

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 33 OF 2000

- 1) Dattu Rama Theurkar]
age about 50 years,]
Occupation - Agriculturist,]
- 2) Deepak Dattu Theurkar]
age about 27 years,]
Occupation Agriculturist]
both r/o Khopodi,]
Taluka Daund, District Pune]
(at present detained at Yerwada
Central Prison). ..Appellants.
(Orig.Accused No.1 & 2)

Versus

The State of Maharashtra] ..Respondent.
] (Orig.Complainant).

Appearance:

Mr. Swapnil Ovalekar, appointed
Advocate (through : Legal Aid Panel)
for the Appellants.

Mrs.M.H.Mhatre,APPfor Respondent
/State.

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**CORAM : S.C. DHARMADHIKARI AND
SMT. BHARATI H. DANGRE, JJ.**

RESERVED FOR JUDGMENT ON: NOVEMBER 16, 2017.
JUDGMENT PRONOUNCED ON : 15th December, 2017

JUDGMENT (Per SMT.BHARATI H. DANGRE, J.):

1 Being aggrieved by the judgment and order passed by the learned Additional Sessions Judge of Baramati in Sessions Case No.23 of 1993 (State of Maharashtra vs. Dattu Rama Theurkar & Ors.), dated 30th December, 1999, the two Appellants i.e. original accused No. 1 and 2, have preferred the present Appeal challenging their conviction under section 302, read with section 34 of the Indian Penal Code ("I.P.C". for short). The learned Additional Sessions Judge, Baramati, District Pune, convicted the present Appellants for the offences punishable under Sections 302 read with Section 34 of the IPC and sentenced them to suffer imprisonment for life and to pay fine of Rs.500/-, each, in default, to suffer rigorous imprisonment (R.I.) for two months. The learned Additional

Sessions Judge has also convicted the above Appellants for the offences punishable under section 323 read with Section 34 of the IPC and sentenced them to suffer R.I. for two months and to pay fine of Rs.200/-, each in default, to suffer R.I. for one month. The substantive sentences of accused / appellants were directed to be run concurrently. By the said judgment, the accused no.3- Kamal Dattu Theurkar came to be acquitted since no clinching evidence to rope the said accused was brought on record by the prosecution.

2 The prosecution case needs a narration in nutshell:

3 For the sake of convenience, the appellants hereinafter, would be referred to as accused No.1 and accused No.2.

Deceased Bhimrao Dnyandeo Shitole was the husband of Savita Shitole (PW 2) who were residing with their children by the side of house of the accused persons. The accused persons were cultivating the field of Shri

Punekar which is situated behind the house of Savita Shitole (PW 2), on crop share basis. Prior to the incident there was some quarrel among the accused persons, Bhimrao and PW 2 Savita on account of canal water. PW No.2 Savita had erected thorny fencing behind her house so as to prevent the entry of hens in the land of Shri Puneekar. Accused No.1 Dattu removed the fencing when PW 2 Savita enquired as to why he removed the fencing. On this accused No.1 was annoyed. It was on 8th December, 1992. At that time deceased was not present at home. He had gone to the field for plucking flowers. Accused No.1 Dattu was sowing in the field of Shri Puneekar. He went near the house of PW 2 Savita and started beating her. Accused No.2 and 3 also joined accused No.1. All of them started beating PW 2 Savita by fist and kick blows. In the meantime, Bhimrao came there. Accused No. 1 and 2 started assaulting Bhimrao by means of sticks and axe on his head. PW 1 Ramchandra witnessed the quarrel between accused and Bhimrao. He went to rescue

Bhimrao. At that time, accused no.1 Dattu gave blow of stick on the head of Ramchandra and accused No.2 gave blow of axe on the head of PW 1 Ramchandra. Ramchandra sustained bleeding injuries. He fell down. PW 3 Vimal Mali, PW 4 Balasaheb Shitole and PW 6 Vilas Shitole came to help of deceased Bhimrao. PW 4 Balasaheb and PW 1 Ramchandra took Bhimrao to Yavat.

4 From Police Station Yavat, Pune (Rural) injured Bhimrao was referred for medical examination and treatment at Yavat. Thereafter, he was shifted to Rubi Hospital, Pune. PW No.1 Ramchandra Ganpat Shitole lodged his complaint at Kedgaon Police Outpost which was registered under Sections 143, 148, 302 read with 149, 324 read with sec. 149 of I.P.C. by PW 8 Balkrishna Pawar, Police Head Constable, which is at Exh.33. The investigation was conducted by PW 7 P.S.I. Shri. Suresh Bhosale. In the meantime on 8th December, 1992 at about 6:00 p.m. Bhimrao Shitole died in Rubi Hospital, Pune.

Police drawn the inquest panchnama Exh.26. Dead body of Bhimrao was sent for postmortem examination and report. Medical Officer of Sassoon Hospital, Pune carried postmortem examination and report is at Exh.56. The Medical Officer opined that death of Bhimrao was due to head injury. During his investigation, PSI PW No. 7 Suresh Bhosale drew spot panchnama (Exh.40). He seized the blood stained articles i.e. axe, stone, stick and pieces of bangles from the spot of incident. He also collected blood stained earth and sample earth from the spot. He arrested the accused persons and seized the blood stained clothes on their person under a seizure panchnama Exhs. 44 and 41. He also seized the blood stained clothes from the person of Ramchandra (PW No.1) vide Exh.42. The blood samples of the accused and seized articles were sent to Chemical Analyzer for analysis and reports. He recorded statements of witnesses and after completion of investigation charge-sheet was filed against the accused persons in the Court of Judicial Magistrate, First Class,

Daund.

5 The offence under Section 302 of the I.P.C. being exclusively triable by the Court of Session, the learned J.M.F.C. Daund committed the case to the Court of Session at Baramati. The learned Trial Judge framed charge against the accused persons vide Exh. 16. The charge was read over and explained to the accused persons in vernacular language. The accused persons pleaded not guilty and claimed to be tried. The prosecution examined eight witnesses to prove the guilt of the accused persons. The accused persons have not examined any witness in defence. The learned trial Judge scrutinized the said evidence and came to the conclusion that the prosecution has established guilt of accused No.1 and 2. He therefore convicted and sentenced accused No.1 and 2 as mentioned earlier. However, learned trial Judge acquitted accused No.3 Kamal Dattu Theurkar as the prosecution failed to prove any offence against the said accused.

6 The learned Additional Sessions Judge on careful scrutiny of the evidence and the material brought on behalf of the prosecution arrived at a conclusion that on the basis of evidence of prosecution witnesses No. 1,2 and 6, it is established that accused no.1 Dattu and accused No.2 Deepak had assaulted the deceased Bhimrao on his head by means of stick and axe and caused his death. As regards accused No.3, the learned Addl. Sessions Judge concluded that no reliable evidence has been brought on record by the prosecution to link her participation in the crime. Similarly, the Court below concluded that there is no reliable evidence that the other two juvenile offenders have attacked Bhimrao and on the basis of such conclusion the learned Additional Sessions Judge concluded that the charge of unlawful assembly fails but arrived at a conclusion that the prosecution has also established that accused No. 1 and 2 have caused hurt to PW 1 Ramchandra Shitole by means of stick and axe and they are guilty of an offence punishable under Section 324 of

IPC. Resultantly, the learned Additional Sessions Judge convicted accused No. 1 and 2 for the offence under Section 302 read with Section 34 and 323 read with Section 34 of the IPC and sentenced them to suffer imprisonment for life and to pay a fine of Rs.500/-, each, in default, to suffer RI for two months. It is this judgment of the learned Additional Sessions Judge which is assailed by the appellants in the present appeal.

7 As far as appellant No.1 is concerned who alleged to have assaulted the deceased and PW No.1 by means of stick has been released on bail by the order of this Court on 24th April, 2000. By the same order, this Court has refused to release appellant No.2 on bail. However, he was released on parole in the year 2001, while he was undergoing jail sentence.

8 We have heard Shri Swapnil Ovalekar, learned Counsel, appointed through Legal Aid Panel, to represent the appellants and Mrs. M.H.Mhatre, learned A.P.P. for the

State. Shri Swapnil Ovalekar would argue that the learned Additional Sessions Judge has erred in convicting the appellants and according to him the prosecution has failed to establish the guilt of the appellants. He would argue that the charge levelled against the accused persons should be of a specific nature so as to enable him to know as to what allegations he is supposed to meet. He would argue that the charge framed against both the appellants in the present case fell short of the same and he invited our attention to the charge framed against the appellants by the learned Additional Sessions Judge on 26th March, 1997 and would argue that perusal of the said document would reveal that the charge framed against the appellants is vague and it did not attribute specific act and merely charges the appellants collectively of the offence punishable under Section 143 and 148 of IPC. He would also argue that as regards charge under Section 302 IPC, the appellants are charged of forming an unlawful assembly in prosecution of the common object and thereby

attacking and giving blows to Bhimrao with axe, stones and sticks and thereby murdering him intentionally or knowingly and thereby committing an offence under Section 302 of IPC. The learned counsel would argue that the charge did not specifically mention as to what specific act was attributed to the individual appellant. The learned Counsel Shri Ovalekar would further extensively argue that the postmortem on the body of deceased was carried out by one Dr. Khan who has opined that death of deceased was due to head injury. The learned Counsel for the appellants would argue that the said witness has not been examined on behalf of the prosecution and therefore an adverse inference has to be drawn and he would also argue that in the absence of he being examined as witness that the document in the form of postmortem report at Exh.56 could not have been exhibited. He would further argue that the learned Additional Sessions Judge has failed to take into consideration the contradictions in the statement of witnesses and specifically as to which weapon was used by

which accused No. 1 and 2 for causing death of deceased and for assaulting the prosecution witness no.1 who suffered a grievous hurt. He would also argue that the witnesses relied upon by the prosecution are interested witnesses as they belong to the family of the deceased and their evidence coupled with the discrepancies brought on record do not inspire any confidence and needs to be disregarded.

9 As against this argument, Mrs. Mhatre, learned APP would argue that the prosecution has established its case beyond reasonable doubt and has proved guilt of the accused persons by leading cogent and reliable evidence, specifically, in the form of six eye-witnesses. Mrs. Mhatre would argue that only because the witnesses are related witnesses, their evidence cannot be doubted when they happened to be the natural witnesses who were present in the house when the incident had occurred. She would also submit that non-examination of the doctor who conducted

the postmortem examination, in no way creates any doubt about the prosecution case. She invited our attention to Exh.24 which is an application filed by the prosecution for production of documents during the trial and calling upon the defence to admit the genuineness of the same as per Section 294 of the Code of Criminal Procedure. She would contend on the said document being exhibited, the accused has admitted the document at Serial Nos. 1, 4, 5, 6,8 and 15 and had given no objection to exhibit the said document and to read the same in evidence. Further, she also invited our attention to that part of the document where the accused had admitted the postmortem notes which document is at Serial No.7 and have endorsed that they have no objection to read the document in evidence and the said noting is signed by the Advocate for the accused on 29th September, 1999. Thus, according to the learned APP when the genuineness of any document is not disputed, there is no legal impediment in reading the document in evidence during the trial without proof of the

signature of the person to whom it purports to be signed. According to the learned APP, object of Section 294 of the Code of Criminal Procedure ("Cr.P.C" for short), is to avoid inordinate delay and to enable the accused to waive the said right and save the time by admitting the documents. As regards framing of charge, the learned APP would argue that there is no discrepancy in the charge framed against the appellant and he was distinctly made aware about the charge levelled against him and since Section 149 of the I.P.C. has been invoked and applied, there is no burden on the prosecution to attribute an overt act to a particular appellant when the prosecution has sufficiently proved the presence of the accused on the spot of the incident. Conclusively the learned APP would urge to uphold the judgment of the learned Additional Sessions Judge and dismiss the present appeal.

10 We have considered the oral and documentary evidence tendered by the prosecution. The incident

referred to in the prosecution case is dated 8th December, 1992 and the place of incidence is an open space near the house of the deceased. The case of the prosecution is that on the day of the incident when the deceased had gone to his field for plucking the flowers, accused no.1 Dattu removed the thorny fencing between the house of the deceased and the field of one Shri Punekar who was ploughing the field of Shri Punekar. The wife of the deceased Savita raised a grievance about removal of fencing with accused no.1 Dattu at around 10:00 a.m. on the date of the incident, at that time accused No.1 Dattu started assaulting her and even his wife accused No.3 and juvenile accused came there and assaulted Savita by slaps, fists and kicks causing injury to her hand. When this act was on going, deceased Bhimrao arrived at the spot and he was assaulted by accused No.1 by means of stick on his head and by an axe by accused No.2 Deepak. At the same time, PW No.1 Ramchandra arrived at the spot for rescuing Bhimrao but he was also assaulted. The other witnesses

namely, Balasaheb Shitole, PW No.4, the brother of the deceased, PW No. 6 Vilas Shitole, PW No.3 Vimlabai Shitole arrived at the spot. These witnesses have entered the witness box narrating the incident and the chronology of the events in which it occurred. PW No.2 Smt. Savita wife of the deceased entered the witness box and deposed that accused no.1 gave a blow of stick on the head of her husband whereas accused No.2 Deepak gave blows of an axe on the head of her husband. She has also deposed that accused no.1 gave a blow of an axe on the head of PW No.1 Ramchandra and accused No.2 gave blow of stick on the head and shoulder of PW No.1 Ramchandra. Said witness has been cross-examined and confronted with statement given to the police where she had disclosed that accused No.1 had inflicted a blow of an axe on the head of Ramchandra and accused No.2 was having stick in his hand by which he assaulted Ramchandra on his head and shoulder. Perusal of the statement before the police reveals that there are omissions in regard to the weapon

and part of the body. However, there is no contradiction in the testimony of this witness as regards the act of assault on her husband at the hands of accused No. 1 and 2.

11 PW No.1 who is also the complainant and injured victim had deposed before the trial Court that prior to the incident there was trifle quarrel between the accused persons and the deceased on account of canal water and hens. He has deposed that on the day of the incident when he was going towards his house, he saw fight between the accused persons and Bhimrao and he stated that there was an axe in the hand of accused No.2 Deepak and stick in the hand of Dattu and they assaulted the deceased by means of weapons in their hands and he intervened and attempted to separate the accused persons and the deceased when he was also beaten by them. PW No.1 has deposed that accused No.1 Dattu gave blow of stick on his shoulder and accused No.2 Deepak gave blow of an axe on his head and he was thereafter brought to the police station and thereafter taken to Yavat Government Medical College. In

cross-examination when he was confronted with his statement given to the police wherein he had stated that there was stick in the hands of accused No.1 Dattu. He, however, admits that at that time he was in confused state of mind being injured and therefore he was not able to understand. PW No.3 Smt. Vimlabai who was staying at the distance of around 40 feet from the house of accused persons, witnessed the quarrel going on near the house of the deceased person and she has deposed that accused No.1 Dattu was having a stick in his hand and Deepak accused No.2 was having axe in his hand and that accused No.2 Deepak gave a blow of axe on the head of Bhimrao and Dattu gave a blow of stick on the neck of Bhimrao.

12 PW 4 Balasaheb Shitole who is the cousin brother of deceased has deposed that he was standing at the bus stand which is 200 to 250 feet from the house of deceased Bhimrao when he heard noise and he could see that accused No.1 Dattu and accused No.2, his son and his

wife were assaulting Bhimrao. He deposed that accused No.1 Dattu was having stick in his hand and Deepak was having axe in his hand and they inflicted blows by the said weapons to the deceased who fell down and PW No.1 Ramchandra tried to rescue the deceased who was also assaulted by Dattu and Deepak. This witness has been extensively cross-examined and in cross-examination he was confronted with the statement given to the police where he had disclosed that accused No.2 Deepak gave axe blow on the head of Bhimrao but this was not mentioned in the statement before the police. However, his testimony unequivocally supports the case of the prosecution to the extent that accused Nos. 1 and 2 gave blows on the head of Bhimrao and resultantly he fell down. The prosecution case that accused No.1 Dattu and accused No.2 Deepak have caused death of Bhimrao and that they were armed with weapons as stick and axe and they used the weapons to cause death of the deceased is not shattered anywhere. Evidence of this witness is corroborated by the postmortem

report which opines the cause of death due to head injury. The postmortem report in column No. 19 refers to the following injuries :-

“1 Hematoma left parietal and occipital region measuring 5x3½ “ corresponding to external injury No.1.

2 Hematoma left occipital region 2x1” corresponding to external injury No.2.

Crack fracture left parietal bone starting from coronal suture and 3” lateral to mid-line extending vertically backwards upwards for 4”. This is corresponding to external injury No.1.

1) Extradural haemorrhagic left parietal region 4 x 3”.

2) Subdural and sub arachnoid haemorrhage left parietal region 2½ x 1½ “.

3) Brain stem haemorrhage present.

Contusion left parietal lobe 1½ x 1” Brain 125 grams congestion and oedema present. These injuries correspond to external injury No.1.”

The opinion expressed by the doctor who carried the postmortem report reads as below :-

“External injury no.1 and corresponding internal injuries are sufficient to cause

death in ordinary course of nature. In my opinion, death was due to head injury. In my opinion, death was due to head injury”.

13 After framing of the said charge, the accused were specifically made aware of the charges to the accused. Undisputedly, the purpose of framing of charges is that the accused should be informed with certainty and accuracy of the charge brought against him and the accused is entitled to know the scope and particulars in detail. The charge has to be precise and as to contain such particulars as to the time and place of alleged offence and the person against whom it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged. One of the requirements of law is that when the nature of the case is such that the particulars mentioned in the charge do not give the accused sufficient notice of the matter with which he is charged, the charge should contain such particulars of the manner in which alleged offence was committed as would

be sufficient for that purpose. For example, if “A” is accused of the murder of “B” at a given time and place, the charge need not state the manner in which “A” murdered “B”. If, therefore, the necessary information is conveyed to him in other ways and there is no prejudice, the framing of the charge is not invalidated. The essential part of this part of law is not any technical formula of words but the reality, whether the matter was explained to the accused and whether he understood what he was being tried for. The appellant never raised any objection about the charge being improperly framed or any prejudice to them before the Trial Court and it is only for the first time the said point is being argued. The Hon'ble Apex Court in the case of **Chandra Prakash Vs. State of Rajasthan reported in (2014) 8 SCC 340** has summarized the law in relation to the non framing of a specific charge. The Hon'ble Apex Court in paragraphs 68,69 and 70 observed thus :-

“68. The next aspect which needs to be adverted to is non-framing of specific charge. On a perusal of the record, we find

that the learned trial Judge has framed the charges specifically by putting the charges to the accused. The purpose of framing of charges is that the accused should be informed with certainty and accuracy of the charge brought against him. There should not be vagueness. The accused must know the scope and particulars in detail. In this context, we may refer to decision in ***Santosh Kumari v. State of Jammu and Kashmir and Ors.*** : (2011) 9 SCC 234, wherein it has been held as follows:

17. Like all procedural laws, the Code of Criminal Procedure is devised to subserve the ends of justice and not to frustrate them by mere technicalities. It regards some of its provisions as vital but others not, and a breach of the latter is a curable irregularity unless the accused is prejudiced thereby. It places errors in the charge, or even a total absence of a charge in the curable class. That is why we have provisions like Sections [215](#) and [464](#) in the Code of Criminal Procedure, 1973.

18. The object of the charge is to give the accused notice of the matter he is charged with and does not touch jurisdiction. If, therefore, the necessary information is conveyed to him in other ways and there is no prejudice, the framing of the charge is not invalidated. The essential part of this part of law is not any technical formula of words but the reality, whether the matter was explained to the accused and whether he understood what he was being tried for.

Sections [34](#), [114](#) and [149](#) Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; and as explained by a five-Judge Constitution Bench of this Court in *Willie (William) Slaney v. State of M.P.* SCR at p. 1189, the charge is a rolled-up one involving the direct liability and the constructive liability without specifying who are directly liable and who are sought to be made constructively liable.”

69. In ***K. Prema S. Rao v. Yadla Srinivasa Rao*** (2003) 1 SCC 217, this Court opined that though the charge specifically Under Section [306](#) Indian Penal Code was not framed, yet all the ingredients constituting the offence were mentioned in the statement of charges. In that context, a three-Judge Bench of this Court ruled that mere omission or defect in framing of charge does not disable the criminal court from convicting the accused for the offence which is found to have been proved on the evidence on record. The said principle has been reiterated in ***Dalbir Singh v. State of U.P.*** : (2004) 5 SCC 334, ***State of U.P. v. Paras Nath Singh*** (2009) 6 SCC 372 and ***Annareddy Sambasiva Reddy v. State of A.P.*** (2009) 12 SCC 546.

70. In the case at hand, as has been stated earlier, the charges have been framed and we do not find any vagueness.

That apart, neither any prejudice has been caused nor has there been any failure of justice. Thus, the submission of Mr. Jain in this regard leaves us unimpressed.”

14 In the light of the aforesaid decision and settled position of law, we do not find that the charge that has been framed against the present appellants are vague nor any prejudice has been caused to the accused nor the counsel has been able to invite our attention for any failure of justice. Thus, we find that the objection raised by the appellants-accused is not tenable.

In the case at hand, as has been stated earlier, the charges have been framed and we do not find any vagueness. That apart, neither any prejudice has been caused nor has there been any failure of justice. Thus, the submission of Mr. Swapnil Ovalekar, learned counsel for the appellants, in this regard leaves us unimpressed.

15 The prosecution has thus established the occurrence of the incident which had taken place in the open space between house of the accused persons and deceased Bhimrao. A spot panchnama exhibited as “Exh.40” mentions about existence of blood stains on the stones near the Ota of house of accused No.1 Dattu. The case of the prosecution is that there was a verbal altercations initially on account of thorny fencing being removed by the accused persons which gradually converted itself into an assault on the deceased person and PW No.1 by the accused No.1 and 2 and deceased Bhimrao sustained injuries on his head and the blood was also found on the stone near the ota. There is slight variance in the version of PW No.2 as regards the use of weapon by accused No.1 and accused No.2 while assaulting PW No.1 Ramchandra and the version of PW No.1 Ramchandra as well as PW No.6 Vilas Shitole. According to PW No.2, accused No.2 Deepak gave a stick blow to Ramchandra and accused No.1 Dattu gave axe blow to him whereas as per

version of PW No.1 Ramchandra and PW No.6 Vilas, accused No.1 Dattu used stick and accused No.2 Deepak used axe while assaulting injured Ramchandra. However, this discrepancy cannot be said to be detrimental to the case of the prosecution as her version is consistent that PW No.1 was assaulted by Accused No. 1 and 2 and the discrepancies only in regard to the weapons which these two accused were carrying. Mere discrepancy about the use of weapon in her statement before the police is not sufficient to disbelieve this witness as regards the assault by accused No. 1 and 2 on PW No.1 Ramchandra. As regards the death of the deceased the testimony of the witnesses corroborate each other and nothing has been brought on record to discredit the version of the eye-witnesses. All the said witnesses are natural witnesses to the incident as PW No.2 is the wife of the deceased and the other witnesses who were present on the spot of the incident in the course of their normal routine, either going to the field or returning from the field. It is this case of the

prosecution which is believed by the learned Additional Sessions Judge in convicting the appellants, testimony of the said witnesses have been heavily relied upon. The learned Counsel for the appellants is not successful in disreputing the said version of the prosecution case and the incident.

16 The learned Counsel for the appellants had vehemently argued that the conviction is unsustainable in view of the fact the postmortem report itself is not proved since the doctor who carried the postmortem did not enter the witness box. We have an anxious consideration to the said arguments advanced on behalf of the appellants, it would be helpful to refer to Section 294 of the Cr.P.C. which reads as follows :-

Section 294 of Cr.P.C.:

- (1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the

accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document. (2) The list of documents shall be in such form as may be prescribed by the State Government. (8) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed;

The objection of Section 294 is to dispense with avoidable waste of time and facilitate removal of such obstruction in the speedy trial. It requires prosecution of the accused to admit or deny the genuineness of documents sought to be relied against him in the writing. On his admitting or not disputing its genuineness or on not the Court is authorized to dispense with formal proof thereof and in fact after indication of no dispute as to genuineness of this document proof of document is

reduced to a sheer into formality. Perusal of Section 294 of Cr.P.C. would also reveal that the said Section is also dispensed with number of certain documents and it enumerates category of documents proof of which is not necessary unless the Court thinks it necessary. Section 294 makes a dispensation of formal proof dependent on the accused or the prosecution, not disputing genuineness sought to be used against them. Such dispensation is not restricted in class or category of documents as under Section 293 in which ordinarily an authenticity is dependent more on the mechanical process involved than on the knowledge, observation or skill of the other rendering oral evidence etc.

17 The question involved is whether the postmortem report would also to be covered within the purview of Section 294 of the Code like any other document. The learned Counsel for the appellants do not dispute Exh.24 and the endorsement made on the said

document which is an application on behalf of the prosecution to admit genuineness of the documents as per Section 294 of the Cr.P.C. and the fact that the advocate for the accused has admitted the postmortem notes dated 9th December, 1992 i.e. serial No.7 and has given his no objection to read said document in evidence. In these circumstances, we may advert to the main question raised by the appellants while arguing the appeal as to whether a document in the form of postmortem notes which have been tendered by the prosecution have been admitted by the accused on an application to admit documents, in the absence of the author of the document entered into witness box at the time of trial and exhibiting the said postmortem note. A full Bench of our Court had an occasion to deal with the situation interpretation of Section 294 of the Code and a similar situation where the appellant was convicted for offence of murder under Section 302 of the IPC and the Trial Court had relied upon amongst other the postmortem notes but the doctor who

held the postmortem and prepared notes was not examined at the trial and the defence lawyer had communicated that he was not disputing the genuineness thereof in response to a query under sub-section (2) of Section 294 of the Code. In the facts and circumstances that the trial Court dispensed with its factual proof and read the report in evidence. During the course of hearing of the matter in an appeal before the Division Bench the counsel for the defence contended that report cannot be relied upon without evidence of the doctor and Section 294 is not intended to dispensed with proof of such documents. Reliance was placed on the judgment of this Court in the case of **Ganpat Raoji v. State of Maharashtra (1980) Mh.L.J. 60** and two other judgments of Gujarat High Court and Delhi High Court relied in the case of Ganpat Raoji's case since the learned Judge of the Division Bench could not agree with the ratio of Ganpat Raoji's case, the matter was referred to the Full Bench. Before the Full Bench three important points were

raised in support of the contention of the defence namely;
(1) Indicating no dispute with the genuineness of the documents means at the most admission of the signature of the author and not the truthfulness of the contents. (2) Authority to “read in evidence” contemplated under Sub-section (5) of Section 294 does not amount to authority to use the same in evidence at the trial and (3) that without the doctor's substantive evidence the postmortem prepared by the doctor cannot be used in evidence, it having no evidentiary value.

The Full Bench through the Hon'ble Chief Justice

V.S. Deshpande observed thus :

“9. Now the post-mortem report is also a document as any other document. Primary evidence of such a document is the report itself. It is a contemporaneous record prepared in the prescribed form, of what the doctor has noticed in the course of post-mortem of the dead body, while investigating the cause of death. It being relevant, it can be proved by producing the same. But production is only a step towards proof of it. It can be received in evidence only on the establishment of its authenticity by the mode of its proof as provided under s. 67 to 71 of

the Evidence Act. Section 294(7) of the Code enables the accused also, to waive this mode of proof by admitting it or raising no dispute as to its genuineness when called upon to do under Sub-section (7). Sub-section (5) enables the Court to read it in evidence without requiring the same to be proved in accordance with the Evidence Act. There is nothing in Section 294 to justify exclusion of It, from the purview of "documents" covered thereby. The mode of proof of it also is liable to be waived as of any other document.

10. *The contention of Mr. Phadkar that the word "genuineness" in Sub-section (3) of Section 294 of the Code contemplates only genuineness of the signature and not that of the document or contents thereof is devoid of any substance. Such a contention ignores the implications of the proof by the mode presented under Section 67 to 71 of the Evidence Act. Section 67 of the Evidence Act is aimed at ensuring the authenticity of the document. The words "without proof of the signature ..." in Sub-section (5) of Section 294 of the Code are obviously intended to dispense with such proof without the compliance of which ordinarily the documents cannot be relied on as authentic and genuine.*

12. *Mr. Phadkar then contends that without the substantive evidence of the doctor a corroborative piece of evidence such as that of the post-mortem report prepared by him earlier, cannot be read in evidence.*

Broadly speaking, this statement of law by itself is unexceptional. This is precisely what appears to have mainly weighed with the learned Judges deciding Ganpat Raoji's case, and the cases of two other High Courts relied on in Ganpat Raoji's case holding Section 294 of the Code to be inapplicable to post-mortem, reports, but restricting its scope to the documents admitting only of formal proof.

13. This statement of law, however, combines two different rules of evidence having different implications. It is one thing to speak of any piece of evidence as substantive or corroborative in terms of its probative value and quite different thing to speak of its being no evidence for want of proof of its authenticity. These are two different rules of evidence having different incidences. The evidence of post-mortem notes according to one rule can have merely corroborative value in relation to the substantive evidence of its author, the doctor, at the trial. The doctor's evidence gets strength from it because it is contemporaneously made by him at the time of performing the post-mortem. It contains the details of injuries noticed by him and his opinion as to the cause of death. Postmortem notes thus are in the nature of previous statement within its conception under Section 157 of the Evidence Act. The fact however, that it lacks more details or is merely corroborative does not make it any the less relevant piece of evidence. These factors may have a bearing on its probative

value. The adjectives "corroborative" and "substantive" are relative depending on the context and set of facts in which these words are used. Ordinarily, the entire medical evidence i.e. the doctor's oral evidence and his reports, happens to be corroborative as against the substantive eye-witness account of any assault. Thus, even the doctor's oral evidence itself is corroborative in nature. Authenticity of a document which is determinative of its reception in evidence is altogether a different factor unconnected with its probative value, and its being corroborative or substantive.

14. The probative value of any documentary evidence also has no direct relevance to reception thereof in evidence. As seen earlier, no document with alt its probative value can be received in evidence unless its authenticity is first established by the mode of proof prescribed under Sections 67 to 71 of the Evidence Act. The mode of proof, however, is liable to be waived in! civil cases. Now, Section 294 is purposefully introduced in the present Code to facilitate such waiver even in criminal cases. It has the virtual effect of making Sections 67 to 71 of the Evidence Act inapplicable. The author's evidence thus is now dispensable thereunder. Report becomes both relevant and authentic evidence of its contents without the proof of its authenticity by the author or anybody else, by force of Section 294 on its conditions being complied with. Section 510 of the repealed Code (corresponding to Section 293 of the present Code) already contemplates

dispensation of the proof of some other documents authenticity of which depends not so much on oral evidence of the author as on the efficacy of the mechanical process through which the concerned data is collected. Section 294 of the Code makes the same rule applicable when the authenticity of the document is not disputed. The documents covered by both these sections stand on par and are receivable in evidence without anything more. The post-mortem report also is receivable in evidence without the doctor's evidence and can still furnish corroborative evidence to support other evidence in the case. With respect to the learned Judges, disregarding the different identity of these two different rules and mixing them together has led to their wrong conclusion.

15. Ganpat Raoji's case as also the Gujarat High Court case were cases in which failure to examine the doctor was found to have resulted in a miscarriage of justice. In some such cases location of injuries, extent of the depth and width and the details as to the nature thereof and possibility of their being caused differently from the one sought to be established, are all very important factors and the doctor's answers to some pertinent questions in evidence can make a difference to the result of the case. But this cannot be true of each and every case. Whether the doctor's evidence is necessary or not depends on facts and facts of each case, the prosecutor, the accused and his lawyer being the best judges to decide it as also the points on which each one of them should

concentrate their attack. Their reaction to the query under Sub-section (7) ordinarily should be decisive. Raising no dispute to the genuineness of any document implies their considered decision of further details being irrelevant. The Court has ordinarily to accept this decision and refrain from entering into the arena itself unless miscarriage of justice is apprehended on demonstrable grounds. The section also invests the Court with a discretion to examine the doctor or any such witness in that case. The section itself thus furnishes in-built protections to the defence or the prosecutor against possible lapses. It was open to the Court in its such discretion to examine the doctor or any other witness when it apprehended miscarriage of justice. Mere such apprehension cannot justify interpreting the section differently and hold it inapplicable to post-mortem reports in, the face of its plain language indicating to the contrary.

18. We accordingly hold that Sub-section (5) of Section 294 of the Code covers post-mortem notes and every other document of which genuineness is not disputed. Thus such documents, can be read in evidence as genuine without the formal proof. In our view, Ganpat Raoji's case is not correctly decided."

The Full Bench of this Court thus held that Section 294 of the Code dispensed with proof of every

document when it become formal on its genuineness and it does not contemplate existence of any class of document as such requiring formal proof.

18 Admittedly, the Counsel for the appellant did not dispute the existence of the postmortem notes. However, he is not right in his contention specifically when the postmortem notes clearly mention that all the injuries mentioned in Column No.17 are antemortem in nature. We are therefore unable to accept the argument advanced on behalf of the appellant that the postmortem report cannot be used to the detriment of the appellants specifically that the doctor making the postmortem has not been examined before the Trial Court. A careful perusal of the postmortem report would reveal that injury no.1 on the forehead of the deceased Bhimrao had resulted in fracture of skull. Such an injury is not possible by any fault and even the prosecution has proved the existence of blood stains of stones and Ota near the house of accused No.1 Dattu. There is no evidence brought on

record to suggest that Bhimrao or deceased or PW 1 Ramchandra who was injured was having any weapon such stick or axe with them. On the contrary, the evidence brought on record by the prosecution establish that accused No.2 Deepak was armed with an axe and accused No.1 was possessing stick in his hand and that they were armed with weapons and prepared to assault the deceased and even assaulted PW No.1 who intervened and tried to prevent the assault. The prosecution also relies on the spot panchnama Exh.40 which is proved by PW No.7 where the blood stains "X" and the stick were lying and which were seized on 9/12/1992. The articles namely "X" and the weapon stick which was sent for chemical analysis shows that they were stained with blood which was found to be human.

19 The next aspect which needs to be adverted and which is extensively argued by the learned counsel for the appellants is the non framing of the specific charge and his contention that the charge framed against the

appellants/accused did not give the details as to the use of particular weapon by a particular accused. In detail, we have perused the charge framed against the appellants-accused and on perusal of the record it is found that the trial Judge has framed the charge which reads as below :-

That you accused Nos.1 to 3 along with Juvenile delinquents by name Ravindra Dattu Theurkar and Mahendra Dattu Theurkar, on or about 8th December, 1992 at about 10.00 A.M. near the house of Bhimrao Dnyandeo Shitole at Khopodi, Taluka, Daund, District Pune were the members of an unlawful assembly the common object of which was to commit murder of Bhimrao Dnyandeo Shitole and thereby committed an offence punishable under section 143 of the Indian Penal Code and within my cognizance.

AND

That you accused Nos.1 to 3 along with Juvenile delinquents by name Ravindra Dattu Theurkar and Mahendra Dattu Theurkar on the aforesaid date, time and place and during the course of same transaction were the members of an unlawful assembly and did, in prosecution of the common object of such assembly, attacked and assaulted the complainant Ramchandra Ganpat Shitole, Bhimrao Shitole, Savita Shitole with stones, axe and sticks and committed murder and caused grievous injuries thus committed the

offence of rioting and at time were armed with deadly weapons to commit the offence of serious nature and thereby committed an offence punishable under section 148 of the Indian Penal Code and within my cognizance.

AND

That you accused Nos.1 to 3 along with Juvenile delinquents by name Ravindra Dattu Rama Theurkar and Mahendra Dattu Theurkar, on the aforesaid date, time and place and during the course of same transaction were the members of an unlawful assembly, in prosecution of the common object did attack and gave blows to Bhimrao Dnyandeo Shitole with axe, stones and sticks to Bhimrao Shitole and thereby did commit murder by intentionally or knowingly causing the death of Bhimrao Shitole and thereby committed an offence punishable under section 302 of the Indian Penal Code read with section 149 of the Indian Penal Code and within my cognizance.

AND

That you accused Nos.1 to 3 along with Juvenile delinquents by name Ravindra Dattu Rama Theurkar and Mahendra Dattu Theurkar voluntarily caused hurts to complainant Ramchandra Ganpat Shitole with stones, axe and sticks on the aforesaid time, place and during the course of same transaction and thereby committed an offence punishable under section 324 of the Indian Penal Code read with section 149 of the Indian Penal Code and within my cognizance.

20 Taking overall view of the case of the prosecution and the manner in which the prosecution has unfolded its case before the Trial Court, we have noted that the prosecution witnesses have spoken about the occurrence of the incident from its inception and their version have been found to be consistent, truthful and reliable despite minor discrepancies or variations on certain insignificant matters and not relevant on vital aspects and the said version of the prosecution witnesses inspires complete confidence. The prosecution with the aid of these witnesses has been able to prove its case beyond reasonable doubt and we do not find sufficient justification in assailing the said judgment and there is no legal and substantive ground raised by the learned counsel for the appellants which would prompt us to set aside conviction recorded by the trial Court. Neither analysis or sifting of evidence by the court below or its assessment would permit us to arrive at a conclusion to

conclude that inference of guilt recorded by the trial Court is erroneous. We do not find any infirmity or any error of law in the judgment of the trial Court when it is based on cogent and reliable evidence adduced by the prosecution.

21 In such circumstances, we affirm the judgment and order passed by the learned Additional Sessions Judge of Baramati in Sessions Case No. 23 of 1993 dated 30th December, 1999 which is based on the footing that the prosecution has proved its case by adducing sufficient evidence to the effect that it was accused No.1 and 2 who had caused death of deceased Bhimrao. Learned Additional Sessions Judge has rightly appreciated the evidence adduced on behalf of the prosecution and has rightly convicted accused No. 1 and 2 of the offence punishable under Section 302, 323 read with section 34 of the IPC. We do not find any infirmity or error in the judgment delivered by the learned Additional Sessions Judge. In the result, the appeal is dismissed.

22 In view of the confirmation of the judgment and order of the learned Additional Sessions Judge, Baramati the bail bonds of the accused/appellant no.1 stand cancelled. Appellant No.1 is directed to surrender before the Court of Session at Baramati, District Pune within a period of 15 days from today.

23 We appreciate the efforts of Mr. Swapnil Ovalekar, learned Counsel appointed by the Maharashtra State Legal Services Authority for the appellants in the appeal. He has rendered valuable assistance to us.

23 The appeal is disposed of in the above terms.

(SMT. BHARATI H. DANGRE, J) (S.C. DHARMADHIKARI, J.)