

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 232 OF 2001

1. Gundya s/o. Yellappa Arote,
Age 25 years,
2. Sailu s/o. Yellappa Arote,
Age 22 years,
3. Mondhya Jalba s/o. Yellappa Arote,
Age 32 years,
4. Jalba s/o. Yellappa Arote,
Age 32 years,
(Appeal is abated against
appellant No. 4 as per order
dated 14.10.2016)
5. Yellappa s/o. Yellappa Arote,
Age 19 years,

All R/o. Shahapur, Tq. Degloor,
District Nanded.

....Appellants.

Versus

The State of Maharashtra

....Respondent.

Mr. S.B. Bhapkar, Advocate for appellant Nos. 1 to 3 & 5.

Mr. V.S. Badakh, APP for respondent/State.

**CORAM : T.V. NALAWADE AND
S.M. GAVHANE, JJ.**

RESERVED ON : 12/09/2017
PRONOUNCED ON : 20/09/2017

JUDGMENT : [PER T.V. NALAWADE, J.]

- 1) The appeal is filed against judgment and order of

Sessions Case No. 27/1994, which was pending in the Court of learned Additional Sessions Judge, Biloli. All the appellants are convicted and sentenced for the offences punishable under sections 302, 324 r/w. 149 of Indian Penal Code ('IPC' for short) and each accused is also convicted and separately sentenced for offences punishable under sections 147 and 148 of IPC. During the pendency of the present appeal, appellant No. 4 died and so, his appeal is already disposed of as abated.

2) In the present matter, appellant No. 5 has taken the defence that at the relevant time, his age was below 18 years and so, he is entitled to the benefit of provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 and also the provisions of the Rules of 2007 framed under this Act. In view of this contention, this Court had referred the matter of appellant No. 5 to Juvenile Justice Board, Nanded to give finding. In a proceeding bearing OMCA No. 4/2014 the Juvenile Justice Board gave finding that present appellant No. 5, accused No. 5 was juvenile at the relevant time in view of provisions of the aforesaid Act and the Rules. This finding is not challenged by the State. In view of this circumstance, the matter of appellant No. 5, accused No. 5 needs to be disposed of in accordance with the law developed on this point and the provisions of the aforesaid Act and the Rules.

3) In short, the facts leading to the institution of the present appeal can be stated as follows :-

Deceased - Hanmanlu was son of first informant - Yellappa Savle. Yellappa Savle has two more sons by names Saibu and Narayana. The deceased was aged about 30 years and he was living with the first informant and his brothers in village Shahapur. Present appellant Nos. 1 to 5 are the sons of one Yellappa s/o. Saibu Arote. The house of accused is situated adjacent to the house of first informant. There is a public water tap fixed by Village Panchayat of this village in front of these houses and both the families were collecting water from this tap for household use, for drinking purpose. There was fixed time and only limited quantity of water supply at this tap.

4) The dispute between the two families started about 15 days prior to the date of incident in question. The family of accused had started some construction work over their property situated adjacent to the property of first informant and for that purpose, they were collecting water from aforesaid public water tap. Due to this act of the accused, the family of the first informant was not getting sufficient water from this tap. The family of the first informant had requested the family members of the accused not to use the water

from public tap for construction purpose. The accused were not ready to listen to them. Due to the aforesaid dispute, quarrel started between the two families on 8.1.1994. At about 5.00 p.m. on that day supply of water was there at this tap and so, the deceased - Hanmanlu went to the water tap for collecting the water. The accused persons did not allow the deceased to take water and then the quarrel started. The deceased left for giving report in respect of this quarrel to Degloor Police Station.

5) After giving report, when the deceased was returning to home, in the night time, near his house all the accused intercepted him, questioned him about his conduct of going to police and assaulted him. The first informant was present inside of the house and after hearing hue and cry he came out of the house. He was also assaulted. During the incident, the deceased assaulted Yellappa Arote, father of the accused/appellants. When the persons gathered, the accused left the place. The deceased and the first informant had sustained injuries in that incident and so, they went to PHC Shahapur. Dr. Dagade, who was incharge of this PHC, gave treatment like dressing to both the first informant and the deceased in the night time at about 2.00 a.m. of 9.1.1994.

6) On 9.1.1994 at about 7.00 a.m. there was S.T. bus from

Shahapur to Degloor. The first informant and the deceased left home for going to Degloor as they wanted to give report in respect of the incident of the previous night in which the deceased and the first informant were assaulted. When the first informant and the deceased were sitting by the side of road and they were waiting for the bus at the bus stop, all the five accused went there with sticks. The accused expressed their anger by saying that the deceased had assaulted their father on previous night and when he was at fault, he was going to police. All the accused then assaulted the deceased. During the incident, accused No. 5 gave one blow of stick on the head of the deceased, the second blow of stick was given by accused No. 1 and that was also given on the head of the deceased. It is the case of State that other three accused persons and also the accused Nos. 1 and 5 then together assaulted the deceased by using sticks on both his hands, legs and back. When the first informant intervened in the incident, he was also assaulted by accused No. 1 and blow of stick on the head of the first informant was given by accused No. 1. It is the case of State that other accused persons also assaulted the first informant.

7) Many persons gathered on the spot as the incident took place near the bus stop. Nobody dared to intervene in the incident. One Vithal Basatwar, who was vendor near the bus stop requested

accused persons not to assault the deceased by saying that they were giving beating to him as if he was an animal. After that accused persons left the place. The deceased was seriously injured in the incident. Saibu, brother of deceased learnt about the incident and he came to the spot from the field. The bus arrived at the spot. In this bus, the first informant and Saibu took the deceased to Degloor by giving him support. From Degloor bus stand, they took the deceased in one auto-rickshaw to Government Hospital of Degloor.

8) In the campus of the hospital from Degloor, when the first informant and Saibu took the deceased out of auto-rickshaw, the deceased had hiccup and he breathed last in the campus of the hospital. It was at about 8.30 a.m. of 9.1.1994.

9) The hospital from Degloor informed about the death of Hanmanlu to Degloor Police Station. The Investigating Officer, PSI Shri. Shaikh went with the staff to the campus of the hospital. He recorded the report given by father of the deceased and crime came to be registered. In this crime, inquest panchanama of the dead body of the deceased was prepared. The dead body was referred for post mortem ('PM' for short) examination. The PM examination on the dead body of the deceased was conducted on 9.1.1994 between

1.20 p.m. and 3.10 p.m. Dr. Venkat conducted the PM examination and gave advance opinion that the death took place due to hemorrhagic shock which was caused due to injuries to head.

10) Police Inspector Shaikh made entire investigation of the case. On 9.1.1994 he visited Shahapur and he prepared the panchanama of the spot situated near the bus stop in the presence of panch witnesses. Blood was found on the spot. Earth sample of earth mixed with blood was collected from the spot. Shaikh recorded statements of many eye witnesses. He recorded supplementary statement of the first informant on the same day. Accused Nos. 1 to 4 came to be arrested on 11.1.1994 and accused No. 5 came to be arrested on 13.1.1994.

11) During the course of investigation, accused No. 1 gave statement under section 27 of the Evidence Act and on the basis of this statement, one stick, weapon was recovered. The weapon was seized under the panchanama. Similar statements were given by some other accused including accused No. 5 and on that basis, some sticks, weapons were recovered and seized under the panchanama. The clothes of the deceased having blood stains were taken over under the panchanama. As Dr. Dagade of Shahapur Hospital had gone to the spot where assault was made on the deceased on

previous night, his statement also came to be recorded. The M.L.C. prepared by Dr. Dagade in respect of examination of the deceased and the first informant were collected by police. Articles like aforesaid weapons, clothes of the deceased, earth mixed with blood were sent to C.A. Office. After completion of investigation, the charesheet came to be filed for aforesaid offences.

12) The charge was framed for aforesaid offences. As the charge was framed only in respect of incident dated 9.1.1994 which took place at about 7.00 a.m. near the bus stop of Shahapur and not in respect of the incident which had taken place on previous day on 8th, the oral evidence given by the witnesses including the first informant only on the incident dated 9.1.1994 which took place at 7.00 a.m. as the direct evidence can be considered. However, in view of the submissions made for the appellants, the evidence given by both the doctors needs to be considered.

13) Before Trial Court, all the accused pleaded not guilty. In all nine witnesses were examined by the prosecution. The accused took the defence of total denial. On the basis of direct and circumstantial evidence, Trial Court has convicted all the appellants and sentence of imprisonment for life is given.

14) The main witness of prosecution is Yellappa Savle (PW 2), first informant. He has given evidence on the dispute, motive and also on the incident which had taken place on 8.1.1994 and also on the incident in question which took place on 9.1.1994. His evidence does not show that in the incident of previous night in which beating was given to the first informant and the deceased, any weapon was used by any of the accused. The first informant has deposed that after the incident of previous night, he and the deceased had gone to Dr. Dagade of PHC Shahapur and after giving primary treatment, Dr. Dagade had given letter of reference to them and they were expected to go to Degloor Hospital. Here only it needs to be mentioned that such reference letter is not produced.

15) The first informant (PW 2) has deposed that on the next day, he and the deceased wanted to go to Degloor for receiving treatment and also for giving report to police in respect of incident of previous night. He has deposed that on 9.1.1994, early in the morning, when he and the deceased were sitting under the Neem tree which was standing near the bus stop, all the accused came there and gave them beating. Much was argued by the learned counsel for the appellants on the circumstance that first the deceased had left for bus stop as per the version of first informant and after some time, the first informant had followed him to the bus

stop. Though the evidence of such nature given by the first informant (PW 2) is there, the first informant has stuck to his version that at the time of incident he was present as he had already reached the bus stop.

16) The first informant (PW 2) has given evidence that all the accused came there with sticks. He has deposed that accused No. 5 gave first blow of stick on the head of the deceased and second blow on the head of the deceased was given by accused No. 1. The first informant (PW 2) has given vague evidence that all the accused then assaulted the deceased with sticks on his back, legs etc. He has deposed that when he tried to intervene in the incident, to save the deceased, accused No. 1 gave blow of stick on his head and accused No. 5 also assaulted on his leg by using stick. He has deposed that many persons gathered at the spot, but only Vithal Basatwar had made request to the accused persons not to give beating to the deceased by saying that they were giving beating to the deceased by treating him like an animal. The first informant (PW 2) has taken the name of one more witness like Parvatabai by saying that she had tried to offer water to the deceased, but the deceased could not drink it. The first informant (PW 2) has given evidence that he and his other son viz. Saibu then took the deceased in bus to Degloor. He has deposed that from Degloor bus stop, they took the

deceased in auto-rickshaw to the hospital. He has deposed that when they reached the campus of Degloor Hospital, they helped the deceased to come out of auto-rickshaw, but after coming out of the auto-rickshaw, the deceased had a hiccup and he breathed last in the campus of Degloor Hospital. He has deposed that the death took place at about 9.00 to 10.00 a.m.

17) Prosecution has examined one more eye witness Manappa (PW 5). When his examination in chief was recorded, he avoided to give evidence and so, with the permission of the Court the learned APP cross examined this witness. In the examination in chief, he tried to say that incident was over when he reached the spot. In the cross examination, he admitted his presence over the spot at the time of assault, but he gave vague evidence that all the accused assaulted the deceased and the first informant near the bus stop by using sticks. Though this evidence is vague and this witness has admitted in cross examination that for some time, he was working as a labour with first informant, there is no reason to disbelieve this witness. There is circumstantial evidence also to give check to the evidence of first informant and this witness.

18) Khanderao (PW 1), panch witness on inquest panchanama turned hostile. He is resident of Bhaktapur, Tahsil

Degloor. He, however, admitted his signature appearing on inquest panchanama and in cross examination, he has stated that he had come to Degloor Hospital for some other work and there, his signature was obtained by the Investigating Officer. Shaikh (PW 9), Investigating Officer has given evidence on the preparation of inquest panchanama as he had prepared the panchanama. The said panchanama is proved as Exh. 80.

19) The inquest panchanama at Exh. 80 shows that from some portion of the head of the deceased hairs were already removed and it can be said that some hairs were removed to make the injuries visible on the head. The panchanama shows that blood was coming out through left ear and it had cumulated in the left ear. Similarly blood was present in the nostrils. There was blood almost at every injury.

20) In Exh. 80, inquest panchanama, the injuries which were found on the head are described as 'Y' shaped injuries. Through one such injury, even brain matter was visible. Two clear bleeding injuries were noticed on the head portion and one injury like swelling was also found on the head portion.

21) The inquest panchanama was prepared between 11.00

a.m. and 11.45 a.m. of 9.1.1994 in Degloor Hospital and it was prepared in the Crime No. 9/1994. Thus, the F.I.R. was recorded first and then the inquest panchanama was prepared. There was underwear on the dead body. The papers show that the remaining clothes of the deceased were taken over under separate panchanama by police on the same day.

22) The oral evidence of first informant (PW 2) and also the evidence of Dr. Dagade (PW 8) shows that deceased had sustained injuries in the incident which had taken place on the previous night, on 8.1.1994 at about 11.30 p.m. also. The charge is framed for the last incident which took place on 9.1.1994 at about 7.00 a.m. near the bus stop. In view of such evidence, the learned counsel for appellants submitted that it is not possible for the prosecution to say that the death took place due to so called injuries caused at about 7.00 a.m. on 9.1.1994 near bus stop. In view of such submission and the circumstances, the medical evidence of both the doctors viz. who conducted PM examination (Dr. Venkat) and Dr. Dagade, who had examined deceased at 2.00 a.m. of 9.1.1994 needs to be considered together and compared.

23) Dr. Dagade (PW 8) has given evidence that on 9.1.1994 at about 2-00 hours the deceased and the first informant came to

him to PHC and he gave them treatment. He has given evidence that he had reported the matter to police as it was medico legal case. But no such record is produced. When he gave evidence that he has brought original M.L.C. register to the Court. According to him, he found following injuries on the person of deceased :-

- "(i) C.L.W. - 1"x1/4"x1/2" - on head right temporal region.
- (ii) C.L.W. - 1"x1/2"x1/2" - on head right temporal region.
- (iii) C.L.W. - 1/2"x1/2"x1/2" - on right index finger
- (iv) Abrasion - 1½"x 3¼th" - superficial left forehand.
- (v) Abrasion - 1/4" x 1/2" - superficial on left fore-hand.
- (vi) Contusion 1" x 1" - left fore hand
- (vii) Abrasion 2"x3/4th" - superficial right forehand.
- (viii) Abrasion - 1/2"x1/2" - superficial on right forehand.
- (ix) Contusion - 2" x 1/2" - on right arm near elbow.
- (x) Contusion - 1" x 1/2" - on left forearm near elbow.
- (xi) Abrasion - 1"x3/4th - superficial on left near knee.
- (xii) Contusion - 1"x1/2" - on left leg near knee.
- (xiii) Abrasion - 1/2"x1/2" - on left leg near knee.
- (xiv) Contusion - 1"x1/2" - on left leg paputeal region.
- (xv) Contusion - 6" x 1" - on back right scapular region.
- (xvi) Contusion - 6"x1" - on back right scapular region.

(xvii) Contusion - 8"x1" - on back left thorasic region.

(xviii) Abrasion - 3/4th" x 1/2" - superficial on back medial
lumber region.

(xix) Contusion - 1/4"x1/4" - near injury no. 18.

(xx) Contusion - 1"x1/2" - on chest left side.

Age of all injuries was within six hours whereas their nature was simple and might have been caused by hard and blunt or irregular object."

The aforesaid description of injuries which were found on the person of the deceased shows that there were two C.L.Ws. over head, but they were on right temporal region. These injuries are described as simple and caused by hard and blunt object. It is true that the first informant has not given evidence that on the previous night any weapon was used against them. As the death took place due to the head injuries, the two injuries [injury Nos (i) and (ii)] found on the head of the deceased by Dr. Dagade (PW 8) need to be kept in mind while considering the evidence of Dr. Venkat (PW 4).

24) In the cross examination of Dr. Dagade (PW 8), it is brought on record that the M.L.C. register which was brought by him to the Court shows no page numbers and it was not in tabular form. It can be said that the said register was not properly maintained, but it is not suggested to him that it was not regularly maintained. The

evidence shows that police collected the M.L.C. on 24.1.1994 when the entry in the register was taken on the night between 8.1.1994 and 9.1.1994. It needs to be kept in mind that in the F.I.R. itself, the first informant (PW 2) had mentioned that on the previous night, they had approached Dr. Dagade and they had received treatment of Dr. Dagade. The evidence, however, shows that they had walked up to PHC for receiving treatment.

25) In the cross examination of Dr. Dagade (PW 8), it is suggested by the defence that the injuries which were found on the person of deceased can be caused due to simple fall from running tractor or trolley. This suggestion is admitted. The evidence shows that they were simple injuries and the defence has not disputed that those injuries were simple injuries. M.L.C. at Exh. 76 prepared by Dr. Dagade is consistent with his oral evidence, though it is not that consistent with the evidence of first informant (PW 2). To Dr. Dagade, the defence has suggested that the deceased had not sustained any injury in the incident of previous night and he created false record of injuries. This suggestion is, however, denied.

26) Dr. Venkat (PW 4) has given evidence that he found in all 15 surface wounds on the dead body of Hanmanlu. The injuries are described as follows :-

- "(i) Contusion over back medial to left scapula, obliquely running downwards and laterally, 11 x 2 cms.
- (ii) Contusion over back, over right scapular area, oblique 9 x 1.5 cm.
- (iii) Contusions over back in between two scapular region, oblique, one overlapping upon another 15 x 4 cms.
- (iv) Contusion over back, lumbar region, oblique, crossing from one side to other, 9 x 1.5 cms.
- (v) Abrasion over back, right side near to L2 spine, horizontal, 1 x 0.5 cm.
- (vi) Abrasion below fifth injury, vertical 1 x 1.5 cm.
- (vii) Contusion over left shoulder, laterally, horizontal 8 x 2 cm.
- (viii) Abrasion over left forearm, extensor side, middle 1/3rd, vertical, 3 x 1 cm.
- (ix) Abrasion below 8th injury, vertical 1 x .5 cm.
- (x) Abrasion over pulp of tip of left index finger 2 x 1 cm.
- (xi) Abrasion over right forearm, lower 1/3rd, flexor side, oblique, radial side, 3 x 5 cm.
- (xii) Abrasion with contusion over shin of tibia right lower 1/3rd 2 x .5 cm., Diffused contusion (dressed wound).
- (xiii) CLW over left parietal area, extending medial and anterior to left parietal eminence, diffused contusion,

surrounding by lacerted wound, 4 x 1 cm. (deep to bone), oblique.

(xiv) CLW over left parietal area, 3 cm medial to left parietal eminence, 'L' shape width 2 cm deep to bone, defused contusion around lacerated wound.

(xv) Contusion over left parietal eminence and left temporal bone, diffused.

Scbutaneous tissue of all contusions having blood stains and clotts present, muscles stained with blood. Injuries were simple and probably caused by hard and blunt object. All injuries were antimortem."

27) Dr. Venkat (PW 4) has given evidence on internal injuries noticed by him on the dead body as follows :-

"(i) On skull I noticed fissured fracture from left parietal eminence upto midline 6 cms grievous in nature.

(ii) Fissure fracture base of skull, left side sphenoid bone, 4 cm, horizontal, and torn of left middle meningeal artery, grievous and dangerous to life,

(iii) There was extradural haemeorrhage present left side and 300 gram clott present."

28) Dr. Venkat (PW 4) has given evidence that the internal

injuries corresponds to surface wound Nos. 13 and 14, which were on the head portion. He has given evidence that these injuries are sufficient in ordinary course of nature to cause death. Immediately after conducting PM examination, he gave advance opinion which is called as short opinion. The advance opinion is proved as Exh. 62 and the PM report is proved as Exh. 63. These documents are consistent with the oral evidence of Dr. Venkat (PW 4).

29) If the evidence of Dr. Dagade (PW 8) is compared with the evidence of Dr. Venkat (PW 4) along with record created by them, it can be said that there are some inconsistencies so far as the injuries described by them are concerned. When Dr. Dagade (PW 8) found as many as 20 surface wounds, though simple in nature on the person of Hanmanlu, Dr. Venkat (PW 4) found 15 injuries on the dead body. The evidence of Dr. Venkat, however, shows that some injuries like contusions over scapular region were overlapping each other. Dr. Venkat (PW 4) noticed fissured fractures of bones of skull at two places. These fracture injuries which were caused by external injury Nos. 13 and 14 proved to be fatal. They were found on left side of head and they were having description as already quoted. It can be said that the injuries on head which were noticed by Dr. Dagade (PW 8) on the previous night were not noticed by Dr. Venkat (PW 4) when he conducted PM examination. On the contrary, it can

be said that Dr. Dagade did not notice the injuries which proved to be fatal and which are noted by Dr. Venkat. In view of the nature of injuries and description given, it can be said that if they were there, Dr. Dagade would have noticed those injuries on previous night. Due to these inconsistencies, it becomes duty of the Court to ascertain as to which injuries actually caused the death and when those fatal injuries were inflicted. In any case, the aforesaid evidence is sufficient to infer that it is homicide.

30) To ascertain the time of death is not that difficult in the present matter in view of the medical evidence given by the prosecution. Dr. Venkat (PW 4), who prepared PM report has mentioned that rigor mortis development had not started. He started conducting the PM examination on 9.1.1994 at 1.20 p.m. The evidence of Dr. Venkat shows that rigor mortis starts development after about 2-3 hours of the death. If Dr. Dagade is believed, it can be said that at about 2.00 a.m. of 9.1.1994 when deceased walked up to his PHC, the deceased was alive. Considering the period required for starting of development of rigor mortis, the period for which the rigor mortis remains on the body and the period after the death when rigor mortis cannot be seen on the dead body, it is not possible that the death had taken place prior to 7-00 a.m. This circumstance is consistent with the case of prosecution that the fatal

injuries were caused to the deceased at about 7.00 a.m.

31) In view of the nature of direct and circumstantial evidence, it does not look probable that the death had taken place already and the dead body was taken to Degloor Hospital by first informant and his other son. Though nobody like Conductor or Driver of bus are examined, there is no reason to disbelieve the evidence of the first informant in respect of his version that he and his other son had helped the deceased to board the bus and they had together gone to Degloor Hospital. If the death had taken place prior to 7.00 a.m. in view of the evidence given by Dr. Venkat, he would have noticed the development of rigor mortis atleast to some extent on dead body, but this did not happen. There are many other circumstances which are consistent with the case of prosecution that the deceased was assaulted near bus stop of Shahapur at about 7.00 a.m. on 9.1.1994.

32) Dr. Venkat (PW 2) is cross examined on the point of age of injuries mentioned by him in column No. 17. These injuries are already quoted. Dr. Venkat has deposed that ordinarily the age of injury is not mentioned in the PM report and he has mentioned that all these injuries were anti-mortem in nature. Doctor could have been cross examined by putting some questions with regard to other

symptoms like development or forming of puss or scab or other symptoms developed after sustaining injuries like colour of the injury etc. In PM report, the injuries are not described that way. The evidence, however, shows that there was blood at almost every injury though there was coagulation of blood. In PM report, there is opinion given on the basis of contents of food material found in digestive system by mentioning the period passed after taking last meal. But, no substantive evidence is brought on the record from Dr. Venkat on the basis of this circumstance.

33) The aforesaid discussion shows that no probability is created that the fatal injuries described above were sustained prior to the incident in question. Thus, the oral evidence of first informant (PW 2) cannot be said to be inconsistent with the medical evidence, PM report so far as fatal injuries are concerned.

34) The direct evidence of first informant (PW 2) to some extent is inconsistent with the evidence given by Dr. Dagade (PW 8) and M.L.C. prepared by him, which is at Exh. 76. The first informant (PW 2) was not referred for medical examination on 9.1.1994 even when he had made contention in the F.I.R. that he was also assaulted by the accused persons in the incident in question. This circumstance was argued for the appellants to submit that there is

no circumstantial check to the evidence of first informant. Further, the M.L.C. which is at Exh. 76 and which was prepared by Dr. Dagade is not consistent with the PM report at Exh. 63 as already discussed and that inconsistency is limited to the injuries not noticed by Dr. Venkat (PW 4) on head of deceased. At Exh. 77, the M.L.C. in respect of first informant is produced and proved and it shows that he sustained injuries in the incident which had taken place on previous night. This circumstance can be considered in support of the case of prosecution as it is the version of the first informant that he and the deceased were proceeding to Degloor to give report in respect of the incident which had taken place on the previous night.

35) The relevant portions of evidence of first informant (PW 2) and of Mannappa (PW 5) are already quoted. The evidence of first informant (PW 2) is mainly against accused Nos. 1 and 5. He has given evidence that they gave blows of sticks on head of the deceased. The evidence of Dr. Venkat (PW 4) shows that the injuries found on the head of deceased proved to be fatal. The cross examination of first informant (PW 2) made in respect of the evidence given by him on incident of previous night need not be considered to much extent and that part can be considered only to test the veracity of the witness. It was submitted for the appellants that no record is produced to show that the deceased had really

given report in respect of the incident which had taken place at 5.00 p.m. on 8.1.1994 and so, the first informant cannot be believed. This submission cannot be accepted as the deceased had left home by saying so and whether the deceased had really given the report or not, was not within the personal knowledge of the first informant.

36) The first informant (PW 2) is cross examined on the evidence given by him on the incident in question. In the evidence, he has stated that around 100 persons had gathered there when the incident took place. It is true that only Manappa (PW 5) is examined by the prosecution and no other eye witnesses, including the two persons who are named in the F.I.R. are examined by prosecution. Manappa (PW 5) has admitted in his cross examination that in the past, he was working as a labour with the first informant. Due to this circumstance, it was submitted for appellants that there is no independent evidence with the prosecution. Though there are aforesaid circumstances, only due to these circumstances the evidence cannot be discarded. It is the duty of the Court to see as to whether there is corroboration of circumstances to the evidence of interested witnesses due to which they can be believed.

37) In the cross examination of first informant (PW 2), it is suggested to him that in the incident of previous night father of the

accused persons was assaulted and report was given against the first informant and the deceased by the side of accused due to the said incident. It is also suggested that the case was filed against them in respect of that incident. These suggestions are indirectly admitted by the first informant (PW 2) by giving evidence that they were acquitted in that case. This circumstance can actually help the prosecution as it gives one more circumstance on motive against the accused. The other contention about motive is already mentioned.

38) Shaikh (PW 9), Investigating Officer, has given evidence on spot panchanama. This evidence corroborates the version of first informant. The blood was found on the spot. There is also evidence of Manappa (PW 5) on spot panchanama, Exh. 65. The evidence shows that in the vicinity of the spot, where blood was found, there were three trees though they were not Neem trees. This spot was shown by Saibu, brother of deceased. The evidence is given by the first informant that Saibu had given him company when deceased was taken to Degloor and the deceased was taken from this spot.

39) By examining some panch witnesses and the Investigating Officer, the prosecution has given evidence on the statements given mainly by accused Nos. 1 and 5 under section 27 of the Evidence Act on 17.1.1994. The prosecution has given

evidence that those statements led to discovery of weapons, sticks. Those panchanamas are proved in the evidence of Investigating Officer. The panch witnesses have not supported the prosecution, they have turned hostile. This evidence shows that all the sticks are shown to be recovered from the vicinity of the house of father-in-law of one of the accused. The documents are at Exhs. 81 to 89. It is already mentioned that accused Nos. 1 to 4 were arrested on 11.1.1994 and accused No. 5 was arrested on 13.1.1994. The recovery is shown to be made on 17.1.1994. Thus, the recovery was late. There is no support of independent witnesses to this evidence. The clothes of accused No. 5 are also shown to be taken over from accused No. 5, but for that there is no statement under section 27 of Evidence Act. The C.A. reports are produced to show that the blood group of deceased was 'O' and the blood of same group was detected on the sticks. Due to aforesaid circumstances, this Court holds that the circumstantial evidence like recovery of weapons from the accused persons is not that satisfactory and these circumstances are not established to the satisfaction of the Court. However, absence of such evidence cannot go to the root of matter as there is direct evidence to which there is corroboration of other circumstances.

40) Argument was advanced on one more circumstance by

the learned counsel for the appellants. He submitted that the first informant (PW 2) had described the weapons as sticks cut on machine, they were not round in shape. The seizure panchanama shows that the sticks seized are round in shape and they do not appear to be cut on machine. It can be said that this circumstance is against the evidence given on recovery of weapons, but this cannot be treated as circumstance inconsistent with the oral evidence. In the present matter, there are many circumstances creating doubt about the investigation and creating probability that attempt was not made to bring the truth on record. This circumstance cannot come in the way of prosecution and it cannot create reasonable doubt about the evidence of first informant. Unfortunately, due to seizure of aforesaid sticks, suggestion was not given to the doctor who conducted PM examination as to whether machine cut sticks can cause such injuries.

41) The aforesaid discussion shows that the investigating agency was not acting under the influence of complainant. The first informant was definitely not favoured. The Investigating Officer in ordinary course ought to have referred the first informant (PW 2) for medical examination, but that was not done. The record of medical examination created by Dr. Dagade was collected late and in respect of that material, there are the circumstances which are already

discussed. The things were not in the hands of first informant (PW 2). This Court has done the necessary scrutiny of the evidence given by the two doctors and on that basis, this Court has no hesitation to hold that the injuries which caused the death were inflicted in the incident in question. That is most important point in the present matter. Suspicious circumstances are separable as mentioned above. Thus the accused Nos. 1 and 5 caused the death is the truth.

42) On the basis of contents of F.I.R. and the medical record, the Trial Court could have framed charge in such a way that charge includes the incident of assault made on deceased on the previous night and also the assault made in the incident shown in the present charge. Whenever there are such two consecutive assaults on the same person, may be at different times and at different places, but within short span of time and injuries are inflicted in both the incidents, it is always desirable to frame the charge which includes both the incidents as both the incidents can be treated as the part of the same transaction as provided in section 223 of Criminal Procedure Code ('Cr.P.C.' for short).

43) In the present matter, the charge was framed only in respect of incident which took place near bus stop at 7.00 a.m. on 9.1.1994 and there was no charge in respect of the incident which

had taken place on previous night. The discussion on the vital injuries which caused the death and the time when they were inflicted is already made. The other injuries which were found on the hands, scapula were like abrasions and contusions. Most of these injuries were noted by Dr. Dagade (PW 8) at 2.00 a.m. Thus, the PM report prepared by Dr. Venkat (PW 4) and the M.L.C. prepared by Dr. Dagade create a probability that other injuries which were not vital were caused in the incident of previous night. There is also possibility that in addition to fatal injuries, some more injuries were caused to the deceased in the incident in question. But in view of nature of oral evidence which is vague as against accused Nos. 2 to 4, the probability which is created in favour of these accused needs to be accepted. Due to these circumstances, this Court holds that the benefit of doubt needs to be given to accused Nos. 2 to 4.

44) The incident in question took place in the year 1994 and so, after 20 years of the date of incident, it is not desirable to take steps to see that the charge is again framed in respect of the incident of previous night also as mentioned above. Due to absence of the charge in respect of incident of previous night, the prejudice is certainly caused to accused Nos. 2 to 4. The provision of section 212 of Cr.P.C. shows that it is right of the accused to know the offence and for that, the time, place and person need to be

mentioned in the charge.

45) The learned APP submitted that in view of the relationship of the accused *inter-se* and as they had the common motive and as direct evidence is given that they had come together to the spot of offence with sticks, the provision of section 149 of IPC can be used to convict accused Nos. 2 to 4 also. This submission cannot be accepted. The direct evidence shows that the evidence is specific as against accused Nos. 1 and 5. The direct evidence further shows that accused Nos. 1 and 5 also assaulted on other parts of the body of the deceased. Further, due to nature of weapons used, the motive described and the number of incidents which took place, it is not possible to infer that there was common object to finish the deceased. Due to these circumstances also, it is not possible to hold accused Nos. 2 to 4 guilty by using the provision of section 149 of IPC. The aforesaid circumstances have created a probability that accused Nos. 2 to 4 had not taken part in the incident in question and the injuries found on the other parts of the body of the deceased were inflicted in the incident of previous night. Due to these circumstances, the submission of the learned APP cannot be accepted and the benefit of doubt needs to be given to accused Nos. 2 to 4. Similarly, due to absence of medical evidence with regard to the injuries sustained by first informant in incident in question, it is

not possible to give conviction for the offence punishable under section 324 r/w. 149 of IPC.

46) The question arises as to what offence committed by accused Nos. 1 and 5. The evidence of first informant (PW 2) shows that in the incident in question, accused No. 1 gave only one blow of stick on the head of deceased and accused No. 5 only gave one blow of stick on the head of deceased. If the M.L.C. prepared by Dr. Dagade (PW 8), Exh. 76, is compared with the PM report, at Exh. 63, for this purpose, it can be said that the C.L.Ws. (injury Nos. 13 and 14 from PM report, column No. 17) were found over left parietal region and one contusion injury No. 15 was found over left temporal region. As already observed, two simple injuries were found as per Exh. 76 when Dr. Dagade has examined the deceased. Dr. Venkat has referred surface wound Nos. 13 and 14 as fatal injuries. Injury No. 15 was also not mentioned in Exh. 76 prepared by Dr. Dagade. But, the first informant (PW 2) has given evidence in respect of only two injuries inflicted on head of the deceased. Injury No. 15 did not cause death, but injury Nos. 13 and 14 cumulatively caused the death. Accused Nos. 1 and 5 are real brothers *inter-se*, had common motive and both of them had given blows of sticks on the head and so, the common intention can be inferred against them as provided in section 34 of IPC. Thus, the provision of section 149 of IPC cannot

be used, but provision of section 34 of IPC can be used against accused Nos. 1 and 5.

47) As already observed, the accused had become angry due to the assault made on their father and that was motive for them. They used the weapons like sticks, the weapons which were readily available for them. The injuries were found not only on the head portion, but also on other parts of the body of the deceased. These circumstances can be considered for the purpose of ascertaining the offence which is committed. It can be said that the accused persons had no intention to cause the death, but they knew that they were likely to cause death by making such assault. Similarly, there was no intention to cause the fatal injuries which would be sufficient in ordinary course of nature to cause death and such intention also cannot be inferred. Thus, at the most, the provision of section 304 Part II of IPC can be used against accused Nos. 1 and 5.

48) The charge was framed for offence punishable under section 302 r/w. 149 of IPC. Though the provision of section 34 of IPC was not used, in view of the evidence discussed, inference of constructive liability and presence of common intention as defined under section 34 of IPC is possible and it is necessary. Even in appeal, use of section 34 of IPC is possible and conviction given by

using section 34 of IPC to accused Nos. 1 and 5 will not become illegal. (Reliance placed on cases reported as **1973 SUPREME COURT 460 [Garib Singh and Ors. Vs. The State of Punjab]** and **AIR 1958 SC 672 [B.N. Srikantiah Vs. State of Mysore]**).

49) The learned counsel for appellants placed reliance on the following reported cases :-

(i) AIR 1993 SUPREME COURT 1462 [Anil Phukan Vs. State of Assam],

(ii) AIR 1994 SUPREME COURT 549 [State of Punjab and Gurmej Singh Vs. Jit Singh and Ors.],

(iii) AIR 1994 SUPREME COURT 1250 [Patel Chela Vikram Vs. State of Gujarat],

(iv) 1994 CRI.L.J. 18 [State of Karnataka Vs. Babu and Ors.],

(v) 1994 CRI.L.J. 21 [Joseph Vs. State of Kerala],

(vi) 1997 CRI.L.J. 1788 [Narayan Kanu Datavale and Ors. Vs. State of Maharashtra]

(vii) 2010 CRI.L.J. 920 [Hari Kishan Vs. State of Haryana].

Some cases are on appreciation of evidence. Some cases are to support the proposition that the stick cannot be called as dangerous weapon. Some cases are on appreciation of evidence of sole eye witness and appreciation of evidence of interested witnesses. The

facts and circumstances of each and every case are always different. The relevant facts of the present matter are already discussed by this Court. The propositions made in these cases cannot be disputed.

50) The aforesaid discussion shows that the Trial Court has committed error in convicting accused Nos. 2 and 3. Accused No. 4 is dead and so, this Court is not making observations in respect of accused No. 4. Thus, the conviction given to them and sentence given as against them needs to be set aside. Similarly, the conviction given as against accused Nos. 1 and 5 needs to be modified to hold them guilty for offences punishable under sections 304 Part II of IPC r/w. 34 of IPC as there was no unlawful assembly. They cannot be convicted for offence punishable under sections 147 and 148 of IPC and that part of the decision also needs to be set aside.

51) The learned counsel for appellant No. 5 produced on record some decisions of the Apex Court reported as **LAW(SC) -2015-3-85 [Panna Lal and Ors. Vs. State of M.P.], 2013 (4) Bom.C.R. (Cri.) 56 (SUPREME COURT) [Ketankumar Gopalbhai Tandel Vs. State of Gujarat]** and **2008 CRI.L.J. 1038 SUPREME COURT [Babban Rai and Anr. Vs. State of Bihar]**. Reliance was also placed on the judgment delivered by this Court in **Criminal Application No. 1816/2014 filed in Criminal Appeal No.**

290/2013 [Ratnadeep s/o. Jalba Dhawale Vs. The State of Maharashtra]. It is already mentioned that the learned Member, Magistrate of Juvenile Justice Board constituted under the Juvenile Justice Act, 2000 has given finding that at the relevant time, appellant No. 5, original accused No. 5 was juvenile, he had not completed 16 years of age. In the cases cited supra for accused No. 5, the Apex Court and this Court has laid down that such persons are entitled to benefit of protection of the Act of 2000. As the appellant No. 5 is no more juvenile, he would not be sent to remand home also. However, he needs to be dealt with under the provisions of this special Enactment and so, the matter as against accused No. 5/appellant No. 5 needs to be sent to Juvenile Justice Board of Nanded for disposal of the case in accordance with the provisions of the Act of 2000. In the result, following order.

ORDER

(I) The appeal of appellant Nos. 2 and 3 is allowed. The judgment and order of Trial Court, convicting and sentencing them for the offences punishable under sections 302 r/w. 149 of IPC, 324 r/w. 149 of IPC and also for the offences punishable under sections 147 and 148 of IPC is set aside. Fine amount already deposited by these accused is to be refunded to them. Their bail bonds are to continue for the period of three months from today for giving opportunity to the State to challenge the decision of this Court.

(II) The appeal of Accused No. 1 - Gundya s/o. Yellappa Arote and Accused No. 5 - Yellappa s/o. Yellappa Arote is partly allowed. The conviction and sentence given to them for the offences punishable under sections 302 r/w. 149 of IPC, 324 r/w. 149 of IPC and also for the offences punishable under sections 147 and 148 of IPC is set aside. Accused No. 1 - Gundya s/o. Yellappa Arote and Accused No. 5 - Yellappa s/o. Yellappa Arote stand convicted for the offence punishable under section 304 Part II of IPC r/w. section 34 of IPC. Accused No. 1 is sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.1,000/- (Rupees one thousand). In default of payment of fine, accused No. 1 is to further undergo rigorous imprisonment for one month. He was behind the bars for few months and he is entitled to get set off of that period in substantive sentence. Accused No. 1 is to surrender to his bail bonds for undergoing sentence.

(III) In stead of sentencing accused No. 5 for aforesaid offences, he is given benefit of provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 and Rules framed thereunder. His case is to be sent to Juvenile Justice Board, Nanded for dealing the matter against him in accordance with the provisions of aforesaid special Enactment.

(IV) Appellant No. 5 is to appear before the aforesaid forum on 26.10.2017.

[S.M. GAVHANE, J.]

[T.V. NALAWADE, J.]

SSC/