

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 753 OF 2009

1. Maulali Mehboobsab Nadaf
2. Salim Ajikhan Pathan
3. Hussain Gorikha Pathan
4. Faiyaz Bashir Shaikh
5. Maulali Usman Pathan
6. Nitin Pruthwirajsing Bayas
7. Balaji Narayansing Bayas
8. Sakharam Kankarsing Dikkit
9. Jamir Husain Pathan- **deceased**
(case abated vide order dtd 17.3.2016)
nos.1 to 8 all residing at Post Dahitane
District Solapur

..Appellants
(Org. Accused nos.4 to 12)

v/s.

The State of Maharashtra
at the instance of
Jail Road Police Stn.,
Solapur

..Respondents

Mr.V.M.Thorat & Mr. S.B.Munde for the appellant nos.1 to 8
Mr.A.S.Shitole, APP for the Respondent/State.

**WITH
CRIMINAL APPEAL NO.765 OF 2009**

1. Yunus Mohd. Nadaf
2. Munif Siraj Pathan
3. Siraj Ibrahim Pathan
all residing at Post Dahitane
District Solapur

..Appellants
(Org. accused nos.1 to 3)

v/s.

The State of Maharashtra
at the instance of
Jail Road Police Stn.,
Solapur

..Respondents

Mr.Ujwal Agandsurve for the Appellant no.1.
Mr.V.M.Thorat & Mr. S.B.Munde for the appellant nos.2 and 3
Mr.A.S.Shitole, APP for the Respondent/State.

**CORAM : SMT. V.K.TAHILRAMANI &
SMT. ANUJA PRABHUDESSAI, JJ.
RESERVED ON: MARCH 18, 2016.
PRONOUNCED ON : JULY 27, 2016.**

JUDGMENT (PER ANUJA PRABHUDESSAI, J.):

1. The appellants in Criminal Appeal No.765 of 2009 were the accused nos.1, 2, 3, whereas the appellants in Criminal Appeal No. 753 of 2009 were accused nos.4 to 12 in Sessions Case No.168 of 2009 on the file of the Addl. Sessions Judge, Solapur (hereinafter referred to as accused, as arrayed before the trial court).

2. The accused were tried for the offences under Section 143, 147, 148, 302, 307, 324, 336, 337, 435, 427 r/w. 149 of the I.P.C.

and under Section 135 of the Bombay Police Act, and Section 3, 25 of Arms Act and Section 3(1)(x) and 3(2)(iv) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

3. By the impugned judgment dated 25.5.2009 the learned Adhoc Addl. Sessions Judge acquitted the accused for the offences under Sections 307, 324, r/w. 149 of IPC, 3, 25, 135 of Bombay Police Act and 3(1)(x) and 3(2)(iv) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act) 1989 and held the accused guilty of offence under Sections 147, 148, 302, 323, 326, 336, 337, 427, 435 all r/w. 149 of IPC and sentenced them as under:

- i) to undergo rigorous imprisonment for one year and fine of Rs.1000/- each i.d. imprisonment for three months for offence under Section 147 IPC.
- ii) Rigorous imprisonment for one year and fine of Rs.1000/- each i.d. simple imprisonment for three months for offence under Section 148 of IPC.
- iii) Life imprisonment and fine of Rs.1000/- each i.d. Simple imprisonment for three months for offence under Section 302 r/w.

149 IPC.

iv) Rigorous imprisonment for one month and fine of Rs.200/- each i.d. Simple imprisonment for 10 days for offence under Section 323 r/w. 149 IPC.

v) Rigorous imprisonment for one month and fine of Rs.200/- I.d. Simple imprisonment for 10 days for offence under Section 336 r/w. 149 of IPC.

vi) Rigorous imprisonment for two months and fine of Rs.500/- each i.d. Simple imprisonment for one month for offence under Section 337 r/w. 149 of IPC.

Vii) Rigorous imprisonment for one year and fine of Rs.500/- each i.d. simple imprisonment for three months for offence under Section 435 r/w. 149 IPC and

viii) Rigorous imprisonment for one year and fine of Rs.500/- each for offence under Section 427 r/w. 149 of IPC.

4. Being aggrieved by the conviction and sentence the accused have preferred these appeals.

5. The case of the prosecution in brief is that on 8.5.2004 at about 8 p.m. the complainant Vinayak Khatal and his friends Vithal Gaikwad i.e. deceased, Balasaheb Sarvagod and others were proceeding from Panchsheel Nagar to Vadje Village to enquire about the assault on Dayanand, the brother-in-law of Vithal. Vinayak, Vitthal and Balasaheb were traveling by a motor cycle, whereas the others followed them by an auto-rickshaw bearing No. MWC 1528. When they reached near Hanuman temple at Village Dahitane, some boys of Muslim community from the said area started pelting stones at them, and as such they stopped at the place of the incident. Immediately thereafter the accused no.1 rushed towards the complainant and gave a blow of knife on his left thigh. The accused no.1 also tried to inflict a blow of knife on his abdomen, but the complainant avoided the same by putting his hand forward and in the process the complainant received an injury on his right palm. It is further alleged that the accused Munna Pathan also gave a blow of iron zari on the head of the complainant.

6. The accused no.1. Yunus Nadaf took a sword which was in the

hands of the other accused and stabbed Vithal Gaikwad, as a result, said Vithal Gaikwad sustained injuries and fell on the ground. The complainant and the other injured ran away from the spot to save their lives. The accused pelted stones at them while they were running away. Balasaheb Sarvagod and Shankar Bansode sustained injuries due to pelting of stones. The accused nos. 1 and 2 also damaged and burnt the motorcycle of Balasaheb.

7. The complainant and others went to Jodhbhavi Peth Police Chowki. They learnt that Shankar Bansode and Vithal Gaikwad were taken to the Civil Hospital and that injured Vithal was declared dead. The complainant Vinayak therefore lodged a FIR, pursuant to which the Investigating Officer registered Crime No.149 of 2004 for offence under Sections 147, 148, 302, 307, 324, 336, 337, 435, 427 r/w.149 IPC and 135 of Bombay Police Act, r/w. Sec. 3, 25 of Arms Act. Subsequently, Section 3(1)(x) and 3(2)(iv) of the Scheduled Castes and Scheduled Tribes Atrocities Act came to be added. Upon registration of the crime, the Investigating Officer deputed police staff to trace the accused.

8. PW 13 - PI Ravindra Rasal conducted the panchanama over the body of the deceased and sent the body for postmortem. The postmortem on the body of deceased Vithal was conducted by PW 11 Dr. Subhashchandra Sardar. He noticed following external and internal injuries over the body of the deceased:

External injuries:

- I) Incised wound on head 3" above right eye brow on forehead 1" x 1" scalp deep.
- II) Stab wound on abdomen right side 8" below the right nipple vertical elliptical margin clear cut regular gapping present inverted 1" x 1" cavity deep, through the stab wound coil of intestine coming out.
- III) Incised wound on lateral aspect of left hand near wrist joint 1 x1" vertical muscle deep, margin clear cut regular gapping present inverted.
- IV) Incised wound 1" x 1/2" muscle deep margin cleancut, regular gapping present.

Internal Injuries:

- 1) Abdominal cavity was full of blood clot,
- 2) Penetrating wound on duodenum 1/2" x 1/2" margin clear cut regular gapping present big haematoma below it.

- 3) On internal examination of head it was found that Hematoma under scalp, brain was congested.

PW11 Dr. Subhashchandra Sardar opined that the cause of death was shock & hemorrhage due to stab injury to intestine.

9. The Investigating Officer visited the scene of offence, panchanama at Exh.34., seized the burnt motorcycle and the piece of iron zari, blood stained stone and other incriminating material from the scene of offence. The accused were arrested and their clothes were seized. PW 13 recorded the statements of the witnesses. Since the investigation disclosed offence under SC ST Act, he handed over further investigation to ACP Pansare-PW 14 and in the course of the investigation, PW 14- ACP Pansare recovered a knife, one stick and a motorcycle chain, pursuant to the disclosure statement made by the accused nos.1, 4 and 3 respectively. He sent the incriminating material to CSFL for analysis. The absconding accused nos.2 and 12 were arrested on 15.5.2012 and the handle of the iron zari was recovered pursuant to the disclosure statement made by the accused no.2.

10. After completion of investigation, PW14 filed the charge sheet before the learned JMFC, Solapur. The learned JMFC, Solapur committed the case to the Sessions Court, Solapur. The prosecution in support of its case examined 18 witnesses. The statement of the accused was recorded under Section 313 of Cr.P.C. The defence of the accused, as disclosed from the tenor of the cross-examination is that PW8 and PW10 had committed murder of Vithal with the help of the complainant since he was having an illicit relationship with their sisters. The learned Sessions judge, after considering the evidence adduced by the prosecution and after hearing the learned counsels for the respective parties, convicted and sentenced the accused as stated above. Being aggrieved by this conviction and sentence, the appellants have preferred these appeals.

11. The learned Counsel Shri Thorat has submitted that the prosecution has not established the guilt of the accused beyond reasonable doubt. He has submitted that the prosecution has not established the identity of the accused. He has further submitted

that the evidence of the injured witnesses is inconsistent and suffers from material omissions, contradictions and improvements. Furthermore, the medical evidence is not consistent with the ocular evidence. The learned counsel Shri Thorat therefore claims that the prosecution case is improbable.

12. He has submitted that the accused had no reasons to believe that the deceased would be proceeding towards Vadge so as to assemble at the spot of the incident with an intention of assaulting the complainant and others. He has submitted that the prosecution has suppressed the genesis of the incident and hence the case of the prosecution cannot be believed. He has relied upon the decisions:

- (i) Bhimrao @ Ramesh Pandhari Bhade (2003) 3 SCC 37
- (ii) Bunnilal Chaudhary vs. State of Bihar (2006) 10 SCC 639
- (iii) Bhera v. State of Rajasthan (2000) 10 SCC 225
- (iv) Vadla Chandraiah v. State of A.P. (2006) 13 SCC 587

13. The learned APP has submitted that the case of the

prosecution is supported by the injured witnesses whose presence at the place of the incident cannot be doubted. He has submitted that the medical evidence as well as the C.A. report corroborates the ocular evidence. He submits that the testimony of the injured witnesses cannot be discarded on the basis of the missing omissions and contradictions.

14. We have analysed the evidence and considered the submissions advanced by the learned Counsel for the appellants/accused and the learned APP for the State.

15. At the outset, it may be mentioned that the evidence of PW11 Dr. Subhashchandra Sardar vis-a-vis the postmortem report at Exh.64 leaves no manner of doubt that death of Vithal Gaikwad was homicidal. The prosecution in order to prove that the death of Vithal was caused by the above accused has examined injured witnesses, viz. PW8 Balasaheb Sarvagod, PW9 Vinayak Khatal, PW10 Shankar Bansode, besides the eye witness-PW6 Rahul Khatal.

16. PW9 Vinayak had lodged the FIR at Exh.51. He has deposed that the deceased is the brother-in-law of Dayanand Kamble. He has deposed that on 8.5.2004 at about 8 p.m. deceased Vithal had come to his house and told him that there was quarrel between his brother-in-law Dayanand Kamble and some other persons at Village Vadge. The deceased Vithal requested the complainant to accompany him to village Vadge. At about 8 to 8.30 p.m. he along with Vithal and Balasaheb proceeded to Village Vadge on a motorcycle. PW10 Shankar Bansode, Dnyaneshwar kamble, PW6 Rahul Khatal, Madhukar Gaikwad, Nandkumar Gaikwad, Chimma Kamble, Latika Shinde, Santosh Bhakumbe followed them in a rickshaw. When they reached near Hanuman temple at Dahitane, they saw the accused pelting stones at them. One of the stones hit Balasaheb Sarvagod, hence they stopped the motorcycle in front of the house of Kadamsing Dikkit. The rickshaw which was following them also halted at the place of the incident. PW9 deposed that some of the persons who had come by rickshaw ran away from the place of the incident. PW9 has deposed that while he was trying to run away, the accused no.1 gave a blow of knife on his right leg. The accused

no.1 tried to inflict another blow on his stomach. He put his hand forward to avoid the blow and as a consequence thereof sustained injury on his right palm.

17. PW9 has deposed that accused no.2 gave a blow of iron jhari on his head and he sustained bleeding head injury. He has deposed that the accused no.1 abused them in filthy words. The accused no.1 took a sword which was in the hands of another person and inflicted a blow of the said sword on the abdomen of Vithal Gaikwad. As a result, Vithal sustained bleeding injuries and fell down. He has deposed that the other accused also assaulted them by sticks and motorcycle chain. The accused no.1 and accused no.2 set fire to the motorcycle of Balasaheb. PW9 has deposed that they ran away from the place of the incident and went to Panchsheel Nagar. Thereafter he, Balasaheb Sarvagod and some others went to Jodbhavi Peth Police Stn. and lodged the FIR at Exh.51.

18. In his cross examination PW9 has stated that Rahul Khatal is his younger brother. He has deposed that PW6 Rahul had told him

that Munna Pathan, Phiroz Pathan, Maulali Pathan and Ramesh had assaulted him on 8.5.2004. He has admitted in the cross examination that he had not stated in the FIR that the accused had pelted stones on them when they were proceeding to village Vadge because of the quarrel between Dayanand and some other persons from village Vadge. He has also admitted that he had not stated in the FIR that he had stopped the motor cycle near the house of Kadamsingh Dikkit and that the accused had started beating them near the house of Kadamsingh Dikkit. He has admitted that he has not stated in the FIR that the accused no.2 had assaulted them with a motorcycle chain and the other accused had assaulted them with sticks.

19. PW9 has admitted that Vithal was his childhood friend. He has denied the suggestion that they were involved in several other illegal activities and that deceased Vithal was their leader. He has also denied that Vithal was involved in the business of illicit liquor. He has denied that Vithal was having illicit relation with the sisters of Balasaheb and Shankar Bansode and that he along with said

Balasaheb and Shankar had decided to eliminate Vithal. He has denied that Vithal had asked them to accompany him to village Dahitne as he wanted to attack the persons involved in the quarrel which took place sometime on 7th or 8th May, 2004. He has denied the suggestion that they had proceeded to Village Dahitne with weapons and that they deliberately took the vehicle in front of the house of Dikkit and committed murder of Vithal. He has denied that he has lodged a false report against the accused.

20. PW8 Balasaheb Sarvagod has deposed that on 8.5.2004 he along with PW9 and deceased Vithal had proceeded to Village Vadge by motorcycle. When they reached near Hanuman temple, the accused pelted stones at them. He has further stated that they parked the motorcycle and stayed near the house of one Kadamsing Dikkit. The rickshaw, which was following them also stopped at the place of the incident. He has deposed that they rushed towards the house of one Revankoli due to pelting of stones. He has deposed that the accused no.1 inflicted a blow of knife on the leg of PW9 Vinayak and that when he tried to inflict another blow on his

stomach, PW9 raised his hand and in the process PW9 sustained injuries on his hands. He has deposed that the accused no.1 took a sword which was in the hands of another accused and gave several blows of sword on Vithal Gaikwad. The accused no.3 assaulted them by motorcycle chain, whereas accused no.4 and others assaulted them by sticks and stones. He has identified the accused who were present before the Court.

21. PW8 has further stated that on 7.5.2004 there was an Orchestra at village Dahitne and that there was an altercation between them and the accused. He has further stated that on 8.5.2004 at about 11 a.m. the accused had assaulted PW6 Rahul and one Ramesh. He claims that the said dispute was resolved. PW8 has denied that the deceased Vithal was having illicit relation with his sister and the sister of PW10. He has denied that he and PW10 with the help of PW9 had committed murder of deceased Vithal.

22. PW10 Shankar Bansode has deposed that Dayanand Kamble,

brother-in-law of deceased Vithal was assaulted by someone from Village Vadje. On 8.5.2004 at about 8.00 to 8.30 p.m. he along with Vithal, PW9 Vinayak, PW8 Balasaheb, Santosh Ghadkumbe, Madhukar Gaikwad, Nandkumar Gaikwad, Dnyaneshwar Kamble, Rahul Khatal, Latika Shinde, Laxmi @ Chimma Kamble were proceeding to Vadje to inquire about the said incident. PW8 Balasaheb, deceased Vithal and PW9 Vinayak were on a motorcycle and others followed them in a rickshaw. He has deposed that when they reached near Hanuman temple at Village Dahitne, the accused pelted stones at them. Hence, PW8 Balasaheb stopped the motorcycle and they went near the house of one Kadamsing Dikkit. He has deposed that accused no.1 gave a blow of knife on the leg of PW9 Vinayak. Accused No.1 tried to inflict another blow on his stomach but PW9 held a knife and avoided the blow. He has deposed that accused no.2 also gave a blow of iron jhari on the head of Vinayak. He has deposed that accused no.1 took a sword from one of the accused and inflicted several blows of sword on Vithal, as a result thereafter Vithal suffered severe bleeding injuries. He has also stated that the accused assaulted him, Vinayak and

Bhauasaheb by a motorcycle chain, stones and sticks. He has identified all the accused as assailants.

23. In his cross examination PW10 has stated that the entire incident had lasted for about 5 to 7 minutes. He has stated that he had sustained injuries and was unconscious and that he does not know as to who had taken him to the hospital. He has stated that he regained consciousness in the hospital. He has denied the suggestion that the accused were not involved in assaulting him or Vithal and other prosecution witnesses. He has also denied the suggestion that the deceased Vithal was eve-teasing his sister.

24. PW6 Rahul has deposed that on 8.5.2004 at about 8 - 8.30 p.m he along with Dnyaneshwar Kamble, Shankar (PW10), Vinayak and others were proceeding to village Vadge to enquire about the incident of assault on Dayanand, the brother-in-law of deceased Vithal. PW9- Complainant Vinayak, the deceased Vithal and PW8 Balasaheb were on the motorcycle, whereas he and the others had followed them by a rickshaw. When they reached near Maruti

Temple at Dahitne, all the accused started pelting stones at them. They stopped the motorcycle and rickshaw near the house of Kamdsing Dikkit at which time all the accused rushed towards them and assaulted them. The accused no.1 inflicted a blow of knife on the right leg of complainant Vinayak, and while he was trying to inflict another blow on his abdomen, PW9 held the knife and in the process sustained injury on the palm. PW6 has further deposed that the accused no.2 also inflicted a blow of zari on the head of PW9 Vinayak. In the meantime the accused no.1 gave the knife to some other accused and took a sword from his hand and inflicted a blow on the abdomen of Vithal. The other accused pelted stones at them as a result Balu Sarvagod and Shankar sustained bleeding injuries. He has stated that he was frightened and he ran away from the place of the incident.

25. He has stated that on 7.5.2004 there was a fair in village Dahitne, and that there was a quarrel between him and the accused. He has also deposed that on 8.5.2004 at about 11 a.m. the accused had assaulted him. He has stated in his cross examination

that the village fair was from 5.5.2004 to 7.5.2004. An orchestra was organized on 7.5.2004. He alongwith Vithal, Shankar, Balasaheb were present for the programme. He has stated that Sanjay Bias was the President of the Village Fair Committee. He has denied that some boys from Panchsheel Nagar were dancing under the influence of alcohol and that Sanjay had prevented them from dancing. He has also denied that deceased Vithal had slapped Sanjay. He has admitted that PSI Kadam who was on bandobast duty had stopped the orchestra and asked the respective groups to go home.

26. The evidence adduced by the prosecution reveals that a day prior to the incident there was a quarrel between PW6 and the accused. It is therefore evident that the accused were known to PW6 and the other injured witnesses and they were sufficiently identified. Hence there is no dispute about the identity of the accused.

27. The evidence of PW6, PW8, PW9 and PW10 amply proves

that the incident leading to these appeals occurred in village Dahitne on 8.5.2004 at 8 to 8.30 pm . The testimony of these witnesses proves that on the relevant date, they were proceeding to Vadge and when they reached near the temple at Dahitne, the accused had pelted stones at them. Immediately after they got down from the vehicles, the accused no.1 inflicted injury on PW9 by a knife and later he took a sword from the hands of another accused and gave several blows of sword on Vithal. The medical evidence reveals that the blow inflicted on the abdomen had proved to be fatal . PW11 Dr. Sardar also opined that the said stab wound (injury no.2) could be caused by the sword (Art.39). Thus the ocular evidence which is corroborated by medical evidence proves that Vithal had died as a result of the fatal blow inflicted by the accused no.1.

28. The prosecution has also examined PW7 Gajanan to prove the recovery of knife and sword, pursuant to the disclosure made by the accused no.1. He has deposed that on 10.5.2005, one of the accused who was in police custody had stated that he would produce the weapons and that his statement was recorded in his

presence. He had stated that thereafter one stick, sword, iron bar were brought to the police station. He had further stated that he was unable to disclose the name of the said accused. He was cross examined by the APP. In his cross examination he has stated that on 10.5.2004 at about 8.00 am the accused no.1 had made a statement that he would produce the sword and knife which were kept behind the house of Shrirang Bansode. He has stated that the said statement (Exh.39) was recorded in his presence and that he had signed the same. He has further stated that the accused no.1 had taken them towards the rear side of the house of Shrirang Bansode. The accused no.1 had taken a sword and knife from the shrubs and handed over to the police. The said weapons were seized by the police under panchanama at Exh.40.

29. The testimony of PW14 Dilip Phansale, Addl. Commissioner of Police, reveals that in view of addition of provisions under Atrocities Act he had taken over the investigation of the said crime from PI Ravindra-PW10. He interrogated the accused no.1 on 10.5.2004 and in the course of the interrogation the accused no.1 volunteered

to produce the knife and the sword. Accordingly, he prepared a memorandum panchanama (Exh.39) in presence of the panch witnesses. The accused no.1 thereafter took them to Bhim Nagar, Dahitne. The accused no.1 removed one knife and sword which were concealed in Babul shrubs. The said knife and sword (Art.39) were stained with blood. He seized the said weapons under seizure panchanama at Exh.40. The said weapons as well as the clothes of the accused and the deceased seized by PW13 under panchanama for CA examination. The testimony of PW16-Head Constable Rahul reveals that he had taken the said muddemal articles to CSFL, Pune on 15.5.2004, under requisition letter at Exh.105.

30. The CA report at Exh. 107 reveals that the blood group of Vithal could not be determined as the results were inconclusive. Nonetheless the CA report at Exh. 108 reveals that the clothes of the deceased were stained with human blood of B group. The CA report at Exh.118 further reveals that the sword (Art.39) recovered at the instance of the accused no.1 was stained with human blood, however the blood group was inconclusive. The accused no.1 has

not explained how the sword recovered from his house at his instance was stained with blood.

31. The ocular evidence which is duly corroborating circumstantial evidence in the form of recovery of sword, CA report as well as medical evidence, proves that the accused no.1 had attacked the deceased Vithal with a sword. As regards the nature of the injuries, the evidence of PW11 Dr. Subhashchandra Sardar reveals that the deceased had suffered three incise wounds, above right eye-brow on the head and left hand, a hematoma below the scalp and a stab wound on abdomen. The medical evidence leaves no doubt that the death of Vithal was homicidal. The question is whether the offence is covered by Section 300 of IPC or under Section 304 (I) or 304 (II) of IPC.

32. While drawing distinction between culpable homicide and murder, the Apex Court in the case of *Virsa Singh V/s. State of Punjab, AIR 1958 SC 465*, has held as under:-

“12... the prosecution must prove the following facts before it can bring a case under s. 300, “thirdly ” ;

First, it must establish, quite objectively, that a bodily injury is present ;

Secondly, the nature of the injury must be proved; These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

13. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under s. 300, 3rdly. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can

be shown, or reasonably deduced that the injury was accidental or otherwise unintentional....”

33. Similar distinction is also drawn in the case of ***Kannda Swamy V/s. State of Tamilnadu (2008) 11 SCC 97*** and ***In the State of Andhra Pradesh V/s. Rayavarapu Punnayya & Anr. 1976 (4) SCC 382.***

34. Reverting to the facts of the present case, the evidence reveals that though the accused no.1 was armed with a knife, he did not inflict injury on Vithal by knife, but he took a sword from the hands of another accused and inflicted several blows of sword on Vithal who was unarmed. The nature of injury no.2 reveals that the accused no.1 had pierced the sword in the abdomen of the deceased with such a force that the sword had penetrated the duodenum and a coil of small intestine had come out . The evidence of PW11 also indicates that the injury no.2 i.e. the stab wound was sufficient to cause death. Furthermore, the evidence indicates that Vithal had died instantaneously even before he could be given medical aid. The aforesaid facts leave no manner of doubt that the injuries inflicted on Vithal were neither accidental nor unintentional. On the

contrary, the nature of the weapon used as well as the nature of the injury shows that the accused had pierced the sword in the abdomen with the requisite intention of causing murder of the deceased. There is nothing on record to prove that the deceased or the other prosecution eye witnesses were armed with weapons or that they had provoked the accused no.1 in any manner. The case does not therefore fall in any of Exceptions to Section 300 IPC. In the light of above facts and circumstances, in our view the offence is covered under clause III of Section 300 IPC. Consequently, we are unable to accept the contention of the learned counsel for the accused that the case falls under section 304 part I or part II of IPC. Under the circumstances, in our considered view, the prosecution has established the guilt of the accused no.1 for committing offence punishable under Section 302 of IPC.

35. It is to be noted that the other accused have been held guilty of offence under Section 302 IPC with aid of Section 149 of IPC. Needless to state that these accused could have been held guilty of the substantive offence with the aid of Section 149 of IPC only if it

was proved that they were members of unlawful assembly and that they had assembled with common object of causing death of Vithal, or injuries to complainant or to commit any other offence. The Apex Court in ***Kuldip Yadav & Ors. vs. State of Bihar, JT 2011 (4) SC*** has held as under:

"26) The above provision makes it clear that before convicting accused with the aid of Section IPC, the Court must give clear finding regarding nature of common object and that the object was unlawful. In the absence of such finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove common object. Section 149 creates a specific offence and deals with punishment of that offence. Whenever the court convicts any person or persons of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but also that the object was unlawful. Before recording a conviction under Section 149 IPC, essential ingredients of Section 141 IPC must be established....."

36. In ***Bunimlal Choudhary*** (supra) the Apex Court has reiterated

that

" it is now the settled law that under Section 149 IPC, the liability of other members for the offence committed during the continuance of the occurrence rests upon the fact whether the other persons knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms, or behavior on or before the scene of the occurrence. If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during occurrence does not arise."

37. In the light of the above principles, the crucial question to be determined is whether the accused were the members of the unlawful assembly within the meaning of Section 141 of IPC. It is to be noted that the evidence of PW9 Vinayak vis-a-vis FIR at Exh.51 as well as the testimony of PW6, PW8 and PW10 reveals that they were proceeding to village Vadge in order to enquire about the incident of assault on Dayanand, the brother-in-law of Vithal. The testimony of these witnesses does not indicate that the accused

were aware that they would be passing by Village Dahitne on the said date and time, and that they had assembled at the place of the incident with a common object of causing death of Vithal, injuries to the other prosecution witnesses or for committing any other offence.

38. It is also pertinent to note that PW9 and other eye witnesses have stated that the other accused were armed with motorcycle chain, sticks etc. However, no such statement was made in the FIR or in the statement under 161 of Cr.PC. These material omissions which were elicited in the cross examination and proved through the Investigating Officer makes it doubtful to accept that the other accused had gathered at the place of the incident armed with weapons with an object of assaulting Vithal and other injured witnesses. The omissions, variations and improvement in the testimony of these witnesses raises a serious doubt about presence of these accused at the place of incident and their participation in the incident and thus rules out the possibility of these accused being members of an unlawful assembly or having formed an unlawful assembly with common object of causing death of Vithal or injuries to

the complainant or any other offence. The prosecution having failed to prove the essential ingredients of section 141 CrPc, the conviction of the accused under Section 147, 148 is unsustainable. Consequently, the other accused also cannot be held guilty of the offence under Section 302 IPC and the other substantive offences with aid of Section 149 of IPC. The accused can at the most be held liable for their individual acts.

39. As regards the individual role of the accused, as stated earlier there is no evidence to prove that any of these accused other than the accused no.1 was responsible for inflicting injuries on Vithal. Hence, except accused no.1 none of the other accused can be individually held guilty of committing murder of Vithal.

40. The accused are also held guilty of offence under Section 323 of IPC. The testimony of PW6, PW8, PW9 and PW10 reveals that accused no1 had given a blow of knife on the leg of PW9 . It may be mentioned here that the evidence of Dr. Chidanand- PW12 vis-à-vis the MLC record and medical certificate at exh78 and 79 reveals that

PW9 had sustained incised wound on his right leg. The doctor has opined that the said injury was simple in nature and could be caused by a sharp weapon. The medical evidence therefore corroborates the fact that the accused no.1 had inflicted an injury on PW9 by means of a knife. Though this act constitutes an offence under Section 324 IPC, the learned Judge has held the accused guilty of offence under Section 323 IPC. In the absence of any challenge to the said finding by the State, we are not inclined to interfere with the conviction of the accused no.1 for offence under Section 323 IPC.

41. It is pertinent to note that these witnesses had deposed that accused no.2 had struck the iron zari on the head of PW9 and that he had sustained bleeding injury. However, the medical evidence does not indicate that PW9 had sustained a head injury. In view of the inconsistency in the oral evidence, vis-à-vis the medical evidence, we are inclined to grant benefit of doubt to accused no.2.

42. PW8 and PW10 have alleged that the accused no.3 and 4 had assaulted them with a motorcycle chain and a stick. PW6 is totally

silent on this aspect. PW9 has also not attributed any role to accused no.4. He had made a general statement that all the accused had assaulted them with sticks. Though the medical evidence reveals that PW8 and Pw10 had sustained simple injuries, there is no cogent and conclusive evidence to prove as to which of the accused had inflicted these injuries. In the circumstances, conviction of the accused nos.2 to 11 for offence under Section 323 cannot be sustained.

43. The learned Judge has also held that the accused had pelted stones at the prosecution witnesses and had endangered their life by rash and negligent act. The learned Judge has therefore held the accused guilty of offence under Section 336 and 337 of IPC. Rashness or negligence is the gravamen of these sections. It is not the case of prosecution that the accused had caused injuries or endangered life or safety of the prosecution witnesses by their rash or negligent act. Suffice it to say that these sections have no application when, as in the present case, the injury was allegedly inflicted with an intention of causing hurt or knowing that it was likely

to cause hurt. This being the case the conviction of accused under Section 336 and 337 cannot be sustained.

44. The evidence of PW6, PW8, PW9 and PW10 reveals that the accused nos.1 and 2 had set fire to the motorcycle of Balasaheb Sarvagod. The testimony of the Investigating Officer Ravindra Rasal PW13, indicates that he had visited the scene of offence and had seen a motorcycle lying at the place of incident in a burnt condition. He has stated that he had seized the burnt motorcycle under panchanama at Exh.89. The evidence of the aforesaid witnesses, vis-à-vis the panchanama at Exh.89 proves that the accused no.1 and 2 had set fire to the motorcycle and had thereby committed offence under Section 435 of IPC. It may be mentioned here that there is no evidence to prove that accused no.3 to 11 were involved in setting fire to the motorcycle. Hence, the conviction of the accused nos.3 to 11 for offence under Section 435 cannot be sustained.

45. Under the circumstances and in view of the discussion supra,

Appeal No. 753 of 2009 filed by original accused nos.4 to 11 is allowed and Appeal No.765 of 2009 is partly allowed.

i). The accused nos.1 to 11 are acquitted of the offences under Sections, 147, 148, 302, 323, 336, 337, 435, 427 r/w. 149 of IPC.

ii). The accused no.1 is held guilty of the offence under Section 302 of IPC and is sentenced to undergo imprisonment for life and to pay fine of Rs.5000/- in default simple imprisonment for six months.

iii). The accused no.1 is also held guilty for offence under Section 323 of IPC and is sentenced to undergo imprisonment for six months and fine of Rs.1000/- in default simple imprisonment for 15 days.

iv). The accused nos.1 and 2 are held guilty of offence under section 435 of IPC and sentenced to undergo imprisonment for six months and to pay fine of Rs.5000/- in default undergo simple imprisonment for 30 days.

v). The substantive sentence to run concurrently. In terms of section

428 of Cr.P.C. the period of detention undergone by the accused nos.1 and 2 during the investigation till the pendency of the appeal shall be set of as against the substantive sentence for offences under Section 323 and 435 IPC.

(ANUJA PRABHUDESSAI, J.)

(SMT. V.K.TAHILRAMANI, J.)