

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.445 OF 2001

The State of Maharashtra
through Police Station
Sonpeth, Dist. Parbhani

**..APPELLANT
(Ori. Complainant)**

VERSUS

1. Dagadu s/o. Nivrutti Bhusnar,
Age: 38 years, Occu.Aгри,
R/o. Underwadi, Tq. Gangakhed,
2. Uttam S/o. Nivrutti Bhusnar
Age: 28 years, Occu. &
R/o. as above,
3. Raosaheb s/o. Nivrutti Bhusnar
Age: 23 years, Occu. &
R/o. As above.
4. Nivrutti s/o. Dagdoba Bhusnar
Age: 58 years, Occu.Aгри.,
R/o. As above,
5. Lahu s/o. Ginaji Kachale
Age: 25 years, Occu.: &
R/o. As above

**..RESPONDENTS
(Ori. Accused)**

Shri. S.J. Salgare, A.P.P. for State
Shri. Satyajit .S. Bora, Advocate for Respondents.

WITH

CRIMINAL APPEAL NO. 304 OF 2001.

Dagadu Nivrutti Bhusnar
Aged 43 years, Occu.Agriculture,
R/o. Underwadi, Tq. Gangakhed,
Dist. Parbhani

**.. APPELLANT
(Ori. Accused No.1)**

VERSUS

State of Maharashtra

.. **RESPONDENT**

Mr. Satyajit S.Bora, Advocate for Appellant;
Mr. S.J.Salgare, APP for Respondent-State

**CORAM : SUNIL P.DESHMUKH &
P.R.BORA, JJ.**

DATE OF RESERVING JUDGMENT : 25th January, 2018
DATE OF PRONOUNCING JUDGMENT : 9th February, 2018

JUDGMENT:- (P.R.Bora, J.)

1) Both the aforesaid appeals arise out of the judgment delivered by the learned Additional Sessions Judge, Parbhani on 28th July, 2001 in Sessions Trial No.47/1997.

2) The respondents in Criminal appeal No.445 of 2001 and the appellants in Criminal Appeal No. 304 of 2001 were prosecuted in the aforesaid Sessions Case for the offences punishable under Sections 147, 148, 149 and 302 read with 34 of Indian Penal Code. Vide the impugned judgment, the learned Additional Sessions Judge acquitted the respondents in Criminal Appeal No.445/2001 whereas convicted the appellant in Criminal Appeal No.304/2001 for the offence punishable under Sections 304 Part-II of IPC and sentenced him to suffer rigorous imprisonment for seven years and fine of Rs.15,000/-,

in default to suffer further R.I. for one year. Aggrieved by the said judgment, the State has filed the Criminal Appeal No. 445/2001, taking exception to the order of acquittal recorded by the learned Additional Sessions Judge, Parbhani in regard to the original accused Nos. 2 to 5; whereas the original accused No. 1 has preferred the Criminal Appeal No. 304/2001, challenging the order of conviction passed against him for the offence punishable under Section 304 Part-II of IPC.

3) In view of the fact that both the appeals are arising out of one judgment, the arguments in both the appeals were simultaneously heard by us and we deem it appropriate to decide both these appeals by a common reasoning.

4) First we would like to deal with Criminal Appeal No. 445/2001 filed by the State taking exception to the acquittal of original accused Nos. 2 to 5. During pendency of the appeal accused No. 4 viz. Nivrutti Dagduba Bhusnar has expired and the appeal thus stood abated against him. The surviving accused are represented by Advocate Satyajit Bora. The respondents in Criminal Appeal No. 445/2001 are herein after referred to as accused Nos. 2, 3 and 5.

5) The alleged incident, which had given rise for prosecution against the accused, had occurred on 30th August, 1995. AT the relevant time, in the Maruti temple at Tivthan Tanda in Gangakhed taluka, religious programme of '*Parayan of Pandav Pratap Pothi*' was going on. Mike and loud speakers were therefore set up at the said temple. One Waman Balu Rathod was one of the organizers of the said religious function. The villagers of the adjoining villages used to attend the said function and arrangements were made for the meals of the said devotees by way of prasad.

6) As per the case of the prosecution, on 30th August, 1995, accused No. 5 – Lahu first had been to Waman Rathod and requested him to give the loud-speaker to be used in the Ganpati festival in the village of the accused persons. Waman Rathod refused the request of Lahu. It is alleged that all the accused then approached Waman after sometime and jointly requested Waman to give them the loud-speaker and the mike for Ganpati festival. However, Waman, did not accede to the request made by the accused. According to the further case of the prosecution, the accused then though left the said place, assembled there again after some time, equipped with the weapons and made assault on Waman Balu Rathod as well as

few others. It was alleged that in the assaults so made by the accused persons, Waman Rathod suffered serious injuries and ultimately succumbed to the said injuries on the next day, i.e. on 31st August, 1995.

7) Uttam Rathod, brother of the deceased Waman, lodged a complaint of the alleged incident, whereupon investigation was set in motion. The accused were arrested. The statements of the witnesses were recorded. Panchanama of the spot was prepared; inquest panchanama on the dead body of the deceased Waman was carried and post mortem examination of the dead body was also got done by the police. During the course of the investigation, some recoveries were also made and after completing the investigation, charge sheet was filed against all the five accused in the court of JMFC at Gangakhed. Since the offences charged against the accused were exclusively triable by the Court of Sessions, the case was committed to the Sessions Court at Parbhani. The learned Sessions Judge framed the charge against all the accused on 4.11.1998. The accused did not plead guilty and claimed to be tried. In order to substantiate the charges levelled against the accused, the prosecution examined as many as 13 witnesses. The prosecution evidence had commenced with the testimony

of Dr. Manohar Ghule, the Medical Officer from Rural hospital, at Gangakhed and was concluded with the evidence of Shivaji Kamble (PW 13) – PSI, who had made the investigation in the alleged crime. The defense of the accused was total denial. The learned Sessions Judge, after having assessed the oral and documentary evidence on record, acquitted accused Nos. 2 to 5 and convicted accused no.1 , i.e. appellant in Criminal Appeal No. 304/2001, for the offence punishable under Sections 304 Part-II of IPC and imposed the sentence as noted herein above. Aggrieved by, as noted above, one appeal is filed by the State and the another appeal is filed by the convict, i.e. original accused No.1.

8) Shri S.J.Salgare, learned A.P.P. Appearing for the State, assailed the impugned judgment on various grounds. The learned APP submitted that despite there being sufficient evidence against all the accused, proving their complicity in the commission of crime, the learned Sessions Judge has wrongly acquitted accused Nos. 2 to 5 and has erred in not holding accused No.1 guilty for the offence under Section 302 of IPC.

9) The learned APP, taking us through the evidence of the prosecution witnesses and more particularly the evidence of

PW 3, PW 5 and PW 7, submitted that the evidence of the aforesaid witnesses, which has been held valid by the Sessions Court for convicting accused No.1, has not been considered by the said Court against accused Nos.2 to 5. The learned APP further submitted that the prosecution had examined the eye-witnesses to the alleged occurrence and the said eye-witnesses and more particularly, PW 3 Uttam and PW 7 – Kallubai had perfectly given the ocular account of the alleged incident proving the incriminating acts of the accused persons. The learned APP further submitted that the medical evidence brought on record by the prosecution through the evidence of Dr. Manohar Ghule (PW 1); Dr. Siddharh Bhalerao (PW 4) and Dr. A.G.Solanke (PW 6) has not been properly appreciated by the learned Sessions Judge. The learned APP submitted that PW 4 – Dr Bhalerao had examined deceased Waman and PW 6 – Kallubai at Gangakhed Rural hospital immediately after the incident and in his evidence, has deposed about the injuries, as were noticed on person of deceased Waman as well as PW 6 Kallubai. The learned APP submitted that sufficient evidence was placed on record by the prosecution to prove weapon used in commission of the offences and it was also sufficiently brought on record by the prosecution that the injuries as were noticed on person of deceased Waman as well as injured

Kallubai, were possible to have been caused with the said weapons. The learned APP further submitted that the prosecution had also brought on record the incriminating acts of other accused in making assaults on the victims and the evidence so brought on record was not shattered even during the course of cross-examination.

10) According to the learned APP, in the above circumstances, none of the accused was liable to be acquitted. The learned APP submitted that the learned Sessions Judge has drawn some unwarranted inferences and for no good reasons, rejected the prosecution evidence. The learned APP further submitted that the evidence, which was brought on record by the prosecution was sufficient to prove beyond reasonable doubt the complicity of the accused in knowingly and intentionally causing death of deceased Waman. In the circumstance, according to learned APP, the learned Sessions Judge has manifestly erred in not holding accused No.1 guilty for the offence under Section 302 of IPC and instead holding him guilty for a lesser offence punishable under Section 304 Part-II of IPC and acquitting accused Nos. 2 to 5 from all the offences..

11) Relying on the judgment of the Hon'ble Apex court in the case of Jayprakash Vs. State - (1991) 2 SC 32, the learned APP submitted that the conclusion recorded by the learned Sessions Judge that the case against accused No.1 falls in exception thirdly, as provided under Section 299, is wholly erroneous. The learned APP submitted that in view of the fact that the Sessions Court has held the fact to have been proved, that the assault was made by accused no.1 on the head of the deceased with a sharp and cutting weapon, the burden was shifted on the accused to bring on record sufficient evidence to rebut presumption raised against him that his intention was not to cause the death of deceased Waman. The learned APP further submitted that though accused No.1 has failed in rebutting the said presumption, the learned Sessions Judge has erroneously not held him guilty for the offence under section 302 of IPC and instead has held him guilty for the lesser offence under Section 304 Part-II of IPC.

12) The learned APP, for all above reasons, prayed for setting aside the impugned judgment and order and to hold all the accused guilty for offence under Section 302 read 34 of IPC and to adequately punish them.

13) Shri Satyajit Bora, learned Counsel appearing for the accused, supported the impugned judgment and order in so far as accused Nos. 2 to 5 (now accused Nos. 2, 3 and 5). The learned Counsel, inviting our attention to the elaborate discussion made by the learned Sessions Judge, submitted that the learned Sessions Judge has minutely scrutinized and has correctly analyzed the evidence of each and every prosecution witness and has recorded a well-reasoned finding, exonerating accused Nos. 2 to 5 from the charges levelled against them. The learned Counsel further submitted that having regard to inconsistencies in the evidence of the prosecution witnesses and failure on part of the prosecution to bring on record any unimpeachable evidence against accused Nos. 2 to 5, showing their complicity in commission of the alleged crime, the learned Additional Sessions Judge has rightly acquitted the said accused. The learned Counsel submitted that no interference is, therefore, warranted in the judgment and order passed by the learned Sessions Judge so far as acquittal of accused Nos. 2 to 5 is concerned.

14) After having considered the submissions made on behalf of the learned APP and the learned counsel for the accused and on perusal of the impugned judgment and the

evidence on record, apparently, it does not appear to us that any interference may be required in so far as the acquittal recorded by the learned Trial Judge in respect of accused Nos.2 to 5 is concerned. The case already stood abated against accused No.4. Accused Nos.1 to 3 are real brothers of each other. Deceased accused No.4 was father of accused Nos. 1 to 3. Accused No. 5 does not seem to be in relation to other accused. However, all the accused are residents of village Underwadi.

15) As revealed from the submissions made by the learned APP, the thrust of the prosecution, in order to prove the guilt of the accused, was mainly on the evidence of PW 7 – Kallubai, who is posed to be the victim of the alleged incident as well as the eye witness to the assaults made on deceased Waman. PW 10 – Dhuma Rathod was also cited as an eye-witness and has deposed at Exhibit-52. Reliance was also placed by the prosecution on the evidence of PW 5 – Telu Paithane and he was also stated to be an eye-witness to the alleged incident. PW 3 – Uttam Balaji Rathod had lodged the report of the alleged incident whereupon the investigation was set in motion. Obviously, the prosecution also relied upon the testimony of said PW 3 – Uttam. The other witnesses were the

panch witnesses on the spot and the alleged recovery of weapon. In addition to the aforesaid witnesses, the prosecution has also examined the police persons, who were part of the investigation and two medical officers, one who had issued the injury certificates and the another who had conducted the post mortem examination.

16) It was vehemently argued by the learned APP that by examining the aforesaid witnesses, the prosecution has, beyond reasonable doubt, proved the complicity of all the five accused in knowingly and intentionally causing death of deceased Waman and causing severe injuries to PW 7 – Kallubai. It is not in dispute that PW 7 – Kallubai is sister of deceased Waman. According to learned APP, the learned Sessions Judge has, for some wrong reasons, declined to rely upon the evidence of the prosecution witnesses. The learned APP also submitted that some of the observations made by the learned Sessions Judge are contrary to the evidence on record. The learned APP, taking us through the evidence of PW 3 – Uttam; PW 5 – Telu; PW 7 – Kallubai and PW 10 – Dhuma, submitted that the inconsistencies and the contradictions, as are considered by the learned Sessions Judge in the testimonies of these witnesses, were, in fact, minor and immaterial and

must have been ignored by the learned Sessions Judge. The learned APP further submitted that the prosecution has, through the evidence of the aforesaid witnesses, sufficiently brought on record that all the five accused were involved in making assaults on deceased Waman as well as PW 7 – Kallubai and from the conduct of the accused, it was evident that all were having common intention to cause death of deceased Waman.

17) The learned APP further submitted that the conclusions recorded by the learned Sessions Judge that, though knowledge can be attributed on part of accused No. 1 – Dagadu, no intention can be attributed on his part so as to hold him guilty for the offence under Section 302 of IPC, is also unconscionable . In light of the submissions so made by the learned APP, when we perused the evidence on record and thereafter analysis of the said evidence made by the Sessions Judge, we did not find that any apparent error has been committed by the learned Sessions Judge in not holding accused Nos. 2 to 5 guilty for the offences with which they were charged. In so far as the finding recorded by the learned Sessions Judge while holding accused No.1 guilty for the offence punishable under Section 304 Part-II of IPC is

concerned, we would deal with the said aspect separately.

18) The learned Sessions Judge has held the death of deceased Waman to be homicidal and has assigned adequate reasons therefor while deciding Issue No.1 in that regard. Though the said finding was sought to be objected by Shri Satyajit Bora, learned Counsel appearing for accused No.1, on certain points, we did not find any merit in the submissions so made. The defense of the accused that the vital injury, which ultimately resulted in causing death of Waman, was likely to be caused by beating of head of the deceased against the stony platform by an accident, has been rightly rejected by the learned Sessions Judge. Relying upon the evidence of PW 4 – Dr. Siddharth Bhalerao; PW 6 – Dr. Anand G.Solanke; the learned Sessions Judge has reached to the conclusion that the vital injury, which ultimately resulted in causing death of deceased Waman, was not likely to be caused accidentally and there was sufficient evidence on record showing that the same was caused in the assaults made on deceased Waman in the alleged incident. The finding recorded by the learned Sessions Judge that deceased Waman suffered the homicidal death, therefore, has to be sustained.

19) The next question arises as to who caused the injury to deceased Waman which ultimately resulted in causing his death. According to the learned trial Judge, the prosecution has succeeded in proving the complicity of accused no.1 alone in occurrence of the alleged crime and has failed in bringing on record any cogent and sufficient evidence against accused nos. 2 to 5. It was the contention of the learned A.P.P. that there are at least two eye witnesses; PW 3 Uttam and PW 7 Kallubai who had consistently deposed before the Court as about the common intention of all the accused in causing death of deceased Waman and about the assaults made on deceased Waman by accused no.1 and accused no.3. It was the contention of the learned A.P.P. that though the assaults were actually made by accused no.1 and accused no.3, what was more material was the intention of all the accused to cause death of deceased Waman and, as such, the trial Court must have held all the accused guilty for the offense under Section 302 read with Section 34 of IPC.

20) After having considered the entire evidence on record, we find it difficult to agree with the argument so advanced by the learned A.P.P. The evidence on record shows that accused no.1 alone has admitted his presence on the spot

of occurrence. The others have denied their presence on the spot of occurrence and their alleged participation in commission of the alleged crime. Though PW 3 Uttam and PW 7 Kallubai, are cited as eye witnesses and their evidence has been heavily relied upon by the learned A.P.P., on perusal of the evidence of the aforesaid witnesses it is apparently revealed that both are not corroborating the facts stated by each other. As has been observed by the learned trial Judge, Uttam (PW 3) has not corroborated the version of Kallubai (PW 7) in respect of first as well as second visit of accused no.5 when he was alleged to have come with accused nos. 1 to 4. PW 3 Uttam was stated to be on the spot of occurrence since beginning. His house is also situated just near to the spot of occurrence. In the circumstances, as has been observed by the learned trial Judge, serious doubts are raised about the entire occurrence when Uttam had not stated anything about first two visits of the accused persons.

21) It is the matter of record that on the basis of the complaint lodged by Uttam (PW 3), the investigation was set in motion. In the circumstances, as has been observed by the learned trial Judge, inconsistency in the evidence of Uttam (PW 3) and Kallubai (PW 7), on the alleged two previous visits of the

accused persons, and the alleged demand by them from deceased Waman to hand over the loud-speaker, cannot be ignored. As noted hereinabove, accused no.1 did not dispute his presence on the spot of occurrence. The question was whether the prosecution has proved presence of accused nos. 2 to 5 along with accused no.1 so as to gather whether accused nos. 2 to 5 were having common intention of causing death of deceased Waman. On this material aspect the evidence of PW 3 and PW 7 is inconsistent. Though PW 5 Paithane was also cited as the eye witness, he did not support the prosecution version. Thus, the prosecution has failed in bringing on record any unimpeachable evidence so as to prove the complicity of accused nos. 2 to 5 in commission of the alleged crime. In paragraph no.55 to 62 of the impugned judgment, the learned trial Judge has elaborately discussed the inconsistencies in the evidence of Uttam (PW 3) and Kallubai (PW 7). We need not to repeat the observations made by the learned trial Judge; suffice it to say that after having perused the evidence on record, we fully agree with the observations made by the learned Judge.

22) It is further apparently revealed that the complaint at Exh.35 filed by PW 3 Uttam is not consistent on the material

aspects with the report submitted by Siddiki (PW 11) who had recorded the complaint at Exh.35. Exh.35 is also not consistent with the contents of the FIR which was forwarded to the Judicial Magistrate, First Class. It has to be further noted that Exh.57, the report submitted by PW 11 Azimoddin Siddiqui does not mention the names of witnesses like Namdeo (maternal uncle of the complainant), Uttam Jadhav (brother-in-law of the complainant) and Kallubai. However, these names are there in the so called complaint at Exh.35. In Exh.57, there are names of Dhondiram, Bandu and Laxman as witnesses but, in the complaint at Exh.35, these names are not mentioned. In Exh.35, name of accused no.5 Lahu is mentioned but, in the report at Exh.57, his name is missing. When in Exh.57 it is mentioned that accused nos. 2 to 4 assaulted deceased Waman with stick, there is no such mention in Exh.35. As has been observed by the learned trial Judge, the reports at Exh.56 as well as at Exh.57 were prepared on the basis of Exh.35 and, as such, they must have been consistent with Exh.35. PW 11 Siddiki, the Head Constable, has attempted to give explanation that in the further enquiry the name of few more witnesses were revealed and they are mentioned in the report at Exh.57. However, the explanation is unacceptable and the same has been rightly not accepted by

the learned trial Judge. The conclusion recorded by the learned trial Judge that probability of manipulation in the original complaint filed by PW 3 Uttam was difficult to be ruled out.

23) After having considered the evidence as above, it does not appear to us that the learned trial Judge has committed any error in recording the finding that the prosecution has failed in bringing on record any cogent and sufficient evidence against accused nos. 2 to 5 proving their involvement in commission of the alleged crime. According to us, the trial Court has, therefore, rightly acquitted accused nos. 2 to 5 from the charges levelled against them. No case is made out by the State for causing interference in the finding so recorded by the trial Court.

24) It was the further contention of the appellant State that the learned trial Judge has erred in not holding accused no.1 guilty for the offence punishable under Section 302 of IPC. After having considered the entire evidence on record and the discussion made by the learned trial Judge on the issue, we do not find much substance in the objection raised by the appellant State. We fully agree with the conclusion recorded

by the trial Court that no such evidence has been brought on record by the prosecution so as to hold that accused no.1 was having an intention to cause the death of deceased Waman. The evidence on record reveals that it was a sudden quarrel between accused no.1 and deceased Waman on account of handing over of the loud-speaker set for the purpose of Ganpati festival. As has been rightly observed by the learned trial Judge, accused no.1 had gone to the spot of occurrence only for the purpose of making demand of loud-speaker and nothing has been brought on record to draw an inference that at the relevant time there was any intention of accused no.1 to finish Waman. The quarrel between deceased Waman and accused no.1 started all of a sudden without premeditation. Admittedly, there was no previous enmity between deceased Waman and accused no.1. The prosecution has also not brought on record any such clinching evidence showing that the sickle was purposely and intentionally brought by accused no.1 with him. However, when the said sickle was used by the accused in making assault on the head of deceased Waman, as rightly held by the learned trial Judge, the knowledge has to be attributed on the part of accused no.1 that making an assault by him with a sickle on the head of deceased Waman was likely to cause his death. In the circumstances, according to us, the learned trial

Judge has rightly held accused no.1 guilty for the offense punishable under Section 304 Part II of IPC. The prosecution has failed in making out any case to hold accused no.1 guilty for the offense punishable under Section 302 of IPC. The aforesaid contention of the prosecution also, therefore, cannot be accepted and the appeal filed by the State, therefore, deserves to be dismissed in toto.

25) In an appeal filed by accused No.1 (Criminal Appeal No.304/2001), the appellant has challenged his conviction for the offense punishable under Section 304 Part II of IPC. However, in view of the finding recorded by us while deciding Criminal Appeal No.445/2001, Shri Satyajit Bora, learned Counsel for the appellant, on instructions, restricted the argument only to the extent of quantum of sentence imposed upon accused no.1 by the trial Court; in other words, to reduce the period of sentence, and to release accused no.1 on the sentence already undergone by him. Learned Counsel Shri Bora submitted that accused no.1 was arrested on 3rd of September, 1995, and was released on bail vide order passed on 14th of December, 1995. Learned Counsel further submitted that after pronouncement of the judgment, accused no.1 was taken in custody and was released on bail vide order

passed by this Court on 31st of October, 2001. Learned Counsel submitted that though the orders were passed by the respective Courts for releasing the applicant on bail, some time was consumed in arranging for bail, etc. and if the said time is considered, accused no.1 has practically undergone the imprisonment for a period of about seven months. Learned Counsel further submitted that the alleged incident occurred prior to about 23 years. The accused, who was at the relevant time 38 years old, has now crossed his age of 61 years. Learned Counsel further submitted that there was no previous enmity between accused no.1 and the deceased and whatever happened was in a sudden fight between the both. Learned Counsel further submitted that accused no.1 had no criminal antecedents. Relying upon the judgment of the Division Bench of this Court in the case of Narayan Aba Pawar and others Vs. State of Maharashtra (2015 All. M.R. (Cri) 1790), learned Counsel submitted that accused no.1 be released on the sentence of imprisonment already undergone by him.

26) Learned A.P.P. opposed the submission so made on behalf of accused no.1. Learned A.P.P. submitted that the learned trial Judge has already considered the circumstances as

are put forth by the accused and has shown adequate leniency while awarding the sentence and, as such, no further leniency deserves to be shown.

27) We have carefully considered the submissions made on behalf of the appellant i.e. original accused no.1 and by the State. Having regard to the facts involved in the present case, it appears to us that the request made by the appellant accused no.1 deserves to be positively considered. The alleged incident had admittedly occurred prior to about 23 years i.e. in the year 1995. Admittedly, it was a sudden fight and was not a premeditated act. There is no dispute that there are no criminal antecedents to accused no.1 and present is the only criminal case against the accused. As has been submitted by the learned Counsel for the appellant, accused no.1 has now crossed the age of 61 years. It is a matter of record that he has already undergone imprisonment for a period of seven months. Aforesaid are the circumstances which make us to consider the request of the appellant to reduce the sentence imposed upon him by the trial Court and to substitute the same with the sentence of imprisonment already undergone by him.

28) There is no straight-jacket formula for sentencing the

accused on proof of crime. Twin objectives of sentencing policy are deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the Court has to keep in mind the gravity of the crime, motive for the crime, nature of the offense and all other attendant circumstances. In the instant matter, admittedly, accused no.1 had been to the spot of occurrence for demanding the loud-speaker set from deceased Waman to be used for Ganpati festival which was to commence from the next day and not with the intention of causing injury to deceased Waman which had ultimately resulted in causing his death. From the evidence on record it is also discernible that in a fit of anger, a single assault was made by accused no.1 on the head of deceased Waman. It can be gathered that accused no.1 was deeply annoyed since his request for handing over the loud-speaker set was turned down by deceased Waman. Learned trial Judge has, therefore, rightly held him guilty for the offense punishable under Section 304 Part II of IPC. The only question now remains to be considered is whether to accept the request made by the accused to modify the sentence imposed upon him by the trial Court and to sentence him with imprisonment already undergone or to confirm the sentence imposed upon him by the trial Court

Court.

29) In the case of Narayan Aba Pawar and others Vs. State of Maharashtra (cited supra), the trial Court had convicted the accused therein for an offense punishable under Section 302 read with Section 34 of IPC and had sentenced them to suffer imprisonment for life and to pay fine of Rs.5,000/- each. In an appeal, the Division Bench set aside the conviction for the offense punishable under Section 302 read with Section 34 of IPC and held the accused guilty for the offense punishable under Section 304 Part II of IPC. While considering the adequacy of sentence to be imposed upon the appellants / accused, the Division Bench has made the following observations in para nos. 20 and 21 of the said judgment which read thus:

"20. It appears that the original accused no.1 Narayan Aba Pawar is aged 70 years now, while original accused no.2- Laxmibai Narayan Pawar is aged 65 years as of today. The date of incident is September 1997 and thus nearly 17 years have elapsed since the date of the incident. Accused Nos.1 and 2 had been arrested on 6.9.1997 and were released on bail on 24.9.1997. Subsequent to their conviction, they were committed to jail on 22.1.2007 and were released on bail by this court on 10.4.2007. Accused Nos.1 and 2 have thus undergone three months imprisonment till date. Accused No.3 Ganesh has been in jail throughout and according to learned Counsel for the appellants, he has undergone an

imprisonment of more than 5 years.

21. Looking to the age of the accused nos.1 and 2 and also in the light of the fact that the incident had occurred more than 17 years back, according to us the imprisonment of three months undergone by the accused nos.1 and 2 would subserve the interest of justice. We are quite conscious of the fact that the imprisonment of 3 months for an offence punishable under Section 304 (II) would be a fleabite sentence. However, in the peculiar facts of the case, as stated above, according to us the interest of justice would better be served by imposing the sentence of a period already undergone by accused nos.1 and 2 as well as the period undergone by accused no.3. The amount of fine imposed by the Trial Court needs to be enhanced and according to us, it would be appropriate if each of the accused should be asked to payment of fine of Rs.15,000/-, in default of which to undergo RI for 1 and ½ years."

30) It appears to us that the course as was adopted by the Division Bench in the cited case can be conveniently adopted in the case in hand also. In the present matter also, the incident in question had occurred in the year 1995, and thus, 23 years have elapsed since the date of incident. Accused no.1 has already undergone imprisonment for a period of more than seven months. Accused no.1 has now crossed the age of 60. He has no criminal antecedents. In the circumstances, we are inclined to accept the request of the accused to modify the sentence imposed upon him by the trial Court and to release him on the sentence of imprisonment already undergone. We reiterate that accused no.1 is not

habitual offender. The crime committed by the accused cannot be termed as heinous crime and since he was not involved in any anti social activities, prolonged confinement may not be required in the instant case. We are, however, of the opinion that the balance can be struck by adequately increasing the amount of fine which can be in turn directed to be paid to the widow of deceased Waman. The learned Trial Judge has imposed fine amount of Rs.15,000/- on the present accused. In the facts and circumstances of the case, we deem it appropriate to enhance the said amount to Rs.1,00,000/- (Rupee one lakh). The accused has already paid the fine amount of Rs.15,000/-. Thus, now he would be required to pay the balance amount of Rs.85,000/- (Rupees eighty five thousand)

31) In the foregoing circumstances and for the reasons stated above, following order is passed:

ORDER

1. Criminal Appeal No.445/2001 filed by the State is dismissed.
2. Criminal Appeal No.304/2001 is partly allowed as under:-

(i) The conviction of accused no.1 Dagadu Nivrutti Bhusnar for the offense punishable under Section 304 (II) of IPC though is maintained, the substantive sentence imposed upon him by the trial Court is reduced to the period of sentence already undergone by him and to pay fine of Rs.1,00,000/- (Rs. one lakh); in default, to undergo simple imprisonment for six months. Fine amount, if paid by the appellant, the same be paid to the widow of deceased Waman, and if she is not surviving, to the surviving legal heirs of deceased Waman. The trial Court shall, after deposit of the fine amount, issue notice to the widow of deceased Waman or, the legal heir(s) of deceased Waman, as the case may be, and to ensure that the amount of fine is expeditiously remitted to them.

(P.R.BORA)
JUDGE

(SUNIL P.DESHMUKH)
JUDGE

bdv & AGP
fldr 3.2.18.