

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

CRIMINAL APPEAL NO.80 OF 2018

Anil s/o Chandraiyya Surkunde
Age : 40, Occu. : Business
R/o Kumbhar Galli, Begumpura,
Tq and Dist. Aurangabad

...APPELLANT

VERSUS

The State of Maharashtra

...RESPONDENT

Mr. M.A. Tandale, Advocate for the appellant
Mr. V.S. Badakh, APP for the respondent/State.

**CORAM : S.M. GAVHANE, J.
RESERVED ON : 26.04.2019
PRONOUNCED ON : 14.08.2019**

J U D G M E N T :-

. By this appeal the appellant (hereinafter referred to as the 'accused No.1') has assailed the judgment and order dated 20-01-2018 passed by the Additional Sessions Judge, Aurangabad in Sessions Case No.433 of 2010, thereby convicting him for the offence punishable under Section 307 of the Indian Penal Code (for short 'IPC') and sentencing him to suffer rigorous imprisonment for Ten years and to pay

a fine of Rs.2,000/-, in default simple imprisonment for two months for the said offence.

2. Facts of the prosecution case are as under:

(A) The informant Nana Vishwanath Chavan (PW-1) and all the four accused are residents of Kumbhar Galli, Begumpura, Aurangabad and the injured Rahul Nandkishor Pere (PW-7) (hereinafter referred to as 'victim') is also resident of Vidyut colony, Begumpura, Aurangabad. Kumbhar Galli and Vidyut colony are adjacent to each other.

B) The informant Nana Chavan (PW-1) lodged report/complaint (Exh.53) at about 23.55 hours in Begumpura police Station on 12-06-2010 alleging that on that day at about 20.45 hours while he was sitting in his house taking meal he heard noise of shouting out of the house. Therefore, when he came out of house he saw that four persons were assaulting one boy. He went there to separate the quarrel. It is alleged that accused No.1 Anil Surkunde was trying to kill victim by assaulting him with knife on his neck

and Raju Surkunde (accused No.4), Dhiraj Surkunde (accused No.2) and Chandraiyya Surkunde (accused No.3), who seems to be father of accused Nos.1, 2 and 4, were assaulting victim by sticks. Accused No.1 was saying victim that "he was defaming him as a liquor addicted person in Begumpura and that he would not live him alive". After the said incident the informant and others took victim by auto rickshaw in Ghati Hospital and the informant was there in the hospital till 10.45 p.m. Thereafter, he went to Begumpura police station and lodged the report as above. Treating the the said report as First Information Report, Crime No.79/2010 for the offences punishable under Sections 307 and 504 read with Section 34 of the IPC was registered against the accused and the investigation was commenced.

(C) The victim was examined and treated in the Ghati Hospital by Dr.Mahesh Vispute (PW-10), Dr.Anant Bidkar (PW-11) and Dr. Amol Kaswa (PW-13). During investigation the investigating officer API S.B. Lahane (PW-12) recorded statement of victim, seized

the clothes on the person of victim and recorded statements of other witnesses. On 20-06-2010 memorandum statement of accused No.2 Dhiraj was recorded and at his instance weapon in the incident was recovered. On 22-06-2010 accused No.1 made statement of handing over knife and accordingly said knife was seized at his instance. Accused Nos.3 and 4 were arrested on 21-06-2010 and 22-06-2010. Memorandum statement of accused No.4 was also recorded and at his instance stick was seized. The investigating officer collected the medical certificates of the victim. All the accused were released on bail. After completion of investigation charge-sheet was filed in the Court of JMFC, Aurangabad against all the four accused for the aforesaid offences. Learned Magistrate committed the case to the Sessions Court as the offence under Section 307 of the IPC was triable by Court of Session.

(D) The learned Additional Sessions Judge-4, Aurangabad framed charge (Exh.38) against all the

four accused for the offences punishable under Sections 307 and 504 read with Section 34 of the IPC. Accused pleaded not guilty to the charge and claimed to be tried.

(E) To prove charge against the accused the prosecution has examined following 13 witnesses.

- (1) Nana Vishwanath Chavan
- (2) Janardhan Vishwanath Chavan
- (3) Sandip Jagannath Rothe
- (4) Sagar Dipakrao Chavan
- (5) Mahesh Babasaheb Alanjkar
- (6) Satish Mahetarao Patil
- (7) Rahul Nandkishor Pere
- (8) Sachin Tarachand Salampure
- (9) Dhiraj Kiran Gujar
- (10) Dr.Mahesh Eknathrao Vispute
- (11) Dr.Anant Narayan Bidkar
- (12) Sunil Bajirao Lahane
- (13) Dr.Amol Amrut Kaswa

Besides the above oral evidence the prosecution has relied upon panchanamas referred to above, injury certificates and reports of the Chemical Analyzer.

(F) Statements of all the accused under Section

313 of the Code of Criminal Procedure were recorded. Their defence was denial. They have examined witness Dilip Ramanna Kasture (DW-1). According to them there was scuffle between accused No.1 and the victim and in the said scuffle victim fell and thus sustained injury due to fall. They have contended that they have been falsely involved in the case.

(G) Considering the evidence adduced by the prosecution and the defence the learned Additional Sessions Judge held that the prosecution has proved offence under Section 307 of the IPC against the accused No.1, it has failed to prove said offence against accused Nos.2 to 4 and further on holding that the prosecution has failed to prove offence under Section 504 read with Section 34 of the IPC, convicted the accused No.1 for the offence under Section 307 of the IPC and sentenced him as said earlier in the opening paragraph of this judgment and accused No.1 was acquitted of the offence under Section 504 of the IPC and rest accused were acquitted of offences under Sections 307 and 504 read

with Section 34 of the IPC by the impugned judgment. Therefore, this appeal by the accused No.1 challenging the conviction and sentence recorded against him for the offence under Section 307 of IPC.

3. Mr.Tandale, learned counsel for the accused No.1 submitted that Nana Chavan (PW-1) the informant claims to be eye witness to the incident of assaulting the victim with knife by the accused No.1 and he filed report/complaint (Exh.53). There is variance in his evidence and the contents of Exh.53 as in the deposition he stated that after taking dinner he was sitting in the house and he heard shouts of quarrel from outside of house, while in the report (Exh.53) it is stated that while he was taking meal he heard shouts out of the house. So also, there is no consistency in his evidence and the report as to who had taken victim in hospital. Therefore, according to learned counsel it is doubtful whether victim was taken in hospital by PW-1. So also, PW-1 has not informed incident to police in Police Chowki in the hospital, but he had chosen to go to police

station, Begumpura to lodge complaint as the investigating officer was his relative, to lodge complaint/report.

4. Mr.Tandale, learned counsel further submitted that PW-2 Janardhan Vishwanath Chavan is brother of PW-1. He claims to be eye witness, but his name is not disclosed in the report (Exh.53) as well as PW-1 does not say that PW-2 witnessed the incident. So also, PW-2 is not saying that PW-1 was at the place of quarrel and he only claims that he separated the quarrel. Therefore, according to learned counsel it is doubtful whether PW-2 was present at the spot of incident and he witnessed the incident. It has come in the evidence of PW-2 that incident was going on for five to seven minutes and it has come in the evidence of PW-1 that the incident was going on near about 8-10 minutes. Therefore, according to learned counsel whether it was possible for PW-1 to witness the incident within 5-7 minutes when he was taking meal at the time of incident, as per the report (Exh.53). Thus, according to learned

counsel the evidence of both PWs-1 and 2 is not believable.

5. Mr.Tandale, learned counsel further submitted that victim is a star witness. Said witness has stated that all the accused had assaulted him by sticks and abused him and he has not stated about knife. It is further submitted that victim then stated that accused No.1 Anil assaulted him with knife. Thus, according to learned counsel there are two versions and therefore the question would be which version is to be relied upon. It is submitted that, it is true that there is no reason to disbelieve victim witness, but when two versions as above are there, corroboration is required to state that the evidence of victim is trustworthy and it inspires confidence. Victim does not say like PW-1 or PW-2 that he was unconscious. Even if it is accepted that victim was admitted in hospital, he at his own did not inform police about the incident. So possibility of his sustaining injuries due to fall i.e. accidentally, cannot be ruled out. Victim had

first opportunity to disclose incident to doctors, but no doctor says so and no history is recorded in the certificate issued by three doctors who had examined victim. The victim nowhere states that he was indoor patient for a particular period. If he was victim as alleged by the prosecution his statement was immediately required to be recorded by police by treating it as MLC case by doctor. This would have become primary evidence.

6. Mr.Tandale, learned counsel further submitted that the prosecution has relied upon memorandum statement (Exh.67) of accused No.1 under Section 27 of the Evidence Act and panchanama (Exh.68) of seizure of knife at the instance of said accused. PW-4 Sagar Chavan-panch on the said panchanama was required to interrogate/ask accused No.1 and then his statement was required to be recorded, but this was not happened in this case and hence it cannot be said that muddemal article knife was seized at the instance of accused No.1 as alleged by the prosecution.

7. Mr.Tandale, learned counsel further submitted that incident took place on platform of Sunil Chavan means oata in front of house of Sunil Chavan and not on the road. None from the family of Sunil Chavan is a witness in the case. It is submitted that if knife is used to cause injury, injury must be in size injury with all three dimensions i.e. width, depth and length. It is not the case that two weapons i.e. sharp and round weapon were used. According to learned counsel stab injuries are not possible by knife and both injuries on the person of victim show that two different instruments were used and said injuries are not result of only one weapon and therefore according to learned counsel it cannot be said that victim was assaulted by knife as alleged by the prosecution. It is submitted by the learned counsel that Dr.Mahesh Vispute (PW-10) admitted that history was not mentioned in MLC register. He admitted defence of the accused of accidentally sustaining injuries. The injury noticed on the person of victim was not on vital part. It is

submitted that Dr.Vispute stated that patient was not on the deathbed and he was not so serious.

8. According to Mr.Tandale learned counsel, Dr. Anant Bidkar (PW-11) says about three injuries on the person of victim. According to learned counsel said three injuries are different than the injuries noticed by PW-10. It is further submitted that PWs-1 and 2 have not stated about injury on chest of victim and so also it is not the case of the prosecution that victim was assaulted with knife on chest. Therefore, according to learned counsel the evidence of Dr.Bidkar (PW-11) about finding three injuries i.e. over scalp, neck and chest of victim is not believable. According to learned counsel when it is the case of the prosecution that the accused No.1 assaulted by knife on the neck of victim, it is doubtful who is author of injury Nos.1 and 3 i.e. over scalp and chest of victim. It is submitted that there is no consistency in the evidence of PWs-1,2,7 (victim) and three doctors and when MLC was not registered immediately in the hospital the evidence

of PWs-1,2 and 7 and the doctors is not believable.

9. Mr.Tandale, learned counsel further submitted that Dr.Mahesh Vispute (PW-10) issued injury certificate (Exh.93). This certificate shows injuries on the neck and back of victim. This doctor says that said injuries are possible by knife. Original injury certificate was not produced and hence injury certificate produced is not admissible. However, the trial Court has considered said certificate. It is submitted that it is not the case of the prosecution that victim was assaulted on chest, scalp and back. Therefore, medical evidence regarding injuries on the chest, scalp and back of victim is not believable and sufficient to state that said injuries were caused by accused No.1.

10. Mr.Tandale, learned counsel further submitted that as per CA report (Exh.125) blood of group 'B' was found on cloths of victim, which is his blood group. So also, this CA report (Exh.125) shows that blood of 'B' group was found on the knife. If said evidence is considered at the most it is

corroborative piece of evidence and not conclusive evidence. It is submitted that the accused No.1 is innocent and he is falsely involved on the say of uncle of the informant (PW-1), who is uncle of victim. Thus, according to learned counsel for accused No.1 the prosecution has failed to prove offence under Section 307 of the IPC against accused No.1 and therefore finding of the trial Court holding accused No.1 guilty for offence under Section 307 of the IPC is not sustainable. Therefore, said finding be set aside and accused No.1 be acquitted of the said offence by allowing the appeal.

11. Mr.Tandale, learned counsel submitted that in case of offence of attempt to murder intention or knowledge of offender would be crucial. Knowledge is necessary to constitute offence under Section 307. Said offence cannot be attributed in absence of evidence showing that serious injuries were inflicted. So also, to attract the offence of attempt to murder the injury suffered by the victim should fall in one or more of the 8 categories mentioned in

Section 320 of the IPC to term said injury as grievous hurt. So also, prosecution has to show that the accused had a motive to do away with the victim. To support these submissions learned counsel has relied upon the decisions in the case of **Dinkar Namdeo Sawant Vs. The State of Maharashtra 2013 All MR (Cri) 3874** and **Ashok s/o Digambarrao Magar Vs. The State of Maharashtra, 2012 All MR (Cri) 1835.**

12. Mr.Tandale Learned counsel also submitted relying upon the decision in the case of **Suresh Singh vs. State of Bihar, 2019 Cri.L.J. 1017 (Patna High Court)** that when the medical evidence does not corroborate the testimony of victim and testimony of interested witnesses, informant and victim is not corroborated by any independent witness accused is entitled to benefit of doubt.

13. Mr.V.S.Badakh, learned APP for respondent-State assisted by Mr.R.V.Gore, appearing for original complainant, on the other hand, submitted that PWS-1 and 2 are independent witnesses. Their evidence is consistent and reliable. They have corroborated the

evidence of the victim. It is proved by the prosecution that the accused No.1 is author of injuries because all the above witnesses have stated that the appellant/accused No.1 had assaulted the victim with knife. Dr.Vispute (PW-10) opined that the injury on the person of the victim was caused within 24 hours by the knife. So also, Dr.Kasawa (PW-13) deposed that injuries on the neck and back of the victim are possible by knife and that they are dangerous to life. Discharge card (Exh.99) shows that the victim was admitted in the hospital for 12 days and undergone surgery. PW-4-Panch Chavan and the investigating officer (PW-12) have proved recovery of knife at the instance of the accused No.1. So also, blood of 'B' group i.e. of the victim was found on knife as per CA report (Exh.125) and therefore it is sufficiently proved by the prosecution that the accused No.1 had used knife in assaulting the victim. The learned APP further submitted that to attract offence under Section 307 of the IPC the prosecution has to prove that the accused has caused injury to the vital part of the body of the victim and he had

knowledge that due to the said act there would be death of the victim. The prosecution has established the same and it has also established that there was preparation by the accused No.1 to assault the victim as he had come to the spot of the incident with the knife and this evidence is sufficient to attribute both knowledge as well as intention to the accused No.1 to cause grievous hurt and one of the injuries mentioned in Section 320 of the IPC, so as to attract offence of attempt to murder against accused No.1. It is submitted by the learned APP that contradictions pointed out by the learned counsel for the accused No.1 in the evidence of PWs-1,2 and 7 and the medical evidence do not go to the route of the matter and they are not fatal to the prosecution case.

14. It is further submitted by the learned APP that it has come in the evidence of PWs-1 and 2 that there were 10-15 persons at the spot of incident and therefore even if they have not specifically stated about each of the said persons, the same cannot be a ground to reject their evidence. PW-1 says that he,

his brother and others took the victim to Ghati Hospital which proves presence of PWs-1 and 2 at the spot of incident and therefore their evidence is believable. It is submitted that defence of the accused is not acceptable and hence it cannot be said that the victim sustained injuries accidentally due to fall.

15. The learned APP has submitted that ocular evidence prevails over medical evidence. Therefore, even if there is any inconsistency in the ocular evidence and medical evidence the same is not sufficient to reject the ocular evidence of PWs-1,2 and 7. The substantive evidence of these witnesses is material and should be relied and contradictions in their evidence if any be ignored. This submission was made relying upon the decision in the case of **Gangabhavani Vs. Rayapati Venkat Reddy & Ors. 2013 DGLS (SC) 710 (Supreme Court)**. In the said case it was held that in case there are minor contradictions in deposition of the witnesses, same are required to be ignored as the same cannot be dubbed as

improvements and it is likely be so as the statement in the court is recorded after an inordinate delay. In case, contradictions are so material that the same go to the root of the case, materially affect the trial or core of the prosecution case, court has to form its opinion about the credibility of the witnesses and find out as to whether their depositions inspire confidence. So also, it was held that it is settled law that where the evidence of witnesses is totally inconsistent with medical evidence or the evidence of ballistic expert, it amounts to a fundamental defect in prosecution case and unless it is reasonably explained may discredit entire case of prosecution. However, opinion of a medical witness need not be the last word on the subject, but same is required to be tested by the court. If the opinion is bereft of logic and objectivity, court is not obliged to go by it. After all an opinion is what is formed in the mind of a person regarding a particular fact situation. If one doctor forms an opinion and another doctor forms a different opinion on the same fact, court may adopt a

view which is more objective and probable. Similarly, if the opinion of one doctor is not consistent and probable, court is not obliged to go by it merely because it is given by the doctor. It would be erroneous to accord in due primacy to hypothetical answers of medical witnesses to exclude eye witnesses account which has to be tested independent and not treated as the variable keeping the medical evidence as the constant. Where eye-witnesses account is found credible and trustworthy, a medical opinion pointing to alternative possibility cannot be accepted as conclusive. Eye witnesses account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence as the sole touchstone for the test of such credibility. Thus, position of law in cases where there is a contradiction between medical evidence and ocular evidence stands crystallized to the effect that though the ocular testimony of a witness has greater evidentiary value vis-a-vis medical evidence, when the medical evidence makes the ocular

improbable, that becomes a relevant factor in the process of evaluation of evidence. However, where medical evidence goes so far that its completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved. Thus, the learned APP has prayed to dismiss the appeal.

16. To support his submissions the learned APP has also relied upon the following decisions-

(A) In the case of **State of Madhya Pradesh Vs. Kashiram & Ors., 2009 DGLS (SC) 118 (Supreme Court)** the respondents who have tried for the offences punishable under Sections 307 read with Sections 149 and 148 of the Indian Penal Code. The learned Additional Sessions Judge found them guilty and sentenced each to undergo rigorous imprisonment for five years with fine and six months rigorous imprisonment for the other two offences. In the appeal the High Court held that the appropriate conviction would be under Section 326 read with Section 149 of the IPC. It was held that it is sufficient to justify a conviction under Section 307 of the IPC if there is present

an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. Section makes a distinction between the act of the accused and its result, if any. Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. Therefore, an accused charged under Section 307, Indian Penal Code cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt. Impugned order passed by the High Court was set aside and judgment of the trial Court stands restored so far as conviction as well as the sentences are concerned.

(B) In the case of **Ashok Magan More Vs. State of Maharashtra, 2012(1) Bom.C.R. (Cri.)414 (Bombay High Court)**, the appellant was convicted for the offence punishable under Section 307 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment for two years and pay fine in the sum of Rs.1000/- in default to suffer R.I. for three months. In the appeal against said conviction it was held that the

evidence of injured witness (PW-2) is corroborated by another injured witness (PW-1). It was further corroborated by medical evidence by Doctor (PW-4). Injuries sustained by PW 2 were grievous in nature. Imposition of sentence is lenient considering youth of the appellant. It was held that no case is made out for interference with impugned judgment and appeal was dismissed.

(C) In the case of **Hazara Singh Vs. Raj Kumar and others, 2013 DGLS (SC)336 (Supreme Court)**, the respondents were convicted for the offence punishable under Section 307 of the IPC and Raj Kumar and Bhag Singh were sentenced to undergo RI for five years and a fine of Rs.10,000/-, in default to further undergo RI for one year, whereas Kesho Ram and Lal Chand were sentenced to undergo RI for three years and a fine of Rs.10,000/-, in default, to further undergo RI for nine months. In addition to the above, all the accused persons were convicted and sentenced under different heads. The respondents had filed criminal appeal in the High Court. Then the conviction and the appellant filed criminal revision for enhancement of sentence. The

High Court by impugned order dated 03.11.2008, dismissed the revision filed by the appellant and partly allowed the appeal filed by the accused by reducing the sentence to the period already undergone. Being dis-satisfied with the judgment of the High Court, the appellant has preferred these appeals by way of special leave before the apex Court. The Apex Court held that although Section 307 does not expressly state the minimum sentence to be imposed, it is the duty of the Courts to consider all the relevant factors to impose an appropriate sentence. The legislature has bestowed upon the judiciary this enormous discretion in the sentencing policy, which must be exercised with utmost care and caution. The punishment awarded should be directly proportionate to the nature and the magnitude of the offence. The benchmark of proportionate sentencing can assist the judges in arriving at a fair and impartial verdict. The cardinal principle of sentencing policy is that the sentence imposed on an offender should reflect the crime he has committed and it should be proportionate to the gravity of the offence. This Court has repeatedly stressed the central role of proportionality in

sentencing of offenders in numerous cases. It was further held that reduction of sentence merely on the ground of long pending trial is not justifiable. The Courts cannot let the accused go scot-free on mere suspicion of eruption of enmity between the families. Accordingly, the appeals were allowed and the respondents accused were directed to be taken in to custody to serve the remaining period of sentence as ordered by the trial Court.

17. Before considering the evidence of the prosecution it is necessary to refer the provisions under Sections 320 and 307 of the IPC. Said provisions are as under:-

"320. Grievous hurt - The following kinds of hurt only are designated as "grievous":-

First - Emasculation.

Secondly - Permanent privation of the sight of either eye.

Thirdly - Permanent privation of the hearing of either ear.

Fourthly - Privation of any member of joint.

Fifthly - Destruction or permanent impairing of the powers of any member of joint.

Sixthly - Permanent disfiguration of the head or face.

Seventhly - Fracture or dislocation of a bone or tooth.

Eighthly - Any hurt which endangers

life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

307. Attempt to murder:- Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to (imprisonment for life), or to such punishment as is herein-before mentioned.

Attempts by life-convicts- [When any person offending under this section is under sentence of (imprisonment for life), he may, if hurt is caused, be punished with death]."

18. Case of the prosecution is that on 12-06-2010 at about 20.45 hours in Kumbhar Galli, Aurangabad the accused No.1 assaulted the victim with knife on his neck and caused injury and as such attempted to commit his murder, which offence is punishable under Section 307 of the IPC. To prove the same the prosecution has relied upon the evidence of PWs-7, 1, 2, the evidence of doctors (PWs-10, 11 and 13), the injury certificate (Exh.93), discharge card

(Exh.99) and the circumstantial evidence in the form of seizure of axe at the instance of accused No.1 and reports of the Chemical Analyser (Exhs.125 and 126).

19. Now coming to the evidence of the victim (PW-7), his evidence is that incident happened on 12-06-2010 at about 8.45 p.m. He had been to Pargaonkar Hospital to his relative. He was returning to home. He was passing from Kumbhar Galli, accused Dhiraj Surkunde, Anil Surkunde (accused No.1), Chandraiyya Surkunde and Raju Surkunde restrained him in front of the house of Sunil Chavan. Anil (accused No.1) asked him, "he is defaming him as liquor addict person". All of them assaulted him by sticks and abused him. He was trying to run away. They assaulted him on the platform of Sunil Chavan. Anil Surkunde asked him, "stop, he will take his life". He stabbed him by knife on his neck, head and back. By hearing the noise surrounding people gathered there. He was lying on the ground in the pool of blood. All the four accused ran away from there. People carried him to Ghati Hospital, Aurangabad by rickshaw. His

motorcycle was lying on the place of incident. Accused before the Court are the same. He stated that he is acquainted with the accused as they are residents of Begumpura since beginning.

20. In the cross-examination victim has stated that at the time of incident he was going on motorcycle. He was beaten with sticks. He fell from motorcycle. Nobody stabbed him with knife when he was on motorcycle. It is so happened he was fallen on platform. There was bleeding from his neck and waist. He denied that he sustained injury by fall. He denied that there was no injury to him except neck and waist. He denied that Lahane, PSI was co-brother of his uncle. He denied that they have filed false case only for taking revenge of accused at the instance of his uncle and further denied that he deposing false. His evidence that the accused No.1 said him that he is defaming him as liquor addict person, accused No.1 asked him, stopped, he will take his life and that said accused stabbed him by knife on his neck, head and back has gone unchallenged in the cross-

examination. So also, his evidence that he was lying on the ground in the pool of blood and the peoples carried him to Ghati Hospital by rickshaw is also gone unchallenged in his cross-examination. Therefore, one think is clear from his evidence that accused No.1 assaulted him with knife on his neck, head and back.

21. Now coming to the evidence of the informant (PW-1), his evidence is that he knows all the accused. The incident is dated 12-06-2010. On that day he was at house at about 8.30-8.45 p.m. After taking dinner he was sitting in the house. He heard shouts of quarrel from outside of house. Thereafter, he came out of house. Four persons were beating to one boy. He immediately went to rescue quarrel. The four persons were beating to victim. Anil was holding knife in his hand and assaulted on the neck of victim. Other three were beating to victim by sticks. All the accused were saying to kill victim. People were gathered. He stated that he, his brother and others took victim in auto rickshaw at Ghati Hospital

and he was there till 10.45 p.m. Thereafter, he lodged the report (Exh.53) in Begumpura police Station. He stated that accused present before the Court are same.

22. In the cross-examination the informant (PW-1) stated that since his birth he resides at Kumbhar Galli, Begumpura, Aurangabad and the accused are residing in their lane. The complainant victim resides in Vidyut colony. Kumbhar Galli and Vidyut colony are adjacent to each other. Thus, it is clear from this evidence of informant that he and the accused are residing in the same lane i.e. Kumbhar Galli, and Vidyut colony in which the victim is residing is adjacent to Kumbhar Galli. So also, it is clear from his evidence that victim belongs to his community. He also stated that prior to incident he had seen the victim and his father. Thus, it is clear from his evidence that he knows the accused as well as victim and there is no reason to say that there is mistake in identifying the accused by the informant.

23. Further in his cross examination the

informant has stated that he does not remember, how many persons were gathered. He stated that name of his brother is Janardhan (PW-2) and he resides at a distance of 20 feet from his house. He stated that while victim was taken in rickshaw the other persons i.e. their neighbourers had accompanied and he could not tell the names of neighbourers, who accompanied him in rickshaw. Thus, it is clear from this evidence of informant that his brother (PW-2) was at the spot of incident and he was with him when the victim was taken to hospital by the rickshaw.

24. It has further come in the cross examination of informant that it did not happen that while he was taking dinner he heard shouts of quarrel. He stated that he had not heard the shouts of the quarrel at the time of taking dinner. He has admitted portion marked 'A' in this respect in his statement before police. In the report (Exh.53) lodged by informant it is stated that on 12-06-2010 at 20.45 hours while he was sitting taking meal in the house he heard shouts out of the house. Referring these contents of the

report learned counsel for the accused No.1 as referred earlier argued that these contents are contrary to the evidence of PW-1 that it did not happen that while he was taking dinner he heard shouts of quarrel. Therefore, according to learned counsel it cannot be said that the the informant has witnessed the incident. From the above evidence of informant at the most it can be said that it is doubtful whether he was taking dinner at the material time of incident or otherwise.

25. The informant has further stated that clothes on the person of victim were blood stained. The incident took place on the oata of his brother. He denied that on that oata iron water tank was kept. He stated that victim became unconscious on the spot. He denied that accused No.1 had not assaulted victim by means of knife and he (Rahul) sustained injury due to fall on oata. He stated that he is not having good relations with the accused. He denied that he lodged false report and no incident has happened in his presence. He also denied that on the oata there was

Katta to cut the fodders for cattles. His evidence that accused No.1 assaulted victim with knife on his neck is not specifically challenged in his cross examination. Thus, the evidence of PW-1-informant on material particulars of the incident of assaulting victim by accused No.1 with knife on his neck is not shattered in his cross-examination.

26. The evidence of Janardhan Vishvanath Chavan (PW-2) who is brother of the informant is that, incident happened on 12-06-2010 at about 08.45 p.m. on the platform of Sunil Chavan situated in Kumbhar Galli. He was sitting in his house. He heard noise of shouting. He came outside the house. Accused Nos.1 to 4 were beating to victim. Accused No.1 was beating him by knife. Accused Nos.2,3 and 4 were beating him with sticks. Accused No.1 was talking loudly. He was asking victim that he is defaming him on the ground of consuming liquor. He separated the quarrel. People were gathered. Then accused ran away. Victim sustained injury on his neck and back. Then he carried the victim to Ghati Hospital. Accused before

the court are the same. He also specifically identified accused No.1 saying that he is sitting at Sr.No.2.

27. In the cross examination of PW-2 has stated that there was no quarrel between victim and accused prior to the incident. Victim did not come to his house on that day. Victim is not his relative. He denied that he is son of aunt of victim. He stated that he does not know that name of his aunt was Sonabai Pere. He stated that informant is his real brother. Sunil Chavan is his cousin. He stated that he knows his neighbourer Lakhan Jafrabadi, Raju Jafrabadi, Dipakk Ketkar and Laxman Sherkar. These people may be present, but he had not seen them. He could not tell whether neighbourers were gathered or not. He stated that after hearing the noise he immediately came out of the house. The incident was going on for 5 to 7 minutes. There was no head injury to victim. He could not tell whether there was injury on the hand of victim. He could not tell about the colours of clothes on the person of victim and the

accused No.1. Anil. He stated that there is Police Chowki at Ghati Hospital. He has not given intimation of incident to police. He could not tell whether police were present or not at the police chowki. He stated that it would not be correct to say that victim was admitted in hospital by Anil Kashinath Chavan. The person, namely, Anil Kashinath Chavan was not present when victim was admitted in the hospital and when police visited place of incident. He stated that Sunil Lahane was Police Inspector at the relevant time and denied that he is his relative. He stated that 5 to 6 people may be there for separating the quarrel. He stated that it was not happened that accused ran away by seeing him and others.

28. PW-2 has further stated that contents of portion marked 'A' in his statement before police were not stated by him and he could not assign reason why police have written so in his statement. He also stated that he stated before police that they have separated the quarrel and people were gathered at the place of incident, but he could not assign reason as

to why said facts are not mentioned in his statement before police. The omission in this respect in the statement before police of this witness has been proved by the investigating officer. He has denied that no incident as deposed by him had happened and that he is deposing false. The evidence of this witness that the accused No.1 assaulted victim with knife and victim sustained injury on his neck and back has not been specifically challenged in his cross examination.

29. Referring the evidence of the informant (PW-1) and his brother (PW-2) the eye witnesses, as referred earlier the learned counsel for the accused No.1 submitted that PW-1 has not specifically mentioned in report (Exh.53) and stated while deposing before the court that his brother (PW-2) had witnessed the incident and separated the quarrel and therefore it cannot be said that PW-2 is an eye witness to the incident and hence his evidence cannot be believed. It is true that in report (Exh.53) it is not specifically mentioned that PW-2 had come to the

spot of incident and he separated the quarrel, but it is mentioned in the report that they, by necessary implication the informant and others, tried to separate the quarrel. So also, on oath the informant has stated that people were gathered there and he and his brother and others took victim in auto rickshaw at Ghati Hospital. This evidence has not been specifically challenged in the course of his cross examination, as observed earlier, by the accused. Therefore, it can be said that PW-2 was present at the spot of incident and he separated the quarrel along with PW-1 his brother. Nothing is brought on record in the cross examination of both PWs-1 and 2 that how they are interested in prosecution and deposing false against the accused. On the contrary from the nature of their evidence, their evidence appears to be quite natural. Thus, there is no reason to doubt presence of these witnesses at the spot of incident and their role in separating the quarrel. Thus, there is no reason to disbelieve their evidence and it can be said that PW-1 has corroborated evidence of victim that accused No.1 assaulted him

with knife and caused injury on his neck. So also, it can be said that PW-2 has corroborated the evidence of victim that victim sustained injury on his neck and back.

30. Both PWs-1 and 2 have stated that other people had gathered at the spot of incident. So also, as referred earlier PW-2 stated that 5-6 people may be there for separating the quarrel. Admittedly, the prosecution has not examined people other than PWs-1 and 2 who had gathered at the spot of incident and separated the quarrel. As referred earlier PW-2 has denied that victim is his relative and PW-1 has stated that victim belongs to his community. It was not suggested to him specifically that victim is his relative. In such circumstances it cannot be said that victim is relative of PWs-1 and 2. As observed earlier the evidence of PWs-1 and 2 regarding accused No.1 assaulting victim with knife on his neck has gone unchallenged in the course of their cross examination on behalf of the accused and that their evidence is quite natural. Therefore, it cannot be

said that they are related to victim and therefore interested witnesses as argued by the learned counsel for accused No.1. Similarly, it cannot be said that evidence of these witnesses is not believable as the prosecution has not examined other people who had come to the spot of incident to settle the quarrel as argued by the learned counsel for the accused No.1. Therefore, decisions in the case of **Dinkar Namdeo Sawant (Supra)** and **Ashok s/o Digambarrao Magar (Supra)** relied upon by the learned counsel for the accused No.1 to support above submissions are not applicable to the present case.

31. Now coming to the medical evidence i.e. evidence of doctors PWs-10,11 and 13 and the certificates and others documents on record, the evidence of Dr.Mahesh Vispute (PW-10) who had examined victim on 12-06-2010 at 09.40 p.m., immediately after the incident is that he examined victim and following were the injuries i.e. (1) Stab injury over neck 2 x 2 cm clear demarcated and (2) Stab injury over back 6 x 4 cm clearly demarcated.

According to him age of both the injuries was within 24 hours. Caused by sharp object and they were grievous in nature. Accordingly, he issued provisional medical certificate (Exh.93). He further deposed that there were two more injuries other than the injuries mentioned in certificate (Exh.93) and they were (1) CLW on scalf size 3x3 cm (2) CLW on left arm 0.5x0.5 c.m. Said injuries were caused due to hard and blunt object and they were simple in nature. Age of said injuries was within 24 hours. He has specifically stated that first two injuries are possible by knife and later two injuries may be possible by stick.

32. In the cross examination Dr.Vispute (PW-10) has stated that it is not mentioned in MLC register whether patient came himself or was brought by any other person. He admitted that later two injuries are not mentioned in MLC register. He stated that he has not brought treatment papers and that he stated about later two injuries on the basis of discharge card. He stated that he does not find any injury on vital part

involving any nerve or vein. There was no active bleeding injury. He has not mentioned directions of any of the wound. Nature of injury is mentioned in MLC register and the nature of weapon is also not mentioned. He stated that the injuries are possible by fall on pointed object. Rest of the two injuries are possible by fall. He stated that patient was not put on life saving device. The patient was not on the deathbed. He has denied that whatever he has stated in chief-examination is false. His evidence that he noticed stab injury over neck and stab injury over back on the person of victim and said injuries are possible by knife has not been specifically challenged in his cross examination. So also, certificate (Exh.93) issued by Dr.Vispute also shows aforementioned stab injuries on the neck and back of victim. Said certificate also shows that nature of said injuries was grievous and they were caused within 24 hours. Thus, the evidence of Dr.Vispute (PW-10) and certificate (Exh.93) issued by him have corroborated the evidence of victim that on the date of incident he was stabbed by knife on his neck and

back. So also, on the basis of evidence of Dr. Vispute (PW-10) and certificate (Exh.93), it can be said that above referred stab injuries on the person of victim were grievous in nature.

33. The next is the evidence of Dr. Anant Bidkar (PW-11) to whom victim was referred on 12-06-2010 in Surgery Department and his evidence is that he examined the patient and found following injuries i.e. (1) CLW over scalp (2) Stab injury on neck and (3) Stab injury on chest. He deposed that injury Nos.1 and 2 were sutured. Injury No.3 was treated by operation. All the injuries were penetrative type. He has stated about discharge card (Exh.99). He also stated that he is unable to say about age of injury because the concerned department has destroyed relevant papers. In the cross examination he has denied that he has not examined the patient. He admitted that Inter Costal Drain was inserted to drain out the blood from cavity. Thus, the evidence of this witness regarding noticing aforementioned three injuries including two stab injuries on the

person of victim has not been shattered. This evidence corroborates the evidence of victim regarding stab injury on his neck. Discharge card (Exh.99) shows that on 12-06-2010 victim was admitted in Medical College and Hospital, Aurangabad and he was discharged on 23-06-2010. This shows that he was admitted in the said hospital for 12 days. The discharge card also shows that injury Nos.1 and 2 as deposed by PW-11-doctor were sutured by surgeon. Thus, on the basis of discharge card it can be said that victim was admitted in the hospital for 12 days and it also corroborates evidence of victim that he sustained injury over neck and back in the incident.

34. The evidence of Dr.Amol Kaswa (PW-13) is that he was attached to Government medical college and Hospital (Ghati) at Aurangabad as a Surgery resident during 2009 to 2012 and on 12-06-2010 he was on duty. One Rahul Pere (victim) was brought by his relatives. He examined him. Dr.Bidkar and Dr.Saurabh accompanied him. Patient was conscious. His pulse rate was 112 per minute, B.P. was 70 MMHG systolic.

There was sharp injury on his neck 2x2 c.m. It was grievous injury. He had three more injuries of simple nature i.e. (a) CLW 3x3 c.m. on scalp, nature is simple, (b) CLW on left arm 5x5 c.m. and (c) Sharp injury 1x1 c.m. on back, it was grievous injury. He had undergone surgery for the said injury as its depth was more. He stated that injuries on neck and back may possible by knife. Injury on arm and scalp may possible by hard and blunt object. He has further stated that thoracostomy was done. Evidence of sudden gush of blood approx 1100 c.c. blood collection ICD back. ICD tube was fixed. Breathlessness of patient was relieved. Immediately two point of blood transfusion was done. Patient was settled down in 48 hours. His ultra sonography was done. It was suggestive mild to moderate collection in left plural cavity with internal echos with underlying lungs collapse. These injuries were dangerous to the life. He prepared discharge card (Exh.99). In the cross examination on behalf of accused No.1 he admitted that Thoracostomy is a very normal surgery and it is for release of accumulated air in cavity. The

original documents of particular patient are not available in the hospital. He has given evidence without going through the original case papers of the patient. The injury may cause by any piercing object other than knife. He denied that the injuries were not dangerous. Thus, on the basis of evidence of Dr.Kaswa it can be said that he noticed sharp injuries on the neck and back of victim, said injuries are possible by knife and that they were dangerous to life of victim. Thus, he corroborates the evidence of victim regarding assault on him with knife on his back and neck.

35. Thus, from the above evidence of doctors-PWs-10,11 and 13 an inference can be drawn that PWs-10 and 13 have corroborated the evidence of victim regarding sustaining injuries on his back and neck and PW-11 has corroborated evidence of victim regarding sustaining stab injury on the neck. So also, these witnesses have corroborated the evidence of victim that above said injuries are possible by knife. Moreover, on the basis of evidence of PWs-10

and 13 it can be said that injuries on the neck and back of the victim were grievous injuries and so also on the basis of evidence of PW-10 it can be said that injury over back of the victim was grievous in nature. So also, it can be inferred from the evidence of PW-13 that injuries on the neck and back were dangerous to life of victim.

36. Mr.Tandale, learned counsel for accused No.1 submitted that the victim (PW-7) deposed that he was stabbed by knife by the accused No.1 on his neck, head and back and as such as per evidence of victim he suffered three injuries. Moreover, the alleged eye witnesses i.e. PW-1 has stated that the accused No.1 assaulted victim with knife on neck and another eye witness PW-2 stated that accused No.1 assaulted victim on his neck and back. It is submitted that as per the evidence of Dr.Vispute (PW-10) victim suffered in all four injuries i.e. stab injury over neck and back, CLW on scalp and left arm, as per evidence of Dr.Bidkar (PW-11) victim suffered three injuries i.e. CLW over scalp, stab injury on neck and

stab injury on chest and as per evidence of Dr.Kaswa (PW-13) victim suffered in all four injuries i.e. sharp injuries on neck and back and CLWs on scalp and left arm as referred earlier in detail. Therefore, according to learned counsel for the accused No.1 there is no consistency in the evidence of all the three doctors and PWs 7, 1 and 2 regarding the number of injuries suffered by the victim and thus the ocular evidence of PWs-1,2 and 7 is contradictory to the medical evidence of doctors- PWs-10,11 and 13 and therefore the evidence of victim and eye witnesses PWs-1 and 2 is not believable. As observed earlier there is no reason to disbelieve evidence as referred earlier of victim (PW-7) and eye witnesses PWs-1 and 2 regarding assault on the victim by the accused No.1 with knife on his neck and back which evidence is corroborated by doctors PWs-10 and 13 and PW-11 has corroborated victim about injury on neck. Therefore, there is no reason to disbelieve the evidence of victim and PWs-1 and 2. Another aspect to be noted is that even if the ocular evidence and medical evidence is contradictory as submitted by the learned counsel

for the accused No.1 still in view of the decision in the case of **Gangabhavani(Supra)**, the ocular evidence would prevail and has to be accepted as there is no reason to reject it. Therefore, argument advanced by the learned counsel for the accused No.1 that the ocular evidence is not believable is not accepted.

37. Now, coming to the circumstantial evidence it is the case of the prosecution that while in policy custody on 12-06-2010 accused No.1 made memorandum statement (Exh.67) that he would produce the knife which was thrown in the bushes and then said knife was seized as per panchanama (Exh.68) at his instance. Sagar Chavan (PW-4)-Panch in whose presence and in presence of panch Harish Tandale and the investigating officer API-Lahane (PW-12) the accused No.1 made above said memorandum statement has deposed that on 22-06-2010 he was called in police station, Begumpura at about 12.15 to 12.30 noon as a panch and one Harish Tandale was another panch. He stated that accused No.1 stated that he had thrown knife near swimming pool in university campus and

accordingly statement (Exh.67) was prepared and then they panchas and police proceeded by mobile-II and the said vehicle was stopped near swimming pool of university campus as accused No.1 had asked to stop the vehicle and then accused went to a babool tree, removed garbage by his hand and took out a knife and handed over the same to the police. Said knife was seized under panchanama (Exh.68). He also stated that both the memorandum statement and panchanama bear his signatures. Though he has been cross-examined at length on behalf of the accused nothing is found in favour of the accused. He also identified knife Article No.5. The investigating officer API-Lahane has also stated about memorandum statement (Exh.67) and panchanama (Exh.68) regarding seizure of knife at the instance of accused No.1. He stated that said knife was having blood stains. In the cross examination he denied that he prepared false memorandum and recovery panchanama in the police station, that accused had not made statement voluntarily and that seized articles are not related to the incident. Thus, his evidence regarding seizure

of knife Article No.5 at the instance of accused No.1 is not shattered in his cross examination. Thus, I hold that prosecution has proved memorandum statement (Exh.67) regarding recovery of knife and seizure of said knife at the instance of said accused as per panchanama (Exh.68).

38. The prosecution has relied upon report of the Chemical Analyzer (Exh.125) and it shows that the Chemical Analyzer received different articles including seized knife which is at Sr.No.4 in the CA report and marked Exh.C for analysis, on 13-07-2010. This CA report shows that Article Nos.1, 2, 3 and 4 are stained with blood of group 'B'. Exh.126 another report of the Chemical Analyzer shows that blood of the victim-Rahul Pere (PW-7) was sent to the Chemical Analyzer for analysis and the Chemical Analyzer received the same on 13-07-2010 and the blood group of the victim is 'B'. Thus, on the basis of reports of the Chemical Analyzer (Exh.125 and 126) it can be very well said that the knife Article No.5 which was seized at the instance of accused No.1 as per

panchanama (Exh.68) was used in assaulting the victim and causing him injuries. Thus, the circumstantial evidence referred to above corroborates evidence of the victim (PW-7), eye witnesses PWs-1 and 2 and the medical evidence of doctors PWs-10,11 and 13 and therefore it can be said that the accused No.1 assaulted the victim with the knife on 12-06-2010 at about 20.45 hours and caused him injuries on his back and neck.

39. Now it is to be seen whether the injuries on the back and neck of the victim were dangerous to the life of the victim so as to attract offence under Section 307 of the IPC. It has come in the evidence of Dr.Vispute (PW-10) that above said both the injuries were stab injuries and their age was within 24 hours, they were caused by sharp object and they were grievous in nature. Said fact is corroborated by the injury certificate (Exh.93) issued by him. He has of course stated that the patient was not on the deathbed. It has also come in the evidence of Dr.Kaswa (PW-13) that there was sharp injury on the

neck of the victim and it was grievous injury. He also stated about injury on the back of the victim and that both the said injuries were sharp injuries. He stated that, he prepared and issued discharge card (Exh.99) which shows that the victim was admitted on 12-06-2010 and discharged on 23-06-2010. Thus, it is clear that victim was admitted in the hospital for 12 days. Thus, as victim was admitted in the hospital for more than 12 days it can be said that injuries on neck and back suffered by him were grievous hurt. Another aspect to be noted is that accused No.1 had come to spot with knife Article No.5, which was seized at his instance, which was three inches in length and he assaulted the victim with the said knife on his neck and back, certainly neck is a vital part of the body. Considering above circumstances and size of the knife used by the accused No.1 in assaulting the victim and part of the body i.e. neck chosen by the accused No.1 to assault the victim it can be said that accused No.1 had intention or knowledge that his act of giving knife blow on neck may cause death of victim and that he had intention

or knowledge that if he by that act caused death of victim, he would be guilty of murder, and therefore the act of the accused No.1 in assaulting the victim and causing him injury on the neck amounts to an act of attempt to commit his murder which is punishable under Section 307 of the IPC.

40. In the above circumstances argument advanced by the learned counsel for the accused No.1 relying upon the decisions in the case of **Dinkar Namdeo Sawant (Supra)** and **Ashok Digambarrao Magar (Supra)** that the injuries suffered by the victim do not fall in one of the categories of grievous hurt given under Section 320 of the IPC and the accused No.1 had no motive to do away with the victim is not acceptable.

41. On perusal of the impugned judgment it appears that the trial Court has properly considered the evidence of victim, eye witnesses PWs-1 and 2, the medical evidence of doctors PWs-10,11 and 13 and observed that it is impossible to say that stab injuries found on the person of the victim are possible due to fall as per the defence of the

accused. To support the defence that the victim suffered injuries due to fall the accused has examined witness Dilip Ramanna Kasture (DW-1) whose evidence shows that on 12-06-2010 at about 08.00 a.m. he was at his house. He was sitting on a platform in front of his house. There was scuffle between Anil (accused No.1) and Rahul (victim). They were not possessing any article. Rahul (victim) fell in the drain during that scuffle and sustained injury due to dash of piece of tiles and he fell in the drain after sustaining injury. In the cross-examination he admitted that he has two sisters and they are four brothers and one brother is dead. His sisters are Savitribai and Gangabai. He admitted that accused Nos.1,2 and 4 are sons of his sister Savitribai and accused No.3 is husband of his sister. Thus, it is clear that he is close relative of the accused and therefore interested in the accused. As observed earlier the prosecution has proved seizure of knife at the instance of the accused No.1 and that said was used in assaulting the victim as blood of 'B' group, which is blood group of victim was found on it as per

CA report (Exh.125) and therefore the evidence of defence witness that the accused No.1 and the victim were not possessing any article and victim fell in the drain during scuffle and sustained injury due to dash of piece of tiles is not believable. It can be said that as he is close relative of the accused, he has every reason to depose as above to save the accused. On the basis of his evidence it can be said that accused No.1 admitted his presence at the spot of incident at the material time of incident. Therefore, evidence of defence witness is rightly disbelieved and not accepted by the trial Court and consequently defence of the accused is rightly not accepted by the trial Court.

42. For the foregoing reasons on the basis of evidence of victim, eye witnesses PWs-1 and 2, the medical evidence and the circumstantial evidence referred to above I hold that the prosecution has proved offence under Section 307 of the IPC of attempt to commit murder of the victim beyond reasonable doubt. The trial Court has rightly held

so on proper appreciation of evidence. On perusal of the impugned judgment it appears that on considering the punishment provided for the said offence and after hearing the accused No.1 the trial Court has rightly declined to extend benefit of Probation of Offenders Act to the accused No.1 for offence under Section 307 of the IPC and rightly imposed sentence of rigorous imprisonment for 10 years with fine of Rs.2000/- with sentence in default. Thus, no fault can be found with the finding of the trial Court holding the appellant-accused No.1 guilty for offence under Section 307 of the IPC and sentencing him as above. Therefore, there is no ground to interfere with the impugned judgment and order. As such appeal being devoid of merits, the same is liable to be dismissed. Accordingly, it is dismissed.

[S.M. GAVHANE, J.]