Gangadharappa deposed that on seeing the attitude of accused persons, he gave information to the police. According to him, he

first gave a telephone call but he was told by the PSO that he will have to come and give the complaint. The evidence of the witnesses mentioned above shows that PW-3 Gangadharappa along with one Bhagwanappa and Subhashappa went to Basamba Police Station on motorcycle.

22. The evidence of PW-6 Head Constable Sheshrao Bangar, is that at about 11.00 a.m. he received phone call from Parda that persons from Hatkar community are coming with Gundas of Bangar and that they are going to assault the person making phone call. PW-6 Head Constable Sheshrao deposed that he informed PW-16 A.P.I. Chate on phone. He also called the control room to send police force. PW-6 deposed that home-guards were available at the police station and he sent 2-3 home-guards with driver to Parda who came back along with Subhashappa and Gangadharappa, who informed that there will be fight and so the Head Constable should accompany. The evidence shows that this PW-6 gave charge of PSO to another

official and along with home-guards and driver Mundhe, by Jeep went to Parda to the spot.

23. It appears that, in the meanwhile, the seven accused persons mentioned above (i.e. accused Nos.1, 2, 4 and 8 to 11) phone called for more persons but without waiting went back to the spot at about 12.00 - 12.30 noon armed with axe and sticks and they started giving abuses. The evidence of PW-2 Suresh, PW-4 Annapurna, PW-5 Gajanan read with evidence of PW-13, PW-14 and PW-15 shows that when these accused persons went back to the spot, victim was there and apart from PW-2 Suresh, his uncle Vithalappa and other uncles were present. The evidence shows that victim tried to convince the accused persons that they should get the land measured. Thus the evidence shows that these accused persons who had threatened to kill the victim if obstructed, when they went back armed with axe and sticks, still found the victim resisting. Victim was thin built 75 years old person. This can be seen from Postmortem Report

Exhibit 91. It is not that these seven accused went there and suddenly accused No.8 Goprao used the axe on the head of the victim. The evidence shows that the victim at the time of earlier entry and even when accused came back armed, was trying to explain to the accused persons and at that time accused No.8 Goprao gave 2-3 blows with axe on the back side of the head of the victim. This can be seen from the Marathi version of evidence of PW-2 Suresh. The evidence of witnesses further makes it clear that at the time when accused No.8 Goprao gave 2-3 blows with axe, the assault was followed up by accused No.9 Baban giving stick blows on the back of the victim. Evidence further shows that the victim fell down on the ground with injuries to head. By the time the victim was taken to the hospital, he was dead.

. The evidence of these witnesses i.e. PW-2, PW-4, PW-5, supported by PW-13, PW-14 and PW-15, shows that when the companions of the victim tried to intervene, the persons intervening

were also beaten by the accused persons. PW-2 Suresh has deposed that accused No.11 Waman in the course of incident, gave blows with stick to PW-13 Santosh Gangadharappa. PW-13 Santosh Gangadharappa has also deposed that accused No.11 Waman had attacked him with the stick and blows were given on his left leg and left hand. There is medical evidence which corroborates PW-13 Santosh Gangadharappa. Medical certificate Exhibit 98 has been proved by PW-8 Dr. Ramesh Kute.

24. PW-5 Gajanan Gangadharappa has also deposed that when the victim was attacked by accused Nos.8 and 9, the other accused persons started assaulting them. He deposed that accused No.4 Kondbarao assaulted PW-15 Raju Torkad using handle of spade. PW-15 Raju Torkad has also deposed that he was assaulted by stick by accused No.4 Kondbarao causing hurt to his little finger of the left hand. Medical certificate Exhibit 99 in this regard has been proved by PW-8 Dr. Ramesh. PW-5 Gajanan further deposed that accused No.1

Krishnarao and accused No.2 Keshavrao assaulted PW-14 Santosh Kishanappa Torkad. The evidence of PW-14 Santosh Kishanappa Torkad shows that he was given blow by stick by accused No.1 Krishnarao on his right knee. The injury has been proved on the basis of the medical certificate Exhibit 97 proved by PW-8 Dr. Ramesh. Even if it was to be said that PW-13 Santosh Gangadharappa and PW-15 Raju Torkad were accused in the cross-case, PW-14 Santosh Kishanappa does not appear to be accused in the cross-case. The evidence on record shows that some of the witnesses were residing with the victim while some of the witnesses examined had residence nearby. Thus their presence is natural. Apart from this, the injuries suffered by these witnesses goes to prove their presence on the spot at the time of incident.

25. Taking over-all view of the evidence, what appears is that seven accused persons mentioned above, earlier went and threatened the victim as they were claiming that part of the

field belonging to accused No.1 Krishnarao had been wrongly purchased by the victim and wanted the victim to give back the said portion of the land and on this basis were claiming that they had a right to take away the crop which was there in the said portion and having threatened that if they were obstructed they will kill the victim or person obstructing, they earlier went back to the nearby road and made some phone calls and then armed with axe and sticks again committed criminal trespass and when victim tried to explain and thus obstructed the accused persons, they carried out the threat. While accused No.8 Goprao gave more than one blows by the axe on the head of the victim, accused No.9 Baban hit on the back of the victim by stick blows and the intervenors were stopped from helping by other accused persons by assaulting them. The common object is obvious. The evidence shows that there was real threat which was given earlier because of which PW-3 Gangadharappa had rushed to the police station. By the time the police reached, the second part of

the incident of murdering the victim and assaulting intervenors was over. The evidence of PW-7 Dr. Vithal Karpe proved three injuries on the head of the victim i.e. one incised wound on head, two contusions on head and one contusion on back and abrasion on the left shoulder of the victim. The oral evidence read with the medical evidence shows that there is substance in the oral evidence regarding the manner in which the offence was committed.

26. The evidence of PW-6 Head Constable Sheshrao Bangar shows that when he reached the spot in Jeep along with the home-guards, he found that there was one tractor which had turtled on the road and there was one Jeep which was dashed from back side and there were two motorcycles lying on the road. When witness got down from the vehicle, he heard crying of lady. This must be PW-4 Annapurna. He found one person lying there having sustained head injury. This was the victim. This Head Constable arranged to shift the victim

to the hospital. The evidence of this witness shows that even on the spot where he had reached almost when the incident was concluding, he was told that accused No.8 Goprao had assaulted the victim with axe and accused No.9 Baban had given blows with the handle on the back. Even if this may be stated to be hear-say, what is relevant is that even immediately the same incident was told to the police. The evidence of PW-13 Santosh Gangadharappa shows that at the time of incident when he was attacked, he tried to flee from the spot with the help of tractor but the tractor turned turtle in a pit. There is corroboration to this evidence of PW-13 from the Head Constable PW-6 Sheshrao and even Spot Panchnama proved by PW-16 A.P.I. Chate. One can visualize the manner in which the persons who tried to help the victim, were attacked by the accused persons who had formed an unlawful assembly to make them run helter-skelter.

27. I am not convinced with the argument that

the act of PW-8 Goprao in assaulting the victim was individual act of his own and the other six accused cannot be said to have had knowledge. The over-all reading of the evidence makes it clear that these accused persons had clear object that they will assert right to the portion of land which they claimed was wrongly with the victim and forcibly take away the crop and resistance if any should be eliminated. When these accused persons went back together to the field of victim with accused No.8 Goprao armed with an axe, they knew that the axe, a deadly weapon, can be used and when the axe was indeed used on the head of the victim not once but three times, there is no material to show that the other accused persons startled or stepped back. Rather accused No.9 Baban followed up the attack made by accused No.8 by giving (in quick succession) stick blows on the back of the victim and the other accused persons attacked those who were intervening using sticks making them run helter-skelter to the extent that one of the intervenor PW-13 Santosh Gangadharappa

could not even manage to run away properly with the help of tractor which turned turtle. Sticks, as in present matter, when used as weapons of offence must also be held to be dangerous weapons. Criminal trespass, murder and rioting was done by the unlawful assembly of the seven accused armed with deadly weapons. Taking over-all view of the evidence, I am not convinced with the arguments made for the accused persons that only accused No.8 Goprao should be held liable for the murder and the other accused did not have any such common object of the assembly to kill if necessary.

28. I have gone through the Judgment of the trial Court and find that the trial Court has not given any appropriate reasons as to how and why, when there was same evidence against accused Nos.1, 4, 8 to 11 vis-a-vis accused No.2, it was not convicting accused No.2 Kesahavrao, who was part of the seven persons in both parts of the incident. Reading of the Judgment shows that trial Court almost missed the presence of accused No.2

Keshavrao while discussing the evidence, although all the witnesses i.e. PW-2 to PW-5 and PW-13 to PW-15 did refer to his presence and participation in the acts. I thus find that there is substance in the State Appeal which has been filed. The State has filed the Criminal Appeal No.179 of 2014 against the acquittal of accused Nos.2 and 5. We have heard Advocate Shri Joydeep Chatterji for accused No.2 but I reject his argument that the evidence against accused No.2 can be distinguished, only because overt act of assault by him has not separately come on record. I find that the Appeal of the State requires to be allowed as far as regards accused No.2 Keshavrao Dattrao Maske is concerned and he too must suffer the same punishment as has been imposed by the trial Court against the other accused, whose conviction needs to be maintained.

29. As regards accused No.6 Santosh Laxman Bangar and accused No.7 Shriram Laxman Bangar, there is evidence of none of the witnesses

speaking against them. No doubt the witnesses turned hostile as regards involvement of accused Nos.6 and 7 but inspite of cross-examination, no evidence which could be judicially accepted so as to convict these persons had come on record. In the impugned Judgment the trial Court in Paragraph Nos. 24, 25 and 37 appears to have relied on the material in the counter-case being Sessions Trial No.9 of 2008 so as to convict accused Nos.6 and 7. On the basis of material in counter-case, the trial Court in this Sessions Trial No.15 of 2008 held the accused Nos.6 and 7 guilty holding that they were present in the unlawful assembly. I find that it would be necessary for the prosecutor to bring necessary material on record to establish the presence and participation of any given accused. Without the material being brought on record of this Sessions trial, only because the Judge deciding the counter-cases is common, does not mean that the Judge can read material from the other trial in this trial. Thus, I find that the conviction imposed against accused Nos.6 and 7

cannot be sustained. From the record of the present trial, it cannot be said that there is actionable evidence for conviction as regards accused Nos.6 and 7. There is no actionable evidence even as regards accused Nos.3 and 5, in this trial.

30. Accused No.8 Goprao has filed Criminal Application No.5160 of 2013 claiming that accused No.6 Santosh Laxman Bangar had registered Crime No.12 of 2007 and that it was necessary to explain injuries on the persons of the either side but the details were not brought on record and the trial Court should have brought on record documents like Spot Panchnama, medical certificate, statement of medical officer and complaint in both the cases on record. The applicant - accused No.8 prays that such documents be allowed to be brought on record. At the time of arguments the learned counsel for accused No.8 has not made submissions regarding this Application. However, it needs to be observed that the documents to be brought on record is job

of the concerned prosecutor. As far as injuries to the accused, in the present matter there is evidence of PW-4 Annapurna which shows that when her husband fell down, quarrel started between the accused persons and their persons (i.e. persons trying to help the victim). Apart from this, even the F.I.R. mentions that at the time of incident there was a big quarrel. Thus, it cannot be said that injuries or cause of injuries to persons involved had not been explained.

31. The learned A.P.P. relied on the case of **Anup Lal Yadav and another vs. State of Bihar, (2014) 10 Supreme Court Cases 275** to submit that all the members of the unlawful assembly are constructively liable for the acts committed by each other, in prosecution and execution of the common object. It is argued that it is not necessary to show overt act by all the accused persons in order to fasten liability of punishment on them. In the Judgment relied on by the learned A.P.P., in Para 19, the Hon'ble Supreme Court

referred with advantage to observations of the Hon'ble Supreme Court in earlier Judgment of **Lalji vs. State of U.P., (1989) 1 S.C.C. 437.** The concerned Para 9 from Judgment in the matter of **Lalji** reads as under:-

"9. Section 149 makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. Thus this section created a specific and distinct offence. In other words, it created a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However, the vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common objects of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. *Once the case of a person falls within the ingredients of the section the question that he did nothing with his own hands would be immaterial. He cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of*

the assembly knew to be likely to be committed in prosecution of that object. Everyone must be taken to have intended the probable and natural results of the combination of the acts in which he joined. It is not necessary that all the persons forming an unlawful assembly must do some overt act. When the accused persons assembled together, armed with lathis, and were parties to the assault on the complainant party, the prosecution is not obliged to prove which specific overt act was done by which of the accused. This section makes a member of the unlawful assembly responsible as a principal for the acts of each, and all, merely because he is a member of an unlawful assembly. While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149. It must be noted that the basis of the constructive guilt under Section 149 is mere membership of the unlawful assembly, with the requisite common object or knowledge."

(Emphasis supplied)

. In Para 22 of its Judgment in the matter of **Anuplal Yadav and another**, cited supra, Hon'ble Supreme Court also referred to the Judgment in the

matter of **State of Rajasthan vs. Shiv Charan,**
reported in (2013) 12 S.C.C. 76, and para 19 of
that earlier Judgment reads as under:

"19. The pivotal question of applicability of Section 149 IPC has its foundation on constructive liability which is the sine qua non for its application. It contains essentially only two ingredients, namely, (I) offence committed by any member of any unlawful assembly consisting five or more members; and (II) such offence must be committed in prosecution of the common object (Section 141 IPC) of the assembly or members of that assembly knew to be likely to be committed in prosecution of the common object. *It is not necessary that for common object there should be a prior concert as the common object may be formed on the spur of the moment. Common object would mean the purpose or design shared by all members of such assembly and it may be formed at any stage. Even if the offence committed is not in direct prosecution of the common object of the unlawful assembly, it may yet fall under the second part of Section 149 IPC if it is established that the offence was such, as the members knew, was likely to be committed.*"

. Referring to such earlier Judgments, in that matter of **Anuplal Yadav**, the Hon'ble Supreme Court rejected the arguments that the accused were only passive onlookers as was tried to be canvassed in that matter. Keeping such Judgments of the Hon'ble Supreme Court in view, I have already appreciated the evidence and find that the accused persons were members of unlawful assembly which had already threatened the victim with death and having once reversed and called for further help and re-entered the field of the victim having armed themselves with axe and sticks when they were still obstructed, they assaulted the victim as well as those trying to intervene. The common object is apparent and apart from accused No.8, accused No.9 the other five accused i.e. accused Nos.1, 2, 4, 10 and 11 against whom evidence has come on record are also liable to be held guilty under Section 302 read with 149 of I.P.C. The assault on the vital part of the body of the victim who was an old thin built man, clearly

demonstrated the common object. Even otherwise, the age of the victim appears to have been such that even without an axe were he to be assaulted even by the sticks in the manner in which he was hit on the head, his chances of survival would be poor. In the present matter having been attacked by the axe, he did not even reach the hospital alive.

32. The learned A.P.P. has further relied on the case of **Om Prakash vs. State of Haryana, reported in (2014) 5 Supreme Court Cases 753**. In Para 16 of the Judgment, the Hon'ble Supreme Court observed as under:-

"16. Common object of an unlawful assembly can also be gathered from the nature of the assembly, the weapons used by its members and the behaviour of the assembly at or before the scene of occurrence. It cannot be stated as a general proposition of law that unless an overt act is proven against the person who is alleged to be a member of the unlawful assembly, it cannot be held that he is a

member of the assembly. What is really required to be seen is that the member of the unlawful assembly should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141 IPC. The core of the offence is the word "object" which means the purpose or design and in order to make it common, it should be shared by all. Needless to say, the burden is on the prosecution. It is required to establish whether the accused persons were present and whether they shared the common object. It is also an accepted principle that number and nature of injuries is a relevant fact to deduce that the common object has developed at the time of incident."

33. In the present matter, the seven accused mentioned above, assembled along with axe and sticks and their behaviour demonstrated that they once went and threatened and having called for reinforcement, without waiting, again committed criminal trespass and attacked the victim and intervenors. There was actual participation in causing of hurts by accused No.1, accused No.4, accused No.8, accused No.9 and accused No.11. In fact PW-5 Gajanan has deposed that he had seen

accused No.2, in addition to accused No.1 assaulting PW-14 but as PW-14 referred to only accused No.1, I am not stressing on that part. Still, accused No.2 and accused No.10 who were also part of the unlawful assembly, and shared the common object, cannot escape liability for overt acts of other accused in prosecution of the common object.

34. For reasons discussed above, with respect I am taking a differing view.

35. For the afore-stated reasons, I pass the following order:-

O R D E R

(I) Criminal Appeal No.622 of 2012 as well as Criminal Appeal No.625 of 2012 are both dismissed.

(II) Criminal Appeal No.633 of 2012 is allowed and the conviction and sentence imposed against the Appellants - original

accused No.6 - Santosh Laxman Bangar and accused No.7 - Shriram Laxman Bangar by the impugned Judgment and order is quashed and set aside. They are acquitted of the offences with which they were charged. Their bail bonds are cancelled.

(III) (i) Criminal Appeal No.179 of 2014 filed by the State against original accused Nos.2 and 5 is partly allowed. The Appeal is rejected as regards original accused No.5 - Santosh Nanarao Maske. His bail bonds are cancelled.

(III) (ii) (a) However, the Appeal of the State being Criminal Appeal No.179 of 2014 against the acquittal of accused No.2 Keshavrao Dattrao Maske is allowed.

(b) Original accused No.2 Keshavrao Dattrao Maske is convicted under Section 302 read with Section 149 of Indian Penal Code, 1860 and is sentenced to suffer imprisonment for life and to pay a fine of Rs.5000/- and in default to suffer rigorous imprisonment for six months.

(c) Original accused No.2 Keshavrao Dattrao Maske is further convicted under

Section 447 read with Section 147 of Indian Penal Code, 1860 and sentenced to suffer rigorous imprisonment for six months and to pay a fine of Rs.1000/- and in default to suffer rigorous imprisonment for one month.

(d) Accused No.2 Keshavrao Dattrao Maske is further convicted of the offence punishable under Section 147 of Indian Penal Code, 1860 and sentenced to suffer rigorous imprisonment for three months and to pay a fine of Rs.500/- and in default to suffer rigorous imprisonment for one month.

(e) Accused No.2 Keshavrao Dattrao Maske is convicted for offence punishable under Section 148 of Indian Penal Code, 1860 and sentenced to suffer rigorous imprisonment for three months and to pay a fine of Rs.500/- and in default to suffer rigorous imprisonment for one month.

(f) Accused No.2 Keshavrao Dattrao Maske is further convicted for offence punishable under Section 149 of Indian Penal Code, 1860 and sentenced to suffer rigorous imprisonment for three months and

to pay a fine of Rs.500/- and in default to suffer rigorous imprisonment for one month.

(g) All the substantive sentences shall run concurrently.

(h) Accused No.2 would be entitled to set off under Section 428 of the Code of Criminal Procedure.

(i) Accused No.2 Keshavrao Dattrao Maske shall surrender to his bail bonds immediately.

(IV) Criminal Application No.5160 of 2013 filed by original accused No.8 Goprao Marotrao Maske is rejected.

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