

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

CRIMINAL APPEAL NO. 613 OF 2002

1. Madhav Nilkanth Thombe,
Age 28 years, Occu. Jeep Driver
and owner r/o Kanhergaon,
Taluka and District Hingoli
 2. Govinda Nilkanth Thombe,
Age 32 years, Occu. Business,
r/o as above
- .. Appellants

Versus

- . The State of Maharashtra
- .. Respondent

Mr Satej S. Jadhav, Advocate for appellants
Mr P.G. Borade, A.P.P. for respondent – State
Mr A.M. Kulkarni Advocate h/f Mrs M.A. Kulkarni, Advocate for
complainant

**CORAM : T.V. NALAWADE AND
A.M. DHAVALA, JJ**

**DATE OF RESERVING
THE JUDGMENT : 7.12.2017**

**DATE OF PRONOUNCING
THE JUDGMENT : 17.1.2018**

JUDGMENT (Per A.M. Dhavale, J.)

1. The two appellants as accused persons in Sessions Case No.2/2002 were prosecuted for committing murder and attempt to commit murder punishable under Sections 302, 307 read with Sec.34 of Indian Penal Code and were convicted by learned Ad hoc Additional Sessions Judge, Hingoli by judgment dated 12.9.2002 for both the offences and were sentenced to imprisonment for life and fine of Rs.500/- each in default rigorous imprisonment for six months under Section 302 of Indian Penal Code and rigorous imprisonment for five

years and fine of Rs.500/- each in default rigorous imprisonment for six months under Section 307 read with Sec.34 of Indian Penal Code with direction to run both the substantive sentences concurrently. Aggrieved by the said judgment, they have preferred this appeal. The special feature of this case is that they were charged for committing murder and attempt to commit murder by deliberately dashing their jeep to the bike of the deceased.

2. The facts relevant for deciding this appeal may be stated as follows :

This prosecution has been initiated on the basis of Crime No.54/1999 registered on 18.9.1999 at 12.05 midnight for offences punishable under Sections 304, 338 of Indian Penal Code on the F.I.R. of P.W.1 Vitthal. P.W.1 Vitthal is a retired Gramsevak. Deceased Pandurang was his son-in-law married to his daughter Vimal about 18 years ago. On 17.9.1999, son-in-law Pandurang, resident of Phalegaon, Taluka Washim was invited by P.W.1 Vitthal at his house at Kanhergaon for dinner on account of Mahalaxmi festival. Son of the deceased Pandurang by name Nitin was residing with P.W.1 Vitthal and he had gone to Phalegaon and given message of invitation to his parents on 15.9.1999. As per F.I.R., on 17.9.1999 at 6.45 p.m., P.W.1 Vitthal was waiting at S.T. Stand, Kanhergaon for his son-in-law and for return of his cattle. That time, he saw Jeep bearing No.MH-7875 came from Washim side (Washim is towards North of Kanhergaon and Hingoli is towards South). Some persons got down from the jeep and the jeep started return journey towards Washim. Accused no.1 Madhav, accused no.2 Govinda and one more person were in the jeep.

The jeep was being driven by accused no.1 Madhav. Within five minutes, at 6.50 p.m., one Madan Biyani - P.W.8 gave him message that one bike rider had died under the jeep and on verification by him, the deceased person was his son-in-law. There was also one person injured and the spot was nearby. P.W.1 Vitthal along with one Vasant Gawande P.W.3 rushed to the spot and saw that Commander Jeep MH-22-7875 had left the road and got down the slope and his son-in-law and his bike was under the jeep and his son-in-law was dead. One Ananda Korde P.W.9 was there in injured condition. P.W.1 Vitthal narrated in the F.I.R. that Rekha, sister of accused nos.1 and 2 was given in marriage to one Dhondur and there were strained matrimonial relations between them. She was staying at her maternal house for fourteen months and thereafter due to intervention of the deceased Pandurang, she was sent to the house of her husband, but thereafter within short time, she committed suicide by consuming poison. Accused nos.1 and 2 and their maternal uncle held deceased Pandurang responsible for death of their sister and prosecuted him along with husband and matrimonial relations of Rekha. Since then both the accused were threatening deceased Pandurang to kill and P.W.1 Vitthal was trying to convince him. P.W.1 Vitthal alleged that accused nos.1 and 2 deliberately gave dash to the bike on which his son-in-law Pandurang was travelling and thereby they killed his son-in-law and seriously injured pillion rider Ananda. On the basis of such F.I.R., crime was registered at C.R.No.54/1999 under Section 304, 338 of Indian Penal Code. During investigation, the police seized clothes of the deceased and inquest panchnama was drawn and autopsy was

conducted. The post mortem notes disclosed eleven injuries on the deceased out of which three fractures were on the skull. The offence was investigated into by A.P.I. Ankushkar P.W.18. He recorded statements of material witnesses. Injured Ananda was sent to Civil Hospital, Washim and thereafter to District Hospital, Akola. His statement came to be recorded after three months. As per his statement, after the accident, both the accused had inflicted blows of iron bar and sticks on the skull of deceased Pandurang and on him as well. He was unconscious for two months. The accused were arrested and after recording statements of material witnesses and sending the articles to the Chemical Analyst, the charge-sheet was submitted in the Court. It is relevant here to record that the jeep in question was seized and accused no.1 as a registered owner obtained its interim custody from the Court.

3. After commission of the case, the learned Additional Sessions Judge, Hingoli framed charge at Exh.29 under Section 302/34 and 307/34 of Indian Penal Code. The accused pleaded not guilty. Learned Additional Sessions Judge, Hingoli convicted accused nos.1 and 2 as referred above and acquitted accused no.3 Arjun (jeep driver) of offences with which he was charged and tried.

4. Mr Satej Jadhav, learned Advocate for the appellants has taken us through the evidence on record. He argued that the prosecution witnesses completely changed the story. The initial story was only death by deliberate accident, but the prosecution witnesses introduced story about assault by accused nos.1 and 2 by crow bar

and sticks after the accident. He argued that it was a pure case of accident and there is no material to show that it was deliberate accident. There is no reliable material to show that accused no.1 was driving the jeep. There is no material to show that accused nos.1 and 2 have assaulted the deceased with sticks and bars. The statement of P.W.9 Ananda was recorded after three months. There is no material to show that he was seriously wounded and was not in a position to speak for such a long time. There was no motive for the accused to commit the crime. As per prosecution case, accused no.3 Arjun was driving the jeep. The jeep was belonging to accused no.1 but the prosecution did not produce R.C. Book and other documents about ownership. There are material contradictions in the evidence of witnesses including P.W.9 Ananda and the learned trial Judge erred in relying on the evidence. It is a case of accident due to negligence of deceased Pandurang. At the most, there may be some negligence on the part of the jeep driver, but accused no.1 cannot be held guilty for murder and attempt to commit murder. No role has been assigned to accused no.2. Therefore, the conviction of the appellants is not sustainable. Hence, the appeal be allowed and both the accused be acquitted.

5. Per contra, learned Advocate Mr A.M. Kulkarni holding for Mrs Kulkarni for the informant and learned A.P.P. Mr Borade for the State supported the judgment of the trial Court. They argued that the jeep had passed barricades erected by the police to some distance from the spot. The jeep had gone completely on the wrong side and dashed the bike and had pushed it down the road. The accident

shows that as deposed by P.W.9 Ananda, it was a deliberate accident. There was previous enmity. Accused nos.1 and 2 had grudge against deceased Pandurang, as he was mediator in resuming cohabitation by Rekha which led to commission of suicide by Rekha. The deceased was prosecuted by the accused for offence punishable under Sections 498A and 306 of Indian Penal Code along with husband and maternal relatives of the deceased Rekha. The evidence on record shows that accused nos.1 and 2 while travelling in their jeep had seen deceased Pandurang travelling on bike and they immediately returned from Kanhergaon with sole intention to give dash to the bike. It was not a case of accident. Subsequent to the accident, both the accused have assaulted both the injured persons and it is ensured that Pandurang should die on the spot. Delay in recording the statement of Ananda is not suspicious, as he was taking treatment at Washim, Akola and then Nagpur. The learned trial Judge has properly appreciated the evidence and no interference is called for in the conviction and sentence.

6. The points for consideration with our findings are as follows:

- (I) Whether deceased Pandurang met with a homicidal death ? ..Not proved
- (II) Whether accused no.1 Madhav along with accused no.2 Govinda drove the jeep deliberately so as to give dash to the bike driven by deceased Pandurang on which P.W.9 Ananda was sitting as a pillion rider ? ..Not proved

- | | | |
|-------|--|--|
| (III) | Whether accused nos.1 and 2 had given blows of crow bar and sticks on the skull of deceased Pandurang and P.W.9 Ananda ? | ..Not proved |
| (IV) | Whether the accused nos.1 and 2 have committed offence punishable under Sections 302, 307 r/w 34 of Indian Penal Code ? | ..In the negative |
| (V) | What order and sentence ? | ..The appeal is allowed. Conviction and sentence of both the accused are set aside |

- REASONS -

7. In the present case, there is no dispute that on 17.9.1999 deceased Pandurang was travelling on his bike from Washim side towards Kanhergaon (from North to South). That time, P.W.9 Ananda was sitting on his bike as a pillion rider. That time, jeep bearing MH-22-7875 came from Kanhergaon side and it gave dash to the bike of deceased Pandurang. There is evidence of witnesses and documentary evidence to show that the jeep has gone on wrong side and dashed the bike and pushed it down the road and it had left the road. The photographs Articles A to I disclose that the jeep has left the road and the bike is exactly at the center of the front wheels of the jeep. It is on its wrong side, i.e it has crossed the lane meant for vehicles coming from opposite direction and gone beyond and down

the road. It is also not disputed that deceased Pandurang died on the spot, while P.W.9 Ananda, who was a pillion rider was seriously wounded. There is evidence of Ananda to that effect supported by other witnesses. Therefore, both the facts that deceased Pandurang died due to dash to his bike and P.W.9 Ananda seriously wounded due to the accident are not disputed.

8. It is, however, contention of P.W.9 Ananda that accused nos.1 and 2 had also given blows of iron bar and sticks on the skull of deceased Pandurang and P.W.9 Ananda. The prosecution story is that it was a deliberate dash with intention to cause death followed by assault with iron bar and sticks. Whereas, according to the accused, it is a case of accident. It was suggested that accident took place due to rash and negligent driving by deceased Pandurang. The evidence on record shows that the bike was proceeding from Washim to Kanhergaon (North to South), whereas the jeep was proceeding from Kanhergaon to Washim i.e. from South to North. The jeep was expected to be on the left side of the road from South to North, i.e. on the Western side. Whereas, the bike was expected to be on the Eastern side. The evidence on record and the photographs disclosed that the jeep has crossed its lane, gone in the wrong lane and then left the road. In that case, there cannot be any rashness and negligence on the part of the bike rider. It may be a deliberate accident or gross negligence of the jeep driver or failure of brakes of the jeep. In view of above facts, the issue whether it is homicidal death or not and whether the accused have committed murder and attempted to commit murder or not will have to be decided together.

9. The prosecution has examined eighteen witnesses, which can be grouped along with the relevant documents as follows :

Main witnesses : P.W. 9 Ananda – the pillion rider injured eye witness.

P.W.1 – Vitthal, father-in-law of the deceased, who has visited the spot immediately after the accident and has deposed that accused no.1 Madhav was driving the jeep and accused no.2 Govinda was sitting in the jeep along with third person when it left Kanhergaon at 6.45 p.m. for proceeding towards Washim.

P.W.4 Datta who was also called along with deceased Pandurang for meals for Mahalaxmi festival at the house of P.W.1 Vitthal has posed himself as an eye witness to the accident as well as assault by accused nos.1 and 2. His evidence shows that he is having extremely weak eye sight almost near to the blindness and he has been disbelieved by the learned trial Judge.

P.W.5 Shaikh Naeem, who runs a garage of removing of punctures at Kanhergaon. As per prosecution case, he had seen accused no.1 driving the jeep towards Washim, but has turned hostile and not supported.

P.W.6 Nandu Bhagat is having his house by the side of the road near the spot. The prosecution claimed that he had seen the deliberate accident, but he has turned hostile and not supported the prosecution at all.

P.W.8 Madan Biyani is running a pan shop at Kanhergaon. He learnt about the accident and death of Pandurang. According to prosecution, he had seen accused no.1 Madhav travelling the jeep at high speed towards Washim, but he has not supported the prosecution.

P.W.11 Madan is a cow boy and according to prosecution, he had seen the accident, but he has turned hostile.

P.W.16 Rambhau was going on his bicycle at the time of accident and had seen the accident. He has partially supported the prosecution by stating that he had seen the jeep taking a turn and thereafter resulting into accident. He deposed that water was administered to one of the injured. With the permission of the Court, learned A.P.P. cross-examined him. He is not supporting the prosecution. He did not speak against the accused.

Other material witnesses :

P.W.2 Vimal is widow of the deceased Pandurang. She has deposed about previous enmity on account of Rekha's suicide and the threats given by the accused to her husband.

P.W.3 Vasanta is a spot panch (Panchnama Exh.54).

P.W.7 Vasanta is a shop keeper from whom deceased had purchased pan, just before his death. The deceased had told him that he was proceeding to Kanhergaon for meals. His evidence is not material.

P.W.10 Laxman is uncle of Rekha's husband Dhondu. He deposed about the strained relations between Rekha and Dhondu and involvement of deceased Pandurang in the said dispute.

P.W.12 – Kishan is a panch to the spot panchnama Exh.54. He has identified the various articles seized from the spot.

P.W.13 – Shaikh Rahimoddin is Head Constable, who has carried the viscera to Chemical Analyst's office.

P.W.14 – A.S.I. Sartaj has recorded the F.I.R. Exh.40 of P.W.1 Vitthal and registered the crime.

P.W.15 – Subhash is a photographer, who has taken photographs of the spot articles A to I. He had also prepared video cassette, but it is not brought on record.

P.W.17 – Dr. Santosh Sarda was Medical Officer at Washim. He has examined Ananda and issued certificate Exh.77, but did not specifically depose about the injuries. He stated that the contents of the certificate are correct.

P.W.18 – Narsing Ankushrao is the Investigating Officer.

The evidence of P.W.9 Ananda, P.W.4 Datta and P.W.1 Vitthal is very material.

The inquest panchnama of the deceased is at Exh.41. Seizure of blood stained clothes of the deceased is at Exh.42. Post mortem notes Exh.43 are admitted. As per post mortem notes, the deceased had sustained following injuries :

- 1) Right lower end of radius and ulna fracture;
- 2) Abrasion over right elbow joint 3 x 3 cm
- 3) Right tibia and fibula fracture at middle side, bone pieces piercing out medially CLW 5 x 5 cm
- 4) Right calf rigor CLW, irregular margin 3 x 3 cm
- 5) Right foot dorsal aspect linear CLW 5 x 1 cm bone deep
- 6) U shaped CLW over right sole 1 x 5 cm x bone deep
- 7) Oval shaped CLW on medial side of right tibia lower end 1 x 1 cm
- 8) Circular CLW over medial aspect of knee joint 1 x 1 cm
- 9) Lt. Parietal bone fracture with CLW 4 x 3 x bone deep
- 10) Left temporal junction CLW 5 x 1 x 2 cm
- 11) Temporal bone fracture with CLW 3 X 2 X 2 cm age of injury 24 hours

The post mortem note disclose that injury nos.1 to 8 are on the legs of the deceased, all on right side, whereas injury nos.9 to 11 are fracture injuries on the skull. Injury no.9 is contused lacerated wound on left parietal region 4 x 3 cm bone deep. Injury no.10 is contused lacerated wound 5 x 1 x 2 cm left tempo parietal region. Injury no.11 – temporal bone fracture with contused lacerated wound 3 x 2 x 2 cm. It is obvious that injury of the size 4 x 3 cm contused lacerated wound cannot be caused by blows of iron bar and sticks, but injury nos.3 and 4 are possible by blows of iron bar and sticks.

The evidence of P.W.17 Dr. Sarda and certificate Exh.77 of P.W.9 Ananda show that Ananda was brought to the hospital on

17.9.1999 at 8.15 p.m. by police of Kanhergaon naka Police Station with history of accident. Following were the injuries on his person :

- 1) Cross injury, right feet fractured to tibia - mid linear - compound open fracture to right feet below knee;
- 2) Lacerated wound 5 x 2 cm to right parietal;
- 3) CLW 5 x 2 cm oblique to forehead right side

On the backside of the certificate, radiological report of District Hospital, Akola has confirmed the linear fracture of right temporo parietal occipital region (Injury No.1). Dislocation of right tarsometatarsal multiple fractures (Injury No.2) Nattalle 2nd metatarsal mid shaft analysis. Right toe with fracture of leg and soft right tibia (not clearly legible). Certificate shows only one lacerated wound of 5 x 2 cm on right parietal region, which can be caused by blows of iron bar or stick.

10. The evidence of P.W.1 Vitthal shows that on that day, 17.9.1999, there was religious programme of Mahalaxmi for which deceased Pandurang was called along with some others from Washim. Pandurang's son Nitin, who was residing with P.W.1 Vitthal had given message to Pandurang about two days earlier. P.W.4 Datta was also called. The evidence indicates that they were expected for the meals at noon time, but P.W.4 Datta alone came at 2.00 p.m. and Pandurang did not come. On enquiry, P.W.4 Datta told him that he would be coming shortly. He stated that he waited for Pandurang and then sent Datta back to Washim to bring Pandurang. After sometime, Datta

returned and informed that Pandurang had left his office. That time, P.W.1 Vitthal was waiting at the S.T. bus stand. He told Datta to go to his house to make preparation for 'Aarti'. His evidence shows that at about 6.45 p.m., Madhav came near S.T. Stand with a jeep. Govinda A-2 was in a hotel at bus stand. Govinda boarded in jeep with something in his hand and the jeep proceeded in the direction of Washim. It was Commander Jeep bearing registration No.MH-22-7875. Within five minutes P.W.8 Madan came running to him. He was making enquiry about P.W.1 Vitthal's son Bandu and then he met Bandu and Bandu told P.W.1 Vitthal that his son-in-law was being assaulted. P.W.1 Vitthal then proceeded in the direction of Washim. Along with Bandu, Vasanta, Subhash, Maroti etc. There was police tent with barricades on the road for checking the vehicles. About 100 and 150 feet away from the tent, motorcycle of his son-in-law Pandurang was lying by the side of road along with jeep of accused no.1. Both the vehicles were down the road. Son-in-law was lying there with serious injuries on his body including head. One Ananda P.W.9 was also lying there in injured condition. P.W.1 Vitthal stated that his son-in-law had acted as a mediator to persuade Rekha to resume co-habitation. Rekha was sister of accused no.1 Madhav and accused no.2 Govinda. After a long stay at her maternal house, she had resumed co-habitation and immediately thereafter committed suicide at Phalegaon. Accused nos.1 and 2 were annoyed with deceased Pandurang and held him responsible for death of Rekha. He, therefore, lodged report that it was a deliberate accident committed by accused nos.1 and 2. He has taken photographs and

handed over those photographs to the police. His cross-examination reveals that at the time of incident, he was unable to see the things clearly and was wearing specs of high number of 4 to 4.5. It was not possible for him to see anything without specs and he was almost blind without specs. He stated that after retirement in 1997, he had changed the specs. Still, he was unable to watch the things and for last one year, he was not using the specs. He was not using the specs at night time due to advise of the doctor. In the witness box, when demonstration of his eye sight was taken, he was unable to figure out the number of fingers shown to him from short distance and number of persons standing at a distance of ten feet. His cross-examination shows that the S.T. Bus stand Kanhergaon is a crowded area, where large number of shops, vehicles are there and people also stand. He admitted that when he was standing at the S.T. Bus stand, there was darkness on the road. His presence on the spot itself is doubtful. Deceased Pandurang was expected to come to him for meals and his time of arrival was totally uncertain. Therefore, P.W.1 Vitthal could not have waited for his son-in-law at S.T.Stand. Considering his weak eye sight, his evidence that he has seen accused nos.1 and 2 in a jeep carrying something and returning towards Washim at 6.40 p.m. cannot be believed. Learned trial Judge has rightly disbelieved him on this point. We agree that evidence of P.W.1 Vitthal deserves to be discarded.

11. P.W.1 Vitthal's cross-examination shows that the spot of incident is 700 to 800 feet away from the bus stand and there is a Police outpost at a distance of 100 to 150 feet from the S.T. Bus

stand. Some drums were kept as barricades by the police for checking the vehicle and obstructing them from proceeding in a high speed. The "accident" took place at a short distance from the police tent and in natural course, the police would have certainly rushed to the spot, but not a single witness is examined, who had seen the accident immediately after the incident.

12. Evidence of P.W.2 Vimal, widow of deceased Pandurang about previous enmity and prosecution of her husband by accused nos.1 and 2 in a case of suicide by Rekha is not disputed, but her evidence that accused nos.1 and 2 had given threats to her husband is not supported by subsequent conduct of the deceased or his relatives. The matter was not reported to the police and the evidence shows that deceased Pandurang was regularly travelling from Kanhergaon to Washim and Washim to Kanhergaon on his bike, whereas accused nos.1 and 2 were plying their jeep as a public carrier on the same route. If there was any substance in the allegations of threat, deceased Pandurang would not have taken risk of plying on the same route by bike that too without wearing helmet.

13. The evidence of panch witnesses P.W.3 Vasant and P.W.12 Kishan is not very much material. The factual situation deposed by them is not much in dispute. There are photographs Articles A to I on record, which makes the position clear.

14. P.W.4 Datta is an eye witness. He stated that P.W.1 Vitthal had called him and deceased Pandurang for meals for Mahalaxmi festival. He is resident of Kalamba (Mahali), Taluka Washim. He stated that

Nitin had brought the message of invitation. He contradicts P.W.1 Vitthal by stating that he and Pandurang decided to go to Kanhergaon at 5.00 p.m. and he was at Washim in connection with his personal work upto 5.30 p.m. He did not say that he had gone to Kanhergaon at 2.00 p.m. and P.W.1 Vitthal made enquiry with him about deceased Pandurang and he was sent back to Washim for bringing Pandurang. He stated that at 5.30 p.m. he was waiting at Pusad naka for proceeding to Kanhergaon. That time, Pandurang came on a bike along with P.W.9 Ananda as a pillion rider. Pandurang asked him to join them, but apprehending imposition of fine by the police, he declined to ride the bike as a triple seat. He stated that after Pandurang and P.W.9 Ananda proceeded on bike, the jeep bearing registration No.MH-22-7875 came there for proceeding to Kanhergaon, but his co-brother (P.W.1) had told him that he should not seat in the vehicle of public carrier as it was dangerous. Thereafter, he boarded another vehicle and was sitting on the front side. When the vehicle crossed Painganga river, he saw Pandurang driving his bike ahead of them. Then he saw a Commander jeep coming from opposite side and deliberately giving dash to Pandurang's bike. That time, his jeep was reaching the spot and he requested the jeep driver to stop the jeep, as the vehicle coming from Kanhergaon side had given deliberate dash to his relative's bike. He stated that when his jeep was halted 200 feet away from the spot, he saw accused nos.1 and 2 giving blows of iron rod on the back side of skull of Pandurang and Pandurang lying by the side of the road. He stated that when his vehicle reached near the spot, he saw both the

accused giving blows of iron rod on the head of P.W.9 Ananda. He and other passengers alighted on the spot and the three accused persons present there ran away towards Painganga river.

15. His evidence on this point seems to be improbable. If he had seen deliberate dash of the jeep coming from opposite side to the bike of Pandurang, he must be within short distance from the said spot. He could not have seen the said incident and could not have identified the person from a long distance. His jeep was moving and by the time, the dash was complete and the bike and jeep went down the road, he could not have reached there. His evidence that he also saw accused nos.1 and 2 giving blows of iron rod and sticks to Pandurang from a distance of 200 feet and thereafter when his jeep reached the spot, he saw both the accused giving blows of iron rod and sticks to P.W.9 Ananda is highly improbable. Giving of dash, then getting down from the jeep and giving of blows requires sometime. There is limitation to the reach of eye sight of a person. If the jeep was moving, all these things could not have happened by the time the jeep reached the spot. Apart from it, his cross-examination shows that his entire evidence on this point is by way of improvement. He has not disclosed these facts before the police. The contradictions have been duly proved. His evidence is not consistent with the evidence of P.W.1 Vitthal. Therefore, his presence on the spot itself becomes doubtful. P.W.9 Ananda has not deposed about presence of P.W.4 Datta. The learned trial Judge has also doubted his evidence and rightly so. We hold that his evidence was rightly discarded. His evidence shows that he had taken Ananda to the hospital at Washim

and thereafter to Akola. P.W.9 Ananda, however, stated that he shouted for help, but nobody came there and thereafter he became unconscious. He regained consciousness after a long time.

16. As earlier discussed, other material witnesses P.W.5 Shaikh Naeem, P.W.6 Nandu, P.W.8 Madan, P.W.11 Madan, P.W.16 Rambhau have not supported the prosecution.

17. P.W.10 Laxman is elder brother of Ramji, father-in-law of Rekha, sister of accused nos.1 and 2. He deposed about the strained relation between Rekha and her husband Dhondur and Rekha stayed at her maternal house for thirteen months. Thereafter, Rekha had resumed co-habitation with son Dhondur at Phalegaon. When he had gone out of station, Rekha committed suicide. His evidence does not directly connect accused nos.1 and 2 with the crime.

18. The most crucial evidence is of P.W.9 Ananda, who has been believed by the learned trial Judge to convict the accused. He was pillion rider with the deceased Pandurang, which is not in dispute. He deposed that he was also proceeding for meals at the house of P.W.1 Vitthal on account of Mahalaxmi festival. He deposed that on that day, he and deceased Pandurang saw a movie at 12.00 to 3.00 p.m. and thereafter second movie was seen by them from 3.00 to 5.00 p.m. and thereafter they started proceeding towards Kanhergaon. He deposed that P.W.4 Datta met them, but he refused to accompany them. He stated that when they reached near Rajegaon, one Commander jeep overtook them. Thereafter there was a bicyclewala in front of them. After sometime when they were crossing the bridge,

a jeep was standing in cross direction on the left hand side. It suddenly gave dash to their bike. Both of them were thrown away. Thereafter, Pandurang was assaulted by accused nos.1 and 2 by iron rod and bamboo stick on the back side of his head and top of his head. His hair were caught from the front side and he was given blows on the back side. He was shouting for help but nobody had come there. Then he was also given blows by the accused on his head and he became unconscious. He stated that the dash of the jeep was on his foot and his foot was seriously injured. He stated that he gained consciousness about 1 to 2 ½ months later. He has identified accused nos.1 and 2 as the assailants.

19. P.W.9 Ananda stated that he was proceeding along with Pandurang on bike for the first time. He is resident of Phalegaon which is nine kilo meter away from Washim. The road between Washim and Phalegaon is not pakka road and they required half an hour to reach Washim. He stated that at the time of incident, the headlights of the bike were not switched on and the headlights of the jeep coming from the opposite side were also not switched on. He stated that surgical operation was carried out on his injuries to the leg and he might have been discharged after two months. He could not state whether there was a police chowki or tent and barricades or drums near the spot, but he was confronted with his previous statement, which shows such statement for which he has no explanation. His statement regarding a meeting of P.W.4 Datta and his refusal to join them on the bike is also not there in the statement. His evidence that their bike was driven from the left side is not there

in his statement, but it is not material. His statement that he was given blows on his head by two assailants is not there in his statement for which he has no explanation. He stated that after the dash of the jeep, the incident continued for 40 to 50 minutes, which is totally improbable and contrary to the evidence of P.W.4 Datta. If he had become unconscious immediately, he could not have stated about the time. He denied that he and Pandurang had consumed liquor and Pandurang was riding the bike in negligent manner by consuming liquor. He denied that accused nos.1 and 2 had not assaulted them. P.W.9 Ananda is most material witness. As per his evidence, his statement was recorded by police two to four days after he returned home and he had returned home after 2 ½ months.

20. As per evidence of P.W.16 Rambhau Bangar, at the material time he was proceeding on his bicycle. He saw the accident in which two persons were injured. He stated that several persons had gathered there and one of the injured was provided water. It indicates that injured witness P.W.9 Ananda was not unconscious and people had gathered there. He has not supported the prosecution. Therefore, he was cross-examined, but it was not suggested to him that accused no.1 was driving the jeep and accused no.2 was in the jeep. Nor it was suggested that they had assaulted deceased Pandurang and P.W.9 Ananda by iron bar and sticks. The story regarding assault by sticks and crow bar is clearly after thought. In that case, P.W.9 Ananda either was not unconscious or must have become unconscious immediately after the accident. If he became unconscious immediately after the accident, it would have been

shown in his medical certificate Exh.77, but it is not shown there. Besides, he deposed that incident was going on for 40 to 50 minutes after the dash. If he would have been unconscious, he could not have stated it. The evidence of P.W.4 Datta shows that there were many passengers and jeep driver in the jeep in which he was proceeding and he had witnessed the incident. In that case, the jeep driver and other passengers were independent and material witnesses, but none of them has been examined. If accused nos.1 and 2 were in the jeep, they would have been injured, but arrest panchnama does not show that they were injured and they were immediately arrested on the spot. The evidence shows that it was heavy traffic road and there were several vehicles passing along the road at the relevant time. Therefore, it is not possible to accept the evidence of P.W.9 Ananda that he raised shouts and nobody came there.

21. The prosecution ought to have produced the medical evidence regarding admission and discharge card and the certificate of Medical Officer as to whether P.W.9 Ananda was unconscious for such a long time. The certificate Exh.77 does not disclose that he was unconscious. There is no material to show that P.W.9 Ananda was admitted in the hospital for such a long time and that he was unable to make a statement for such a long time. The delay of more than three months in recording the statement of most material witness is a material lacuna in the prosecution case. Though the factum of accident is not disputed and though the accident might be deliberate also, the prosecution did not prove the panchnama of condition of jeep to rule out possibility of accident due to vehicular defect.

Besides, the evidence as to who was driving the jeep was very material and this fact was not disclosed by P.W.9 Ananda to the police at the earliest.

22. As per the application moved by accused no.1 and the documents annexed, accused no.1 Madhav is registered owner of the jeep and it was returned to him on bond. As per provisions of Motor Vehicles Act, it was his boundant duty to inform the police as to who was driving the vehicle at the relevant time and the factum of accident should have been reported by him, but if he has not done so, he would be guilty only for the offence punishable under the Motor Vehicles Act. It cannot be presumed that he being the owner, he must have been driving the vehicle. In fact, the prosecution had prosecuted accused no.3 on the assumption that he was driving the jeep.

23. The evidence on record shows that the accident has taken place near a police tent and was witnessed by several persons. The prosecution was bound to examine them to prove as to who was driving the said jeep. When such evidence is available and is not examined, prosecution cannot take the help of Section 106 of Evidence Act. Shifting of burden under Section 106 of Evidence Act is permissible only when there is no other evidence available. In this regard, we rely on **Murlidhar & Ors. Vs. State of Rajasthan, (2005) 11 SCC 133.**

24. As far as accused no.2 is concerned, no role is assigned to him.

25. The role assigned to accused nos.1 and 2 of giving blows of iron and sticks after the incident is after thought and by way of improvements. Except evidence of P.W.9 Ananda, there is no other

evidence to show that accused nos.1 and 2 were travelling in the said jeep and accused no.1 Madhav was driving the jeep. We also find that accused nos.1 and 2 had no direct motive to commit murder of Pandurang on account of his role as a mediator in resumption of co-habitation by Rekha before committing suicide by her. If they had any direct ill feelings, those would be against husband of Rekha and not against the deceased Pandurang, who was simply a mediator. On the other hand, inclusion of his name as accused person can be a motive for false implication of accused nos.1 and 2 by relatives of deceased Pandurang.

26. After considering the entire evidence on record, we find that the learned trial Judge has appreciated the evidence properly except in respect of appreciation of evidence of P.W.9 Ananda. He has not given any importance to the delay in recording the statement of P.W.9 Ananda and absence of medical evidence to justify such delay. He has also not considered the systematic efforts made by the prosecution to change the story to the deliberate accident (+) assault by accused nos.1 and 2. If the accident had taken place while accused nos.1 and 2 were travelling in a jeep, the police and persons in the near vicinity would have immediately visited the spot and the accused could not have been escaped. The accused were not arrested on the spot and their vehicle being used as public carrier, there is a possibility that they must have engaged a driver. The contention of P.W.9 Ananda that he raised shouts and nobody came there does not appear to be probable. Besides, there is evidence on record that P.W.4 Madan had been to the spot immediately after the incident.

There is no witness examined who had been to the spot immediately after the accident, who could have corroborated the evidence of P.W.9 Ananda. We, therefore, hold that the prosecution has failed to prove the role of the accused in the entire act beyond reasonable doubt. Therefore, the conviction of both the accused under Sections 302, 307 read with Sec.34 of Indian Penal Code is not sustainable. Hence, the appeal deserves to be allowed. We accordingly answer the points formulated by us and pass the following order:

- ORDER -

- (I) Criminal Appeal is allowed.
- (II) The conviction and sentence of both the accused for offence punishable under Sections 302, 307 read with Sec.34 of Indian Penal Code in S.T. No.2/2000 delivered by Ad hoc Additional Sessions Judge, Hingoli on 11th/12th September 2002 is hereby set aside. Both the accused are acquitted of all the charges.
- (III) The appellants-accused shall furnish P.R. bond of Rs.10,000/- with like surety each under Section 437-A of the Cr.P.C.

(A.M. DHAVAL, J.)

(T.V. NALAWADE, J.)

vvr