

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

CRIMINAL APPEAL NO.346 OF 1999

The State of Maharashtra .. **Appellant**

Versus

1. Ankush Rangnath Kolekar .. **Respondents**
Age-30 years,
2. Shivaji Rangnath Kolekar,
Age-36 years,
3. Mahadeo Rangnath Kolekar,
Age-34 years,
(Appeal is abated)
4. Dattatraya Rangnath Kolekar,
Age-22 years,

All R/o. Waki, Tq. Jamkhed,
Dist. Ahmednagar

Mr.S.J. Salgare, A.P.P. for the appellant/State
Mr.R.N. Dhorde, Senior Counsel i/b Mr. V.R. Dhorde,
Advocate for the respondent Nos. 1 to 4

**CORAM : S.S. SHINDE &
S.M. GAVHANE, JJ.**

**Reserved on : 09.06.2017
Pronounced on : 21.07.2017**

J U D G M E N T [PER: S.M. GAVHANE, J.] :-

. The appellant/State has filed this appeal under Section 378(1) of the Criminal Procedure Code against the judgment and order dated 18.05.1999 in Sessions Case No. 191 of 1995 passed by learned 2nd Additional Session Judge, Ahmednagar thereby acquitting all the four respondents (accused Nos. 1 to 4) of the offences punishable under Sections 302, 324 and 504 individually or r/w Section 34 of the Indian Penal Code (for short the IPC). Respondent No.3/accused No.3- Mahadeo Kolekar is reported dead on 09.03.2015 during pendency of the appeal as stated in the affidavit (Flag-A) dated 18.06.2015 of respondent No.1/accused No.1-Ankush Kolekar and as seen from the copy of the death certificate of accused No.3- Mahadeo Kolekar produced alongwith above affidavit which is not disputed by the appellant/State and therefore the appeal is abated against accused No.3-Mahadeo Kolekar.

2. The prosecution case, in short, is as under:

A. The informant/complainant-Ajinath Baban Kolekar (P.W.1) was residing alongwith his father Baban Kolekar (deceased), mother Shantabai and brother Navnath (PW-6) jointly in the field in the limits of village Waki, Tq. Jamkhed, Dist. Ahmednagar. At the time of the incident he was having land in Waki Shivar along the Khairi Dam. All the accused who are brothers interse and cousins of PW-1 were also having the land adjacent to the land of the informant. The informant had obtained sanction to supply water to his land by installing electric motor on Khairi Dam. So also, the accused had installed electric motor on the Khairi Dam prior to eight days of the incident. For installing electric motor accused No.1 Ankush and his brothers had spent Rs.500/- for electric pole and electric wire. And about one month prior to the incident the MSEB had taken the electric line.

B. It is alleged that on 07.04.1995 in the morning at about 10.00 a.m. the informant, his brother Navnath

(PW-6) and father Baban went to Khairi Dam with material of electric motor to install the same and when they were laying down the cable of the electric motor from the electric pole up to the electric motor, the informant's father was sitting under the shadow of Babhul tree and while informant and his brother Navnath were laying down the cable on the land in the noon at about 01.00 p.m. all four accused came there. Accused No.1 Ankush said that he incurred the expenses of bringing the electric pole and wire from Jamkhed and that said expenses should be given first and then motor should be installed, otherwise they would not allow the informant to install the motor. Thereupon the informant said him that he is ready to give him expenses whatever he has incurred within a day or two. Thereupon accused No.1 started abusing to informant and his brother Navnath and hits stone upon the right shoulder of the informant by throwing. Accused No.2 Shivaji hits stone to Navnath by throwing and accused No. 4Dattatray assaulted Navnath by chain in his hand.At that time Navnath shouted and started running,therefore when

the father of the informant i.e. deceased came in to rescue, accused No.3 Mahadeo hit stone to the head of the father of the informant. As a result he fell down on the ground and started shouting loudly. The blood was oozing from his head injury. On hearing commotion Shantabai-mother and Nandabai-Sister of the informant came running there. At that time accused No.2 Shivaji threw stone to Nandabai-sister of the informant. The deceased was unconscious after he fell down on the ground. The above said assailants went away. They (informant and others) tried to stand up the deceased by holding him and he was seen dead. Then dead body was brought at the Vasti. On the same day the informant/complainant went to Police Station, Jamkhed at about 16.05 hours and narrated the incident happened to the PSI Gaikwad (PW-11) who reduced the complaint into writing and treating the same as First Information Report registered the crime No.41/1995 for the offences punishable under Sections 302,323,337,504 r/w 34 of the IPC against the accused and commenced the investigation.

C. During the investigation PSI Gaikwad on the same day i.e. on 07.04.1995 prepared inquest panchanama (exh. 19) in presence of Panchas Laxman Shrirame (PW-2) and Bapu Kisan Maharnawar and dead body was sent for postmortem examination. Thereafter, he visited the spot of incident along the Khairi Dam in presence of Panch Ashok Sorte (PW-4) and Gangaram Shrirame and prepared the panchanama of spot of incident (Exh.23) and got prepared map (Exh.21) from the Circle Nath Bade (PW-3). On that day only he seized the clothes having blood stains on the person of informant Ajinath Kolekar (PW-1), Navnath Kolekar (PW-6) and their sister Nanda Karande and prepared panchanama (Exh.25). On 08.04.1995 Dr. Sanjay Mundhe (PW-7) conducted the postmortem examination and opined that death was caused due to head injury and accordingly issued postmortem report (Exh.30) & provisional certificate of cause of death (Exh.31). On that day Head Constable Kakade (PW-9) seized the clothes on the person of the deceased as per the panchanama

(Exh.26) in presence of Panchas Nagnath Shinde (PW-5) and Gangaram Shrirame. So also, on the same day in presence of the same Panchas PSI Gaikwad arrested accused Nos. 1 to 3 and seized the clothes on their person and prepared Panchanama (Exh.27). The injured Navnath Kolekar, Ajinath Kolekar and their sister Nanda were examined by Dr. Goyal (PW-10) the Medical Officer, Primary Health Center, Kharde and he issued their injury certificates respectively Exh.36 to 38. Accused No.4 was arrested on 13.04.1995. PSI Gaikwad recorded the statements of witnesses who were knowing the incident. He sent the seized articles to the Chemical Analyzer for analysis. Then he was transferred and hence further investigation was carried out by PSI Nemade.

D. After completion of the investigation the Investigating Officer PSI Nemade submitted the charge-sheet in the Court of JMFC, Ahmednagar who then committed the case to the Court of Sessions as the offence under Section 302 of the IPC was exclusively trial by the Court

of Sessions. The case was made over to the 2nd Additional Sessions Judge, Ahmednagar.

E. The charge was framed against the accused for the offences punishable under Sections 302,324 and 504 of the IPC individually or r/w section 34 of the IPC to which the accused pleaded not guilty and claimed to be tried. Their defence is denial. Accused No.2 Shivaji and Accused No.3 Mahadeo Kolekar in their written say Exh. 42 and 43 filed at the time of statement under Section 313 of Criminal Procedure Code stated that on the day of incident at about 12.00 p.m.the informant and Navnath (PW-6) started laying down the wire near the pole which was brought by them (accused) in their field to install the electric motor to take the water from the Khairi Dam. Therefore, they went there and said them that they have incurred the expenses to bring the electric pole and that they should pay half of the expenses. Thereupon, PW-1 and PW-6 were annoyed and they have started abusing, pushing and threatening them and said that they would see them

and then they (accused Nos. 2 and 3) started going to their Vasti. PWs-1 and 6 went running to their Vasti and then they alongwith their sister Nanda came armed with sticks to assault them. At that time they all three were throwing stones upon them. But they (accused Nos. 2 and 3) in their defence to protect themselves started throwing the stones. At that time they proceeded towards their Vasti from behind the Vasti of PWs. 1 and 6. At that time the deceased Baban was grazing the cattle. On hearing the shouts of the quarrel he came running by the road of small pieces and he was fallen as his Dhoti was entangled in his leg and he fell on the head and sustained injury. Accused No.1 Ankush and accused No.4 Dattatray were not present at the spot of incident and they have been falsely involved in the case. Due to head injury and due to fall the deceased died. Thus according to accused Nos.2 and 3 they have not committed any offence.

3. To prove the charge against the accused,

prosecution has examined in all 11 witnesses and relied upon the Panchanamas, postmortem report and other documents i.e. injury certificates of eye witnesses etc. Learned Additional Sessions Judge held that the prosecution has failed to prove the aforesaid offences against the accused individually or in furtherance of their common intention and acquitted all the accused of the said offences by the judgment and order dated 18.05.1999. Therefore this appeal by the State challenging the said judgment and order of acquittal.

4. We have heard learned APP appearing for the appellant/State and learned counsel appearing for respondent Nos. 1, 2 and 4. Learned APP submitted that there is evidence of eye witnesses PWs. 1, 6 and 8 which shows that the accused No.3-Mahadeo Kolekar hit stone to the head of the deceased Baban, as a result he suffered head injury and died. Further he submitted that the evidence of PWs. 1 and 6 shows that accused Nos.1,2 and 4 respectively assaulted PW's 1 and 6 by stone and chain,

as per the case of the prosecution. The evidence of said witnesses is corroborated by Dr. Goyal (PW-10) who examined PWs. 1 and 6 and their sister Nandabai and issued injury certificates (Exh.36 to 38) in respect of injuries to them. Therefore, according to the learned APP the trial Court ought to have considered the above said evidence and ought to have convicted the accused for the offences charged. Thus he prayed to allow the appeal.

5. Learned counsel appearing for accused Nos. 1 2 and 4 submitted that admittedly accused No.3 Mahadeo Kolekar who allegedly hit stone to the head of the deceased Baban died during pendency of the appeal. PWs. 1, 6 and 8 the alleged eye witnesses are not only related to the deceased but interested witnesses. Therefore, the prosecution should have examined the independent witness. The owners of the lands which are adjoining to the lands of the informant as well as the accused, whose statements were recorded by Investigating Officer PSI Gaikwad during the investigation are admittedly not examined by the

prosecution. Therefore, when as per the evidence of Dr. Sanjiv Mundhe (PW-7) head injury on the person of the deceased could be caused due to fall and injuries noticed on the person of informant (PW-1), his brother Navnath (PW-6) and their sister Nandabai as per evidence of Dr. Goyal, as per injury certificates (Exh. Nos. 36 to 38) could be caused due to fall and when the injuries noticed on their persons are simple in nature, defence version that the said witnesses and the deceased sustained injuries due to fall is probable and hence the trial Court has rightly accepted the defence and on holding that prosecution has failed to prove the offences alleged against accused rightly acquitted them by the impugned judgment and order and therefore, there is no reason to interfere with the said order of acquittal, since view taken by the trial Court was reasonable and probable view. Learned counsel appearing for the accused in support of his submission that the evidence of PWs. 1,6 and 8 is not believable since they are interested witnesses as they are related to the deceased and

independent witnesses are not examined by the prosecution has relied upon the ratio laid down in the case of **Golbar Hussain and others Vs State of Assam and Another reported in 2015(11)SCC 242** wherein in para Nos. 10 to 13 the Apex Court has observed as under:-

"10. The second issue for consideration is the testimonies of PWs. 4 and 5 in absence of any corroboration from any independent witness. PWs 4 and 5 are related witnesses as they are the brothers of the deceased Hasen Ali. There is no bar on the admissibility of a Statement by related witnesses supporting the prosecution case, but it should stand the test of being credible, reliable, trustworthy, admissible in accordance with law and corroborated by other witnesses or documentary evidence of the prosecution. This Court has held in **Magna Vs State of Uttarakhand** that it is the quality of the witness that matters and not the quantity, when the related witness was examined and found credible. In such a case non-examination of an independent witness would not be fatal to the prosecution case.

11. In the present case, however, the

prosecution witnesses PWs 4 and 5, contradict each other, and their statements are not corroborated by any independent witness in spite of the incident happening in the marketplace, with shops on both sides of the road. Therefore, in our view, as the testimonies of PWs 4 and 5 are not completely reliable, this is a fit case where corroboration by an independent witness was required. The case of the prosecution also weakens on the ground that the only independent witness PW 8 turned hostile. A similar situation arose in **Shyamal Saha Vs State of W.B.**, where the only independent witness turned hostile. This Court decided to affirm the acquittal and granted benefit of doubt to the accused considering the factual background and circumstances involved in the case.

12. Therefore, in the light of the above conclusion on the issues for consideration, the view taken by the trial Court was reasonable and probable on the facts of the present case. We are, therefore, of the opinion that the High Court should not have set aside the acquittal of the appellants.

13. Accordingly, this appeal is allowed and the impugned judgment and order passed by the

High Court is set aside. The appellants are accordingly directed to be set free from incarceration, if not required in any other case."

6. With the able assistance of learned APP appearing for the appellant/State and learned counsel appearing for the respondents /accused Nos.1,2 and 4 we have perused the evidence adduced by the prosecution and the impugned judgment.

7. Since the appeal is against the acquittal before examining the evidence adduced by the prosecution to see whether the acquittal of the accused is proper and the view taken by the trial Court was reasonable and probable or otherwise it is necessary to bear in mind the principle in this respect laid down by the Apex Court in the case of **Murlidhar alias Gidda and another Vs State of Karnataka, 2014(4)Mh.L.J.(Cri)353** wherein in para No.12 the Apex Court has held thus:

"12. The approach of the appellate Court in the appeal against acquittal has been dealt with by this Court in Tulshiram Kanu Vs State, AIR 1954 SC 1, Madan Mohan Singh Vs State of U.P., AIR 1954 SC 637, Atley Vs State of U.P., AIR 1955 SC 807, Aher Raja Khima Vs State of Saurashtra, AIR 1956 SC 217, Balbir Singh Vs State of Punjab, AIR 1957 SC 216, M.G. Agrawal Vs State of Maharashtra, AIR 1963 SC 200, Noor Khan Vs State of Rajasthan, AIR 1964 SC 286, Khedu Mohton Vs State of Bihar, (1970) 2 SCC 450, Shivaji Sahabrao Bobade Vs State of Maharashtra, (1973) 2 SCC 793, Lekha Yadav Vs State of Bihar, (1973) 2 SCC 424, Khem Karan Vs State of U.P., (1974) 4 SCC 603, Bisan Singh Vs State of Punjab, (1974) 3 SCC 288, Umedbhai Jadavbhai Vs State of Gujrat, (1978) 1 SCC 228, K. Gopal Reddy Vs. State of A.P., (1979) 1 SCC 355, Tota Singh Vs State of Punjab, (1987) 2 SCC 529, Ram Kumar Vs State of Haryana, 1995 Supp (1) SCC 248, Madan Lal Vs. State of J & K, (1997) 7 SCC 677, Sambasivan Vs State of Kerala, (1998) 5 SCC 412, Bhagwan Singh Vs State of M.P., (2002) 4 SCC 85, Harijana Thirupala Vs Public Prosecutor, High Court of A.P., (2002) 6 SCC 470, C. Antony Vs K.G. Raghavan Nair, (2003) 1 SCC 1, State of Karnataka Vs K. Gopalkrishna, (2005) 9 SCC 291,

State of Goa Vs Sanjay Thakran, (2007) 3 SCC 755
and Chandrappa, Chandrappa Vs State of
Karnataka, (2007) 4 SCC 415.

It is not necessary to deal with these cases individually. Suffice it to say that this Court has consistently held that in dealing with appeals against acquittal, the appellate Court must bear in mind the following : (i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial Court, (ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal, (iii) Though, the power of the appellate Court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate Court is generally loath in disturbing the findings of fact recorded by the trial Court. It is so because the trial Court had an advantage of seeing the demeanor of the witnesses. If the trial Court takes a reasonable view of the facts of the case, interference by the appellate Court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial Court are palpably wrong or based on erroneous

view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate Court in interfering with such conclusions is fully justified, and (iv) Merely because of the appellate Court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial Court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate Court in the judgment of the trial Court."

8. To prove the charge against the accused under Section 302, 324 and 504 of the IPC individually or in furtherance of their common intention with the help of Section 34 of IPC, out of 11 witnesses the prosecution has mainly relied upon the evidence of eye witnesses PWs. 1, 6 and 8, evidence of Dr. Mundhe (PW-7) and Dr. Goyal (PW-10). Case of the prosecution is that death of deceased Baban was homicidal and to prove the same the prosecution has relied upon the evidence of Dr. Mundhe

and postmortem report (Exh.30). Dr. Mundhe (PW-7) deposed that on 08.04.1995 he conducted postmortem during 08.00 am to 09.00 am and found external injuries on the dead body as under:-

"Lacerated wound over scalp over left parietal region, of the size of 1" above left ear, 2" x half inch x scalp deep, oblique in nature within 24 hours. There was depressed fracture at the site of lacerated injury"

. According to Dr. Mundhe the cause of death was shock due to head injury. The said injuries were sufficient to cause death and that the said injuries are also possible by blow of muddemal stone (Article-1). In the cross-examination he stated that the deceased was old aged person about 60 years and admitted that during the old age bones become fragile and brittle and get easily fracture and fracture can be caused by fall, cerebral hemorrhage can be caused by fall. The cause of death stated by Dr. Mundhe is also given in the postmortem report (Exh.30) and provisional certificate of cause of

death (Exh.31) issued by him. Since Dr. Mundhe deposed that in the old age fracture can be caused by fall and cerebral hemorrhage can be caused by fall the cause of death given by him is not sufficient to state that death of the deceased is homicidal unless evidence of eye witnesses is considered in the light of defence of the accused regarding sustaining injuries to the deceased and the eye witness due to fall.

9. Admittedly the lands of the informant and his brothers and the land of the accused are adjacent and situate in Waki Shivar, Tq. Jamkhed, Dist. Ahmednagar and they are adjacent to Khairi Dam. The accused had taken electric pole and electric connection to install the electric motor on Khairi Dam to water their land.

10. Now we shall consider the evidence of eye witnesses PWs 1, 6 and 8. Ajinath Kolekar (PW-1) the informant deposed that the incident took place some four years before on 7th date. They were intending to install

the electric motor on the Khairi Dam for fetching water to their field and they were spreading electric wire from the motor up to the pole. He and his brother were doing that work and they had worked since noon till 13 hours. Further he deposed that all four accused came there and told him to pay the expenses of bringing electric connection to that pole and Ankush (accused No.1) told that he had spent for it and asked for the amount from them. He also agreed to pay the amount within two days. But, they immediately started abusing and beating them. Accused No.1 pelted stone on his shoulder, accused No.2 Shivaji pelted stone on the back of his brother Navnath (PW-6) and Dattatray (accused No.4) inflicted a chain blow to his brother Navnath (PW-6). Then they (witnesses) started raising shouts and running from there towards their Vasti and they were following them. He deposed that his father Baban (deceased) was sitting at that time under a tree near the Vasti and on hearing shouts he came running towards them. But Mahadeo (accused No.3) obstructed him on the way and forcibly hit a stone on his

head. Then his father collapsed there itself by raising a shout. The assailants fled away. Then they came near father and found that he had no any movement and he was dead. Therefore, they lifted him and took him to their Vasti. He then went to Jamkhed Police Station and lodged the complaint/FIR (Exh.17) Further he stated that his father had bleeding injury to his head. So also, he received injury to his shoulder and his brother Navnath had injury to his arm and their sister Nandabai also received injury.

11. In the cross-examination Ajinath (PW-1) has stated that there is a residential Vasti of Laxman Dharma in the vicinity. There is a Jan-Pir Dargah at a distance of some 100 fts. towards eastern side of their house which is facing towards East. The electric pole is at a distance of 100 fts. from Jan-Pir Dargah and their residential Vasti is at a distance of 100 Fts from pole towards western side. He deposed that they were near the pole when the incident began. When the accused lifted up

the stone they ran towards their house and then pelted stones. He stated that he received a blow on his back while running. Navnath (PW-6) also ran alongwith him. He stated that his father was sitting under a tree near the pole and his father started coming towards him from their backside. Accused No.3 hit a stone to their father at the time when he was coming towards them and their father was at a distance of 50-60 fts. from them. His father fell down at that time on the way at some distance towards eastern side of Vasti at a distance of 50-60 fts. away and at a distance of 25 fts. from pole. He stated that it did not happen that the father (deceased) fell down on the head at a distance of 150-200 fts. behind his Vasti.

12. PW-1 admitted that there are lands of Ajinath Shelke and others to the northern side of his Vasti and they were taking crops in their lands. Men were working in those fields at that time. And incident lasted for about 15 to 20 minutes. It has further come in his cross-examination that after the incident he had not stated

personally about the incident to anybody. He went to Jamkhed. PSI was present there. He talked to him. Then he came back to Waki at the place of incident with police, including PSI in jeep. Then again he went to police station and then lodged the complaint. He stated that in the complaint/FIR he stated that Mahadeo (accused No.3) had obstructed his father (deceased) and forcibly hit a stone. He could not tell why the words "obstructed" and "forcibly" are not mentioned in the complaint/FIR (Exh. 17). He has denied that accused No.1 Ankush Kolekar and accused No.4-Dattatray Kolekar did not come there on the day of incident and further denied that he deposed false that accused hit a stone on his shoulder and to his sister. So also, he denied that he has deposed false that accused No.3 Mahadeo hit a stone to his father (deceased) obstructing him on the way. He has denied that only accused Nos. 2 and 3 had come at the place and asked him to pay expenses incurred by them to take electric connection. He has denied that he got angry, abused and threatened them and then they (accused Nos. 2 and 3) ran

away towards their residence. He has denied that he, his brother Navnath (PW-6) went to their Vasti and they had come with their sister Nandabai with sticks to beat accused Nos. 2 and 3. When they started going towards the village. He denied that they were also pelting stones and accused Nos.2 and 3 also pelted stones to protect themselves, in their defence. He denied that deceased was fallen on the stone on getting his leg entangled in Dhoti. He has denied that having deliberation with the Bhaubands they have decided to lodge the complaint and falsely implicated accused.

13. Navnath(PW-6) brother of PW-1 in his evidence stated that the incident took place on 07.04.1995. He, his brother and father had gone on that day in the morning for work of installing the electric motor at the Khairi Dam. After installing electric motor they were spreading the cable wire at 01.00 p.m. All four accused came there and they had asked them to pay the amount as they had spent for obtaining the electric pole and

connection. Accused No. 1-Ankush had asked for the same. His brother Ajinath (PW-1) then replied that they would pay the amount within a day or two. But accused No.1-Ankush then started abusing and then he took one stone and hit the same on the left arm of Ajinath (PW-1) near the shoulder and accused No.2 Shivaji also hit a stone on his PW-6's back. He stated that accused No.4-Dattatray then immediately came ahead and inflicted chain blow on his back. Thereafter they got frightened and started running away. He stated that Ajinath (PW-1) had started running towards their residential Vasti and he followed him. Further he deposed that his father had then started coming from behind them on hearing the commotion. But accused No.3 Mahadeo took one stone and threw it on the head of his father. Their father was running from behind, following the accused chasing them and when they turned behind they saw that their father was also beaten. He stated that his father then collapsed and he received a big injury to his head and blood was oozing. He claims that his sister had also come there and accused No.2-

Shivaji then inflicted forcibly one stone on her head. Then they came near their father. But the accused then ran away. They (witness and others) tried to move their father but there was no any movement and he was dead. Then he was brought to their Vasti then Ajinath (PW-1) went to Police Station and lodged the complaint. Police then came.

14. In the cross-examination Navnath (PW-6) stated that accused No.1 Ankush and Ajinath (PW-1) were facing each other at the time of incident when he inflicted the stone. He was at a distance of 4 to 5 fts. from Ajinath (PW-1). Ajinath started running away after infliction of stone and he had also started running away following Ajinath. His father came from eastern side and his father was behind the accused. His father (deceased) fell at a distance of 100 fts. away from the pole towards western side. Their house is also towards western side, at a distance of 350 fts. from the pole. He stated that he did not state before the police that they were running ahead.

He stated that accused were chasing them and his father (deceased) was following them. He did not tell before the police that his father uttered the words stop and not to beat etc. and they turned behind and the assault was made on his father and saw the assault made on his father by accused No.3-Mahadeo. He stated that his father was at the side of the road in between the pole and their vasti/residential place. He stated that he did not resist after seeing his father having inflicted with stones. He stated that he did not speak anything at that time. They came to the side of their father when accused had fled away. He denied that accused No.1-Ankush and accused No. 4-Dattatray had not come there. He has denied that they had started abusing accused Nos.2 and 3. He has denied that he, his brother Ajinath (PW-1) and sister Nandabai went towards house for bringing sticks and weapons and returned back with weapons. He denied that accused Nos.2 and 3 pelted stones in their defence. He denied that his father then came running from the place he was grazing cattle and by getting his leg entangled in Dhoti

sustained injury to his head by falling on the stone. He denied that he also suffered injury by fall while running. He stated that he did not tell to anybody till the time of recording of his statement that Mahadeo (accused No.3) had inflicted the stone on the head of his father. He denied that due to death of his father he is deposing false.

15. Laxman (PW-8) who is third eye witness to the incident has stated that he is residing in the field at Vasti at a distance of 200 fts. from Khairi Dam. He knows complainant Ajinath (PW-1) and his father (deceased) as well as accused. His evidence is that incident took place some five years before, at about 12.00 to 01.00 p.m.. He was at his Vasti. He heard some shouts from eastern side from the side of the Khairi Dam. Therefore he saw to that side. Deceased-Baban and Nandabai were coming from that side. He then saw accused No.3-Mahadeo hitting a stone on the head of deceased-Baban and deceased had fallen. Further he deposed that on seeing this he got frightened,

he then came inside of his house and told the incident to his wife. He states that accused Nos.1,2 and 4 were also there and Ajinath (PW-1) and Navnath (PW-6) were also there. Then he came towards the place where deceased-Baban was lying. He claims that accused went away towards eastern side. He then saw Baban-Deceased and there was injury to his head and he was dead. He stated that he and Ajinath (PW-1) then lifted up the body and brought it up to the Vasti and kept the same there. Ajinath (PW-1) then went to inform the police.

16. In the cross-examination Laxman (PW-8) has denied that Baban-deceased was his real cousin. He stated that he does not remember the name of his grand-father. He deposed that he could not tell whether his grand-father and grand-father of the deceased was the same person. He saw accused No.1-Ankush at the place of incident of assault. He saw firstly Baban-deceased and Nandabai were coming from the side of the Dam. They were coming by the road and accused No.3 Mahadeo was in front

of them facing towards them. He states that he saw Nandabai fallen on the person of the Baban (deceased) at the place of incident. He denied that he did not see anything and he is deposing false as deceased was his brother.

17. We have carefully perused the evidence of eye witnesses PWs. 1,6 and 8. Ajinath (PW-1) and Navnath (PW-6) are the sons of the deceased Baban and it appears that Laxman (PW-8) is cousin of the deceased. Therefore, all these witnesses are related to the deceased. Therefore, it is necessary to make close scrutiny of their evidence while accepting or rejecting their evidence. It appears from the evidence of PWs. 1 and 6 that on the day of incident i.e. on 07.04.1995 at about 01.00 p.m. while they were spreading electric wire all four accused came there and accused No.1-Ankush had told that he had incurred expenses for bringing electric connection and asked for the amount from them. Thereupon, PW-1 said that they would pay amount within two days to

accused No.1. Thereafter, incident in question took place.

18. It appears from the evidence of PWs. 1 and 6 that after the above incident the accused immediately started abusing and beating them. Further it appears from the evidence of PW-1 that accused No.1 pelted stones on his shoulder, accused No.2 Shivaji pelted stones on the back of PW-6 and accused No.4 Dattatray inflicted a chain blow to PW-6. It appears from the evidence of PW-6 that accused No.1 started abusing and then took one stone and threw it on the left arm of PW-1, accused No.2 hit a stone on his back and accused No.4 inflicted chain blow on his back. The evidence of both these witnesses show that when they raised shout and started running towards their Vasti, their father deceased came from their behind on hearing their shouts and according to PW-1, accused No.3 Mahadeo (since deceased) obstructed the deceased on the way and forcibly hit a stone on his head and then the deceased collapsed there raising shout and assailants

fled away and evidence of PW-6 shows that accused No.3 Mahadeo took one stone and threw it on the head of his father (deceased). While their father was running from behind they saw that the deceased was beaten. The deceased was then collapsed and he received injury to his head and blood was oozing. It appears from the evidence of PW-8 that at about 12.00 to 01.00 p.m. on the day of incident he was at his Vasti. He heard some shouts from the side of the Khairi Dam and he saw that the deceased and Nandabai were coming from that side. Accused No.3 Mahadeo hit a stone on the head of the deceased and deceased had fallen.

19. Now it is to be seen whether the evidence of PWs. 1,6 and 8 attributing role as above to accused No.1 and 4 is believable. There is consistency in the evidence of PWs. 1 and 6 as regards the role attributed to accused Nos. 1,2 and 4 in assaulting PWs. 1 and 6. But PW-8 has not stated that accused Nos. 1,2 and 4 had assaulted PWs. 1 and 6 by stone as deposed by them. So also, PWs. 1 and

2 have simply stated that their father (deceased) came running to them on hearing the shouts. While PW-8 has stated that on hearing the shouts the deceased and his daughter Nandabai came from eastern side. PWs. 1 and 6 have respectively stated that their sister Nandabai sustained injury and that she was also present. But they have not stated that she had come running to them with their father (deceased). Both PWs. 1 and 6 have claimed that the deceased their father was coming from their behind and at that time accused No.3 hit a stone to his head while he was following the accused. When the deceased was behind the accused who were chasing PWs. 1 and 6 in fact it was not possible for them to see accused No.3 hitting a stone to the head of their father. When as per the evidence of PW-1, the deceased fell down at a distance of 50 to 60 fts. towards eastern side of their Vasti. Another aspect is to be noted that while deposing before the Court PW-1 deposes that accused No.3 obstructed the deceased on the way and forcibly hit a stone on his head. But said fact is not mentioned in the

FIR lodged by him. The evidence of PW-6 shows that accused No.2 hit stone on the head of Nandabai. PWs. 1 and 8 have not stated the same. If really accused No.2 would have hit stone to the head of Nandabai PWs. 1 and 8 would have definitely stated the same, if they would have witnessed the said incident. Admittedly, Nandabai sister of PWs. 1 and 6 and daughter of the deceased who allegedly sustained injury in the incident as deposed by Dr. Goyal (PW-10) has not been examined. In fact she should have been examined to prove the fact that she had came to the spot where PWs 1 and 6 were assaulted by accused Nos. 1,2 and 4 with her father (deceased) and that she was also given stone blow to head by accused No. 2 and that she sustained injury. Therefore, evidence of PWs 1 and 6 attributing role to accused Nos. 1,2 and 4 in assaulting them, is not trustworthy.

20. Moreover, as referred above PWs 1,6 and 8 have claimed that they saw accused No.3 Mahadeo who is now dead hitting stone to the head of the deceased. As noted

earlier the evidence of PWs 1 and 6 is that while running towards their Vasti as accused were following them they had seen accused No.3 hitting stone to their father (deceased) and causing head injury is not acceptable. Moreover PW-8 had also allegedly saw accused No.3 hitting stone to the head of the deceased. As referred earlier in his cross-examination PW-8 stated that on seen that the deceased was fallen he got frightened and came in side his house and told the incident to his wife. In fact, on seeing incident of assaulting the deceased by accused No. 3 his natural conduct would have been that he would have intervened to rescue the deceased from the accused. Therefore, his evidence that he saw the incident of assaulting the deceased on his head by stone by accused No.3 does not inspire confidence.

21. It has come in the evidence that the informant PW-1 after the incident at about 01.00 p.m. went to Jamkhed Police Station and it has taken about one hour to reach in the said police station. There he talked to PSI

who was present in the police station. He came back to Waki at the place of the incident with police including PSI in jeep, then again he went to the police station and lodged the complaint/FIR (Exh.17). Exh. 17 shows that it was lodged at about 16.05 p.m. on the day of incident i.e. 07.04.1995. From the above evidence it is clear that PW-1 himself has reached to the police station at about 02.00 p.m. When he has reached to the police station at about 02.00 p.m. he should have lodged the FIR at that time. But, he did not lodge the FIR at that time. Another aspect to be noted is that when he states that he talked to PSI and alongwith PSI he came to the spot of incident, the concerned PSI should have recorded statement of PW-1 when he informed him about the incident. But, PSI Gaikwad (PW-11) did not record statement of PW-1 immediately before proceeding to the spot of incident with PW-1. Therefore, possibility of PW-1 lodging FIR (Exh.17) after four hours of the incident, after having discussion with his Bhauband as suggested on behalf of accused, cannot be ruled out and as such when there was delay as above in

lodging FIR, the evidence of PW-1 about happening of the incident is not trustworthy.

22. As said earlier PW-1, 6 and 8 stated regarding presence of Nandabai sister of PWs. 1 and 6 and daughter of deceased. Moreover, it has come in the evidence of PW-1 that the adjoining land holders Ajinath Shelke and others seen men working at the time of incident. So also, it has come in the evidence of PSI Gaikwad (PW-11) that he had examined neighbors. Admittedly, prosecution has not examined independent witnesses who were working in the fields adjoining to the spot of incident whose statements were recorded by the Investigating Officer PSI Gaikwad during investigation. Therefore, when there is consistency in the evidence of PWs. 1, 6 and 8 as referred earlier and the prosecution should have examined the said independent witnesses in view of the ratio laid down by the Apex Court in the case of Golbar Hussain and others Vs State of Assam and Another reported in 2015(11)SCC 242 (Supra).

23. As said earlier, it has come in the evidence of Dr. Munde (PW-7) that cause of death was shock due to head injury. So also, it has come in his evidence that in the old age fracture can be caused by fall and cerebral hemorrhage can be caused by fall. It was suggested to PWs. 1 and 6 that deceased sustained head injury due to fall and they had denied said suggestion. It has come on record that there was a rough (kacha) road to the east of the Vasti of the deceased. So also, it is the case of the prosecution that on hearing commotion the deceased came running to the spot. There is no dispute that at the relevant time of the incident the deceased was aged about 60 years. Thus, possibility of his falling while running and sustaining injury due to stone cannot be ruled out.

24. As per the prosecution case PSI Gaikwad seized three stones and chain as per the spot panchanama (Exh. 23) in presence of Panchas Ashok Sorte (PW-4) and another panch and so also he seized clothes of injured PWs. 1,6

and their sister Nandabai as per the panchanama in presence of Pancha Nagnath (PW-5) and another panch. The Investigating Officer had sent the said articles to the Chemical Analyzer for analysis. Admittedly, no report of the Chemical Analyzer is produced by the prosecution. In fact, the prosecution should have produced the report of the Chemical Analyzer to show that there were blood stains on the seized stones and clothes of the injured. Therefore, it cannot be said that the deceased as well as the injured witnesses sustained bleeding injuries as stones were hit by accused No.3 to the deceased and accused Nos. 1 and 4 to PWs. 1 and 6 and their sister Nandabai. It is pertinent to note that as stated earlier it has come in the evidence of eye witness PW-8 that he saw Nandabai fallen on the person of the deceased at the place of the incident. When as per the prosecution case the deceased sustained bleeding head injury and there he was fallen and then his daughter Nandabai had fallen on his person, the clothes on the person of Nandabai would have definitely blood stains due to blood of head injury

of deceased. Therefore, report of the Chemical Analyzer regarding blood stains on the clothes of Nandbai was necessary to show her presence at the spot of the incident. But, such report has not been produced. Moreover, Nandabai has also not been examined. It has also come in the evidence of PW-10 Dr. Goyal that the injuries which were noticed on the person of PWs. 1, 6 and Nandabai were possible due to fall. For the above reasons, evidence referred above is not sufficient to hold that the death of the deceased was homicidal and accused No.3 was responsible for his death. So also, there is no material to show that accused No.3 did the act of causing head injury to the deceased in furtherance of common intention of accused Nos. 1,2 and 4 so as to attract offence under Section 302 r/w 34 of IPC against accused Nos. 1,2 and 4. Thus, the trial Court has properly appreciated the evidence and held that, the prosecution has failed to prove the offence under Section 302 of the IPC beyond reasonable doubt against the accused.

25. As regards the offence under Section 324 of the IPC as referred earlier PWs.1 and 6 have stated that they sustained injuries in the incident. So also, they have stated about injury to their sister Nandabai. For the reasons discussed earlier their evidence is not believable to state that the accused caused them injuries. Dr. Goyal (PW-10) has of course stated that on 08.04.1995 he examined PW-1,6 and their sister Nandabai and noticed three abrasions on the person of PW-6, abrasion with wheel mark on left anterior abdomen and circular contusion on the right shoulder of PW-1, and CLW on scalp right parietal on the person of PW-6 and two abrasions on the person of Nandabai as per certificate exh. 36 to 38 and in the cross-examination he stated that the abrasions can be caused by fall and so also he further stated that contusions and contused lacerated wounds can also be caused by fall. The above said injuries are not grievous injuries. Moreover as observed earlier the prosecution has not established that the stones and chain were used by the accused in assaulting

the above witnesses, as no C.A. report in respect of blood stains on the said weapons is produced. Therefore, it cannot be said that accused Nos. 1,2 and 4 voluntarily caused hurt to PWs. 1,6 and Nandabai by dangerous weapons as alleged by prosecution beyond reasonable doubt so as to attract offence U/s. 324 of the IPC against the said accused.

26. As regards the offence under Section 504 of the IPC PW-1 has stated that the accused started abusing them while PW-6 has stated that accused No.1 started giving abuses. They have not stated about alleged abusive words uttered by all the accused. Therefore vague evidence of PWs.1 and 6 regarding abuses given by the accused is not sufficient to state that either the accused No.1 or all the accused intentionally insulted PWs.1 and 6 to attract the offence under Section 504 of the IPC. Thus, we hold that the prosecution has failed to prove both the offences under Sections 324 and 504 r/w 34 of the IPC against all accused.

27. For all the reasons discussed above, we hold that the view taken by the trial Court that the prosecution has failed to prove offences under Sections 302, 324 and 504 individually or r/w 34 of the IPC against accused beyond reasonable doubt is a reasonably possible view. It is not the case that the said view taken by the trial Court is erroneous. On the contrary the view taken by the trial Court is in consonance with the evidence on record. Assuming for the sake of arguments that another view that the accused Nos.1,2, and 4 voluntarily caused hurt to PWs.1,6 and their sister Nandabai, is possible, but when two views are possible view which favours the accused will have to be accepted. Thus, there is no reason to interfere with the impugned judgment and order of acquittal of accused Nos. 1,2 and 4 of the offences with which they were charged and as said earlier appeal is abated against accused No.3. Therefore, appeal being devoid of merits the same is liable to be dismissed. Accordingly we dismiss the same. The bail bonds of the accused / respondent Nos. 1,2 and 4, if any, shall stand canceled.

[S.M. GAVHANE, J.]

[S.S. SHINDE, J.]