

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

CRIMINAL APPEAL NO. 11 OF 2002

The State of Maharashtra
Through Kannad Police Station,
Kannad, Dist. A'bad.

....Appellant.

Versus

1. Sk. Illiyas s/o. Sk. Chand,
Age 35 years, Occu. Tailor,
R/o. Old Bus Stand, Kannad.
2. Sk. Anis Sk. Chand,
Age 22 years, Occu. Labour,
R/o. as above, At present
R/o. Aurangabad.
3. Sk. Yunus Sk. Chand,
Age 30 years, Occu. Business,
R/o. Yunus Colony, Aurangabad.
4. Sk. Siddiqui Sk. Amir,
Age 75 years, Occu. Tailor,
R/o. Rajwada, Kannad,
Dist. Aurangabad.
5. Sk. Ismail @ Pashu s/o.
Sk. Ibrahim, Age 40 years,
Occu. Pan Stall, R/o. Bada
Bungalow, Kannad.
6. Sk. Chand Sk. Amir,
Age 68 years, Occu. Tailor,
R/o. Old Bus Stand, Kannad,
Dist. Aurangabad.

....Respondents.

Mr. P.G. Borade, APP for appellant/State.

Mr. M.G. Mustafa, Advocate for respondent Nos. 1 to 3.

Appeal admitted only as against Respondent Nos.1 to 3 as per order
dt. 20.8.2004.

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

RESERVED ON : 19/09/2017
PRONOUNCED ON : 09/10/2017

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

1) The appeal is filed by the State to challenge the judgment and order of Sessions Case No. 12/2001, which was pending in the Court of learned 3rd Ad-hoc Additional Sessions Judge, Aurangabad. Respondent Nos. 1 to 3 and other accused are acquitted of the offences punishable under sections 302, 324, 201, 149, 34 etc. of Indian Penal Code ('IPC' for short) and also for offences punishable under sections 147 and 148 of IPC. The appeal is admitted only as against respondent Nos. 1 to 3. Both the sides are heard.

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

Deceased Gausoddin was resident of Kannad, District Aurangabad and he was a son of first informant Bugabee. They were living together. Deceased was aged about 35 years and he was married. Nihaloddin is elder brother of deceased. Deceased has left behind four sons and three daughters and widow Rajiyabee. Accused Nos. 1 to 3, present respondent Nos. 1 to 3 are real brothers of

Rajiyabee and accused No. 6 is father of Rajiyabee.

3) Rajiyabee used to take monetary help from her brothers as she was finding it difficult to pull on with the income of deceased. The deceased was against taking of such help by Rajiyabee and due to that there used to be frequent quarrels between the deceased and Rajiyabee.

4) On 11.6.2000 when deceased saw Rajiyabee going to the shop of her brother Shaikh Iliyas (accused No. 1), he became angry and he started giving beating to Rajiyabee. The shop of Shaikh Iliyas is visible from the house of deceased. On 12.6.2000 due to the incident dated 11.6.2000 quarrel took place between deceased Gausoddin and accused No. 1. During quarrel, accused No. 1 gave beating to deceased. Deceased approached police against accused No. 1 due to incident dated 12.6.2000.

5) The incident in question took place on 15.6.2000 at about 12.30 p.m. The deceased was returning to home for taking lunch. In the vicinity of shop of Shaikh Iliyas, six accused persons intercepted the deceased. Accused persons had come with sticks and iron bars and they started assaulting the deceased. When Bugabee and her son Nihaloddin went to intervene and rescue the deceased,

they were also assaulted. Gausoddin sustained bleeding injury to his head and to other portions of the body. Due to fear Bugabee and Nihaloddin left the place. Injured was shifted by others to Government Hospital. Bugabee approached police immediately after the incident and she gave report against six accused persons. The crime at C.R. No. 57/2000 came to be registered in Kannad Police Station for the offences punishable under sections 324, 34 etc. of IPC at 13.50 hours. Police referred Gausoddin and Nihaloddin to Government Hospital Aurangabad. Gausoddin succumbed to injuries on 17.2.2000 and then the crime came to be converted to make it for the offence of murder.

6) Bodale, P.S.I. of Kannad Police Station made investigation. Inquest report was prepared and dead body was referred for post mortem ('P.M.' for short) examination. The doctor, who conducted P.M. examination on the dead body, gave opinion that death took place due to head injury and haemorrhage in brain. There were other injuries like fractures to bones of leg and a finger.

7) The statements of Bugabee and Nihaloddin were recorded on the day of the incident. Statements of other eye witnesses were also recorded. The spot panchanama was prepared prior to the death. When the crime was registered for offences

punishable under sections 324, 34 etc. of IPC, brothers of Rajiyabee appeared before police and produced the weapons like iron bars and stick and they were taken over. Accused came to be arrested after registering the crime for murder. Remaining weapons were recovered and seized. Clothes of deceased and Nihaloddin were taken over under panchanama. All the articles, which were seized during investigation, were sent to C.A. Office and the chargesheet came to be filed against six accused persons for aforesaid offences.

8) The charge was framed by Trial Court for the offences punishable under section 302 r/w. 149 (for committing murder of Gausoddin), 324 r/w. 149, 201 r/w. 34 and also under sections 147 and 148 of IPC. The offence punishable under section 201 r/w. 34 was considered as against accused Nos. 1 and 2 as they had caused disappearance of evidence by washing the clothes which were having blood stains. The charge was framed for offences punishable under sections 504 r/w. 34, 506 r/w. 34 of IPC and also for the contravention of provision of section 37(1)(a) punishable under section 135 of Bombay Police Act. All the accused pleaded not guilty. No separate charge was framed for assaulting Nihaloddin and also first informant Bugabee.

9) The prosecution examined in all 12 witnesses. The

accused took the defence of total denial. No defence evidence is given.

10) To prove the homicidal death of Gausoddin, prosecution examined Dr. Anil (PW 9), who conducted P.M. examination on the dead body in Government Hospital, Aurangabad. The P.M. was conducted on 18.6.2000 between 8.30 a.m. and 9.30 a.m. The doctor found following surface wounds on the dead body.

- (i) Abrasion over rt. eyebrow of size 5 x 1 cm., horizontal directed medially, brownish scab present.
- (ii) Sutured wound rt. post auricular region of size 3 cm.
- (iii) Deformity seen in rt. leg and left hand.
- (iv) Abrasion over dorsum of terminal phalanx of lt. thumb of size 1 x 1 cm., brownish scab present.
- (v) Abrasion over left lumbar region of size 5 cm. x 3 cm., directed downwards and medially brownish scab present.
- (vi) Abrasion over waist on left side above and lateral to anterior illiac spine of size 3 cms. x 2 cm., brownish scab present.
- (vii) Abrasion over anterior and medial aspects of left knee of size 1 cm. x 1 cm., and 1cm. x 0.5 cm., respectively, brownish scab present.

(viii) Sutured wound over rt. leg lower 1/3rd, antero medial aspects of size 0.1 cm.

The doctor found injuries like fracture of right tibia lower 1/3rd and fracture of first metacarpal of left side.

11) On internal examination, Dr. Anil (PW 9) found following injuries :-

"(i) Meninges - congested, stretched & taut, Subarchnoid haemorrhage seen all around

(ii) Brain Matter - congested, oedematous, Cortical surfaces showed flattening of gyri. on c/s tiny haemorrhages reddish blackish seen cerebrum, cerebellum and brain stem more pronounced on rt. side."

12) Dr. Anil (PW 9) has given evidence that all the aforesaid injuries were anti-mortem in nature. According to doctor, the death took place due to head injury and the internal damage was caused by surface injury Nos. 1 and 2 mentioned above. The P.M. report is proved as Exh. 60 in the evidence of Dr. Anil (PW 9). Dr. Anil (PW 9) has given evidence that surface injury on the head with corresponding internal injury are sufficient to cause death in ordinary course of nature. The doctor has given opinion that all these injuries can be caused by weapons like stick and iron bars.

The defence counsel did not cross examine Dr. Anil and so, it can be said that the defence is not disputing that Gausoddin died homicidal death. The defence has admitted inquest panchanama also. This evidence is sufficient to prove that Gausoddin died homicidal death.

13) To prove that accused persons caused aforesaid injuries to the deceased in the incident dated 15.6.2000, prosecution has relied on direct evidence and also circumstantial evidence. Bugabee (PW 1) and her elder son Nihaloddin (PW 2) are injured eye witnesses, who are examined by the prosecution.

14) Bugabee (PW 1) has deposed that at about 10.00 to 12.00 hours, she heard hue and cry and then she came out of the house. She has deposed that she noticed that accused Nos. 1 to 3 were giving beating to Gausoddin. She has deposed that accused No. 1 - Shaikh Iliyas was holding a stick and accused Nos. 2 and 3 were holding iron bars. She has deposed that accused Nos. 4 and 5 were standing at the spot of offence. She has deposed that accused Nos. 3 and 4 gave beating to her when she tried to give cover of her body to the deceased. She has deposed that due to beating, Gausoddin became unconscious. She has deposed that in the incident, Nihaloddin was also injured. She has deposed that Nihaloddin ran away due to fear and she also ran after Nihaloddin.

She has deposed that from the spot of offence, she directly went to police station. In her evidence, F.I.R. given by her is proved as Exh. 37.

15) Bugabee (PW 1) has identified all the accused persons in the Court as the persons who had assaulted deceased Gausoddin and also to her. Her evidence shows that she does not know the names of accused persons, though accused Nos. 1 to 3 are real brothers of her daughter-in-law and accused No. 6 is their father. This point is being discussed at proper place. She identified the weapons in the Court and also the clothes of both Gausoddin and Nihaloddin which were seized by police.

16) Nihaloddin (PW 2) has deposed that on 15.6.2000 when he had returned to home, he heard commotion. He has deposed that his son informed him that Gausoddin was murdered. He has deposed that when he came out of the house, accused Nos. 1 to 3 were giving beating to Gausoddin by using stick and iron bars in front of house of Ayub. He has deposed that accused No. 1 - Shaikh Iliyas was holding stick and accused Nos. 2 and 3 were holding iron bars. He has deposed that when he went to spot, he was also assaulted by accused No. 2 - Anis and others. He has deposed that he had held the bar of Anis to save himself, but other accused assaulted on his

head, arms and back. He has deposed that accused Nos. 4 to 6 were standing there when accused Nos. 1 to 3 were assaulting him. He has deposed that from the spot, he went to police and police referred him to Government Hospital. His evidence shows that he witnessed that his mother was also injured in the incident. He has deposed that due to injuries sustained, Gausoddin was unable to speak. He has deposed that he produced his clothes having blood stains before police and Article Nos. 4 and 5, Safari dress, are the same.

17) Ahemad Ali (PW 3) has given evidence that on 15th, day of incident, at about 12.00 noon to 1.00 p.m. he heard hue and cry when he was at home and then he rushed to the spot. He has deposed that many persons had already gathered on the spot. He has deposed that accused No. 1 gave blow of stick on the head of deceased and accused No. 2 - Shaikh Anis gave blow of iron bar. He has deposed that accused No. 6 was present on the spot. He has deposed that when he requested the accused persons not to assault, by saying that Gausoddin may die, accused No. 6 said that if Gausoddin dies, they would do the needful like burying him, but others should not intervene in the incident. He has given evidence that there were two other persons who were involved in the incident as assailants, but they were not known to him. He has deposed that

accused No. 4 was present on the spot. Thus, according to him, there were around seven persons on the spot.

18) Syed Iliyas (PW 7) has given evidence that on the day of incident at about 12.00 to 12.30 p.m. when he was at home he heard hue and cry and so, he went to the spot. He has deposed that in his presence accused Nos. 1 to 3 and two unknown persons assaulted Gausoddin with iron bars and stick. He has given specific evidence that accused No. 1 - Shaikh Iliyas used stick and accused No. 2 - Shaikh Anis and accused No. 3 - Shaikh Younus used iron bars. He has deposed that accused Nos. 4 and 6 were present on the spot and they were instigating accused Nos. 1 to 3 to assault the deceased. He has deposed that when Bugabee and Nihaloddin intervened in the incident, they were also assaulted by accused.

19) If the time of incident was around 12.30 to 1.00 p.m., it can be said that the F.I.R., Exh. 37, was given immediately by Bugabee as the time of registration is mentioned as 13.15 hours. Copy of F.I.R. was sent to Magistrate to comply the provisions of section 157 of Cr.P.C. on the same day. It can be said that close relatives of deceased like brothers and father of the wife of deceased were involved in the incident and considering the reason behind the quarrel and also as surface wounds are not appearing serious, police

did not take the matter seriously. Initially crime was registered for the offences punishable under sections 324 r/w. 34 etc. of IPC.

20) If F.I.R. at Exh. 37 is taken as the first disclosure of the incident made by eye witness Bugabee, mother of the deceased, it can be said that there was no intention to concoct and there was also no room to concoct as the lady who gave report is illiterate lady and the family of the complainant appears to be very poor.

21) In Exh. 37, the names of two known accused like Shaikh Iliyas (accused No. 1) and Shaikh Yunus (accused No. 3) were mentioned and it was informed that there were two unknown persons, who were assaulting the deceased. Thus, in the F.I.R. the number of assailants were given as four and there was specific allegation against accused Nos. 1 and 3 only that they used weapons like stick and iron bar. Bugabee (PW 1) has given evidence that accused No. 1 used stick and accused No. 3 used iron bar. She has mentioned name of her son Nihaloddin as a witness as he was injured in the incident. In Exh. 37, she has also given reason for the quarrel, the motive and it was domestic quarrel.

22) In the cross examination of Bugabee (PW 1), it is brought on the record that she knew accused No. 2 - Shaikh Anis,

accused No. 4 - Shaikh Siddiqui and accused No. 6 - Shaikh Chand. In the cross examination, she admitted that accused No. 5 was her neighbour and he used to contest ward election. Thus, even when as per her substantive evidence, she knew other accused, she had given only names of two persons in F.I.R. and she had mentioned that other two assailants were not known to her. Benefit of this circumstance can go to accused Nos. 2, 4, 5 and 6 if there is no convincing evidence against them. The present appeal is admitted only against accused Nos. 1 to 3.

23) The evidence of Nihaloddin (PW 2) shows that he has given evidence that assault was made on his head by accused Nos. 1 and 3. He has deposed that iron bar, which was used against him by accused No. 2 was held by him, so, the blow which was aimed by accused No. 2 did not hit him. Thus, it can be said that he has not made specific allegations as against accused Nos. 2, 4 to 6 that they caused him injuries.

24) Nihaloddin (PW 2) has deposed that accused Nos. 4 to 6 were standing at the spot where assault was going on and they had given instigation to other accused. There is no need to discuss this evidence more as the evidence mainly against accused Nos. 1 to 3 needs to be considered in the present matter.

25) Nihaloddin (PW 2) has deposed that accused No. 2 also assaulted the deceased, but the evidence in support of assault on deceased by accused No. 2 is vague in nature. In F.I.R., no allegation was made against accused Nos. 2, 4 to 6, though in substantive evidence, PW 1 has given some evidence against accused No. 2 and also against accused Nos. 4 to 6. Thus, the evidence given as against accused Nos. 2, 4 to 6 is hit by omission in the previous statement and also in the F.I.R. and this omission is material, amounting to contradiction.

26) The evidence of Ahemad Ali (PW 3) is against accused Nos. 1, 2 and 6 and not against accused Nos. 3 to 5. He has deposed that accused No. 4 was there, but he has not given evidence about the overtacts of accused No. 4. He has deposed that in addition to these accused, there were two unknown assailants. Thus, the version of Ahemad Ali (PW 3) is not consistent with the evidence of Bugabee (PW 1) and Nihaloddin (PW 2). Nihaloddin (PW 2) has not given evidence that there was any unknown assailants involved in the incident.

27) Syed Iliyas (PW 7) has not given evidence against accused No. 5. He has deposed that there were two unknown

persons involved as assailants. There is no evidence from Investigating Officer and others that they could trace the so called unknown persons involved in the incident. No mention is there in chargeheet that two more unknown persons were involved, but they could not be traced. Thus, the versions of the injured witnesses are consistent with each other in respect of the evidence given as against accused Nos. 1 and 3. The evidence of other eye witnesses is there as against accused No. 1, which is consistent.

28) Dr. Ganesh (PW 4) has given evidence that he examined Bugabee (PW 1) and Nihaloddin (PW 2) in Kannad Government Hospital on 15.6.2000. He found two injuries on person of Bugabee and the evidence is given by the doctor is as under :-

- (i) Abrasion over right shoulder size 2 x 1 x .2 cm., margins irregular, bleeding present.
- (ii) Contusion right elbow 2 cm. x 1 cm., margins diffused red oval. Age of both injuries was within 6 hours, caused by hard and blunt object. For first injury X-ray was advised. Second injury was simple.

29) Dr. Ganesh (PW 4) has given evidence that on the examination made by him of Nihaloddin (PW 2), he found following injuries on the person of Nihaloddin :-

- (i) Contused lacerated wound on left frontal region of size 5 cm. x 2cm. x 2 cm., sharp margins horizontal bleeding present.
- (ii) Contused lacerated wound occipital region 2 cm. x 2 cm. x 1 cm., sharp margins horizontal direction bleeding present.
- (iii) Contusion on right forearm 3 cm x 1 cm., margins diffused oval red.
- (iv) Contusion right wrist 5 cm. x 4 cm., oval red margins diffused.
- (v) Contusion right arm 5 cm. x 3 cm., oval red margins, diffused. All injuries were within 6 hours, caused by hard and blunt object. First 3 were simple injuries and for 4th X-ray was advised and injury No. 5 was simple.

30) Exhs. 41 and 42, the injury certificates in respect of PW 1 and PW 2 and the substantive evidence of Dr. Ganesh (PW 4) shows that the injuries were sustained by these two witnesses within six hours and they were caused by hard and blunt object. Even when such period, age of the injuries was mentioned by doctor, the Trial Court has observed that doctor has not mentioned that the injuries were fresh. Some cross examination of this doctor was made to bring on the record that there was some overwriting in M.L.C.

register. These circumstances have not created reasonable doubt about the evidence given by doctor or the evidence given by PW 1 and PW 2. Further, there is other circumstantial check to the evidence given by PW 1 and PW 2. The clothes of PW 2, having blood stains were taken over during investigation under panchanama. There was no reason for Dr. Ganesh (PW 4) to create false record supporting the case of complainant. Thus, the medical evidence has given necessary corroboration to the evidence of PW 1 and PW 2 and this evidence shows that these two witnesses were present on the spot at the time of incident and they were also assaulted.

31) Dr. Ganesh (PW 4) had examined deceased Gausoddin also at Kannad Hospital immediately after the incident on 15.6.2000. He had found following injuries on the person of Gausoddin :-

- (i) C.L.W. on right leg 4 cm. x 3 cm. x 2 cm.
- (ii) C.L.W. behind right ear 3 cm. x 2 cm. x 1 cm., bleeding through right ear.
- (iii) Contusion over right forearm 3 x 2 cm.
- (iv) Abrasion over left elbow 3 x 2 cm. x 1 cm.
- (v) Contusion over the left hand 5 x 4 cm. First 4 injuries were simple and for 5th he was referred to Ghati Hospital.

These injuries were sustained within six hours. The injury certificate is proved as Exh. 43 and the record is consistent with the evidence of Dr. Ganesh (PW 4).

32) In view of nature of cross examination of the aforesaid witnesses and the grounds of challenge to evidence of Dr. Ganesh (PW 4), evidence of Dr. Ganesh (PW 4) needs to be compared with evidence of Dr. Anil (PW 9). It was submitted that the medical evidence is not consistent if the evidence given by two doctors is compared. This Court holds that there is no force in this submission though there are some discrepancies. Most of the injuries noted by Dr. Ganesh (PW 4) were found on the dead body by Dr. Anil (PW 9). The suspicion of fracture expressed by Dr. Ganesh during examination of deceased was confirmed in P.M. examination. The injury on the right side of head starting from right eyebrow had caused haemorrhage in brain. The injury which caused the death was definitely inflicted on 15.6.2000. There was bleeding at this injury and due to this injury, blood was coming through ear. It needs to be kept in mind that deceased survived for few days and due to that there was scab formation. There is nothing to create suspicion about the evidence given by these two doctors and the record prepared by them.

33) Mohammad Bakhar Ali (PW 5), Maintenance Surveyor of Land Record Office prepared map of scene of offence. The record produced by this public servant with map is at Exhs. 46 and 47.

34) Shaikh Noor (PW 10) acted as panch witness when spot panchanama was prepared. The panchanama is proved as Exh. 63 in his evidence. The evidence of this witness and of Investigating Officer shows that the spot panchanama was prepared on 15.6.2000, on the day of incident when the crime was registered for offences punishable under sections 324 r/w. 34 etc. of IPC. This document shows that on east side of the spot, there is house of first informant.

35) The map of scene of offence and spot panchanama show that the shop of accused No. 1 is situated near the spot of offence. All the eye witnesses, including PW 1 and PW 2, have deposed that they rushed to the spot after hearing hue and cry. Only PW 1 and PW 2 could have reached the spot immediately after starting of the incident and it can be said that remaining witnesses came after PW 1 and PW 2. Thus, the evidence of spot panchanama and map support the versions of PW 1 and PW 2 and it cannot be said that they reached the spot after assault was over. The incident took place in broad day light, at lunch time and so, the witnesses who were at

home to take lunch could rush to the spot.

36) Shaikh Baba (PW 6) has given evidence on seizure of clothes of Nihaloddin (PW 2) and clothes of deceased Gausoddin. The panchanama is proved as Exh. 51 and the clothes are produced as Articles 3 and 7. He has admitted that already panchanama was written and his signature was obtained by police. Though there is such admission, there is evidence of Bodale, Investigating Officer (PW 12) on the seizure and this Court sees no reason to disbelieve the Investigating Officer. The evidence is sufficient to prove that there were blood stains on the clothes of Nihaloddin.

37) Abdul Sayeed (PW 8), another panch witness has given evidence on seizure panchanama of clothes of accused No. 1. But, the clothes were recovered on 22.6.2000 from the house of accused No. 1. There is evidence of Investigating Officer also on this seizure. They have given evidence that there were faint blood stains on the clothes. The panchanama is proved as Exh. 54.

38) Abdul Sayeed (PW 8) has given evidence on the statement given by accused No. 3 under section 27 of Evidence Act. He has deposed that on the basis of statement of accused No. 3 weapon like stick and iron bar which were kept in the shop of

accused No. 1 (Tapri) were recovered and the recovery was made on 22.6.2000. From the aforesaid evidence, it can be said that the recovery is shown to be made from the vicinity of the spot of offence as the shop is situated in the vicinity of the spot of offence. This record is at Exhs. 55 and 56. There were blood stains on the weapons. The evidence is given that the shop was having lock and accused No. 3 opened the lock and produced the weapons.

39) Syed Moin (PW 11), panch witness has given evidence that on 16.6.2000 accused No. 1 produced stick in the police station and it was seized under panchanama at Exh. 65. Evidence is given by PW 11 that on 16.6.2000 accused No. 2 - Shaikh Anis also produced iron bar before police and it was seized under panchanama at Exh. 66. However, prosecution witness Investigating Officer has given evidence that Shaikh Anis had given his name as Younus falsely. Exh. 66 shows that the weapon was produced by Younus.

40) Bodale (PW 12), the Investigating Officer has given evidence that on 16.6.2000 accused Nos. 1 and 2 had come to the police station (in crime registered for offences punishable under sections 324 r/w. 34 etc. of IPC) and had produced stick and iron bar. He has deposed that on that day, accused No. 2 - Shaikh Anis had falsely represented himself as Younus by giving the name of

accused No. 3. But, subsequently, police realized that accused No. 2 had made such false representation. It can be said that as the names of accused Nos. 1 and 3 were in F.I.R., such step was taken by the defence, the accused at that time to avoid the detention in custody. It can also be said that as the crime was registered only for offences punishable under sections 324 r/w. 34 etc. of IPC, their purpose was served. The police did not take the incident seriously and accused No. 1 and accused No. 2 (who had represented himself as accused No. 3) were not arrested and detained by police on that day.

41) In the evidence of Bodale (PW 12), no omission is proved in the previous statements of aforesaid material witnesses as contradictions. This witness is cross examined mainly to suggest him that due to agitation of people of complainant's side, which was mainly against accused No. 5, the arrests were made and the crime was registered for the offence of murder. He has admitted that around 100 persons had come in procession to the police station to raise the protest and one Ahemad Ali (PW 3) was present in that procession. Similar cross examination is done of all the witnesses by the defence counsel. Even if there is such circumstance, name of accused No. 5 was not given in F.I.R. at Exh. 37 and he came to be involved subsequently in the case on the basis of statement of

Nihaloddin (PW 2) and other statements. Thus, the fact remains that there was no concoction when Bugabee (PW 1) gave F.I.R. immediately after the incident. It cannot be said that Bugabee (PW 1) had made false allegation. There is one more circumstance on which evidence is given by Bodale (PW 12) that accused Nos. 1 and 3 (for accused No. 3 accused No. 2) as stated above had appeared in the police station on 16.6.2000 and they had produced the weapons.

42) It was submitted for the defence that out of political rivalry and to implicate accused No. 5 in the case, exaggeration was made and all the accused persons were falsely implicated. This submission is not acceptable for the reasons already given. Further, no prosecution witness including Ahemad Ali (PW 3), who is said to be political rival has given active part to accused No. 5. There is evidence of two injured eye witnesses and F.I.R. was given immediately after the incident and on that basis, in the present case, truth can be easily separated from the falsehood or exaggeration. The appeal is admitted only as against accused Nos. 1 to 3 and in view of the aforesaid discussion, this Court holds that the prosecution has failed to prove active role of accused No. 2 in the crime. Aforesaid evidence is sufficient to draw inference that accused Nos. 1 and 3 had assaulted the deceased and also Bugabee (PW 1) and Nihaloddin (PW 2). This evidence is sufficient to prove the case

of the prosecution that these two persons had inflicted injuries to the deceased and to Bugabee (PW 1) and Nihaloddin (PW 2).

43) With covering letters at Exhs. 69 to 71 the property was sent to C.A. Office. C.A. reports are at Exhs. 72 to 74. This record is produced and proved in the evidence of Bodale (PW 12), Investigating Officer. There is also the evidence of panch witnesses on seizure of the articles which is already discussed. This evidence shows that on the pant of accused No. 1 human blood was detected. On the clothes of Nihaloddin (PW 2) blood of group 'B' was detected. On the clothes of deceased blood of group 'B' was detected. Blood group of accused Nos. 1 to 3 is 'A'. Blood group of Nihaloddin is 'B'. Thus, the presence of blood stains on the clothes of accused No. 1 gives further corroboration to the case of prosecution. No explanation is offered by accused No. 1 to this circumstance. Thus, the evidence given as against accused No. 1 is more convincing. The weapons are also shown to be recovered from his shop and the incident in question took place near his shop.

44) The learned counsel for accused placed reliance on the cases reported as **(2015) AIR (SCW) 3248 [Golbar Hussain and Ors. Vs. State of Assam and Ors.]**, **(2014) AIR (SCW) 4984 [Shyamlal Shah and Anr. Vs. State of West Bengal]**, **(2009)**

AIR (SCW) 5973 [Dhanapal Vs. State by Public Prosecutor, Madras], (2014) AIR (SCW) 2440 [Nallabothu Ramulu @ Seetharamaiah and Ors. Vs. State of Andhra Pradesh] and **(1992) Cri.L.J. 3115 [The State Vs. Kumaresan]**. All these cases are on powers and duties of the Appellate Court and also on the appreciation of evidence. On this point, one more case can be cited like **AIR 1973 (SC) 2622 [Shivaji Sahebrao Bobade Vs. State of Maharashtra]**. The Apex Court has made following observations in this case :-

"In many cases, especially the earlier ones the Court has in laying down such principles emphasised the necessity of interference with an order of acquittal being based only on compelling and substantial reasons and has expressed the view that unless such reasons are present an Appeal Court should not interfere with an order of acquittal (vide Suraj Pal Singh v. The State, (1952) SCR 193 = (AIR 1952 SC 52) Ajmer Singh v. State of Punjab, (1953) SCR 418 = (AIR 1953 SC 76) Puran v. State of Punjab, AIR 1953 SC 4590. The use of the words compelling reasons embarrassed some of the High Courts in exercising their jurisdiction in appeals against acquittals and difficulties occasionally arose as to what this Court had meant by the words compelling reasons. In later years the Court has often avoided emphasis on compelling reasons but nonetheless adhered to the view expressed earlier that before interfering in appeal with

an order of acquittal a Court must examine not only questions of law and fact in all their aspects but must also closely and carefully examine the reasons which compelled the lower courts to acquit the accused and should interfere only if satisfied after such examination that the conclusion reached by the lower court that the guilt of the person has not been proved is unreasonable (Vide *Chinta v. The State of Madhya Pradesh*, Criminal Appeal No. 178/1959 decided on 18.11.1960 (SC), *Ashrafkha Haibatkha Pathan v. The State of Bombay*, Criminal Appeal No. 38 of 1960 decided on 14.12.1960 (SC).)

".....On close analysis, it is clear that the principles laid down by the Court in this matter have remained the same. What may be called the golden thread running through all these decisions is the rule that in deciding appeals against acquittal the Court of Appeal must examine the evidence with particular care, must examine also the reasons on which the order of acquittal was based and should interfere with the order only when satisfied that the view taken by the acquitting Judge is clearly unreasonable. Once the appellate court comes to the conclusion the view taken by the lower court is clearly an unreasonable one that itself is a "compelling reason" for interference. For, it is a courts duty to convict a guilty person when the guilt is established beyond reasonable doubt, no less than it is its duty to acquit the accused when such guilt is not so established."

45) The observations made in the case of **Shivaji** cited supra show that Appellate Court has power to set aside the acquittal given by the Trial Court if the Appellate Court comes to the conclusion mentioned in the observations which are quoted above.

46) The Trial Court has given reasons for acquittal which are not tenable in law for the reasons this Court is giving. They are as under :-

(i) The Trial Court has unnecessarily considered the evidence given on the previous incidents by witness like Bugabee (PW 1).

(ii) The Trial Court has considered the possibility of giving support by Ahemad Ali (PW 3) to the complainant's side in taking action and prosecuting the matter.

(iii) The Trial Court has considered some inconsistencies in the evidence of Bugabee (PW 1) and Nihaloddin (PW 2) and also of other witnesses.

(iv) The Trial Court has considered even the circumstance of recording supplementary statement of witness like Syed Iliyas (PW 7) against prosecution.

(v) The Trial Court has considered the inability of Bugabee (PW 1) to identify accused Nos. 2 and 3 by taking

correct names of these accused in the Court.

(vi) The Trial Court has observed that mentioning on M.L.Cs. of the age of the injuries sustained by Bugabee (PW 1) and Nihaloddin (PW 2) as six hours was not sufficient and the Medical Officer ought to have mentioned the injuries as fresh injuries as they immediately approached police and they were examined immediately by doctor.

(vii) The Trial Court has given importance to some overwriting appearing in the record of examination of Gausoddin and the circumstance that the entries in M.L.C. register which are not in chronological order.

(viii) The Trial Court has considered the probability that the injury which was found on the head of dead body of Gausoddin was caused in the incident dated 12th, when there was evidence on M.L.C.

(ix) The Trial Court has considered the possibility of sustaining injuries by Gausoddin due to simple fall and the possibility of such fall after consumption of liquor by Gausoddin.

47) The aforesaid circumstances considered by the Trial Court show that the Trial Court did not properly analyse and

appreciate the evidence. There was the opportunity to defence to cross examine the Medical Officers and create probability that the injuries which were found on the dead body and particularly the injury which caused the death was old injury, but no such probability is created in the evidence of doctors. Only because in the past, there was some incident and accused No. 1 had assaulted the deceased, that does not mean that the injury found on the dead body was caused in the past and it was not inflicted on the date of incident in question. The circumstances like giving of F.I.R. immediately and other circumstances are already discussed and they have ruled out the possibility of concoction or creation of false record. Similarly, the truth is easily separable if the evidence is properly analysed. But the Trial court did not make an attempt to separate the truth. The Trial Court ought to have kept in mind that the main witnesses are illiterate. The Trial Court ought to have kept in mind that Bugabee (PW 1) must have seen brothers of daughter-in-law, but she was not remembering them by their names. What is important is proper identification by this lady of the assailants. In the Court also, she identified accused Nos. 1 and 3. She was asked to identify Shaikh Anis, but she identified him as accused No. 3. The contents of F.I.R. and this circumstance show that there is ring of truth in the evidence of this lady and her evidence could not have been discarded for minor discrepancies. Thus, the approach of the Trial

Court was totally wrong, both in analysing evidence and in appreciation of evidence. When there is evidence of injured eye witnesses, the Court is expected to give due weight to the direct evidence. Further, there was evidence on motive also. The motive is not disputed by the defence. This Court hold that the Trial Court has committed serious error in acquitting accused Nos. 1 and 3.

48) The question arises as to what offence is committed by accused Nos. 1 and 3. Admittedly, accused Nos. 1 and 3 are real brothers of wife of deceased. There was some dispute between accused and the deceased as deceased did not want to take the help from brothers of wife, though infact his family was not making sufficient income for maintaining of members of the family. The evidence is brought on the record about such dispute. It appears that in the past also, when the quarrel took place, deceased was given beating, but no serious injury was caused to him. Motive is important for this purpose also. In the incident in question also only one injury proved to be fatal which was head injury. There was fracture of bone of one leg and there was fracture of one finger. These circumstances show that there was no intention of accused Nos. 1 and 3 to finish the deceased. It can be said that by giving beating with weapons like stick and iron bar and by giving blow on the head of the deceased of such weapon, there was knowledge that

they were likely to cause the death. It cannot be said that they had the intention to inflict such injury which would cause the death. In view of the overall evidence and circumstances of the case, this Court holds that it is not the case of murder, but it is culpable homicide punishable under section 304 Part II of IPC.

49) The charge was framed for offence punishable under section 302 r/w. 34 of IPC as against accused Nos. 1 and 3 and so, accused Nos. 1 and 3 can be convicted for offence punishable under section 304 Part II of IPC which is lessor offence. There was no charge for causing injuries to Bugabee (PW 1) and Nihaloddin (PW 2). Further, other accused have got acquittal and there is no convincing evidence to prove the formation of unlawful assembly. Accused persons also cannot be convicted for alleged act of washing clothes to make the evidence disappear. Thus, accused Nos. 1 and 3, present respondent Nos. 1 and 3 need to be convicted and punished for aforesaid offence.

50) The incident in question took place in the year 2000 and we are in the year 2017. It can be said that these respondents, accused must be taking care of issues of the deceased now. In view of these circumstances, this Court holds that giving of sentence of three years rigorous imprisonment to accused Nos. 1 and 3 (original

accused Nos. 1 and 3) would be just and proper in the present matter. In the result, following order :-

ORDER

(I) The appeal as against respondent No. 1 - Shaikh Iliyas s/o. Shaikh Chand and respondent No. 3 - Shaikh Younus s/o. Shaikh Chand is partly allowed.

(II) The decision of the Trial Court acquitting them of the offence punishable under section 302 r/w. 34 of IPC and 302 r/w. 149 of IPC is hereby set aside and they are convicted for the offence punishable under section 304 Part II r/w. 34 of IPC. Each of them is sentenced to suffer rigorous imprisonment of three years and to pay fine of Rs.500/- (Rupees five hundred). In default of payment of fine, each accused is to further undergo rigorous imprisonment for one month.

(III) Respondent Nos. 1 and 3 are entitled to set off in respect of the period for which they were behind bars in this crime. This period is to be mentioned by the office in the conviction warrant which is to be sent to the Jail authority.

(IV) Respondent Nos. 1 and 3 to surrender their bail bonds for undergoing the sentence.

(V) The appeal as against respondent No. 2 -

Shaikh Anis s/o. Shaikh Chand stands dismissed.

(VI) Copy of this judgment is to be given to the respondent Nos. 1 and 3 free of cost.

[S.M. GAVHANE, J.]

[T.V. NALAWADE, J.]

SSC/