IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.365 OF 2013

1. Krushna S/o. Jagannath Sirsath .. **Appellants**
Age-25 years, Occu-Labour,
R/o. Bhaijalivasti, Tq. Dharur,
Dist.Beed

2. Parvatibai W/o. Jagannath Sirsath
Age-40 years, Occu-Household,
R/o. As above

Versus

The State of Maharashtra .. **Respondent**
Through Police Station Dharur,
Tq. Dharur, Dist. Beed

Mr.P.P.More, Advocate for the appellants (appointed)
Mr.R.V.Dasalkar, APP for the respondent/State

CORAM :T.V.NALAWADE &
S.M. GAVHANE, JJ.

RESERVED ON :18.12.2017

PRONOUNCED ON :27.02.2018

J U D G M E N T [PER: S.M. GAVHANE, J.]

. The appellants original accused Nos.1 and 2 who have been convicted and sentenced to suffer imprisonment for life and to pay fine of Rs.1,000/- [Rupees One Thousand] in default, to suffer rigorous imprisonment for one month, each, for the offence punishable under Section

302 read with Section 34 of the Indian Penal Code [for short 'the IPC'] as per the judgment and order dated 12.06.2013 passed by Additional Sessions Judge, Majalgaon, Dist. Beed in Sessions Case No.73/2012 have preferred this appeal challenging the said conviction and sentence.

2. The prosecution case as it appears from the police papers, is as under:-

A] Accused No.1 is the son and accused No.2 is the widow of the deceased Jagannath Bhaguji Sirsath. Angad and Urmila (PW-4) are the other issues of the deceased and the accused No.2. Angad was residing at Pune at the relevant time. The deceased was residing in a house constructed in his agricultural land at Bhaijalivasti – Jahangirmoha alongwith the accused and Urmila (PW-4). The informant Kushaba Bhaguji Sirsat (PW-3) is the brother of the deceased. He owns agricultural land and house adjoining the agricultural land of the deceased. PW-3 used to reside in the said house. Accused No.1 is married, but his wife was residing with her parents.

B] It is alleged that the deceased was addicted to liquor and under the influence of liquor, he used to pick

up quarrels with the accused oftenly. The accused were saying the deceased that he would sale agricultural land due to addiction of liquor and therefore to transfer the agricultural land in their names. On this count there occurred a quarrel amongst them two month's prior to the incident. It is alleged that, the accused had threatened the deceased of dire consequences.

C] On 28.07.2012 the accused worked in their field, as usual, till evening. The deceased had been to Dharur. Thus, his daughter Urmila [PW-4] was only present in the house. She cooked food. At about 07.00 pm one after another both the accused returned home. After sometime the deceased came home under the influence of liquor. He then started abusing both the accused. The accused No.2 got irritated on account of hurling of abuses. She therefore, said to accused No.1 that to get rid-off the nuisance of the deceased, he needs to be finished at once. Then she hit a kitchen iron rod on the forehead of the deceased. The deceased, who was sitting on the cot, fell down. At that moment, the accused No.1 gave blows of axe on the backside of the head of the deceased. The deceased was bleeding profusely.

D] Upon witnessing the aforesaid gruesome incident,

Urmila [PW-4], who was then 14 years old, ran to the neighboring house of her uncle, viz., the informant. She narrated about the incident to him. Both of them then came to the spot of occurrence. They saw the deceased in the pool of blood. He was motionless. The informant then intimated about the incident to his brother Bappa and father, who were residing at Village Jahangirmoha at the relevant time. They came there. Thereafter, the informant approached Police Station, Dharur in the night. His complaint came to be recorded at about 00.45 hours on 29.07.2012. Treating the said complaint as FIR (Exh.21), the Police Head Constable Bashir Shaikh registered the Crime No.95/2012 against the accused for the offence under Section 302 r/w Section 34 of the IPC and entrusted investigation to PSI Rathod [PW-7].

E] During the investigation PSI Rathod had drawn the enqeust panchanama on 29.07.2012 [Exh.26] at about 07.00 am at the spot. He then referred the dead body for autopsy to Rural Hospital, Dharur. Dr.Ravi More [PW-1] conducted post mortem examination and issued PM report [Exh.16] and he opined that death was caused due to head injury. This was followed by conducting spot panchanama [Exh.29] in presence of the panch witnesses Brahma Sirsat [PW-6] and Prakash Kokate. He seized the blood stained

slippers, blood soaked cloth, blood stained soil, plain soil and the clothes on the person of the deceased, as per the spot panchanama [Exh.29]. He entrusted further investigation to P.I. Sudke [PW-8] on 29.07.2012

F] P.I. Sudke arrested the accused on 29.07.2012. He seized clothes on the person of the accused NO.1 vide panchanam [Exh.24] and that of accused No.2 by drawing panchanama [Exh.25]. On 30.07.2012, while in custody of the police, the accused No.1 made memorandum statement [Exh.30] to produce the weapon axe used in the offence which was reduced in writing in presence of two panchas. Thereafter, the accused No.1 led the police party and panch witnesses to his house and produced an axe stained with blood, kept hidden in a heap of fodder. It was seized by drawing panchanama [Exh.31]. On 31.07.2012 the accused No.2 also made a memorandum statement [Exh.32] to produce the iron rod used in the offence. She then produced the same, kept hidden in the shrubs near her house. The iron rod was seized as per panchanama [Exh.33].

G] On 04.08.2012 P.I. Sudke addressed a letter to Taluka Magistrate for procuring the map of the spot of incident [Exh.37]. Vide communication dated 13.08.2012

[Exh.38] Circle Inspector, Dharur furnished the copy of the map of spot. On 07.08.2012 Urmila [PW-4] was referred to JMFC, Dharur for recording her statement under Section 164 of the Criminal Procedure Code.

H] On 13.08.2012 the seized articles, viz., the clothes of the deceased, the accused, blood stained and plain soil, the slippers and the blood soaked cloth, the blood samples of the deceased and the accused Nos.1 and 2 were referred for Chemical Analysis to Regional Forensic Science Laboratory, Aurangabad through Police Naik Jadhav [PW-2]. C.A. reports dated 06.03.2013 [Exh.40 and 41] were collected and included in case paper.

I] After completion of the investigation the charge-sheet was submitted in the Court of JMFC, Dharur who committed the case to the Additional Sessions Court, at Majalgaon as offence under Section 302 of the IPC was exclusively triable by the Sessions Court.

3. The charge was framed against the accused for the offence punishable under Section 302 read with Section 34 of the IPC to which they pleaded not guilty and claimed to be tried. Their defence is denial. No defence witness has been examined by the accused. It

appears that according to the accused death of the deceased was accidental and they have been falsely implicated due to enmity by the informant [PW-3].

4. To prove the guilt of the accused the prosecution examined in all eight witnesses and relied upon the panchanamas, PM report and CA reports referred above.

5. On considering the evidence adduced by the prosecution learned trial Court held that the prosecution has proved offence under Section 302 read with Section 34 of the IPC against the accused and sentenced them as referred earlier in introductory para of this judgment, which is under challenge in this appeal by the appellants/accused on several grounds mentioned in the appeal memo.

6. Learned Advocate appearing for the appellants/accused submits that the trial Court erred in believing the evidence of only eye witness Urmila [PW-4] daughter of deceased who is a child witness. The trial Court has not considered the aspect that said child witness is in the custody of the informant Kushaba Sirsat [PW-3] since time of incident and there is every

possibility of her being tutored by informant. Accused had no intention or motive to kill the deceased. They have not shared common intention to kill the deceased. There is inconsistency in the medical and ocular evidence. The learned Advocate submitted that thus the prosecution has failed to prove the offence under Section 302 of the IPC against the accused beyond reasonable doubt and therefore, they are entitled to be acquitted by allowing the appeal by setting aside the impugned judgment and order of conviction and sentence. To substantiate his argument learned Advocate appearing for the accused has relied upon following decisions:

1. Shivappa Buddappa Kolkar @ Buddappagol Vs. State of Karnataka 2004 AIR (SC)5047.

2. Farukh Shaikh Mohammed Vs State of Maharashtra 2006(1)Bom.C.R.(Cri.)844 Bombay High Court.

3. Ramajan Khajabhai Shaikh Vs State of Maharashtra 2006(2)Bom.C.R.(Cri.)976 Bombay High Court.

4. Mahadeo Kundalik Vaidya & others Vs State of Maharashtra 2002(Supp.1)Bom.C.R. (Cri.)894 Bombay High Court.

5. Barku Mahadu Ghute Vs State of Maharashtra 2007(1)Bom.C.R.(Cri.)728 Bombay High Court

6. Hallu Vs State of Madhya Pradesh 1974 DGLS(SC)108 Supreme Court.

. In a case of Shivappa Buddappa Kolkar @ Buddappagol (Supra) only one blow with axe was dealt with it and no other injuries inflicted on the deceased. Considering the conduct of the appellant and in view of the very findings recorded by the High Court, the Hon'ble Apex Court has held that the appellant cannot be imputed with the intention to cause death of Hanamant the deceased. Accordingly conviction of the appellant recorded by the High Court for the offence punishable under Section 302 of the IPC was modified to under Section 304 Part-II of the IPC.

. So also in a case of Farukh Shaikh Mohammed (Supra) in the appeal against conviction of the appellant for the offence under Section 302 of the IPC, it was the case of the prosecution that accused assaulted the deceased by knife. Observing that at the time of incidence accused was not even armed with any weapon, it was held that assault committed by the accused with knowledge that it was likely to cause death but without any intention to cause death or to cause bodily injury as is likely to cause death the conviction of the appellant/accused under Section 302 of the IPC was set

aside and he was convicted for the offence punishable under Section 304 Part-II of the IPC and instead of sentencing him to suffer the sentence immediately, he was directed to be released on probation bond for good conduct for a period of three years with one surety in the sum of Rs.25,000/- [Rupees Twenty Five Thousand] with condition.

. In a case of Ramajan Khajabhai Shaikh (Supra) in the appeal against the conviction of the appellant/accused for the offence under Section 302 of the IPC on holding that there appears to be no motive or intention for killing deceased and that it is a case of of culpable homicide not amounting to murder the conviction of the appellants for the offence under Section 302 of the IPC was set aside and instead they were convicted under Section 304 Part-II of the IPC for a period of six years imprisonment which they had already undergone.

6-A. In a case of Mahadeo Kundalik Vaidya & others cited (Supra) in paragraph Nos. 11,12 and 13 this Court [CORAM: Vishu Sahai and A.S.Bagga, JJ.] has observed thus:

“11. Apart from this, the manner of assault as given out by these eye-witnesses, in our view, is not supported by the medical evidence. According to both the eye-witnesses, namely, Sharda and Kalindi, the four appellants assaulted the deceased with axes. It is common knowledge that axes cause incised or cut injuries, unless they are used from blunt side, in which eventuality they would cause contused lacerated wounds. In the instant case, both Sharda and Kalindi, have not stated that axes were used from the blunt side. In such a situation, in our view, the presumption would be that axes were used in the normal manner, i.e. from sharp side and the evidence of the autopsy surgeon, who found seven contused lacerated wounds on the corpse of the deceased and did not find any single incised wound on the corpse, would falsify the pattern off assault given out by the eye-witnesses. It is true that the autopsy surgeon has stated that the seven contused lacerated wounds could be caused by a sharp weapon like axe. However, we are not prepared to accept his opinion, because axe in the normal course would cause an incised wound and not contused lacerated wound.

It was a different matter had in this case there wound have been a large number of incised or cut wounds and, also some contused lacerated wounds, because some times, it happens that instead of the sharp side of the axe striking, the blunt side of the axe strikes. But this is not the case here. Here, not even a single incised wound has been found on the corpse of the deceased by

the autopsy surgeon. It is also pertinent to mention that the autopsy surgeon, during the course of his cross-examination, in paragraph 11, has admitted that the axes, articles Nos. 13,14,15 and 16 were shown to him and in para 13 conceded that the length of the axes did not correspond to the length of the injuries Nos. 1,4 and 7 found by him on the corpse of the deceased. He also conceded in the said para that excepting Injury No.4, the breadth of the antemortem injuries did not correspond with the breadth of the axes. It is pertinent to mention that, during the course of examinatnion-in-chief, axes (articles Nos.13 to 16) were shown to Kalindi, PW-3, and she admitted that these were the very axes with which the appellants had assaulted the deceased. In our view, in view of the admissions made by the autopsy surgeon in paragraph 13 of his deposition, to which we have referred to earlier, the prosecution case that the appellants assaulted the deceased with the axes (Articles Nos.13 to 16) cannot be accepted. In our judgment, this is a serious infirmity which would discredit the credibility of the eye-witnesses.

Apart from it, we find that the perusal of the autopsy report shows that semi-digested food was found in the stomach of the deceased. In this connection, it would be pertinent to refer to paragraph 13 of the deposition of the autopsy surgeon, wherein, during the course of his cross-examination, he admitted that vegetarian food would taken 4 to 6 hours for being semi-digested. According to Sharda and Kalindi, the murder of the deceased took

place on 11.06.1994 at about 09.15 am. Even if the maximum latitude is given to the prosecution, the deceased would have eaten his food at about 05.15 am. In our view, 05.15 am is not the normal time when people take food. It should be borne in mind that the golden rule in criminal cases is to prefer the probable to the possible.

12. We have also mentioned earlier that both the eye-witnesses, i.e. Sharda and Kalindi, being the daughters of the deceased, are interested witnesses and their evidence would have to be evaluated with caution. We dare say that once this is done, for the reasons mentioned above, it would not be safe to accept it. In our view, not only the statement of Sakharam, PW-5, in terms that the corpse of the deceased was noticed at 6-6.30 am in the morning, but also the presence of semi-digested food in the stomach of the deceased indicates that the defence suggestion given to the eye-witnesses that the deceased had been assaulted the previous night some times at about 3 to 4 am is correct. In this connection, it would be useful to advert to paragraph 6 of the statement of Sharda made during cross-examination, wherein she admitted that in the preceding night of the incident, her brothers and father had camped in the cattle shed and they had left the village at 8 pm. The tenor of the defence suggestion appears to be that while her father was returning from the field at about 3 to 4 am, he was assaulted. In our view, the probability of the defence

suggestion being correct appears to be very high.

13. Before parting with the ocular account of the eye-witnesses, we would like to refer to a Division Bench of the Allahabad High Court in AIR 1955 Allahabad 189 (Thakur and others, Appellants V. State, Complainant, Respondent)1, wherein the Allahabad High Court in Paragraph 5 has observed thus:

"..... Where there is a conflict between the medical evidence and the oral testimony of witnesses, the evidence can be assessed only in two ways. A Court can either believe the prosecution witnesses unreservedly and explain away the conflict by holding that the witnesses have merely exaggerated the incident or rely upon the medical evidence and approach the oral testimony with caution testing it in the light of the medical evidence. The first method can be applied only in those cases where the oral evidence is above reproach and creates confidence and there is no appreciable reason for the false implication of any accused. Where the evidence is not of that character and the medical evidence is not open to any doubt or suspicion, the only safe and judicial method of assessing evidence is the second method".

We are in respectful agreement with the ratio laid down in the said case. In the instant case, in our view, for the reasons mentioned above, the evidence of the eye-witnesses does not appear to be beyond reproach and, as we have seen above, there

was acute enmity between the appellants on one side and the informant, the eye-witnesses and the deceased on the other. In such a situation, the possibility of false implication of the appellants cannot be excluded. In our view, it would be safer to accept the medical evidence and when we do this, we are constrained to observe that the ocular account would have to be rejected."

6-B. In a case of Barku Mahadu Ghute (Supra) in the appeal against conviction of the appellant/accused for the offence under Section 302 of the IPC based on uncorroborated testimony of 8 years old child, observing that child witness in cross-examination admitted that he was tutored to state in the Court that he saw accused committing assault and further observing that there were lapses on part of prosecution, conviction recorded against appellant/accused was set aside. In a case of Hallu cited (Supra) in paragraph 11 Supreme Court has observed thus:

"11. The post mortem report prepared by Dr. N.Jain that on the body of Jagdeo were found three bruises and a hematoma. On the body of Padum were found four lacerated wounds and two bruises. According to the eye-witnesses the two men were attacked with lathis, speares and axes but that clearly stands falsified by the medical evidence. Not one of the injuries

found on the person of Jagdeo and Pandum could be caused by a spear or an axe. The High Court however refused to attach any importance to this aspect of the matter by saying the witnesses had not sated that "the miscreants dealt axe blows from the sharp-side or used the spear as a piercing weapon". According to the High Court axes and spears may have been used from the blunt side and therefore the evidence of the eye-witnesses could safely be accepted. We should have thought that normally when the witness says that an axe or a spear is used there is no warrant for supposing that what the witness means is that the blunt side of the weapon was used. If that be the implication it is the duty of the prosecution to obtain a clarification from the witness as to whether a sharp edged or a piercing instrument was used as a blunt weapon."

7. On the other hand learned APP appearing for the respondent/State has submitted that the trial Court has rightly believed the evidence of child witness Urmila [PW-4] as she has no reason to falsely implicate accused her brother and mother to cause death of her father the deceased. He submits that considering the medical and ocular evidence, this Court can reach to its own conclusion as to whether the act of the accused in causing injuries noticed on the person of the deceased is culpable homicide amounting to murder punishable under

Section 302 of the IPC. To support his argument learned APP has relied upon the decision in the case of *Sudam Kisan Dhurjad Vs State of Maharashtra reported in 1995 Cri.L.J. 4029* Bombay High Court. So also, learned APP has relied upon the decision in the case of *Mahadeo Kundlik Vaidya and others* (Supra), relied upon by the learned Advocate for the accused.

8. We have carefully considered the submissions of the learned Advocate appearing for the appellants/accused and learned APP appearing for the respondent/State and with their able assistance we have perused the evidence adduced by the prosecution. We have gone through the impugned judgment and order.

9. To prove homicidal death of the deceased the prosecution has relied upon the evidence of Dr. Ravi More [PW-1] who conducted postmortem on the dead body and issued postmortem report [Exh.16]. Dr.More in his evidence [Exh.15] stated that on 29.07.2012 he was attached to Rural Hospital, Dharur as a Medical officer and at 09.05 am when he carried out the autopsy, he noticed following injuries :

. External injuries:

1. C.L.W. over right part of occipital area, oblique 3x2x1 c.m. grievous, induced by hard object.

2. C.L.W. over occipital area, 4 c.m. below and lateral to injury No.1, oblique 3x1x1 c.m. grievous, induced by hard object.

3. Laceration over right forehead, 5 c.m. above and lateral to right eye-brow, 1x1 c.m., bone deep with irregular margins, grievous, induced by hard object.

3. On palpation, I found fracture over mid-occipital area.

. Internal injuries:

1. After exposing the scalp, I noticed the hematoma of approximate 15x4 cm over occipital area of skull below injuries Nos. 1 and 2 referred above.

2. Fracture of occipital bone, fracture elevated type, involving maximum portion of occipital bone were upper end of bone elevated above skull and lower end deep down in cranial cavity injury dura and brain.

3. Brain congested, brain matter disrupted and extracted in occipital area.

. According to Dr. More cause of death was due to head injury. Above mentioned injuries were antemortem. Said injuries can be caused by hard and blunt object. External injury Nos. 1 and 2 can be caused by handle of the axe. Above referred internal injuries were corresponding to the external injury Nos. 1 and 2. He stated that accordingly he prepared postmortem notes

[Exh.16] which bears his signature. He stated that external injury No.3 mentioned above can be caused by Article-9 iron rod and external injury Nos. 1 and 2 can be caused by handle of axe Article-8. He stated that on 30.07.2012 he collected blood samples of both the accused in the Rural Hospital, Dharur.

10. In the cross-examination Dr. More admitted that external injury Nos.1 and 2 cannot be caused by handle of axe Article-8 and further voluntarily stated that aforesaid injuries can be caused by blunt end of the axe Article-8. He admitted that blunt end of the axe should result in an oval shaped injury. External injury Nos. 1 and 2 do now show oval shaped injuries. Moreover, he stated that injury by blow of big iron rod Article-9 shall be crush injuries. The size of iron rod Article-9 is more than the size of the external injury No.3. Said injury No.3 is not a crush injury. He admits that injury No.3 cannot be caused by iron rod (Article-9). He also stated that external injury Nos. 1 and 2 are possible when a person falls on stony surface with sufficient amount of speed. His evidence regarding cause of death i.e. the Head injury has gone unchallenged in his cross-examination. The postmortem report [Exh.16] also shows that Dr. More noticed above referred external as well as

internal injuries on the person of the deceased when he conducted postmortem examination on the dead body and so also postmortem report shows head injury as probable cause of death. Thus, on considering the above evidence one thing is certain that death of the deceased was not natural and he died due to head injury noticed by Dr. More. However, considering the evidence of Dr. More regarding possibility of suffering external injury Nos. 1 and 2 due to fall on stony surface as referred above and defence of the accused that deceased sustained head injury due to dash by the bullock accidentally to arrive at the conclusion whether death of the deceased was homicidal or accidental, on the basis of above medical evidence the other evidence relied by the prosecution to connect the accused with the crime, is to be considered.

11. To connect the accused with the crime, the prosecution has mainly relied upon the following evidence and circumstances:

A] Evidence of eye witness Urmila [PW-4]

B] Evidence of informant Kushaba [PW-3]

C] Plea in defence of the accused and their conduct.

D] Circumstantial evidence in the form of:

i] Memorandum Statement [Exh.30] of the

accused No.1 and Seizure of axe at his instance as per panchahnama [Exh.31]. Mermorandum statement [Exh.32] of accused No.2 and seizure iron rod at the instance of said accused as per panchanama [Exh.33].

ii] Seizure of cloth of accused as per panchanama [Exh.24 and 25] and taking sample of blood of accused by Dr. More.

iii] Reports of Chemical Analyzer [Exh.40 and 41]

12. The evidence of Urmila [PW-4] who is sole eye witness is at Exh.22. Admittedly, she is daughter of the deceased and accused No.2 and sister of accused No.1. There is no dispute that she was aged 15 years when her evidence was recorded in the Court on 04.04.2013. There is no dispute that at the time of incident this witness, the deceased and accused were residing in the house in the agricultural land at Bhaijali Vasti Jahangirmoha and the said agricultural land was owned by the deceased. The evidence of Urmila [PW-4] is that the deceased her father was alcoholic. On account of the vice of liquor, there used to occur frequent quarrels amongst her father and

both the accused. The accused used to insist the deceased to transfer the agricultural land in their names whenever her father used to come under influence of liquor. The accused also used to threat the deceased of dire consequences.

13. As regards the incident she [PW-4] deposed that the incident occurred on 28.07.2012. That day both the accused worked in their agricultural field. At about 07.00 to 07.30 pm both the accused returned home. At that time her father the deceased returned from Dharur. He was under the influence of liquor. Her father then started abusing both the accused. Accused No.2 then said accused No.1 that the deceased was always inviting quarrels by consuming liquor. She then said to accused No.1 that he needs to be finished. Her mother then took the iron rod from the kitchen and hit it on the forehead of the deceased. At that time her father was sitting on a cot. He fell on the floor. Accused No.1 then gave blows of axe on the backside of the head of her father. The deceased was then profusely bleeding. The deceased then made frantic movements of his hands and legs. Accused No.2 then said to accused No.1 that they need to flee from the spot. She thereafter ran away to the house of her uncle Kushaba [PW-3]. She told about the incident to him. She

then returned to her home alongwith uncle Kushaba. They noticed the deceased lying in the pool of blood. He was motionless. He died. She identified the axe Article-8 and iron rod Article-9 being the weapons used by the accused in commission of the offence.

14. In her cross-examination her evidence about her presence, presence of her father the deceased and presence of both the accused in the house at the material time of incident as well as her evidence regarding act of both the accused in assaulting the deceased has gone unchallenged. Moreover, in her cross-examination she has denied that she was informed by her uncle Kushaba [PW-3] that she has to give evidence in the Court and as told by him she has deposed before the Court. She admitted that, her uncle Kushaba is presently looking after them. She also denied that she is required to follow his instructions and further denied that she is deposing false at the instance of her uncle Kushaba. Thus, nothing is found in favour of the accused in the cross-examination of PW-4.

15. As referred earlier there is no dispute that when the evidence of PW-4 was recorded on 04.04.2013 she was aged 15 years. The incident has taken place on

28.07.2012 i.e. about eight months prior to recording of evidence of PW-4. Thus, it is obvious that she was more than 14 years on the day of incident. It has come in her evidence that on the day of incident she was at home. The food was usually cooked either by herself or by her mother. At the time of incident her mother accused No.2 was sitting in the courtyard on the platform. This evidence shows that PW-4 was sufficiently matured girl and she was having enough understanding. Admittedly, she is the daughter of the deceased and accused No.2 and sister of accused No.1. Considering her relationship with accused and the deceased, it cannot be said that she had reason to falsely implicate her brother and mother being the murderer of her father. When she was at the house on the day of incident at the material time in the evening at 07.00 to 07.30 pm when both the accused and the deceased had come to the house it was quite natural and probable for her to see the incident from the close distance. Nothing is brought on record to show that she was tutored by her uncle PW-3 to depose against the accused.

16. It has come in the evidence of PW-4 that on the next day of incident she had been to Dharur Police Station alongwith her uncle Bappa. She was not enquired

by the police authorities about the incident. 2-3 days thereafter, she had been to the Court where she was enquired about the incident by a Judge and she told about the incident. This evidence shows that her statement was not recorded by Police on the next day of incident when she had gone to the Police Station. So also, said evidence shows that her statement was recorded by a Judge 2-3 days after the incident. But, it appears that on the next day i.e. 29.07.2012 her statement was recorded by police. Therefore, it cannot be said that there was inordinate delay in recording her statement by police during the course of investigation. As observed above, she was very well present in the house at the material time of the incident. Considering the same and when there is no reason to her to depose against the accused, delay in recording her statement under Section 164 of the Code of Criminal Procedure by the Magistrate in the course of the investigation, is not sufficient to reject her evidence. Thus, on the basis of evidence PW-4 an inference can be drawn that on the day of incident in the house of the deceased and the accused, accused No.2 hit iron rod on the forehead of the deceased and accused No.1 then gave blows of axe on the backside of the head of deceased and caused bleeding injuries to him.

17. Next is the evidence of Kushaba Sirsat [PW-3] at Exh.20. He is admittedly brother of the deceased. At the material time of incident he was residing in the house at a distance of 200 to 300 feet from the house of the deceased. He deposed that the deceased was an agriculturist. The deceased used to consume liquor once in a while. On account of vice of liquor there used to occur quarrels of the deceased with the accused. The accused used to insist the deceased to transfer the agricultural land in their names. During the course of such quarrels, the accused always used to give threat to him of life, in case he did not transfer the land in their names. Two months prior to the incident there occurred a quarrel amongst the deceased and the accused. At that time deceased was under influence of liquor and accused insisted him to transfer the land in their names and the accused threatened the deceased of life. He therefore, intervened in the quarrel and pacified them.

18. As regards the incident PW-3 has deposed that the incident occurred on 28.07.2012. He worked in his field till about 07.00 pm. He then returned home and washed his hands and legs. At that time, the daughter of the deceased namely Urmila [PW-4] came running from the house of the deceased to his home. She was crying and

shouting. She told him that accused No.1 assaulted the deceased with an axe and accused No.2 had beaten the deceased with an iron rod, used in kitchen. She also told him that the deceased was lying in the pool of blood on the floor and that the deceased was not making movement and he had died. He stated that she was frightened at that time. He stated that he informed his father about the incident who resides in another house at a distance of about 200 to 300 feet and also told his brother Bappa on telephonically about the incident. He stated that he alongwith brother and father went to the house of the deceased and saw the dead body and noticed injuries on the dead body of the deceased with the sharp edge of an exe on the left and right side of the forehead and on the backside of the head. Accordingly he, his brother and father went to Dharur Police Station and he lodged the FIR [Exh.21]. The evidence of this witness is hearsay in nature. He has no direct knowledge about the incident. However, since his house was at a distance of 200 to 300 fts from the house of the deceased and the deceased was his brother it was quite natural for PW-4 his niece to inform the incident to him and thereafter it was quite natural for him to rush to the house of the deceased and to see what has happened. Therefore, there is no reason to disbelieve his evidence to the extent that PW-4

informed him about the incident immediately and thereafter immediately he went to the house of the deceased and saw the deceased lying in the pool of blood in injured condition.

19. Learned Advocate appearing for the accused inviting our attention to the medical evidence and ocular evidence of PW-4 submitted that since there is no consistency in the said evidence the case of the prosecution that the deceased was assaulted by the axe and the iron rod and therefore, he sustained external injury Nos. 1 to 3 referred earlier cannot be accepted. It is true that as referred earlier it has come in the evidence of Dr. More that external injury Nos.1 and 2 can be caused by the handle of the axe Article No.8 and in the cross-examination he admitted that the external injury No.1 i.e. CLW over right part of occipital area, oblique 3x2x1 c.m. grievous, induced by hard object and injury No.2 i.e. CLW over occipital area, 4 c.m. below and lateral to injury No.1, oblique 3x1x1 c.m. grievous, induced by hard object cannot be caused by handle of the axe Article No.8 and he further voluntarily stated that the said injuries can be caused by blunt end of the axe Article No.8. Moreover, he admitted that blunt end of the axe should result in an oval shaped injury. External

injury Nos.1 and 2 do not show oval shaped injuries. Nothing is brought in the cross-examination of eye witness Urmila [PW-4] as to whether the blow was given by the blunt side of the axe or by the sharp side of the axe Article No.8. So also, it is not brought on record either by the prosecution or by the accused that blade of the axe was blunt or otherwise. Therefore, when Dr. More has stated that injury Nos.1 and 2 can be caused by blunt end of the axe, even if external injury Nos. 1 and 2 are not oval shaped injuries it cannot be said that they are not caused by axe Article No.8. Moreover, as referred earlier, Dr. More has stated that external injury No.3 cannot be caused by iron rod Article No.9, injury No. 3 is not crush injury and if the injury is inflicted by blow of iron rod Article No.9 it shall be crush injury. It is pertinent to note that all the external injury Nos. 1 to 3 were on occipital area and over right forehead as noted earlier in detail when the evidence of Dr. More is referred. When these injuries were caused on the head on occipital area and right forehead which is vital part of the body and Dr. More has stated that injury Nos. 1 and 2 can be caused by blunt end of the axe and he noticed internal injury No.1 below external injury Nos.1 and fracture of occipital bone i.e. internal injury No.2 it can be said that forcefully axe blow by the blunt end was

given and therefore internal injury Nos.1 to 2 noted earlier were caused to the deceased. So also, it can be said that as head part of the body is hard, external injury No.3 which was caused by iron rod was not crush injury. It is true that in case blow of axe is given by sharp side it causes incise or cut injuries. But, in case sharp side of the axe is blunt then it would cause contusion lacerated wounds like external injury Nos. 1 and 2 in the present case. Nothing is brought on record in the evidence of Dr. More that external injury Nos. 1 and 2 are not at all possible by the blade or sharp side of axe if it is blunt. On the contrary Dr. More has stated that injury Nos.1 and 2 can be caused by blunt end of the axe. In such circumstances the medical evidence is consistent with ocular evidence of PW-4 regarding external injury Nos. 1 and 2 to the deceased. Assuming for the sake of argument, that there is inconsistency in the medical and ocular evidence, said inconsistency is not sufficient to discard the ocular evidence of PW-4 because ocular evidence would prevail over the medical evidence.

20. As regards the defence of the accused, PW-3 the informant brother of the deceased has denied that there used to occur frequent quarrels between him and accused

No.2 on account of land and other pretty issues. So also he has denied that a day before the incident there occurred quarrel of accused No.2 with him on account of she-goats. So also, PW-4 daughter of the deceased has denied that there used to occur frequent quarrels amongst her mother and uncle Kushaba [PW-3] on account of grazing of the cattle in his land. As referred earlier she has denied that her father the deceased was sitting on the cot and the bullock gave dash on forehead and then he fell from the cot and in that he sustained injuries to the back of his head. PW-3 has also denied that he deposed false on account of his enmity with accused taking disadvantage of injuries to the deceased. The accused have not examined any witness in defence. Both PWs-3 and 4 have no reason to depose against the accused. Therefore, and when they have denied afore mentioned suggestions to them, there is no substance in the defence of accused regarding the deceased sustaining injuries accidentally due to fall from the cot as the bullock gave him dash on forehead and regarding frequent quarrel of PW-3 with accused No.2 on account of grazing of cattle or she-goats in his land.

21. The incident has taken place on 28.07.2012 at about 07.00 to 07.30 pm in the house of the deceased

where he was residing with accused and PW-4 daughter. As observed earlier both the accused have not denied their presence in the house at the relevant time. There is nothing on record to show that after the incident they were at the spot of incident or that they had taken the deceased in the hospital. On the contrary PW-4 has stated that after assaulting the deceased accused No.2 said accused No.1 that they need to flee from the spot. All above circumstances show that after the incident they ran away from the spot of incident. The said conduct of the accused also shows that as they had caused injuries to the deceased as alleged by the prosecution they ran away from the spot of incident.

22. Now coming to the circumstantial evidence the panch Brahma [PW-6] and Investigating Officer PI Sudke [PW-8] have stated that on 30.07.2012 accused No.1 made memorandum statement [Exh.30] that he is willing to discover/produce axe and then at his instance axe was seized from the heap of fodder which was to the southern side of the house of the deceased and panchnama [Exh.31] was prepared. Though they have been examined at length on behalf of the accused their evidence regarding memorandum statement of accused No.1 and seizure of axe at his instance is not shattered. Exh.30 memorandum statement

also shows that accused No.1 made said statement that he would produce axe hidden by him and it bears his signature and signatures of panchas and Investigating Officer. So also, Exh.31 panchanama shows that axe having blood stains was seized at the instance of accused No.1 as deposed by PWs-6 and 8 and it also bears signatures of accused, both panchas and Investigating Officer. Similarly, both PWs-6 and 8 have deposed that on 31.07.2012 accused No.2 made statement [Exh.32] that she would produce iron rod and then at her instance iron rod was seized as per panchanama [Exh.33] which was hidden in custard apple shrubs behind house of the deceased. Their evidence is also not shattered in the course of cross-examination. Exh.32 memorandum statement shows that accused No.2 made statement that she would produce iron rod (Thombya) which was hidden and it bears her thumb impression as well as signatures of both panchas and Investigating Officer. Similarly, Exh.33 panchanama shows that at the instance of accused No.2 iron rod (Thombya) having blood stains was seized under said panchanama and it also bears thumb impression of said accused and signatures of panchas and Investigating Officer. Thus, on the basis of aforesaid evidence an inference can be drawn that prosecution has proved seizure of axe Article No.8 having blood stains and iron rod Article No.9 having

blood stains respectively at the instance of accused No.1 and 2 as per panchanama Exh.31 and 33.

23. Next circumstantial evidence is seizure of clothes of accused. Panch Vinayak Gore [PW-5] and Investigating Officer PI Sudke [PW-8] have deposed regarding the seizure of clothes of accused No.1 as per panchanama [Exh.24] and seizure of Sari of accused No.2 as per panchanama [Exh.25] on 29.07.2012 after the accused were arrested. PW-5 has specifically stated that shirt and pant of accused No.1 were seized and they were stained with blood. So also, he stated that Sari of accused No.2 stained with blood was seized. He stated that Article No.6/1 shirt, Article No.6/2 pant and Sari Article No.7 shown to him, are the same. The evidence of both PWs.5 and 8 regarding seizure of clothes of accused as per above said panchanamas has not been shattered in the course of their cross-examination. Thus, on the basis of above evidence an inference can be drawn that the prosecution has proved that pant and shirt of accused No.1 having blood stains and Sari of accused No.2 having blood stains were respectively seized as per panchanama Exh.24 and 25 by the Investigating Officer. Similarly, it is the case of the prosecution that Dr. More [PW-1] had taken sample of blood of the accused for analysis and

as referred earlier Dr. More has stated regarding taking blood samples of the accused on 30.07.2012.

24. Now coming to the reports of the Chemical Analyzer, Exh.41 report of the Chemical Analyzer shows that blood group of the deceased was 'B', blood group of accused No.1 is 'O' and blood group of accused No.2 is 'B'. Exh.40 report of the Chemical Analyzer shows that human blood of group 'B' was found on axe. So also, it shows that human blood of group 'B' was found on seized shirt, pant of accused No.1 and Sari of accused No.2 i.e. Exh.6,7 and 8. As said above the blood group of deceased was 'B'. Therefore, finding of blood of Group 'B' on axe shows that axe was used in assaulting the deceased and finding of blood of 'B' group on clothes of accused also shows presence of accused at the spot of incident and their involvement in the incident. It is true that blood group of accused No.2 is 'B'. But, it is not the case of the accused that accused No.2 sustained any injury and therefore blood stains of blood of 'B' group were found on her Sari. Moreover, Exh.41 report of the Chemical Analyzer shows that human blood was found on Exh.2 iron rod. Of course blood group of said blood is not given in the C.A. report. However, finding of human blood on iron rod as per C.A. report [Exh.40] also indicates that said

iron rod was used in assaulting the deceased. For the above reasons, circumstantial evidence referred to above relied upon by the prosecution connects the accused with the act of assaulting the deceased with axe and iron rod and causing him external as well as internal injuries as deposed by Dr. More [PW-1] out of which head injury has ultimately resulted into death of the deceased.

25. For all the reasons discussed above on the basis of evidence of Dr. More [PW-1], the evidence of Urmila [PW-4] and circumstantial evidence referred to above, an inference can be drawn that on 28.02.2012 in his (deceased's) house accused No.1 assaulted the deceased with the axe on his head and accused No.2 assaulted the deceased with iron rod on his head and caused him external as well as internal injuries as deposed by Dr. More [PW-1] and as such they are responsible for his death.

26. Now, it is to be seen whether the accused had intention to cause death of the deceased. An intention is to be gathered from the circumstances proved on record. It is proved that the deceased suffered in all three external injuries and out of said three injuries one was CLW over right part of occipital area of size 3x2x1 cm.

and second was CLW over occipital area, 4 cm below and lateral to injury No.1 and it was of seize 3x1x1 cm and both the injuries were grievous. So also, it is proved that these two injuries resulted the hematoma of approximate by 15x4 cm over occipital area of skull as per internal injury No.1. Moreover, fracture of occipital area bone was noticed as per internal injury No.2 by Dr. More. From the nature of above injuries it can be said that said injuries were caused by applying the sufficient force while assaulting the deceased with the axe and the iron rod. All the three external injuries were noticed on the head. Considering the fact that the accused had chosen head of the deceased which is vital part of body while assaulting him and the grievous nature of all the three external injuries it can be said that the accused had intention to kill the deceased. Moreover, it has come in the evidence of Urmila [PW-4] that after the deceased came to house under the influence of liquor he started abusing to the accused and thereupon accused No.2 said to accused No.1 that the deceased is always inviting quarrels on consuming the liquor and that he needs to be finished and thereupon he was assaulted by both the accused as said earlier. This evidence has gone unchallenged in the course of cross-examination of Urmila [PW-4]. Therefore this evidence also leads to an

inference that the accused had assaulted the deceased with an intention to kill him. Moreover, the conduct of the accused subsequent to the incident of not taking the deceased in the hospital shows that they had intention as well as knowledge that by their aforesaid act of assaulting the deceased there would be death of the deceased. The trial Court has considered this aspect in detail in paragraph No. 51 of the judgment.

27. For all the reasons discussed above we hold that the act of both the accused in assaulting the deceased and causing external as well as internal injuries and causing death of the deceased as a result of head injury falls within the ambit of culpable homicide amounting to murder punishable under Section 302 read with 34 of the IPC and as the facts of the present case are different from the facts in the decisions in *Shihivappa Buddappa Kolkar @ Buddappagol* (supra), *Farukh Shaikh Mohammed* (supra) and *Ramajan Khajabhai Shaikh cited* (supra) relied upon by the learned Advocate for accused, ratio in said decisions, cannot be made applicable to this case to state that the aforesaid act of the accused is amounting to culpable homicide not amounting to murder punishable under Section 304 Part-II of the IPC, so as to hold them guilty for the said offence and not under Section 302 of

the IPC as submitted by the learned Advocate appearing for the appellants/accused.

28. For the forgoing reasons we hold that prosecution has proved the offence punishable under Section 302 read with 34 of the IPC against the accused beyond reasonable doubt. The trial Court has rightly held so and rightly convicted and sentenced the accused for the said offence by the impugned judgment and order. As such there is no justifiable ground to interfere with the impugned judgment and order, therefore the appeal being devoid of merits, the same is liable to be dismissed. Accordingly we dismiss the same.

29. Mr.P.P.More, Advocate was appointed to represent the appellants. We appreciate his sincere efforts in conducting the matter and assisting this Court to arrive at a proper conclusion. We quantify his fees at Rs.7,500/- [Rupees Seven Thousand Five Hundred].

[S.M. GAVHANE, J.] **[T.V. NALAWADE, J.]**