

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 7 OF 2015

State of Goa, Through Police Inspector,
(Major), Ponda Police Station. Appellant

Versus

Dhiraj Murari Warkar, (Major), s/o Murari
Warkar, Age 29 years, Service, r/o H. No.
1401, Marutigad, Tisk, Usgao, Ponda, Goa. Respondent

Shri S.R. Rivankar, Public Prosecutor for the Appellant.

Shri S.D. Lotlikar, Senior Advocate with Ms. Aditi Naik,
Advocate for the Respondent.

CORAM: C.V. BHADANG &

PRITHVIRAJ K. CHAVAN, JJ.

RESERVED ON: 14th SEPTEMBER, 2017

PRONOUNCED ON: 22nd SEPTEMBER, 2017

JUDGMENT: (per C.V. BHADANG, J.)

This is an appeal challenging the acquittal of the respondent from the offence punishable under Section 307 of Indian Penal Code, 1860 (IPC, for short).

2. The prosecution case shorn of minor details may be stated thus:-

That on 30.09.2007, between 7:30 p.m. to 7:45 p.m., in the Gymnasium of the victim at Usagao, Tisk, Ponda, the

respondent assaulted the victim, Utkarsh Parsekar on his head with the help of an iron bar with an intention to kill him. According to the prosecution, the victim had borrowed an amount of Rs.12,000/-, which the victim refused to pay and on account of the said dispute, it is claimed that the incident happened. Undisputedly, after the assault, the appellant surrendered himself before P.S. Ponda.

3. The matter was investigated in which, the Investigating Officer recorded the statement of the witnesses, effected certain seizures. The victim, Utkarsh was admitted in the Goa Medical College & Hospital (GMC) for medical treatment. The statement of witnesses came to be recorded on 06.03.2008. After completion of the investigation, a charge sheet came to be filed before the learned Judicial Magistrate First Class at Ponda, which was committed to the Court of Sessions and was registered as Sessions Case No. 1/2008 on the file of the learned Sessions Judge at Panaji.

4. The learned Sessions Judge framed charge against the respondent for the offence punishable under Section 307 of IPC, to which, the respondent pleaded not guilty and claimed to be tried. The defence was of total denial and false implication.

5. At the trial, the prosecution examined as many as 28 witnesses and produced the record of investigation. In response to the statement under Section 313 of Cr.P.C, the respondent filed a written statement (Exhibit-125). It is the specific defence that prior to the incident, the respondent had already left the Gymnasium and had gone to the market to purchase fish. It is contended that after keeping the same at home, the respondent returned back to the Gymnasium at about 7:45 p.m. and saw Utkarsh Parsekar (PW-9), lying on the ground in a bleeding condition. The respondent tried to contact the Ponda P.S., when he was called to the police station. He went there and informed about the incident, where he was detained. The respondent claimed that he never gave loan of Rs.12,000/- to Utkarsh Parsekar and such a story was cooked up to show some false motive. He claimed that the victim was in fact his friend and he had stood as security for the victim in a criminal case pending before the learned Magistrate at Ponda, under Section 138 of the Negotiable Instruments Act. He claimed that the victim was facing several such cases as he owed money to several persons.

6. The respondent did not lead any evidence in defence.

7. The learned Sessions Judge framed a solitary point as to whether, the prosecution has succeeded in establishing that the respondent assaulted the victim in the Gymnasium with an iron bar with an intention to kill him. The learned Sessions Judge on appreciation of the evidence, answered the point in the negative and proceeded to acquit the respondent giving him benefit of doubt. Feeling aggrieved the State is before this Court.

8. We have heard Shri Rivankar, the learned Public Prosecutor for the appellant and Shri Lotlikar, the learned Senior Counsel for the respondent. With the assistance of the learned Counsel for the parties, we have gone through the evidence and record as well as the impugned judgment.

9. It is submitted by Shri Rivankar, the learned Public Prosecutor for the appellant that the appreciation of evidence by the learned Sessions Judge and particularly that of PW-9 and the confessional statement by the respondent, is perverse. It is submitted that the learned Sessions Judge ought to have relied upon the evidence of PW-9 as the same is consistent and stands corroborated on material, notwithstanding the fact that in the interregnum, during the period of treatment, the mental

capacity of PW-9 was affected. The learned Public Prosecutor submitted that the appreciation of the evidence on the mental condition of PW-9 and particularly, on the aspect of loss of memory, permanent or otherwise, has not been considered properly by the learned Sessions Judge. The learned Public Prosecutor has taken us through the relevant observations of the learned Sessions Judge, more particularly, those relating to the appreciation of evidence of PW-9, PW-7 and PW-10, in order to submit that the view taken by the learned Sessions Judge is an impossible view, requiring interference by this Court.

10. It is submitted that the motive for the offence, namely, advance of some amount by the respondent to PW-9 and a dispute as to return of the said amount is clearly spelt out from the evidence on record. It is submitted that the learned Sessions Judge ought to have found the appellant guilty for the offence punishable under Section 307 of IPC. The learned Public Prosecutor has pointed out that the respondent had assaulted the victim on the backside of his head with an iron rod thrice and this is indicative of the intention of the respondent to cause death of the victim. He therefore, submitted that the appeal be allowed.

11. On the contrary, Shri Lotlikar, the learned Senior Counsel for the respondent has submitted that over a long period of time, PW-9 was unable to recollect anything and as such, no implicit reliance can be placed on his evidence. It is submitted that the learned Sessions Judge has rightly referred to the evidence of PW-9 in para 67 of the judgment, where PW-9 has stated that after he regained consciousness and till 06.03.2008, he was not in a position to understand as to “who was coming and going in the hospital to meet him”. During that period, he was not able to understand what anyone was talking and was even unable to communicate his needs. It is submitted that PW-9 has specifically stated that he could not remember as to what had happened to him. It is submitted that therefore, it would be unsafe to place reliance on the evidence of PW-9 and the learned Sessions Judge has rightly refused to accept the same. It is submitted that the evidence regarding confession is also not satisfactory particularly, in the context of the principles as laid down by the Supreme Court in the case of **Rabindra Kumar Pal @ Dara Singh Vs. Republic of India, 2011 ALL MR (Cri) 673**. It is submitted that the memorandum of the confessional statement of the respondent clearly shows that the respondent was brought before the Magistrate by the Police Constables attached to the Ponda police station and was again

handed over to the said Constables on a direction to produce the respondent on 20.11.2007. On that day also, the respondent was produced before the Special Judicial Magistrate by the Constables attached to the Ponda police station. It is thus submitted that the possibility of an undue influence or coercion being practiced to give the confessional statement cannot be ruled out.

12. The learned Senior Counsel submitted that the scope of interference in an appeal against acquittal is limited. It is submitted that this Court cannot re-appreciate the evidence and reach a different conclusion, unless and until the view taken by the learned Sessions Judge is perverse or is an impossible view. It is submitted that where two views are possible, this Court would refuse to interfere with the order of acquittal. He submits that the appeal is without any merit and it be dismissed.

13. We have given our anxious consideration to the rival circumstances and the submissions made. It would be necessary to make a reference at some details to the evidence of the victim, Utkarsh Parsekar (PW-9), who is the prime witness in this case, alongwith Jairaj Mulguri (PW-7) and

Sarvesh Malwankar (PW-10).

14. PW-9, Utkarsh Parsekar had opened a Gymnasium under the name and style as “Health Care Fitness Park” at Tisk, Usgao, opposite PDA market. PW-9 and the respondent were known to each other as the respondent was a resident of the same village. Both of them knew each other from childhood and the respondent used to visit the Gymnasium, to have a chat and pass time.

15. PW-10, Sarvesh Malwankar was working as a helper in MRF factory in the first shift i.e. from 9:00 a.m. to 4:00 p.m. and was also working as part time coach in the Gymnasium. According to PW-9, 30.09.2007 was a Sunday and a holiday to the Gymnasium. PW-9 claims that on the earlier date i.e. 29.09.2007, he had asked PW-10, Sarvesh to come to the Gymnasium. On 30.09.2007, at about 5:30 p.m., while PW-9, Utkarsh was going to the Gymnasium, he met Sarvesh (PW-10) on the way and both of them went to the Gymnasium, where they worked in cleaning the floor and the equipments. At about 6:00 p.m., they brought the shutter half down and were discussing about the competition, which PW-9 had organised in the month of December. According to PW-9, it is at this time

that the respondent came to the Gymnasium. The respondent was wearing a blue colour shirt and a grey colour pant. PW-9 found the respondent to be tense. At about 6:45 p.m., one Sainath came alongwith one Jairaj with an intention to get Jairaj enrolled in the Gymnasium. PW-9 claims that he asked PW-10 to get the admission form of Jairaj filled in, however, PW-10 told that he will do the job the next day and PW-9 himself filled the form. PW-9 specifically claims that he had mentioned the date as 01.10.2007 i.e. the next date (30.09.2007 being a Sunday). He asked Jairaj to come to the Gymnasium on the next day. After completing all the formalities, Sainath and Jairaj went away. Till that time, Sarvesh and the respondent were there in the Gymnasium. After some time Sarvesh left for home, after he was asked to come to the Gymnasium the next morning. It is the material evidence of PW-9 that after Sarvesh left, he went alongwith the respondent to the Gymnasium, where the respondent demanded the amount of Rs.12,000/-, which PW-9 had borrowed from the respondent at the time of setting up of the Gymnasium. PW-9 claims that he informed the respondent that he could not pay the amount as he was not having the amount and requested for some time. At that time, PW-9 and the respondent were standing between "the bars and the low pulley hammer press". The respondent picked up one such bar

about two feet long (from out of the bars, which were lying on the floor) and gave three blows of the said bar on the backside of his head, after which PW-9 fell unconscious. PW-9 claims that his family members told that after about 17 days he had regained senses. He claimed that at the time of the incident, he was wearing a white coloured sleeved shirt and chocolate coloured pant, which were identified alongwith the inner wear (Exhibit-13) and the clothes of the respondent, which he was wearing.

16. PW-9 has been extensively cross examined mainly on the aspect of his mental condition and ability to remember, recollect and state about the incident. While appreciating the evidence of PW-9, it is necessary to note that the statement of PW-9 was recorded on 06.03.2008 i.e. close to about 5 ½ months after the incident. PW-9 states that after he regained consciousness (and till 06.03.2008), he was not in his proper senses and during this period he was not in a position to identify the visitors in the hospital or to understand as to what they were saying. He was unable to communicate his needs. The learned Sessions Judge has relied upon this part of the evidence, in order to discard the evidence of PW-9. We would tend to disagree. As noticed earlier, this part of the evidence of

PW-9 pertains to the period when his mental faculties were affected and not thereafter.

17. There are some material omissions, which are brought on record, which in our opinion would not amount to contradiction. For instance, in the cross examination of PW-9, he has stated that on previous occasions also, he had seen the respondent in a tense condition. This PW-9 had not stated to the police. Similarly, PW-9 claims that he had stated during his statement that after receiving three blows he had become unconscious. However, the specific word “unconscious” is not appearing in the statement, which omission, the PW-9 could not explain. PW-9 stated to the police that he regained consciousness after 17 days. These are some of the omissions, which in our opinion does not strike at the veracity of the evidence of PW-9, which otherwise we find to be cogent and one inspiring confidence. PW-9 was unable to remember as to for how many days he remained in the hospital. The record however discloses that PW-9 was in the hospital for about a month. He further claimed that he had not stated to the police that there was delay in giving the statement as his speech was affected. He also did not state to the police that earlier he used to talk fluently and only after the incident he had difficulty in

his speech.

18. We have carefully gone through the evidence of PW-9. It is trite that the evidence of any witness has to be read as a whole. The evidence has to be appreciated in the context of broad human probabilities and human conduct. We find that the evidence of PW-9 is natural and one inspiring confidence, notwithstanding the fact that immediately after the incident PW-9 was not in a position to specify or to give a statement and for some time was even unable to recollect as to what had happened.

19. From the defence, as elicited from the cross examination, as well as the statement under Section 313 of Cr.P.C., it is clear that the respondent did not dispute that he had visited the Gymnasium on the date of the incident. What is claimed is that the respondent left before Sarvesh (PW-10). This is in order to create a possibility that it was Sarvesh, who probably assaulted the victim. The respondent claims that he went home and returned back to the Gymnasium at 7:45 p.m., when he found PW-9 lying in a bleeding condition. He informed this to the police, when the Ponda police called him. He went to P.S., Ponda, where he was detained. We are unable to accept

the said defence as put forth. The normal human conduct who would find his friend lying in a pool of blood would be to seek medical help. At least that would be the priority before the police are alarmed. Here the respondent claims that he informed the Ponda police station, where he went and was detained by the police. Be that as it may, coming back to the evidence of PW-9, we find it highly improbable that the victim would falsely implicate somebody else, instead of the real assailant/s. There is no reason, at least not brought on record, which would prompt PW-9 to falsely implicate the respondent in place of the real assailant. As noticed earlier, the evidence of the victim has to be appreciated in the context of normal human conduct. It has come on record that PW-9 and the respondent were close friends. Not only that, the respondent was a regular visitor to the Gymnasium of PW-9. It has further come on record that the respondent had stood as a Guarantor for PW-9 before the Ponda Court, in a case against PW-9 under Section 138 of the Negotiable Instruments Act. PW-9 even disclosed that the respondent had accommodated him with an amount of Rs.12,000/- at the time when the Gymnasium was set up. Although, this later part of the respondent advancing an amount of Rs.12,000/- is disputed on behalf of the respondent, the fact remains that the respondent had stood as a security to

PW-9 and that both of them were long time friends. It would be thus unlikely that PW-9 would falsely implicate the respondent in the place of the real assailant. It would be significant to note that when the respondent went to P.S. Ponda, where he was arrested, the clothes on the person of the respondent were seized. The clothes and the chappal worn by the respondent were blood stained.

20. A brief reference may be made at this stage to the evidence of Sarvesh (PW-10). He claims that on 29.09.2007, PW-9 told him to come to the Gymnasium on 30.09.2007 in order to clean the Gymnasium at 5:30 p.m. On 30.09.2007, he met Utkarsh on the way. Both of them cleaned the Gymnasium and went to discuss about the body building competition, which was organised in the month of December. At about 6:30 p.m. to 6:45 p.m., the respondent came to the Gymnasium and after about 5 minutes, one Sainath and one Jairaj came to the Gymnasium. Sainath asked Utkarsh to admit Jairaj to Gymnasium. Utkarsh asked PW-10 to take the money and get the admission form filled. PW-10 told PW-9 that he himself should take the money and after the form was filled, told Jairaj to sign on it and PW-9 also signed on the form. Utkarsh asked Jairaj to come to the Gymnasium on the following day. Then

Jairaj and Sainath went away at about 7:20 p.m. This witness (PW-10) also left. He specifically stated that at that time it is PW-9 and respondent, who were in the office of the Gymnasium. At about 10:00 p.m. he came to know that Utkarsh was assaulted by the respondent. The evidence of PW-10 substantially corroborates the evidence of PW-9 on the happening prior to the actual assault. It is true that except PW-9, there is no eye witness to the incident. However, the incident as unfolded from the evidence of PW-9, prior to the actual assault is well corroborated by the evidence of PW-10 and for that matter, by the evidence of PW-7.

21. Jairaj Mulguri (PW-7) at the relevant time was working for Team Computers Private Ltd. at Panaji. He states that on 30.09.2007 at about 6:45 p.m., he alongwith one Sainath had gone to the Gymnasium of Utkarsh as he wanted to join the Gymnasium and Utkarsh gave him one form to fill in. Since it was a Sunday, Utkarsh put the date on the form as 01.10.2007. Utkarsh also introduced Jairaj to the Coach. On the following day i.e. on 01.10.2007, when he went to the Gymnasium, he was told by some boys that Utkarsh was assaulted by someone. He identified the form and his signature thereon. Nothing significant has come in the

cross examination of PW-7 and PW-10. The evidence of PW-9 taken together with the evidence of PW-10 and PW-7, lead to a natural story, ultimately culminating into the assault on PW-9 by the respondent. We are conscious of the fact that PW-7 and PW-10 are not eye witnesses to the incident of actual assault, however their evidence is relevant in order to find out the manner in which the evening unfolded and to corroborate part of the evidence of PW-9, prior to the incident of assault.

22. It is contended on behalf of the respondent that this is an attempt to falsely implicate the respondent. We would tend to disagree. On a careful perusal of evidence of PW-9, coupled with the evidence of PW-7 and PW-10, we find that there is a ring of truth in their version, which is also supported by medical and other evidence.

23. PW-13, Dr. Gajanan Naik was a medical officer attached to PHC, Ponda, who examined Utkarsh at 8:50 p.m. on 30.09.2007. On examination he found the patient to be unconscious, pupils were sluggishly reacting to light. He found the following injuries on the person of Utkarsh:-

- i. CLW (cruciate form) of the size 3 x ½ cms on left temporals region.

- ii. CLW of 4½ x ½ cm on left occipital region.
- iii. CLW 2 x ½ cm on the base of skull on right side.
- iv. CLW 1½ x ½ cm again on the base of skull right side.

According to PW-13, all the injuries were caused by hard and blunt object, within six hours. He did not specify the nature of injuries, as the patient was referred to GMC for investigation and further management.

24. PW-14, Dr. Poonam Gaonkar, was the Chief Medical Officer at Goa Medical College (GMC), who examined Utkarsh at 10:20 p.m. on the same day and has noticed the following injuries on his person:-

- i. Sutured wound 5 cm in length on the left temporal region.
- ii. Sutured wound 4 cm in length on the left occipital region.
- iii. Sutured wound 3 cm in length on the right base of skull.
- iv. Swelling of the right hand is present.

She claims that the patient was referred to the Neurosurgery Department. Both these Doctors are independent witnesses and the injuries noticed are

commensurate with the evidence of assault as stated by PW-9.

25. PW-5 is a spot panch. Spot panchanama was conducted at about 10:00 p.m. on the same day i.e. on 30.09.2007 alongwith recording of statement of PW-5. The spot panchanama (Exhibit-23) shows blood stains on the grey colour mat, where Utkarsh was lying. There were some coins lying there, smeared with blood. A piece of broken teeth was also found. The samples and the articles were collected. The evidence as to the scene of occurrence panchanama also corroborates with the evidence of PW-9.

26. PW-2 is a pancha witness on the arrest of the respondent. He states that he acted as a panch, when the respondent was arrested. He states that the respondent was wearing a blue colour long sleeved shirt, having checks print design and the said shirt had blood stains on the left side of the pocket and the respondent was wearing a grey colour full pant having company mark "my choice" and there were red colour stains on the left side of the pant. The respondent was wearing black colour chappals, which had blood stains. The pair of chappals were also seized and sealed under his signature and after explaining the ground of arrest, the respondent came to

be arrested. The witness has also identified the relevant articles during the course of his evidence.

27. PW-12, Dr. Silvano Dias Sapeco had done the blood grouping of PW-9 and the respondent. The evidence of PW-12 shows that the blood group of PW-9 is O'Rh positive and that of the respondent is A'Rh positive.

28. PW-18, Jorson D'Costa is yet another medical officer, who is a Neurosurgeon. He examined PW-9 at 20:40 hours on 30.09.2007. He has given the nature of the wounds and has stated that the patient was in coma with glasgow coma scale (GCS) at 7/15. It has come in the evidence of this witness that PW-9 was unconscious even on his discharge with GCS at 12/15. The patient was making some sounds, responding to pain and spontaneously opening his eyes two days prior to his discharge.

29. As per the CFSL report, human blood stains were detected on long sleeved shirt, full pant, iron bar, five one rupee coins and one two rupee coin, piece of mat and torn sleeveless banian (Exhibits 1, 2, 5, 6, 8 and 11). However, the test for grouping was inconclusive. The human 'O' group blood stains

were detected on the short sleeved shirt (Exhibit-10).

30. This takes us to the next piece of evidence, in the form of a confession (albeit retracted) by the respondent.

31. PW-19, Jayatan Tanksali is the Special Judicial Magistrate, who recorded the confessional statement of the respondent, under Section 164 of Cr.P.C. It is the evidence of PW-19 that he had received a letter (Exhibit-65) dated 04.11.2007 for recording the statement of the respondent. He made a request to produce the respondent before him on 18.11.2007 at 10:00 hours. Accordingly, the respondent was produced before him on 18.11.2007 at 11:00 hours, whereupon the respondent was placed in the custody of a peon namely, Surya Silkar attached to Ponda Court. The Police Constable was directed to leave the premises. PW-19 states that the respondent was appraised that he is not bound to make any statement and there is no compulsion to make such statement and if, such statement is made, it would be recorded and would be used against him. Thereafter, the respondent was asked his name, date and reason for his arrest and whether he wants to make any statement, when the respondent agreed to make a statement. PW-19 gave twenty four hours of time to the

respondent, to reflect and directed the respondent to be produced on 20.11.2007 at 17:00 hours. The respondent was produced at 17:45 hours by Ponda police. The police personnel were directed to leave the premises. The respondent was placed in the custody of peon, Surya Silkar. The respondent was told again about the purpose of statement, appraising the respondent that he is not under any compulsion and if, such statement is made, it will be recorded and may be used as evidence against him. Accordingly, PW-19 recorded the statement. The material part of the confession has come in response to question no. 8, which may be reproduced as under:-

Q.8. Narrate the incident that took place between you and said Utkarsh J. Parsekar on 30.09.2007.

Ans: That on 30.09.2007 in between 7:00 p.m. to 8:00 p.m. I had gone to Gym which is located at Tisk Usgaon to meet Utkarsh who is taking care of the said Gym. Thereafter I had asked him about the return of my amount of Rs.12,000/- which he had taken from me about one year back. However, he refused to return my said amount and acted arrogantly. Then there were hot discussions between both of us. At that spur of moment I lost my temper and I assaulted him on his head with an iron bar with three blows.

32. PW-19 has been extensively cross examined, mainly with a view to demonstrate, that the confessional statement is not recorded as required by law and the procedure followed does not exclude the possibility of undue influence or coercion being practiced on the respondent. The learned Sessions Judge after noticing the judgment of the Supreme Court in the case of **Rabindra Kumar Pal @ Dara Singh** (supra) has held that the confession was unworthy of being relied upon.

33. Before proceeding to consider the evidence of PW-19, it would be necessary to notice the decision in the case of **Rabindra Kumar Pal @ Dara Singh** (supra). The Supreme Court has *inter alia* held that while recording the confession, the provisions of Section 164 of Cr.P.C. must be complied with, not only in form, but in essence. There are several requirements which need to be followed and which are set out by the learned Sessions Judge in para 63 of the judgment. The whole object and purpose of adherence to such requirements is to ensure that the confession is voluntary and not tainted with an element of coercion, undue influence or inducement. One of the important requirements is that, during the time when the accused is granted time to reflect, he should be completely out of the police influence, thereby ruling out the possibility of any

undue influence or coercion or an inducement being made or practiced so as to procure the confession. The emphasis is on excluding any extraneous influence on the accused so that he gets an opportunity to reflect on his own and if, he adheres to his decision to make a confession, the same is voluntary. A retracted confession is a weak type of evidence, where the Court would normally look for some corroboration before basing conviction on such confessional statement.

34. With this, let us now consider the evidence of PW-19. PW-19 has admitted during the course of cross examination that although, the respondent was explained about his rights, the reply given by the respondent was not recorded anywhere. He further admits that PSI, Gauns was the Investigating Officer and he had asked the Investigating Officer to produce the respondent as according to this witness, it is the normal practice. He further admitted that he could have called upon the Jailor to secure the respondent directly without the intervention of PSI, Gauns. He also admitted that at the relevant time, the Police Constables, who produced the respondent, both on 18.11.2007 and 20.11.2007 (being P.C., B. Nos. 6012 and 5798) were attached to P.S. Ponda. He further admitted that on the second occasion i.e. when the respondent

was produced on 20.11.2007, the respondent was not appraised about his fundamental rights. He also admitted that the respondent was not informed that he is entitled to and can take legal advice in the matter. It was suggested to this witness that the respondent was first taken to Ponda P.S. where he was briefed by PSI, Gauns and was induced to make a statement on the assurance that the respondent would be released. Obviously, PW-19 claimed that he is not aware whether, the respondent was first taken to the Ponda P.S. and whether, any such assurance was given. The fact however remains that on both occasions, the respondent was produced before PW-19 by the Police Constables attached to P.S. Ponda. It has also come on record that PW-19 had asked the Investigating Officer, PSI, Gauns to produce the respondent when this could have been done directly through the Jailor.

35. It would be significant to note the contents of the letter dated 04.11.2017 (Exhibit-65) written by PSI, Gauns to PW-19, in which PSI Gauns has requested PW-19 to issue the summons "through this police station" in order to serve the Jailor of the Judicial Lockup, Panaji. This could have well been left to the discretion of PW-19. Be that as it may, the fact remains that the respondent was produced before PW-19 by the

Police Constables attached to P.S. Ponda. Thus, the possibility of the respondent being under the influence of the Investigating Officer, cannot be ruled out in this case. As noticed earlier, during the period when the accused is granted time to reflect, he has to be out of the possible police influence. For this reason, we find that no exception can be taken to the finding recorded by the learned Sessions Judge, insofar as refusal to place reliance on the confessional statement of the respondent, which has since been retracted from. We however would hasten to add that this does not impinge upon the veracity of the evidence of PW-9 and for the matter of that PW-7 and PW-10.

36. The nature and the scope of interference available in an appeal against acquittal is subject matter of several decisions of the Supreme Court and the various High Courts. The legal position is too well settled to be restated. However, a useful reference in this regard may be made to the decision of the Supreme Court in the case of **Chandrappa & Others Vs. State of Karnataka, (2007) 4 SCC 415**, in which the following principles have been laid down:-

(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion;

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court;

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

Thus, the Appellate Court can interfere, where the finding of acquittal recorded by the Court below is perverse, meaning thereby, it is against the weight of the evidence on record or can be said to be an impossible view. With respect, we find that the appreciation of evidence of PW-9 alongwith PW-7 and PW-10 and the medical evidence, which substantially corroborates the evidence of PW-9 is not acceptable and in our considered view the same is perverse. At the cost of repetition, it may be mentioned that although there was some transient loss of memory suffered by PW-9, the evidence taken as a whole does not show that there is permanent loss of memory. There are cases where the memory loss may be temporary or transient. In other words, each and every case of loss of memory, cannot be said to be permanent so as to incapacitate the person of remembering the occurrence in the past. There are cases and cases where a person regains his memory, after a transient loss, on account of a trauma. The learned Sessions Judge has also acknowledged in para 55 of the impugned judgment that from the deposition of PW-9 it cannot be said that he was unable to

recollect things which took place on 30.09.2007. Thus, it can be seen that the learned Sessions Judge who had the benefit of recording the evidence of PW-9 and watching his demeanour had also found that there was nothing in the evidence to suggest that PW-9 was unable to recall the incident, on the fateful day of 30.09.2007.

37. While appreciating the evidence of PW-18, who is a Neurosurgeon, the learned Sessions Judge has observed thus:

“It is required to note here that no cross examination of these experts on the point of memory aspect of the victim and therefore there is absolutely no material to show that there is any possibility of losing memory or a particular event by the victim i.e. PW-9 due to the assault or the injury to the head. Admittedly PW-9 was in unconscious state when he was discharged but his Glasgow coma scale had improved and it was 12/15. These experts nowhere stated that there was any loss of memory due to the injuries caused to the victim/PW-9 or any specific loss of memory of particular event. PW-9 has specifically deposed that gradually he started remembering and identifying persons and therefore he became normal. It is no doubt true that some aspects which have been deposed by PW-9 show that he was not fully remembering all the aspects however it is possible

that some minor events he might have forgotten however as far as the assault by the accused on him is concerned, he is very certain and deposed."

(Emphasis supplied)

38. The impugned judgment is not one of clean acquittal. The learned Sessions Judge has acquitted the respondent by extending benefit of doubt. It is now well settled that the doubt to which the accused is entitled to get benefit is not every doubt, but a reasonable doubt. In other words, it is not every doubt and not one of wavering mind, to which the accused is entitled to the benefit of. The extension of benefit of doubt presupposes that two views are equally possible on appreciation of prosecution evidence, one pointing to guilt and the other which may point to innocence. On appreciation of prosecution evidence and in particular that of PW-9, we are clearly of the view that this is not a case in which, such two views are possible. The evidence clearly points to the guilt of the respondent. We thus find that this is a case where the interference of this Court in the order of acquittal is called for.

39. Shri Lotlikar, the learned Senior Counsel for the respondent has made an alternate submission. It is submitted

that in the event, this Court is inclined to reverse the order of acquittal, even then, the respondent cannot be held guilty of the offence under Section 307 of IPC. It is submitted that no intention to cause the death of PW-9 can be attributed to the respondent or gathered from the record. The learned Senior Counsel was at pains to point out that the incident, even as per the say of PW-9, happened on account of some dispute as to repayment of Rs.12,000/- by PW-9 to the respondent. It is submitted that thus, in all probability the incident occurred on the spur of the moment, without any premeditation on the part of the respondent. He therefore submits that at the highest the act would be one which would fall under Section 326 of IPC.

40. The learned Public Prosecutor for the appellant has submitted that the intention has to be gathered from the various circumstances, including the nature of the weapon used and the assault. It is submitted that in this case, there is clear intention to cause death of PW-9 is spelt out and the respondent be convicted for the offence punishable under Section 307 of IPC.

41. We have given our anxious consideration to the submissions as made. The intention in such cases has to be

gathered from various circumstances, including the nature of the weapon, the part of the body chosen for the assault, the manner in which the assault is made, namely, whether it was a single blow or multiple blows and such other circumstances which may be relevant. In the present case, undoubtedly and even going by the evidence of PW-9, the incident appears to have happened on the spur of the moment and there may not be any premeditation as such. However, that cannot rule out intention to cause death of PW-9. This is on account of the fact that the weapon used was an iron rod and PW-9 was assaulted on the back side of the head thrice. Thus, notwithstanding the fact that the incident may have happened on the spur of the moment, we are unable to accept that the offence would fall simpliciter under Section 326 of IPC and not under Section 307 of IPC. We thus find that the acquittal of the respondent has to be set aside and the respondent is liable to be convicted for the offence punishable under Section 307 of IPC.

42. At this stage, the learned Senior Counsel for the respondent submits that, as this Court is inclined to convert the acquittal into conviction, time may be granted to the respondent to make submissions on the point of sentence. He points out that the incident is of the year 2007 and the

respondent is being convicted after a period of 10 years and therefore, it would be appropriate that an opportunity is granted to the respondent to bring on record all the relevant circumstances, which may have a bearing on the question of the sentence.

43. The learned Public Prosecutor for the appellant has no objection for grant of time.

44. Having heard the learned Counsel for the parties, stand over to 25.09.2017 at 4:30 p.m., for hearing the parties on the point of sentence.

45. The respondent shall personally remain present before this Court on 25.09.2017.

PRITHVIRAJ K. CHAVAN, J.

C.V. BHADANG, J.

EV

JUDGMENT CONTINUED:
(26th September, 2017)

46. We have heard Shri Rivankar, the learned Public Prosecutor for the appellant and Shri Lotlikar, the learned Senior Counsel for the respondent.

47. It is submitted by Shri Rivankar, the learned Public Prosecutor that the offence is serious and looking to the nature of the offence and the circumstances in which it is committed, a deterrent punishment is called for.

48. On the contrary, it is submitted by Shri Lotlikar, the learned Senior Counsel for the respondent that the respondent was a friend of the victim (PW-9) and there was no prior enmity or premeditation in commission of the offence. It is submitted that the respondent at the relevant time was young and has no criminal antecedents to his discredit. It is submitted that even going by the evidence of victim (PW-9), the incident happened on the spur of the moment and there was no premeditation on the part of the respondent. It is further submitted that the respondent is a Teacher and the order of conviction has come after about ten years of the occurrence. It is submitted that the respondent has an aged mother dependent on him. It is therefore submitted that this Court may take a lenient view while awarding sentence.

On behalf of the respondent, reliance is placed on several decisions including the decision in the case of *Manjappa Vs. State of Karnataka*, (2007) 6 SCC 231; *Karamjit Singh Vs. State of Punjab*, (2009) 7 SCC 178; *Sumer Singh Vs.*

Surajbhan Singh, (2014) 7 SCC 323; Jage Ram & Others Vs. State of Haryana, (2015) 11 SCC 366; State of Madhya Pradesh Vs. Udaibhan, (2016) 4 SCC 116; State of Himachal Pradesh Vs. Nirmala Devi, (2017) 7 SCC 262 and the decision of this Court in the case of Shripat Barku Bhagat Vs. the State of Maharashtra, 2015 ALL MR (Cri) 4748.

It is pointed out that the respondent has undergone a sentence of about six months as an under trial prisoner.

49. We have given our anxious consideration to the rival circumstances and the submissions made. It is now well settled that while considering the question of sentence, the Court has to weigh conflicting considerations of the larger interest of the society as well as the aggravating and extenuating circumstances, if any, in favour of the accused. There cannot be any manner of dispute with the proposition that the Court is required to award adequate sentence, having regard to the nature and the seriousness of the offence, the circumstances and the manner in which it is committed, the antecedents of the accused and the other relevant considerations. The question obviously depends upon facts and circumstances of each case and there cannot be any straight jacket formula while considering the question of sentence to be awarded.

50. Section 307 of IPC under which the respondent has been found to be guilty, attracts punishment of either description, for a term which may extend to ten years and fine. The cases cited before us show that sentence ranging from two years to five years has been awarded depending upon the facts and circumstances of each case.

51. In the case of **Nirmala Devi** (supra), the sentence of imprisonment of two years for the offence punishable under Section 307 of IPC, awarded by the learned Sessions was restored by the Supreme Court.

52. Insofar as the present case is concerned, admittedly, the respondent was a friend of the victim and had advanced certain amount to PW-9. The incident has happened when there was some altercation, which had ensued between the respondent and PW-9, when the respondent had demanded the amount back. There is no premeditation on the part of the respondent. Admittedly, there are no criminal antecedents to the discredit of the respondent. In such circumstances, in our view a sentence of imprisonment for two years and a fine of Rs.25,000/- would be adequate and would meet the ends of justice.

53. In the result, the following order is passed:

ORDER

(a) The Criminal Appeal is allowed.

(b) The impugned judgment dated 26.08.2014, passed by the learned Sessions Judge, Panaji in Sessions Case No. 1/2008, acquitting the respondent-accused of the offence punishable under Section 307 of IPC, is hereby set aside.

(c) The respondent is convicted for the offence punishable under Section 307 of IPC.

(d) The respondent is sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.25,000/- and in default to suffer simple imprisonment for three months.

(e) The period of detention already undergone, shall be set off under Section 428 of the Code of Criminal Procedure.

(f) The respondent is hereby granted two months time to surrender before the learned Sessions Judge at Panaji.

(g) The learned Sessions Judge at Panaji shall issue a bailable warrant to the respondent, calling upon him to surrender within two months.

(h) In the event, the respondent does not surrender within two months, the learned Sessions Judge shall issue a non bailable warrant against the respondent and shall cause him to be apprehended to serve the remaining part of the sentence.

(i) M.O. Nos. 1 to 5 and 7 to 13 and additional Exhibit Nos. 'M' and 'N', to be destroyed. M.O. No. 6 to be forfeited to the Government after a period of six months, if, there is no further appeal filed.

PRITHVIRAJ K. CHAVAN, J.

C.V. BHADANG, J.