

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

CRIMINAL APPEAL NO. 249 OF 2002

The State of Maharashtra
Through P.S.O., Purna P.S.
Dist. Parbhani.

**....Appellant.
(Ori. Complainant)**

Versus

1. Narayan s/o. Abarao Parve,
Age 55 years, Occu. Agri.,
R/o. Gaur, Tq. Purna,
Dist. Parbhani.
2. Prabhakar s/o. Narayan Parve,
Age 18 years, Occu. & R/o.
As above.
3. Balaji s/o. Nivrutti Parve,
Age 45 years, Occu. & R/o.
As above.

**....Respondents.
(Ori. Accused)**

Mr. S.D. Ghayal, APP for appellant/State.

Mr. H.F. Pawar h/f. Mr. A.H. Kapadia, Advocate for respondents.

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

RESERVED ON : 14/09/2017
PRONOUNCED ON : 03/10/2017

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

1) The appeal is filed by State to challenge the judgment and order of Sessions Court, Parbhani delivered in Sessions Case No. 55/2001. The respondents/accused are acquitted of the offences punishable under section 302 r/w. 34 and 447 r/w. 34 of Indian

Penal Code ('IPC' for short). Both the sides are heard.

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

Deceased Kanta was younger brother of accused No. 1. Accused No. 2 is son of accused No. 1. Accused No. 3 is an agriculturist to whom the land was given for cultivation by accused Nos. 1 and 2. Partition had taken place amongst the deceased and accused Nos. 1 and 2 and other brothers. The land which had come to the share of deceased from village Gaur was having one well. The water of this well was being used for irrigation purpose. The deceased was also using the water for breeding fish in this well. On 1.11.2000 accused No. 3 collected some fish from this well and due to that, the deceased had questioned accused No. 3. Quarrel had taken place. It is the case of accused persons that they have the share in the water of the well and as accused Nos. 1 and 2 had given land to accused No. 3 for cultivation, he had right to go to the well. The land of deceased was with Mallikarjun for cultivation. The deceased was working as labour with Mallikarjun on annual labour charge basis.

3) The incident in question took place on 5.11.2000 in the field owned by Mallikarjun alias Baburao at about 11.00 a.m. The

deceased was ploughing the land of Mallikarjun. Mallikarjun and his son Rajesh were present in their field and there were other employees of Mallikarjun like Shaikh Bashir, Shaikh Makdum. Godavaribai, sister of Mallikarjun was also present in the field.

4) At about 11.00 a.m. all the three accused entered the field of Mallikarjun with intention to assault deceased Kanta. Accused No. 1 was holding sickle, accused No. 2 was holding stick and accused No. 3 was holding axe. By using these weapons, they attacked the deceased in the field of Mallikarjun. Mallikarjun and Rajesh rushed to the spot to interfere and save the deceased and after that, accused Nos. 2 and 3 left the field. Kanta was seriously injured in the incident and he was having bleeding injuries.

5) Kanta was younger brother of accused No. 1 and so, after seeing the bleeding injuries on the person of Kanta, accused No. 1 repented and he decided to shift Kanta to hospital and accused No. 1 and Rajesh then kept Kanta in bullock-cart of Mallikarjun and they first took Kanta to the village. On the way, they met Drupadabai Parkhe. To this lady, accused No. 1 confessed the offence, by saying that he committed serious mistake in assaulting the deceased. In village Gour, the injured was shifted to auto-rickshaw and from there, accused No. 1 and others shifted Kanta to

Purna.

6) In Purna, Kanta was taken to Purna Police Station where report of Kanta was recorded by police at C.R. No. 129/2000 for the offence punishable under section 326 r/w. 34 etc. of IPC at about 14.30 hours. In the report, Kanta gave the names of all the aforesaid three accused persons to police as assailants. From the police station, Kanta was taken to Government Hospital Purna. But doctors from Purna Hospital were busy in other work and they asked police to take Kanta either to Government Hospital Parbhani or Government Hospital Nanded. Injured was then shifted to Nanded Government Hospital. Doctor from Nanded Government Hospital declared that Kanta was already dead.

7) Inquest panchanama of dead body of Kanta was prepared in Government Hospital Nanded and police referred the dead body for conducting P.M. examination. The P.M. was conducted on 6.11.2000. Seven injuries which included six incised wounds were found on the dead body and injuries had caused fractures to hand and leg. There was fracture of occipit and the death took place due to the head injury.

8) On 5.11.2000 itself the investigation was taken over by

P.S.I. Gaur of Purna Police Station. During investigation, he arrested all the accused persons. He prepared spot panchanama of the spot situated in the field of Mallikarjun. Blood was there and earth sample mixed with blood was taken over. The shoes of the deceased were having blood stains and were lying on the spot of offence. They were taken over. Two sticks were lying there and they were taken over.

9) During the course of investigation, accused Nos. 1 and 2 gave separate statements under section 27 of the Evidence Act and on the basis of those statements, weapons like sickle and stick were recovered by police. Accused No. 3 came to be arrested on 1.12.2000 and then his statement under section 27 of the Evidence Act came to be recorded. On the basis of this statement, axe came to be recovered. The statements of aforesaid witnesses came to be recorded. All the aforesaid articles came to be sent to C.A. office and after completion of investigation, chargesheet came to be filed for the offence of murder and trespass.

10) The accused persons pleaded not guilty. The prosecution examined in all 12 witnesses. Accused persons took the defence of total denial. However, accused No. 1 admitted in the statement given under section 313 of Criminal Procedure Code ('Cr.P.C.' for short) that from the field of Mallikarjun, he had shifted the deceased to

Purna for treatment. Accused persons have also admitted that there was dispute between them and the deceased over share of water of well situated in the land of deceased. The Trial Court has given acquittal on the circumstances which are being discussed at proper places.

11) To prove that Kanta died homicidal death, the prosecution has examined Dr. Devendra (PW 10) to prove the P.M. report prepared by him. Inquest panchanama at Exh. 30 is admitted by defence. Inquest panchanama shows that it was prepared on 5.11.2000 between 21.10 and 22.00 hours. These documents show that widow of the deceased had identified the dead body and that she had reached Nanded. Inquest panchanama shows that on the head, there was bleeding injury and similarly, there was bleeding injury on the left leg and right leg etc. Even panchas formed opinion that sharp weapon like sickle or axe was used for inflicting these injuries.

12) Dr. Devendra, (PW 10) of Nanded Civil Hospital has given evidence on P.M. report which is proved in his evidence as Exh. 45. The injuries are mentioned in column Nos. 17 to 19 of the P.M. report and substantive evidence is given on the injuries by the doctor. Injuries mentioned in column Nos. 17 to 19 are as under :-

Column No. 17 :-

- (i) IW over occipital region, 2" long
- (ii) IW (Lt) arm 2" long posterior
- (iii) IW (Lt) arm 2" long posterior
- (iv) IW (Lt) arm 1" long
- (v) Lt. thus nerlicial split up to bone
- (vi) IW over Dorsum of (Lt) ring finger over middle phalynx 1 " long
- (vii) IW 1/2 " long (Rt) elbow posterior

Column No. 18 :-

- (i) # skull occipit
- (ii) # humearous 1/3rd (Rt)
- (iii) # T/F (Lt) U/3
- (iv) # proximal dorsum phalynx (Lt) thumb

Column No. 19 :-

- (i) hematoma post over occipit
- (ii) # Occipit
- (iii) hematoma (Lt) over occipit region

13) Dr. Devendra (PW 10) has given opinion that the death took place due to head injury and also the multiple fracture injuries mentioned above. No specific evidence is brought on the record that these injuries, in ordinary course of nature, are sufficient to cause

death. But the circumstance remains that the aforesaid injuries caused the death. Dr. Devendra (PW 10) has given evidence that all the injuries were anti-mortem in nature and injury No. 1 can be caused by axe. He has given evidence in examination in chief that injury Nos. 2 to 7 can be caused by weapon like sickle. He has deposed that injury Nos. 2 to 7 can be also caused by weapon like axe. The challenge to the medical evidence is being discussed at proper place. But, the aforesaid evidence is sufficient to prove that Kanta died homicidal death. The defence has not disputed that it was homicide.

14) To prove that respondents/accused Nos. 1 to 3 were authors of injuries and they caused the death, the prosecution relied on direct evidence of eye witnesses, on the evidence of motive and other circumstantial evidence which include the recovery of weapons made on the basis of statements given by accused under section 27 of Evidence Act. The clothes of the accused Nos. 1 and 2 having blood stains were also recovered. The prosecution has also relied on the evidence of extra-judicial confession given by accused No. 1 to one lady. There is also the evidence of dying declaration, report of the deceased to Purna Police against the accused.

15) Waghmare (PW 4), Police Head Constable was Police

Station Officer of Purna Police Station on 5.11.2000. He has deposed that Kanta, deceased came to the police station and gave report on that day regarding the incident. He has given evidence that the report of Kanta was recorded by him and in the report, the deceased disclosed that all the three accused had assaulted him. His evidence shows that motive was also told in the F.I.R. and the report recorded by him bears thumb impression of Kanta. The F.I.R. is duly proved as Exh. 24. As contents of this documents have relation to the cause of death and so, in view of the provision of section 32 of Evidence Act, this document can be treated as dying declaration. On the basis of this document, crime at C.R. No. 129/2000 was registered though for causing injuries by all the accused persons. It was recorded at 14.30 hours of 5.11.2000. The incident had taken place after 11.00 a.m. on that day and so, due importance needs to be given to this document.

16) In Exh. 24, dying declaration, specific role was attributed to each accused. The weapon used by each accused was described by the deceased by informing that accused No. 1 was holding sickle and he inflicted injuries by using sickle on left hand (cut thumb), accused No. 2 used stick, he gave blow on legs and head and accused No. 3 used axe and gave blow on left hand and shoulder. In Exh. 24, the names of persons, who witnessed the incident and

rescued him like Mallikarjun (Baburao) and Rajesh were also mentioned by the deceased.

17) In the statement given under section 313 of Cr.P.C. by accused No. 1, he admitted that from the field of Mallikarjun, he had shifted Kanta to Purna as he wanted to take him to hospital. The nature of evidence shows that Kanta was first taken to police station as doctors would not have admitted Kanta unless there was reference letter of police. Thus, accused No. 1 has indirectly admitted that when Kanta gave report to police, he was present in the company of Kanta. Waghmare (PW 4) has given evidence that the deceased was brought in auto-rickshaw, but he walked up to the police station from auto-rickshaw. The evidence of Waghmare (PW 4) shows that he gave requisition letter to Kanta and Kanta was referred to Government Hospital Purna for treatment and examination. It is only suggested to Waghmare (PW 4) that Kanta had not given report at Exh. 24 and this suggestion is denied by PW 4.

18) In the cross examination of Waghmare (PW 4), it is brought on the record that two persons were in the company of deceased and they reached to police station at about 2.30 p.m. It is brought on the record that Waghmare (PW 4) had personally verified

that there was injury on the head. In Exh. 29, the requisition/reference letter given to the Government Hospital, the injury on the head was not mentioned. It is already observed that in Exh. 24, F.I.R., there was mention of assault made on the head though by using stick. There is some inconsistency in the description of injuries given in reference letter, Exh. 29. But, that cannot help the accused in any way. It is suggested to Waghmare (PW 4) that the dead body of Kanta was taken to police station. But, this suggestion is also denied and no such probability is created. There are many more circumstances to rule out that probability.

19) The evidence of Waghmare (PW 4) does not show that he felt that there were serious injuries sustained by Kanta. Much was argued on circumstance like description of injuries given in Exh. 29, the reference letter issued by this police station. Due to nature of injuries described in Exh. 29 also, it can be said that it was carelessness of police and even when injuries were mentioned in F.I.R. by the deceased, those injuries were not mentioned in Exh. 29. At Exh. 28, there is the report given by police Head Constable to the P.S.I. of the police station on 5.11.2000. The evidence is given and this document is proved to show that the deceased was taken to Purna Government Hospital at about 13.45 hours, but the doctor there was busy and the hospital had advised police to take Kanta to

Civil Hospital Parbhani or Civil Hospital Nanded. There is endorsement of the hospital of such nature on Exh. 29. It can be said that in this document also different time is mentioned as 13.45 hours. Substantive evidence is given that the deceased reached to police station at about 2.30 p.m. and so, not much can be made out due to this inconsistency. This record and circumstances show that the police machinery was acting most carelessly and it can be said that even the hospital had not taken care to see the injuries of Kanta and the endorsement of aforesaid nature was made by the hospital. It can be said that within 2-3 hours thereafter Kanta died. No benefit of this circumstance can be given to the accused as carelessness has become the routine of the Government machinery including the police and the hospital. They never take poor persons seriously.

20) Mallikarjun (PW 1) has deposed that about four days prior to the date of incident, the deceased had quarrel with accused No. 3 as accused No. 3 had collected fish from the well of the deceased when the deceased had done the breeding of fish in the well. The evidence of all the witnesses and suggestions given to them by the defence counsel show that defence is not disputing that there was dispute between the deceased on one side and accused Nos. 1 to 3 on other and so, the circumstance of existence on motive is not seriously disputed by the defence.

21) Mallikarjun (PW 1) has deposed that on 5.11.2000 at about 11.00 a.m. all the three accused together entered his land where the deceased was ploughing the land. He has given evidence that accused No. 1 was holding sickle, accused No. 2 was holding stick and accused No. 3 was holding axe. He has deposed that accused No. 1 started quarreling with deceased by giving abuses and then accused No. 2 gave stick blow on the head of deceased. He has deposed that accused No. 1 gave sickle blow on the hands, legs, head and back of deceased. He has deposed that accused No. 3 gave blow of blunt side of axe on the back of Kanta. He has deposed that when he and his son Rajesh rushed forward to rescue the deceased, accused Nos. 2 and 3 left his field.

22) Mallikarjun (PW 1) has deposed that accused No. 1 and Rajesh (son of Mallikarjun) shifted the deceased in the bullock-cart of Mallikarjun to the house of accused No. 1 and from there, the deceased was shifted in auto-rickshaw by accused No. 1 and others to Purna. Accused No. 1 has not disputed that he along with Rajesh had shifted the deceased from this field and then accused No. 1 had taken the deceased to Purna in auto-rickshaw. That can be seen in the statement given under section 313 of Cr.P.C. by accused No. 1. The cross examination of Mallikarjun (PW 1) is mainly on the dispute

which was going on between the deceased and Mallikarjun on one side and accused no. 1 on other side. There is also the cross examination made to create probability that Mallikarjun had gone towards river side and in between, there was standing crop due to which there was no opportunity to Mallikarjun to witness the incident. No such probability is created in the cross examination of Mallikarjun by the defence counsel.

23) In the cross examination of Mallikarjun (PW 1), omissions in the police statement are pointed out like he had not stated before police that accused No. 2 gave blow of stick on the head of accused No. 1, accused No. 1 gave blow of sickle on head, back and legs. These omissions are proved in the evidence of Police Officer, who recorded the police statement of Mallikarjun. Thus, the omissions are in respect of the particular blows given by three accused persons.

24) In the cross examination of Mallikarjun (PW 1), it is brought on the record that the distance between the spot of incident and Purna is around 6 k.m. It is brought on the record that he had laid the pipeline in the land of accused No. 3. It is suggested to him that due to this act of Mallikarjun, there is dispute between him and accused No. 3. But this suggestion is denied by saying that the

pipeline was laid many years back. His evidence shows that electric motor was installed by him on the river 20 years prior to the date of incident and at that time, pipeline was laid. On the contrary, Mallikarjun (PW 1) has deposed that his relations with accused Nos. 1 to 3 were cordial. It can be said that for accused, there was reason to quarrel with deceased, but there was no reason to quarrel with Mallikarjun. This is because the quarrel was picked up by the accused with deceased and not with Mallikarjun even when Mallikarjun was there.

25) In the cross examination of Mallikarjun (PW 1), he has admitted that he had no talk with Kanta after the assault was made on him. He has also admitted that Kanta was not able to speak. He has admitted that accused No. 1 had virtually lifted Kanta to keep him in bullock-cart as he wanted to take Kanta for treatment at Purna. In the cross examination of Mallikarjun (PW 1), it is brought on the record that accused No. 1 and one Manohar Shinde (PW 8) shifted the deceased to Purna Hospital. Suggestion is also given that Kanta died in the field, but that suggestion is denied. The tenor of the cross examination shows that the defence did not dispute the presence of Mallikarjun in the field at the relevant time, though the defence tried to bring on record that Mallikarjun was at quite long distance and the spot was not visible from the place where

Mallikarjun was working. The evidence of Mallikarjun and other witnesses and also the circumstances that his bullock-cart was used and Rajesh had given company to accused No. 1 for shifting the deceased to the house of accused No. 1 corroborate the direct evidence given by Mallikarjun (PW 1).

26) The evidence of Shaikh Bashir (PW 2), who was working with Mallikarjun, is similar in nature. However, this witness has not given description of specific blows given by each accused to the deceased. He has also described the weapons which the accused were holding at the relevant time.

27) In the cross examination of Shaikh Bashir (PW 2), it is brought on the record that these persons were doing different work at different places in the field of Mallikarjun. To him also, it is suggested that he was at longer distance and from there, it was not possible for him to see the actual incident. This suggestion is denied by Shaikh Bashir (PW 2).

28) The evidence of Shaikh Makdum (PW 3), other employee of Mallikarjun is similar in nature. He also has described the weapons used by all the accused. He has given specific evidence that accused No. 2 gave blow of stick to Kanta. His cross

examination also shows that the defence tried to create a probability that he was at longer distance and from there, it was not possible for him to see the incident. This suggestion is denied. Some omissions in relation to police statements of Shaikh Bashir (PW 2) and Shaikh Makdum (PW 3) are pointed out to them, but they are not that material. The evidence of these three witnesses need to be considered separately as a whole as eye witness version and then together.

29) Rajesh (PW 9), son of Mallikarjun has given similar evidence. It is already observed that in the statement given under section 313 of Cr.P.C., accused No. 1 has admitted that this witness had helped him for shifting Kanta in bullock-cart from the field. The tenor of cross examination of Rajesh (PW 9) shows that it is not disputed that he was travelling in bullock-cart with accused No. 1 and on the way, they met Gayabai, another witness. Thus, the evidence of all the four eye witnesses is consistent with each other on material points. Though specific blows given by each accused are not described and there are some omissions in relation to police statements of the witnesses, those omissions are not material and it can be said that they rushed to the spot of incident when they heard hue and cry as the incident was taking place in the field where all of them were working. In view of the distance between other fields and

the spot of incident, it can be said that the incident took place well inside the field of Mallikarjun and so, there was the opportunity to all the witnesses to see the accused holding weapons, their entry in the field and their presence on the spot at the relevant time and also their exit from the field.

30) Gayabai (PW 7) is examined by the prosecution to prove that accused No. 1 confessed to her that he had assaulted the deceased and he had committed mistake in making such assault. This witness has deposed that when accused No. 1 was taking the deceased in bullock-cart to his house, she made inquiry with accused No. 1 and then accused No. 1 gave extra-judicial confession to her that in anger, he had caused injuries to Kanta. In the cross examination of this witness, one contradiction is pointed out to her that she had stated before police that she had asked accused No. 1 as to why he had given beating mercilessly to Kanta. Though this contradiction is there, that cannot make much difference as she was supposed to give evidence on the disclosure made by accused No. 1 to her immediately after the incident. There is no such omission in respect of extra-judicial confession given by accused No. 1.

31) Manohar Shinde (PW 8) is examined as panch witness. He was expected to give evidence that accused No. 3 gave

statement to police under section 27 of Evidence Act. This witness resiled from the statement and so, the learned APP cross examined him.

32) The evidence Manohar Shinde (PW 8) cannot be discarded in toto in view of the circumstance that the witnesses are not disputing that Manohar Shinde was in the company of accused No. 1 when the deceased was shifted to Purna. There is some cross examination of this witness made by both APP and the defence counsel in which both sides have brought some evidence on record.

33) In the evidence of Manohar Shinde (PW 8), it is brought on the record by defence that he, accused Nos. 1 and 2 and wife of deceased were present in auto-rickshaw in which the deceased was shifted to Purna. It is brought on the record that they reached police station at about 1.45 p.m. This is again relevant circumstance as in one document like Exh. 28, such time is mentioned. Surprisingly, the defence has brought on the record that Kanta was serious, but he was able to speak. This circumstance corroborates the case of prosecution that Kanta was not in a position to give report against all the three accused persons. It is brought in the evidence of Manohar Shinde (PW 8) that Kanta was shifted to Nanded in ambulance from Purna and they left Purna at about 6.00 p.m. The evidence of Shinde

(PW 8) brought on the record by defence is not supporting the defence, but it is supporting the case of prosecution.

34) The aforesaid evidence is sufficient to prove that all the four eye witnesses were present in the field when the incident started and they had the opportunity to see all the three accused persons holding the weapons described by them. Incident took place at about 11.00 a.m. and all the accused persons were known to four eye witnesses. Thus, the evidence is sufficient to infer that the accused persons are the authors of the injuries which were found on the dead body of Kanta. The statements of these witnesses were recorded by police on 5.11.2000 itself and this circumstance shows that there was no room for concoction. There was also no reason for them to falsely implicate the accused persons. Their evidence remained unshattered on material points.

35) The C.A. report shows that no blood was detected on the weapons shown to be recovered on the basis of statements given by accused persons. Those weapons were confronted to doctor as already mentioned. Due to absence of blood on the weapons and as such weapons, articles are readily available in every house of the village, there is no need to discuss in detail the evidence of panch witness Shinde (PW 8) and Rajendrasingh Gaur (PW 11),

Investigating Officer and also Subhash (PW 6).

36) Evidence is given by examining Gaur, (PW 11), Investigating Officer to prove the seizure of clothes of accused Nos. 1 and 2. They were arrested on the day of incident and panchanamas are proved as Exhs. 35 and 36. This evidence shows that blood was found on clothes of accused Nos. 1 and 2. Article Nos. 6 and 7 belong to accused No. 1. On banian blood of group 'O' was detected and on 'Dhoti' human blood was detected. Article Nos. 8 and 10 are of accused No. 2 and on both the clothes, blood of group 'O' was detected. Here only it needs to be mentioned that accused No. 2 has not come with the case that he had helped accused No.1 in lifting Kanta to bullock-cart. There is no explanation from him on the circumstance like presence of blood group 'O' on his clothes. Evidence is given of Subhash (PW 6) and Gaur (PW 11), Investigating Officer on the statement given by accused No. 2 which lead to discovery of stick. Exh. 37 and 37-A, memorandum panchanamas and C.A. report, Exh. 51 show that human blood was detected on the stick. On the spot of incident also some sticks were lying. It does not look probable that such sticks were taken away from the spot of offence and there is no explanation with the prosecution as to why one piece of wood and one stick were lying on the spot. Due to these circumstances the evidence of recovery of

stick having blood stains on the basis of statement given by accused No. 2 cannot be used in favour of prosecution.

37) The evidence of Gaur (PW 11), Investigating Officer and the evidence of Vishwambhar (PW 5), panch witness of spot panchanama is there to prove the spot panchanama, Exh. 33. It shows that one piece of wood having blood stains and one small stick were lying there. Shoes of the deceased were lying there and they were having blood stains. These articles were taken over. Earth sample mixed with blood was also collected. The defence has not seriously disputed that the incident took place in the field of Mallikarjun. This circumstantial evidence supports the direct evidence.

38) Blood sample of accused Nos. 1 to 3 and deceased were taken. On the clothes of accused No. 2 there was blood of group 'O' when his blood group is 'A'. The blood group of accused No. 1 is 'O', which was also the blood group of deceased. Blood group of accused No. 3 could not be determined. Due to evidence brought on record that accused No. 1 had shifted the deceased to Purna by virtually lifting him in bullock-cart, not much importance can be given to the circumstance that blood of group 'O' was found on his clothes. Even if that part of evidence is not considered against accused No. 1, that

cannot make much difference as there is already sufficient evidence against him as quoted above and which is being discussed hereinafter.

39) Accused No. 3 came to be arrested on 1.12.2000, after about three weeks of the incident. No specific evidence is given by Investigating Officer Gaur (PW 11) that accused No. 3 was not traceable. His clothes were not seized and no blood was found on the weapon recovered on the basis of his statement. Though these circumstances are there, the evidence already discussed shows that quarrel started due to questioning by deceased to accused No. 3 and it is accused No. 3, who had collected fish from the well of the deceased. There is one more circumstance like medical evidence, which shows that vital injury which was found on the head can be caused by axe and not by sickle. The evidence is given that accused No. 3 used axe. There is nothing to disbelieve the direct evidence on this point and this circumstance points finger to accused No. 3 as the author of the said injury.

40) As there is the evidence of aforesaid nature, this Court has no hesitation to hold that the prosecution has proved the following things :-

(i) The deceased gave report to police, Exh. 24, and the

report needs to be treated as dying declaration.

(ii) There is direct evidence of four eye witnesses to show that all the three accused persons came together to the field of Mallikarjun and the accused were armed with weapons like sickle, stick and axe.

(iii) All the three accused actively participated in the incident and due to their overtacts, the injuries were caused to the deceased. The head injury proved to be fatal, it caused the death.

(iv) Immediately after the incident, accused No. 1 admitted the guilt, gave extra-judicial confession to Gayabai (PW 7) by saying that he has committed serious mistake by assaulting the deceased.

(v) There was motive for all the three accused for crime and there was the dispute over sharing of water of the well situated in the field of the deceased. There was quarrel few days prior to the date of incident between the deceased and accused No. 3 as accused No. 3 had collected fish from the well when deceased had spent for breeding fish in this well.

41) It was argued for the accused persons that there is discrepancy in the direct evidence and dying declaration. It is true

that there is discrepancy in relation to injuries mentioned by the deceased in Exh. 24 and the direct evidence and also the medical evidence. But, that discrepancy cannot be called as fatal. The approach of the police officer which is already mentioned and the opportunity which the four eye witnesses could have to witness particular blow given by each accused is also mentioned. Further, a person, who sustained injuries and who is disclosing the incident to give the names of assailants, will not spare the person who had assaulted him. For the purpose of section 32 of Evidence Act, it is sufficient that in the disclosure, names of persons who inflicted the injuries are mentioned and it is not necessary that the role played by each accused need to be mentioned. In ordinary course, conviction can be based only on the basis of dying declaration and in the present matter, in addition to the evidence of dying declaration, there is direct evidence and evidence of other circumstances already quoted. In the present matter, due importance need to be given to all the circumstances and if the pieces of evidence are considered together, the evidence is more than sufficient to prove that the accused assaulted the deceased and there was common intention of the accused to make such assault. The evidence is also sufficient to prove that they used weapons like sickle, axe and stick.

42) The learned Judge of the Trial Court has acquitted all the

accused persons by giving following reasons. This Court is also discussing as to whether and how the reasons given by the Trial Court are not sound and are not having base of principles of appreciation of evidence.

(i) Mallikarjun (PW 1) has given evidence that he had seen the accused giving abuses to the deceased, he had seen accused No. 1 giving many blows of sickle on back, head, leg etc. of the deceased, when he had not given such statement before police. Similarly, Mallikarjun (PW 1) has given evidence against accused No. 2 that accused No. 2 gave blow of stick on the head deceased, but such specific role was not attributed to accused No. 2 in the statement given before police. These omissions are said to be major amounting to contradictions.

The relevant evidence of the present matter is already discussed and that shows that in view of the place where incident took place, time of the incident and the possibility of the opportunity to the witnesses to witness the incident, there is no need to consider the evidence in such minute details and evidence as a whole of every witnesses needs to be considered. Further, the other circumstances corroborate the versions of the witnesses and so, over much importance could not have been given

to the aforesaid omissions proved by defence.

(ii) The prosecution witnesses had probably no opportunity to see the actual assault and they were probably at longer distance from the spot of offence. The circumstance that prosecution witnesses did not prevent the assailants from assaulting the deceased.

These circumstances are also considered and discussed by this Court already. When the presence of these witnesses in the field is admitted, the incident took place in broad day light and there must have been hue and cry, and so, it cannot be said that the witnesses had no opportunity to see the accused persons in the field and having arms as described in their hands. It was possible for them even from long distance to see that assault was going on. The evidence of spot panchanama is relevant on this point and that is already discussed. Further, the evidence is sufficient to prove the common intention and so, it was necessary for the prosecution to attribute some overtacts and that is done by giving evidence that all the accused assaulted the deceased. There is no law making it necessary in such a case to describe the incident in minute details to make it possible to convict the accused. If that

approach is used, the provision of section 34 of IPC will become otiose. Thus, the Trial Court has given over much importance to the circumstance that before police specific overtactst by mentioning particular blow given by particular accused was not mentioned by some witnesses.

(iii) In P.M. report, the injuries are not described in minute details like depth, width etc.

The length of injury is given by the doctor. The Trial Court has given over much importance to this circumstance also. In view of the other part of the medical evidence and also the evidence of eye witnesses and dying declaration, not much can be made out from this circumstance. There is specific opinion given on the use of weapons and it is described as hard and sharp weapons. Other things like the manner in which the weapon was used etc. cannot be considered much by the Court and suggestions in those regards are generally hypothetical. The Trial Court has committed error by using this circumstance also for giving benefit of doubt to the accused.

(iv) Dr. Devendra (PW 10) has given opinion that

due to injury sustained on head, a patient may go in shock, he can become unconscious and he may die immediately. This circumstance is also used in favour of defence.

Even if this circumstance is accepted as it is and it is believed that the death took place on the spot, only the evidence of dying declaration (Exh. 24) could have been ignored. Even in absence of evidence of dying declaration, in the present matter there is the evidence of eye witnesses which needs to be believed. Further, there is no corresponding evidence on the time of death and so, the opinion given by Dr. Devendra (PW 10) of the possibility of immediate death cannot be accepted as it is. When there is positive evidence that deceased gave report, Exh. 24, between 2.00 and 3.00 p.m. on the same day and even the defence has brought on the record in the cross examination of witnesses that the deceased was able to speak, the opinion evidence could not have been accepted by the Court. The Trial Court has committed grave error in accepting the opinion and discarding the direct evidence.

(v) Mallikarjun (PW 1) allowed accused No. 1 to take injured to Purna in his bullock-cart. This circumstance is considered in favour of accused by Trial Court by holding

that if accused No. 1 had assaulted the deceased, in ordinary course, Mallikarjun would not have allowed accused No. 1 to shift the deceased from the place of offence.

This reasoning cannot be accepted. The deceased was younger brother of accused No. 1 and the evidence on record is sufficient to show that when accused No. 1 saw the bleeding injuries sustained by the younger brother, he repented and he decided to take the steps to save the life of his younger brother. When there is such evidence and when there is specific case of accused No. 1 that he shifted the deceased to Purna with the help of Rajesh in the bullock-cart of Mallikarjun, the evidence given by Rajesh and Mallikarjun could not have been ignored. Thus, the circumstance which can be used against accused No.1, is used in his favour by the Trial Court in the present matter.

(vi) The evidence of dying declaration is inconsistent with the medical evidence. This circumstance is considered by the Trial Court in favour of the accused by holding that the contents of dying declaration describing the injuries are not consistent with the injuries described in

P.M. report.

This Court has already made sufficient observations on this circumstance while discussing the manner in which the evidence given under section 32 of the Evidence Act needs to be appreciated. This Court holds that the Trial Court has committed grave error in using this circumstance in favour of defence.

(vii) The evidence of each witness is considered separately and each piece of evidence is considered separately by the Trial Court and after that it is observed that each piece of circumstance is suspicious in nature.

This approach of appreciation and analysis of evidence is not proper and correct. This Court has already discussed the so called discrepancies noted by the Trial Court in the evidence of witnesses. The evidence as a whole of every witness needs to be considered and then other part of the evidence given by other witnesses needs to be seen to ascertain as to whether other evidence gives necessary general corroboration. That approach was not at all used by the Trial Court. The Trial Court has given importance to the circumstances like inconsistency in the evidence collected under section 27 of the Evidence Act.

This Court has already observed that even if there was no blood found on the weapon like axe and sickle, that circumstance cannot shake the direct evidence. Even non recovery of weapon cannot go to the root of the matter if other part of the evidence is convincing and the Court finds that the other part of the evidence needs to be believed and accepted.

(viii) The copy of F.I.R. was sent late i.e. on 7.11.2000 to the Court of J.M.F.C. The Trial Court has discussed the requirement of provision of section 157 of Cr.P.C. and it is held that due to sending copy late, by one day, a suspicion is created about the F.I.R. For giving such opinion, the Trial Court has placed reliance on two cases cited by the defence counsel reported as **2001 ALL MR (Cri) 994 [State of Rajasthan Vs. Teja Singh and Ors.] and AIR 1980 SUPREME COURT 638 [Marudanal Augusti Vs. State of Kerala]**.

On this point, the case of Apex Court reported as **(2001) 7 SCC 318 [Anil Rai Vs. State of Bihar]** can be cited. The observations made by the Apex Court shows that the facts and circumstances of each and every case are always different. In section 157 of Cr.P.C. there is

nothing to show that the F.I.R. cannot be used in evidence, if there is no strict compliance of section 157 or filing of the F.I.R. in the Court of J.M.F.C. late will vitiate the case itself. The observations made by the Apex Court show that when there is no possibility of concoction, creating false evidence, then over much importance cannot be given to this circumstance. In the present matter, accused Nos. 1 and 2 were arrested on 5.11.2000 itself and they were produced before the Magistrate along with remand report dated 6.11.2000. In the remand report sum and substance of the allegations made in the F.I.R. are mentioned and names of all the three accused are also mentioned. Thus, there is no possibility of creation of false F.I.R. On the contrary, it can be said that the report of the deceased, Exh. 24, was not that specific to describe minutely and if he had survived, the vagueness could have been certainly considered. Thus, evidence on record shows that proper approach was not adopted for appreciation of the things and also the position of law.

43) The learned APP placed reliance on the case reported as **AIR 1973 (SC) 2622 [Shivaji Sahebrao Bobade Vs. State of Maharashtra]** and submitted that in view of the aforesaid approach

of the Trial Court Judge, interference is warranted in the decision and the decision needs to be set aside. The Apex Court has made following observations :-

"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."

44) This Court has discussed all the evidence of the present matter and also the reasoning given by the Trial Court. If the law laid down by the Apex Court in the case of **Shivaji** cited supra is kept in mind, it can be said that present one is a fit case where interference is warranted. This Court has no hesitation to hold that

the view taken by the Trial Court is clearly unreasonable one and that itself is 'compelling reason' for interference. This Court further holds that the Trial Court has failed to discharge its duty properly and correctly. In view of the material available against all the three accused, this Court holds that all the three accused persons need to be convicted for causing death of Kanta.

45) The question now arises as to what offence is committed by these three persons. On the basis of evidence already discussed, this Court holds that there was no intention to cause the death of Kanta. However, there was intention to teach lesson to Kanta due to aforesaid dispute and for that, assault was made. Weapons like sickle and axe were used and due to that, it needs to be presumed that there was knowledge to the accused that by such attack, they were likely to cause the death. However, the injuries were not caused with intention to cause the death. This Court holds that conviction needs to be given to all the three accused for offence punishable under section 304 Part II r/w. 34 of IPC. Similarly the prosecution has proved that the accused persons committed the trespass in the land of Mallikarjun (PW 1) and thereby committed the offence punishable under section 447 r/w. 34 of IPC.

46) The incident in question took place in the year 2000 and

this Court is convicting and sentencing the accused in the year 2017. Due to overall circumstances and also this circumstance, this Court holds that sentencing the accused with rigorous imprisonment of three years would be sufficient in the present matter. In the result, following order is made.

ORDER

- (I) The appeal is partly allowed.
- (II) The judgment and order of Trial Court acquitting accused No. 1 - Narayan s/o. Abarao Parve, accused No. 2 - Prabhakar s/o. Narayan Parve and accused No. 3 - Balaji s/o. Nivrutti Parve is hereby set aside. Aforesaid accused Nos. 1 to 3 are acquitted of the offence of murder, but they stand convicted for the offence punishable under section 304 Part II of IPC r/w. section 34 of IPC and each accused is sentenced to suffer rigorous imprisonment for 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) Similarly, accused No. 1 - Narayan s/o. Abarao Parve, accused No. 2 - Prabhakar s/o. Narayan Parve and accused No. 3 - Balaji s/o. Nivrutti Parve stand convicted for the punishable under section 447 r/w. 34 of IPC and each

accused is sentenced to suffer rigorous imprisonment for one month.

(IV) Both the substantive sentences are to run concurrently.

(V) Accused Nos. 1 to 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 warrant which is to be sent to the Jail authority.

(VI) Copy of this judgment is to be given to the accused free of cost.

[S.M. GAVHANE, J.]

[T.V. NALAWADE, J.]

ssc/