

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

CRIMINAL APPEAL NO.371 OF 2001

Kishor S/o. Ramrao Lahane
Aged-39 years,
Occu-Taxi Bicycle Shop,
R/o. Gautam Nagar, Parbhani,
Dist.Parbhani

.. Appellant
(Ori.Accused No.2)

Versus

The State of Maharashtra
Through Police Station,
New Mondha, Parbhani

.. Respondent

Mr.R.D.Sanap, Advocate for the appellant (appointed)
Mr.V.S.Badakh, APP for the respondent/State

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

RESERVED ON : 25.09.2017

PRONOUNCED ON : 19.12.2017

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

. The appellant (hereinafter referred to as accused No.2) was convicted and sentenced to suffer imprisonment for life and to pay a fine of Rs.500/- (Rupees Five Hundred), in default to suffer simple imprisonment for three months, who was tried alongwith accused No.1 Dhuraji Sane (Whose Criminal Appeal No.421/2001 against conviction has been abated as per

order dated 05.08.2014), for the offence punishable under Section 302 r/w Section 34 of the Indian Penal Code (For short the IPC) as per the judgment and order dated 20.08.2001 in Sessions Trial No.45/1997 passed by the 3rd Additional Sessions Judge, Parbhani, has preferred this appeal challenging the conviction and sentence recorded against him. The appellant was also given benefit of set off as per the impugned judgment and order for the period from 04.09.1996 to 17.04.1997 when he was in jail.

2. Facts of the prosecution case, as it appears from the police papers, are as under:-

A] The deceased Sirajoddin was working as a Police Constable in New Mondha Police Station, Parbhani. The complainant Shaikh Mehboob Shaikh Habib (PW-2) is the maternal uncle of the deceased Sirajoddin. Accused No.1 was resident of Milind Nagar, Parbhani while accused No.2 was resident of Gautam Nagar, Parbhani. Accused No.1 Dhuraji Sane had borrowed money from the deceased.

B] It is alleged that on 03.09.1996 in the night at about 10.00 pm when the deceased constable was passing from Gautam Nagar locality he met accused persons. The deceased demanded cash amount to accused No.1 which he

had borrowed from the deceased. Accused No.1 then gave a stick blow to the deceased Sirajoddin. Accused No.2 Kishor who was present alongwith accused No.1 had thrown bicycle on the head of the deceased. There was one another person alongwith accused persons and he also gave stick blow to the deceased. The deceased sustained bleeding head injury besides other injuries.

C] Immediately after the incident as above the deceased who was attached to New Mondha Police Station, Parbhani as a Constable went to the said police station. He requested Police Officer to refer him to Civil Hospital as he had sustained bleeding head injury and to record his complaint subsequently. Accordingly after taking entry in the station diary the deceased was referred to Civil Hospital alongwith Police Constable Bhagwan Wadkile (PW-6). While going to the Civil Hospital alongwith Police Constable Wadkile (PW-6), the deceased on enquiry disclosed to him incident as above. After the deceased was admitted in Civil Hospital, Parbhani his maternal uncle the complainant (PW-2) on knowing that the deceased was assaulted at Gautam Nagar Pati went to the Civil Hospital in the night. On enquiry the deceased disclosed to him that accused No.1 gave stick blow to him, accused No.2 had thrown bicycle on his head and one

another person with whom he was not acquainted had also given stick blow to him. During night of 03.09.1996 and 04.09.1996 at about 01.15 am Sirajoddin died.

D] Thereafter at about 04.00 am the complainant Shaikh Mehboob (PW-2) went to New Mondha Police Station, Parbhani and lodged the complaint (Exh.29) making aforesaid allegations against the accused and particularly that in the night of 03.09.1996 at about 10.00 pm on account of money the accused caused serious head injury to the deceased by stick and by throwing bicycle on his head and as a result he died in the night at 01.15 am. Treating the said complaint as FIR Crime No.204/1996 for the offence under Section 302 r/w Section 34 of the IPC came to be registered in New Mondha Police Station, Parbhani against accused assailants and the investigation was started. During initial investigation inquest panchanama (Exh.59) was prepared by Police Head Constable Dadake and the postmortem examination was conducted by Dr. Pande (PW-1) in the Civil Hospital, Parbhani and he issued postmortem report (Exh.26). As regards cause of death he opined that death was caused due to cardio respiratory arrest due to cerebral laceration, with intra cerebral hemorrhage with fracture of skull.

E] In further investigation PSI Sarode (PW-10) visited the scene of offence and prepared panchanama. He arrested the accused and seized clothes on the person of the accused and prepared separate panchanamas. The complainant Shaikh Mehboob produced shirt of the deceased and it was seized under panchanama. The pant and nicker of the deceased were also seized under separate panchanama. The accused were referred to Civil Hospital for examination. Doctor examined them and issued certificates. The Investigating Officer recorded statements of witnesses. On 10.09.1996 when the accused No.1 was in police custody, PSI Sarode recorded statement that he would produce the stick and accordingly at his instance stick was seized and panchanama was prepared. So also, witness Jaiwant Waghmare had produced bicycle stating that it was kept with him by the deceased and said bicycle was seized.

3. After completion of the investigation police submitted the charge-sheet in the Court of JMFC, Parbhani against in all five accused for the offence punishable under Section 302 r/w Section 149 and Section 147 of the IPC. As the offence under Section 302 of the IPC was exclusively triable by Court of Session, learned Magistrate committed the case to the Sessions Court,

Parbhani.

4. At the time of framing charge the accused Nos. 3 to 5 were discharged by the Additional Sessions Judge, Parbhani and charge was ordered to be framed against accused Nos.1 and 2.

5. The charge was framed against the accused i.e. accused Nos.1 and 2 for the offence punishable under Section 302 r/w Section 34 of the IPC to which they pleaded not guilty and claimed to be tried. Their defence as it appears from their statements under Section 313 of the Code of Criminal Procedure and trend of the cross-examination of the material prosecution witnesses is that they have been falsely involved by the PSI Sarode (PW-10) the Investigating Officer.

6. To prove the guilt of the accused the prosecution has examined in all 10 witnesses and it has relied upon the panchanamas and postmortem report referred to above. Considering the evidence trial Court has held that the prosecution has proved that death of the deceased is homicidal and the accused are responsible for the death of the deceased and accordingly it has convicted both the accused for the offence punishable

under Section 302 r/w 34 of the IPC and sentenced each of them to suffer life imprisonment and to pay a fine of Rs.500/- [Rupees Five Hundred] in default, to suffer simple imprisonment for three months and also directed to give set off of the period under gone by the accused by the impugned judgment and order dated 20.08.2001.

7. Aggrieved by the aforesaid judgment and order the appellant /accused No.2 has preferred this appeal on several grounds mentioned in the memorandum of appeal.

8. We have heard Mr.Sanap, learned Advocate (appointed) for the appellant/accused No.2 and the learned APP for the respondent/State and with their able assistance we have perused the evidence adduced by the prosecution. We have also perused the impugned judgment and order.

9. Learned Advocate for the appellant/accused No.2 submits that the evidence in the form of eye witnesses Pws.3 and 4, station diary entry No.49 and oral dying declaration allgedly made by the deceased to Police Constable Wadkile (PW-6) and Shaikh Habib (PW-2) is not believable and the trial Court has erred in relying upon the said evidence. PW-2 is maternal uncle of the deceased

and as such he is interested witness. Learned Advocate for the appellant/accused No.2 has thus prayed to set aside the impugned judgment and order and to acquit the appellant/accused No.2 by allowing the appeal.

10. On the other hand learned APP submits that the trial Court has properly considered the evidence of aforesaid eye witnesses, evidence in the form of oral dying declaration to Pws.2 and 6 and Exh.49 extract of station diary and rightly concluded that death of the deceased was homicidal and the accused were responsible to the death of the deceased. He submitted that the trial Court has rightly held the accused No.2/appellant guilty for the offence under Section 302 r/w 34 of the IPC and sentenced him by the impugned judgment and order and there is no ground to interfere with the said judgment and order. He claimed to dismiss the appeal.

11. Case of the prosecution is that death of the deceased was homicidal and the accused are responsible for his death. As regards motive to the accused to commit the offence is concerned it is alleged that accused committed murder of the deceased as he demanded cash

amount borrowed by accused No.1 from him.

12. As regards homicidal death of the deceased Dr. Pande (PW-1) in his evidence at Exh.25 deposed that on 04.09.1996 he was attached to Parbhani Civil Hospital. On that day dead body of Shirajoddin/deceased was referred to him for conducting postmortem examination. He conducted the postmortem examination and found following surface wounds and injuries on the dead body:

- i. Abrasion over midarm left side about 1cm. In diameter (Red to blue colour)
- ii. Abrasion over left leg anterior aspect middle 1/3rd portion having size 2x1 cm. (Red to blue)
- iii. CLW over left temporal scalp region above ear having size 3x2x2 cm.
- iv. Contusion abrasion over extending from upper end of scapula laterally up to upper part of arm on left side having size 21 cm x 2 cm. (Red to blue colour)
- v. Contusion abrasion on from upper end of scapula towards post axillary line fold having size 14x1.5 cm. (Red to blue colour)
- vi. Contusion mid scapular region left side having size 8 cm 0.5 cm (Red to blue)
- vii. CLW about 3 cm diameter left forearm lower 1/3rd.

13. According to Dr. Pande corresponding to above said surface wound No.3 mentioned in column No.17 there was internal injury fracture of temporo parietal region on left side just behind and above mastoid area of 'L' shaped having 3 x 4 cm. There was cerebral laceration caused due to by Injury No.3 temporo occipital region of size 3x5x1/2 cm. Due to injury No.3 there was contusion with pattachial hemorrhage of size 2 x 2 cm. at the base of brain. There was blood collected at the inside middle post drainal fossa. (The back of portion of the head inside of the skull). Dr. Pande further deposed that all these injuries were ante-mortem in nature, caused by hard and blunt object. The person died within 24 hours of taking the last meal. The viscera was preserved for chemical analysis. The cause of death was due to cardio respiratory arrest due to crebral laceration intra cerebral hemorrhage due to fracture of skull. He stated that he issued postmortem report (Exh.26). He deposed that injuries can be caused by stick article No.8 showed to him. Injury No.3 is sufficient to cause death. The handle or other part of bicycle can also cause such injury if the bicycle is thrown by force at this portion of the body.

14. In the cross-examination Dr. Pande has stated that except injury No.3 other injuries like injury Nos. 1,2,6 and 7 can be caused due to fall on hard and blunt object. He denied that injury No.3 is possible only due to sharp object. He stated that injury No.3 had bleeding but could not tell as to whether there was excessive bleeding. According to him in such cases the period of 12 hours after receiving of the injury is crucial. In the cross-examination on behalf of accused No.2 he has denied that unless some sharp weapon is used the injury No.3 cannot be caused. So also, he stated that if the person is lying on the ground and bicycle is simply thrown on the head and it is not hit on the head by using force then there may not be injury like injury No.3. Thus, the evidence of Dr. Pande regarding cause of death due to cardio respiratory arrest due to cerebral laceration, with intra cerebral hemorrhage with fracture of skull and that in the ordinary course of nature injury No.3 is sufficient to cause death has not been specifically challenged in the course of his cross-examination on behalf of the accused. It was not suggested to Dr. Pande, that injury No.3 which was sufficient to cause death was caused accidentally. The postmortem report (Exh.26) shows that injuries as deposed by Dr. Pande were found on dead body and it also shows cause of death as deposed by Dr.

Pande. Thus, on the basis of above medical evidence it can be inferred that death of the deceased was homicidal. The trial Court has rightly held so. We find no fault with the said findings.

15. Now it is to be seen whether the accused i.e. present appellant accused No.2 and accused No.1 whose appeal is abated, have in furtherance of their common intention caused death of the deceased and as such they are responsible for death of the deceased.

16. To Prove above facts, the prosecution has relied upon the evidence of following categories:

- a] The evidence of eye witnesses PWs-3 and 4.
- b] Exh.49 station diary entry No.47 dated 03.09.1996.
- c] Oral dying declaration to Police Constable Bhagwan Wadkile (PW-6) and Shaikh Mehboob complainant (PW-2) by the deceased and evidence of Dr. Dhanorkar (PW-8) regarding condition of the deceased at the relevant time.
- d] Memorandum Exh.33 of accused No.1 to produce the stick and seizure of stick at his instance as per panchanama Exh.33-A.
- e] Finding of injuries on the person of accused Nos. 1 and 2 as per injury certificates (Exh.44 and 45) respectively on the basis of evidence of Dr. Jainapurkar (PW-7).

17. The evidence of PW-3 Sayyad Habib, who is eye witness, is that the incident took place about 5 years back. It was at about 10.00 pm. At about 09.50 pm passengers boarded in his cycle-rickshaw at bus-stand and they were to be taken to A-1 market. After reaching the passengers at A-1 market he was returning home via Gulshanbag road. It was at about 10.00 pm. After reaching Gautam Nagar Pati he saw crowd of people. He parked his cycle-rikckshaw by the side of the road and he went towards the crowd to see as to what was happening. He saw that three persons were giving beating to constable Sirajoddin. He had seen police constable Sirajoddin in the past and he knew him. He further deposed that two persons were holding sticks and they were beating Sirajoddin with sticks. The third person lifted a bicycle and he forcibly threw the bicycle on the head of the Sirajoddin. Due to this blow of bicycle Sirajoddin sustained bleeding injury to his head and near ear. He stated that one person gave a blow of stick on the head of Sirajoddin and after that other persons hit Sirajoddin by bicycle on the head. He stated that he saw Sirajoddin had put his hand on the injury and he walked towards the police station. As regards identification of the accused,

Sayyad Habib (PW-3) has stated that the persons who gave stick blow on the head of the Sirajoddin was Dhuraji accused No.1 and he identified him in the Court. He stated that person who hit bicycle on the head of Sirajoddin was Kishor Cycle Taxiwalla. His name is also Kishor. He identified accused No.2 in the Court. Thus, he identified both the accused in the Court.

18. Though PW-3 has been cross-examined at length on behalf of the accused nothing is found in favour of the accused. In the cross-examination he stated that he used to take his Cycle-rickshaw at the shop of Kishor (accused No.2) for removing puncture and so he knows him. He stated that he has to maintain cordial relation with police due to nature of his work. But he has denied that he is deposing false at the instance of police and the complainant. He also denied that he deposed false that Kishor accused No.2 hit bicycle on the head of Sirajoddin and due to that he sustained bleeding injury. This witness is not related to the deceased or PW-2 the complainant who is maternal uncle of the deceased. He is an independent witness. He has no reason to depose false against the accused or to support the prosecution unnecessarily. His evidence shows that he used to take Cycle-rickshaw at the shop of accused No.2 for removing

puncture. Therefore, it is quite natural for him to know the accused No.2. Thus, on the basis of his evidence an inference can be drawn that accused No.1 who is now dead and one more person had given stick blows to the deceased and present appellant/accused No.2 had thrown bicycle on the head of the deceased and due to that the deceased sustained bleeding injury to his head and near ear.

19. The evidence of PW-4 Sayyad Nasir Sayyad Mohammadali another eye witness is that he was working as a contractor. At the relevant time the construction was going on at Ramkrishna Nagar, Parbhani. The incident took place five years back. At about 08.30 pm he returned home to have a dinner. After having dinner he was proceeding to the site of work at Ramkrishna Nagar. He ascertained as to whether the bricks were brought at the work site. When he found that the bricks were not brought, he went to the person, Shaikh Mehboob who was to supply the bricks, near the Super Market. He could not see him. He went to the Yusuf Colony to the house of Mk. Mehboob but he was not present in his house. Then he started proceeding towards Gautam Nagar.

20. Sayyad Mohammadali (PW-4) has further deposed regarding incident that when he reached near Gautam Nagar

Pati he saw that the people had gathered there. The people were saying that Sirajoddin a Police man was being beaten. He was on his Hero Honda motor cycle. He stopped his motorcycle by the side of the road. 3-4 persons were there and they were giving abuses to Siraj. He saw that one person gave blow of stick on the head of Siraj, one person gave blow of stick on the back of Siraj and third person hit bicycle on the head of Siraj. Siraj proceeded towards Mondha Police Station on foot. He (witness) was frightened and he returned to home. As regards identification of the accused his evidence shows that he identified accused No.1 to be the person who gave stick blow on the head of Sirajoddin and accused No.2 to be the person who hit Sirajoddin by using bicycle.

21. In the cross-examination (PW-4) stated that he did not intervene in the incident. He did not take Sirajoddin to Police or hospital on his motorcycle as he was frightened. He has denied that he is deposing false that he has seen the incident. He stated that police did not hold identification pared and accused persons were not shown to him by police at any time and for the first time he pointed out the persons who gave stick blows and person who hit bicycle to the deceased. He denied that he had no occasion to come via Gautam Nagar and he did

not see the incident. He also denied that he is deposing false at the instance of PSI Sarode. It is true that police did not hold identification pared and this witness has identified the accused for the first time in the Court. But, nothing is brought on record in his cross-examination on behalf of the accused as to why he is deposing false against the accused. He is an independent witness. He is not relative of complainant or the deceased. Therefore, it cannot be said that he is interested witness. In such circumstances there is no reason to disbelieve his evidence and on the basis of his evidence an inference can be drawn that at the material time of incident accused No.1 gave stick blow on the head of deceased and accused No.2 hit bicycle on the head of the deceased. As such he has corroborated the evidence of PW-3 in respect of these material particulars.

22. Exh.49 station diary extract of 03.09.1996 shows that said entry was taken at Sr. No.47 at 10.30 pm on the said day. As per said entry the deceased Sirajoddin was assaulted by accused Nos. 1,2 and unknown person in front of Cycle Taxi Shop near Gautam Nagar Pati, Parbhani and that he was assaulted by stick and bicycle was hit on his head. Therefore, he sustained beating and head injury and he said that firstly he be sent to the hospital and

his complaint be taken subsequently. Therefore, he was sent in Government Hospital, Parbhani alongwith Police Constable Wadkile (PW-6). The station diary entry corroborates evidence of eye witnesses PWs.3 and 4 regarding assaulting deceased by stick and hitting bicycle to his head by the accused.

23. As regards oral dying declaration made by the deceased to PWs.2 and 6 is concerned the evidence of PWs.2 Shaikh Habib shows that while he was at his home on the day of incident at 11.30 pm he came to know that deceased was assaulted at Gautam Nagar Pati and admitted in Civil Hospital. Then he went to Civil Hospital. After reaching there he saw that Rafiuddin Bashiroddin, the maternal uncle of the wife of the deceased, Mahraj Ahmad brother of the deceased and Jebunissabegum the wife of the deceased were present near Sirajoddin. He asked Sirajoddin as to what had happened and he disclosed in presence of these four persons that he was proceeding by the side of Gautam Nagar Pati and when he was present near Kishor Cycle Taxi, two persons like Dhuraji and Kishor were present near Kishor Taxi. He demanded amount given as hand loan to Dhuraji (accused No.1) and after that Dhuraji started giving abuses to him. He further disclosed that Dhuraji was holding stick and Dhuraji

assaulted him with the stick. He further disclosed that Kishor accused No.2 then hit on his head with the bicycle. That there was one more person who was unknown to Sirajoddin and he assaulted him with stick on his back and on his head. According to him Sirajoddin disclosed that in the incident Dhuraji gave blow of stick on his head and he sustained injuries in the assault. He also disclosed that in that condition he went to police station. He requested police to admit him in the hospital and thereafter to record his complaint. He was sent in the hospital. In the cross-examination he has denied that Sirajoddin has two wives, second wife was living in a separate house, that he had given divorce to his first wife and that due to said divorce the relatives of first wife of Sirajoddin were angry with him. So also, he has denied that Sirajoddin was unconscious and he could not have given such statement. He denied that so many persons were on enimical terms with Sirajoddin and only out of suspicion, the accused persons are implicated in this case. He denied that accused No. 2 has been falsely implicated in this case at the instance of PSI Sarode and no such dying declaration was given before him by Sirajoddin. Thus, nothing is found in favour of the accused in the cross-examination of PW-2 and his evidence regarding oral dying declaration to him by the deceased

is not shattered.

24. As regards oral dying declaration to PW-6 Police Constable Bhagwan Wadkile is concerned, he stated that on 03.09.1996 he was on duty in New Mondha Police Station, Parbhani. His duty was from 08.00 pm on 03.09.1996 to 08.00 am on 04.09.1996. At about 10.30 pm Constable Sirajoddin B.No. 62 came to the police station. Head Constable Pungar was on duty as PSO and said Sirajoddin /deceased met him. Sirajoddin was in injured condition. The Police Station Officer had directed him in writing to take Sirajoddin to the Civil Hospital, Parbhani. Accordingly he had taken Sirajoddin to Civil Hospital. He had returned the office copy of said letter (Exh.42) in the Police Station. He stated that he and Sirajoddin went to Civil Hospital in autorickshaw and while they were going towards the Civil Hospital from Police Station in autorickshaw he had enquired with deceased Sirajoddin as to how the incident occurred. He had informed that he had been to the accused persons who were standing near the Board of Gautam Nagar, in Gautam Nagar locality. When he had demanded cash amount which accused No.1 borrowed from him, accused No.1 Dhurqaji addressed abuses such as 'Haramkhor' and enquired as to how he is liable to pay cash amount and gave stick blow

to him. Accused No.2 Kishor had thrown bicycle on his head. Though he has been cross-examined at length on behalf of the accused nothing is found in favour of the accused. Exh.42 copy of letter addressed to the Medical Officer, Civil Hospital, Parbhani shows that the deceased Sirajoddin was sent in the said Civil Hospital in injured condition. In such circumstances there is no reason to disbelieve the evidence of PW-6 Police Constable Wadkile simply because he is Police Constable and that the deceased was also Police Constable. Thus, on the basis of evidence of PW-6 it can be inferred that the deceased made oral dying declaration to PW-6 that accused No.1 assaulted him on his head by the stick and accused No.2 had thrown bicycle on the head of the deceased when deceased had demanded cash amount which was borrowed from him by the accused No.1.

25. Now, it is to be seen whether the deceased was conscious when he made oral dying declaration to PW-6 Police Constable Wadkile and thereafter to PW-2 Shaikh Habib his maternal uncle in the Hospital. The evidence of Dr. Shripad Dhanorkar (PW-8) shows that on 03.09.1996 he was on duty as Medical Officer in Civil Hospital, Parbhani from 08.00 pm to 08.00 am of the next day morning. From New Mondha Police Station, Parbhani Mohd.

Sirajoddin was referred to him. He examined him at about 10.50 pm and he found four injuries i.e. three contusions and one abrasion on the person of the deceased. He stated that when he examined Sirajoddin he was conscious and he was talking. He has of course not mentioned in injury certificate (Exh.47) issued by him that deceased was conscious and able to talk when he examined him. But and the fact remains that after the deceased was admitted in the hospital at about 10.50 pm in the night on 03.09.1996 and he died at 01.15 am on 04.09.1996. Thus, he died after about two hours of his admitting in the hospital. As referred earlier PW-2 has denied that the deceased was unconscious and there is no suggestion to PW-6 that the deceased was unconscious when he disclosed incident to him. Thus, on the basis of above evidence it can be said that the deceased was conscious when he made oral dying declaration to PWs.2 and 6 in the night after incident. For the above reasons on the basis of evidence of Pws.2 and 6 it can be inferred that the deceased made oral dying declaration to both the PWs.2 and 6 that the accused No.1 assaulted the deceased by stick on his head and accused No.2 had thrown bicycle on the head of the deceased and as a result the deceased sustained head injury.

26. As referred earlier it has come in the evidence of Dr. Pande (PW-1) that he noticed in all 7 injuries, as referred earlier on the person of the deceased, including injury No.3 i.e. CLW over left temporal scalp region above ear having size 3x2x2cm which is proved fatal injury and which was sufficient to cause death. Considering the fact that said injury was over left temporal scalp region above ear and evidence of both eye witnesses PWs-3 and 4 that accused No.1 gave stick blow on the head of the deceased and accused No.2 hit bicycle on the head of the deceased and oral dying declarations made by the deceased to PWs.2 and 6 particularly that accused No.1 had assaulted the deceased on his head with stick and accused No.2 had thrown bicycle on the head of the deceased it can be said that the medical evidence i.e. evidence of Dr. Pande and postmortem report (Exh.26), has corroborated the evidence of eye witnesses PWs.3 and 4 and oral dying declaration to PWs.2 and 6 regarding act of the accused Nos.1 and 2 in assaulting the deceased on his head.

27. As regards finding of injuries on the person of accused Nos.1 and 2 respectively as per injury certificates (Exh.44 & 45) is concerned the evidence of PW-7 Dr. Jainapurkar shows that on 04.09.1996 he was on

duty at Civil Hospital, Parbhani. Accused No.1 Dhuraji and accused No.2 Kishor were referred to him by New Mondha Police Station. He examined them at 04.30 pm. His evidence shows that on examination of accused No.1 Dhuraji he found only one injury i.e. abrasion at the base of the right thumb pamar aspect. The size of the injury was $\frac{1}{2}$ cm by $\frac{1}{4}$ cm. It was simple in nature, caused by hard and blunt object within about 24 hours and he issued certificate (Exh.44). Similarly, he stated that he examined accused No.2 Kishor and found abrasion on right side of forehead just above right eye brow. Size about 1 cm by 1 cm. It was simple in nature caused by hard and blunt object within about 24 hours and he issued certificate (Exh.45). He stated that injuries on person of both the accused were simple in nature. His evidence is not shattered in the cross-examination on behalf of the accused. He stated that injury No.2 on the person of accused No.2 is not possible by self infliction due to scratching of that portion by nails. Thus, on the basis of evidence of Dr. Jainapurkar and injury certificates of accused Nos. 1 and 2 the possibility of sustaining such injuries to the accused in the incident cannot be ruled out and on the basis of the same an inference can be drawn regarding presence of the accused at the spot of incident and their involvement in the incident of

assaulting the deceased. The accused have not explained how they sustained the injuries noticed on their persons.

28. Accused No.1 made statement (Exh.33) that he would produce the stick in presence of panchas and Investigating Officer Sarode. The prosecution has examined Abdul Mosin (PW-5) who stated that accused No.1 made statement as per Exh.33 that he would produce the stick. He stated that it bears his signature and signature of another panch. So also, he has stated that at the instance of accused No.1 stick was seized from the house of accused No.1 as per panchanama (Exh.33-A). In the cross-examination evidence of PW-5 is not shattered. The Investigating Officer (PW-10) has also stated regarding seizure of stick as above at the instance of accused No.1 as per panchanama (Exh.33-A) after recording his statement. Thus, the circumstance of seizure of stick as above shows that stick was used by accused No.1 in the commission of offence although there is no specific evidence in the form of C.A. report showing that any blood was found on the said stick.

29. For all the reasons discussed above on the basis of evidence of eye witnesses PWs. 3 and 4, Exh.49 extract of station diary, oral dying declaration to PWs-2 and 6

and circumstantial evidence referred to above an inference can be drawn that on 03.09.1996 at about 10.00 pm when the deceased demanded amount borrowed by accused No.1 from him, the accused No.1 abused him, then he gave a stick blow on the head of the deceased and accused No.2 had thrown bicycle on the head of the deceased and as a result caused injuries including injury No.3 which resulted into his death as deposed by Dr. Pande (PW-1). Therefore, both the accused were responsible for death of the deceased. The trial Court held both the accused guilty for the offence punishable under Section 302 r/w Section 34 of the IPC. As discussed earlier accused No.1 Dhuraji had filed separate appeal which has been abated as he is dead.

30. Now it is to be seen whether the appellant/accused No.2 Kishor had intention to cause death of the deceased. Admittedly there was no money transaction between accused No.2 and the deceased. The money transaction was only between accused No.1 and deceased. As the accused No.1 had borrowed money from the deceased and when deceased demanded said amount to the accused No.1 the incident had taken place. Therefore, the accused No.2 had no motive to cause death of deceased. As discussed earlier the evidence

shows that the accused No.1 first assaulted the deceased on his head with stick and then the appellant/accused No.2 had thrown the bicycle on the head of the deceased. This was only act of the appellant/accused No.2. It is not the case of the prosecution that the accused No.2 repeatedly threw the bicycle on the head of deceased or hit the bicycle to the head of the deceased repeatedly. Therefore, on the basis of evidence adduced by the prosecution it cannot be said that the appellant/accused No.2 had intention to cause death of the deceased. However, on considering the act of the appellant/accused No.2 of hitting the bicycle to the head of the deceased only once, it can be said that he had knowledge that the injury inflicted by him by the said act was likely to cause death. Therefore, when the accused No.2 had no intention to cause death of the deceased, we hold that the prosecution has failed to prove offence under Section 302 r/w Section 34 of the IPC against the appellant/accused No.2. There is also no evidence to show that appellant/accused No.2 had shared common intention with accused No.1 to cause death of the deceased. However, we hold that act of appellant/accused No.2 in throwing bicycle on the head of the deceased and causing his death amounts to culpable homicide not amounting to murder punishable under Section 304 Part-II

of the IPC. Therefore, impugned judgment and order convicting and sentencing the appellant/accused No.2 for the offence punishable under Section 302 r/w 34 of the IPC is liable to be quashed and set aside and instead he is liable to be convicted and sentenced for the offence punishable under Section 304 Part-II of the IPC by allowing the appeal partly to modify impugned conviction and sentence accordingly. In the result, we pass the following order.

ORDER

- i. The criminal appeal is partly allowed.
- ii. The impugned judgment and order dated 20.08.2001 in Sessions Trial No.45/1997 convicting the appellant/accused No.2-Kishor S/o. Ramrao Lahane and sentencing him to suffer imprisonment for life and to pay fine of Rs.500/- (Rupees Five Hundred) in default, to suffer simple imprisonment for three months for the offence punishable under Section 302 r/w Section 34 of the IPC is set aside.
- iii. The appellant/ accused No.2 is convicted for the offence punishable under Section 304 Part-II of the

IPC and sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.500/- (Rupees Five Hundred) in default, to suffer simple imprisonment for three months.

iv. He is entitled to set off for the period he was in jail as mentioned in impugned dorder.

v. The bail bond of the appellant/accused No.2 stands cancelled.

vi. The appellant/accused No.2 shall surrender before the Sessions Judge, Parbhani immediately to undergo the sentence as above.

vii. Mr.R.D.Sanap, Advocate was appointed to represent the appellant. We appreciate his sincere efforts in rendering able assistance during the course of hearing the appeal, so as to arrive at the proper conclusion. We quantify his fees at Rs.7,500/- [Rupees Seven Thousand Five Hundred only]

[S.M. GAVHANE, J.]

[T.V. NALAWADE, J.]