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IN THE HIGH COURT OF JUDICATURE AT BOMBAY,  
BENCH AT AURANGABAD

**CRIMINAL APPEAL NO.54 OF 2006**

The State of Maharashtra,  
through Shrigonda Police Station,  
District Ahmednagar

... APPELLANT  
(Original Complainant)

**VERSUS**

1. Prabhakar @ Prakash Vithal Kapse,  
Age 49 years,
2. Shashikala Prabhakar @ Prakash Vithal Kapse,  
Age 42 years,
3. Suhas @ Pinu Prabhakar @ Prakash Vithal Kapse,  
Age 19 years
4. Sandip @ Bandu Prabhakar @ Prakash Vithal  
Age 22 years

All R/o Pargaon Sudrik Shivar,  
Tq. Shrigonda, Dist. Ahmednagar. ... RESPONDENTS  
(Original Accused)

.....  
Shri M.M. Nerlikar, A.P.P. for appellant/ State  
Shri R.G. Hange, Advocate for respondents  
.....

CORAM: T.V. NALAWADE AND  
SUNIL K. KOTWAL, JJ.

Date of reserving judgment : 12th January, 2018.

Date of pronouncing judgment : 24th January, 2018.

**JUDGMENT (PER SUNIL K. KOTWAL, J.) :**

1. By filing this appeal, State of Maharashtra has

challenged the judgment and order passed by Additional Sessions Judge, Ambajogai in Sessions Case No.94/2004, wherein accused Nos.1, 2, 4 and 5 were acquitted of the offence punishable under Section 302 read with Section 149, Sections 504 read with Section 149, Section 143, 147 and 148 of the Indian Penal Code. State has also challenged the correctness of conviction of accused Nos.1 and 4 only for the offence punishable under Section 323 of the Indian Penal Code. Respondents are original accused Nos.1, 2, 4 and 5.

2. Facts leading to institution of this appeal are that, accused and complainant as well as all witnesses are the residents of village Pargaon Sudrik Shivar, Taluka Shrigonda, District Ahmednagar. Informant Chandrabhagabai Labde (P.W.1) is the wife of deceased Bhaguji Labde. At the relevant time of the occurrence, deceased used to work as labour at Kukdi irrigation Department, used to come from Pargaon to Karjat. On 2.4.2004 at about 11.00 a.m., informant Chandrabhagabai and her son Sachin (P.W.6) went to their field, known by local name "Dara". Deceased Bhaguji also accompanied them. The land of the accused is adjacent to the land of the deceased. At that relevant time, even the accused persons were also working in their field. Chandrabhagabai Labde (P.W.1) noticed that at about 11.30 a.m., accused were cutting one common tree standing on

the common boundary of their field and they were also removing stones from that common boundary. When Chandrabhagabai objected this act, by that time, even Bhaguji reached on the spot and asked his wife Chandrabhagabai not to talk with the accused. However, the accused No.3 suddenly started abusing the deceased Bhaguji, made him fall on the ground, sat on his chest and started assaulting him on his chest by stone. That time, accused No.1 Prakash was armed with iron bar, accused No.4 Subhash was armed with stick and accused No.5 Sandip was armed with axe. They started assaulting Bhaguji by their respective weapons on the head, back and hand of the deceased Bhaguji. Chandrabhagabai (P.W.1) started shouting and requested the accused not to beat her husband. When she tried to intervene, that time accused No.2 Shashikala pulled her hair, fell her on ground and started beating her by means of fist blows and kicks. Hearing the noise of commotion, even Sandip Labde (P.W.6) rushed on the spot and he tried to rescue the deceased, but he was assaulted by sticks and stones on his back by the accused. By that time, deceased Bhaguji became unconscious. Therefore, Chandrabhagabai (P.W.1) rushed towards the houses of her relatives and hearing her shouts, her relatives Nilesh Madke (P.W.5) and Ramdas Hirve reached on the spot of the incident. They took the injured Bhaguji by motorcycle initially to Pargaon and thereafter to Shrigonda Rural Hospital. Doctor

examined the deceased and declared him dead. On the same day, Chandrabhagabai (P.W.1) lodged report to Police Station, Shrigonda (Exh.24). Head Constable Kolhe (P.W.8) registered Crime No.77/2004 against the accused persons for the offence punishable under Sections 143, 147, 148, 302 read with Section 149, Section 323 read with Section 149, Section 504 read with Section 34 of the Indian Penal Code. P.S.I. Girme (P.W.9) conducted investigation of the crime. He referred the dead body of the deceased for post mortem. Dr. Baban Thaval (P.W.2) performed autopsy examination of the dead body on 2.4.2004 and issued post mortem notes (Exh.36). Investigating Officer (P.W.9) prepared spot panchanama (Exh.39) and seized one blood stained flint stone, blood stained PVC plastic pipe, two blood stained sticks from the spot. After arrest of the accused Nos.1 and 2, he seized their clothes under seizure panchanama (Exh.45) on 2.4.2004. Subsequently, other accused were arrested. On their medical examination, their blood samples were collected. All seized muddemal and vicera together with blood samples were referred to Chemical Analyser, Aurangabad. After completion of the investigation, charge sheet was filed in the Court of Judicial Magistrate, First Class, Shrigonda.

3. Offence punishable under Section 302 of the Indian Penal Code being exclusively triable by Court of Sessions, this

case was committed to Sessions Court, Ahmednagar.

4. Charge (Exh.14) was framed against accused Nos.1 to 5 for commission of the offences punishable under Sections 143, 147, 148, 302 read with Section 149 of the Indian Penal Code, in the alternate, under Section 302 read with Section 34, Section 323 read with Section 149, Section 504 read with Section 149 of the Indian Penal Code. Accused pleaded not guilty and claimed trial.

5. Defence of the accused was of total denial. Defence examined A.S.I. Shivaji Nagare (D.W.1) and Dr. Patil (D.W.2).

6. After considering the evidence of total 9 prosecution witnesses and two defence witnesses, learned trial Court pleased to convict the accused Nos.1 and 4 for the offence punishable under Section 323 of the Indian Penal Code and they were sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.1000/- each. Accused Nos.1 to 5 were acquitted of the offences punishable under Sections 143, 147, 148, 302 read with Section 149, Section 504 read with Section 149 of the Indian Penal Code. Accused No.3 died during pendency of the trial and proceeding against him was abated.

7. At the outset, we must note that, accused Nos.1 and 4 who were convicted by the trial Court for the offence punishable under Section 323 of the Indian Penal Code for voluntarily causing simple hurt to deceased Bhaguji, have not challenged the judgment of their conviction.

8. State has challenged the conviction of accused Nos.1 and 4 simply under Section 323 of the Indian Penal Code and prayed for modification of their conviction into Section 302 read with Section 34 of the Indian Penal Code. Even clean acquittal of respondent Nos.2 and 4, who are original accused Nos.2 and 5, is challenged by the State. Therefore, initially we will consider whether conviction and sentence imposed by trial Court against accused Nos.1 and 4 under Section 323 of the Indian Penal Code is just and proper or it needs certain modification.

9. Learned A.P.P. for the State submitted that, though learned trial Court held that deceased Bhaguji Labde died of homicidal death, while convicting the accused No.1 and 4, learned trial Court erroneously convicted the accused Nos.1 and 4 for the offence punishable under Section 323 of the Indian Penal Code. According to learned A.P.P., when deceased was assaulted by accused Nos.1 and 4 by deadly weapons like iron bar and stick respectively and though fatal injury was caused on

the head of deceased, which resulted into his death, learned trial Court erroneously held that, possibility of sustaining brain injury by the deceased is probable due to fall over stony and rocky surface. He submits that, panch witness Tukaram (P.W.3) and investigating officer P.W.9 have duly proved the preparation of spot panchanama (Exh.39) and seizure of blood stained flint and two blood stained sticks from the spot. Learned trial Court erroneously held that the spot of the occurrence is in front of the house of the accused which is rocky and stony surface.

10. Learned A.P.P. submits that, when Medical Officer (P.W.2) has duly proved that the injury No.3 contusion together with haematoma over parieto occipital region, compressing underlying brain matter is sufficient to cause death in ordinary course of the nature, the conviction of the accused Nos.1 and 4 simply under Section 323 of the Indian Penal Code is absolutely incorrect. He submits that, when accused Nos.1 and 4 have inflicted iron bar and stick blow with force on the head of the deceased, it is established that, at least accused Nos.1 and 4 had knowledge that due to their act, the deceased may sustain injury which is sufficient in ordinary course of nature to cause his death. He prayed for conviction of accused Nos.1 and 4 at least under Section 304 of the Indian Penal Code. He placed reliance on the case of **Masati : Munga Ram, Bhagwati, Chandan Sinali,**

**Laxmi Prasad Vs. State of Uttar Pradesh** reported in  
**1965(1) Cri.L.J. 226.**

11. In reply, learned Advocate for the respondents submits that, the testimony of informant Chandrabhagabai (P.W.1) and Sandip Labde (P.W.6) is not trustworthy on account of material contradictions and omissions emerging in their evidence before the Court. He points out that, from the recitals of F.I.R., it becomes clear that the so called eye witness Nilesh (P.W.5) reached on the spot when the incident of assault to deceased was over and, therefore, evidence of Nilesh (P.W.5) is not useful to establish the occurrence of incident.

12. Next limb of the argument of learned counsel for the respondents is that, though Chandrabhagabai (P.W.1) deposes that one Bore tree was totally cut and cutting of second tree was in progress when the incident occurred, spot panchanama does not show cut or partly cut tree standing on the spot. He also points out that, though Chandrabhagabai (P.W.1) and Sandip (P.W.6) claim to be eye witnesses, they have not sustained any injury during the entire occurrence.

13. Learned counsel for the respondents points out that, two blood stained sticks and one PVC pipe were recovered from

the spot. However, none of the prosecution witness has whispered regarding use of PVC pipe at the time of occurrence. He submits that there was no premeditation to assault the deceased and other witnesses by accused, because as per prosecution case itself the incident occurred in the spur of moment when quarrel arose on account of cutting of trees standing on boundary line bandh of the land of accused and land of deceased. No evidence is available to establish which accused inflicted the fatal blow which resulted into death of deceased.

14. Next submission of learned defence counsel is that, by examining Head Constable Shivaji (D.W.1) the defence has proved counter F.I.R. Exh.83 as well as spot panchanama to prove that the incident occurred in front of the house of the accused and not in the field of deceased.

15. Last objection of learned counsel for the accused is that, the injury sustained by accused which are proved by Medical Officer (P.W.2) are not explained by the prosecution. He placed reliance on **State of Maharashtra Vs. Dipak Patil and others** reported in **2017 Cri.L.J. 819, Laxmisingh & ors. Vs. State of Bihar** reported in **(1976 4 SCC 394)** and **Mahadeo Vaidya Vs. State of Maharashtra** reported in **2001 Cri.L.J. 4306 (Bom.)** and **Puran Vs. State of Rajasthan** reported in

**AIR 1976 SC 912.**

16. In the case at hand, though accused Nos.1 to 5 were charged under Sections 143, 147, 148 of the Indian Penal Code and under Sections 302 read with 149, 504 read with 149, 323 read with 149 of the Indian Penal Code, heavy burden lies on the prosecution to first establish that at the time of occurrence accused Nos.1 to 5 were members of "unlawful assembly" within meaning of Section 141 of the Indian Penal Code. The expression "unlawful assembly" defined in Section 141 of the Indian Penal Code requires that there should be assembly of five or more persons having the "common object" of the persons comprising that assembly to use criminal force or to commit mischief or criminal trespass or other offence etc. However, in the case at hand, as per prosecution case itself, the deceased and his family members as well as even the accused persons assembled in their respective landed property on 2.4.2004 for performing agricultural work in their respective lands. The incident of assault to the deceased Bhaguji occurred only on account of cutting of trees standing on the boundary line bandh of respective land of accused and land of deceased. Thus, undisputedly, the incident occurred in a spur of moment due to sudden quarrel which arose in between these two families on account of cutting of common tree. It means that, there was no

premeditation in between the accused to cause assault to the deceased or to any other witnesses. In other words, accused Nos.1 to 5 had no "common object" to assault the deceased at the time of occurrence. Therefore, in absence of the important ingredient i.e. "common object", the assembly of the accused Nos.1 to 5 at the time of occurrence cannot be termed as unlawful assembly. As per the prosecution case itself, the incident occurred due to sudden quarrel in between these two family members. Therefore, obviously, Section 149 of the Indian Penal Code will not be attracted. In **Puran Vs. State of Rajasthan** (cited supra), it is ruled that, in a case of sudden mutual fight between the two parties, there can be no question of invoking the aid of Section 149 for the purpose of imposing constructive criminal liability on an accused. In view of above observation, no case is made out against accused Nos.1 to 5 for the offence punishable under Sections 143, 147, 148 of the Indian Penal Code.

17. About the occurrence, prosecution case is totally based on direct evidence of Chandrabhagabai (P.W.1), her son Sandip Labde (P.W.6) and testimony of Nilesh Madake (P.W.5). One additional witness Balasaheb Mote (P.W.7) is also examined by the prosecution. However, this witness has turned hostile and nothing could be elicited in his cross-examination which is helpful

to the prosecution.

18. As rightly pointed out by learned counsel for the respondents, as per oral testimony of Chandrabhagabai (P.W.1) and recitals of the F.I.R. (Exh.27), initially Nilesh Madake (P.W.5) was not present on the spot of the incident, but only Chandrabhagabai (P.W.1) and her husband Bhaguji (deceased) were present in the field of Bhaguji. Nilesh Madake (P.W.5) reached on the spot only when the incident of assault to Bhaguji at the hands of accused was over. From the evidence of Chandrabhagabai (P.W.1), it emerges that, after assault to Bhaguji Labde (deceased), he became unconscious. Thereafter, Chandrabhagabai (P.W.1) shouted and called her relatives and thereafter Nilesh Madake (P.W.5) and Ramdas Hirve reached on the spot. Therefore, the learned trial Court rightly discarded the oral evidence of Nilesh Madake (P.W.5) on the ground that he is not eye witness of the incident.

19. In the circumstances, only oral testimony of Chandrabhagabai (P.W.1) and Sandip Labde (P.W.6) is available on record to prove the occurrence. Learned defence counsel has assailed the evidence of these both witnesses on the ground that they being close relatives of the deceased as wife and son, they are interested witnesses and their testimony cannot be believed

without corroboration by independent witnesses. He points out that, from the cross-examination of Chandrabhagabai (P.W.1), which has brought on record that Vikas Kapse also came to the spot on hearing commotion. However, prosecution has not examined independent witness Vikas Kapse.

20. The Hon'ble Apex Court, in case of **Manga Vs. State of Uttarakhand** reported in **(2013) 7 SCC 629**, held that, it is the quality of witness that matters and not the quantity. When related witness was examined and found credible, in such a case, non examination of independent witness would not be fatal to the prosecution case. Therefore, if the testimony of Chandrabhagabai (P.W.1) and Sandip Labde (P.W.6) passes the test of close scrutiny, their evidence can be relied upon to base the conviction.

21. Chandrabhagabai (P.W.1) categorically stated before the Court that, on the date of the incident at about 11.30 a.m., when accused started cutting trees from common boundary, she objected and that time her husband Bhaguji (deceased) advised her not to talk with the accused persons. According to Chandrabhagabai (P.W.1), thereafter accused No.3 Vijay made her husband Bhaguji to fall on the ground, sat on his chest and started assaulting by stone on his chest. According to

Chandrabhagabai (P.W.1), accused No.1 Prabhakar inflicted iron bar blow on the head and shoulder of deceased Bhaguji and accused No.5 assaulted deceased by axe. When Chandrabhagabai (P.W.1) tried to intervene, that time accused No.2 Shashikala assaulted her by fist and kicks. Hearing shouts of Chandrabhagabai (P.W.1), her son Sandip (P.W.6) reached on the spot and he was assaulted by accused No.4 by stick. Even Sandip (P.W.6) fully corroborated version of Chandrabhagabai (P.W.1) by deposing that on the date and time of the occurrence after hearing commotion and shouts, he rushed on the spot and witnessed the occurrence. Sandip (P.W.6) deposed that, accused No.1 assaulted deceased by iron bar and accused No.4 assaulted deceased by stick. Accused No.5 Sandip assaulted deceased by axe. According to Sandip (P.W.6), when he tried to intervene, that time he was assaulted by accused No.4 by stick. When injured Bhaguji was taken to hospital with the help of Nilesh Madake and others, he was declared dead by Dr. Baban Thaval (P.W.2).

22. Dr. Baban Thaval (P.W.2), when performed autopsy examination of Bhaguji Labde, he found following external injuries on the body of Bhaguji :-

(1) Abrasion 1" x ¼" transverse over left eye brow crust

formed.

- (2) CLW 5 cm. x ½ cm. x scalp deep on left side parietal region, oblique in direction, margins irregular, deeply stained.
- (3) Contusion 2 " diameter over top of head, colour reddish.
- (4) C.L.W. ¾" x ¼" x scalp deep, vertical 2" diameter over top of head, colour reddish.
- (5) Abrasion 2" x ¼" oblique above left nipple crust formed.

23. Dr. Thawal (P.W.2) also found following internal injuries on head of deceased :

"Subdural haematoma over parieto occipital region 4 ½" diameter and 1 ½" thickness. Compressing underlying brain matter colour reddish."

24. According to Dr. Baban Thaval (P.W.2), external Injury No.3 i.e. contusion corresponds to above internal injury and it was sufficient to cause death in ordinary course of nature. Dr. Baban (P.W.2) opined that, the cause of death was due to shock due to subdural haemorrhage. He also opined that, above injury No.3 contusion and corresponding internal injury is

possible due to forceful stick blow and iron bar. He also opined that, injury Nos.2 and 4 i.e. contused lacerated wounds are possible due to axe.

25. However, from the cross-examination of Dr. Thaval (P.W.2), it has come on record that, the axe is sharp edged weapon and it causes incised wound. He has also admitted that, the contused lacerated wound may be caused due to hard and blunt object. It is to be noted that, though defence counsel tried hard, Dr. Thaval (P.W.2) is firm on his opinion that injury No.3 i.e. contusion with corresponding subdural haematoma and subdural haemorrhage is not possible due to fall as the place of this injury is on the top of the head.

26. It is to be noted that, though learned defence counsel has placed reliance on minor variance in between oral testimony of Chandrabhagabai (P.W.1) and recitals of the F.I.R., after careful perusal of her testimony, we are fully satisfied that the discrepancies emerging in the evidence of Chandrabhagabai (P.W.1) are very minor and do not shake her basic version. Therefore, over much importance cannot be given to those discrepancies. Surprising thing is that, in the cross-examination of Chandrabhagabai (P.W.1), the defence has brought on record that, accused No.1 Prakash had inflicted iron bar blow on the

shoulder and head of the deceased Bhaguji (para 9 of the cross-examination). Defence has tried to bring on record that this version of Chandrabhagabai (P.W.1) is omission. However, after going through F.I.R. Exh.27, it becomes clear that, Chandrabhagabai Labde (P.W.1) has specifically mentioned in her F.I.R. that accused No.1 inflicted iron bar blow and accused No.4 inflicted stick blow on the head, chest and hand of deceased Bhaguji. Therefore, we find that, the above statement of Chandrabhagabai (P.W.1) is not omission. She is absolutely truthful witness and her evidence regarding assault to Bhaguji by accused No.1 and 4 by iron bar and stick is corroborated by medical evidence. Her presence on the spot is natural and even not disputed by defence in her cross-examination. Learned defence counsel pointed out that, Chandrabhagabai (P.W.1) cannot give explanation for the injuries to the accused. However, it cannot be ignored that Chandrabhagabai (P.W.1) is illiterate witness and the incident of assault occurred in very fast sequence as everything was over within five minutes. In the circumstances, an illiterate lady like Chandrabhagabai (P.W.1) is not expected to even recollect the minor injuries sustained by accused No.1, 3 and 4. Even the injury to accused No.5 is fracture, which cannot be located by open eyes. Such silence of Chandrabhagabai (P.W.1) regarding injuries on the person of accused cannot be viewed with suspicion. We, therefore, hold

that, conviction of the accused Nos.1 and 4 can be safely based on even sole testimony of Chandrabhagabai (P.W.1). Even in the case of **Bharwada Bhoginbhai Hirjibhai Vs. State of Gujrat** reported in **(AIR 1983 Supreme Court 753)**, the Apex Court ruled that :-

“Overmuch importance cannot be attached to minor discrepancies emerged in the testimony of prosecution witnesses. The reasons are obvious :-

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which taken place in

rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him – perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment”.

27. Even testimony of Sandip (P.W.6) is free from material infirmity. Only in his cross-examination defence has tried to bring on record slight exaggeration. However, Sandip Labde (P.W.6) being son of the deceased, slight exaggeration regarding number of blows inflicted by accused is natural. So also, it cannot be ignored that the incident occurred within a short time in fast sequence. Therefore, in ordinary course, nobody can exactly tell the number of blows inflicted by each and every accused as well as the exact part of body where the weapon blows landed. On the other hand, being son of the deceased, even presence of Sandip (P.W.6) near the spot of incident for grazing cattle is natural. Therefore, we do not find material infirmity in the testimony of Sandip Labde (P.W.6) to disbelieve his version so far as assault to deceased by accused Nos.1 and 4.

28. By examining defence witness A.S.I. Shivaji Nagare (D.W.1), accused have proved copy of counter F.I.R. Exh.83. However, none of the accused stepped in witness box to prove the contents of counter F.I.R. Exh.83. Defence has only filed copy of spot panchanama Exh.84 drawn on the basis of counter F.I.R. i.e. Crime No.76/2004, registered on the basis of report lodged by accused No.1 Prabhakar Kapse. However, the contents of this spot panchanama Exh.84 are not proved by defence by examining any panch witness or police officer who prepared the spot panchanama. Otherwise also, the spot panchanama Exh.84 relied by defence counsel does not show any signs of struggle or fight to show that the incident occurred in front of the house of the accused on stony and rocky surface. Thus, the copy of counter F.I.R. and spot panchanama relied by defence deserves to be ignored as not supported by any substantial evidence.

29. On the other hand, by examining panch Tukaram (P.W.3) and investigating officer P.S.I. Hanumant Girme (P.W.9), prosecution has proved preparation of spot panchanama Exh.39 and seizure of blood stained flint and blood stained stick from the spot of incident. Tukaram (P.W.3) has fully supported preparation of spot panchanama, seizure of blood stained flint

and stick from the spot. Even the Chemical Analyser's report Exh.68 shows that, human blood of Group "B" was found on the flint as well as on one wooden log seized from the spot and human blood of same group was also found on the trouser and banian of the deceased Bhaguji. In other words, blood of the deceased was found on the spot which is situated in the field of deceased Bhaguji and Chandrabhagabai (P.W.1). This evidence is sufficient to hold that the above incident of assault occurred in the field of the deceased Bhaguji and not in front of the house of the accused as claimed by them. On the other hand, this spot panchanama together with oral testimony of Chandrabhagabai (P.W.1) and Sandip (P.W.6), is sufficient to hold that, at the time of occurrence accused entered in the field of deceased Bhaguji and assaulted him. These circumstances are sufficient to hold that accused are the aggressors. Therefore, question of exercise of right of private defence by accused does not arise. Under these distinguishing circumstances, the cases **State of Maharashtra Vs. Dipak & others** (cited supra) is distinguishable on facts.

30. Though learned counsel for the respondent placed reliance on **Laxmi Singh Vs. State of Bihar** (cited supra), for the reason that injuries found on the body of accused are not explained by the prosecution, it cannot be ignored that, in this

case Hon'ble Apex Court has carved out exception to the rule that non-examination of injuries on the body of accused persons shall be considered as fatal to the prosecution case, by observing that, "There may be cases where non-explanation of injuries by prosecution may not affect prosecution case where the injuries sustained by accused are minor and superficial or where evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy that it is far outweighs, the effect of the omission on the part of prosecution to explain the injuries. In the present case, Chandrabhagabai (P.W.1) and Sandip (P.W.6) are absolutely independent and disinterested witnesses, who carried no personal grudge against any accused and who had no reasons to falsely implicate the accused in the present case. These both witnesses being near relatives of deceased, possibility of absolving real culprit and involving innocent persons in the present crime, is absolutely impossible. Therefore, under these distinguishing facts before the Court, the above cited authority is of no help to the accused to claim benefit of doubt.

31. This spot situation falsifies the claim of the defence that deceased Bhaguji and family members pelted stones towards accused persons and Bhaguji lifted accused No.5 Sandip and forcibly threw him on the ground, resulting into fracture of

left arm radius ulna bone of accused No.5 Sandip. No doubt Dr. Prabhas Patil (D.W.2) has duly proved that he operated the fracture injury of accused No.5 Sandip Kapse on 2.4.2004. However, it cannot be ignored that, accused No.5 may sustain such fracture injury while scuffling with deceased Bhaguji at the time of assault. Other injuries sustained by accused No.1 Prabhakar, accused No.2 Shashikala, accused No.4 Suhas are so minor abrasions and one contused lacerated wound that over much importance cannot be given to those injuries.

32. In view of the above discussion, we have no hesitation to hold that, prosecution has proved beyond reasonable doubt that on the date and time of the incident, accused Nos.1 and 4 assaulted deceased Bhaguji by iron bar and stick blow and caused fatal head injury and other injuries to the deceased. Learned trial Court convicted the accused Nos.1 and 4 only under Section 323 of the Indian Penal Code, on the ground that head injury sustained by deceased Bhaguji is possible due to fall over rocky and stony land at the time of occurrence. However, from the spot panchanama Exh.39, it becomes clear that, the spot of the incident is in the field of deceased Bhaguji which is not stony and rocky land. So also, Dr. Thaval (P.W.2) has specifically denied the suggestion that contusion on the top of the head of the deceased together with corresponding internal

injury is possible due to fall on the ground. This Medical Officer (P.W.2) is very firm that injury No.3 to the deceased being on the top of the head, is not possible due to fall on the ground. Thus, inference drawn by the trial Court regarding sustaining head injury by deceased due to fall on rocky surface is totally against situation on the spot and medical opinion given by Dr. Thaval (P.W.2). We have no hesitation to hold that the finding given by learned trial Court that deceased Bhaguji probably sustained head injury due to fall on the rocky surface is absolutely perverse. The view taken by the trial Court while convicting the accused Nos.1 and 4 simply under Section 323 of the Indian Penal Code is perverse and impossible view and needs interference by this Court.

33. In view of above discussion, prosecution has proved beyond reasonable doubt that, on the date and time of incident, accused Nos.1 and 4 were armed with iron bar and stick respectively and they inflicted iron bar and stick blow on the head of deceased Bhaguji and thereby caused his homicidal death.

34. In **Mahesh & another Vs. State of Madhya Pradesh** reported in **[2012 (1) Mh.L.J. (Cri.) 294]**, the Hon'ble Apex Court observed that :

"20. Section 34 of the Indian Penal Code provides that if two or more persons intentionally do an act jointly, the position in law would be just the same as if each of them has done the offence individually by himself. This doctrine of constructive criminal liability is well-established in law."

35. In view of this legal position, when prosecution has proved that on the date and time of the occurrence accused Nos.1 and 4 entered in the field of deceased Bhaguji and by inflicting iron bar blow and stick blow on the head of deceased Bhaguji, caused his homicidal death, choosing of weapons like iron bar and stick and inflicting its blows on the head of deceased by accused Nos.1 and 4 is sufficient to hold that they shared common intention to assault the deceased on fatal part of his body. Therefore, conclusion can be drawn that accused Nos.1 and 4, in furtherance of their common intention, inflicted iron bar and stick blow on the head of deceased at least with the knowledge that it is likely to cause death of the deceased. However, as there was no previous premeditation or enmity in between the parties and as the incident occurred in spur of moment, it cannot be said that accused had intention to kill the deceased Bhaguji. Therefore, the accused Nos.1 and 4 deserve to be convicted only for the offence punishable under Section 304

Part II read with Section 34 of the Indian Penal Code.

36. Accused No.3 died during the pendency of the trial and proceedings against him is abated. Therefore, evidence against him needs no consideration.

37. So far as accused No.2 is concerned, allegation against her is that she had beaten Chandrabhagabai (P.W.1) by fist and kick blows. However, testimony of Chandrabhagabai (P.W.1) regarding assault to her by accused No.2 is not corroborated by medical evidence. Even Sandip Labde (P.W.6) has not supported Chandrabhagabai (P.W.1) and he nowhere deposed that the accused No.2 had beaten Chandrabhagabai (P.W.1) by fist and kick blows. Therefore, acquittal of accused No.2 recorded by learned trial Court is possible view and needs no interference.

38. So far as accused No.5 Sandip Kapse is concerned, though Chandrabhagabai (P.W.1) and Sandip Labde (P.W.6) deposed that he inflicted axe blow on the body of deceased Bhaguji, from the testimony of Dr. Thaval (P.W.2), it emerges that, no incised wound was found on the body of deceased Bhaguji. From the cross-examination of Dr. Thaval (P.W.2), it becomes clear that two contused lacerated wounds i.e. injury

Nos.2 and 4 found on the head of deceased are possible due to stick blow. Dr. Thaval (P.W.2) has admitted that, by axe blade only incised wound would be caused. Therefore, benefit of doubt goes in favour of accused No.5 Sandip. As rightly pointed out by defence counsel, in **Mahadeo & ors. Vs. State of Maharashtra** (cited supra), this Court also expressed similar view that it is common knowledge that axes cause incised or cut injuries unless they are used from blunt side. None of the witness deposed that accused No.5 inflicted axe blow from its blunt side. Thus, injury to deceased Bhaguji due to axe blow inflicted by accused No.5 is impossible. Even assault to Sandip Labde (P.W.6) by accused No.4 by stick blow on his back is not corroborated by medical evidence. Therefore, taking into consideration the available evidence against accused No.5, learned trial Court extended benefit of doubt in his favour. The view taken by learned trial Court regarding accused No.5 is probable view and needs no interference.

39. In view of above discussion, prosecution has proved beyond reasonable doubt that only accused Nos.1 and 4 (respondent Nos.1 and 3) have committed offence punishable under Section 304 Part II read with Section 34 of the Indian Penal Code. Considering the young age of accused No.5 Sandip, it is desirable to show leniency while sentencing the accused. In

view of overall circumstances of the case, rigorous imprisonment for five years and fine of Rs.5000/- each is reasonable punishment to the both convicted accused. Therefore, this appeal deserves to be partly allowed and conviction and sentence imposed by learned trial Court against accused Nos.1 and 4 needs to be modified as under: Hence, we pass the following order :

**ORDER**

- (i) The Criminal Appeal is partly allowed.
- (ii) Conviction of original accused No.1 Prabhakar @ Prakash Vitthal Kapase and original accused No.4 Suhas @ Pinu Prabhakar @ Prakash Kapse under Section 323 of the Indian Penal Code is set aside and it is modified as under :

"The original accused No.1 Prabhakar @ Prakash Vitthal Kapase (respondent No.1) and original accused No.4 Suhas @ Pinu Prabhakar @ Prakash Kapse (respondent No.3) are hereby convicted for the offence punishable under Section 304 Part II read with Section 34 of the Indian Penal Code and they are sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs.5000/- (Rupees five thousand) each, in default to suffer rigorous imprisonment for six months

each.”

- (iii) The above fine amount, if recovered, be paid to the informant Chandrabhagabai Bhaguji Labde, Resident of Pargaon (Madkewadi), Taluka Shrigonda, District Ahmednagar as compensation under Section 357(1) of the Code of Criminal Procedure, after the period of appeal is over.
- (iv) Accused No.1 Prabhakar @ Prakash Vitthal Kapase was in jail since 2.4.2004 till 7.5.2005 and accused No.4 Suhas @ Pinu Prabhakar @ Prakash Kapase was in jail since 7.4.2004 till 7.5.2005. They are entitled for set off for the period undergone by them, as contemplated under Section 428 of the Code of Criminal Procedure.
- (v) The original accused No.1 Prabhakar @ Prakash Vitthal Kapase (respondent No.1) and original accused No.4 Suhas @ Pinu Prabhakar @ Prakash Kapase (respondent No.3) shall surrender to their bail bonds before the trial Court immediately.
- (vi) Appeal against respondent Nos.2 and 4 is dismissed. Bail bonds of respondent Nos.2 and 4 stand cancelled.

( SUNIL K. KOTWAL )  
JUDGE

( T.V. NALAWADE )  
JUDGE