

THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

CRIMINAL APPEAL NO. 425 OF 2015

1. Hedya Sonaji Gavit,
Age 51 years, Occu. Agril.,
2. Shankar Sonaji Gavit,
Age 50 years, Occu. Agril.
3. Vilas Hedya Gavit,
Age 28 years, Occu. Agril.,
4. Jayabai Shankar Gavit,
Age 41 years, Occu. Agril.,
5. Radhubai Hedya Gavit,
Age 46 years, Occu. Agril.,
6. Dinabai Katya Gavit,
Age 31 years, Occu. Agril.,

All R/o Pratappur, Tq. Nawapur,
District Nandurbar.

... APPELLANTS

(Ori. Accused Nos. 1 to 4, 6 and 7)

VERSUS

The State of Maharashtra,
Through Nawapur Police Station,
Nawapur, District Nandurbar.

... RESPONDENT

...

Mr. C. R. Deshpande, Advocate for the Appellants.

Mrs. V. N. Patil (Jadhav), APP for Respondent/State.

...

CORAM : **T. V. NALAWADE &
K. K. SONAWANE, JJ.**

DATE : 06th August, 2019.

JUDGMENT: (Per T. V. Nalawade, J.)

. The appeal is filed against the judgment and order of Sessions Case No.13 of 2012, which was pending in the Court of learned Additional Sessions Judge, Nandurbar. The Trial Court has convicted and sentenced the Appellants for the offences punishable under Section 302 read with 149, Section 307 read with 149 and Section 147 of the Indian Penal Code. Appellant Nos.1, 2 and 4 are convicted for the offence punishable under Section 148 of the Indian Penal Code also. Original Accused No.5 (Katya Gavit) is acquitted by the Trial Court of all these offences.

2 Both the sides are heard.

3 In short, the facts leading to institution of the appeal can be stated as follows:

The informant, Surabai is widow of deceased Ruaji. This couple was living in a locality known as Uchalifali of Pratappur,

Tahsil Nawapur, District Nandurbar. One of their daughters by name Mirabai is given in marriage to Sunil. Sunil is also resident of Pratappur. The house of Sunil is situated at a distance of more than 1 and 1/2 kilometers from the house of informant. The house of informant is situated in forest and agricultural land having threshing place is situated at a distance of around 1 and 1/2 kilometers from the residential place.

4 Accused No.1 (Hedya) is a cousin of deceased. Accused No.2 (Shankar) is real brother of Hedya. Partition of ancestral land had not taken place between the deceased and his brothers on one side and Accused Nos.1 and 2 on the other. Appellant No.3 is son of Hedya, Appellant No.4 is wife of Shankar, Appellant No.5 is wife of Hedya and Appellant No.6 (Dinabai) is also relative of other Appellants and she is wife of Accused-Katya, who is acquitted.

5 There was a litigation pending between these two sides as partition had not taken place. Tension between the two sides had increased as at the relevant time, there were fruit bearing trees of bare in the ancestral land, which was in the possession of deceased

and the deceased was not allowing the Accused persons to take those fruits. Many quarrels had already taken place prior to the date of incident between the two sides.

6 The incident in question took place on 5th January, 2012. At about 06:30 pm, on that day, informant and deceased left home for the house of son-in-law Sunil with a tiffin for Sunil. When they were proceeding towards the residential place of Sunil through forest and they had crossed some distance from residential place, all the Accused intercepted them and assaulted them by using weapons like stone, axe and iron bar. Ruaji died on the spot and informant became unconscious. Accused persons felt that informant was also dead and so they left the spot.

7 After 2 to 3 hours of incident, Surabai regained consciousness and she somehow walked towards the place where Sunil was present. She narrated the incident to Sunil. Sunil and other relatives shifted the informant to Nawapur Government Hospital for treatment. In the Government hospital, police recorded her statement on 6th January, 2012 and Crime No.3 of 2012 came to be

registered in Nawapur Police Station for the offences punishable under Sections 302 and 307 read with 149 etc. of the Indian Penal Code.

8 During the course of investigation, spot *Panchanama* was prepared and dead body was referred for *postmortem* examination. Statements of witnesses came to be recorded. Articles taken over from the spot and blood samples of deceased and informant came to be sent to C.A. office. Charge-sheet came to be filed for aforesaid offences. During trial, prosecution examined informant (Surabai). *Postmortem* report and injury certificates came to be proved. The Trial Court has believed the only eye-witness, who was available and examined by prosecution. In view of the absence of specific evidence as against Accused No.5, the Trial Court has acquitted him.

9 The prosecution has relied upon both direct and circumstantial evidence. Surabai (PW-4) had sustained injuries in the incident. Her evidence shows that she is an illiterate lady and at the relevant time, her age was 45 years. All the Accused were known to her.

10 Surabai (PW-4) has deposed that at the relevant time, she and deceased were proceeding towards the place where Sunil (PW-1) was present and they had taken lunch box for Sunil. She has deposed that they were on foot and when they were proceeding towards the place of Sunil, Accused No.1 first came forward and gave blow of stone on the head of deceased. She has deposed that Accused No.2 then gave two blows of axe and after that her husband collapsed due to bleeding injuries. She has given evidence that she felt that her husband was dead and so for escaping, she somehow was proceeding ahead, but Accused Jayabai followed her and gave blow of iron bar on her person. She has deposed that Accused Radhubai hit a stone on her head. She has deposed that when she started shouting loudly, Accused Vilas gagged her mouth by pushing a piece of cloth into her mouth. She has deposed that during the incident, Accused Dinabai had held her. She has deposed that when she collapsed and she became unconscious, Accused left the place.

11 Surabai (PW-4) has given evidence that after some time of the incident, she regained consciousness and she somehow

walked towards the place where Sunil was present. She has deposed that she narrated the incident to Sunil and other relatives and then Sunil, Fulji Gimba and others shifted her to Pratappur road and from there she was shifted to Government Hospital Nawapur in auto-rickshaw. She has deposed that in hospital, her report was recorded by police and her thumb impression was obtained on it. She has deposed that her daughter, Savita who had arrived there helped her to explain and narrate the incident to police as she had narrated the incident in *Adivasi* language. FIR at Exhibit-50 is duly proved in the evidence of Surabai (PW-4). During the evidence, PW-4 identified clothes of her husband, articles like tiffin taken over from the spot of offence by police and also weapons.

12 In Exhibit-50 (FIR) there is mention of names of Accused Nos.1, 2, 3, 4, 6 and 7 and her evidence given in Court is consistent with the first disclosure made to police by her. No specific role was attributed by her to Accused No.5 (Katya), who is acquitted by the Trial Court. FIR registered by police under Section 154 of the Code of Criminal Procedure gives necessary corroboration to the substantive evidence given by Surabai (PW-4).

13 The defence has not seriously disputed that there is civil dispute between the two sides over the ancestral property. The tenor of cross-examination is of that nature. In the statements given under Section 313 of the Code of Criminal Procedure they have, however, denied the evidence of the dispute given by Surabai (PW-4). It is suggested to PW-3 (Asu), brother of deceased that deceased used to quarrel with his real brothers over the land dispute. These suggestions are denied. There is nothing on record to infer that deceased had dispute with any other person of any kind. No suggestion is given to Surabai (PW-4) in respect of any reason as to why she has given evidence against the Accused persons.

14 In the cross-examination of Surabai (PW-4), it is brought on record that after 2 to 3 hours of the incident, she could go towards the threshing field where Sunil was present. Evidence of Surabai (PW-4) and Sunil (PW-1) shows that she reached the place where Sunil was present at about 12:00 hours of that night i.e. on 5th January, 2012 itself. Their evidence shows that the places of residence of parties are situated in hilly and forest area. The

evidence shows that they are required to walk first upto road and there they can take some conveyance. Their evidence show that they walked upto that road and there they could get auto-rickshaw for going to hospital. The prosecution examined Sunil Jirya Gavit (PW-5), driver of auto-rickshaw and his evidence shows that on 6th January, 2012 in the night time (night between 5th January, 2012 and 6th January, 2012) he took deceased, informant and his relatives from Pratappur road to Government hospital. His evidence is consistent with the evidence of PW-1 and PW-4 and his evidence needs to be kept in mind while considering the fact that crime was registered on 6th January, 2012, after few hours of the incident.

15 In the evidence of Dr. Avinash Mavchi (PW-7), who was attached to Government hospital Nawapur, it is brought on record that Surabai (PW-4) was admitted in the hospital at about 01:50 am on 6th January, 2012. MLC at Exhibit-61 prepared by him in respect of Surabai is consistent with his oral evidence. He has deposed that he had informed to police about admission of Surabai and then police came to the hospital.

16 On FIR at Exhibit 50 no time of registration of crime is mentioned though date is mentioned as 6th January, 2012. However, in other record, time of registration of crime is mentioned as 04:15 am of 6th January, 2012.

17 The evidence of Sudhir Patil (PW-10), investigating officer shows that *inquest* of dead body was prepared at about 05:00 am. The evidence of Asu (PW-3) brother of deceased and Sunil (PW-1) shows that Surabai (PW-4) had disclosed the incident to them. Evidence of Sunil (PW-1) shows that he showed the place of offence to police and at that time *Panchas* were also taken to the spot by police. This evidence is sufficient to infer that FIR was given immediately, at the first opportunity by Surabai (PW-4).

18 In the evidence of Dr. Avinash (PW-7) injury certificate in respect to Surabai (PW-4) is duly proved at Exhibit-61. Surabai (PW-4) had sustained the following injuries:

- “1. CLW on parietal occipital region 3 x 2 x 1 cms.
2. Abrasion on forehead 2 x 1.5 cms.
3. Abrasion on right elbow point 5 x 1/2 cms.
4. Abrasion on right knee 4 x 1 cms.
5. Blunt trauma on left thigh.”

19 It is already observed that the injured was examined at 02:00 am and the age of the injury is given as within 12 hours, they were fresh. The injuries were simple. Doctor has given evidence that such injuries can be caused by hard and blunt object like stone or iron bar. The weapons taken over by police from the spot were shown to doctor. His evidence shows that due to injury to head, she was indoor patient from 6th January, 2012 to 11th January, 2012. Medical evidence is consistent with the oral evidence of Surabai (PW-4).

20 Sunil (PW-1) is cross-examined extensively by the defence to create probability that if one raises hue and cry at the spot of offence, that can be heard at the residential place of deceased. This suggestion is denied. The evidence on record shows that the houses of brothers of deceased are situated in the vicinity of the house of deceased and after that there are houses of Accused persons and after that spot of incident is situated. Thus, the houses of Accused were in the vicinity of the spot of offence. Considering the distance between the residential place of deceased and spot, which was more than 1 kilometer, it does not look probable that shouting of

deceased or Surabai (PW-4) could be hard by brothers of deceased. Further, the evidence on record shows that the incident took place on the way, which passes through forest and it is not *Pakka* road.

21 In the evidence of Soma (PW-2), spot *Panchanama* at Exhibit 44 is duly proved. This evidence shows that spot is situated in the forest. *Panchanama* was prepared when the dead body was still lying there. The evidence shows that one stone having blood stains, pieces of bangles and one chain were lying there. There was blood on the spot. The way was ascending towards residential places of deceased and Accused. One red muffler, one spect, a pair of *chappal*, a pair of sandal, a pendal of metal, tiffin box containing some food and one small pot used for taking meal were also lying there. All these articles were taken over under the *Panchanama*. These articles were found spread upto a distance of 50 feet. A hand sketch map of spot is prepared on the *Panchanama*. The oral evidence shows that residential place of deceased was at a distance of around 1 and 1/2 kilometers from this spot. It was prepared between 08:00 am and 09:00 am of 6th January, 2012. This evidence is consistent with the oral evidence of Surabai (PW-4).

22 The postmortem report in respect of dead body is at Exhibit-58 and it is proved in the evidence of Dr. Jaiswal (PW-6). The evidence of Dr. Jaiswal and postmortem report show that the *postmortem* was conducted between 11:10 am and 12:00 noon on 6th January, 2012. Dr. Jaiswal found following *ante-mortem* injuries on the dead body:

- “1. Contused lacerated wound admeasuring 3 x 3 x 2 cms over right eye-brow.
2. Contused lacerated wound admeasuring 2 x 2 x 1.5 cms over left forehead in front of ear below hair line.
3. CLW 8 x 3 x 8 cms. Deep upto brain matter, left parietal region.
4. CLW 9 x 3 x 8 cms Deep upto brain matter right parietal region fracture skull vault. Margins are sharp and clear.
5. CLW 4 x 2 x 4 cms deep upto brain matter, skull fracture over left occipital region. Margins are sharp and clear.
6. CLW 2 x 2 x 1 cms. Over left shoulder joint anteriorly.
7. CLW 2 x 1 x 1 cms over left wrist joint at the place of left thumb.
8. CLW 4 x 2 x 4 cms. Deep upto bone, after fracture spine of left scapula over left side of back.”

23 The medical evidence shows that the death took place due to haemorrhagic shock due to aforesaid head injuries. The head injuries had caused the fracture of skull vault. Multiple injuries caused to the deceased were cause of death. Evidence of Dr. Jaiswal (PW-6) shows that injuries Nos.3, 4 and 5 mentioned above can be caused by axe and other injuries can be caused both by axe and stone. Further, margin of injury No.4, which was brain deep was sharp and clean. Same can be said in respect of injury No.5, which was also on head. The evidence shows that injury Nos.1 and 2 can be caused by weapon like stone. This medical evidence is consistent with oral evidence of Surabai (PW-4). Oral evidence on number of blows given by Accused Nos.1 and 2 is not that consistent with medical evidence but on material point, the role attributed and the weapons used, it is consistent with medical evidence. So not much can be made out in favour of Accused due to such minor discrepancy.

24 In the cross-examination of Dr. Jaiswal (PW-6), it is brought on record that the death took place after three hours of taking last meal by the deceased. Attempt was made by defence during the

cross-examination of PW-4 to create probability that just before leaving the residential place with tiffin, they had taken meal, but that suggestion is denied. Thus, the evidence on record shows that they had taken lunch, but they had not taken dinner and they had left residential place at 06:00 pm with tiffin for Sunil. Considering the distance between the place of Sunil and residential place of deceased, it can be said that they would have returned to residential place after supplying tiffin to Sunil on the same night for taking dinner. Semi-digested food found in the small intestine is a circumstance that shows that lunch was taken but not the dinner. This part of medical evidence is also consistent with the oral evidence of Surabai (PW-4).

25 The prosecution has given other circumstantial evidence also. In the evidence of Soma (PW-2) memorandum of statement of Accused No.2 is proved at Exhibit-42. On this statement, there is evidence of investigating officer (PW-11) also. This statement led to discovery of articles like axe having blood stains, clothes of Accused No.2 having blood stains and they were recovered from the house house of Accused No.2. These articles and one iron bar came to be seized under *Panchanama* Exhibit-44 by police. It is not disputed that

on 6th January, 2012 itself, Accused No.2 and other Accused came to be arrested. Thus, the statement leading to discovery and discovery was made immediately after arrest of Accused. Though arrest *Panchanamas* are not exhibited, there is evidence of Sudhir Patil (PW-10), investigating officer on *inquest* and also on arrest.

26 In the evidence of Soma (PW-2), *Panchanama* of seizure of *Sari* of Surabai (PW-4) and clothes of deceased are proved at Exhibits 45 and 46. There was blood on these articles. These articles were taken over on 6th January, 2012 itself. It is already mentioned that Surabai (PW-4) had sustained bleeding injury in the incident.

27 Sudhir Patil (PW-10), investigating officer has given evidence that the aforesaid articles seized by him during investigation were forwarded to CA office with covering letter Exhibit-63. CA reports in respect of these articles are at Exhibits 71 to 74. CA reports show that earth sample collected from the spot of offence contained blood of group 'A', clothes of deceased and clothes of Surabai (PW-4) contained blood of group 'A'. Similarly, on the clothes of Accused No.2 (Shankar) blood of group 'A' was detected. Blood

group of deceased and Surabai (PW-4) was 'A'. Blood group of Accused No.2 (Shankar) could not be ascertained by CA office, but it is not the case of Accused No.2 (Shankar) and there is no evidence to show that he had sustained injuries at the relevant time. No explanation is offered by Accused No.2 (Shankar) in respect of aforesaid incriminating circumstantial evidence and those circumstances are satisfactorily established by the prosecution.

28 The informant (PW-4) is an illiterate lady. She disclosed the incident at first opportunity to her relatives and to the police. Her report was recorded in Government hospital. Evidence is given on motive also. Thus, there was motive for the Accused persons for committing offence and that was no room for concoction and false implication.

29 Evidence of Surabai (PW-4) is closely scrutinized by the Trial Court and this Court has also attempted to do scrutiny to the possible extent. The evidence is sufficient to infer that injuries to the deceased and PW-4 were caused by the Accused as described by her. However, the substantive evidence of PW-4 does not show that

they came across all the Accused at the same time or that all Accused were waiting for them on the way and all of them had intercepted them. It is already observed that the houses of the Accused were in the vicinity of the spot of offence though the houses of deceased and his brothers were situated beyond the houses of Accused. Unfortunately, there is no map of scene of offence showing the exact distance between the spot of offence and houses of Accused. Evidence of informant (PW-4) does not show that every day they used to go towards the threshing field in the evening time with tiffin. Sunil is a married man and he was living separate from PW-4 and deceased. There is nothing on record to infer that all the Accused had information that deceased and informant were to pass at that time by that road. Possibility that some of the Accused noticed deceased and PW-4 proceeding away from the residential place and then they took some decision is there.

30 Evidence of Surabai (PW-4) shows that first Accused No.1 appeared on the scene of offence and all of a sudden Accused No.1 assaulted the deceased with stone. Her evidence shows that Accused No.2 then came forward and gave blows of axe to the

deceased. The evidence of PW-4 shows that only due to assault made by Accused Nos.1 and 2 (Hedya and Shankar), her husband collapsed on the ground and he died. There is no substantive evidence against the other Accused that they had also assaulted the deceased. Though there is no specific mention of number of blows of axe given by Accused No.2 in FIR, that absence, omission cannot make much difference. As there is evidence of PW-4 that only Accused Nos.1 and 2 assaulted the deceased and they caused death, such omission can be safely ignored. Further, the evidence of PW-4 does not specifically show that other Accused had arrived on the spot of offence when Accused Nos.1 and 2 were assaulting the deceased. Thus, there is no evidence to prove that unlawful assembly was formed by all the Accused and after that Accused Nos.1 and 2 had assaulted the deceased. The burden is on prosecution to prove that unlawful assembly was first formed and then the offence was committed.

31 The substantive evidence of Surabai (PW-4) shows that when her husband collapsed, she started proceeding ahead, but Accused No.4 (Jayabai) assaulted her. She has deposed that

thereafter, Accused Radhubai, Vilas and Dinabai participated in the incident. Thus, substantive evidence of PW-4 shows that when her husband died, other accused appeared on the scene of offence and then she was assaulted. Due to such nature of evidence, this Court holds that it needs to be inferred that unlawful assembly was formed after the assault made on the deceased was over and then informant was assaulted by the Accused. This Court holds that the evidence is not sufficient to prove that unlawful assembly was formed before assault was made on her husband. This Court holds that it came to be formed subsequent to the assault made on deceased was over.

32 The injuries sustained by informant (PW-4) were simple, but one injury was on the head portion. She was indoor patient for some days. Her evidence shows that due to assault made on her head, she became unconscious and only when she collapsed, the Accused left the place. The fact that the husband of informant had died on the spot, as many as eight injuries were inflicted to him, which had caused fracture of vault of skull, they were attacked on road passing through forest and there were no persons to witness the incident need to be kept in mind to ascertain as to what offence is

committed against Surabai (PW-4). Though simple injuries were inflicted to informant, due to aforesaid circumstances and as all the Accused were present when assault was made on her after finishing her husband, this Court holds that there is sufficient material to draw inference that unlawful assembly was formed by the Appellants and its object was to finish the informant. She survived and so the Appellants need to be convicted for the offence of attempt of murder made by all of them which is punishable under Section 307 read with 149 of the Indian Penal Code.

33 The Trial Court has committed error in not appreciating the substantive evidence of Surabai (PW-4) properly so far as it is given in respect of murder of her husband. Due to aforesaid nature of her evidence, it is not possible to convict the Accused except Accused Nos.1 and 2 for the offence of murder of Ruaji. So that part of the decision of the Trial Court needs to be set aside and only Accused Nos.1 and 2 can be convicted for the offence punishable under Section 302 read with 34 of the Indian Penal Code. It can be said that within no time Accused Nos.1 and 2 had assaulted the deceased and particularly on his head and so there was common intention of

Accused Nos.1 and 2 to finish the deceased out of aforesaid dispute.

34 Charge was framed against all the Accused for the offence punishable under Section 302 read with 149 of the Indian Penal Code for the murder of Ruaji. There was no charge for the offence punishable under Section 302 read with 34 of the Indian Penal Code. In the case reported as **AIR 2003 Supreme Court 796**, (*Chittarmal Vs. State of Rajasthan*), the Apex Court in paragraph 14 has laid down in this regard as follows:

“14. It is well settled by a catena of decisions that S. 34 as well as S. 149 deal with liability for constructive criminality i.e. vicarious liability of a person for acts of others. Both the sections deal with combinations of persons who become punishable as sharers in an offence. Thus, they have a certain resemblance and may to some extent overlap. But a clear distinction is made out between common intention and common object in that common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or pre-concert. Though there is substantial difference between the two sections, they also to some extent overlap and it is a question to be determined on the

facts of each case whether the charge under S. 149 overlaps the ground covered by S. 34. Thus, if several persons numbering five or more, do an act and intend to do it, both Ss. 34 and 149 may apply. If the common object does not necessarily involve a common intention, then the substitution of S. 34 for S. 149 might result in prejudice to the accused and ought not, therefore, to be permitted. But if it does involve a common intention then the substitution of S. 34 for S. 149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. The non-applicability of S. 149 is, therefore, no bar in convicting the appellants under S. 302 read with S. 34 I.P.C., if the evidence discloses commission of an offence in furtherance of the common intention of them all.”

35 In the present matter, though there was no charge for the offence punishable under Section 302 read with 34 of the Indian Penal Code, the facts proved and evidence adduced by prosecution would have been the same if Accused Nos.1 and 2 were charged for the offence punishable under Section 302 read with 34 of the Indian Penal Code. Right from the beginning, from the time of registration of crime, it was a case against Accused Nos.1 and 2 that they had assaulted the deceased. In the statements given under Section 313

of the Code of Criminal Procedure also the evidence given as against Accused Nos.1 and 2 was put to them specifically to offer them opportunity to explain the circumstances and have say about that evidence. Thus, Appellant Nos.1 and 2 (Accused Nos.1 and 2) were fully aware of the nature of offence with which they were charged and no prejudice will be caused to them if they are convicted for the offence punishable under Section 302 read with 34 of the Indian Penal Code. It is not illegal to convict Accused Nos.1 and 2 for the offence punishable under Section 302 read with 34 of the Indian Penal Code as substitution for conviction under Section 302 read with 149 of the Indian Penal Code.

36 The learned counsel for Appellants placed reliance on the observations made by the Apex Court in the following three cases:

- i) **AIR 1954 Supreme Court 695**, (*Gajanand and others Vs. State of U.P.*);
- ii) **1992 CRI. L. J. 3953**, (*Thakore Dolji Vanvirji and others Vs. State of Gujarat*); and
- iii) **1994 Supreme Court Cases (Cri) 1169**, (*Kotha Das and another Vs. State of A.P.*).

37 In the first case, it is observed by the Apex Court that for using of Section 149 of the Indian Penal Code, it needs to be established that Accused against whom Section 149 of the Indian Penal Code is to be used, had knowledge of common object or he knew that offence actually committed was likely to be committed in prosecution of common object of assembly. It is laid down by the Apex Court that if such knowledge cannot be attributed to particular Accused then he cannot be held liable for the offence committed by others by using Section 149 of the Indian Penal Code. In the second case, when only Accused (Accused No.1) had caused fatal injury to the deceased and other Accused had caused simple injuries, the Apex Court held that only Accused No.1 was liable for the offence of murder defined under Section 300 of the Indian Penal Code and others can be held liable for the offence punishable under Section 326 read with 149 of the Indian Penal Code. In the third case, when some Accused had entered together a bar and they had caused damage to furniture and they had caused injuries to witnesses and only one Accused had snatched wrist watch of the cashier, the Apex Court held that others cannot be held liable for the offence punishable under

Sections 392, 395 or 397 of the Indian Penal Code as they had no intention of such robbery and so there was no common object of assembly to commit such offence against the cashier.

38 The aforesaid propositions made by the Apex Court were in the mind of this Court when this Court was appreciating the evidence given in the present matter. The present matter is on better footing for Accused other than Accused Nos.1 and 2 as when they came on the scene of offence when Accused Nos.1 and 2 had already assaulted the husband of informant and that part of incident was already over. However, when the informant was assaulted by some of the Accused, other Accused were present on the scene of offence and so, it is easy to infer that unlawful assembly was formed and common object of unlawful assembly was to finish the informant also. In the result, the following order is passed:

ORDER

- I. The appeal of Appellant No.1 (Hedya Sonaji Gavit) and Appellant No. 2 (Shankar Sonaji Gavit) is dismissed.
But, the conviction is given to them for the offence

punishable under Section 302 read with Section 34 of the Indian Penal Code. They stand convicted for the offence punishable under Section 307 read with Section 149 of the Indian Penal Code along with other Accused and Appellant No.1 (Hedya Sonaji Gavit) and Appellant No.2 (Shankar Sonaji Gavit) also stand convicted for the offence punishable under Section 148 of the Indian Penal Code and sentence given to them for all these offences by the Trial Court stands confirmed.

- II. The appeal of Appellants Nos.3 to 6 is partly allowed. They stand acquitted of the offence punishable under Section 302 read with Section 149 of the Indian Penal Code, however, conviction given to them for the offence punishable under Section 307 read with Section 149 of the Indian Penal Code is maintained.
- III. Appellants Nos.3, 5 and 6 also stand convicted for the offence punishable under Sections 143 and 147 of the Indian Penal Code. For these offences, they are sentenced to suffer imprisonment for the period already

undergone. Accused No.4 stands convicted for the offence punishable under Sections 143 and 148 of the Indian Penal Code. They are also sentenced to pay total fine of Rs.1000/- by each of them, in default to make payment of fine, they shall suffer one month simple imprisonment. To Accused Nos.3 to 6 the sentence of imprisonment of period undergone for offence punishable under Section 307 read with Section 149 of the Indian Penal Code is given. They are behind bars for more than three years.

- IV. Writ of this order be sent to the Jail authority concerned, as Appellants – Accused Nos.3 to 6 are in jail, for their release forthwith, on obtaining bond as provided in Section 437-A of the Code of Criminal Procedure of Rs.15,000/- (Rupees Fifteen Thousand Only) with one surety of like amount for a period of six months.
- V. The sentence given to Accused Nos.1 and 2 for the offence punishable under Section 307 read with 149 of the Indian Penal Code is maintained.

VI. As already ordered by the learned Trial Court substantive sentences in respect of Appellant No.1 (Hedya Sonaji Gavit) and Appellant No.2 (Shankar Sonaji Gavit) to run concurrently, they are entitled to set off as against term of substantive imprisonment as provided under Section 428 of the Code of Criminal Procedure.

[K. K. SONAWANE, J.]

[T. V. NALAWADE, J.]

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