

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

Criminal Appeal No. 80 of 2016

- 1) Shriram Laxman Bangar,
Age 37 years,
Occupation : Labour.
- 2) Barku Laxman Bangar,
Age 42 years,
Occupation : Labour.
- 3) Laxman Hariba Bangar,
Age 67 years,
Occupation : Labour

All Residents of Nipani Jawalka,
Taluka Gevrai, District Beed.

.. Appellants.

Versus

* The State of Maharashtra.

.. Respondent.

Shri. S.J. Salunke, Advocate, for appellants.

Smt. V.S. Choudhari, Additional Public Prosecutor, for
respondent.

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

Judgment reserved on : 26th July 2019

Judgment pronounced on : 19th August 2019

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

1) The appeal is filed against the judgment and order of Sessions Case No.112/2013 which was pending in the court of the learned Additional Sessions Judge, Beed. The trial court has convicted the appellants for offence punishable under section 302 read with 34 of the Indian Penal Code and sentence of imprisonment of life is given. The appellant Nos.1 to 3 are convicted for offence punishable under section 326 read with 34 of the Indian Penal Code also and for that offence, sentence of rigorous imprisonment of five years is given. Fine is also imposed. Accused No.4 who was tried along with these three accused is acquitted by the trial court. Accused Nos.5 to 8 of the case were absconding so the case of only the accused who faced trial was separated. Both the sides are heard.

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

3) The incident in question took place on 4-4-2013 in village Nipani Jawalka, Tahsil Georai, District Beed. On that date up to 5.00 p.m. deceased Mahadeo, brother of

the first informant by name Dilip, Vinod, who is brother of Mahadeo and Dilip and a friend of the deceased by name Appa Bangar and also Barku Bangar (present accused No.2) were playing card-game in the house of Sarjerao, cousin of the first informant Dilip. They were putting money on the game. In the game, Barku lost money and then there was a quarrel. Deceased Mahadeo tried to intervene in the incident and advised Appa Bangar and others to stop playing the game. Due to this advice, Barku became angry with Mahadeo. He asked Mahadeo to leave the place and then there was quarrel between Barku and Mahadeo. Somehow the quarrel was settled at that place and the persons who had gathered returned to their respective houses.

4) At about 7.00 p.m. of the same day, the informant Dilip, his brother Vinod and deceased Mahadeo together went to the house of Barku to ask him as to why he had quarrelled with Mahadeo. When these three persons were having talk with Barku, Shriram (accused No.1) a brother of Barku came out with axe from the house and gave blow of axe on the head of Mahadeo.

Mahadeo collapsed due to this blow and he sustained bleeding injury to the head. When Dilip tried to hold Shriram, Shriram gave blow of axe from blunt side on the head of Dilip and due to that Dilip also sustained bleeding injury. Shriram assaulted Dilip also on his hand. In the mean time Barku took a bamboo stick and assaulted Dilip on his leg. Kalabai, mother of Barku came there with handle of axe and she gave blow of that handle on the head of Mahadeo. Laxman, father of Barku also came out with stick and he assaulted with stick to Dilip and Vinod. Due to the injuries, Dilip, Vinod and Mahadeo were moaning but the assault was continued by the accused by saying that they wanted to finish the injured.

5) The aforesaid incident was going on in front of the house of one Wadmare and the spot is situated in the vicinity of the house of Barku. After hearing hue and cry of the injured, Archana and Komal, lady members of the families of Vinod, Mahadeo and Dilip rushed there. To save the life of the three injured they gave cover of their bodies to injured persons. They somehow saved Dilip and Vinod. All the three injured had become unconscious.

These three injured were shifted first to Government Hospital Georai and then they were referred to Civil Hospital Beed for further treatment. As the condition of Mahadeo was more serious, he was shifted to one private hospital from Aurangabad. Then Vinod was also shifted to Civil Hospital Aurangabad.

6) The report of Dilip came to recorded in Civil Hospital Beed on 6-4-2013, after he regained consciousness. Certificate about fitness of this witness to give statement was obtained from the doctor. This report was sent to Georai Police Station by police who recorded the statement in Civil Hospital Beed. On 7-4-2013 Crime at CR No.50/2013 came to be registered first for offence punishable under section 326 read with 34 of the Indian Penal Code. On 10-4-2013 Mahadeo succumbed to the injuries and then section 302, IPC came to be added in the crime.

7) Statements of the witnesses came to be recorded during investigation. Post mortem was conducted on the dead body of Mahadeo. Accused Nos.1

to 4 came to be arrested on 11-4-2013. Some weapons came to be recovered during investigation. All the articles taken over during investigation were sent to C.A. office. Charge sheet came to be filed for offences punishable under sections 302, 307, 326, 325, 34 of the Indian Penal Code. Four persons like Kalabai, Shantaram, Savita and Chandrakala are shown as absconding accused in the charge sheet.

8) Charge was framed for offence of murder of Mahadeo punishable under section 302 read with 149 of the Indian Penal Code. Charge for causing grievous hurt to Dilip was framed under section 326 read with section 149 of Indian Penal Code. Charge for causing grievous hurt to Dilip was framed for offence under section 325 read with section 149 of the Indian Penal Code and there was charge for offences punishable sections 506, 504 of the Indian Penal Code. The prosecution examined 14 witnesses. The trial court has believed the prosecution witnesses and conviction is given for offences punishable under sections 302, 326 read with section 34 of the Indian Penal Code to accused Nos.1 to 3.

9) For proving the aforesaid offences the prosecution relied on both the direct and circumstantial evidence. Dilip (PW 1) who gave report and who happens to be brother of the deceased Mahadeo, has given evidence on the incident which took place in the house of his cousin Sarjerao in the noon time when they were playing card game. He has deposed that Barku started quarreling when he lost money in the game and then Mahadeo intervened to settle the dispute. He has deposed that as Mahadeo advised to stop playing the game of card, Barku became more angry with Mahadeo and he asked Mahadeo to leave the place. This is the evidence given on motive. The tenor of the cross-examination of this witness and other witnesses shows that the defence did not dispute that Dilip was present on the spot when the first quarrel took place. However, Dilip has admitted in the cross-examination that the dispute was resolved then and there only and after that those who had gathered had returned to their respective houses.

10) Dilip (PW 1) and his brother Vinod (PW 2) have given evidence that the incident of quarrel was discussed

by Mahadeo, Dilip and Vinod. Their evidence shows that they felt that Barku had unnecessarily quarreled and had abused to Mahadeo and so it became necessary to question Barku about his act of the noon time. Dilip (PW-1) and Vinod (PW-2) have deposed that they and Mahadeo went to the house of Barku at about 7.00 p.m. The tenor of the cross-examination of these two witnesses shows that the defence did not dispute that at that time Dilip (PW-1), Vinod (PW-2) and Mahadeo had gone towards the spot of incident and these two witnesses were in the company of Mahadeo when Mahadeo sustained injuries.

11) Dilip (PW-1) has given evidence that the house of Barku is situated at the distance of around 125 feet away from his house. He has deposed that when they were having talk with Barku, Shriram (accused No.1) came out with axe and gave blow of axe on the head of Mahadeo. Dilip (PW-1) has deposed that due to this blow Mahadeo sustained bleeding injury. He has deposed that when he went ahead to hold Shriram, Shriram gave blow of axe from blunt side on his head. He has deposed that Barku

(accused No.2) then assaulted him on the shin of his leg with the stick and Laxman also assaulted him with stick. He has deposed that during the incident, mother of Shriram by name Kalabai came with axe and gave blow from blunt side to Vinod on his hand. He has deposed that Laxman also assaulted Vinod with stick. He has deposed that his wife Komal, sister-in-law Archana came there, they intervened by giving cover of their body to injured persons. He has deposed that the lady members of his house and others shifted them first to Georai Government Hospital. He has deposed that the spot of incident is situated opposite to the houses of Wadmare and Vairagade. He has given evidence that his report was recorded in Civil Hospital Beed. The report at Exhibit 77 is proved in the evidence of Dilip. In the cross-examination, Dilip has admitted that report given by him as against accused No.4 is not correct and he was not attributing any role in the incident to accused No.4.

12) The F.I.R. at Exhibit 77 is consistent with the aforesaid version of Dilip (PW-1) given in the court on material points. The consistency is in respect of the role

attributed to accused Nos.1 to 3 in the incident. It gives corroboration as available under section 157 of the Evidence Act to the substantiate evidence.

13) Dr. Hashmi Ahmad (PW-8) has given evidence on the injury certificate prepared by him in respect of Dilip (PW 1). The certificate is at Exhibit 103. The doctor has deposed that he had examined Dilip (PW-1) in Georai Hospital on 4-4-2013. He found following three injuries on the person of Dilip :

"(1) C.L.W. on left frontal region size 6x3x3 cm with ragged edges, caused within 24 hours with hard and blunt object, simple in nature.

(2) Blunt trauma to right to left forearm, caused by had and blunt object.

(3) Blunt trauma to right leg, caused by hard and blunt object."

14) Dr. Hashmi Ahmad (PW-8) has given evidence that history of assault was given by Dilip. He has deposed that X-rays were taken and fracture on left forearm was noticed. The X-ray plates are produced on the record. The doctor has deposed that the aforesaid injuries Nos.1 to 3 can be caused by weapon like stick. This medical evidence is consistent with the oral evidence of Dilip (PW-1).

15) Dr. Prashant Revadkar (PW-10) was working in Civil Hospital Beed. He has also given evidence on the injuries which were noticed by him on the person of Dilip (PW-1). He has given evidence that Dilip was indoor patient due to aforesaid injuries from 4-4-2013 to 18-4-2013. The evidence of these two doctors and the record show that on 4-4-2013 itself Dilip (PW-1) was shifted first to Government Hospital Georai and then Civil Hospital Beed and then F.I.R. came to be recorded on 6-4-2013 in Government Hospital Beed.

16) The evidence of Dr. Hashmi Ahmad (PW-8) shows that Dilip and Vinod were conscious when they had come to Georai Hospital on their own on 4-4-2013. However, the evidence shows that history of assault was given by both of them and then they were referred to Civil Hospital Beed for further treatment. It is brought on record in the cross-examination of the doctor that when there is such injury to head, patient needs to be admitted in the hospital. The F.I.R. was recorded on 6-4-2013 in Civil Hospital Beed and the certificate of the doctor was required to be obtained regarding fitness of Dilip to give

such statement.

17) The evidence of Dr. Shaikh Ahmed (PW-11) shows that he did C.T. scan of Vinod and he found non haemorrhagic contusion in right cerebral hemisphere. He noticed that there was communicated fracture of left frontal bone. This medical evidence needs to be kept in mind while considering the circumstance that F.I.R. was late. In any case the presence of PW-1 Dilip on the spot at the relevant time is not disputed by the defence. Thus, all the three injured were taken to the hospital immediately on 4th April 2013 and the F.I.R. was recorded on 6th April, 2013. Further, in respect of the same incident the other side also gave report on 6th itself and so the other side has not disputed that the incident took place involving these witnesses from the complainant side and accused Nos.1 to 3 from the accused side. Due to such admission not much can be made out of the circumstance that delay was caused in giving F.I.R. There is circumstantial evidence including medical evidence also.

18) The substantive evidence of Vinod (PW-2) is also consistent with the evidence given by Dilip (PW-1). When there is consistency in their evidence on the role attributed to each accused in the incident, in the cross examination of Vinod (PW-2) omissions in the police statement of Vinod were pointed out to him. They are in respect of specific role of each accused. Pralhad Mote (PW-13), police officer, who recorded statement of Vinod in Civil Hospital Aurangabad is examined and in his evidence the omissions are proved by the defence. The omissions are in respect of the specific role and also the assault made by Shriram on Mahadeo. The description of the weapons was also not the same which is given in the Court. It can be said that in the first version given to police Vinod had made general allegations against the accused Barku, Shriram, Laxman and Kalabai that they had together assaulted Mahadeo by using axe, sickle, stick etc. Though this omission amounts to contradiction and they are duly proved as required under section 145 of the Evidence Act, no confusion is created due to proof of those contradictions in relation to the evidence of Vinod.

19) It is unfortunate that even when it was a medico legal case and three injured were required to be referred to Civil Hospital, police did not make inquiry on 4-4-2013 itself with other eye witnesses, lady members from the house of Dilip. That can be said to be lapse on the part of police but the benefit of it cannot be given to such an extent that evidence of the two eye witnesses like Dilip and Vinod be discarded. Considering the nature of defence taken by the accused and the existence of other circumstantial evidence the court can reach to the truth. From the evidence on record the court can ascertain as to which witness had opportunity to see the entire incident and as to who described the entire incident by giving evidence on most of the relevant facts. Considering the nature of injuries which were sustained by Vinod, which are already quoted, it can be said that first inquiry was made with Dilip and then with Vinod. Dilip could give account of the injuries sustained by him, Vinod and by Mahadeo. Vinod could not give account by giving the particulars. Fuhrer, other evidence can be considered to ascertain the involvement of the accused persons in the incident.

20) Dr. Prashant Revadkar (PW-10) was attached to Civil Hospital Beed on 4-4-2013. He has given evidence that Mahadeo was referred by Georai Hospital and he found following injuries on the person of Mahadeo.

- (i) C.L.W. over left frontal parietal area.
- (ii) Contusion over left lower forearm. Size 3x2x1 cm.

According to him, both injuries were caused by hard and blunt object. He has deposed that C.T. scan was done and it was noticed that there was large subdural haematoma at fronto parietal area to both sides and there was fracture to both temporal bones. He has deposed that as injury to the head was grievous, Mahadeo was referred to Civil Hospital Aurangabad. He has denied the suggestion that such injury can be sustained due to simple fall on hard and rough surface. He has deposed that injury to right temporal bone is counter-coup injury viz. due to injury to left side caused by using force. The doctor has admitted that injuries sustained by PW-1 and PW-2 can be caused by fall on sharp stone. Dr. Shaikh Ahmed (PW-11) did CT scan and his evidence on the number and nature of head injury found on the head of Mahadeo is similar to the

evidence of PW-10. He, however, deposed that such injury can be caused by axe.

21) Dr. Vikas Rathod (PW-12) has given evidence on the post mortem report. He has given evidence that death of Mahadeo took place due to head injury. He has deposed that the injury found on the head can be caused by axe. In the post mortem report at Exhibit 122 in column Nos.17 and 18 as many as 12 injuries are mentioned and they are as follows.

"(1) Stitched surgical wound of craniotomy present over left fronto parietal temporal region with 24 stitches. It is 24 cm in length. Margins are dried and dark reddish. Stitches are intact and no gapping. On dissection e/o craniotomy seen with bony flap of left parietal temporal bone of size 12x10 cm absent.

(2) Stitched lacerated wound of size 3x2 cm present over right parietal region. Margins are dry and dark reddish.

(3) Stitched lacerated wound present over parietal region, along the midline, 4 cm in length with 3 stitches. Margins are dry and dark red.

(4) Abrasion present over right side of face, 2 cm anterior to right ear of size 4x1 cm, dry with brownish black scab.

(5) Multiple contusions present over right area of sizes ranging from 3x2 cm to 2x1 cm. subcutaneous tissue deep. Greenish brown in colour.

(6) Abrasion present over right elbow region of size 2x1 cm, dry with brownish black scab.

(7) Contusion present over left posterior axillary region of size 12x3 cm. subcutaneous tissue deep. Greenish brown in colour.

(8) Abrasion present over medial aspect of right thigh of size 18x1 cm. dry with brownish black scab.

(9) Multiple abrasions of sizes ranging from 2x1 cm to 1x1 cm present over anterior aspect of right leg. Dry with brownish black scab.

(10) Multiple contusions of sizes 2x2cm to 1x1cm present over anterior aspect of left thigh, lower 1/8 rd. They are subcutaneous, deep and greenish brown in colour.

(11) Stitched lacerated wound present over anterior aspect of left leg. Margins are dry, dark red. It is 3x1 cm with 3 stitches.

(12) Two abrasions present over back (middle part) of sizes 31x1 cm and 26x1 cm, horizontally placed. They are dry with brownish black scab. Abrasions present over left buttock of size 13x5 cm, dry and brownish black.

22) Dr. Vikas Rathod (PW-12) has deposed that all aforesaid injuries were anti mortem and injury Nos.4 to 13 can be caused by fist blows and kicks. He has deposed that the injuries were sustained 6 to 7 days before 11-4-2013, the date of post mortem examination. He has deposed that injury Nos.2 and 3 can be caused by axe and these injuries need to be read with the injuries described in column No.19. He has deposed that injury Nos.2 and 3

read with the injuries described in column No.19 are sufficient in ordinary course of nature to cause the death.

The injury described in column No.19 is as under.

"Diffuse under scalp contusion present over left frontal parietal temporal region and right parietal temporal region with corresponding sub periosteal hemorrhage. It is dark red. Evidence of left sided craniotomy seen (refer to injury No.1). Fracture of right temporal bone (involving squamous and petious part) undisplaced with e/o blood infiltration. Fracture of left temporal bone (squamous part) seen. It is undisplaced. Dura mater over craniotomy site is absent. Brain parenchyma bulging out through it. Subdural haematoma present over left frontal parietal temporal region and right parietal region. It is dark red. Diffuse subarachnoid hemorrhage present over left frontal parietal temporal region and right parietal temporal region. It is dark red. Brain parenchyma - soft, congested, oedematous."

23) The evidence of Dr. Revadkar (PW-10) and Dr. Shaikh Ahmed (PW-11) if considered together and if that evidence is compared with the evidence of Dr. Vikas Rathod (PW-12) it can be said that most of the injuries which are noted in the post mortem report were not on the person of Mahadeo when Mahadeo was examined immediately after the incident. Mahadeo was shifted from place to place like from spot of the incident to Georai Hospital then to Civil Hospital Beed and then to private hospital of Dr. Dunakhe from Aurangabad. Possibility that

during shifting of Mahadeo to various places 10 more injuries which are described were caused. They were simple like abrasions. What is important for consideration is the head injury and number of injuries which were found on the head. Injury Nos.1 to 3 mentioned in column No.17 and 18 of post mortem report are stitched wounds on the head. This stitch wound is a treatment wound and so injuries described in MLC prepared on 4-4-2013 need to be considered to ascertain as to how many blows were given to Mahadeo in the incident.

24) Dr. Milind Dunakhe (PW-7), who runs a private hospital in Aurangabad, has given evidence that Mahadeo was admitted in his hospital on 5-4-2013. According to this witness history of assault on head by sharp object was given. According to him, Mahadeo was indoor patient from 5-4-2013 to 10-4-2013 and Mahadeo died on 10-4-2013. The papers of treatment at Exhibit 99 show that history of assault by axe on the head was given. The other evidence of this doctor is similar to the evidence of aforesaid doctors from Georai and Beed. The evidence shows that Vishnu, father of Mahadeo, had admitted

Mahadeo in the hospital. Thus, only the injury which was inflicted on the head proved to be fatal. The other injuries like abrasions and contusions on the limbs can be ignored. In this regard specific evidence given by the two eye witnesses also needs to be kept in mind.

25) In view of nature of injuries described by PW-1 and PW-2 and other evidence more weight needs to be given to the evidence of Dilip (PW-1). So far as the evidence on injuries sustained by Mahadeo in the incident is concerned, the evidence of Dilip (PW-1) needs to be believed. From the evidence of Vinod it can be said that his evidence which is affected by material contradictions cannot be used. However, the other part of the evidence like the evidence given by Vinod on the injury sustained by him can be considered as the person injured by somebody will never commit mistake in naming the person who assaulted him. In this regard reliance can be placed on the cases reported as (1) **Abdul Sayeed v. State of M.P. (2010) 10 SCC 259**; and (2) **Mohar v. State of U.P. (2002) 7 SCC 606**.

26) Evidence of Madhukar Pradhan (PW-14), A.P.I., who made the investigation of the case and the record like arrest panchanama show that all the accused who faced the trial came to be arrested on 11-4-2013. Clothes of the accused were taken over on the same day under separate panchanamas. Those panchanamas are proved in the evidence of PW-14. The panch witnesses on all the panchanamas except the spot panchanama have turned hostile. Even the panch witness on the spot panchanama has admitted that he is close relative of the complainant side. In any case, this circumstance cannot be given much importance as the fact that the incident took place is not disputed and there is no dispute over the spot where the incident took place.

27) Madhukar Pradhan (PW-14) has given evidence on the statement given by accused No.1 Shriram under section 27 of the Evidence Act. This statement led to the discovery of weapons like axe, bamboo stick and one ordinary stick. The memorandum of statement is at Exhibit 143 and the panchanama of seizure of these articles is at Exhibit 145. The articles were seized on 15-

4-2013. Madhukar Pradhan (PW-14) has given evidence that the seized articles were sent to C.A. office along with covering letter which is at Exhibit 144. The C.A. report Exhibit 132 shows that human blood was found on the blade of the axe. Blood of "B" group was detected on the clothes of accused Nos.1 and 2. No blood was detected on the clothes of accused No.3. The blood of deceased Mahadeo was sent to the C.A. office but the results were inconclusive.

28) Panch witness Kuldeep Lonake (PW-3) has given evidence on spot panchanama which is at Exhibit 86. In the evidence of two eye witnesses it has come on the record that PW-1, PW-2 and deceased Mahadeo had gone to the house of Barku (accused No.2) and the incident took place there. In the evidence of Madhukar Pradhan (PW-14) it is brought on record that the spot is situated near the house of Barku. The spot panchanama at Exhibit 86 prepared on 11-4-2013 shows nothing was there to show that the incident had taken place at that place. Hand sketch map on Exhibit 86 prepared by police shows that houses of Wadmare and Vairagade are situated

in the vicinity of the spot shown by the witnesses. The house of the accused is not shown in the vicinity of the spot but the evidence on record is sufficient to infer that at the relevant time accused Nos.1 to 3 had gone towards the house of accused Barku and towards that side the incident took place.

29) In the cross-examination of the eye witnesses the defence suggested that the prosecution witnesses and the deceased had gone towards the house of Barku with weapons and as these three persons had assaulted Barku and others by using weapons, the accused had exercised right of private defence of body. In the evidence of Madhukar Pradhan (PW 14) it is brought on record that crime at CR No.49/2013 was registered in respect of the same incident on the basis of report given by the side of the accused. In the statement given under section 313 of the Code of Criminal Procedure the accused have contended that as they had filed report against the prosecution witnesses, present report bearing Crime No.50/2013 was given by PW-1. Unfortunately, copy of F.I.R. in Crime No.49/2013 and injury certificates in

respect of the persons injured from the side of the accused are not produced on the record. No defence witness is also examined to prove the kind of injuries which they had sustained. The case against the prosecution witnesses was tried as counter case but the relevant record as mentioned above and even copy of charge sheet of the said case was not filed in the present matter by the side of the accused. If the accused persons wanted to use the circumstance that they had sustained some injury which can be caused by dangerous weapon they ought to have produced such kind of record. That is not done by the side of the accused. In the case reported as **Mitthulal v. State of M.P. (1975 Cri.L.J. 236)** the Apex Court has laid down that each case must be decided on the evidence recorded in it. It is made clear by the Apex Court that evidence recorded in another case cannot be taken into account in arriving at a decision. Thus, it is not possible to draw inference in the present case that, the accused were assaulted by using dangerous weapons by Mahadeo, Dilip and Vinod and due to that they were exercising right of private defence of the body.

30) The discussion made above shows that there are following circumstances :

(i) Prosecution witnesses like PW-1 and PW-2 and the deceased had gone towards the side of the house of accused Nos.1 to 3 to question them about the previous incident and then the incident in question took place; and,

(ii) In respect of the same incident the accused had given report due to which Crime No.49/2013 came to be registered against some persons from the prosecution side.

31) The defence could not make out the case that dangerous weapons were carried by PW-1, PW-2 and Mahadeo and by using the dangerous weapons Mahadeo had inflicted injury either to Shriram, accused No.1 or to Barku (accused No.2). Due to absence of such evidence it is not possible to infer that there was any apprehension created by the deceased and the prosecution witnesses in the mind of the accused that there will be harm caused to their life or body and due to that they were entitled to exercise right of private defence of person. After

appreciating this evidence, the trial court has also not come to the conclusion that accused were exercising right of private defence. Thus, provisions of sections 96 and 97 of the Indian Penal Code cannot be used in favour of the accused. For the same reason, the contention that there was probably free fight cannot be considered.

32) When there is no evidence on the record to create probability that complainant's side had carried dangerous weapons and on the other hand there is evidence to show that the accused persons had used dangerous weapons, the accused can be treated as aggressors. The aggressor cannot have right of private defence. For the same reasons it is not possible to infer that there was free fight. If there was free fight in that case also right of private defence was not available. On this point, reliance can be placed on the case reported as **Sikhar Behera V. State of Orissa (1993 Cri.L.J.3664)** and **Jaipal v. State of Haryana, (AIR 2000 SC 1271)**.

33) Learned counsel for the appellants placed reliance on the case reported as **Kanbi Nanji Virji v. State**

of Gujarat, AIR 1970 SC 219. The facts of this reported case were altogether different. Criminal case needs to be decided on the basis of facts of that case and all the relevant facts of the present matter are quoted already. It is true that defence can establish right of private defence by reference to the circumstances appearing from the prosecution evidence itself. However, the entire evidence on the record has not created such possibility. Due to absence of material which ought to have been brought on the record by the defence and the nature of weapons used by the accused it is not possible to infer that the accused were exercising right of private defence. There is no proof as is required under section 105 of the Evidence Act. Burden of proof of such defence was on the accused but the accused failed to create such probability.

34) The trial court has believed the prosecution witnesses. It is true that the prosecution witnesses are the accused in counter case. In the case reported as **Raj Kishore Jha v. State of Bihar, AIR 2003 SC 4664** it is laid down by the Apex Court that if the evidence of a witness is cogent, credible and trustworthy it cannot be totally

wiped out because of the circumstance that he was accused in counter case. In the present matter also due to aforesaid circumstances, this Court holds that there is no reason to disbelieve both the prosecution witnesses. To some extent there is a discrepancy and some part of the evidence of Vinod (PW-2) can be discarded but even after deleting the portion which is contradiction, the witness can be believed in respect of other version and further there are aforesaid circumstances corroborating the evidence of PW-1.

35) The question arises as to what offence is committed by the appellants. Accused Nos.1 and 2 are the sons of accused No.3. Accused Nos.1 to 3 are convicted for the offence of murder of Mahadeo punishable under section 302 read with 34 of the Indian Penal Code. They are also convicted of the offence of causing grievous hurt to Vinod punishable under section 326 read with 34 of the Indian Penal Code. Operative part of the judgment of the trial court shows that no separate conviction is given for causing hurt/grievous hurt to Dilip (PW-1) though charge was framed for that offence punishable under section 325

read with 149 of the Indian Penal Code. No acquittal is also shown in respect of that offence. However, it is not necessary to consider the same at this stage. The evidence and the record also do not show that grievous injury was sustained by PW 1. In the case of **Abdul Sayeed v. State of Madhya Pradesh** decided with other matters and reported as **(2010) 10 SCC 259** the Apex Court has laid down that there is no bar in law for conviction of accused with aid of section 34 in place of section 149 if there is evidence on record to show that such accused shared a common intention to commit the crime and no apparent injustice or prejudice is shown to have been caused by application of section 34 in place of section 149. The trial court has used section 34 for conviction of the three accused.

36) The learned counsel for the appellants submitted that there is no evidence on the basis of which inference is possible that there was common intention of appellant Nos.1 to 3 to murder Mahadeo. There is force in this submission of the counsel for the appellants. The evidence of both, PW-1 and PW-2 shows that when they were questioning appellant Barku, appellant No.1 came

out with axe and he gave blow of axe on the head of Mahadeo. Thus, the evidence which is given by PW-1 and PW-2 has created probability that there was no meeting of minds of the appellants much less between appellant No.1 and appellant No.3. There is clear probability that accused No.1 had taken decision on his own and he had come out with axe and had used the axe to give blow on the head of Mahadeo.

37) Evidence of PW-1 and PW-2 shows that the incident of assault by all the accused on the prosecution witnesses started when Mahadeo collapsed on the ground due to blow given on his head by accused No.1. PW-2 had not stated before police that Kalabai had given blow of handle of axe on his head and that omission is duly proved. There is evidence to that effect of PW-1. Though there is some discrepancy in his evidence given as against accused Nos.1 to 3, about the assault made on PW-1 and PW-2 their presence on the spot and making of assault on both the injured witnesses is sufficient to infer that they developed common intention subsequently, subsequent to the assault made on Mahadeo by accused No.1 was over.

There is positive evidence of PW-1 and PW-2 on active participation of accused No.1 Barku and Laxman in the incident. They in furtherance of common intention caused fracture of skull of PW-2. For that, common intention of accused Nos.1 to 3 and other accused can be inferred. For coming to this conclusion reliance can be placed on the law laid down by the Apex Court in the case of **Kripal v. State of UP** reported as **(AIR 1954 SC 706)**. Due to these circumstances this Court holds that conviction for offence punishable under section 325 read with section 34 of the IPC is possible as against accused Nos.1 to 3.

38) The learned counsel for the appellants placed reliance on the observations made by the Apex Court in the case reported as **2011 ALL MR (Cri) 3886 (Abdul Hafiz v. The State of Maharashtra)** and **AIR 2009 SC 2825 (Nafe Singh v. State of Haryana)**. The learned counsel submitted that “intention” of murder cannot be inferred against accused No.1 and so conviction is not possible under section 302 of Indian Penal Code and at the most conviction can be for offence punishable under section 304 Part II of IPC. This submission is not acceptable. In

view of the nature of evidence given as against accused No.1, the part of the body chosen by him, the nature of weapon used by him, the extent of force used by him and result which was there due to such assault, this Court holds that there was intention to cause such bodily injury which would be sufficient in ordinary course of nature to cause death. Thus, offence committed is punishable under section 302 of Indian Penal Code and not under section 304-II of IPC.

39) Evidence and the record show that single blow was given by accused No.1 on the head of Mahadeo. Argument was advanced that there is inconsistency in the medical evidence on the use of sharp weapon and some part of the medical evidence shows that hard and blunt object was used. In any case the medical evidence shows that much force was used and the blow had caused fracture of fronto parietal bones and that injury caused the death. There is medical evidence to show that the injury was sufficient to cause death in ordinary course of nature. Though it is a case of single blow of dangerous weapon like axe, evidence is given that after giving of the

blow by accused No.1 to Mahadeo when PW-1 intervened he was also assaulted by the accused No.1 on the head. Thus, there was clear intention of inflicting such bodily injury (head portion was chosen) which would be sufficient in ordinary course of nature to cause the death. Such injury was actually caused and so it can be said that accused No.1 is guilty of offence of murder punishable under section 302 of Indian Penal Code. However, it is not possible to infer that accused No.2 who had not started the incident and he came in picture only after giving of the blow by accused No.1 had common intention with accused No.1. The evidence as against accused No.3, father of accused No.1, is more weak. He came on the spot with stick much after giving of blow of axe by accused No.1 Shrikant on head of Mahadeo and for these reasons, this Court holds that accused Nos.2 and 3 cannot be convicted for offence of murder of Mahadeo and that decision of the trial court needs to be set aside.

40) The learned counsel for the appellants placed reliance on the case reported as **1995(1) ALL MR 103 (Sayed Ahmed Ali Kari Vs. The State of Maharashtra)**. In

this case the meaning of “common intention” is given. Learned counsel for appellants placed reliance on the case reported as **(2012) 9 SCC 249 (Suresh Sakharam Nangare v. State of Maharashtra)**. On the basis of the observations made by the Apex Court the learned counsel for the appellants submitted that provision of section 34 of the Indian Penal Code requires a pre-arranged plan and pre-supposes prior concert, prior meeting of minds. The material which needs to be considered to ascertain as to whether there was common intention is already quoted and the benefit is being given to accused Nos.2 and 3. It is already observed that due to absence of material it is not possible to believe that it is a case of free fight. For the discussions made above this Court holds that the appeal needs to be partly allowed. In the result, following order.

41) The appeal is partly allowed.

(A) The judgment and order of conviction given against accused No.2 Barku and accused No.3 Laxman for murder of Mahadeo punishable under section 302 read

with 34 of the Indian Penal Code is hereby set aside. The accused Nos.2 and 3 stand acquitted of that offence.

(B) The judgment and order of the trial court convicting accused Nos.1 to 3 for offence punishable under section 326 read with 34 Indian Penal Code is set aside. They stand acquitted of offence punishable under section 326 read with 34 Indian Penal Code but they stand convicted for offence punishable under section 325 read with 34 Indian Penal Code and they are sentenced to suffer imprisonment for the period already undergone. The period is around 4 years and 9 months in respect of accused No.2 - Barku and it is more than 9 months in respect of accused No.3 Laxman. Fine amount of Rs.1000/- (Rupees One Thousand Only) is imposed on each of them. In default of payment of fine, they are to undergo simple imprisonment for the period of one month. If the fine amount is deposited, accused No.2 Barku and accused No.3 Laxman are to be released from jail if they are not required in any other case. They are to be released after obtaining bond of Rs.15,000/- (Rupees Fifteen Thousand Only) from each of them as provided by

section 437-A of the Code of Criminal Procedure of the period of 6 months.

(C) The appellant No.1 Shriram is hereby convicted for offence punishable under section 302 of the Indian Penal Code and he is sentenced to suffer imprisonment for life and to pay fine of Rs.500/- (Rupees Five Hundred only). The substantive sentences as against accused No.1 to run concurrently. He is entitled for the set off for the period for which he has been behind the bars in the case. The record and muddemal is to be preserved for trial of the absconding accused.

Sd/-
(K.K. SONAWANE, J.)

Sd/-
(T.V. NALAWADE, J.)

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