

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.11 OF 2016

- 1) Devraj s/o Vyankat Phad
Age: 30 Yrs., occu. Service,
R/o Dharmapuri, Tq. Parli
Vaijnath, Dist. Beed.
- 2) Ashish s/o Vyankat Phad,
Age: 22 Yrs., occu. Education,
R/o Dharmapuri, Tq. Parli
Vaijnath, Dist. Beed.
- 3) Balaji s/o Ramrao Phad,
Age: 41 Yrs., occu. Agril.
R/o Dharmapuri, Tq. Parli
Vaijnath, Dist. Beed. = **APPELLANTS**

VERSUS

The State of Maharashtra = **RESPONDENT**

Mr. Shirish Gupte, Senior Counsel with Mr. Rajendra
Deshmukh, Advocate for Appellants;

Mr. K. D. Mundhe, APP for Respondent-State.

CORAM : P. R. BORA, J.

DATE OF RESERVING JUDGMENT : 27th APRIL, 2018

DATE OF PRONOUNCING JUDGMENT : 12th JULY, 2018

JUDGMENT:

1) Appellants have preferred the present
appeal against the judgment and order passed in
Sessions Case No. 38/2012 on 23rd December, 2015
by Additional Sessions Judge Ambejogai, District

Beed. The appellants have been convicted in the aforesaid Sessions Case for the offences punishable under Section 307 read with 34 of IPC and Section 323 read with 34 of IPC. For the offence punishable under section 307 read with 34 of IPC, the appellants are sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.15,000/- each, in default, to suffer simple imprisonment for three months each; whereas for the offence punishable under section 323 read with 34 of IPC, the appellants are sentenced to suffer rigorous imprisonment for six months and to pay fine of Rs.500/- each, in default to suffer simple imprisonment for eight days each. Both the sentences are directed to run concurrently.

2) The alleged incident, which gave rise for initiation of prosecution against the appellants (herein after referred to as accused) happened on 24th January, 2012. The appellants are the residents of village Dharmapuri, Tq.

Parli Vaijnath District Beed. Accused Nos. 1 and 2 are the real brothers *interse* whereas accused No.3 is paternal uncle of accused Nos.1 and 2. Father of accused Nos.1 and 2, viz. Vyankat Phad was having some dispute with Bamaji Phad and Prakash Phad as about open space adjacent to Pralhad Mobile Shoppe situated at Pangaon 'T' Point, Dharmapuri.

3) Prosecution case is that on 24th January, 2012 at about 9.00 a.m. when accused No.3-Balaji was spreading rubble on his land, which is adjacent to the land of Prakash Phad and Bamaji Phad, he was obstructed by PW-6 Chandrakant, son of Bamaji Phad. It was the contention of Chandrakant (PW-6) that Balaji was attempting to spread the rubble on their land. On the same day, at about 5.30 p.m., when Chandrakant (PW 6) was proceeding towards his land via Pangaon 'T' Point, accused No.1-Devraj, who, along with accused no.2 and 3 was standing near the mobile shoppe of one Pralhad Joshi, asked him why he

obstructed his uncle Balaji from spreading the rubble in his field. Accused No.1 Devraj was alleged to have used abusive language while talking to Chandrakant. There was some hot exchange of words between Chandrakant and the accused persons. By the time, Shivaji, Dhanraj, Ramrao etc. had reached to the said spot. Wordy quarrel between Chandrakant and the accused persons took ugly turn. Accused No.1 Devraj then took out a pistol from his waist and fired one shot at PW 6 – Chandrakant. The bullet so fired caused a serious injury into the chest of PW 6 – Chandrakant. He collapsed on the spot itself. Hearing the sound of bullet shot Devraj, Suryakant (PW 7); Shivaji (PW 5) and others rushed to the said spot. Accused Nos. 2 and 3 were alleged to be holding stick and stone respectively in their hands. When PW 7 –Suryakant tried to intervene, accused No.1 Devraj fired a bullet from his pistol at him also which hit to his left knee and caused him serious injury. He also collapsed on the spot. It was alleged that

the accused persons beat PW 2 – Shivaji Phad when he attempted to intervene and beat him with fists and kicks and also inflicted a knife blow on his person causing him grievous hurt. Accused, then fled from the said spot. Chandrakant (PW 6) and Suryakant (PW 7) were immediately taken to the S.R.T.M. hospital at Ambejogai through a jeep. After having received the primary treatment, accused No.7 Suryakant lodged a report against the accused. The said report was taken by the police in the hospital itself. On the complaint so lodged by PW 7 – Suryakant, offence was registered against the accused persons and investigation was set in motion. The police visited the spot of occurrence; carried out its panchanama and seized the casings of bullets lying on the spot. Medical examination of the injured was done.

4) Accused Nos.1 & 2 were arrested on 25.1.2012 while Accused No.3 was arrested on 26.1.2012. While in custody of the police,

accused Nos. 1 and 3 allegedly gave their statements and in pursuance of it, the pistol and the stick were alleged to be recovered at their instance. The pistol so recovered and the cartridges and casings recovered from the spot of occurrence as well as the blood samples of the injured, blood-stained earth collected from the spot of occurrence, clothes on person of PW-6 and PW-7 etc. were sent for chemical analysis to the Chemical Analyzer. Report from the Ballistic expert was also sought. The Investigating Officer in the meanwhile recorded the statements of the witnesses. After completing the investigation, charge sheet was filed against the accused in the JMFC court at Parli District Beed for the offence punishable under Section 307, 323, 506 read 34 of IPC as well as under Section 4(25) of the Arms Act. Since the offence under Section 307 was exclusively triable by the Court of Sessions, the JMFC, Parli, vide order passed on 21st April, 2012, committed the said case to the Court of Sessions. After committal of the case, the

learned Additional Sessions Judge framed the charge against the accused on 8.6.2012. The accused did not plead guilty and claimed to be tried. In order to prove the guilt of the accused, as many as 13 witnesses were examined by the prosecution. The defence of the accused was of total denial and false implication. None of the accused entered into the witness box nor any defence witness was examined by any of them. The learned Additional Sessions Judge after having assessed the oral and documentary evidence brought before him, held the accused guilty for the offences punishable under Sections 307 read 34 of IPC as well as under Section 323 read 34 of IPC and sentenced them to suffer the imprisonment as noted herein above. Aggrieved by, the accused have filed the present appeal.

5) Shri Shirish Gupte, learned Sr.Counsel appearing for the accused, assailed the impugned judgment and order on various grounds. The learned Counsel submitted that the learned Trial

Court has grossly erred in relying upon the testimonies of PW Nos. 4, 5,6 and 7 to base the conviction of the accused. The learned Counsel, taking me through the evidence of the aforesaid witnesses, submitted that there are material contradictions and omissions in the testimonies of these witnesses and the facts stated by the witnesses as about the core instance are also not consistent. In the circumstances, according to the learned counsel, benefit of doubt was liable to be given to the accused persons.

6) The learned Senior Counsel further submitted that the evidence in respect of the alleged recovery of pistol as well stick, at the instance of accused Nos. 1 and 3 is highly doubtful. The learned counsel further submitted that the trial court has failed in appreciating that for recording memorandum statement at police station Parli, PW 3 – Mahadev Dahiphale was summoned by the police to act as a panch witness from village Dharmapuri, which is at the distance

of about 26 kms from Police station Parli. The learned Counsel further submitted that PW 3 — Mahadev Dahiphale is maternal uncle of informant — Chandrakant (PW 6). The learned Counsel further submitted that to call a person from the distance of about 26 kms, who is admittedly the near relative of the informant for recording the memorandum statement of the accused, creates serious doubt about giving of any such statement voluntarily by the accused persons. The learned Counsel further submitted that the recovery of the weapon of the offence is thus under shadow of doubt.

7) The learned counsel further submitted that the evidence of the Ballistic expert (PW 13) if read in proper perspective, it is difficult to reach to the conclusion that the weapon allegedly recovered, was in fact used in commission of the alleged crime. The learned counsel further submitted that present is the case wherein the accused were entitled to be given benefit of

doubt since the prosecution has failed in bringing on record any unimpeachable evidence to prove that it was accused No.1, who had caused fire arm injury to PW 6 – Chandrakant and PW 7 – Suryakant and that accused Nos. 2 and 3 were sharing a common intention with accused No.1 to cause death of PW 6 – Chandrakant and PW 7 – Suryakant.

8) Learned APP supported the impugned judgment and order. Learned APP submitted that PW 6 and PW 7 are the victims of the alleged occurrence and both had narrated the alleged incident as it had occurred. The learned APP further submitted that both the aforesaid witnesses have specifically alleged that accused No.1-Devraj shot the bullet from his pistol causing injuries in the chest of PW 6-Chandrakant and in the left knee of PW 7 –Suryakant. Both these witnesses have further deposed that accused Nos. 2 and 3 were all the while along with accused No.1-Devraj and were instigating accused

No.1 to finish PW 6-Chandrakant as well as PW 7-Suryakant.

9) The learned APP further submitted that though evidence of PW 2 -Shivaji, who is also one of the victims in the alleged occurrence, has not been believed by the learned trial court. The said witness also had corroborated the facts as were deposed by PW 6-Chandrakant and PW 7-Suryakant. The learned APP further submitted that the objection raised by the appellants as about recovery of weapons of offence cannot be sustained in view of the fact that accused No.1-Devraj himself in his statement given under section 313 of Cr.P.C., has submitted that the said pistol was handed over to the police by his father. The learned APP further submitted that the Ballistic expert (PW 13) has candidly opined that the casings which were seized from the spot of occurrence, were of those bullets which were fired from the said pistol. The learned APP further submitted that firing of bullet in the

chest of PW 6-Chandrakant explicitly reveals the intention of the accused to cause death of said Chandrakant. The learned APP further submitted that the trial court has passed a well reasoned judgment and has rightly held the accused persons guilty for the offences punishable under Section 307 read with 34 of IPC and no interference is called for in the judgment and order so passed. The learned APP, therefore, prayed for dismissal of the appeal.

10) I have duly considered the submissions made by the learned Sr. Counsel appearing for the appellants-accused and learned APP appearing for the State. I have perused the impugned judgment and the evidence adduced in the sessions trial.

11) From the case of the prosecution and more particularly from the charge framed against the accused, it is quite evident that overt act of firing bullet from the pistol at PW 6-Chandrakant and PW 7-Suryakant, is alleged

against accused No.1-Devraj and the allegation against accused No.2-Aashish and accused No.3-Balaji is that they shared common intention with accused No.1-Devraj to cause death of both the aforesaid victims and that in furtherance thereof instigated accused No.1-Devraj to fire the bullet from the pistol at the aforesaid victims.

12) Though accused Nos.2 and 3 are also charged with offence under Section 307 of IPC with the aid of section 34 of IPC. First I would like to examine whether the charge against accused No.1-Devraj that he attempted to commit murder of PW 6-Chandrakant and PW 7-Suryakant by firing the bullets on them can be said to have been proved by the evidence brought on record by the prosecution.

13) It is the specific allegation against accused No.,1-Devraj that he fired the bullets from the pistol in his hand at PW 6 -Chandrakant and PW 7-Suryakant and attempted to kill them.

The allegation has been denied by accused No.1. It was the defence of accused No.1 in the trial that a false case was filed against him at the instance of Prakash Ramrao Phad as there was a land dispute between said Prakash and his uncle Balaji, i.e. accused No.3. In his statement under section 313 of Cr.P.C., accused No.1 has stated that said Prakash Ramrao Phad has encroached to the extent of 7 Ares in the land Gut No.1382 owned and possessed by his family and in order to prevent them from claiming back the said 7 Ares land from Prakash, a false case was filed against them with a systematic plan. The prosecution evidence will have to be examined keeping in mind the defence so raised by accused No.1.

14) The offence was registered against the accused persons on the basis of the statement given by PW 7-Suryakant. The evidence on record shows that the police recorded the statement of Suryakant in the Government Hospital at Ambejogai on 24th January, 2012 at about 7.45 p.m. The said

statement was treated as FIR and on the basis of the same, the crime was registered against the accused persons for the offences punishable under Sections 307, 323, 506 read 34 of IPC and under Section 4(25) of the Arms Act and the investigation was set in motion.

15) In the FIR, it was the contention of informant Suryakant (PW 7) that on 24th January, 2012 at about 5.30 p.m., when he was standing besides his bullock, he heard the sound of firing in front of the shop of one Pralhad Joshi at Pangaon 'T' point, where his nephew Chandrakant (PW 6) was standing. He, therefore, rushed there and saw that Chandrakant had suffered a fire arm shot. Accused No.3 - Balaji and two sons of brother of Balaji viz. Vyankat Phad were alleged to be present on the spot. It was further contended that son of Vyankat, who is in military, was holding a revolver in his hand. When informant Suryakant asked Balaji (Accused No.3) and sons of Vyankat as to why they are

beating Chandrakant, son of Vyankat Phad, who was in military, fired a bullet from the pistol in his hand on his left knee, because of which, he fell down. It was further contended that Chandrakant was already fallen on the earth after having suffered a bullet shot in his chest. It was further contended that accused No.3 – Balaji and the brother of the military-man, i.e. accused No.2-Aashish were holding sticks in their hand and they beat him and Chandrakant (PW 6). It was further contended that at the relevant time, Shivaji Phad; Dhanraj Phad; Suraj Suryakant Phad; Ramrao Dashrath Phad etc. reached at the spot and removed him as well as Chandrakant (PW 6) to the hospital at Ambejogai in the jeep of one Rajabhau. Informant Suryakant has made a specific allegation against Balaji, i.e. accused No.3 and sons of Vyankat Phad, i.e. accused Nos. 1 and 2 that they had attempted to commit murder of him and PW 6 – Chandrakant by firing the bullet in the chest of Chandrakant and in the left knee of Suryakant.

16) As has come on record, the alleged incident was stated to have happened at around 5.30 p.m. at Pangaon 'T' point, village Dharmapuri. It is thus evident that the FIR of the said incident was promptly lodged within 2½ hours of the occurrence of the alleged incident.

17) The evidence on record further shows that immediately after registration of the crime, the police reached at the spot of occurrence which was disclosed by informant – Suryakant and drew its panchanama. When the police reached at the spot, the exact spot was shown to the police by father of Chandrakant. The spot panchanama at Exh. 47 reveals that from the spot of occurrence two casings and two live cartridges were seized.

18) It was sought to be contended by the learned Sr. Counsel appearing for the accused that while preparing the panchanama of the spot, intentionally the close relatives of the informant and the victims were taken as the panch

witnesses and hence no reliance can be placed on such a panchanama. I am, however not convinced with the objection so raised. Shri Prashant Deshpande, the then Police Inspector, who investigated Crime No. 7/12, has also in his testimony before the court elaborately deposed about his visit to the spot of occurrence and about seizure of the empty and the live cartridges from the place of occurrence. Nothing has been brought on record so as to disbelieve the version of the said witness.

19) The evidence on record further shows that the casings and the live cartridges so seized from the spot of occurrence were sent for their chemical analysis in the forensic lab at Kalina, Santacruz.

20) It was the further case of the prosecution that accused No.1-Devraj and accused No.2-Balaji while in custody of the police, expressed their desire to give their memorandum statement and accordingly on 29th January, 2012,

their memorandum statements were recorded in presence of Mahadeo Trimbak Dahiphale and Dnyanoba Balaji Phad. It was further case of the prosecution that in pursuance of their memorandum statements, the pistol was recovered and seized at the instance of accused No.1-Devraj and the stick at the instance of accused No.3-Balaji in presence of the aforesaid panch witnesses.

21) To prove the recovery of the weapon of the offence the prosecution has examined Mahadeo Trimbak Dahiphale (PW 3) who was one of the panch witnesses. According to the prosecution, the said witness has fully corroborated the case of the prosecution and as such, the recovery of the weapon of offence at the instance of the accused persons has been duly proved by the prosecution. As against it, it was vehemently argued by the learned Sr. Counsel appearing for the accused that both the witnesses on the so-called memorandum statements and the recovery of weapon, were interested witnesses. The learned Counsel

submitted that PW 3 – Mahadeo is maternal uncle of victim Chandrakant and another witness Dnyanoba was cousin brought of informant Suryakant. The learned counsel submitted that they were purposely called for drawing the aforesaid panchanama from the distance of 26 kms. The learned Counsel further submitted that the panchanama drawn in presence of such interested witnesses when the police could have certainly called the independent witnesses from the vicinity, raises serious doubts about the correctness and truthfulness of the said panchanama. The learned counsel submitted that no reliance can be placed on such panchanama to base the conviction of the accused.

22) It cannot be disputed that both the witnesses on the recovery panchanama are the relatives of the victims of the alleged incident. It is further not in dispute that both were called from the distance of 26 kms by specifically summoning them. There is no

explanation from the side of the prosecution as to why the Investigating Officer was required to call the witnesses from the distance of 26 kms and that too such witnesses, who are admittedly in relation to the victims of the alleged occurrence. The objection raised by the defence as about genuineness of the alleged recovery of weapon, thus deserves serious consideration.

23) The question also arises whether the prosecution has brought on record sufficient evidence to prove that, the weapon produced in the case was used in commission of the alleged crime.

24) My attention was invited by the learned APP to the statement of accused No.1 under Section 313 of Cr.P.C. In his said statement, accused No.1 has disclosed that after his arrest, his father handed over the pistol and ten cartridges to Investigating Officer P.I. Deshpande on 26th January, 2012. It is nowhere the case of the accused that the pistol which was

produced in the case as weapon of offence and which was sent for its examination to the Ballistic expert, was not the pistol handed over by father of accused No.1 and that the pistol as was shown to have been recovered at the instance of accused No.1-Devraj and the pistol handed over by father of accused No.1 were two different pistols.

25) The prosecution has examined Shri Mahesh Shankar Kadam, who was at the relevant time, serving as Assistant Chemical Analyzer in the Forensic Lab at Kalina, Santacruz, Mumbai in its Ballistic division. The said witness has testified that one 7.65 mm – caliber 0.32 mm pistol having body No.RP-155121 and marking PISTOL 7.65 mm (0.32) – RP – 155121 – GSF-IN -2011, Two intact KF 7.65 mm pistol cartridges and 2 KF 7.65 mm pistol empties having indentation on their caps, were received to the Ballistic division for their analysis. I deem it appropriate to reproduce herein below paras 6 and

7 of his deposition before the court, which read thus, -

"6) During analysis, I measured physical parameters and draw the sketches. I performed the chemical tests. I carried out test fire. I carried out ballistic comparison. During the ballistic comparison, firing pin impression in addition to breach face impression on the empties Exhibit 1 C and 1 D tallied with test fired cartridge through exhibit 1 A. Mr. Toskar taken the photographs of ballistic comparison on my instruction.

7) I have prepared the report and shown to H.O.D. for checking. The result of analysis Exhibit 1 A is a 7.65 mm caliber pistol in working condition, residue of fired ammunition nitrite was detected in the barrel washings of Exhibit 1 A showing that 7.65 mm caliber pistol was used for firing prior to its receipt in the laboratory, Two 7.65 mm pistol cartridge in Exhibit 1 B were successfully test fired through

the Exhibit 1 A.

The empties in Exhibit 1 C and 1 D are the fired 7.65 mm pistol cartridge cases, the characteristics features of fire pin impression in addition to breech face marks on the empties in Exhibit 1 C and 1 D tally among themselves and with those on the 7.65 mm pistol cartridge test fired from Exhibit 1 A (examined under comparison microscope), showing these empties in Exhibit 1 C and 1 D have been fired from the 7.65 mm caliber pistol Exhibit 1 A."

26) The report so submitted by the said witness was duly proved during the course of his evidence before the court and was marked as Exhibit-150. The pistol as well as two intact pistol cartridges and two pistol empties (casings) were shown to the said witness during the course of his evidence before the court and he identified the said articles to be the same, which were analyzed by him, report of which is at Exhibit-150.

27) PW 13, thus, has candidly opined that the casings, which were seized from the spot of occurrence immediately after the occurrence of the alleged incident, were discharged from the said 7.65 mm caliber pistol, i.e. Exhibit-1A produced in the case as weapon of offence. Thus, through the evidence of PW 13 Mahesh Kadam, the prosecution has successfully proved that the pistol produced as weapon of offence was used in commission of the alleged crime. In the circumstances, both the facts, whether the pistol was recovered at the instance of accused No.1-Devraj, as per the case of the prosecution or it was handed over by father of accused No.1-Devraj to the police, as stated by accused No.1 in his statement under Section 313 of Cr.P.C., lose significance and the bare fact remains that the prosecution has fully established that the pistol produced in the case as weapon of offence was used in the commission of the alleged crime.

28) The next question, which falls for

consideration is, whether the evidence brought on record by the prosecution proves that accused No.1 – Devraj fired two bullets from the said pistol, one on PW 6-Chandrakant and the other on PW 7-Suryakant, causing them grievous injuries. In this regard, the prosecution has relied upon the evidence of about four witnesses. As per the case of the prosecution, PW 4 – Ram Bhagwan Phad; PW 5 – Shivaji Ramrao Phad, are the eye-witnesses to the alleged incident; whereas PW 6-Chandrakant and PW 7-Suryakant are the victims of the alleged incident.

29) I have carefully gone through the evidence of all these witnesses. PW 4-Ram Phad though in his examination-in-chief deposed that he saw accused No.1-Devraj firing the bullet from his pistol on PW 6-Chandrakant, in the cross-examination the said witness has admitted that he went to the spot of occurrence after hearing noise of the crowd. He has further stated in his cross-examination that he reached to the spot of

occurrence after the incident took place. The evidence of PW 4-Ram Phad, therefore, cannot be accepted to be the evidence of an eye-witness. Further, there are certain material contradictions and omissions in his evidence, which also prevent me from placing reliance on the evidence of the said witness. The only relevant fact, which the said witness deposed is that he saw PW 6-Chandrakant and PW 7-Suryakant lying on the spot and the bullet injury was caused to Chandrakant in his chest and to Suryakant on his knee.

30) PW 5-Shivaji Ramrao Phad has deposed that on 24th January, 2012, he was present at the spot of occurrence when the alleged incident happened. He has further deposed that when the accused persons started abusing Chandrakant, he had asked the accused as to why they were abusing him. He has further deposed that the accused then abused him also and accused No.1-Devraj took out the pistol from his pocket and fired bullet

from the said pistol on the chest of Chandrakant and the second bullet on the left knee of Suryakant. The said witness has also deposed that accused No.2-Aashish inflicted stick blows on his right middle arm and accused No.3-Balaji inflicted injury on his back with stone. However, after having read the entire evidence of the said witness, I find it unsafe to rely upon, for the reason that in the cross-examination, some different story has been built up by the said witness that one blow of knife was inflicted on his person, however, has not clarified as to who inflicted the said knife blow on him. There are few more contradictions and omissions in his evidence, which I do not find it to be worth mentioning. Suffice it to say that the evidence of the said witness is not dependable.

31) PW 6 – Chandrakant is the victim of the alleged assault. He has deposed that on 24th January, 2012 at 5.30 p.m., when he was proceeding towards his land from Pangaon T point,

all the three accused came in front of him and there were some altercations amongst them. Chandrakant (PW 6) has also deposed that all the three accused abused him and Devraj threatened him to kill him. Chandrakant has further deposed that accused No.1-Devraj shot bullet from the pistol in his hand into his chest, which went out from his back. Chandrakant has also deposed that after hearing the sound of the fire arm, Suryakant arrived on the spot and accused No.1-Devraj shot bullet from his pistol on his left knee. Chandrakant has further deposed that because of the injury suffered by him, he fell down on the earth.

32) The learned Sr. Counsel though highlighted the contradictions and omissions in the evidence of Chandrakant to urge that no reliance was liable to be placed on his evidence, it is difficult to agree with the contention so raised. I have carefully gone through the cross-examination of PW 6-Chandrakant. Though certain

contradictions are brought on record in his cross-examination, the core fact deposed by him that accused No.1-Devraj shot bullet from his pistol into his chest, has remained unshattered. Apparently, I do not see any reason to disbelieve the testimony of PW 6-Chandrakant so far as it relates to the fact deposed by him that accused No.1-Devraj shot the bullet from his pistol into his chest.

33) In his evidence before the Court, PW 7-Suryakant has also specifically deposed that accused No.1-Devraj shot the bullet from his pistol on his left knee. In his cross-examination also certain contradictions and omissions are brought on record by the defence. However, considering his evidence as a whole, in so far as the key fact that accused No.1-Devraj shot the bullet from the pistol on his left knee is concerned, the same has been undoubtedly proved.

34) It was sought to be contended by the

learned Sr.Counsel that taking into account the incident happened in the morning of 24th January, 2012, there was every reason for PW 6-Chandrakant and PW 7-Suryakant to falsely implicate the accused persons in commission of the alleged crime. The learned counsel brought to my notice the statement given by the accused persons under Section 313 of Cr.P.C. The learned counsel further submitted that the accused had sufficiently brought on record that there was a dispute between the accused persons on one side and the family of Bamaji Phad and Prakash Phad on other side on account of the land abutting to the road situated near Pangaon T point. The learned counsel further submitted that in the morning, one instance had already occurred and as such, there was every reason for PW 6-Chandrakant and PW 7-Suryakant to falsely implicate the accused persons in commission of the alleged crime.

35) I am, however, unable to accept the contention so raised. It does not appear to me

that PW 6-Chandrakant and PW 7-Suryakant, the victims of the alleged crime, would falsely implicate the accused persons in commission of the alleged crime, leaving real perpetrator of the crime free.

36) Further, it cannot be lost sight of that FIR of the alleged incident was promptly lodged by PW 7-Suryakant, wherein he has disclosed the names of all the three accused and has specifically alleged that the bullets were shot by accused No.1-Devraj from the pistol in his hand. The further particulars were also provided that the first bullet was shot into the chest of PW 6-Chandrakant and the other into his left knee. He has also disclosed the spot where the alleged incident had occurred.

37) As I have discussed herein above, the police visited the said spot within a short while after occurrence of the alleged incident and two casings were seized from the said spot. Through

the evidence of PW 13, the Ballistic expert, the prosecution has undoubtedly proved that casings which were seized from the spot of occurrence, were of the bullets shot from the pistol produced in the case as the weapon of the offence.

38) By examining PW-9 Dr. Ashok Vishwanath Dake, PW-10 Dr Gaurav Arun Kale and PW-11 Dr Manoj Sudhir Landge, the prosecution has sufficiently proved that, the injuries caused to PW-6 Chandrakant in his chest and the injuries caused in the left knee of PW-7 Suryakant, both were fire arm injuries.

39) Though the prosecution has not produced on record any document showing ownership of accused No.1-Devraj over the said pistol, sufficient evidence is brought on record proving that the said pistol was possessed by accused No.1-Devraj and he was holding the license therefor. Moreover, as per the statement of accused No.1-Devraj himself given under Section

313 of Cr.P.C., his father had handed over the said pistol to the Investigating Officer on 26th January, 2012.

40) The evidence as above, which I have alaysed in detail, if is considered cumulatively, there remains no doubt that the prosecution has successfully proved that it was accused No.1, who fired the bullets on PW 6-Chandrakant and PW 7-Suryakant from the pistol produced in the case as weapon of offence and caused grievous injuries to both of them.

41) Once it is proved that accused No.1-Devraj had fired the bullets, one in the chest of PW 6-Chandrakant and the other in the left knee of PW 7-Suryakant, the next question falls for consideration as to what offence is made out against accused No.1-Devraj? According to the prosecution, it was the joint attempt of all the accused, to commit murder of PW 6-Chandrakant and PW 7-Suryakant and as such, the trial Court has

rightly convicted all of them for the offence under Section 307 read with 34 of IPC.

42) Per contra, it is the argument made on behalf of the accused that even if the evidence of the prosecution is held believable, then also, no offence under Section 307 of IPC can be said to have been made out against any of the accused persons. It was the contention of the learned Sr.Counsel that in order to attract the offence under Section 307 of IPC, intention or knowledge of accused is necessary to be established and without such strong evidence on record, there could be no offence of attempt to commit murder.

43) Learned Sr. Counsel submitted that had accused No.1 been intending to commit murder of PW 7 Suryakant, he would not have fired the bullet on his left knee. The learned Sr. Counsel further submitted that Dr. Landge (PW-11) has candidly opined that the fire arm injury caused to PW 7- Suryakant was not fatal and not capable

of causing death of PW 7 Suryakant. In the circumstances, according to the learned Sr. Counsel, in no case, it can be said that accused No.1-Devraj was intending to commit murder of PW 7-Suryakant so as to attract Section 307 of IPC.

44) The learned Sr. Counsel further submitted that though the injury is caused to PW 6-Chandrakant in his chest, merely on that count, no such conclusion can be drawn that accused No.1- Devraj was intending to cause his death. The learned Sr. Counsel further submitted that all other circumstances will have to be taken into account before reaching to any conclusion whether by causing the alleged injury to PW 6 Suryakant, accused No.1-Devraj was intending to cause his death.

45) The learned Sr. Counsel further submitted that the circumstances on record clearly demonstrate that before making the alleged assault on PW 6-Chandrakant, there was a

wordy quarrel between said Chandrakant and the accused persons. The learned Sr.Counsel submitted that PW 6-Chandrakant in his cross-examination has admitted that he was not fearing that accused No.1-Devraj will fire bullet on him even though Devraj took out the pistol from his waist. The learned Counsel further submitted that had accused No.1-Devraj been intending to cause death of PW 6-Chandrakant, he could have shot one more bullet in vital organ of PW 6-Chandrakant and would have ensured his death on the spot itself. Not making of any repeated assaults on PW 6-Chandrakant by accused No.1-Devraj reveals that he was never intending to cause death of PW 6-Chandrakant.

46) In the aforesaid circumstances, it was the alternate submission of the learned Sr.Counsel that, if at all any offence was made out against accused No.1-Devraj, it was under Section 326 of IPC and not under Section 307 of IPC.

47) After having considered the evidence on record, it is difficult to accept the contention so raised by the learned Sr.Counsel. In order to ascertain as to whether intention of the accused was to cause murderous assault upon PW 6-Chandrakant and PW-7 Suryakant, the quantum of injury and manner of assault would be significant. After the alleged occurrence, PW 6-Chandrakant and PW 7-Suryakant were removed to SRTR Medical College and Hospital at Ambejogai. PW 11-Dr.Manoj Landge was the medical officer in the casualty department at the relevant time. Said Dr.Landge in his evidence before the court has deposed that following injuries were noticed on person of PW 6-Chandrakant and PW 7-Suryakant.

Injuries noticed on person of PW-6 Chandrakant

- 1) Punctured wound over lower 1/3rd of Pre-sternal area 2 x 2 cm. oval, age less than six hours.
- 2) Punctured wound over right side of chest post axillary line about in 7 inter costal space 2 x 2 cm. oval, age less than six hours.

- 3) Contused lacerated wound over scalp left parieto occipital region, 2 x 1 x 0.5 cm, age less than six hours, simple in nature.

Injuries noticed on person of PW-7 Suryakant

- 1) Punctured wound on lateral aspect of upper part of left knee 2 x 2 cm, oval, age less than six hours, grievous in nature.
- 2) Punctured wound over medial aspect of popliteal region, 2 x 2 cm. oval, age less than six hours. Grievous in nature. X-ray shows displaced fracture of supracondylar. "

48) Dr.Landge has further specifically deposed that injuries No.1 & 2 caused to PW 6-Chandrakant were capable of causing his death. Dr.Landge has denied the suggestion given to him in his cross-examination that the injuries caused to PW 6-Chandrakant were not fatal. It is significant to note that in so far as injuries caused to PW 7-Suryakant are concerned, Dr. Landge has opined that the injuries of Suryakant were not fatal to life. In absence of any contrary evidence on record, I see no reason to disbelieve the evidence of Dr. Landge to hold

that the injuries caused to PW 6-Chandrakant were fatal and were capable of causing his death. It has come on record through the evidence of PW 6-Chandrakant that accused No.1-Devraj fired the bullet into his chest from a short distance, which exited from his back.

49) In the FIR lodged by PW 7-Suryakant, he had stated that one of the sons of Vyankat Phad was in the military. Admittedly, the reference was towards accused No.1. There is reason to believe that Accused No.1-Devraj being a military man, was possessing sufficient knowledge and skill as about the use of a weapon like pistol. Secondly, holding of a valid license for possessing the pistol by accused No.1-Devraj also leads to an inference that he was having knowledge how to use the pistol. In the circumstances, it cannot be believed or accepted that hitting of the bullet into the chest of Chandrakant (PW-6) was a co-incidence or an accident or that accused no.1 did not knowingly

fire the bullet into the chest of Chandrakant (PW-6). In the circumstances, the only conclusion, which emerges is that accused No.1-Devraj fired the bullet from his pistol into the chest of PW 6-Chandrakant knowing that it was capable of causing his death.

50) There cannot be a dispute that chest is the vital part of the human body and causing any injury to such vital organ was likely to cause death of PW 6-Chandrakant. The evidence which has been brought on record by the prosecution thus sufficiently establishes that accused No.1-Devraj fired the bullet from his pistol on PW 6-Chandrakant knowing that it may cause death of PW 6-Chandrakant. The act of accused No.1 would, therefore, fall within the mischief of Section 307 of IPC. Even if it is assumed that accused No.1-Devraj had no intention to kill PW 6-Chandrakant, he certainly had the knowledge that his said act was likely to cause death of PW 6-Chandrakant, which would make his act an offence

of murder if the death had been caused by his said act.

51) The next question arises whether the act of accused no.1 Devraj of firing a shot and causing a bullet injury to the left knee of PW-7 Suryakant would also amount to an offence under Section 307 of I.P.C. It is well settled that, the act which would amount to an attempt under Section 307 of I.P.C. must be one, which is capable of causing death. As has been discussed by me herein before, none of the bullet injury caused to PW-7 Suryakant was fatal to his life. In the circumstances, the assault made on PW-7 Suryakant by accused no.1 Devraj would not fall under the mischief of Section 307 of I.P.C. However, the evidence on record fully establishes that, by firing a bullet at the left knee of PW-7 Suryakant, accused no.1 Devraj voluntarily caused him a grievous hurt by a dangerous weapon. I, therefore, hold him guilty for the offence under Section 326 of I.P.C.

52) The next question which falls for consideration is whether accused no.2 Ashish and accused no.3 Balaji had shared the common intention with accused no.1 Devraj in an attempt by said Devraj of committing murder of PW-6 Chandrakant and causing of grievous hurt to PW-7 Suryakant.

53) It was the contention of learned Sr.Counsel that the trial court has grossly erred in holding accused Nos.2 and 3 also guilty for offence under section 307 of IPC with the aid of Section 34 of IPC. The learned Sr. Counsel submitted that to constitute 'common intention' it is necessary that intention of each of the accused is known to the others and is shared by them. The learned Sr. Counsel further submitted that the prosecution has not brought on record any such evidence on the basis of which an inference could have been drawn that intention of each of the accused in the instant case was known to the others and that they have shared the said

intention.

54) The learned Sr. Counsel further submitted that there is no evidence on record showing that accused Nos.2 and 3 were having knowledge that accused No.1 would take out the pistol and would fire a bullet from it since everything happened in the spur of moment and in the circumstances, accused Nos.2 and 3 could not be deemed to have shared common intention. The learned Sr.Counsel further submitted that the prosecution has also utterly failed in bringing on record any dependable evidence proving any overt act committed by accused Nos.2 and 3. The learned Sr.Counsel further submitted that when PW 7-Suryakant has deposed that accused Nos.2 and 3 beat PW 6-Chandrakant after and before he suffered the fire arm injury and that he was beaten by accused Nos.2 and 3 with stick and stone, PW 6-Chandrakant in his testimony before the court has, nowhere deposed any such fact. As testified by him, neither he was manhandled

before he suffered the fire arm injury nor he was beaten by any of the accused either before suffering the firearm injury or thereafter. The learned Counsel submitted that the prosecution has not brought on record any evidence on the basis of which accused Nos.2 and 3 could have been held guilty even for an offence under Section 323 of IPC. According to the learned Sr.Counsel, in absence of any evidence against accused Nos.2 and 3, they are liable to be acquitted of all the charges leveled against them.

55) As against the argument so advanced by the learned Sr.Counsel, it was the contention of learned APP that the prosecution has brought on record sufficient evidence even as against accused Nos.2 and 3 to prove that they had shared the common intention with accused No.1-Devraj in causing murderous assault on PW 6-Chandrakant and PW 7-Suryakant.

56) My attention was invited by the learned APP to the evidence of PW 4 Ram Bhagwan Phad; PW 5 Shivaji @ Shivraj Ramrao Phad; PW 6-Chandrakant and PW 7- Suryakant. According to the learned APP, all these witnesses have consistently deposed that all the three accused had reached at the spot with the common intention in their mind to cause death of PW 6-Chandrakant and PW 7-Suryakant. It was also contended by the learned APP that accused No. 2 and accused No.3 both were fully aware that accused No.1 was possessing the pistol with him. It was also contended that even when accused No.1 took out the pistol and held it against PW 6-Chandrakant, neither accused No.2 nor accused No.3 did make any attempt to prevent accused No.1-Devraj from hitting the bullet from his pistol, on the contrary, as has been deposed by PW 6-Chandrakant as well as PW 7-Suryakant, accused Nos. 2 and 3 were instigating accused No.1-Devraj to finish them. It was also contended by the learned APP that evidence on record also shows that accused Nos. 2 and 3 had actively

participated in beating PW 6 and PW 7 even after the said witnesses have suffered the bullet injuries. According to the learned APP, accused Nos. 2 and 3 were also, therefore, liable to be held guilty for an offence under Section 307 of IPC with the aid of Section 34 of IPC and have been rightly held guilty by the learned trial court for the said offence.

57) I have held the accused no.1 guilty for an offence under Section 307 of IPC for making murderous assault on PW-6 Chandrakant and for the offence under Section 326 of I.P.C. for causing grievous hurt with dangerous weapon to PW-7 Suryakant. It has now to be examined whether accused nos.2 and 3 had shared the common intention in commission of the aforesaid offences by accused no.1 Devraj in light of the arguments advanced by the learned Senior Counsel and the learned APP.

58) Section 34 of IPC lays down a principle

of joint liability in doing of a criminal act. To apply section 34 of IPC, apart from the fact that there should be two or more accused, two factors must be established, viz., i) common intention; and ii) participation of the accused in the commission of an offence. If 'common intention' is proved but no 'overt act' is attributed to the individual accused, even then section 34 will be attracted as it essentially involves a vicarious liability. It is not possible to have direct evidence of 'common intention'. It has to be inferred from the facts and circumstances of each case. The accused, who is fastened with liability on the strength of section 34 of IPC should have done some act, which has nexus with the offence. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. That need not necessarily be overt. Even if it is only a overt act, it is enough, provided such overt act is proved to have done by the co-accused in furtherance of the common intention.

Even an omission can, in certain circumstances, amount to an act. This is the purport of Section 32 of IPC. So, the act, mentioned in Section 34 of IPC, need not be an overt act even an illegal omission to do a certain act in certain situation can amount to an act.

59) The acts committed and the conduct of accused nos.2 and 3 during the relevant period will have to be examined in light of the principles stated above for arriving at a conclusion whether they can be held guilty for the offences committed by accused no.1 with the aid of Section 34 of I.P.C. It is not in dispute that, the cognizable overt act of firing bullet shots at PW-6 Chandrakant and PW-7 Suryakant is attributed on part of accused no.1 alone. Accused nos.2 and 3 were however accompanying accused no.1 at the relevant time. As has come on record through the prosecution evidence, accused nos.1 to 3 were standing together near the mobile shoppe of one Pralhad at Pangaon 'T' point. There

further appears no dispute that, accused nos.2 and 3 were aware of the fact that, accused no.1 Devraj was carrying a pistol with him. The material on record further reveals that, initially a wordy quarrel took place between accused on one side and PW-6 Chandrakant on the other side and the altercations so started amongst them subsequently took an ugly turn. The evidence on record also shows that, accused nos.2 and 3 provoked accused no.1 as a result of which, he fired the bullet shots at PW-6 Chandrakant and PW-7 Suryakant. It has come in the evidence of PW-7 Suryakant that, accused nos.2 and 3 beat PW-6 Chandrakant with kicks, fists and sticks. However, PW-6 Chandrakant in his testimony before the Court has not deposed any such fact, on the contrary he has deposed that, he was neither manhandled by anybody nor anybody beat him before or after he suffered the bullet injury. In his evidence before the Court PW-7 Suryakant though deposed that accused nos.2 and 3 beat him with fists, kicks and sticks, his evidence has not

been duly corroborated by any other witness. The medical evidence also does not support the allegation so made by PW-7 Suryakant. Thus, no evidence has come on record against accused nos.2 and 3 to show that, any overt act was committed by these accused except that, they instigated accused no.1 Devraj against PW-6 Chandrakant and PW-7 Suryakant, as a result of which accused No.1 Devraj fired bullet shots at them causing them grievous injuries.

60) Further, it was sought to be contended by the learned Sr.Counsel that for invoking section 34 of IPC against the accused, prior concert or pre-arranged plan has to be established. It was also contended by the learned Sr.Counsel that the prosecution has not brought on record any evidence even remotely to suggest that all the three accused had assembled on the spot of occurrence with the determination to assault PW 6-Chandrakant with whom they had some quarrel in the morning. In absence of any such

evidence, according to the learned Sr.Counsel, even though the incident had occurred of firing a bullet from his pistol at the hands of accused No.1-Devraj, in no case an inference can be drawn that accused Nos. 2 and 3 were sharing common intention with accused No.1 in making such assault by him on PW 6-Chandrakant and PW 7-Suryakant.

61) The prosecution has admittedly not brought on record any evidence showing that, after the occurrence of the morning incident, accused nos.1 to 3 had some discussion amongst them in respect of taking any further action against PW-6 Chandrakant or persons from his side. Further nothing is brought on record to show that the accused were having some concrete information that PW-6 Chandrakant will be passing from Pangaon 'T' point in the evening so that, with some determination the accused had assembled at the said spot. It is, therefore, difficult to believe a prosecution theory that, the assaults

made on PW-6 Chandrakant and PW-7 Suryakant was a pre-arranged plan prepared by the accused with the common intention.

62) As I have discussed herein before, it is difficult to hold that, accused no.1 Devraj had any intention to cause the death of PW-6 Chandrakant though he has fired the bullet in his chest. However, he certainly had the knowledge that, his said act was likely to cause death of Chandrakant, which would make his said act an offence of murder if death has been caused by his said act. That is the reason that I have held accused no.1 Devraj guilty for an offence under Section 307 of IPC insofar as assault made by him on PW-6 Chandrakant. However, from the evidence as aforesaid, I am afraid a conclusion can be drawn that, accused nos.2 and 3 had shared the common intention with accused no.1 Devraj of attempting to commit murder of PW-6 Chandrakant. To constitute common intention, it is necessary that, the intention of each of the accused is

known to the others and is shared by them. In the instant matter, the prosecution has not brought on record any evidence showing that, accused no.1 Devraj was intending to cause death of PW-6 Chandrakant by firing bullet at him and that his said intention was known to accused nos.2 and 3.

63) Evidence on record reveals, that in the morning of 24th January, 2012, PW 6-Chandrakant obstructed accused No.3-Balaji from spreading the rubble, alleging that it was being spread in his land. However, according to accused No.3, PW 6-Chandrakant had unauthorizedly and illegally obstructed him though he was not having concerned with the said land. In relation to the aforesaid land and more particularly the frontage of the said land, there were serious disputes between the family of Bamaji Phad and Vyankat Phad. Though no such specific evidence has come on record, it can be discerned that accused No.3-Balaji must have disclosed the said incident to accused No.1-Devraj and accused No.2-Aashish.

64) In the above background, it appears that in the evening of 24th January, when the accused were standing together near Mobile Shoppe of Pralhad at Pangaon T point and when PW 6-Chandrakant was seen by them passing from the said place reminded by the incident happened with accused No.3-Balaji in the morning, accused No.1-Devraj got exasperated the moment he saw PW 6-Chandrakant and he entered into the quarrel with him. Accused No.3-Balaji was already having grudge against PW 6-Chandrakant. This was an opportunity for him to settle the score against PW 6-Chandrakant taking to the morning incident. Accused No.2-Aashish being younger brother of accused No.1-Devraj naturally joined him. As has come on record, accused Nos. 2 and 3 both provoked accused No.1 and resultantly, accused No.1-Devraj fired the bullet shots from the pistol in his hand at PW 6-Chandrakant and PW 7-Suryakant.

65) From the facts, as above, it is

difficult to jump to any conclusion or to draw an inference that accused Nos. 2 and 3 were intending to cause death of PW 6-Chandrakant or PW 7-Suryakant. What could be gathered from the circumstances which have come on record is the fact that their intention was to cause hurt to PW 6-Chandrakant and PW 7 Suryakant so that they should be alarmed of the consequences if they again enter into dispute with the accused.

66) As I have elaborately discussed herein before, even accused No.1-Devraj cannot be said to be intending to commit murder of PW 6-Chandrakant or PW 7-Suryakant though he fired the bullets at them from the pistol in his hand. It can be surmised that at that particular moment, he was so infuriated that he fired the bullets at PW 6-Chandrakant and also on PW 7-Suryakant because he tried to intervene. It however, cannot be denied that accused No.1-Devraj had knowledge that his said act was likely to cause death of PW 6-Chandrakant, which would make his

said act an offence of murder if death had been caused by his said act. That is the reason that I have held accused No.1-Devraj guilty for an offence under Section 307 of IPC in so far as assault made by him on PW 6-Chandrakant and for an offence under Section 326 of IPC in relation to the assault made by him on PW 7-Suryakant. The same measures cannot be applied to the acts committed by accused Nos. 2 and 3. Both these accused were sharing the common intention with accused No.1-Devraj only to the extent of causing some sort of hurt to PW 6-Chandrakant and PW 7 Suryakant so as to caution them that they shall not take any friction with them. In the circumstances, both these accused can, at the most, be held guilty for an offence of abatement to cause hurt.

67) In the case of Babusingh and Ors. Vs. State of Haryana - 1995 Cri.L.J. 2630 (SC), four appellants were tried for the offence under Section 307 read with 34 of IPC and other ancillary offence. The trial court convicted all

of them under Section 324 read with 34 of IPC for having caused injuries to the victims in the said case. On appeal by the State, the Punjab and Haryana High Court convicted all the four accused under Section 307 read with 34 of IPC. On joint special leave petition to the Hon'ble Apex court, Leelasingh, one of the accused, who was also convicted for the offence under Section 307 of IPC, was declined leave whereas the other appellants were granted leave to appeal and ultimately the Hon'ble Apex court altered their conviction to offence under Section 324 read 34 of IPC, by observing that common intention to commit murderous assault could not have been attributed to all the accused other than one, who caused injury from which murderous assault could be spelt out. The Hon'ble Apex court further held that common intention only to commit lesser offence, i.e. one under section 324 of IPC was liable to be attributed on part of other accused. In the instant matter also, accused Nos.2 and 3 can be attributed common intention only to commit

lesser offence, i.e. for abatement of the offence of causing grievous hurt under section 326 of IPC.

68) I may usefully refer to one earlier decision rendered by the Hon'ble Division Bench of this High Court in the case of **State Vs. Bhimshankar Siddannappa Thobde and others, AIR 1968 BOMBAY 254**. In the said case, the facts were thus: Three accused persons armed with a stick and two knives had rushed from their house to attack their opponents, one of the accused gave a knife blow to one of the victims, which caused a deep punctured wound in his chest and as soon as the victim shouted that he was killed, the accused persons ran away and the attack did not continue after that serious injury was inflicted. In premise of such facts, the Division Bench observed that, when the accused persons armed with deadly weapons started from their house to attack their opponents, it must be held that, their common intention was to cause grievous

hurt. One of them exceeded the common intention and inflicted the fatal injury on one of the victims. The Division Bench, therefore, convicted the accused, who inflicted a knife blow and caused deep punctured wound to one of the victim, under Section 307 of IPC for attempted murder and all the three accused including the accused who inflicted the knife blow, under Section 326 read with 34 of IPC for causing grievous hurt.

69) In the instant case also all the three accused were sharing common intention to cause grievous hurt to PW-6 Chandrakant and PW-7 Suryakant, but accused no.1 Devraj exceeded the common intention and fired a bullet shot in the chest of PW-6 Chandrakant. As such though accused no.1 is held guilty for the offence under Section 307 of IPC, accused nos.2 and 3 can be held guilty only for the offence under Section 326 read with 34 of IPC. They are held guilty accordingly.

70) The last issue which falls for consideration is the quantum of punishment. The trial Court has sentenced accused no.1 Devraj to suffer rigorous imprisonment for 7 years with fine of Rs.15,000/-, in default of payment of fine to suffer simple imprisonment for three months for the offence punishable under Section 307 r.w. 34 of I.P.C. During the course of his arguments, the learned Senior Counsel had alternatively submitted that, if at all this Court confirms the conviction of accused no.1 Devraj for an offence under Section 307 of I.P.C. having regard to the circumstances on record, he may be released on the sentence of imprisonment already undergone. It was contended by the learned Senior Counsel that, the alleged offence was committed by accused no.1 Devraj in the fit of anger without any premeditation. It was further contended that, accused is of a young age and does not have any criminal antecedents. On these grounds, it was urged by the learned Senior Counsel that, the punishment awarded by the trial

Court be altered and be reduced to the period already undergone by the said accused.

71) For accused nos.2 and 3, the learned Senior Counsel had claimed clean acquittal. For these accused also, the similar alternative prayer was made that, in case, they are held guilty for the offence under Section 307 read with 34 of IPC or for any lesser offence, they may be sentenced for the period already undergone.

72) Submissions so made by the learned Senior Counsel were opposed by the learned APP. It was his contention that, while considering the case of the accused, the plight suffered by the victims of the alleged offence shall not be lost sight of. The learned APP had further contended that, considering the serious nature of offence committed by the accused, they do not deserve to be shown any more leniency. According to the learned APP, punishment awarded by the trial

Court was adequate and shall not be reduced any more.

73) Section 386 of the Code of Criminal Procedure enlists the powers of the Appellate Court while hearing the appeals from the trial Court. In an appeal from conviction, if the conviction is maintained, the Appellate Court has the power to alter the nature or the extent, or the nature and extent, of the sentence. I am conscious that, such power has to be exercised in terms of the provisions of the Penal Code.

74) The twin objectives of the sentencing policy are deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case.

75) First I will consider the case of accused no.1 Devraj. The trial Court has convicted him for the offence punishable under Section 307 of IPC read with 34 of IPC and has

sentenced him to suffer RI for 7 years with fine of Rs.15,000/-. For the reasons recorded above, I have held accused no.1 Devraj guilty for the offence punishable under Section 307 of IPC in so far as murderous assault made by him on PW-6 Chandrakant and for the offence punishable under Section 326 of IPC in relation to assault made by him on PW-7 Suryakant causing him a grievous injury by a dangerous weapon.

76) Accused no.1 Devraj was arrested on 25.01.2012 and he was released on bail sometimes in June-2012. Thus, initially he was in jail for the period of about 6 months. He was taken in custody after pronouncement of the Judgment by the trial Court i.e. 22nd December, 2015 and since then, he is behind the bars. It is not in dispute that, at the time of commission of the offence age of accused no.1 Devraj was 23 years. Undisputedly there are no criminal antecedents against him. It is further not in dispute that, he did not make the repeated assaults to ensure

the death of PW-6 Chandrakant. It is also the matter of record that, he fired the bullet shot at PW-7 Suryakant on the non vital part of his body i.e. left knee and the Medical officer has candidly opined that, the injuries caused to PW-7 Suryakant were not fatal to his life. As noted by me earlier, the assault made by accused no.1 was not premeditated. There is reason to believe that, it happened at the spur of moment.

77) Having considered the facts and circumstances as aforesaid, it appears to me that, sentence of five years rigorous imprisonment would be the adequate punishment for accused no.1. Considering the nature of offence committed by accused no.1 Devraj, it does not appear to me that, sentence of 5 years imprisonment would be in any way inadequate or disproportionate. He cannot be branded to be an anti-social element. He is not a habitual offender. In the circumstances, it does not appear to me that, his prolonged confinement is

necessary. According to me, the five years imprisonment for him will be an adequate punishment for him. Of course, a balance can be struck by appropriately enhancing the amount of fine.

78) Offence under Section 326 read with 34 of IPC proved against accused no.1 is part of the same incident. In view of the fact that, he is being convicted under Section 307 of IPC, his conviction under Section 326 read with 34 is redundant. Even otherwise if any separate punishment is awarded, even then the sentences awarded for the two offences would run concurrently.

79) Nextly, about the punishment to be imposed upon accused nos.2 and 3 for the offence punishable under Section 326 read with 34 of IPC. Accused no.2 Ashish was only 19 years old on the

date of offence, whereas accused no.3 Balaji was of the age of around 38 years. It is contended on behalf of accused no.2, that considering his age and his future career, he may be sentenced for the period already undergone by him. Same request is made for accused no.3 Balaji on the ground that, he is the sole bread earner of his family. Admittedly, there are no criminal antecedents against both the accused and they are the first time offenders.

80) Accused nos.2 and 3 were also arrested on 25.01.2012 and were released on bail sometimes in June-2012. Accused nos.2 and 3 are behind the bars from the date of pronouncement of the Judgment. Considering the periods as aforesaid, it is evident that, both the accused have undergone the imprisonment for the period of more than 3 years. It appears to me that, for the offence committed by these accused, the imprisonment already undergone by these accused will be the adequate punishment. Here also the

balance can be struck by imposing the adequate amount of fine, so that the said amount can be directed to be paid to the victims of the alleged occurrence.

In the result, the following order is passed.

ORDER

1. The conviction of accused nos.1 to 3 namely Devraj s/o. Vyankat Phad, Ashish s/o. Vyankat Phad and Balaji Ramrao Phad for the offence punishable under Section 307 read with 34 of IPC and the sentence awarded to them for the said offence is set aside. Instead,

(i) Accused no.1 Devraj Vyankat Phad is convicted under Section 307 of IPC and sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs.25,000/-, in default to suffer simple imprisonment for 4 months.

(ii) Accused no.1 Devraj Vyankat Phad is also convicted for the offence under Section 326 read with 34 of IPC and is sentenced to suffer the imprisonment of the period already undergone by him and to pay fine of Rs.15,000/-, in default to suffer simple imprisonment for two months.

(iii) Accused no.2 Ashish s/o. Vyankat Phad and Accused no.3 Balaji Ramrao Phad are convicted for the offence under Section 326 read with 34 of IPC and are sentenced to suffer imprisonment of the period already undergone by them and to pay fine of Rs.25,000/- each, in default to suffer simple imprisonment for three months.

(iv) The conviction of accused nos.1 to 3 namely Devraj s/o. Vyankat Phad, Ashish s/o. Vyankat Phad and Balaji Ramrao Phad for the offence punishable under Section 323 read with 34 of IPC and the sentence awarded therefor is maintained.

(v) The sentences imposed upon accused nos.1 to 3 namely Devraj s/o. Vyankat Phad, Ashish s/o. Vyankat Phad and Balaji Ramrao Phad shall run concurrently.

(vi) The accused are entitled for the set off under Section 428 of the Code of Criminal Procedure for the period which they had remained behind the bars as under trial prisoners.

(vii) After deposit of the fine amount by Accused no.2 Ashish s/o. Vyankat Phad and Accused no.3 Balaji Ramrao Phad, they shall be released

if not required in any other case or crime.

(viii) If the fine amount is deposited by the accused, a sum of Rs.60,000/- out of the same shall be paid to PW-6 Chandrakant Bamaji Phad and Rs.30,000/- shall be paid to PW-7 Suryakant Baburao @ Ramrao Phad by way of compensation as per the provisions under Section 357 of the Code of Criminal Procedure.

. The impugned Judgment and order, thus, stands modified to the aforesaid extent and the Criminal Appeal stands partly allowed in the aforesaid terms.

(P.R. BORA)
JUDGE

BDV/GGP