

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.558 OF 2010

Vipul Ramdas Shinde.	]	
Age - 20 years, Occ.- Education & Labourer.	]	
R/o.- H.No.715, South Kasba, Nyamane	]	
Chawl, Choupad, Solapur, Dist.- Solapur.	]	... Appellant / Orig.Accd.No.2

Versus

The State of Maharashtra.	]	... Respondent
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ALONG WITH

CRIMINAL APPEAL NO.478 OF 2010

1. Rohit @ Chikya Prakash Nikam.	]	
Age - 22 years,	]	
2. Rahul Prakash Nikam.	]	
Age - 24 years,	]	
Both are R/o.- Plot No.13, Jay Bajarang	]	
Nagar, Majrewadi, Solapur,	]	
At present at Yerawada Central Prison, Pune]		... Appellants / Orig.Accd.Nos.4 & 5

Versus

State of Maharashtra.	]	... Respondent
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ALONG WITH
CRIMINAL APPEAL NO.486 OF 2010
WITH
CRIMINAL APPLICATION NO.1535 OF 2016

Ajay Suryakant Malge.	]	
Age - 22 years,	]	
R/o.- H.No.756, South Kasba, Near Kali	]	
Masjid, Solapur,	]	
At present at Yerawada Cenral Prison, Pune	]	... Appellant /
		Orig.Accd.No.6
Versus		
State of Maharashtra.	]	... Respondent

ALONG WITH
CRIMINAL APPEAL NO.569 OF 2010

Bablu Ramdas Shinde.	]	
Age - 21 years,	]	
R/o.- H.No.715, South Kasba, Nyamane	]	
Chawl, Choupad, Solapur,	]	
At present at Solapur Dostrect Prison, Solapur.	]	... Appellant /
		Orig.Accd.No.1
Versus		
State of Maharashtra.	]	... Respondent

ALONG WITH
CRIMINAL APPEAL NO.963 OF 2010

Niranjan Subhash Nyamane.	]	
Age - 21 years,	]	
R/o.- H.No.715, South Kasba, Nyamane	]	
Chawl, Choupad, Solapur,	]	
At present at Yerawada Central Prison, Pune.	]	... Appellant /
		Orig.Accd.No.3
Versus		
State of Maharashtra.	]	... Respondent

Mr. D. G. Khamkar for Appellants in Criminal Appeal No.558 of 2010 and Criminal Appeal No.569 of 2010 and for Applicant in Criminal Application No.1535 of 2016.

Mr. Satyavrat Joshi for Appellant in Criminal Appeal No.486 of 2010.

Mr. M. K. Kocharekar for Appellant in Criminal Appeal No.963 of 2010.

Mr. Priyal G. Sarda for Appellants in Criminal Appeal No.478 of 2010.

Mr. J. P. Yagnik, APP for State.

CORAM :- B. R. GAVAI &
SARANG V. KOTWAL, JJ.
DATE :- 25 JUNE, 2018

JUDGMENT (PER : SARANG V. KOTWAL, J.) :-

1. These Appeals are preferred by different accused in Sessions Case No.190 of 2007 on the file of the learned Ad-hoc Additional Sessions Judge, Solapur. By these Appeals, the Appellants are challenging the same Judgment and Order dated 04/06/2010 passed by the learned Ad-hoc Additional Sessions Judge, Solapur, passed in Sessions Case No.190 of 2007. Since all these Appeals are against the same Judgment and Order, all these Appeals are disposed of by this common Judgment. For the sake of convenience, the Appellants are referred to by their status as accused in the said Sessions Case.

2. At the conclusion of the trial, all the accused were convicted for the offences punishable under Sections 143, 147, 148, 302 read with 149 and 324 read with 149 of the IPC. They were sentenced as under :

- (i) For the offence punishable under Section 143 of the IPC, accused no.1 - Bablu Ramdas Shinde, accused no.2 - Vipul Ramdas Shinde, accused no.3 - Niranjan Subhash Nyamane, accused no.4 - Rohit @ Chiknya Prakash Nikam, accused no.5 - Rahul Prakash Nikam and accused no.6 - Ajay Suryakant Malge were sentenced to suffer rigorous imprisonment for three months and to pay fine of Rs.200/- and in default of payment of fine, to suffer rigorous imprisonment for five days.
- (ii) For the offence punishable under Section 147 of the IPC, each of the accused was sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.500/- and in default of payment of fine, to suffer rigorous imprisonment for 10 days.
- (iii) For the offence punishable under Section 148 of the IPC, each of the accused was sentenced to suffer rigorous

imprisonment for one year and to pay fine of Rs.500/- and in default of payment of fine, to suffer rigorous imprisonment for 10 days.

(iv) For the offence punishable under Section 302 read with Section 149 of the IPC, each of the accused was sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.1,000/- and in default of payment of fine, to suffer rigorous imprisonment for 15 days.

(v) For the offence punishable under Section 324 read with Section 149 of the IPC, each of the accused was sentenced to suffer rigorous imprisonment for six months and to pay fine of Rs.500/- and in default of payment of fine, to suffer rigorous imprisonment for 15 days.

3. All the sentences were directed to run concurrently. The accused were acquitted of the offence punishable under Section 504 of the IPC and under Section 135 of the Bombay Police Act.

4. All the accused were prosecuted for committing murder of one Ajay Kamble on 04/05/2007. The prosecution case, in brief, is as follows :

Deceased Ajay Kamble and his younger brother Vijay Kamble were working for Lakhan Bhel House on commission basis at Lucky Square, near Hutatma Garden, Solapur. Lakhan Bhel House was owned by one Narsing Sathe. Deceased Ajay and Vijay used to move around in Hutatma Garden looking for customers. After taking their order, they used to collect the snacks from their stall and used to serve their customers. About two weeks before the incident dated 04/05/2007, three boys had bhel and kachori from them but they had run away without paying for the same. Vijay made inquiries about these boys and was told by one Amit Chotya who was working in a nearby stall, that, names of two of them were Babu Shinde and Vipul Shinde. According to the prosecution case, they were accused nos.1 and 2. It is further the prosecution case that, on 04/05/2007, out of those three boys, Vijay noticed two boys and demanded the unpaid money from the previous occasion. The accused nos.1 and 2 did not like it. They threatened Vijay and gave a blow of a tray on Vijay's head. There was a quarrel between these two accused and Vijay and his brother Ajay. Thereafter, they left the place and came back around 8.45 p.m. with 4 to 5 boys wielding weapons like knives. According to the prosecution case, accused no.1 assaulted Ajay on his left abdomen

and chest and some of them assaulted Vijay with knife, others assaulted Ajay with kicks and fist blows and they left the spot. Somebody informed the police who removed Ajay to Civil Hospital. Vijay was taken for his own treatment. The stall owner Narsing Sathe informed Vijay regarding the names of the accused / assailants. After the treatment from Civil Hospital, Vijay was taken to police station where he gave his statement which was treated as FIR. The FIR was registered at Fauzdar Chawdi Police Station, Solapur, vide C.R.No.130 of 2007, under Sections 302, 324, 323, 506, 143, 147 and 148 read with 149 of the IPC and under Section 25(4) read 27 of the Indian Arms Act and under Section 37(B)1 read with 135 of the Bombay Police Act. The investigation commenced. Different panchanamas were conducted. Statements of different witnesses were recorded. The accused were arrested on 05/05/2007. Their clothes were seized and the weapons were recovered at the instance of accused nos.1 and 2. After conclusion of the investigation, charge-sheet was filed. The case was committed to the Court of Sessions at Solapur for trial.

5. During trial, the prosecution examined 20 witnesses. The defence of the accused nos.2 to 6 was of total denial. However, the

accused no.1 took a defence that the deceased assaulted him and while defending himself, the injuries were caused to the deceased Ajay. After recording the evidence and the statements of the accused under Section 313 of the Cr.P.C., the learned trial Judge passed his impugned Judgment and Order convicting and sentencing the accused as mentioned earlier.

6. We have heard Mr. D. G. Khamkar, learned for Appellants in Criminal Appeal No.558 of 2010 and Criminal Appeal No.569 of 2010, Mr. Satyavrat Joshi, learned Counsel for Appellant in Criminal Appeal No.486 of 2010, Mr. M. K. Kocharekar, learned Counsel for Appellant in Criminal Appeal No.963 of 2010 and Mr. Priyal G. Sarda, learned for Appellants in Criminal Appeal No.478 of 2010. We have also heard Mr. J. P. Yagnik, learned APP for State. With their assistance, we have read the entire evidence and have gone through the record and proceedings of the case.

7. Learned Counsel appearing for various Appellants submitted that PW 2 Vijay is not a truthful witness. He was the aggressor and he was holding grudge against the accused nos.1 and 2.

Therefore, false implication of the accused on his part cannot be ruled out. Admittedly, PW 2 Vijay was not knowing the other accused and their names were told by PW 8 Narsing. Similar is the case with PW 4 Somnath. Even he was not aware of the names of the accused. Since PW 8 Narsing was declared hostile, neither of these witnesses is reliable. They further submitted that PW 3 Sunil was an interested witness being closely associated with PW 2 Vijay and deceased Ajay. His conduct is unnatural and his statement is recorded belatedly. Therefore, he is a got up witness. The recoveries from the accused cannot be believed and the prosecution has failed to establish the link between the offence and these recoveries, including the seizure of clothes. On the other hand, the learned APP submitted that there is no reason to disbelieve the evidence of the eye witnesses. Their presence at the spot was natural. PW 2 Vijay himself being an injured eye witness, his evidence inspires confidence. The learned APP further submitted that the prosecution case is based on direct evidence and the prosecution has proved its case beyond reasonable doubt and therefore, the impugned Judgment ought not be interfered with.

8. The prosecution case is based mainly on the evidence of the eye witnesses, PW 2 Vijay Kamble who himself suffered injuries in the incident. Vijay was the brother of the deceased and had lodged the FIR. PW 3 Sunil Gaikwad, PW 4 Somnath Sonawane and PW 8 Narsing Sathe were the other eye witnesses. PW 8 Narsing Sathe was owner of Lakhan Bhel House which was a stall on a handcart. PW 8 had allegedly given names of the assailants to PW 2 Vijay. However, this witness PW 8 Narsing Sathe did not support the prosecution and was declared hostile. The prosecution case heavily relies on their evidence and therefore, their evidence needs to be scrutinized carefully.

9. Before referring to the evidence of the eye witnesses, it would be advantageous to refer to the medical evidence led by the prosecution in the form of deposition of PW 14 Dr. Tipanna Kamble. This witness had conducted the post-mortem examination on the dead body of the deceased and had found the following injuries :

- (1) Stab injury on left side of chest, 8 cm below and medially of left nipple 3 cm X 1 cm X cavity deep,

- (2) Another stab injury on back side 5 cms from the vertebral column to left side at renal region 1 cm X $\frac{1}{2}$ cm X skin deep,
- (3) CLW over scalp at left parietal region 2 cms from central line, 1.5 cm X 1 cm X scalp deep,
- (4) CLW to right shoulder 1 cm X $\frac{1}{2}$ cm X $\frac{1}{2}$ cm,
- (5) Abrasion linear scratch 3 cms on right scapular region,
- (6) A curved scratch line abrasion 11 cms on left scapular area towards left axilla.

On internal examination, it was noticed by him that the heart was perforated because of the stab injury. In the cross-examination, he has admitted that Injury Nos.2 to 6 were simple in nature and that they were not the cause of death of the deceased. Thus, in effect, his evidence shows that the deceased had suffered one major stab injury which had led to his death.

10. PW 2 Vijay Kamble was the first informant and an injured eye witness. According to him, he and the deceased Ajay were working on commission basis for Lakhan Bhel House and used to scout for the customers in Hutatma Garden. He has narrated that,

about two weeks prior to the incident dated 04/05/2007, three boys had taken snacks from them, but had not paid for the same. Therefore, PW 2 and Ajay had to pay Rs.25/- out of their own pocket for these snacks. PW 2 has deposed that on inquiries made by him, he came to know from one Amit Chotya who was working with a nearby Jai Bhavani Bhel House that names of two persons out of three, were Bablu Shinde and Vipul Shinde. PW 2 has further deposed that on 04/05/2007, he and Ajay had come for their job at about 4.00 p.m. While they were on their job, PW 2 saw the accused nos.1 and 2 in the garden and therefore, immediately confronted them and demanded the unpaid amount. At that time, a quarrel ensued and both the accused nos.1 and 2 threatened him. The accused no.1 snatched a tray from a boy named Amit and gave a blow with that tray on PW 2's head. In the meantime, Ajay went to help PW 2. At that time, both the accused threatened Ajay and left the spot. At about 8.45 p.m., both the accused nos.1 and 2 came there with 4 to 5 boys wielding weapons. The accused no.1 was having a knife and the accused no.2 was holding an iron scale. PW 2 has further deposed that the accused no.1 gave a blow of knife on the left abdomen of Ajay and a blow on the left side of the chest. In the meantime, one of the accused

assaulted PW 2 on his right shoulder. According to him, the person who gave a blow on his shoulder was the accused no.3 Niranjan. The accused no.6 gave a blow with an iron stool lying nearby on the head of the deceased. PW 2 has further deposed that he first rushed to the handcart of his cousin Kisan Kamble but Kisan was not there and therefore, he came back to Lakhan Bhel House. At that time, he saw Ajay was lying in a pool of blood with a sharp edged iron knife lying nearby. It is PW 2's case that he asked the stall owner Narsing Sathe the names of the boys who had assaulted him and Ajay and at that time, Narsing told him names of the six accused. According to PW 2, out of them he was knowing the accused nos.1, 2 and one Amit Chotya. Ajay was taken to Civil Hospital, Solapur and police took PW 2 to the hospital for his treatment. After his treatment, he was brought to the police station where his statement was recorded and was treated as FIR. The FIR is produced at Exh.43. In his cross-examination, he has admitted that there were other stalls in and around that area. There was a rickshaw stop and in short, it was a crowded locality around that time. He has deposed in his cross-examination that Fauzdar Chawdi Police Station was at some distance and it took half an hour to reach there walking. He did not know at

what time police officers had come to the hospital who had recorded his complaint. He further admitted that the incident was witnessed by some handcart owners. On behalf of the accused no.1, a specific suggestion was given to this witness that deceased Ajay was trying to strangle the accused no.1 and the accused no.1 had to protect himself. When the accused no.1 tried to protect himself, PW 2 and Ajay sustained injuries. Of course, this witness has denied this suggestion.

11. The prosecution has examined PW 16 Dr. Pradip Karyakarte who had examined PW 2 for his injuries and had treated him. According to him, PW 2 had suffered the following injuries :

- (1) Incised wound on right shoulder blade 6 inch X 1/4 inch X 1/5 inch sharp pointed object, fresh, nature simple,
- (2) Incise wound on left hand thumb palmer aspect - size of injury was 1/4 inch.

Both these injuries were described as simple injuries.

12. The prosecution has examined PW 4 Somnath Sonawane as one of the eye witnesses to the incident. He used to sell

groundnuts at Lucky Square in front of Hutatma Garden. He was knowing that Narsing Sathe was the owner of Lakhan Bhel House. He was also knowing the deceased Ajay and his brother PW 2 Vijay. These two used to reside near this witness's house. This witness used to sell groundnuts at that spot till around 10.30 p.m. He has described the incident and has deposed that at about 8.45 p.m., 7 to 8 persons with knife and iron scale had gone to Lakhan Bhel House. One of the young boys gave a blow of knife to the deceased Ajay. When Vijay caught the knife, another young boy gave a knife blow on his shoulder. He has further deposed that the boy who gave the first blow to Ajay, gave another blow by knife on the left side of the chest. He has further deposed that the same boy again gave one more blow with knife on Ajay's back. According to him, another boy was assaulting Ajay by means of iron scale. He has further deposed that one of the boys then picked up an iron stool which was normally used by this witness and hit Ajay on his head with the same. The other boys were assaulting by fists and kicks. The boy who had assaulted Vijay, threw the knife at the spot and then all of them left together. Thereafter, police came and made inquiries. He informed them that the iron stool belonged to him. Importantly, this witness has

categorically deposed that he made inquiries with PW 2 Vijay. According to him, at that time, PW 2 Vijay and PW 8 Narsing disclosed the names of accused nos.1 and 3. He has further deposed that the accused no.1 had given a blow of knife to the deceased Ajay and the accused no.3 Niranjan had assaulted Ajay with knife. The accused no.2 Vipul had assaulted Ajay with an iron scale and the accused no.6 Ajay Malge had assaulted the deceased Ajay with an iron stool. The other accused assaulted Ajay by fist and kick blows. He has further reiterated in his deposition that all these names of the accused were disclosed to him by PW 2 Vijay and PW 8 Narsingh. In his cross-examination, he has stated that the police recorded his statement on 05/05/2007 at about 2.30 p.m. Surprisingly, in his cross-examination, he has described the accused nos.4 and 5 by their names and has deposed that they were brothers of one Ravi Nikam. He has further stated that he was knowing Chikya Nikam i.e. accused no.4 and Rahul Nikam i.e. accused no.5. He has further admitted that he had affection for the deceased Ajay and PW 2 Vijay.

13. PW 8 Narsing Sathe has not supported the prosecution case and was declared hostile. According to him on the date of the

incident, he had closed his business at about 7.30 to 8.00 p.m. and had gone to answer nature's call. When he came back, he saw that Ajay was lying on the road. Apart from that, he pleaded ignorance about the incident. Thus, the PW 8 has not supported the version of the PW 2 that the names of the assailants were supplied by him.

14. Thus, reading the evidence of PW 2, PW 4 and PW 8, it is clear that PW 2 was not knowing anybody except accused nos.1 and 2. PW 4 Somnath has admitted that the names of the accused were given by PW 8 Narsing and PW 2 Vijay. Therefore, it was absolutely necessary for the investigating agency to have held an identification parade to enable these witnesses to identify the suspects at the earliest. Insofar as the evidence of these witnesses is concerned, the identification of the assailants is the most crucial aspect where the prosecution has failed to establish the identity of the accused, except that of the accused nos.1 and 2 who were known to PW 2 Vijay because of the earlier incident of non-payment of money. The evidence of PW 4 Somnath is, in any case, not reliable. Not only he has admitted that the names of the accused were supplied by PW 2 and PW 8, but he has deposed that he was knowing the accused nos.4

and 5. In that case, he should have clearly stated so while attributing roles to the accused and there was no necessity for him to inquire with PW 2 and PW 8 regarding the identity of the assailants. Therefore, we are not inclined to accept this evidence given by PW 2 and PW 4 insofar as the identity of the assailants is concerned, except the identity of accused nos.1 and 2.

15. Insofar as the evidence of PW 3 Sunil is concerned, the prosecution has relied on his evidence as he has claimed to be one of the eye witnesses to the incident. He was knowing the deceased Ajay and PW 2 Vijay. He used to do labour work. When he was returning home and when he was near Hutatma Garden, he noticed the crowd in front of Lakhan Bhel House. He has deposed that he had seen the accused nos.1 to 3 and other 2-3 boys assaulting Ajay and Vijay by knife and iron scale. He has identified all the accused before the Court. He has deposed that the accused no.1 had assaulted Ajay with knife and accused no.3 assaulted Vijay on his right shoulder. He has further deposed that the accused no.2 also gave a blow of iron scale on the head of Ajay and the accused no.6 assaulted Ajay on his head with an iron stool. The others were assaulting by fist and kick blows.

Thus, he has described the incident in detail naming all the accused and ascribing roles to them. This witness has admitted in his cross-examination that he was knowing the deceased Ajay and PW 2 Vijay from childhood and they used to reside at the backside of his house. In this background, his evidence needs to be scrutinized carefully. First of all, he is a chance witness. He was not working in the vicinity. He just happened to pass from that area at the time when the incident had taken place. His conduct, after the incident, was not natural. He has admitted that he was knowing the deceased since childhood. Even then, he did not try to intervene or save him. Even assuming that being scared he would not have intervened, but even thereafter he did not go to police chowki to seek help. Navi Ves Police Chowki was located nearby. He had waited at the spot when the police had arrived and even then, he did not disclose anything about the incident to the police. His statement was recorded on 09/05/2007 and no explanation is offered as to why he had not given his information to the police for five days. He has admitted that after the police came there, he had gathered sufficient courage but still he had not informed the police about witnessing the incident. Looking at these infirmities, we are not inclined to place reliance on his evidence.

16. Apart from this direct evidence, the prosecution has tried to rely on corroborative pieces of evidence in the form of recovery of weapons and seizure of clothes worn by the accused at the time of the incident. Besides the Investigating Officers, the prosecution has examined PW 1 Siddhu Shivsharan to prove various panchanamas of seizure. This witness was a panch for different panchanamas. On 04/05/2007 at about 11.45 p.m., he was called for conducting spot panchanama. He has proved the spot panchanama which is produced at Exh.23. Besides the pool of blood at the spot, he had noticed a knife without handle, a plastic chappal with bloodstains, steel tray, iron folding stool at the spot. He has described the location and the surrounding locality of the spot. In the presence of this witness, PW 2 had produced his clothes. On 05/05/2007 at about 6.30 p.m. in his presence, arrest panchanama of accused nos.1, 2 and 3 was prepared and their clothes were seized. On 09/05/2007 at about 5.30 p.m., he was again called to the police station. According to him, the accused no.1 made a statement that he was willing to show the place where he had concealed the knife used in the incident. After completing the formalities of writing the memorandum statement between 5.45 p.m. to 6.0 pm., the police party and this witness was led by the accused

no.1 near Indira Kanya Prashala. The accused led the panchas and the police to a public lavatory and produced a knife from the roof of the lavatory. The same was seized by the police. On the same day, an iron scale was recovered at the instance of the accused no.2 from his house. On 12/05/2007, clothes of accused no.6 were seized from his house in the presence of this witness. The prosecution has relied on the evidence of this witness to show that the murder weapon was recovered at the instance of the accused no.1. However, the knife was kept by the accused no.1 on the upper side of the public lavatory. The memorandum statement and the evidence of PW 1 show that the accused no.1 had not mentioned the place where he had concealed the said weapon. Therefore, it cannot be said that the statement was in consonance with the requirement of Section 27 of the Evidence Act. It cannot be said that his statement led to recovery of the weapon from a particular spot. Moreover, the public lavatory was obviously accessible to public in general and not much weightage can be given to such recovery. In any case, the C.A. report at Exh.138 read with the requisition letter at Exh.97 show that no blood was detected on the said knife. Insofar as the iron scale recovered at the instance of the accused no.2 is concerned, there is no injury attributable to the

iron scale, on the body of the deceased, in the post-mortem report. Therefore, it cannot be said that it was used in the assault. Though there is a CLW on scalp, the evidence shows that the deceased was assaulted on his head with an iron stool and there is only one injury on the head. Therefore, that injury could not have been caused both by the iron stool and the iron scale. In any case, the chemical analysis of the clothes of the accused and the weapons seized at their instance show that though there was human blood on them, the blood group was inconclusive and therefore, these articles cannot be conclusively connected to the murder of the deceased or to the assault on the injured PW 2.

17. Except the evidence of PW 3, PW 4 and PW 5 as the eye witnesses and PW 1 as the panch for recovery of weapons, the rest of the depositions of other witnesses are not very material. Most of these witnesses are panchas for various panchanamas viz. arrest of accused, seizure of their clothes, seizure of clothes of the deceased, etc. PW 17 PSI Rajaram Nale, PW 18 API Kaluram Dandekar, PW 19 PI Gajanan Huddedar and PW 20 Sr.PI Kashinath Umbarje had conducted the investigation in different parts.

18. In this background, the question still remains regarding the evidenciary value of the evidence of PW 2. There is no reason to doubt his evidence insofar as the identity of the accused nos.1 and 2 is concerned. According to him, he came to know about their names about 15 days before the incident of murder. Admittedly, the PW 2 had reason to hold grudge against these two accused. On the date of the incident also, it was the PW 2 who had initially confronted these two accused. According to him, thereafter these two accused came back with other accused and the assault took place. PW 2 has not ascribed any role to the accused no.2 in assault on the deceased. According to him, the accused no.2 was carrying an iron scale, which can hardly be described as a deadly weapon. The accused no.1 has taken a specific defence that the deceased Ajay tried to assault him and sensing danger, in retaliation by the accused no.1, the deceased had suffered the fatal injury. He has specifically stated in his statement recorded under Section 313 of the Cr.P.C. as under :

“On 4/5/2007 at about 7-30 p.m. when I was proceeding towards Employment Exchange Chowk, near Hutatma garden, both Ajay and Vijay Kamble met me. They both started assaulting me. Ajay caught hold of my neck. Vijay was bringing a knife of Bhelwala handcart to implit injuries & assault me. I pushed Ajay away. With a viov to save my life, when I was moving a knife, which I had

taken from handcart of Bhelwala, it mistakenly struck to Ajay. I had no enmity with Ajay. Report lodged against me is false. I had not gone to ear Bhel prior to that day. There was a container (kadas) having not oil. They both were pushing me. I was pushing them. Mistakenly knife in my hand struck Ajay. I had no intention to assault them (both the brothers). Other accused were not present there.”

Thus, there are two versions of the same incident and we are of the opinion that neither of the versions can be completely true. The genesis of the incident has not been brought before the Court clearly. There is no corroboration to the evidence given by PW 2 in respect of first part of the incident when he had confronted the accused nos.1 and 2. No other witness has deposed about the quarrel which took place before the main incident when the accused nos.1 and 2 had allegedly given threats to PW 2. Admittedly, the deceased and the PW 2 were holding grudge against the accused nos.1 and 2. The PW 2 had confronted these two accused at the first instance. Therefore, we are inclined to give benefit of doubt to the accused no.1 of Exception 4 and the Explanation thereunder as mentioned under Section 300 of the IPC which reads thus :

“Exception 4.-- Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the

offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation.-- It is immaterial in such cases which party offers the provocation or commits the first assault.”

Medical Officer PW 14 Dr. Tipanna Kamble has specifically admitted in his cross-examination that the Injury Nos.2 to 6 were simple in nature. Therefore, it cannot be said that the accused no.1 had acted in a cruel or unusual manner or had taken undue advantage. Therefore, his act falls within first part of Section 304 and not under 302 of the IPC. Since the blow was given on the chest, the intention mentioned in first part of Section 304 can be attributed to him. Thus, we are of the opinion that the accused no.1 has committed an offence punishable under Section 304 (Part-I) of the IPC. The fact that the accused no.2 had not carried a deadly weapon and had not taken part in actual assault on the deceased shows that he did not share the common intention with the accused no.1 and therefore, the accused no.2 deserves benefit of doubt. The other accused are not found guilty because their identity is not established and the evidence of PW 3 is not acceptable. With the above observations, we pass the following order.

ORDER

Appeal Nos.558 of 2010, 478 of 2010, 486 of 2010 and 963 of 2010 are allowed.

Appeal No.569 of 2010 is partly allowed.

The order of conviction and sentence against the Appellants / original accused nos.2 to 6 under Sections 143, 147, 148, 302 read with 149 and 324 read with 149 of the IPC is quashed and set aside. The said accused are acquitted of the charges charged with.

The accused nos.3 and 6 are directed to be set at liberty forthwith if not required in any other case.

The bail bonds of accused nos.4 and 5 shall stand discharged.

The order of conviction against the accused no.1 for the offence under Section 302 of the IPC is turned into that under Section 304 (Part-I) of the IPC. The accused is sentenced to suffer rigorous imprisonment for ten years for the said offence. The rest of the order regarding fine insofar as the accused no.1 is concerned, is maintained.

The accused no.1 has already undergone a sentence of almost 11 years. He is, therefore, directed to be set at liberty forthwith if not required in any other case.

In view of disposal of Criminal Appeal No.486 of 2010, Criminal Application No.1535 of 2016 also stands disposed of.

(SARANG V. KOTWAL, J.)

(B. R. GAVAI, J.)