

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 424 OF 2013

The State of Maharashtra
Through PSI, Sangamner Taluka
Police Station for the complainant
Dhondiba Raoji Hajare,
R/o. Hajarwadi, Post Panodi,
Tq. Sangamner, Dist. Ahmednagar. **....Appellant.**

Versus

1. Bhika Raoji Hajare,
Age 50 years, Occu. Agri.,
2. Macchindra Bhika Hajare,
Age 27 years, Occu. Agri.,
3. Lahanu Bhika Hajare,
Age 25 years, Occu. Agri.,
4. Sonabai w/o. Bhika Hajare,
Age 47 years, Occu. Household,
5. Kalpana w/o. Macchindra Hajare,
Age 20 years, Occu. Household,

All R/o. Hajarwadi, Panodi Shiwar,
Tq. Sangamner, Dist. Ahmednagar. **....Respondents.**

Mr. A.S. Shinde, APP for appellant/State.

Mr. V.Y. Bhide, Advocate for respondent Nos. 1 to 5.

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

RESERVED ON : 16/08/2019.

PRONOUNCED ON : 28/08/2019.

JUDGMENT : [PER T.V. NALAWADE, J.]

- 1) The appeal is filed by the State to challenge the decision of acquittal given in Sessions Case No. 40/2011, which was pending

in the Court of learned Additional Sessions Judge, Sangamner. The Trial Court has acquitted all the respondents of the offences punishable under sections 302, 325, 123 r/w. 149 of Indian Penal Code (hereinafter referred to as 'IPC' for short), sections 143, 147, 148 of IPC, sections 504, 506 of IPC and section 120-B of IPC. Both the sides are heard.

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

The crime came to be registered on the basis of report given by one Dhondiba Hajare on 23.4.2011. Respondent No. 1 Bhika Hajare is real brother of the informant. Deceased Gorakh was son of informant Dhondiba. Dhondiba and Bhika together own 8 Acres of agricultural land in village Hajarwadi, Tahsil Sangamner and it is their ancestral property. By mutual understanding, they are cultivating 4 Acre portion each, but the entries in the revenue record in respect of portions are not made separately of the two brothers. Bhika is not satisfied with the contentions of Dhondiba that they are already cultivating separate portions. As name of Bhika is not entered in the revenue record separately, he had filed civil suit for relief of partition. The suit was decreed prior to the date of incident and the appeal against the said decision filed by Dhondiba was pending on the date of incident.

3) The incident in question took place on 23.4.2011. After 8.00 a.m. when son of informant Gorakh was ploughing the land which was in their possession, all the accused went there to prevent the agricultural operation. When Gorakh said that the said portion had come to their share, Bhika became angry and he along with other accused started assaulting Gorakh by using weapons like axe, iron bar and sickle. Bhika was holding axe, Macchindra son of Bhika was holding iron bar and Lahanu other son of Bhika was holding sickle. The house of informant is situated in the vicinity of that portion and he rushed to the spot to save Gorakh. After arrival of informant to the spot, Bhika gave blow of axe on left hand of informant. Daughter in law of informant Mainabai came forward and she was assaulted by accused Sonabai (wife of Bhika) and Kalpana (wife of Macchindra). In the incident, Gorakh sustained serious injuries and informant and his daughter in law Mainabai also sustained injuries. Threats of life were given by the accused to the informant and his family members. When the neighbours like Punja Hajare, Ambu Hajare and Mukta Hajare came there, the accused left the spot of offence. They were shifted to hospital of Dr. Shelke from Sangamner in the vehicle of Raju Puneekar. Gorakh was alive but was unconscious at that time, on the date of report. In the hospital of Dr. Shelke, the report of Dhondiba came to be recorded and the crime

came to be registered for offences punishable under sections 307, 149, 323 r/w. 149 etc. of IPC.

4) Gorakh succumbed to the injuries on 24.4.2011 and the crime came to be converted for the offence of murder. During the course of investigation, inquest panchanama of the dead body was prepared and dead body was referred for post mortem (P.M.) examination. Accused came to be arrested during the course of investigation. The spot panchanama came to be prepared on 23.4.2011. During the course of investigation, the weapons came to be recovered on the basis of statements given under section 27 of Evidence Act by some of the accused. The P.M. report came to be collected and the injury certificates also came to be collected. The articles seized were sent for C.A. The chargesheet came to be filed for aforesaid offences. The charge was framed for the offences already mentioned. Accused took the defence that false case is filed against them. One written say also came to be filed under section 313 of Cr.P.C. In the say, they contended that on 23.4.2011 the informant and members of his family had assaulted accused Macchindra by using weapons like knife, axe and threats of life were given to all the accused. They contended that as police did not take cognizance of this report, private complaint was filed and in the private complaint direction of investigation was given by Judicial

Magistrate, First Class. They contended that on the basis of directions given, the crime came to be registered against the informant and the members of his family for the offences punishable under sections 307, 325, 326 r/w. 149 of IPC. In the present appeal, the learned counsel for respondents submitted that it needs to be presumed that there were counter cases. No evidence is given by the present respondents in the Trial Court on the injuries allegedly sustained by them in the incident.

5) The Trial Court has acquitted all the respondents by observing that there is discrepancy in the oral evidence and medical evidence, there is no possibility of causing of the injuries found on the deceased and the witnesses due to the weapons shown to be recovered in the present matter, the presence of witness like PW 8 on the spot at the relevant time was doubtful and the direct evidence is not inspiring confidence.

6) As per the case of prosecution, initially deceased Gorakh alone was present on the spot of offence. He was ploughing the land by using the bullocks. He was there since 7.00 a.m. Dhondiba (PW 1) has deposed that his house is situated at the distance of around 40 ft. from the spot of offence. There is similar evidence from the other witnesses on the distance including the evidence of the panch

witness of spot panchanama.

7) Dhondiba (PW 1) has deposed that accused No. 1 Bhika came to the spot of offence with axe, accused No. 2 Macchindra came there with iron bar, accused No. 3 Lahanu came there with sickle, accused No. 4 Sonabai came there with stick and accused No. 5 Kalpana came there, but she was not having any weapon. Thus, the evidence is given that all the accused came there together.

8) Dhondiba (PW 1) has deposed that all the accused accosted deceased Gorakh and started questioning as to why he was ploughing the land. He has deposed that the deceased said to them that the land had come to share of his father in partition and so, he was ploughing the land and thereafter, the accused started assaulting him. Evidence of Dhondiba shows that he could hear the conversation which was going on between the deceased on one side and accused on other.

9) Dhondiba (PW 1) has given account of particular role played by each accused in the incident. He has deposed that accused No. 1 gave blow of axe on the head of Gorakh, accused No. 2 gave blow of iron bar on the head of Gorakh and he also gave blows on the hands and legs of Gorakh with iron bar, accused No. 3 gave blow

of sickle on the head of Gorakh and he also gave blows on the legs of Gorakh and accused No. 4 assaulted Gorakh with stick on his hands and legs.

10) Dhondiba (PW 1) has deposed that after seeing the assault, he rushed forward to save the deceased and then accused No. 1 aimed a blow of axe at his head. He has deposed that he avoided the blow, but the blow of axe landed on his left palm from external side. He has deposed that accused No. 2 then assaulted him with iron bar on his hands and legs. He has deposed that accused No. 3 assaulted him with sickle on his hands and legs. He has not deposed that two ladies assaulted him.

11) Dhondiba (PW 1) has deposed that accused No. 4 assaulted Mainabai with stick and accused No. 5 assaulted Mainabai with kicks and fist blows. Thus, the evidence is given against lady member, accused No. 4 that she assaulted Gorakh with stick on his legs and hands.

12) Dhondiba (PW 1) has deposed that the neighbours like Punja Hajare, Ambu Hajare and Mukta Hajare rushed there after hearing hue and cry and they rescued the members of the family of the informant and after that accused left the spot. He has deposed

that before leaving the spot, accused gave threat of life to them.

13) Dhondiba (PW 1) has deposed that a jeep was arranged and in a jeep first Gorakh and he were shifted to Shelke Hospital from Sangamner. He has deposed that they reached there at 9.00 to 9.30 a.m. He has deposed that the condition of Gorakh was serious and so, he was shifted to Nashik from Ahmednagar. He has deposed that his other son Gunwant, daughter Kamlabai and other relatives took Gorakh to Nashik.

14) Dhondiba (PW 1) has deposed that treatment was given to him and his leg was put in plaster. He has deposed that at about 1.00 to 1.30 p.m. police came to the hospital of Dr. Shelke and there his report came to be recorded. Exh. 30, the report is duly proved in the evidence of Dhondiba. His evidence shows that Gorakh died in Nashik Private Hospital on 24.4.2011 at about 9.00 to 9.30 a.m.

15) F.I.R. at Exh. 30 is on motive and the litigation filed by the side of accused for partition is mentioned in it. In F.I.R., there is mention that incident took place at about 8.00 a.m. and at that time, Gorakh was ploughing the land where the incident took place. In F.I.R., there is mention that Gorakh replied to accused that land had come to their share and that is why he was ploughing the land.

In F.I.R., there is mention that after reply given by Gorakh, accused started assaulting him. In F.I.R., there is specific mention that accused No. 1 used axe in the incident, accused No. 2 used iron bar and accused No. 3 used sickle and accused Nos. 1 to 3 assaulted Gorakh on his head. Though the number of blows etc. are not mentioned, this portion of F.I.R. about the assault on deceased is consistent with the oral version given by Dhondiba in the Court. It can be said that this part gives corroboration under section 157 of Evidence Act to the direct evidence of Dhondiba.

16) In F.I.R. at Exh. 30, there is mention that when Dhondiba rushed forward, accused No. 1 gave blow of axe on his left hand which hit the palm portion. In F.I.R., it is mentioned that Mainabai was assaulted by accused Sonabai and Kalpana with fist blows and kicks. Thus, there is no corroboration of F.I.R. in respect of the direct evidence given by Dhondiba that accused No. 4 assaulted deceased with stick.

17) In F.I.R., there is mention that neighbours like Punja Hajare, Ambu and Mukta rushed to the spot after hearing hue and cry and they rescued the persons of the side of complainant. There is mention that some persons including the relatives shifted him and Gorakh to the hospital of Dr. Shelke from Sangamner. This portion of

F.I.R. is also consistent with the oral evidence of Dhondiba (PW 1). Thus, there is general corroboration of the F.I.R. to the direct evidence that accused Nos. 1 to 3 had assaulted Gorakh by the weapons which they were carrying, they had assaulted first informant also and accused Nos. 4 and 5 had assaulted prosecution witness Mainabai.

18) F.I.R., Exh. 30 was recorded by Police Naik of Sangamner Tahsil Police Station in the hospital of Dr. Shelke. On the basis of this report, the crime was registered in that police station at C.R. No. 81/2011 at 14.15 hours on 23.4.2011. There is endorsement on Exh. 30 that the patient was conscious when the report was recorded. The evidence of Dhondiba (PW 1) shows that his village is situated at the distance of 5 k.m. from the place Panodi and Sangamner is situated at the distance of 20-22 k.m. from Panodi. Evidence is given that they were taken via Panodi to the hospital of Dr. Shelke from Sangamner. Thus, considering the time of incident which is given by both the sides, the time of registration of crime in the police station shows that the report was given immediately, at first opportunity by PW 1. In this regard, time for arranging the conveyance, the time taken for travelling the distance, the time taken for giving intimation of the admission of patient by the hospital to police and the time taken by the police station to depute

the police constable for recording the F.I.R. needs to be kept in mind. For all these reasons, this Court holds that F.I.R. at Exh. 30 under section 154 of Criminal Procedure Code was given immediately in the present matter. On F.I.R, there is evidence of Bhosle (PW 7), police officer, who recorded the F.I.R. The circumstance that F.I.R. was given immediately gives credence to the testimony of PW 1 and on material points it gives corroboration as available under section 157 of Evidence Act.

19) Prosecution has examined panch witness Talekar (PW 2) to prove the spot panchanama which is at Exh. 32. The spot panchanama was drawn on 23.4.2011 between 15.00 and 16.00 hours i.e. immediately after registration of crime. The spot was shown by Indubai, wife of Dhondiba (PW 1). The oral evidence and the spot panchanama at Exh. 30 show that the plough which was taken to the spot of offence by Gorakh was still there, one iron bar and one stick, the weapons were lying there. The spot panchanama and substantive evidence show that the earth samples were collected and the aforesaid two weapons were collected. These articles were sent to C.A. Office with covering letter. Evidence on sending of the articles is given by other witness. C.A. reports at Exh. 38 and 39 show that blood was detected on aforesaid two weapons taken over from the spot of offence. Though blood was not detected

in earth samples, there are other circumstances due to which not much can be made out from this circumstance in favour of the defence.

20) Talekar (PW 2) is independent witness and that can be seen from the cross examination of this witness. The tenor of the cross examination of PW 2 and the statements given under section 313 of Cr.P.C. by accused persons show that they did not dispute that the incident took place at the spot shown in Exh. 32. Some record is produced to show that attempt was made to given counter F.I.R. and in that F.I.R., place was shown as place situated in front of house of accused. In any case, the place is situated in the vicinity of both the house of the accused and house of informant. In the statement given under section 313 of Cr.P.C. it was not specific case that the incident had taken place at other place and not in the spot described in Exh. 32. In spite of these circumstances, the Trial Court has held that the prosecution has failed to prove that the incident had taken place at the place described in Exh. 32. This Court holds that Trial Court has committed error in giving such finding. This Court holds that the evidence of spot panchanama has given corroboration to the direct evidence.

21) Talekar (PW 2) has given evidence that the spot of

offence is situated at the distance of 30-35 feet from the house of informant and it is situated at the distance of 60-65 feet from the house of accused. On Exh. 32 hand sketch map is prepared showing the location of the spot of offence in relation to the houses of the two sides, but the exact distance is not mentioned in Exh. 32. On the basis of evidence of spot panchanama, it can be ascertained as to whether prosecution witnesses had an opportunity to hear the quarrel and then to rush to the spot and witness the incident. On the basis of evidence of PW 1 and PW 2 and Exh. 32, it can be said that there was no standing crop in the field in which agricultural operation was going on and there was nothing in between the house of informant and the spot. Considering the distance between the house of informant and spot of offence, even from front portion of courtyard of the house of informant, it was possible to witness the incident. Further, it was very much possible to hear the quarrel if it was going on at the place of incident. This evidence shows that informant and his relatives could have rushed to the spot of offence after starting of the quarrel within no time. The circumstance that the house of accused is situated in the vicinity of the spot and all of them or atleast some of them could have gone together or they could have joined the other accused after starting of the quarrel is there.

22) Dr. Shelke (PW 11) has given evidence that on 23.4.2011 at about 9.00 a.m. Dhondiba (PW 1) and deceased Gorakh were brought to his hospital. He has deposed that the condition of Gorakh was serious. He has deposed that there were multiple contusions over the scalp of Gorakh and there was bleeding from nose. He has deposed that patient Gorakh was in unconscious state with convulsions and he was in gasping condition. He has deposed that when condition of Gorakh settled, he was referred for C.T. scan of brain and on the basis of C.T. scan, he found that there was subdural haematoma and subarachnoid haemorrhage with shift of midline. Exh. 79 is the C.T. scan report. The doctor who conducted C.T. scan is also examined. Dr. Shelke has deposed that the age of the injuries was within six hours and the injuries found on the head were caused by hard and blunt object and they were grievous. His evidence shows that he received C.T. scan report online and so, he took the decision to refer Gorakh to Nashik for further treatment. The M.L.C. in respect of Gorakh is at Exh. 67 and it is proved in the evidence of Dr. Shelke. Specific opinion was given about the weapon which could have caused these injuries and it is at Exh. 68. The documents at Exhs. 67 and 68 are consistent with the oral evidence of Dr. Shelke and it shows that Gorakh was indoor patient in his hospital on 23.4.2011 between 9.00 a.m. and 12.30 p.m. This evidence shows that he found many injuries, many contusions on

the head of Gorakh. He has denied that the injuries found on the head of Gorakh could have been caused due to simple fall on plough.

23) The evidence of Dr. Shelke (PW 11) shows that on the same day he examined and treated Dhondiba (PW 1). He found following injuries on the person of Dhondiba.

- (i) C.L.W. over left hand palm at first inter digital cleft
10 x 3 x 2 c.m.
- (ii) Contusion on both legs.
- (iii) Contusion to right foot.

The evidence of Dr. Shelke (PW 11) shows that X-ray was taken in respect of aforesaid injuries sustained by Dhondiba (PW 1) and it was found that there was fracture to left fibula and fracture of 2nd metatarsal right side. He has given evidence that age of the injuries was within 24 hours. He has deposed that injury No. 1 was simple and injury Nos. 2 and 3 were grievous. The M.L.C. at Exh. 70 prepared by him is consistent with his oral evidence. He has deposed that injury No. 1 can be caused by blunt side of axe and injury Nos. 2 and 3 can be caused by hard and blunt side of object like iron rod or sickle. In the cross examination, it is suggested to him that injury No. 1 can be caused by sharp weapon like knife and this suggestion is accepted by the doctor.

24) Dr. Desai (PW 10) was working in Shatabdi Hospital, Nashik. He has given evidence that Gorakh was brought to his hospital on 23.4.2011 itself at about 2.45 p.m. He has deposed that Gorakh was unconscious. He has deposed that C.T. scan was already done and as the report showed that there was subdural haematoma, and as there was extensive haematoma all over scalp, operation was performed. He has deposed that Gorakh expired on 24.4.2011 due to injuries sustained on the scalp and brain. He has deposed that these injuries were sufficient to cause the death. He issued M.L.C. and death certificate and they are at Exhs. 64 and 65 and these documents are consistent with oral evidence of Dr. Desai. He has given opinion that blunt side of axe or iron bar or blunt side of sickle can cause injuries which were found on the head of Gorakh. He has given evidence that due to such injuries bleeding can take place from mouth, ears etc.

25) Gorakh died in aforesaid private hospital from Nashik. Dr. Barve (PW 6) was working in Civil Hospital Nashik where post mortem was conducted on the dead body. The evidence of Dr. Barve shows that she found following injuries on the dead body.

- (i) Sutured craniotomy wound present on right side of scalp extending from right frontal, right parietal, right temporal region up to post aurio region 'C' shaped with

14 stitches. On opening the wound right parietal and part of right temporal bone not in place.

(ii) Abrasion on right thigh anterior with swelling 8 c.m. x 2 c.m.

(iii) Abrasion on left thigh anteriorly 6 c.m. x 1.5 c.m.

Dr. Barve found internal injuries like intra cerebral haemorrhage and blood clots on surface of brain. Her evidence shows that they were antemortem injuries and internal injuries were due to surface wound No. 1 mentioned above.

26) According to Dr. Barve (PW 6), death of Gorakh took place due to head injury and such injury is sufficient in ordinary course to cause death. Injury No. 1 mentioned in the P.M. report is injury caused during the operation. Her evidence shows that piece of bone of right temporal side was removed and it was not in place when P.M. was conducted. Thus, the evidence of Dr. Shelke (PW 11) who had examined Gorakh first in time needs to be considered to ascertain the number of injuries which were found on the head of Gorakh. The evidence of Dr. Shelke shows that there were more than one contusion on head and these injuries were caused by hard and blunt object. The P.M. report at Exh. 55 is consistent with the evidence of Dr. Barve (PW 6). Exh. 57 is in respect of injury No. 1 showing that it was craniotomy operation injury.

27) The Trial Court has held that medical evidence is not consistent with the oral evidence of informant and other eye witnesses. It is true that when witness says that weapon like axe or sickle was used for assault, the Court needs to go with presumption that witness wants to say that the blade side portion of the weapon was used during assault. However, that does not mean that the edge of blade must have hit the body. It can only refer to the intention when the witness says that axe was used or sickle was used. Further, the blade of axe is having sufficient length and the blade is also heavy, having much thickness towards the handle of axe. In such cases, the Court is expected to keep in mind that the victim always tries to ward off the blow or tries to move away and in such a case, there is possibility that the blunt side of the blade would hit the victim. The edge of blade is small portion, but the blunt side is big portion and it is hard and blunt. The blade of sickle on the other hand is peculiar. The blade of sickle is ordinarily semi circular in shape. The entire blade portion of the sickle is not having that thickness like blade of axe and on inner portion of the blade of sickle there is edge to some extent. When sickle is used for assault from front side, edge side, it causes peculiar injuries and ordinarily, the pointed portion at the end of the blade causes puncture injury. When the blade is hit from other side, that side is also not that blunt and

so, that would cause different kind of injury on the head and not injury like contusion. Iron bar is hard and blunt and it can cause injury like contusion. Thus, the possibility of causing of contusion injury is less when the edge of the blade of axe hits the body or the blade of sickle hits the body. Further, the Court needs to keep in mind the evidence that there is only opinion evidence under section 45 of the Evidence Act and the Court is expected to consider all the probabilities. This Court holds that in view of aforesaid circumstances, it cannot be said that the medical evidence is not consistent with the direct evidence given by Dhondiba (PW 1) and other witnesses. It can be said that so far as the opinion given by doctor that blunt side of sickle can cause the injuries like contusions cannot be accepted in the present matter. Beyond that nothing can be inferred in favour of other accused persons and particularly, accused Nos. 1 and 2.

28) Mainabai (PW 5), widow of Gorakh has given evidence that at the relevant time, she was present in front of their house as her kid was answering nature's call there. She has deposed that she saw that all the accused entered the aforesaid field and then they had conversation with Gorakh in which they had questioned Gorakh as to why he was ploughing the land. She has deposed that incident of assault then started and in the incident accused No. 1 gave blow of

axe on the head of Gorakh, accused No. 2 gave blow of iron bar on the head of Gorakh, accused No. 4 Sonabai gave blows of stick on the head of Gorakh and accused No. 4 also also gave blows of stick on the hands and legs of Gorakh. Thus, Mainabai (PW 5) has not given evidence as against accused No. 3 that he had assaulted Gorakh with sickle.

29) In the cross examination of Mainabai (PW 5), police statement of Mainabai was confronted to her. She had not stated before police that accused No. 4 Sonabai had assaulted Gorakh on his head, hands and legs by using stick. That omission is duly proved in the evidence of police officer who recorded her police statement and this omission is material. Due to such omission, the aforesaid substantive evidence given as against accused No. 4 Sonabai cannot be used against her.

30) Mainabai (PW 5) has deposed that during incident accused No. 1 attempted to give blow of axe on the head of PW 1 Dhondiba, but the blow hit the hand of PW 1 as PW 1 had raised his hands to save his head. She has deposed that accused No. 2 assaulted PW 1 by using iron bar and accused No. 3 assaulted PW 1 by using sickle. She has deposed that accused Nos. 4 and 5 assaulted her with stick, fist blows and kicks and in the incident, she

was injured. She had not stated before police that she had sustained injuries in the incident and that omission is proved by the defence. However, the tenor of the cross examination of PW 5 shows that her presence on the spot at the relevant time is not disputed by the defence. On the contrary, it is suggested to her that she had also gone with other prosecution witnesses for assaulting accused No. 2 Macchindra.

31) The injury certificate at Exh. 81 issued by Government Hospital and which is in respect of Mainabai (PW 5) is admitted by defence. This document shows that she had injuries like blunt trauma, abrasion etc., but she was examined on 25.4.2011 and the age of injuries was within 12 hours. This circumstance is considered against prosecution by the Trial Court and on that ground, she is disbelieved. It is already observed that the presence of Mainabai on the spot at the relevant time is not disputed by the defence.

32) Kamalabai (PW 8) is daughter of Dhondiba (PW 1). Her evidence shows that she was living with her parents as husband had deserted her about seven years prior to the date of incident. She has deposed that she, PW 1 and PW 5 were all present in front of their house when Gorakh was ploughing the land. She has deposed that all the accused entered that portion of land and when they entered,

accused No. 1 was carrying axe, accused No. 2 was carrying iron bar, accused No. 3 was carrying sickle and accused No. 4 was carrying stick. She has deposed that with these weapons all these accused attacked Gorakh and accused No. 5 assaulted Gorakh with fist blows and kicks. She has deposed that when PW 1 went ahead to save Gorakh, accused Nos. 1 to 5 assaulted PW 1 also. She has deposed that accused Nos. 4 and 5 assaulted Mainabai.

33) In the cross examination of Kamalabai (PW 8), it is suggested to her that she had not stated before police that accused No. 1 had assaulted PW 1 with axe, accused No. 2 had assaulted PW 1 with iron bar and accused No. 3 had also assaulted PW 1 with sickle and similarly accused Nos. 4 and 5 had assaulted PW 1. This omission was confronted and it is duly proved by the defence. It is not the version of PW 8 that in the incident, she was also assaulted. The aforesaid portion which is hit by contradiction can be ignored. Her evidence in a way is general as against the accused, though the particular weapons used by each accused are described by her.

34) Dhondiba (PW 1) has not stated in the evidence that accused Nos. 4 and 5 had assaulted him. It is not his version that accused No. 5 had assaulted deceased Gorakh. These inconsistencies in the evidence of PW 1 and other witnesses need to be kept in mind

as the F.I.R. was given by PW 1 and in that specific role was assigned by him to each accused. In view of the inconsistencies which are already quoted in the oral evidence of aforesaid three eye witnesses, it becomes necessary to ascertain to who can be believed and to what extent the evidence of each witness can be relied upon to base the conviction. For that, the other evidence which is circumstantial in nature needs to be considered.

35) Punja (PW 12) is examined by State as eye witness. In F.I.R. his name was mentioned as witness. He turned hostile and he did not give evidence on actual assault. However, other part of his evidence can be used. He has given evidence that the distance between his house and the house of informant is around 10-12 bullock ropes and from his house he heard shouts which were raised from the spot of offence. He has deposed that he went to the land of Gorakh and there, he noticed that Gorakh was lying in the land and the witnesses like informant (PW 1), wife of Gorakh (PW 5) and sister of Gorakh (PW 8) were present. He has deposed that accused had already left the spot of offence. He has deposed that the spot is situated at the distance of 30-40 ft. from the house of informant.

36) In the cross examination of Punja (PW 12), he showed his inability to tell as to whether the spot where the incident took

place is situated in the land of informant or it is situated in the land of accused.

37) The evidence given by Punja (PW 12) on the circumstance that during incident shouts were raised and due to that he had rushed to the spot need to be kept in mind as the circumstance shows that prosecution witnesses also must have rushed to the spot and they must have reached the spot prior to the arrival of Punja (PW 12) to the spot. The evidence of Punja to the effect that witnesses were present by the side of injured Gorakh also can be considered in support of case of prosecution. The tenor of cross examination of this witness shows that the defence did not dispute the evidence of Punja.

38) The evidence of Sanjay Sanap (PW 3), panch witness of seizure panchanama of clothes of informant on 25.4.2011 needs no discussion. The presence of PW 1 on the spot at the relevant time is not disputed by the defence.

39) Sanjay (PW 3) was witness on the seizure panchanama of clothes of accused No. 2 Macchindra. This panchanama at Exh. 35 dated 23.4.2011 is admitted by the defence. Under this panchanama, shirt and pant of Macchindra were seized. The

panchanama of seizure of clothes of deceased is at Exh. 37 and that document is also admitted by the defence. The office copy of covering letter with which the articles seized by police were sent to C.A. Office is at Exh. 62. On this document, there is evidence of Rangnath (PW 9), Police Sub Inspector. The C.A. report in respect of these articles is at Exh. 38. This evidence shows that blood of group 'B' was detected on the pant of accused No. 2 Macchindra. It shows that blood of group 'B' was detected on the clothes of deceased. On the clothes of informant, human blood was detected. This circumstantial evidence can be used in support of the case of prosecution and particularly as against accused No. 2 Macchindra.

40) The evidence of Police Inspector Ravindra Tayade (PW 13) who made most of the investigation of the matter shows that he arrested accused No. 1 on 26.4.2011. The arrest panchanama of accused No. 1 is admitted by defence. There is evidence of one Khemnagar (PW 4), panch witness on discovery of weapons on the basis of statements given by accused No. 1 under section 27 of Evidence Act. This evidence shows that the statement was given on 29.4.2011 by accused No. 1 and the weapons were recovered on the basis of this statement. The memorandum of this statement is proved as Exh. 51. There is evidence of panch witness PW 4 and of Investigating Officer that on 29.4.2011 accused No. 1 took police

and panchas towards the hut prepared by using dry fodder and from there he took out weapons like axe and sickle. The evidence of seizure panchanama of these weapons is at Exh. 52. The evidence shows that there were red stains on the axe. Both these weapons were sent to C.A. Office. Exh. 38, C.A. report shows that human blood was found on both the weapons, though the blood group could not be ascertained. The Trial Court has not relied upon this evidence. This Court holds that in view of the other circumstances of the case, there is no reason to disbelieve this evidence. There are some admissions of the panch witness in the cross examination and the Trial Court has given over much importance to absence of mention of sealing of the property in panchanama. Due to these circumstances, the entire evidence of discovery and seizure cannot be discarded.

41) In the evidence of another Investigating Officer Rangnath (PW 9), it is brought on record by the defence that one private complaint bearing No. M.29/2011 was referred for investigation by Judicial Magistrate, First Class to police. He also admitted that on 23.4.2011 itself accused No. 2 Macchindra had given report to police against the prosecution witnesses and deceased. However, the record was not specifically confronted and it is not proved. The judgment of the Trial Court shows that with list Exh. 49 some documents like photocopy of complaint given by the

side of accused and copy of M.L.C. in respect of accused No. 2 were produced. These documents were not proved. The contents of these documents are, however, considered by the Trial Court and on that basis, the Trial Court has observed that the time and place given by accused of the incident did not tally with the time and place given by prosecution witnesses in the present matter. That comparison could not have been done in view of the evidence already discussed and that grave error is committed by the Trial Court. The tenor of the defence shows that the defence did not dispute that some incident did take place on that morning. It is not disputed that there was litigation filed by the side of accused for partition in respect of the agricultural lands. Though the partition suit was decided in faovur of accused, the appeal against the said decision was filed and the decree of partition was not executed. These circumstances need to be kept in mind as due to these circumstances it cannot be inferred that the accused were cultivating the portion where the incident took place. It is not disputed that no chargesheet was filed by police against the prosecution witnesses in the matter which was referred by J.M.F.C. for investigation. Only on the basis of direction given by J.M.F.C. under section 156 of Cr.P.C., it cannot be inferred that the incident as alleged by the accused did take place and there was counter case in existence. The burden was on the accused to establish the circumstance either by giving positive evidence or by

creating probability on the basis of evidence given by prosecution witnesses. The relevant circumstances which the defence wanted to bring on record are not duly brought on record and no such probability is created.

42) In the cases like present one ordinarily accused take the defence either of exercise of right of private defence or of free fight. For ascertaining the right of private defence, the accused need to discharge the burden of proof which is given in section 105 of the Evidence Act. It is already observed that the defence has not established that Macchindra sustained injury in the incident much less by dangerous weapon. Further, in view of nature of civil dispute which was filed by the side of accused, it cannot be said that infact the accused persons were in possession of that portion. No probability is created by the defence that incident took place at the place other than the place shown in the present matter by the prosecution witnesses. Thus, it was not possible to consider or infer the exercise of right of private defence either of body or property. When only the injuries which were sustained by the deceased and the prosecution witnesses are proved and use of dangerous weapon is proved, there is no option left than to infer that the accused were aggressors.

43) In the case like present one where the incident is not disputed, when defence is taken that prosecution witnesses had assaulted the accused, when there is direct or indirect admission of the presence of accused on the spot at the relevant time, the presence of witnesses on the spot at the relevant time is not disputed, when there is medical evidence and other circumstantial evidence which corroborates the direct evidence, the Court cannot discard the direct evidence. The convincing reasons need to be given by Court for discarding direct evidence in such a case. Only due to some discrepancies in the evidence of eye witnesses or discrepancies in the medical evidence and direct evidence, the entire evidence cannot be discarded. In such cases, the Court must scrutinize the evidence to ascertain the part played by each accused in the incident and the Court must consider the provisions like provision of section 34 and section 149 of IPC for using the evidence available against the accused. If after such scrutiny and application of provision of section 34 or 149 of IPC, the Court finds that the discrepancies in the evidence have not created any other probability which must be reasonable one, the Court must act on the evidence available against the accused. On this point, the cases reported as **AIR 2000 SC 1271 [Jaipal Vs. State of Haryana]** and **AIR 2003 SC 4664 [Raj Kishor Jha Vs. State of Bihar]** can be referred. If such approach is not used by the Court and benefit of minor discrepancies

is given to the accused, then there will be acquittal in almost all criminal cases. If the evidence is sufficient to infer that only due to assault made by the accused the death took place or injury was sustained and if the aforesaid defences are not made out, the Court should not hesitate to convict the accused.

44) In the present matter, the relevant evidence is quoted by this Court. The evidence available as against accused Nos. 1 and 2 is very strong. Many contusions were found on the head of Gorakh when he was first examined by Dr. Shelke. The external injuries caused internal damage and ultimately the death took place due to those injuries. The weapons which could have caused those injuries were hard and blunt. Accused Nos. 1 and 2 were holding such weapons and there is direct evidence against accused Nos. 1 and 2 to that effect of three witnesses. First informant Dhondiba (PW 1) was injured in the incident and he had also sustained injuries due to hard and blunt weapons. It is already observed that there was no hurdle or obstruction between the house of informant and the spot of offence and it was possible for the witnesses to witness the incident and note the assault made by the accused persons. As against accused No. 2 there is the circumstance that he had approached police on 23rd itself and he had made allegations that he was assaulted in the incident. He was arrested on that day. Accused

No. 1 came to be arrested on 26th, but his presence on the spot is not disputed by the defence. These are the additional circumstances in addition to the aforesaid evidence given against accused Nos. 1 and 2.

45) Considering the nature of injuries found on the dead body of Gorakh and the presence of PW 1 on the spot at the relevant time, it does not look probable that weapon like sickle was used to cause these injuries. In direct evidence given as against accused No. 3 also, there are discrepancies in the evidence of three eye witnesses. The benefit of these discrepancies need to be given to accused No. 3 as they have created reasonable doubt about use of weapon like sickle in the incident. Considering the number of injuries found on the dead body which were contusions on the head of Gorakh and three injuries found on the person of PW 1, it does not look probable that accused Nos. 4 and 5 had assaulted PW 1. The relevant substantive evidence is already quoted and it also creates reasonable doubt about the case of prosecution that these lady accused assaulted either Gorakh or PW 1. Thus, the evidence considered as a whole leads to only one inference that accused Nos. 1 and 2 had together assaulted both deceased Gorakh first and then PW 1.

46) Both the sides have cited some reported case in support of the rival submissions. In the case reported as **2010 AIR SCW 5701 [Abdul Sayeed Vs. Vs. State of M.P.]**, the Apex Court has made it clear that when incident takes place within few minutes, in facts and circumstances, the exact version of incident revealing every minute details, exact part played by each accused cannot be given by witnesses. The Apex Court has observed that the Court cannot expect from each eye witness to state about all the injuries inflicted and the manner in which they were inflicted. The Apex Court has laid down that in facts situation discrepancy in medical evidence and ocular evidence is bound to occur and that discrepancy cannot tilt balance in favour of accused. It is also laid down that to the evidence of injured eye witness who has given graphic description of the incident due weightage must be given by the Court. This Court holds that the present case is on better footing as the presence of the witnesses of the present matter on the spot at the relevant time is not disputed by the defence.

47) In the case reported as **2013 DGLS SC 473 (SC) [Thaman Kumar Vs. State of Union Territory of Chandigarh]** at para No. 16, the Apex Court has made observations with regard to the circumstances when there is discrepancy in medical and oral evidence. The observations are as under :-

"16. The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eye-witnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third category no such inference can straightway be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony."

The relevant discrepancy and other evidence corroborating the direct evidence is already discussed by this Court. On this point, for accused reliance was placed on the case reported as **AIR 1980 SC 1873 [Purushottam & Anr. Vs. State of Madhya Pradesh]**. The facts of this reported case were altogether different and particularly on the nature of discrepancy.

48) The learned counsel for defence, respondents placed reliance on the observations made by this Court in the case reported as **2005(4) Bom.C.R. (Cri.) 410 [State of Maharashtra Vs. Shripati Govinda Varape and Ors.]**. The facts of this case show that prosecution failed to prove that accused were authors of injuries, prosecution failed to prove that the weapon of assault was in the hands of accused, the accused had also sustained injury in that incident and in view of those facts, the Trial Court had given decision of acquittal. This Court held that the view taken by the Trial Court was a possible view. In the case reported as **1991 MCR --189 [The State of Maharashtra Vs. Karbasappa s/o. Basavanappa Halkunde and Ors.]** which is cited by respondents, the version given to police officer was different than the evidence given in the Court. Due to material omissions and contradictions, the witnesses were not believed by the Trial Court and the High Court held that the view taken by the Trial Court was a possible view. The facts of the

other case reported as **1992 Cri.L.J. 2156 [Satya Narain Bhagat and Anr. Vs. State of Bihar]** Patna High Court show that there was no corroboration to the evidence of interested witness. The evidence of the witnesses was hit by material omissions and the spot of offence was not proved. Due to these circumstances, benefit of doubt was given to the accused. Reliance was placed by the learned counsel for respondents on the observations made by Supreme Court in the case reported as **1978 Cri.L.J. 177 [Bir Singh and Ors. Vs. The State of U.P.]**. In this case, the Apex Court held that adverse inference was possible as independent witness was not examined. In the present matter, one independent witness was examined, but he turned hostile. In the present case, this Court has discussed the evidence of three eye witnesses who include injured eye witness and so, the observations made by the Apex Court in the case of **Bir Singh** cited supra cannot help to defence in the present matter.

49) The learned counsel for respondents placed reliance on the observations made by this Court in the case reported as **1997 Cri.L.J. 1788 Bombay High Court [Narayan Kanu Datavale and Ors. Vs. State of Maharashtra]**. In this reported case, this Court held that it is not immutable rule that evidence of injured witness should be mechanically accepted at the time of appreciation of

evidence. This proposition cannot be disputed and the law already settled on it is discussed by this Court by quoting the case of Supreme Court. Reliance was placed on the observations made by this Court in the case reported as **1997 Cri. L. J. 3277 Bombay High Court [State of Maharashtra Vs. Vithal alias Balu Narayan Patale and and Ors.]**. The facts of this reported case show that the place where the incident took place was in possession of accused. The accused had sustained grievous injury and there was no evidence to show as to who had caused the fatal injury to the deceased. In view of those facts, this Court held that the view taken by the Trial Court was a possible view. This Court has already observed that when there is the evidence of eye witnesses, when there is evidence for corroboration, it is the duty of the Court to scrutinize the evidence carefully and to find out the truth from the evidence.

50) The learned counsel for respondents placed reliance on the observations made by Supreme Court in the case reported as **AIR 1991 SC 339 [Abdul Hamid and Ors. Vs. Vs. State of U.P.]**. In that case, many accused were involved and the charge for offence punishable under section 304 Part II r/w. 149 of IPC was proved. There was evidence that many accused had given beating by using Lathi, and other weapons and one person was assaulted. There were

injuries on the person of accused also. It was held that conviction on the basis of probability of free fight was not proper. This proposition is not disputed.

51) The Trial Court has given acquittal in the present matter by giving following reasons :-

(I) In the complaint which was filed by Macchindra, the time of incident was not given, but M.L.C. in respect of accused Macchindra dated 23.4.2011 showed that incident had taken place at 8.30 a.m. The place of incident given by Macchindra was different from the place of incident mentioned by witnesses in the present matter. The time given by the witnesses is also different than the time given by the accused. It is already observed that these circumstances were not established by defence and further, these circumstances could not have been treated as discrepancies. The accused have admitted that some incident took place but they did not create any probability in their favour.

(II) The Trial Court has held that the omissions in the previous statements of the witnesses are material. The omissions in F.I.R. are quoted as under :-

(A) (a) PW 1 had not stated that Gorakh had left home by saying that the land had remained unploughed

and so, he was going there to plough it.

(b) PW 1 had not stated in the F.I.R. and in the supplementary statement that the distance between his house and the place of incident was 40 ft.

(c) PW 1 had not stated in the F.I.R. and supplementary statement that accused Sonabai had come to the spot with stick.

(d) PW 1 had not stated in the F.I.R. and supplementary statement that Macchindra had assaulted him with iron rod on hands and legs.

(e) PW 1 had not stated that accused Lahanu had assaulted him with sickle on his hands and legs.

(B) PW 5 had not stated before police few things and following are the omissions quoted by the Trial Court :-

(a) She had received treatment in Government Hospital Sangamner on 23.4.2011.

(b) The distance between the spot of offence and her house is 30 to 40 ft.

(c) Accused No. 4 Sonabai assaulted her husband Gorakh with stick on his head, hands and legs.

(d) Accused No. 1 Bhika was about to give blow of axe on the head of informant.

In respect of these omissions, it can be said that benefit of those omissions can be given to the accused like accused Nos. 3 to 5, not to accused Nos. 1 and 2.

(C) Kamalabai (PW 8) had not stated before police the following facts :-

(a) On 22.4.2011 there was discussion in the family that the land where the incident took place was not yet ploughed and Gorakh was to plough it on the next morning.

(b) After hearing shouts of informant, PW 8 and PW 5 had rushed to the spot.

(c) The house of this witness is situated at the distance of 30-40 ft. from the spot of offence.

(d) Accused No. 1 Bhika assaulted the informant with axe, accused No. 2 Macchindra assaulted the informant with iron bar and accused No. 3 Lahanu assaulted the informant with sickle and so also accused No. 4 assaulted with stick and accused No. 5 assaulted with kicks and fist blows.

(III) Mainabai's M.L.C. is dated 25.4.2011. She was examined after two days of the incident. In the history given to the hospital

she informed that incident had taken place on 25.4.2011 at about 9.00 a.m. Age of injuries in M.L.C. is mentioned as within 12 hours. So, this medical evidence is inconsistent with the oral evidence of Mainabai and that falsifies the version of Mainabai. It can be said that the injury certificate could not have been relied upon, but due to admission of defence that Mainabai was present on the spot, the entire evidence of Mainabai could not have been discarded.

(IV) In the version of Dhondiba (PW 1), it is stated that the blow of axe was given by accused No. 1 on hand, but the injury found on the hand is not incised wound and it is only C.L.W.

(V) When the allegations are made that four persons assaulted PW 1, only three injuries were found on the person of PW 1. The benefit of this circumstance can be given to the accused, who had probably not played active role in the incident and that is already discussed.

(VI) No bleeding injury was found on the head of the deceased when blow of axe was given on his head. This is inconsistency and it is between the medical evidence and the oral evidence. The evidence of doctors show that the injuries found on the head of the deceased were caused by hard and blunt object and

axe cannot be called as hard and blunt object. This point is discussed in detail and due to this inconsistency the evidence of the eye witnesses cannot be discarded.

(VII) The injuries on the persons of the witnesses by themselves do not lead to inference of their credibility or truthfulness. It is true that only due to injuries, the witnesses cannot be called as credible or truthful. However, it becomes the duty of the Court to give proper weight to such evidence and if the witness is interested one, the evidence can be relied upon only by making close scrutiny. If there is no material infirmity in the evidence, the evidence of injured witness cannot be discarded. Further, the injury itself can give inference of the presence of witness on the spot. In the present matter, the presence of injured witnesses on the spot at the relevant time is admitted by defence in many ways.

(VIII) There is no corroboration of independent witness to the case of prosecution. In the present matter, the prosecution has examined one independent witness by name Punja (PW 12), who turned hostile. In any case, three eye witnesses were examined and their presence on the spot is not disputed by the defence. There is evidence to corroborate the direct evidence and in addition to that

there is admission of accused persons that some incident did take place at that time. Thus, the absence of evidence of independent witness has not affected the case of prosecution.

52) The aforesaid discussion shows that to most extent the reasoning given by the Trial Court is not convincing in nature. It can be said that the Trial Court did not make even an attempt to separate the truth from falsehood. It was not that difficult task. Due to that approach of Trial Court, there is error in the judgment.

53) In view of the discussion made above, this Court holds that there is more than sufficient evidence to prove that it is accused Nos. 1 and 2, who in furtherance of their common intention, assaulted Gorakh with weapons like axe and iron bar. The evidence is sufficient to prove that they together assaulted PW 1 also by using these weapons. There is evidence that the injuries which were inflicted to Gorakh on his head were sufficient in ordinary course of nature to cause the death. There were more than one contusions on the head and they had caused internal damage. As all the injuries found on the dead body of Gorakh were on the head, inference is easy that the blows were aimed at the head. Thus, there was either intention of murder or there was intention to cause such injury which would be sufficient in ordinary course of nature to cause the

death. This Court holds that both accused Nos. 1 and 2 are liable to be convicted for the offence of murder punishable under section 302 r/w. 34 of IPC.

54) Considering the site of injuries, weapons used and actual injuries inflicted to PW 1 Dhondiba, this Court holds that accused Nos. 1 and 2 are guilty of the offence of causing grievous hurt punishable under section 325 r/w. 34 of IPC.

55) In the present matter, no charge was framed for the offences punishable under sections 302 r/w. 34 of IPC and 325 r/w. 34 of IPC, though there was charge for the offences punishable under sections 302, 325 r/w. 149 of IPC. In the case reported as **(2010) 10 SCC 259 [Abdul Sayeed Vs. State of Madhya Pradesh]**, the Apex Court has laid down that there is no bar of law for convicting accused with the aid of section 34 of IPC in place of section 149 of IPC, if the evidence on record shows that the accused shared common intention to commit the crime. It is observed that if no apparent injustice or prejudice is shown to have been caused by the application of section 34 of IPC in place of section 149 of IPC, the Court can use section 34 of IPC for conviction. The facts of the present matter are sufficient to show that no prejudice will be caused to accused Nos. 1 and 2 if the provision of section 34 of IPC

is used in place of provision of section 149 of IPC.

56) In view of the discussion made above, this Court holds that Trial Court has committed error in acquitting accused Nos. 1 and 2 of the offences punishable under sections 302, 325 r/w. 34 of IPC. However, the view of the Trial Court in favour of remaining accused is a possible view. As this Court is not going to impose death penalty, there is no need of giving hearing to accused Nos. 1 and 2 on the point of penalty. In the result, following order :-

O R D E R

(I) Appeal as against accused No. 1 - Bhika Raoji Hajare and accused No. 2 - Macchindra Bhika Hajare is allowed. The judgment and order of acquittal given in favour of accused Nos. 1 and 2 in respect of offences punishable under sections 302, 325 r/w. 34 of IPC or 302, 325 r/w. 149 of IPC is hereby set aside.

(II) Accused No. 1 - Bhika Raoji Hajare and accused No. 2 - Macchindra Bhika Hajare stand convicted for the offence punishable under section 302 r/w. 34 of IPC and each of them is sentenced to suffer imprisonment for life and to pay fine of Rs.1,000/- (Rupees one thousand), each. In default of payment of fine, each accused is to undergo simple imprisonment for one month.

(III) Accused No. 1 - Bhika Raoji Hajare and accused No. 2 - Macchindra Bhika Hajare stand convicted for the offence punishable

under section 325 r/w. 34 of IPC and each of them is sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs.1,000/- (Rupees one thousand), each. In default of payment of fine, each accused is to undergo simple imprisonment for one month.

(IV) Both the substantive sentences given to accused Nos. 1 and 2 to run concurrently.

(V) Accused Nos. 1 and 2 are entitled to set off under section 428 of Cr.P.C. in respect of the period for which they were already behind bars.

(VI) In this case, accused Nos. 1 and 2 to surrender their bail bonds for undergoing the sentence.

(VII) Warrant of arrest and conviction is to be sent accordingly.

(VIII) Appeal filed as against accused Nos. 3 to 5 stands dismissed.

Copy of this judgment is to be given to accused Nos. 1 and 2 free of cost.

[K.K. SONAWANE, J.]

[T.V. NALAWADE, J.]

ssc/