

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

CRIMINAL APPEAL NO. 75/2000

1. Subrao Bhimrao Kolekar
Age : 38 years,
2. Shrimant Nivrati Kolekar
Aged : 29 years
3. Baliram Goroba Kolekar,
Age : 28 years
4. Prakash Dadarao Bondgar
Age : 35 years
5. Bibishan Dagadu Kolekar
Age : 24 years
6. Kalyanrao Bhimrao Kolekar
Age : 29 years
7. Venkat Nivrati Kolekar
**(Appeal abated against
appellant No.7 as per
order of the Court dated
21.01.2014).**
8. Agatrao Nivrati Kolekar
Age : 49 years
9. Vishnu Dhondiba Kanade
Age : 35 years

All r/o Ter, Taluka and
District Osmanabad.

.. Appellants.

Versus

The State of Maharashtra
Copy served on A.P.P, High
Court Bench at Aurangabad.

.. Respondent.

Mr. V.D. Salunke, Advocate for appellant Nos.1 to 6, 8 and 9.
Mr. S.D. Ghayal, A.P.P. for the State.
Appeal is abated against respondent No.7 as per order of
this Court dated 21.01.2014.

**CORAM : T.V. NALAWADE &
SUNIL K. KOTWAL,JJ.**

**RESERVED ON : 26-07-2017.
PRONOUNCED ON : 18-08-2017.**

JUDGMENT : (PER SUNIL K. KOTWAL,J.)

1. This appeal is directed against the judgment and order of conviction passed by 2nd Additional Sessions Judge, Osmanabad in Sessions Case No. 94/1993 convicting accused Nos.1 to 9 for the offences punishable under Sections 147, 148, 324 and 302 read with Section 149 of the Indian Penal Code (For short "I.P.C.").

2. Appellants are original accused Nos.1 to 9 and respondent is the State of Maharashtra.

3. Prosecution case, in brief, is that the accused and informant party are residents of Kolekar Wadi, Taluka Osmanabad. Both parties are at inimical terms on account of dispute of agricultural land in between them. On 05.07.1992 at about 9.00 p.m. initially accused No.7 Venkat and accused No.6 Kalyan started abusing the informant's family because the informant refused to withdraw criminal case filed against the rival party. After some time, accused Nos.1 to 9 came in front of the house of informant Devidas Kolekar (PW-9) by holding sticks, chain and hunter in their hands. Accused persons started beating the informant Devidas (PW-9), his brother Vasant Kolekar, father Baburao Kolekar, aunt Shantabai Kolekar, cousin sister Sangita Shendge, one Muktabai Kolekar by chain, sticks and hunter. Due to that assault, these all persons sustained injuries and therefore immediately Devidas Kolekar (PW-9) approached to Police Station, Dhoki and lodged F.I.R. (Exh. 105) against the accused persons. On the basis of this complaint Crime No.104/1994 was registered against accused persons under Sections 147, 148, 324 and 326 read with Section 149 of I.P.C.

4. Police referred the injured persons to Primary Health Centre, Ter. Dr. P.R. Kulkarni (PW-2) examined the injured. Baburao Kolekar sustained serious head injury, and therefore, he was referred to Civil Hospital, Osmanabad where Dr. R.G. Gute (PW-17) examined him. On x-ray examination, fracture of skull of Baburao was detected. His condition deteriorated and at last he succumbed to his injuries at Government Hospital, Solapur. Dr. A.S. Kanki (PW-1) performed postmortem examination of the dead body of Baburao Kolekar and issued postmortem notes (Exh. 84). By that time P.S.I. Kulkarni (PW-16) started investigation of this crime and prepared spot panchnama (Exh.125) and map (Article-A). Accused were arrested and bicycle chain was seized from accused No.9 Vishnu Kanade. 8 sticks were recovered from the remaining accused persons under panchnamas (Exh.109 to 116). After death of Baburao Kolekar on 17.07.1992, offence was registered under Section 302 of I.P.C. against accused persons. Blood stained clothes of deceased Baburao were seized under panchnama (Exh.102). Blood stained clothes of Kalidas Kolekar and Muktabai were also seized. After completion of investigation, charge-sheet was

submitted before the Chief Judicial Magistrate, Osmanabad.

5. Offence punishable under Section 302 of I.P.C. being exclusively triable by the Court of Sessions, this case was committed to Sessions Court, Osmanabad.

6. The then Sessions Judge, Osmanabad framed charge (Exh. 56) against original accused Nos.1 to 9 for the offences punishable under Sections 147, 148, 324 read with Section 149 and 302 read with Section 149 I.P.C. Charge was read over to accused. Accused pleaded not guilty and claimed trial.

7. Prosecution examined total 17 witnesses. After considering the oral and documentary evidence placed on record by prosecution, the learned trial Court pleased to convict accused Nos.1 to 9 for the offences punishable under Sections 147, 148, 324 read with Section 149 and 302 read with Section 149 I.P.C. For the offence punishable under Section 148 of I.P.C. rigorous imprisonment for one month and fine of Rs. 1000/- each was imposed. No separate sentence was imposed for the

offence punishable under Section 147 of I.P.C. Rigorous imprisonment for three months and fine of Rs. 2,000/- each was also imposed for the offence punishable under Section 324 read with Section 149 of I.P.C. and life imprisonment and fine of Rs. 2,000/- each was imposed for the offence punishable under Section 302 read with Section 149 of I.P.C. against all the accused persons. Therefore this appeal arises.

8. Heard learned Advocate for the appellants and learned A.P.P. for the State.

9. Learned Advocate for the appellants assailed the judgment passed by trial Court on various grounds which would be considered in subsequent part of the judgment at appropriate stage.

10. In the case at hand, prosecution case is based on direct evidence of eye witnesses as well as circumstantial evidence. At the outset we must observe that the circumstantial evidence placed on record in the form of spot panchnama (Exh.125) is of no help because the spot panchnama itself

shows that no signs of struggle were found on the spot of incident. Another part of the circumstantial evidence is the seizure of one bicycle chain and 8 sticks from the possession of accused persons. However, both panchas namely Sopan Bhosale (PW-7) and Abdul Rehman (PW-13) on all seizure panchnamas (Exhs. 108 to 116) have turned hostile and nothing could be elicited in their cross-examinations to prove the seizure of any incriminating article from the possession of accused. Investigating Officer P.S.I. Kulkarni (PW-16) vaguely stated before the Court that on 09.07.1992 he seized cycle chain from accused No.9 Vishnu and 8 sticks from remaining accused Nos.1 to 8 (seizure memos Exhs. 109 to 116). Even if this testimony of P.S.I. Kulkarni (PW-16) is accepted as it is, even then it is of no help to the prosecution to connect the accused with the alleged crime, because all these seizure memos show that no blood stains were found on these weapons at the time of seizure. Otherwise also, P.S.I. Kulkarni (PW-16) did not take pains to refer these weapons of the offence to Chemical Analyzer to ascertain as to whether any traces of human blood can be detected over it. In the circumstances, the circumstantial

evidence placed on record by the prosecution in the form of seizure of weapons of the offence is absolutely useless piece of evidence.

11. Thus, direct evidence of eye witnesses and medical evidence is to be examined to ascertain whether it is sufficient to establish the charges against accused beyond reasonable doubt.

12. Subhash Kolekar (PW-3), Kalidas Kolekar (PW-4), Sanjay Kolekar (PW-6), Sangita Shendge (PW-8), informant Devidas (PW-9) and Vasant Kolekar (PW-10) are the eye witnesses. Out of these witnesses, Subhash (PW-3), Sanjay (PW-6), Devidas (PW-9), Sangita (PW-8) and Vasant (PW-10) are the injured witnesses. No doubt, these all eye witnesses are the near relatives of deceased Baburao Kolekar. So also, on account of civil dispute in between the parties, these witnesses can be treated as interested and partisan witnesses. However, on that count alone the testimonies of these related witnesses cannot be discarded. Only the evidence of such witnesses shall

pass the test of close scrutiny.

13. In the case of 'Mano Dutt and another Versus State of Uttar Pradesh', reported in [(2012) 4 SCC 79], the Apex Court ruled that, "where witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. 'Convincing evidence is required to discredit an injured witness'".

In view of this set legal position, presence of these injured eye witnesses on the spot of incident cannot be doubted. Unless there are acceptable reasons, their testimony cannot be disbelieved, if otherwise it is reliable.

14. Learned defence Counsel has raised objection that in F.I.R. (Exh. 105) lodged by informant Devidas (PW-9) no weapons of offences are mentioned in the hands of particular accused persons and there is no specific allegation as to exactly

which accused persons caused injuries to deceased Baburao Kolekar. His contention is that all allegations levelled against accused are general in nature.

15. Learned A.P.P. for the State replied that F.I.R. need not mention these all minute particulars.

16. We do not find any substance in the objection raised by learned defence counsel for the simple reason that the F.I.R. is nothing but information to the police regarding occurrence of the cognizable offence within jurisdiction of that police station. It is not the encyclopedia which includes each and every minute details of the occurrence. We may refer “**Mukesh & anr. Vs. State of NCT of Delhi & ors.**” reported in (AIR 2017 SC 2161), wherein the Apex Court ruled that, F.I.R. is not an encyclopedia which is expected to contain all details of prosecution case, it may be sufficient if broad facts of prosecution case alone appear. Merely because names of accused persons not named in F.I.R., serious doubt against case of prosecution cannot be raised.

17. Otherwise also, after careful examination of the contents of F.I.R. (Exh. 105) proved by informant Devidas (PW-9), it emerges that in F.I.R. names of all accused Nos.1 to 9 are specifically mentioned. It is also mentioned that at the time of occurrence accused were holding chain, sticks and hunter in their hands. Even the names of injured persons are specifically mentioned. It must be noted that informant Devidas (PW-9) has specifically mentioned in F.I.R. that during the occurrence due to assault by accused persons, his father (deceased Baburao Kolekar) sustained injuries. Thus, obviously all required particulars are mentioned in the F.I.R. to make out the case of commission of cognizable offence by accused persons. Law does not speak that in F.I.R. all minute details, such as, particulars regarding which accused caused which injury to which person, need to be mentioned. Such minute particulars can be ascertained from the oral testimony of injured witnesses and other eye witnesses. The nature of injuries sustained by prosecution witnesses can be proved on the basis of medical evidence. Thus, we do not find any substance in the above-referred objection raised by learned Advocate for the appellants.

18. Informant Devidas (PW-9) deposed before the Court that there was dispute in between accused No.2 Shrimant and his uncle Abhiman on account of landed property. From his testimony it is emerged that on the date of incident accused No.2 Shrimant damaged the crops of his uncle Abhiman Kolekar. Because the report of the occurrence was lodged to Police Station, Dhoki on the date of the incident, at about 8.30 p.m. when this witness was present in his house alongwith his brother Vasant Kolekar (PW-10) and father Baburao Koleker, all accused came in front of the house of this witness and initially started abusing. Thereafter when this witness proceeded to his field with brother Vasant, that time on request by Subhash (PW-3), this witness went to the house of his uncle Subhash (PW-3) alongwith his brother Vasant (PW-10). That time accused No. 7 Venkat dragged Vasant out of the house and inflicted iron bar blow on the body of Vasant. Accused No.2 Shrimant, accused No.3 Baliram and accused No.5 Bibishan started beating Devidas (PW-9) by sticks and chain. Hearing the hue and cry of this witness when deceased Baburao rushed on the spot, accused No. 9 Vishnu assaulted Baburao by chain. Accused

No.8 Aghatrao assaulted Baburao by axe and other accused assaulted by sticks. This witness specifically named accused No.4 Prakash and accused No.6 Kalyanrao as the persons who assaulted deceased Baburao by sticks. From the testimony of this witness it emerges that one Sangita Shendge (PW-8) and his other family members tried to rescue him, that time accused No.4 Prakash inflicted stick blow on the body of Sangita. Vasant Kolekar (PW-10) sustained injuries on his forehead and deceased Baburao sustained injuries on his head, back and chest. Even Subhash (PW-3) and Sanjay (PW-6) sustained injuries due to assault by accused persons. As this witness and his family members sustained injuries, this witness lodged report (Exh.105) and the injured were referred for medical examination. This witness has identified all the accused persons before the Court.

19. In fact, identification of the accused and their presence is not disputed by defence. On the other hand, as per the statement of accused No.2 Shrimant recorded under Section 313 of the Code of Criminal Procedure, at the time of incident

all the accused persons were assaulted by informant and his family members. Therefore, the question of presence of accused on the spot of the incident is an admitted fact in between both the parties. The only question to be determined is that, which party is telling the truth and which party was aggressor.

20. In cross-examination of informant Devidas (PW-9) nothing could be elicited which creates doubt about truthness of the testimony of this witness. Even all details of the occurrence deposed by this witness are also fully corroborated by his immediately lodged F.I.R. (Exh. 105) on every material particular.

21. The testimony of informant Devidas (PW-9) is also fully corroborated by Subhash (PW-3) who has repeated same story and who has given every particular regarding assault by each accused and weapons in their hand. From the testimony of Subhash (PW-3) it emerges that accused No.9 Vishnu was holding chain in his hand and accused No.9 Vishnu inflicted chain blow on the back of this witness and same accused

inflicted chain blow on the head of Vasant Kolekar (PW-10). This witness has specified that deceased Baburao was assaulted by accused No.9 Vishnu, accused No.4 Prakash, accused No.1 Subrao, accused No. 7 Venkat, accused No.2 Shrimant, accused No. 5 Bibishan, accused No.6 Kalyanrao and others by chain and sticks. This witness has also made it clear that due to assault by accused, deceased Baburao sustained head injury and he fell on the spot. Muktabai and Sangita went to intervene, and at that time they were also assaulted by accused persons. It was tried to suggest in the cross-examination of this witness that the incident occurred in front of the house of accused No.1 Subrao. However, this suggestion was specifically denied by this witness. Certain improvements are pointed out by learned defence Counsel in the testimony of Subhash (PW-3), however, those improvements are not material improvements which shakes the basic version of this witness. Therefore, importance cannot be given to such minor improvements.

22. Sanjay Kolekar (PW-6) and Sangita Shendge (PW-8) have also fully corroborated the testimony of informant Devidas

(PW-9) and Subhash Kolekar (PW-3) on every particular. Sanjay (PW-6) has only improved his version by deposing that accused No.2 Shrimant was holding stone in his hand. However, such minor improvement needs no more consideration when his overall testimony is consistent with the evidence of other injured witnesses. Sangita (PW-8) has also deposed before the Court regarding sustaining the injuries by her on her eye due to chain blow by accused No.9 Vishnu and stick blow inflicted by accused No.4 Prakash.

23. Oral evidence of these injured eye witnesses is fully corroborated by medical evidence of Dr. P.R. Kulkarni (PW-2), the then Medical Officer, P.H.C. Ter. This witness has proved multiple contusions of various sizes and direction on the left shoulder and left side of spine of Vasant Kolekar (PW-8), contused lacerated wound on lateral angle of left eye and two contusions on occipital region and lumbar region of Vasant Kolekar. Dr. P.R. Kulkarni (PW-2) also found the following injuries on the body of injured Baburao Kolekar.

- (i) Multiple contusions, red in colour on left shoulder and left scapular region of different sizes and directions.

- (ii) Contused lacerated wound with bleeding on left parietal region of size 5 c.m. X 0.5 c.m. X bone deep.
- (iii) Contused lacerated wound with bleeding above right eyebrow of size 1 c.m. X 0.5 c.m. X 0.3 c.m.

Dr. PR. Kulkarni (PW-2) has also proved following injuries on the body of Devidas (PW-9) :-

- (i) Multiple contusions, red in colour on right shoulder and right scapular region of different sizes and directions.
- (ii) Contused lacerated wound with bleeding on right parietal region posterior aspect of size 5 X 0.2 X 0.2 c.m.
- (iii) Contused lacerated wound with bleeding on right parietal region medially of size 8 X 0.3 c.m. X bone deep.

This witness has also proved following injuries on the body of Sanjay Kolekar (PW-6) :-

- (i) Abrasion, red in colour at the base of right third finger of size 1 X 0.2 c.m.
- (ii) Abrasion, red in colour on right knee of size 1 X 0.5 c.m.
- (iii) Contused lacerated wound with bleeding above right eyebrow of size 1 c.m. X 0.5 c.m. X 0.3 c.m.

This witness also proved following injuries on the body of Subhash Bhagwan Kolekar (PW-3) :-

- (i) Abrasion, red in colour left left shoulder of size 1 X 1 c.m.
- (ii) Abrasion, red in colour on left arm of size 2 X 0.5 c.m.
- (iii) Abrasion, red in colour on left arm of size 5 X 0.1 c.m.

24. It is to be noted that Dr. P.R. Kulkarni (PW-2) has specifically opined that multiple contusion of different sizes and directions found on the body of Vasant Kolekar (PW-10), Baburao Kolekar (deceased) are possible due to chain and contused lacerated wounds are possible due to stick. This witness has also proved the fracture of skull of Baburao Kolekar (M.L.C. Exh.88). According to this witness, the injuries sustained by Baburao Kolekar were grievous and injuries sustained by other witnesses were simple in nature.

25. In cross-examination of this witness, it has been brought on record that wheal mark is not necessary if the blow is given by chain. It does not mean that there cannot be wheal mark on the body of any witness due to chain blow. In the cross-examination of this witness only defence has proved that the injuries found on the body of accused No.1 Subrao, accused No.2 Shrimant, accused No.9 Vishnu are possible due to stick blow. Though the opportunity was available with the defence Counsel, he has not brought on record exact nature and age of injuries sustained by these accused persons. Injury certificates

of accused persons (Exhs.97, 98, 99 and 100) though placed on record, the contents of these certificates are not established by defence Counsel. Mere exhibiting document does not prove its contents. Therefore, on the basis of only injury certificates of the accused persons, defence cannot prove the exact nature and age of injuries sustained by accused.

26. Even assuming that the injury certificates of the accused can be read in evidence, even then after going through these certificates, it emerges that the injuries sustained by accused are simple in nature. On the other hand, the nature of injuries proved on the body of deceased Baburao as well as other witnesses are comparatively grave than the injuries of accused persons. Even during the incident deceased Baburao Kolekar was killed at the hands of accused. Even the place of occurrence is not in front of the house of accused No.1 Subrao, but the spot panchnama (Exh.125) proved by Fulchand Thombre (PW-11) shows that the spot of incident is on the southern side of the house of Subhash (PW-3), where the informant Devidas (PW-9) was present at the time of

occurrence. House of Nivrutti is also shown towards western side of the spot of incident. Thus, it is clear that the spot of incident is not in front of the house of any accused person, but it is near the house of uncle of informant. In the circumstances, even the evidence of Devidas (PW-9) and Subhash (PW-3) is read together alongwith spot panchnama (Exh.125), it can be gathered that the accused persons came near the house of Subhash (PW-3) where Devidas (PW-9) and his brother were present. In other words, accused came towards the side of residence of prosecution witness Subhash (PW-3). Even F.I.R. lodged by accused is not proved by defence. In view of these circumstances together with grave injuries sustained by Baburao Kolekar, who is the father of informant Devidas (PW-9) and brother Subhash (PW-3), we have no hesitation to hold that prosecution has proved that accused were the aggressors. Therefore, right of private defence is not available to accused persons only because minor injuries were noticed on the body of some of the accused persons.

27. Learned defence Counsel assailed the oral evidence

of prosecution witnesses on the ground of improvements. However, as observed above, the improvements pointed out by learned defence Counsel do not go to the core of contention of prosecution witnesses that accused persons attacked and caused grave hurt to Baburao Kolekar (deceased).

28. To prove that the injuries sustained by Baburao Kolekar at the hands of accused resulted into his death, prosecution has examined Dr. R.G. Gute (PW-16). He deposed that on 11.07.1992 he examined Baburao Kolekar at Civil Hospital, Solapur and found fracture of the skull of Baburao. This witness has opined that the injury sustained by Baburao is possible due to blow of chain or stick. Despite cross-examination, learned defence Counsel could not falsify this opinion of this expert witness. In addition to this, prosecution has examined Dr. A.S. Kanki (PW-1) who performed postmortem examination of the dead body of Baburao Kolekar on 17.07.1992 at Solapur. This witness has proved postmortem report (Exh. 84) of the dead body of Baburao as well as the following external and internal injuries.

External Injuries :-

- (i) Sutured wound (stitches removed) on the scalp left frontal region, 2.5 inch length oblique.
- (ii) Sutured wound above right eyebrow ½ inch length.
- (iii) Contusion on lateral aspect of left shoulder of size 3 X 1.5 inch, dark brown.
- (iv) Contusion at left infra clavicular region of size 2.5 X 2.5 inch, dark brown.
- (v) Contusion at right lateral aspect of chest near nipple of size 3.5 inch X 3.5 inch, dark brown.
- (vi) Contusion on anterior aspect right arm of size 3 X 1 inch, dark brown, vertical.
- (vii) Abrasion (scratch) near right coastal margin of 2 inch in length, scab formed.
- (viii) Abrasion, anterior aspect right knee of size ½ X ½ inch with scab.
- (ix) Bed sore on right buttock of size 3 X 2 inch.

Internal Injuries :-

Haematoma under all the scalp radiating fracture frontal, both parietal and left temporal bone. Subdural haematoma all over brain more on left cerebrum. Brain was congested oedematous with slogging at left fronto parietal lobe in the cortex.

Dr. Kanki (PW-1) opined that the cause of death of

Baburao Kolekar was “due to shock and haemorrhage due to fracture of skull with subdural haematoma”. According to this witness, the head injury found on the body of Baburao Kolekar was sufficient to cause death in ordinary course of nature and this injury is possible due to stick blow. No doubt, in cross-examination this witness has admitted that in case of assault of chain there is possibility of mark of chain and he could not find chain mark or hunter mark on the body of Baburao. However, this admission does not falsify the contention of eye witnesses for the simple reason that Dr. Kanki (PW-1) examined the dead body of Baburao on 17.07.1992 i.e. after 12 days from the date of occurrence. It cannot be ignored that due to passage of 12 days, the chain marks which were initially visible and which are mentioned in the M.L.C. Certificate (Exh.88) of Baburao Kolekar, might have extinguished.

29. Thus, after considering the oral evidence of informant Devidas (PW-9), Subhash Kolekar (PW-3), Sanjay Kolekar (PW-6) and Sangita Shendge (PW-8) together with medical evidence on record, we have no hesitation to hold that

prosecution has proved that due to head injuries caused to Baburao due to assault by accused Nos.1 to 9, he died of homicidal death.

30. Learned defence Counsel submitted that the occurred incidence is only free fight in between two rival parties and there was no motive to kill deceased Baburao Kolekar. His next contention is that in case of free fight accused persons cannot be convicted with the aid of Section 149 of I.P.C. He placed reliance on “Ananta Kathod Pawar Vs State of Maharashtra”, reported in (1997 DGLS (Soft.) 1039) wherein the Apex Court ruled that, “in the case of free fight between two groups, there is no scope for convicting the members of one group under Section 147 and 148 of I.P.C. and for other substantive offences with the aid of Section 149 of I.P.C. Accused can be made liable for their individual acts”.

31. Further, the learned defence Counsel relied on “Lakshmi Singh Versus State of Bihar” reported in (1976 DGLS (Cri.) Soft 16) wherein the Apex Court ruled that, “the

omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one”.

32. In “Bharat Soni Versus State of Chhatisgarh”, reported in (2012 DGLS (Soft.) 559), relied by defence Counsel, the benefit of doubt was given considering the particular circumstances of that case.

33. Even the last case relied by learned defence Counsel “Kuldip Yadav and others Versus State of Bihar” reported in (2011 DGLS (Soft.) 351) is of no help to the defence due to altogether different facts before the Apex Court.

34. Though it is the contention of defence that this was the case of free fight in between accused and informant party. Accused persons cannot bring on record that at the time of occurrence sudden fight arose in between accused and

informant party. The F.I.R. lodged by accused is not proved by defence. No defence witness is examined by accused. On the other hand, as accused assembled together near the house of Subhash Kolekar (PW-3) with arms in their hand, when Devidas (PW-9) and his brother were present in that house, it indicates that after knowing the presence of Devidas (PW-9) and his brother at the house of Subhash (PW-3), accused came and gathered near the house of Subhash (PW-3) with deadly weapons. It indicates that it was pre-mediated attack and it was not sudden free fight in between these two rival groups. Otherwise also, mere filing of copies of injury certificates and copy of F.I.R. accused cannot prove assault to them by the informant's party. Accused ought to have examined witnesses to prove the contents of F.I.R., as well as occurrence of the alleged incident by examining defence witness, as contended by them at the stage of argument and at the stage of recording statement under Section 313 of Cr.P.C. Without any acceptable material on record supporting the contention of accused persons, merely on the basis of filing of counter criminal case against the informant and other witnesses, conclusion cannot be drawn that

it was the case of free fight. Therefore, the above-cited authorities relied by defence Counsel are not applicable in the case at hand.

35. In the case at hand, we have to examine whether the accused can be roped together with the aid of Section 149 of I.P.C. and under which section accused can be convicted if they are found guilty for causing homicidal death of Baburao Kolekar.

36. As observed above, deceased Baburao Kolekar is the father of informant Devidas (PW-9). Even inimical terms in between the family of accused and family of informant Devidas is admitted fact. On the day of incident in the evening some dispute arose in the field of Abhiman, who is uncle of Devidas, and report was lodged to Police Station, Dhoki. This contention of Devidas (PW-9) is not disputed in his cross-examination. This was one of the root cause for occurrence of the incident. Evidence on record also indicates that all accused went near the house of Subhash Kolekar (PW-3) where Devidas (PW-9) and

his brother Venkat (PW-10) were present. That time accused No.9 Vishnu was holding chain in his hand and other accused were holding sticks in their hands. After initial abusing, accused persons started beating Subhash Kolekar (PW-3) and Vasant Kolekar (PW-10) and other accused started beating Devidas Kolekar (PW-9) by stick and chain. That time Baburao Kolekar reached on the spot. He was also assaulted by accused persons by sticks and chain, which resulted into his death. These circumstances indicate that when accused assembled together near the house of Subhash Kolekar (PW-3) where Devidas (PW-9) and his brother were present and when accused were armed with deadly weapons like sticks and chain, definitely that assembly was an unlawful assembly and common object of that assembly can be gathered as to teach lesson to informant and his uncle Subhash (PW-3). No doubt, till that moment common object of the unlawful assembly by accused was not to kill Baburao. However, as accused persons started assaulting Baburao by sticks and chain after his arrival on the spot, it can be gathered that unlawful assembly of the accused developed common object on the spot to cause injuries to Baburao Kolekar.

In a similar circumstances, in the case of 'Bhagwan Singh and others Versus State of M.P.' reported in (AIR 2002 SC 1621), the Apex Court observed that,

“Common object, as contemplated by Section 149 of the Indian Penal Code, does not require prior concert or meeting of minds before the attack. Generally no direct evidence is available regarding the existence of common object which, in each case, has to be ascertained from the attending facts and circumstances. When a concerted attack is made on the victim by a large number of persons armed with deadly weapons, it is often difficult to determine the actual part played by each offender and easy to hold that such persons attacked the victim had the common object for an offence which was known to be likely to be committed in prosecution of such an object. In this case the accused persons have been proved to be on inimical terms with the complainant-party. The enmity between the parties had been aggravated on account of litigation with respect to the dispute over the mango trees. Accused persons who came on the spot are shown to have come armed with deadly weapons. The facts and circumstances of the case unequivocally prove the existence of the common object of such persons forming the unlawful assembly who had come on the spot and attacked the complainant party in consequence of which three precious lives were lost. The High Court was, therefore, justified in holding that the accused persons, involved in the occurrence, had shared the common object”.

37. Thus, in view of law laid down by the Apex Court, when accused assembled near the house of brother of Baburao Kolekar with deadly weapon in their hands and when after arrival of Baburao Kolekar they assaulted him and inflicted stick

blow and chain blow on his head as deposed by eye witnesses and supported by medical evidence, common object of this unlawful assembly was certainly to cause grave hurt to Baburao Kolekar. Accused may not be intended to cause death of Baburao, however, when they had chosen head, which is a vital part of the body of Baburao Kolekar, it can be inferred that accused persons had knowledge that their assault may result into death of Baburao Kolekar. Therefore, though offence punishable under Section 302 read with Section 149 of I.P.C. is not made out against accused persons, prosecution has established guilt of accused Nos.1 to 9 for the offence punishable under Section 304-II read with Section 149 of I.P.C.

38. As observed above, the prosecution has established that on the date and time of incident accused formed unlawful assembly near the house of Subhash Kolekar (PW-3) with common object to cause hurt or injury to informant party. That time accused were armed with deadly weapons like sticks and chain. Therefore, prosecution has proved offence punishable under Section 147 of I.P.C. against all accused persons.

Prosecution has also proved that in furtherance of common object of that unlawful assembly, the accused persons caused simple hurt to Devidas Kolekar (PW-9), Sanjay Kolekar (PW-6) and Vasant Kolekar (PW-10) by deadly weapons. Therefore, offence punishable under Section 324 read with Section 149 of I.P.C. is also proved against all the accused persons. As unlawful assembly of the accused persons armed with deadly weapons used criminal force and caused hurt to the above witnesses in furtherance of common object of their unlawful assembly, offence punishable under Section 148 of I.P.C. is also proved against all the accused persons. In other words, prosecution has proved beyond reasonable doubt the offences punishable under Sections 147, 148 and 324 read with Section 149 of I.P.C. against all the accused persons.

39. Accordingly, after careful consideration of the evidence placed on record, our conclusion is that the prosecution has established guilt of the accused under Section 147, 148, 324 read with Section 149 and 304-II read with Section 149 of I.P.C. The conviction imposed by the learned

trial Court under Section 302 read with Section 149 of I.P.C. is incorrect and deserves to be set aside by partly allowing this appeal. However, accused Nos.1 to 6, 8 and 9 deserve to be convicted for the offence punishable under Section 304-II read with Section 149 of I.P.C. (Accused No.7 Venkat Nivrati Kolekar died during pendency of appeal and his appeal is abated).

40. Regarding the quantum of sentence, after considering young ages of accused Nos.1 to 6, 8 and 9 as well as the circumstances of the case i.e. killing of one old man for no reasonable cause, we hold that rigorous imprisonment for 5 years each and fine of Rs. 1000/- each for the offence punishable under Section 304-II read with Section 149 of I.P.C. is suffice to meet the ends of justice. It follows that this appeal deserves to be partly allowed. Hence, the following order.

ORDER

1. Criminal Appeal No. 75/2000 is partly allowed.
2. The conviction of accused No.1 Subrao Bhimrao Kolekar, accused No.2 Shrimant Nivrati Kolekar, accused No.3 Baliram Goroba Kolekar, accused No. 4 Prakash Dadarao

Bandgar, accused No.5 Bibishan Dagadu Kolekar, accused No. 6 Kalyanrao Bhimrao Kolekar, accused No.8 Agatrao Nivrati Kolekar and accused No.9 Vishnu Dhondiba Kanade under Section 302 read with Section 149 of the Indian Penal Code is set aside and it is modified as under :-

“Accused Nos. 1 to 6, 8 and 9 are held guilty for the offence punishable under Section 304-II read with Section 149 of the Indian Penal Code and they are sentenced to suffer rigorous imprisonment for 5 years and to pay fine of Rs. 1,000/- (Rupees One Thousand) each, in default, to suffer rigorous imprisonment for one month”.

3. The conviction of accused Nos.1 to 6, 8 and 9 under Sections 147, 148 and 324 read with Section 149 of the Indian Penal Code is confirmed.
4. Accused Nos.1 to 6, 8 and 9 shall surrender to their bail bonds immediately before the trial Court to undergo the sentence.

(SUNIL K. KOTWAL)
JUDGE

(T.V. NALAWADE)
JUDGE
