

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

CRIMINAL APPEAL NO. 566 OF 2002

1. Balu s/o. Dashrath Barhate,
Age 26 years, Occu. Agriculture,
R/o. Jalalpur, Taluka Karjat,
District Ahmednagar.
2. Sukhdeo s/o. Dashrath Barhate,
Age 20 years, Occu. and
R/o. As above.

....The Appellants.

Versus

The State of Maharashtra
(Through the Public Prosecutor,
High Court, Bench at Aurangabad)

....The Respondent.

Mr. Joydeep Chatterji, Advocate for appellants.

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

**CORAM : T.V. NALAWADE AND
ARUN M. DHAVAL, JJ.**

RESERVED ON : 28/11/2017.

PRONOUNCED ON : 06/12/2017

JUDGMENT : [PER ARUN M. DHAVAL, J.]

1) This is an appeal by the appellants against judgment dated 7.9.2002 of conviction against them, who were accused in Sessions Case No. 121/2001 before Additional Sessions Judge, Ahmednagar for the offence punishable under section 302 r/w. 34 of Indian Penal Code (hereinafter referred to as 'IPC' for short).

2) The facts relevant for deciding this appeal may be stated as follows :-

Deceased Shrirang Bajirao Barhate, aged about 55 years, was uncle of accused Nos. 1 and 2. He was residing at and was having agricultural land at Jalalpur, Taluka Karjat, District Ahmednagar. Accused No. 1 Balu was residing in the filed while his father Dashrath and brother Sukhdeo were residing in village. Deceased Shrirang and his brother Dashrath inherited agricultural land of 5½ acres. There was no partition between Dashrath and deceased Shrirang. A civil suit for partition and separate possession was filed in Karjat Court. The dispute arose as Dashrath was not allowing Shrirang to cultivate the land. The two accused, who were sons of Dashrath, were supporting their father and restraining Shrirang from entering in to the land.

3) On 11.6.2001 at 5.00 p.m. both the accused, Balu and Sukhdeo cut Babool tree from the common land and took away the firewood. On 12.6.2001 at 8.00 a.m. deceased Shrirang went to the house of accused and accosted them about their acts. That time there was quarrel and Shrirang was intimidated that he should leave the spot lest he would be killed. PW 2 - Bhimabai, widow of deceased Shrirang was standing in front of her house and watching the incident. At about 8.15 to 8.30 a.m. when Shrirang was returning the field of Tulshiram, both the accused came with sticks and stones and by asking Shrirang as to how he was concerned with

cutting of branches, they started assaulting him with stick and stones. When PW 2 - Bhimabai tried to rescue her husband, both the accused rushed towards her with sticks and threatened to kill her. Due to fear she ran towards the house of Tulshiram. She was shouting and requesting the accused not to assault her husband. Still both the accused continued to assault him. The incident was witnessed by Tulshiram, Ashok, Popat, Shivaji and Changdev. When Shrirang became unconscious, both the accused abused him and left the spot. PW 2 - Bhimabai noticed injuries on skull, hands, legs and back of her husband. He was unconscious and hence, she brought Police Patil to the spot and carried her husband in the bullockcart of Ashok Borate to S.T. stand of Jalalpur and from there, he was brought in a tempo to Rural Hospital, Rashin.

4) On examination, the Medical Officer declared Shrirang dead. Accordingly, she lodged F.I.R. at Rashin Police Station at 11.45 a.m. The crime was registered at C.R. No. 101/2001 and immediately, post mortem was conducted on the dead body at 2.00 p.m. by PW 6 - Dr. Subhash Shinde.

5) During investigation PW 10 - Police Inspector Shri. Ramesh Pawar carried out inquest panchanama, Exh. 17, spot panchanama, Exh. 24 and seized the samples of ordinary soil and

soil mixed with blood from the spot, Article Nos. 3 and 4. He recorded statements of material witnesses and searched and arrested the accused at 8.15 p.m. Blood stained clothes on their person were attached while drawing arrest panchanamas at Exhs. 30 and 31. One application showing threats by the accused to Tulshiram was taken up in the investigation papers. During police custody, accused No. 1 made a statement to discover two sticks from the crop of Jawar. His memorandum was recorded and in pursuance of his memorandum, he discovered the sticks, concealed in Jawar crop near the house, which were seized. The seized articles were forwarded to C.A. Office. Copies of civil litigation were collected. Map of the spot was obtained from the Revenue Officers and after completion of investigation, chargesheet was submitted in the Court.

6) In the due course, the case was committed to Court of Sessions. The learned Additional Sessions Judge, Ahmednagar framed charge against both the accused under section 302 r/w. 34 of IPC. The accused pleaded not guilty. The prosecution examined eleven witnesses. The defence of the accused is of total denial and false implication due to land dispute.

7) After recording examination of all the witnesses up to 26.12.2001, the Court examined as court witness, one Head

Constable dealing with maintenance of Muddemal and thereafter, there were doubts about mental condition of accused No. 2 about his ability to defend himself. On 1.1.2002 Superintendent Jail sent report, Exh. 65 that accused No. 2 Sukhdeo was sick and on request of Medical Officer from Civil Hospital, Ahmednagar, he was forwarded to Sasoon Hospital, Pune. The report of Sasoon Hospital disclosed that he had a psychic problem. On 30.1.2002 the learned Trial Judge examined Dr. Vilas Bahilume as a Court witness on the point of mental condition of accused No. 2 and he was found to be unfit for trial. Then, the learned Additional Sessions Judge passed order dated 4.1.2002 for keeping accused No. 2 under observation of doctors from mental hospital for ten days and for submission of report regarding his progress. Meanwhile, the learned Additional Sessions Judge was pleased to grant interim bail to accused No. 2 by order dated 21.1.2002. On 5.7.2002 the report of medical fitness of accused No. 2 was received. After hearing the arguments, the learned Additional Sessions Judge was pleased to hold both the accused guilty under section 302 of IPC and sentenced them to suffer imprisonment for life and to pay fine of Rs.3,000/-, each and in default of payment of fine, simple imprisonment for six months. Hence, the aggrieved accused have preferred this appeal.

8) Heard learned Advocate Shri. Joydeep Chatterji for the

appellants. He has taken us through the pleadings on record and submitted that there is evidence of only two material witnesses, PW 2 - Bhimabai, wife of deceased and PW 4 - Ashok. He stated that all other witnesses are either insignificant or not supporting the prosecution. He pointed out that the clothes of the accused, though seized, were not sealed and discovery panch (PW 8 - Amrut Akhade) has turned hostile. He referred to P.M. notes and made submissions that the deceased had sustained eight injuries and injury Nos. 2 to 7 are minor and only injury No. 1 C.L.W. over occipital region, having size of 6 x 6 x 6 c.m. is fatal wound. But, the Medical Officer has stated that injury No. 1 along with injury No. 8, contusion over right chest, caused the death. He submitted that there is no evidence that the injuries were sufficient in ordinary course of nature to cause the death. He pointed out that as per evidence of PW 4 - Ashok, by the time he went to spot, Shrirang was lying in injured condition and he had not actually seen the assault nor seen the accused near the spot. He argued that evidence of PW 2 - Bhimabai is not consistent with the evidence of PW 4 - Ashok. He argued that there is no evidence as to who had given vital blow of stick on the skull of deceased Shrirang. He pointed out that PW 2 - Bhimabai has given admission which discloses that the F.I.R. was lodged by Police Patil and she has given only thumb impression and she has not disclosed the facts to police. Her evidence that she has gone to the house of

Tulshiram to save herself is contrary to the prosecution case and the material witness Tulshiram has not been examined. Shri. Chatterji argued that conduct of PW 2 that she has not come to police station and give the information to Police Patil raises doubt about the credibility of her evidence. He, therefore, submitted that evidence of PW 2 and PW 4 should be disbelieved and both the accused should be acquitted. He in alternative submitted that even if PW 2 and PW 4 are believed, it is a case for the offence under section 304 Part II of IPC.

9) Per contra, the learned APP Mr. Ghayal has whole heartedly supported the judgment of Trial Court. He argued that evidence of PW 2 and PW 4 is consistent, the F.I.R. is lodged promptly and the accused had a motive as they were having land dispute with the deceased, the P.M. was also conducted immediately and the accused were arrested and their blood stained clothes were also seized. The learned APP submitted that PW 2 - Bhimabai is a rustic, illiterate witness; some minor discrepancies in her evidence does not make her evidence incredible or untrustworthy. He, therefore, submitted that the conviction of both the accused should be upheld. With regard to nature of crime, he submitted that the injuries on skull and on chest were on vital parts and the deceased

Shrirang has met with an instant death. He submitted that the injuries were fatal and therefore, the offence punishable under section 302 r/w. 34 of IPC is made out.

10) Mr. Ghayal relied on the case of **State of Rajasthan Vs. Dhool Singh, AIR 2004 (SC) 1264**, wherein the accused was convicted for the offence punishable under section 302 of IPC, but the High Court reduced the sentence to 304 Part II of IPC on the ground that there was only single injury caused and therefore, intention to cause murder was not spelt out. The Apex Court deprecated the practice of reducing sentence for the offence under section 302 of IPC to section 304, Part II of IPC on insufficient ground and restored the judgment of the Trial Court.

11) Shri. Ghayal also relied on the case of **Saddik @ Lalo Gulam Hussein Shaikh Vs. State of Gujrat 2017 CR.L.J. 149 (SC)** with respect to the effect of invoking section 149 of IPC. It is held that once the accused is shown as member of unlawful assembly, it is not necessary to show any overt act on his part in commission of crime.

12) The points for our consideration with our findings are as follows :-

<u>Points</u>	<u>Findings</u>
1 Whether deceased Shrirang met with homicidal death ?	- In the Affirmative.
2 Whether accused Nos. 1 and 2, in furtherance of their common intention, caused death of Shrirang by assaulting with sticks and stones ?	- In the Affirmative
3 Whether it is a case of murder or culpable homicide, not amounting to murder ?	- U/s. 304, Part II of IPC.
4 What order ?	- The appeal is partly allowed.

REASONS

Point No. 1 :-

13) In the present case, as per the evidence of PW 2 - Bhimabai, the incident took place on 12.6.2001 at about 8.00 to 8.30 a.m. in the morning at Jalapur. The injured was first taken to Rural Hospital, Rashin and when he was declared dead, immediately F.I.R. came to be lodged at 11.45 a.m. Surprisingly, the P.M. came to be conducted at 2.00 p.m. As per the evidence of PW 6 - Dr. Subhash Shinde and his P.M. notes, Exh. 38, deceased Shrirang was aged about 55 years and the rigor mortis was well marked on his body. He noted the following injuries on his person.

- (i) CLW over occipital region, 6 x 6 x 3 cm in size, bony deep.
- (ii) CLW over left forearm upper 1/3, 3 x 2 x 2 cm in

size, palmar aspect,

(iii) CLW over right leg over shin middle 1/3 and 6 x 2 x 2 cm. in size.

(iv) CLW over right leg lower 1/3, 3 x 2 x 1 cm. in size

(v) An abrasion over right ankle joint, 2 x 1 cm. in size.

(vi) Contusion over back middle 1/3, 10 x 2 cm. in size.

(vii) Contusion over right hip joint, 6 x 2 cm. in size.

(viii) Contusion over right chest lower 1/3 side, 10 x 3 cm. in size.

All the injuries were antimortem. There were corresponding fracture of occipital bone, 3 x 1 cm. in size, fracture of radius and ulna as described in clause No. 18 of P.M. notes. There was intracarnial haemorrhage with subdural haematoma of size 2" x 2" on occipital region. Doctor has opined that Shrirang died due to acute neurogenic as well as haemorrhagic shock due to fracture of skull bone (occipital bone) leading to intracarnial haemorrhage and subdural haematoma as well as rupture of liver. Dr. Subhash had received letters of request, Exhs. 36 and 37 for PM. He had seen the inquest panchanama at Exh. 17. The P.M. report given by Dr. Subhash is at Exh. 38. His evidence is according to the contents of P.M. notes. He deposed that the death occurred within one hour prior to 10.00 a.m. due to injury Nos. 1 and 8 and it was instant death. Thus, it is obvious that these injuries could not have been self-

inflicted or accidental as there were as many as eight injuries. Therefore, the defence has not disputed that the deceased Shrirang died homicidal death. So, point No. 1 is answered in the affirmative.

Point Nos. 2 :-

14) The oral and documentary evidence in chronological order may be stated as follows :-

(i) PW 2 Bhimabai, informant, is resident of village Jalalpur. She and her husband were having agricultural land at a distance of 2 k.m. from the village. Both the accused are sons of her brother in law Dashrath. Dashrath and accused No. 2 Sukhdeo were residing in the village whereas accused No. 1 Balu is residing in the house in field. Jalalpur is a village having population of 3000 persons situated 30-35 k.m. away from Rashin.

(ii) Accused and Dashrath on one hand and PW 2 Bhimabai and her husband on the other hand were having agricultural land dispute. In possession of Dashrath there was land of five and half Acres in cultivation. Shrirang was claiming that it was of joint ownership. He had filed civil suit for partition in Karjat Court. On 11.6.2001 there was a date in the said case and both Shrirang and Dashrath had attended the said case. At that time, accused No. 1 Balu cut off some branches of a tree. According to PW 2

Bhimabai, the branches cut off were of Ramphal tree situated in the land of joint ownership. According to accused, the branches of the tree from their land were cut off. PW 2 Bhimabai disclosed this fact to her husband when he returned in the evening from the Court.

(iii) PW 2 Bhimabai stated that on 12.6.2001 in the morning her husband had gone to the place of accused to accost them as to why branches of the trees were cut off.

(iv) The said spot is about 400 ft. away from the house of PW 2 Bhimabai and she was standing in front of her house and watching the incident.

(v) PW 2 Bhimabai stated that she heard and saw that both the accused were beating her husband by stones and sticks in the land of Tulshiram which is situated in between land of accused and land of PW 2 Bhimabai. She, therefore, rushed to rescue her husband. But, both Balu and Sukhdeo rushed at her to assault her and due to fear she ran to the house of Tulshiram for taking shelter. The incident was witnessed by Tulshiram, Ashok, Popat, Changdev and Shivaji. They came to the place where Shrirang was assaulted. They found that Shrirang was lying in a pool of blood and the accused were not present there. PW 4 Ashok brought one bullockcart and PW 2 Bhimabai

took her husband to Rashin. That time Police Patil was with her. The doctor declared that her husband was dead.

(vi) Then PW 2 Bhimabai went to Police Station Rashin and she lodged occurrence report, Exh. 40, which was recorded by PW 7 ASI Bhimrao. This occurrence report was forwarded by PW 7 Bhimrao to Karjat Police Station where PW 9 ASI Pandharinath treated it as FIR and registered crime at C.R. No. 101/2001. The FIR is at Exh. 21.

(vii) PW 10 PI Ramesh Pawar took over the investigation of the crime. He proceeded to Rashin and in presence of PW 1 Machindra drew inquest panchanama, Exh. 17. PW 1 Machindra has supported the prosecution.

(viii) Thereafter PW 10 PI Ramesh Pawar went to the spot, noticed blood stained soil, blood stained stones and odd pair of shoe. He seized them along with sample of ordinary soil and drew the spot panchanama, Exh. 24. He identified Muddemal Article Nos. 3 and 4 as the same blood stained stones and shoe. PW 3 Ramdas is panch to the spot panchanama. He has supported the prosecution.

(ix) Meanwhile PW 6 Dr. Subhash Shinde, Medical Officer, Primary Health Center, Rashin received request letters Exhs. 36 and 37 for conducting post mortom from

PW 10 PI Pawar. He conducted the post mortem at 2.00 to 3.00 p.m. The injuries noted by him and cause of death are already discussed and needs no repetition. The P.M. notes are at Exh. 38.

(x) On the same day PW 10 IO Pawar searched accused and brought them to the Police Station at 8.15 p.m. Their clothes were stained with blood. He seized blood stained clothes and drew arrest panchanama, Exh. 30 of accused No. 1 Balu. PW 5 Hanumanta Shelke, panch identified Muddemal Articles Nos. 4 and 5 as clothes of accused No. 1 Balu. Then PW 10 PI Pawar seized blood stained clothes of accused No. 2 Sukhdeo from his person and drew arrest panchanama, Exh. 31. PW 5 Hanumanta has supported him in respect of this seizure panchanama and identification of the Articles.

(xi) PW 4 Ashok, eye witness had given application dated 13.6.2001 showing that both the accused had threatened to kill him for giving shelter to PW 2 Bhimabai. It is at Exh. 27.

(xii) During investigation on 14.6.2001 accused No. 1 Balu showed willingness to produce two sticks concealed by him in Jawar crop. His memorandum was accordingly recorded. It is at Exh. 42. Then he took the police and

panchas to village Jalalpur and then in Jawar crop from southern side of one house, he produced two sticks concealed under dry leaves. Those were stained with blood. Those were attached with panchanama, Exh. 43. PW 10 PI Pawar identified sticks, Muddemal Article Nos. 11 and 12 as the same sticks.

(xiii) PW 8 Amrut has half heartedly supported Investigating Officer. Initially he stated that police told him that accused had given memorandum and he should sign it and without permission of the Court, the APP has cross examined him and he has admitted most of the facts and proved the memorandum and panchanama at Exhs. 42 and 43 and Muddemal sticks, Articles Nos. 11 and 12. In cross, he again admitted that he signed the memorandum and he was asked by police to sing. But, PW 8 Amrut has denied that accused No. 1 Balu had not given any memorandum.

(xiv) PW 5 Hanumanta has deposed that on 12.6.2001 one constable produced clothes of deceased Shrirang from Medical Officer. It contained one white Kopri (like a shirt) and one white Dhotar, both having blood stains. He proved panchanama, Exh. 32 and identified clothes, Muddemal Articles Nos. 9 and 10 as that of deceased Shrirang. PW 10 PI Pawar has issued letters,

Exhs. 48 and 49 to one Police Constable and asked him for delivery of dead body and delivery of clothes from Medical Officer. He kept the aforesaid Muddemal Articles in safe custody in Muddemal locker vide Exh. 50. He collected certified copies of suit filed by accused No. 1 against deceased Shrirang, PW 2 Bhimabai and one Kasturilal, Exh. 51. The 7/12 extract of the disputed land is at Exh. 52. He issued letter to Tahsildar for drawing map of the spot, Exh. 53.

(xv) On 26.6.2001 PW 11 Police Naik Laxman took Muddemal Articles along with covering letter, Exh. 47 to C.A. Office and obtained acknowledgment of C.A. Office on Exh. 47. The C.A. report is at Exh. 14.

15) We have carefully gone through the evidence of main witnesses viz. PW 2 Bhimabai and PW 4 Ashok. PW 2 Bhimabai has deposed about her dispute with the accused and pendency of civil suit pending between them, which is not in dispute. There is also no dispute that on earlier day of incident, accused No. 1 had cut some branches of tree which led to dispute between the deceased and accused Nos. 1 and 2. PW 2 Bhimabai has stated that while she was standing in front of the house, her husband had gone to the house of accused in the morning of 12.6.2001 which is about 400 ft. away

from her house. She could hear and see that both the accused were assaulting her husband. She rushed to help her husband. As both the accused threatened to beat her, due to fear she ran to the house of Tulshiram and narrated the incident. Then she along with Tulshiram, Ashok, Popat, Changdev and Shivaji came to the spot where her husband was being assaulted. He was lying in the pool of blood and the accused were not present there.

16) It is argued that the material witness Tulshiram has not been examined. However, PW 4 Ashok is examined, who is son of Tulshiram and he was residing in the same house. Therefore, non examination of Tulshiram is neither significant nor suspicious. PW 4 Ashok has supported PW 2 Bhimabai about the dispute in respect of agricultural land. He stated that Shrirang was too poor and was not getting meals for two times a day. He was unable to purchase a pair of shoe. He referred the incident of cutting of branches of tree which took place one day before the date of incident. But he stated that the branches cut off the tree were of Babool tree whereas PW 2 Bhimabai stated that branches of Ramphal tree were cut, is not material contradiction. He stated that on 12.6.2001 Shrirang had gone to the house of accused for accosting them and both the accused assaulted him which was seen by him. He stated that assault was going on at the distance of 100 ft. and it was in their

field. He and his father had seen the incident in the morning, but he stated the time as 7.00 to 7.30 a.m. whereas PW 2 Bhimabai has stated the time as 8.00 to 8.30 a.m. He has stated that both the accused Balu and Sukhdeo were beating Shrirang by means of sticks and stones. PW 2 Bhimabai has stated similarly. PW 4 Ashok stated that the accused warned him not to intervene, otherwise they would kill him. After some time, they went to the spot, where there were 7-8 persons. Shrirang was lying in the pool of blood and Shrirang was unconscious on the spot. He stated that accused had chased PW 2 Bhimabai to beat her and hence, she had been to his house for taking shelter. Accused had threatened to make forcible entry in his house. But, he did not open the door. Thereafter, PW 2 Bhimabai had gone to Police Patil. PW 4 Ashok has lodged the report, Exh. 27 on 13.6.2001, disclosing the subsequent incident. He has stated that when he tried to intervene, he was abused and stones were pelted at him. When PW 2 Bhimabai due to fear came and hid herself in his house, both the accused had threatened him to send Bhimabai out of that place so that she should be killed and if she would not be taken out, they would kill him. This subsequent conduct of PW 4 Ashok is consistent with the prosecution case and evidence of PW 2 Bhimabai and PW 4 Ashok. PW 4 Ashok stated that the leg and hands of Shrirang were broken and he was taken in bullockcart to Jalalpur S.T. Stand. He identified the Muddemal Article No. 3 shoe

found on the spot and Muddemal Article No. 11.

17) Learned Advocate Shri. Joydeep Chatterji relied on the admissions of PW 4 Ashok disclosing that initially he had heard cries and the incident was going on for about 25 minutes. After hearing cries, people had gathered on the spot and Shrirang was crying for help when he was beaten, but the villagers could not come to his rescue. The incident was going on at a place 400 to 500 ft. from his house. Shri. Chatterji relied on the admissions that PW 4 reached the spot when Shrirang had fallen down and the accused were not present there to submit that PW 4 Ashok is not eye witness. But the evidence of PW 4 Ashok shows that he has seen the incident from long distance and could not go to save Shrirang due to fear of the accused. Besides his evidence, evidence of PW 2 Bhimabai is consistent about the attempt made by the accused to assault PW 2 Bhimabai and Bhimabai taking shelter in his house. Their evidence is supported by report, Exh. 27 submitted by PW 4 Ashok on the next date. This incident is part of the same transaction in which accused Nos. 1 and 2 had assaulted Shrirang just before the same.

18) After carefully considering the evidence of PW 2 and PW 4, we find that the learned Trial Judge has rightly relied upon their evidence to hold accused Nos. 1 and 2 as authors of the injuries

sustained by deceased Shrirang. This evidence is well supported by the evidence of PW 10 PI Pawar, Investigating Officer and PW 5 Hanumanta that clothes of both the accused were found blood stained at the time of their arrest on the same day. The C.A. report at Exh. 14 shows that clothes of accused Nos. 1 and 2 were having stains of human blood of group 'O'. Since both the accused were not injured, the blood stains on their person connect them with the crime. The sticks recovered also have human blood stains, but the group could not be determined. The spot panchanama proved by PW 3 Ramdas shows that blood was found on the spot. After carefully considering of the aforesaid evidence, we find that the learned Trial Judge has rightly relied upon the aforesaid evidence to hold accused Nos. 1 and 2 as authors of the injuries sustained by deceased Shrirang. So, point No. 2 is answered in the affirmative.

Point Nos. 3 and 4 :-

19) The evidence of PW 6 Dr. Subhash Shinde, Medical Officer and P.M. notes, Exh. 38 show that there were eight injuries on the person of deceased Shrirang. One was C.L.W. on occipital region of size 6 x 3 x 3 cm. bony deep and injury No. 8 is contusion over right chest lower 1/3rd, 10 x 3 cm. The opinion of the doctor shows that these injuries caused haemorrhagic shock due to fracture of skull bone and haematoma due to rupture of liver which were causes of death. The other three C.L.Ws, two contusions and one

abrasion, total six in number are on hands and legs. From the evidence on record, we are satisfied that accused Nos. 1 and 2 had common intention to assault Shrirang by means of sticks and stones. But, when six out of eight injuries are not on vital parts and weapons used were sticks and stones only, it is difficult to agree with the finding of the Trial Judge that accused Nos. 1 and 2 had common intention to commit murder. Both of them knew that they were going to give blows of sticks and stones, some of which might cause injuries on vital part, which would be likely to cause death, we therefore, hold that they had common intention to commit the offence of assault with knowledge that such assault was likely to cause death.

20) In **State of Rajasthan Vs. Dhool Singh, AIR 2004 (SC) 1264** there was a single injury incised wound 9 x 3 x 2.5 cm. on transversally placed on left side of neck Thyroid Cartilage is cut. Transversally on left side sternocleidomastoid muscle external jugular vein internal jugular vein and common carotid artery cut completely. It was caused by deadly weapon sword on vital part, neck. It is common knowledge that blow of sword on the neck is always intended to cause death and most likely to cause death whereas blow of stick or stone on skull, though capable of causing death, the probability of death is not so high. It is not sufficient in ordinary

course of nature to cause death nor it indicate motive on the part of assailants to cause death. The Apex Court in **Dhool Sing's** case cited supra criticised the tendency to bring down the offence under section 302 of IPC to the offence under section 304, Part II of IPC in the light of totally different set of facts. The same is not applicable to the present facts. When there is causing of death with intention or knowledge, it is always the duty of the Sessions Judge to determine whether it amounts to culpable homicide amounting to murder or not amounting to murder and in later case it is to be considered whether it was intentional act or act with knowledge i.e. falling under section 304 Part I or 304 Part II of IPC. This discretion rather obligation on the Court to decide the nature of offence is not taken away by observations made in **Dhool Sing's** case which are read in improper context.

21) In **Saddik @ Lalo Gulam Hussein Shaikh & Ors. Vs. State of Gujrat 2017 CR.L.J. 149 (SC)** it is held that when any person is member of unlawful assembly, it is not material what overt acts he played in the commission of crime and vicarious criminal liability can be fastened to him under section 149 of IPC. In the first place, in the present case section 149 of IPC is not applicable and secondly, while considering the common intention of the accused, the role played by them in the crime becomes very much relevant as

intention of the accused is hidden in their mind. We, therefore, hold that conviction under section 302 r/w 34 of IPC is not sustainable and it will have to be reduced to under section 304 Part II of IPC. Therefore, point Nos. 3 is answered accordingly.

22) We have considered the submissions made by the accused persons before the Trial Court for leniency. They had old parents depending upon them. Assault has taken place out of civil dispute. The deceased Shrirang has gone to the house of both accused to accost them. The incident has taken place around 16 to 17 years back. Considering all these circumstances, we hold that rigorous imprisonment for seven years and fine of Rs.3,000/-, each, in default R.I. for three months with direction to pay the entire fine amount as compensation to the wife of deceased will meet the ends of justice. Hence, we pass the following order.

ORDER

(I) The appeal is partly allowed. The conviction of the appellants viz. Balu s/o. Dashrath Barhate and Sukhdeo s/o. Dashrath Barhate in Sessions Case No. 121/2001 given for the offence punishable under section 302 r/w. 34 of IPC is hereby set aside and modified in to conviction for the offence punishable under section 304 Part II r/w. 34 of IPC. Both the appellants are sentenced to suffer rigorous imprisonment for seven years and to pay fine of

Rs.3,000/-(Rupees three thousand) each, in default, rigorous imprisonment for three months.

(II) The appellants are entitled to set off in respect of the period for which they were behind bars in this crime. This period be shown in conviction warrant.

(III) The appellants to surrender to their bail bonds for undergoing the sentence.

(IV) The fine amount be paid to PW 2 Bhimabai w/o. Shrirang Barhate, R/o. Jalalpur, Taluka Karjat, District Ahmednagar as compensation.

[ARUN M. DHAVAL, J.]

[T.V. NALAWADE, J.]

ssc/