

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 20 of 2017

WITH

CRIMINAL APPEAL NO. 38 OF 2017

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Mr. Rupesh Salgaonkar,
 S/o. Ramrai Salgaonkar,
 Aged 32 years, Male, Married, Indian
 National, R/o. H.No.348, Dando,
 Siolim- Goa. (Presently in Judicial ... Appellant
 Custody, Central Jail Colvale)

Vesus

State of Goa (through)

- 1 The Police Inspector
Officer-in-charge
(Anjuna Police Station)
- 2 The Public prosecutor
High Court of Bombay at Goa
Althinho Panaji Goa.

... Respondents

WITH

CRIMINAL APPEAL NO. 38 OF 2017

State of Goa,
 Through Anjuna Police Station,
 Anjuna, Goa. ... Applicant/
 Appellant

Vesus

- 1 Mr. Rupesh Salgaonkar,
 S/o. Ramrai Salgaonkar,
 Aged 32 years, Male, Married, Indian
 National, R/o.H.No.348, Dando,

Siolim- Goa.

- 2 Mr. Suraj Shirodkar
s/o, Sripad Shirodkar,
Aged 36 years, Male, Indian National,
R/o.H.No.318, Dando, Siolim- Goa.
- 3 Mr. Bhiva Salgaonkar,
s/o. Ramarai Salgaonkar,
Aged 35 years, Male, Indian National,
R/o.H.No.348, Dando, Siolim- Goa.
- 4 Mr. Nanu Salgaonkar,
s/o. Ramrai Salgaonkar,
Aged 38 years, Male, Indian National,
R/o.H.No.275/3, Dando, Siolim- Goa.
- 5 Mr. Ashok Salgaonkar,
s/o. Nonu Salgaonkar,
Aged 61 years, Male, Indian National,
R/o.H.No.276/3 EK, Dando, Siolim-
Goa.
- 6 Mr. Subhash Salgaonkar,
Aged 63 years, Male, Indian National,
R/o.H.No.276/3EJ, Dando, Siolim-
Goa.
- 7 Mr. Ashok Raoji Shirodkar,
Aged 56 years, Male, Indian National,
R/o.H.No.312, Dando, Siolim- Goa.
- 8 Mr. Ramrai Nanu Salgaonkar,
Aged 73 years, Male, Indian National,
R/o.H.No.253/3, Dando, Siolim- Goa.
- 9 Mr. Sham Dabolkar,
s/o. Vivekanand Dabolkar,
Aged 32 years, Male, Indian National,
R/o.H.No.347, Dando, Siolim- Goa.
- 10 Mr. Ulhas Dabolkar,
s/o. Vaikunth Dabolkar,
Aged 48 years, Male, Indian National,
R/o.H.No.348/4, Dando, Siolim- Goa.
- 11 Mr. Sumit Shirodkar,

s/o. Sripad Shirodkar,
Aged 30 years, Male, Indian National,
R/o.H.No.318, Dando, Siolim- Goa.

12 Mr. Ritesh Shirodkar,
s/o. Ramesh Shirodkar,
Aged 26 years, Male, Indian National,
R/o.H.No.269/P/A, Dando, Siolim-
Goa.

13 Mr. Rashid Shirodkar,
s/o. Ramesh Shirodkar,
Aged 22 years, Male, Indian National,
R/o.H.No.269/P/A, Dando, Siolim-
Goa.

14 Mr. Rakesh Salgaonkar,
s/o Ramrai Salgaonkar,
Aged 32 years, Male, Indian National,
R/o.H.No.348/1, Dando, Siolim- Goa.

Shri S.G. Desai, Senior Advocate with Mr. Pavithran A.V. and Mr. Rohan Desai, Advocate for the appellant in CRIA No.20/2017 and Advocate for the respondents No. 3 to 6, 8 to 10 and 14 in CRIA No. 38/2017.

Mr. S.R. Rivankar, Public Prosecutor for the State.

Mr. Arun De Sa, Advocate for the respondents No.2,7,11, 12 and 13 in CRIA No.38/2017.

**Coram:- M. S. SONAK &
NUTAN D. SARDESSAI, JJ.**

Reserved on : 1st August, 2019.

Pronounced on: 13th September,2019

JUDGMENT: (per Nutan D. Sardessai, J.)

The Criminal appeal No.20 of 2017 is at the instance of the lone accused who has been convicted by the learned Additional Sessions Judge, Mapusa for the offence punishable under Section 304 Part I IPC instead of Section 302 IPC amongst others while the Criminal Appeal No.38 of 2017 is by the State challenging the conviction of the lone accused No.1 Rupesh under Section 304 Part I IPC and praying for a conviction under Section 302 IPC amongst others and besides seeking a reversal of the judgment of acquittal qua the accused Nos.2 to 14 and a conviction under Section 302 IPC r/w. Sections 120B, 143, 147, 148, 504, 323 r/w. 149 IPC. The parties would hereinafter be referred to as the State and the accused for brevity's sake.

2. It was the case of the prosecution that sometime on 20/01/2013 at 00.15 hours at Bailoyee, Tisk, Dando Siolim all the accused persons No.1 to 14 hatched a criminal conspiracy acting in furtherance of their common object, formed an unlawful assembly armed with deadly weapons like hammer etc. and assaulted the complainant Nilesh Pomburpekar and his friends with kicks and fist blows thereby causing injuries to them, abused them with filthy

words over the issue of the erection of the shed at Matarajeshwar Devasthan, Dando and furthermore the accused no.1 Rupesh assaulted Arun Toraskar with a hammer on his head causing him serious injuries resulting in his death thereby committing the offence of murder punishable under Section 302 IPC. The learned Additional Sessions Judge, North Goa Panaji had framed charges against all the accused for the above stated offences to which each of them pleaded not guilty and claimed to be tried and thereupon the prosecution proceeded to examine various witnesses in support of its case numbering 17 in all. The accused in defence after broadly denying the case of the prosecution led against them, examined two witnesses in defence and closed their case.

3. The learned Additional Sessions Judge on the basis of the material on record came to a clear finding that the prosecution had failed to establish the aspect of criminal conspiracy, that all the accused except one had acted in furtherance of their common object and as such gave them the benefit of doubt and acquitted the accused Nos.2 to 14 of the charges levelled against them. The learned Additional Sessions Judge however took a view that the prosecution had established its case against the accused No.1

beyond all reasonable doubt though for the offence under Section 304 Part I IPC and convicted him accordingly sentencing him to undergo rigorous imprisonment for a term of 10 years and to pay a fine of ₹10,000/- in default Simple imprisonment of six months.

4. Heard Shri S.R. Rivankar, learned Public Prosecutor on behalf of the State who contended that all the accused in furtherance of their common object had hatched a criminal conspiracy and thereafter mounted an assault on the complainant and his companions on the evening of 19/01/2013 initially and thereafter around midnight had hailed the complainant and his companions resulting in a free fight and the accused No.1 in particular had caused the murder of Arun by giving a hammer blow on the right side of his head. In that context, he referred to the testimony of the eyewitnesses and submitted that it was not a case of a sudden fight but a pre-planned attack after forming an unlawful assembly in furtherance of the criminal conspiracy hatched to mount the assault on the complainant and his companions. He next referred to the testimony of the Doctor who had conducted the autopsy examination on the body of the deceased Arun and submitted that the injury No.1 was fatal in the ordinary course of nature.

5. Shri S.R. Rivankar, learned Public Prosecutor He also adverted to the testimony of the defence Ashok Dw1 who had clearly admitted the previous dispute. Insofar as the injuries on the person of the accused was concerned, it was his contention that they were simple in nature and not much weightage could be given to these injuries. It was a fit case to reverse the judgment of acquittal against the accused Nos.2 to 14 to one of conviction under the various heads of charge including that under Section 302 IPC and reversing the judgment of conviction against the accused No.1 under Section 304 Part I to that under Section 302 IPC. He placed reliance in **Lalji and others v/s. State of U.P.** [1989 AIR (SC) 754], **Yuniz @ Kariya v/s. State of Madhya Pradesh** [2003 0 CrLJ 817], **Bolineedi Venkataramalah and others v/s. State of A.P.** [1994 0 AIR (SC) 76] and **State of Rajasthan v/s. Dhool Singh** [AIR 2004 SC 1264] and pressed for the conviction of all the accused under Section 302 IPC amongst others and the dismissal of the appeal filed by the appellant No.1 and allowing the State appeal.

6. Shri S.G. Desai, learned Senior Advocate on behalf of the accused No.1 submitted that the group of the deceased had confronted the group of the accused who belonged to Congress

party on the construction of the structure around 4.00p.m. There was no evidence that the accused group had knowledge that the deceased group would appear at the scene on the stated date and time and therefore the case of the State about the conspiracy and the formation of an unlawful assembly was totally belied. The investigation in the case was motivated at the instance of the deceased group which belonged to the BJP party. The recovery of the hammer purportedly under Section 27 of the Indian Evidence Act was suspicious and no credence could be given to such recovery. There was no explanation forthcoming at the instance of the State to account how six of the group of the accused sustained injuries. The presence of Head Constable Nitesh Pw8 also created a serious doubt on the crime and his inaction to react appropriately. On his part he placed reliance in **Darshan Singh v/s. State of Punjab and another** [(2010)2 SCC 333] and submitted that the investigation in the case was motivated. For that matter even the scene of crime was not properly shown which was next to the house of the accused and whose presence at the spot was most natural.

7. Shri S.G. Desai, learned Senior Advocate for the accused No.1 invited attention to the testimony of Dr. Kamat Pw13 to point out

the injuries suffered on the person of the accused and how these injuries were unaccounted for by the State unlike the lack of injuries on the person of the deceaseds group which had not been explained by the State. It was the group of the deceased which had carried the weapons to the scene of crime and therefore no motive could be attributed to the group of the accused for the alleged incident. The so called eyewitnesses were all interested witnesses and whose evidence should be scrutinized thoroughly. There was a serious doubt about the Panch to the scene of offence Panchanama who was known to the complainant and who had otherwise no need to go to the scene of crime. He also sought to raise doubts about the attachment of the scooter of the deceased Arun and contended that there was no such attachment. He also raised doubts about how one of the witnesses Samir Pw2 could have identified the alleged weapon of assault at Police Station when it was allegedly concealed by A1 Rupesh. His testimony however did not inspire confidence when he himself was facing criminal charges.

8. It was the contention of Shri S.G. Desai, learned Senior Advocate that the information about the crime was received by PI Lotlikar Pw17 at around 01.30hours unlike the FIR which showed

that the offence was registered around 02.30 hours based on the complaint of Nilesh Pw3. Therefore, it was not a complaint per se of Nilesh Pw3 but it was a statement under Section 161 CrPC. The investigation had started to on the basis of the telephonic information received at the Police Station and not on the complaint of Nilesh Pw3. He placed reliance in **State of Andhra Pradesh v/s. Punati Ramulu and others** [1994 Supp(1) SCC 590], once again invited attention to the testimony of Nilesh Pw3 to submit that it did not inspire confidence nor that of Sagar Pw4, Kishor Pw5, Sitaram Pw6 and Sarvesh Pw7. It was his contention that even assuming that the scooter was attached under the attachment panchanama dated 23/01/2013, the panchas had not been examined nor was the brother of the deceased examined who had taken the scooter home and therefore there was a serious doubt on recovery of the scooter. There was a serious doubt about the recovery of the hammer at the instance of A1 Rupesh. Moreover, the panch to the recovery panchanama was not an independent but a related/partisan witness. Further reliance was placed in **Gambhir v/s. State of Maharashtra** [(1982) 2 SCC 351], **Bir Singh and others v/s. The State of Uttar Pradesh** [AIR 1978 SC 59] and **Sudhakar Alia Sudharsan v/s. State** [(2018) 5 SCC 435] before wrapping up his

arguments to contend that even assuming at the highest that the case was established against the accused under 304 IPC, it had to be under Part II and not Part I IPC.

9. Shri Arun Bras De Sa, learned Advocate for the accused Nos.2,7, 11, 12 and 13 submitted that there was a suppression of the genesis of the incident. No offence under Section 149 IPC was at all made out and when these accused had no knowledge that A1 had carried the hammer. He adverted to the testimony of Sarvesh Pw7 and submitted that no act was attributed to any of these accused and therefore there was no case of common object or criminal conspiracy made out against these accused and similarly by pointing out to the testimony of H.C. Nitesh Pw8. No perversity was spelt out in the judgment of acquittal and therefore there was no basis in the State appeal which had to be dismissed simplicitor. He placed reliance in **Lakshmi Singh and others v/s. State of Bihar** [(1976) 4 SCC 394], **Ananta Kathod Pawar v/s. State of Maharashtra** [(1997) 11 SCC 564], **State of Punjab v/s. Sanjiv Kumar @ Sanju and ors** [AIR 2007 SC 2430] and concluded that the appeal against acquittal had to be dismissed with costs.

10. Shri Rohan Desai, learned Advocate for the respondents No.3 to 6, 8, 9, 10 and 14 submitted while adopting the arguments of Shri S.G. Desai, learned Senior Advocate for the accused No.1 and Shri Arun Bras De Sa, learned Advocate for the other accused that the presence of the accused at the spot was natural as they were residing in the vicinity of the spot of crime. They were innocent bystanders and therefore there was no basis in the case of the alleged criminal conspiracy or having acted in furtherance of their common object armed with deadly weapons to mount an assault on the complainants' group. He too made a passing reference to the evidence of the witnesses and submitted that no case whatsoever was made out on behalf of the State for the reversal of the judgment of acquittal and therefore the State appeal had to be dismissed.

11. Shri Rivankar, learned Public Prosecutor countered the submission of Shri S.G. Desai, learned Senior Advocate on the aspect of the motivated investigation by adverting to the testimony of H.C. Nitesh Pw8 who had done his public duty by immediately informing the incident at the Police Station and therefore there was no basis to contend that it was a case of political interference. The

conduct of PI V. Karpe Pw16 was also natural and therefore the testimony could not be painted with the brush of interestedness or motivation for political reasons. Insofar as the plea of self defence was concerned, it was his contention that the injuries suffered by Arun were not commensurate to the act in self defence as it caused grievous-fatal injuries to the deceased. There was no proportionality in the plea of self defence and which was otherwise destructive in the face of a plea that a hammer fell on the deceased in the course of the scuffle.

12. Shri S.R. Rivankar, learned Public Prosecutor placed further, reliance in **V. Subramani and another v/s. State of T.N.** [(2005) 10 SCC 358] and **Rizan and another v/s. State of Chhattisgarh** [(2003) 2 SCC 661]. The recovery panchanama of the scooter was produced through the IO under Section 294 CrPC and therefore there could not be any doubt on its recovery. On the vital aspect of the flaw in the testimony of Nilesh Pw3 that he was shown the hammer at the Police Station when it was apparently concealed by A1 Rupesh, he placed reliance in **State of UP v/s. Anil Singh** [AIR 1988 SC 1998] and submitted that at the highest it was a minor discrepancy at his instance and there was no reason to disbelieve

his testimony. Moreover, A1 Rupesh was arrested on 23/01/2013 while the recovery of the hammer was done at his instance on 25/01/2013. The CFSL packets were duly sealed and merely because there was an exaggeration of by Nilesh Pw3 to be overawed by the Court atmosphere and to admit the identity of the hammer could not overthrow his entire evidence. Insofar as the reference to the construction is concerned viz-a-viz the eyewitnesses Samir Pw2, Nilesh Pw3, Sagar Pw4 and Kishor Pw5, it was his contention that the deceased Arun had fallen on the ground and not on the road and there was no departure from the substantive evidence. Once again he placed reliance in **Rohtash Kumar v/s. State of Haryana** [2013 All MR (cr.) 2620] and **Sidhartha Vashisht v/s. State (NCT) of Delhi**[(2010) 6 SCC 1] to meet the contention of the defence that the FIR was concocted. It was also his contention that there was no basis to allege that the recovery was tainted only because the witnesses were related when their testimony otherwise inspired confidence. It was a fit case to dismiss the appeal of the first accused and to allow the appeal of the State and convict each of the accused for the offence under Section 302 IPC amongst others.

13. We have considered the contentions of Shri S.R. Rivankar, learned Public Prosecutor on behalf of the State, Shri S.G. Desai, learned Senior Advocate on behalf of the accused No.1, Shri Arun Bras De Sa, learned Advocate on behalf of the accused Nos. 2,7,11, 12 and 13 and Mr. Rohan Desai, learned Advocate for the accused No.3 to 6, 8 to 10 and 14. We have also considered the relevant judgments relied upon by the prosecution, those of the defence and besides scrutinized indepth the evidence on record to appreciate each of their contentions and in that view of the matter proceed to decide the appeal.

14. In **Ananta Pawar**(supra), the Hon'ble Apex Court held that where the Trial Court had recorded a sudden and free fight between the two groups, there was no scope for convicting the members of one group under Section 147 or 148 or 149 IPC and the accused would be liable only for individual acts. Besides, in the absence of any specific evidence led by the prosecution for convicting under individual acts, the appeals had to be allowed and the accused had to be acquitted. **Sanjiv Kumar**(supra), held that mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object.

Lakshmi Singh(supra), held that where there was a failure of the prosecution to explain the injuries on the accused, two results could follow: (i) that the evidence of the prosecution witnesses is untrue and (ii)that the injuries probabalise the plea taken by the appellants.

15. **Darshan Singh**(supra), culled out the principles on a consideration of the various judgments in the matter of the plea of self defence at paragraph 58 and as below:(i) Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits. (ii)The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation. (iii) A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised. (iv)The right of private defence commences as soon as a reasonable apprehension

arises and it is co-terminus with the duration of such apprehension. (v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude. (vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property. (vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record. (viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt. (ix) The Indian Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence. (x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened.

16. In **Punati Ramulu** (supra), the Hon'ble Apex Court held that where the Police Officer deliberately not recording FIR on receipt of information about cognizable offence and the FIR is prepared after reaching the spot and after due deliberations, consultations and discussion, such a complaint could not be treated as FIR. It would

be a statement made during the investigation of a case and hit by Section 162 Cr.PC. Consequently, it would be unsafe to rely on such a tainted investigation. In **Sudhakar**(supra), the Hon'ble Apex Court held that it is settled law that there cannot be any hard-and-fast rule that evidence of interested witness cannot be taken into consideration and they cannot termed as witnesses. But, the only burden that is cast upon the courts in such cases is that the Courts have to be cautious while evaluating evidence to exclude the possibility of false implication. Relationship can never be a factor to affect the credibility of a witness as it is not possible always to get an independent witness.

17. In **Bir Singh** (supra), the Hon'ble Apex Court held that it is the duty of the prosecution to examine independent witnesses available. Where all the eye witnesses examined by the prosecution had serious animus against the accused and were interested in implicating the accused and neither independent witnesses were examined nor any reasonable explanation was given by the prosecution, the Court would be justified in drawing an adverse inference against the prosecution.

18. In **Gambhir** (supra), the Hon'ble Apex Court laid down the test to maintain a conviction where a case rests upon the circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; (iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

19. In **Dhool Singh** (supra), the Hon'ble Apex Court held that the number of injuries is not always the determining factor in ascertaining the intention. It is the nature of injury, the part of body where it is caused, the weapon used in causing such injury which are the indicators of the fact whether the accused caused the

death of the deceased with an intention of causing death or not. In **Bolineedi Venkataramaiah** (supra), the Hon'ble Apex Court held that for arriving at a conclusion of constructive liability the Courts have to see whether they had common intention or common object and the proved circumstances like the formation of an unlawful assembly, the weapons with which they were armed and the active role played by them. In the facts at large, the proved circumstances established that the appellants were members of an unlawful assembly who had chased the deceased and necessarily they must have inflicted injuries which ultimately proved fatal which were enough to invoke Section 34 or 149 IPC.

20. In **Yunis @ Kariya** (supra), the Hon'ble Apex Court held that where eight persons, each armed with weapons, attacked a single individual in broad daylight in a market place, alleged discrepancy between the evidence of eye witnesses and injuries mentioned by autopsy surgeon found not real. The suggestion that place of occurrence has been changed by prosecution was rejected. The doubt regarding the veracity of eye witnesses found misconceived and in the result upheld the conviction and dismissed the appeals. In **Lalji and others** (supra), the question at large

before the Hon'ble Apex Court was whether in view of the death caused to Girdhari and Siddhu by the unlawful assembly which is punishable under Section 302 with the aid of Section 149 IPC, the corroboration as to participation of each individual member of the assembly would be necessary, and if so, whether in the instant case there is such corroboration. It considered Section 149 IPC which provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person, who at the time of committing of that offence is a member of the same assembly, is guilty of that offence. Thus, whenever so many as five or more persons meet together to support each other, even against opposition, in carrying out the common object which is likely to involve violence or to produce in the minds of rational and firm men any reasonable apprehension of violence, then even though they ultimately depart without doing anything whatever towards carrying out their common object, the mere fact of their having thus met will constitute an offence.

21. In **Rizan** (supra), the Hon'ble Apex Court held that the burden of proof is on the accused who sets up the plea of self-defence and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of self- defence. The Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not required to call evidence: he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The accused need not prove the existence of the right of private defence beyond the reasonable doubt. It is enough for him to show as in the civil case that the preponderance of probabilities is in favour of his plea.

22. In **Anil Singh** (supra), the Apex Court held that the prosecution case should not be rejected merely because of minor inconsistencies in it or certain embellishments in the version of the witnesses. The Court should sift the truth from falsehood. In **Rohtash Kumar**(supra), the Hon'ble Apex Court held in a case of murder based on circumstantial evidence that while appreciating the evidence of a witness, minor discrepancies on trivial matters which do not affect the core of the case of the prosecution, must not prompt the court to reject the evidence in its entirety. Therefore, unless irrelevant details which do not in any way corrode the credibility of a witness should be ignored. The evidence of a prosecution witness cannot be rejected in toto, merely because the prosecution chose to treat him as hostile and cross examined him. The evidence of such witnesses cannot be treated as effaced, or washed off the record altogether.

23. In **Damodar** (supra), the question at large before the Hon'ble Apex Court was whether a telephonic message could be treated as an FIR, the DD entry showing that an unknown person had given an information on telephone about a vehicle hitting the deceased did not constitute an FIR. The written report lodged by

an eye witness PW15 was not hit by Section 162 Cr.P.C. It further held that the conspiracy can be proved even by circumstantial evidence and therefore the lack of direct evidence relating to conspiracy had no consequence. An overt act is inessential when the conspiracy is to commit any punishable offence. The most important ingredient of the offence being the agreement between two or more persons to do an illegal act.

24. In **Sidhartha Vashisht** (supra), the infamous Jessica Lal murder case, the Hon'ble Apex Court considered what constituted in the FIR. In the facts of that case the question at large was whether the three telephonic messages received by the Police at around 2:25 a.m. or the statement made by Shyan Munshi recorded at Ashlok Hospital constitute the FIR. On considering a host of judgments, the Hon'ble Apex Court held that the telephonic message was an extremely cryptic one and could not be regarded as an FIR in any sense of the term.

25. Samir Pw2 apart from spelling out the relations inter se the accused had spoken about the incident which had taken place earlier in the evening of 19/01/2013 at about 16.00 hours when Arun, since deceased, had questioned one of the accused Ashok regarding

the construction which was undertaken at Matarajeshwar Devasthan. Arun had confronted him alongwith Nilesh as to how he was carrying out the construction work of the shed without the permission of the villagers when the accused No.5 Ashok reacted by giving abuses and followed by them pushing each giving rise to a complaint at the Siolim Outpost at the instance of Arun and Nilesh. He indicated thereafter that on that same night he had gone for food with Nilesh, Sagar, Kishor and Sarvesh at about 9.00pm in a shack belonging to said Arun situated at Dando and had left the shed after food around 23.45 hours. On reaching at Bailoyee, Tisk, on their way home, they had noticed that the accused present alongwith some other persons and halted their the vehicles. Arun has also reached the spot on his scooter in the meantime and thereupon the accused started arguing with him regarding the shed at Matarajeshwar Temple. There was a scuffle between them and Nilesh contacted 100 when one policeman named Nitesh Pw8 was present who was convincing A1 Rupesh to move from there. A1 Rupesh however told the police that he would teach a lesson, went towards Arun with a hammer and gave two blows on his head due to which he fell down from the scooter on the ground and sustained bleeding injuries.

26. Samir Pw2 stated further that all the accused had dispersed from the scene alongwith the other persons who had gathered alongwith them and then they shifted the injured Arun, since deceased, in a Wagon-R Car initially to the Primary Health Centre, Siolim and thereafter to the District Hospital at Mapusa where he was declared brought dead. A cursory perusal of his evidence would indicate that there was not a word or whisper at his instance about any conspiracy being hatched by the accused or that they were armed with any weapons so as to act in furtherance of their common object and or that the accused were the perpetrators of the crime. Rather his testimony is indicative of the fact that it was A1 Rupesh alone who had brought the hammer and dealt a fatal blow on the head of Arun, since deceased. Attempts were made to bring out the various distances from the shack of Arun to the residence of the accused and the availability of alternate accesses to them. An attempt was also made to bring forth evidence on record regarding his involvement in criminal cases but barring this aspect there was no rebuttal of his testimony on the vital point that A1 Rupesh had dealt a fatal blow with a hammer on the head of Arun although it must be said that he was absolutely silent on the role played by any of the other accused Nos.2 to 14 in the said crime. Rather his

testimony would indicate that the accused were standing outside the houses near the road and that it was on seeing that the group of the complainant had stopped and thereafter there was an exchange of abuses and followed by the lethal blow by A1 Rupesh on the head of Arun. Shri S.G. Desai, learned Senior Counsel tried to make much about the discrepancy in the scene of offence but nothing substantially turns on the same looking to the scene of offence as indicated from the examination of Deepak Pw1 and viz-a-viz the testimony of the eyewitnesses to which we would allude shortly.

27. Nilesh Pw3 too spoke about the illegal construction going on in the temple of Matarajeshwar Temple at Dando Siolim and being carried out without the permission of the Temple Committee and without the knowledge of the locals. A5 Ashok had abused them with filthy words on the evening of 19/01/2013 on being confronted about the said construction giving rise to a complaint at the Siolim outpost and registered as an NC complaint. On the same night around 21.00 hours he alongwith Sagar, Tarzan @ Sarvesh and Kishor had gone to the shack of Arun at Dando, Siolim for dinner and came out of the shack around 23.00 hours. On reaching at the Tisk Siolim they noticed a crowd and stayed there to find out what

had happened. A policeman was available at the spot who told A1 Rupesh to go away but instead A1 Rupesh stated that he would kill Arun there only and he would show him. Arun had not reached the spot till then but he came soon thereafter on the scooter. He was confronted by A5 Ashok, A8 Ramrai and A6 Subhash as to why he was concerned with the construction being done at the temple when A1 Rupesh rushed with a hammer and assaulted him on his head.

28. Niles Pw3 had revealed that A12 Ritesh, A10 Ulhas, A9 Sham, A7 Ashok, A4 Nonu, A5 Ashok, A11 Sumit, A2 Suraj and A13 Rashid as the persons who had assaulted him and others with hands. Arun had fallen on the ground with bleeding injuries on his head after the assault with a hammer by A1 Rupesh. He too corroborated the version of Samir Pw2 that he was immediately shifted to the Primary Health Centre, Siolim and then to the District Hospital Mapusa where he was declared dead. On his part too he too had not revealed about any of the named accused being armed with any weapons except A1 Rupesh who had assaulted Arun with a hammer on the right side of his head. Rather digressing for a moment, the absence of injuries on any of the complainant party belies the case of the prosecution that the accused except A1

Rupesh were armed with weapons like dandas, sticks etc. etc. and or that they had mounted the assault on the complainant party. An attempt was made on behalf of the defence to highlight that alcohol was easily available in the shack of Arun and that the complainant party had had alcohol alongwith their food and they were the ones who had initiated the fight with the group of the accused. The presence or availability of alcohol in the shack of Arun does not at all establish that the group of the complainant had consumed alcohol on that night and or that they had initiated the fight between them and the group of the accused. Although an attempt was made to impeach his credibility on account of a case pending against him before the Children's Court, nothing substantially turns on that count. Besides, the complaint of Nilesh Pw3 was registered at the Police Station soon after the incident and therefore the telephonic message at the Police Station which was cryptic in its contents cannot be taken to be an FIR and as to treat the complaint of Nilesh(Pw3) as a mere statement under Section 162 Cr.P.C.

29. Sagar Pw4, Kishor Pw5 and Sarvesh Pw7 spoke about the incident of abuses on the evening of 19/01/2013 at the instance of the accused in the quarrel that ensued between the complainant

party and the accused and then spoke about the incident on the late night hours of 19/01/2013 when A1 Rupesh in particular after abusing them with filthy words had come with a hammer and assaulted Arun with it on the right side of his head while he was astride the scooter and fell on the ground with bleeding injuries on his head. Each of these persons who were eyewitnesses to the incident, corroborated the version of Samir Pw2 and Nilesh Pw3 about the assault on the person of Arun by A1 Rupesh though at the same time each of them were silent on the other accused were armed with any weapons or having assaulted the group of the complainant if at all the case of the prosecution is to be believed that all the accused in furtherance of their common object had hatched a criminal conspiracy and then assaulted the complainant party and Arun in particular. Attempts were made to impeach their credibility but which needs no further pen to paper looking to their unvarnished version inspiring confidence and corroborating that of Samir Pw2 and Nilesh Pw3.

30. Sitaram Pw6 had come to the spot after the incident of assault and when he noticed Arun, since deceased, lying on the ground in blood and blood coming out of his head. He had brought

his Wagon-R vehicle and taken the injured Arun to the Health Centre at Siolim and thereafter he was taken in an ambulance to Azilo Hospital, Mapusa where he was declared brought dead. He had learnt that it was A1 Rupesh who had assaulted Arun over the issue of the construction of a shed at Matarajeshwar Temple. His testimony being that of a witness who had reached the spot soon after the incident of assault inspires confidence to corroborate the prosecution case that Arun was lying on the ground in a pool of blood with blood oozing out of his head. In all fairness he did not at all claimed any knowledge of any altercation between the group of the complainant and or the accused and who actually was responsible for causing such bleeding injuries to Arun, since deceased.

31. Deepak Pw1 had acted as a panch at the instance of PI Lotlikar Pw17 on 20/01/2013 to the scene of offence which had taken place during the late night hours of 19/01/2013 and the early morning hours of 20/01/2013. He described the scene of offence being near a four road junction where he was shown blood fallen in between the electric pole and telephone pole, chappals, sandals, monkey cap, blood fallen on the muddy portion by the side of the

road which was collected by the police as also the control sample of mud and being duly packed and sealed. He identified the photographs and the attached property. Undoubtedly, he knew the complainant Niles Pw3 being a resident of Novabhat, Siolim which by itself is no ground to disbelieve his testimony. He also knew the deceased Arun who was running a shack at Udo. He was familiar with the terrain of the place and described the ways to go from the bar to the house of the complainant and the other houses. There was mostly an attempt at the instance of the defence to bring on record that it was not essential for the complainant party to come by the road in front of their houses and that they had alternate access to go to their respective houses from the bar/ shack of Arun, since deceased. Shorn of these statements, there is nothing in his testimony to disbelieve the case of the prosecution on the scene of offence being in the vicinity of the four road junction and those of the houses of the accused and more particularly the attachment of the various articles from the scene of crime.

32. PC Nitesh Pw8 was a constable attached to the Anjuna PS and working at the Siolim outpost on 19/01/2013 when there was a complaint from the local people of Dando, Siolim in respect of the

erection of a shed of Matarajeshwar Temple. There was opposition to the said erection by Nilesh Pw3, Arun (since deceased), Sagar Pw4, Rajesh, Ramakant and Samir from Dando, Siolim. One of the accused Ashok had abused them and Arun, since deceased, and thereupon Nilesh Pw3 had filed an NC complaint at the Siolim outpost which was registered by him. The accused Ashok had also filed complaint against them on the same evening which too was registered as an NC complaint. Materially he revealed that he received information on the same night around 23.20 hours that a fight was likely to ensue between the two groups at Dando, Siolim over the issue of erection of the temple shed and he had informed the Anjuna PS requesting them to depute staff and himself went to the spot. He had seen A1 Rupesh, Suraj, Bhiva, Nonu, Ashok, Subhash, Ashok, Ramrai, Sham and Ulhas i.e. all the accused alongwith 10-12 other persons who were from Dando, Siolim and requested them to go away from the spot. In the meantime, Nilesh Pw3, Sagar Pw4, Kishor Pw5, Samir Pw2 and Tarzan Pw7 came to the spot with their motorcycles and stopped on seeing the group. Arun, since deceased, also reached the spot on his scooter and at that time an argument took place between the said Arun and the accused on the issue of erection of the temple shed. He had

requested them to maintain peace but they did not move away from the spot.

33. PC Nitesh Pw8 had requested A1 Rupesh to go away from the spot who did not go away and instead threatened Arun, since deceased, that he would teach him a lesson and would assault him there. This was followed by hot arguments and the accused person started abusing Kishor Pw5, Nilesh Pw3, Sagar Pw4, Samir Pw2 and Tarzan Pw7 with filthy words and physically started assaulting them with fist blows and kicks. A1 Rupesh brought a hammer and attacked Arun with a hammer on his head who fell on the ground, started bleeding and became unconscious. Sitaram Pw6 came with a vehicle and took Arun to the PHC Siolim from where he was referred to the District Hospital Mapusa in an ambulance and the Doctor declared him dead on arrival. He had personally seen A1 Rupesh assaulting Arun with a hammer on his head which he duly identified in Court upon being shown to him from the envelope bearing the seals of the CFSL, Hyderabad. A serious doubt was sought to be created on his presence, his conduct and his version on the incident of assault at the spot.

34. Nitesh Pw8 was materially unshaken on his testimony that he had informed his senior at the Anjuna Police Station telephonically upon receipt of the information about the fight likely to take place at Dando, Siolim. The fact that the Anjuna Police had not reacted promptly nor deputed staff at the spot is something cannot be attributed to Nitesh Pw8 nor could be held him responsible for any inaction on the part of the Anjuna PS to act with promptitude despite him relaying the said information. Merely because he knew Nilesh Pw3, Sagar Pw4, Kishor Pw5, Samir Pw2 and Tarzan Pw7 would not make his testimony any the less reliable when he was from that locality, was posted at the Siolim outpost and had occasion to know these persons due to his said posting.

35. PC Nitesh Pw8 had not faltered in his testimony that he had issued a reminder to the Anjuna Police Station to send the staff at the spot and the SHO had assured him that he would send the staff. It is another matter that no staff were deputed till even the time the accused had left the spot and Arun, since deceased, was initially taken in a car to the PHC Siolim and later by an ambulance to the District Hospital at Mapusa. Rather his assertion that he had informed the SHO telephonically that the persons gathered at the

spot were not going away on his request rather indicates his commitment to duty to bring peace at the spot and to ward off the untoward incident. However as rightly pointed out by Shri De Sa, learned Advocate for some of the accused that his statement that it was a fight between two groups which had taken place all of a sudden belies the case of the prosecution that the group of the accused became members of an unlawful assembly in furtherance of their common object and armed with weapon to do harm to the group of the complainant. Instead it becomes obvious from the tenor of his testimony that it was a free fight between the group of the accused and the complainant with none armed except A1 Rupesh who had dealt a fatal hammer blow on the head of Arun, since deceased. Nitesh Pw8 had otherwise maintained and accounted for the fact that he was informed about the fight between the two groups being that of the accused and of the complainant since NC complaints were lodged by either by them earlier in the evening.

36. Dr. M. Ghodkirekar Pw9 had examined the body of Arun, since deceased, in the Crime No.11 of 2013 of the Anjuna Police Station at their instance on 20/01/2013. He had found a split laceration over

the temporal region of the scalp just about the right mastoid process and 1cm behind the upper inversion of the ear pinna with a compound comminuted fracture in oval shape signature type of oval shape signature type over the right temporal bone with its lower edge touching the upper border of mastoid process. There were multiple small fragments to the fracture portion of his fracture window which had penetrated the brain matter of the right temporal lobe thereby making multiple lacerations. He had also noticed the features of black eye for right eye, an abrasion with bruise over the left side chest, below left clavicle and all these injuries were ante-mortem in nature and were caused by blunt force impact. Dr. M. Ghodkirekar on internal examination had noticed effusion of blood present under the injury No.1 on scalp, with the underlying depressed fracture of signature type. The fragments of depressed fracture had penetrated in dura and brain substance of the right temporal lobe. He had preserved the viscera and materials for chemical and serological examination and certified the cause of death as due to damage to the brain caused vide the injury No.1 in turn caused by a blunt object, fresh at the time of death and was necessarily fatal. On being shown the hammer, he did not at all rule out the possibility that such a hammer could cause the injury No.1

found on the deceased. His examination confirms the prosecution case that the death of Arun, since deceased, was homicidal and that the injury No.1 was caused by a hammer and fatal in the ordinary course or nature.

37. Chandrashekhar Pw10 was the panch witness with another at the instance of the Anjuna PS to the recovery of the hammer at the instance of A1 Rupesh. The said A1 Rupesh was brought to the cabin of the PI Anjuna PS who made a disclosure in their presence and particularly that he would show the hammer to them and thereupon a record was made in the panchanama and they left for the spot in a police jeep as per his directions. On travelling some distance toward Mandrem, the jeep was stopped at the instance of A1 Rupesh after crossing the descending road and after crossing about 200 metres away and then he had pointed out to the bushes towards the interior of the road, removed the hammer from the bushes and handed over the same to the P.I. The hammer was having a wooden handle with a metal head of which the length was taken and so too the measurement of the head. The hammer was heavy in weight, was put in an envelope duly packed, sealed and signed and attached under the panchanama.

38. Chandrashekhar Pw10 had duly identified the hammer in Court being that recovered at the instance of the accused upon being shown to him. Shri Desai, learned Senior Counsel raised serious doubt about its recovery on the premise that the purported recovery was from an open place and therefore no importance could be attached to such recovery. However, a reading of Section 27 of the Indian Evidence Act and the law on the point would belie the contention at the instance of Shri Desai, learned Senior Counsel on behalf of A1 Rupesh when the hammer was recovered from the place within the exclusive knowledge of A1 Rupesh and at his instance and meet the predicates of Section 27 of the Evidence Act and the law on the point.

39. The mere fact that Chandrashekhar Pw10 was related to the complainant only because his brother had married the cousin of the complainant would not be reason enough to paint him with the brush of interestedness and belie his testimony which had otherwise stood the test of cross examination. His admission too that there was no identification mark on the said hammer does not make a dent in the prosecution case when he had proved the recovery of the hammer at the instance of A1-Rupesh and it was certified to be

that with which the fatal wound was inflicted on Arun, since deceased.

40. Dr. Chetan Karekar Pw11 had occasion to examine 5 accused at the instance of the Anjuna Police Station on 20/01/2013. He had found tramline bruise on A10 Ulhas which was simple in nature, no injuries on the persons of A4 Nonu, an abrasion on the right arm of A1 Rupesh which was simple in nature and as per his version caused in the course of a scuffle on 19/01/2013 when he was pushed and fell on an object on the road in the darkness. He did not rule out the possibility of A10 Ulhas suffering the injury being the tramline bruise after a hit by a danda or long cylindrical object like bamboo stick or rod or any pipe while at the same time keeping open an option that it could take place in a scuffle or in a group fight. It needs reckoning at this juncture that none of the prosecution witnesses Samir Pw2, Nilesh Pw3, Sagar Pw4, Kishor Pw5 and Tarzan Pw7 had stated that any of them were armed with any danda or pipe or a rod and so too the independent witness PC Nitesh Pw8 in particular. The accused had examined two witnesses in defence but had also not thrown light on any of the member of the complainant group carrying any weapon and therefore the possibility

of these injuries being caused by a bamboo stick or rod or pipe is on the face of it ruled out.

41. HC Y. Salgaonkar Pw12 had reported to PSI Pilgaonkar at Tisk, Dando Siolim during the early morning hours of 20/01/2013 around 01.00 hours upon learning that there was a free fight between two groups at that place and during which one Arun was killed. He was primarily deputed to guard the scene of crime which they guarded with the help of the electricity light available from the pole and noticed blood, sandals and chappals lying at the spot. PI Lotlikar Pw17 had arrived at the spot at 07.45 hours and conducted the panchanama in the presence of the panchas apart from collecting blood from the spot, sandals, chappals and monkey cap. There was no rebuttal of his testimony on being deputed to the spot for guarding the scene of crime and more particularly the arrival of PI Lotlikar Pw17 during the morning time to conduct the scene of offence pachanama.

42. Dr. G. Kamat Pw13 had examined A6 Subhash at the instance of the Anjuna Police Station on 20/01/2013 at 06.05 pm and noticed two bruises on the left wrist and the left loin region of the abdomen. These were caused by blunt force object or surface impact and

thereupon he was referred to the blood bank for blood grouping and to the radiology department for x-ray. He had queried with A6 Subhash on the cause of the injuries and he disclosed that on 20/1/2013 around 02.00 hours there was a scuffle with a group of people and in that course he had suffered the injuries. There was no evidence of any fracture visible to the forearm bones nor was there any evidence of any pathology to the abdominal organs on drawing of an ultra sonography. He had also examined A8 Ramrai at the request of the Anjuna Police Station and noticed an abrasion over the outer aspect of the right side, an abrasion on the right shoulder top and 10 more on different parts of the body all caused by blunt impact and simple in nature. He had referred him to the Blood Bank for blood grouping and the Department of Radiology for x-ray to rule out any pathology and there was no evidence of any fracture. Dr. G. Kamat Pw13 had examined A3 Bhiva again at the request of the Anjuna Police Station, noticed two abrasions on the left ankle and left foot which was simple in nature and disclosed by him to have been caused in the course of scuffle during the late night hours of 19/01/2013 at Siolim.

43. PSI Kerkar Pw14 was instrumental in recording the statements of the witnesses i.e. C. Salgaonkar Pw12, PC Morajkar, Sitaram Pw6 and Rajesh and thereafter had handed the investigation to PI Lotlikar Pw17. PI Pilgaonkar Pw15 had corroborated the version of PC Nitesh Pw8 that he had received a call from him informing about the fight that had taken place between the two groups at Tisk, Dando, Siolim. He had visited Dando, Siolim and met Nitesh Pw8 who told him about the fight and that the injured had been taken to the hospital. He had visited the District Hospital at Mapusa and later informed his superior about the death of Arun. He had recorded the statements of Samir Pw2, Kishor Pw5, Sagar and Tarzan Pw7 and handed over the investigation to PI Lotlikar Pw17.

44. PSI Pilgaonkar Pw15 corroborated the version of HC Nitesh Pw8 that he had telephonically informed at the Police Station about the fight which had taken place between two groups at Tisk, Dando, Siolim and thereupon he had met HC Nitesh Pw8 on going to the spot who confirmed about the incident of fight and further that the injured had been taken to the hospital. He had visited the District Hospital Asilo, Mapusa, informed his superior about the

death of Arun and thereafter recorded the statements of Sameer Pw2, Kishor Pw5, Sagar Pw4 and Tarzan Pw7 before handing over the investigation to PI Lotlikar. Except for proving the contradictions and omissions in the statements of Sameer Pw2, Sagar Pw4 and Kishor Pw5, apart from Tarzan Pw7, he was materially unshaken on the nature of the investigation carried out by him. These omissions and contradictions have been dealt with while dealing with their respective testimony which have not made a dent in their version of the incident of assault particularly on the person of Arun, since deceased, by A1 Rupesh with the hammer on his head.

45. PI Karpe Pw16 had taken over the investigation from PI Lotlikar on 23/01/2013 who gave him the brief about the crime which had taken place on 20/01/2013 and acquainted himself with the facts of the case by visiting the scene of crime. He was instrumental in attaching the scooter belonging to Arun, since deceased, upon its production by his brother Namdev on which he had driven to the scene of crime and thereafter A1 Rupesh had assaulted him with a hammer on his head while astride the scooter. It has come through an evidence that the scooter which was lying at the spot had been removed by Namdev, brother of Arun, since

deceased, and kept at his residence for safe custody and being a Suzuki Access bearing the distinct registration number. The attachment panchanama of the scooter was not disputed at the instance of the accused and which panchanama was admitted in evidence under Section 294 CRPC. Therefore taking a pause at this juncture, there is no basis in the contention of Shri Desai, learned Senior Counsel for the accused No.1 that there was a serious doubt about the recovery of the scooter and its attachment when it was abundantly established from the testimony of PI Karpe Pw16 that it was removed from the spot by Namdev, brother of the deceased and kept at his residence for safe custody.

46. PI Karpe Pw16 had also been instrumental in conducting the attachment panchanama of the weapon of assault based on the disclosure made by A1 Rupesh apart from the attachment of the motorcycle used by him to flee from the scene of crime alongwith the weapon of assault after assaulting Arun, since deceased. It was evident from his testimony that he had attached the motorcycle of A1 Rupesh, recorded the statements of witnesses, forwarded the viscera materials and Exhibits to CFSL-Hyderabad and thereafter had filed a chargesheet against all the accused numbering 14 under

Sections 120B, 143, 147, 148, 504, 323, 302 r/w. 149 IPC. There was no rebuttal of his testimony which had stood the test of cross-examination despite the concerted efforts on behalf of the accused to breach the same. Moreover unlike the contention of Shri Desai, learned Senior Counsel for A1 Rupesh, it was amply demonstrated from his testimony that he had been impartial in his investigation and was even instrumental in recording the statement of one Dayanand Mandrekar, a member of the BJP party and later a minister of the said party in office. Rather his admission that he was aware that the said Mandrekar was a local MLA at the time of the incident and later a minister and besides one Uday Palekar, was a Congress candidate who had lost the assembly election to him rather indicates that he was not swayed by their political party affiliations in carrying out the investigation in the matter.

47. The admission of PI Karpe Pw 16 that the said Mandrekar had stated to him that he had telephonically informed the Siolim Outpost about the possibility of a breach of peace at Dando, Siolim on the basis of information received from an unknown villager would go to show that he was acting to his post to record information diligently irrespective of the source and that there was nothing untoward in

the police acting on the basis of the information. It is quite another matter that despite the telephonic information conveyed by HC Nitesh Pw8 at the Police Station, no police were deployed at the spot on his request and information that there was likely to be a fight at Tisk, Dando, Siolim.

48. PI Lotlikar Pw17 corroborated the version of PSI Pilgaonkar Pw15 that he had received a telephonic message at 01:30 hours on 20/01/2013 about the fight between two groups in which one group was assaulted and that the victim Arun was assaulted by Rupesh and others, had been referred to the District Hospital and declared brought dead. He had recorded the complaint of Nilesh Pw3, registered an offence, visited the scene of crime as shown by the complainant at Tisk, Dando, Siolim by the side of the road and noticed fresh blood apart from sandals at the scene of crime where a detailed panchanama was drawn and various articles attached from the scene. He had searched the spot for the weapon of assault, which was not found and also arranged photographs to be taken of the scene of crime. He had conducted the inquest panchnama on the body of Arun, since deceased, referred the body for autopsy examination and thereupon Dr Ghodkirekar Pw9 had drawn the

memo of autopsy certifying the cause of death as damage to the brain caused by the injury No.1 which was caused by a blunt object, fresh at the time of death and necessarily fatal in the ordinary course of nature.

49. PI Lotlikar Pw17 had revealed that he had placed five accused under arrest on 20/01/2013, another 7 on 21/01/2013 and had them medically examined by the Police Surgeon, GMC Bambolim. He has recorded the statement of HC Nitesh Pw8 and 2 others and besides directed his subordinate PSI Pilgaonkar Pw15 and PSI Kerkar Pw14 to record the statements of the witnesses and to trace the other accused involved in the crime. Besides, he had identified the specimens attached by him from the scene of crime and otherwise un rebutted in his testimony on the nature of the investigation carried out by him, the duty assigned to the other police and their role in the investigation in the crime. Besides, unlike the contention of Shri Desai, learned Senior Counsel for A1 Rupesh, it was apparent from his testimony that the complainant Nilesh Pw3 had reported at the Police Station alongwith PSI Pilgaonkar at 02.00 hours and then his complaint was recorded as per his say. No doubt omissions were brought forth in his complaint but which do not go to the root of the

case and when it is a settled legal proposition that a complaint is not required to be an encyclopedia.

50. All the accused had denied the prosecution case put to them in their statements recorded under Section 313 Cr.P.C. and taken a specific plea in defence that it was out of political vendetta that the case was filed against them at the instance of the local MLA Dayanand Mandrekar and to teach them a lesson and moreover they were the injured party and not the assailants. A1 Rupesh in particular had specifically denied that he was the assailant who dealt the hammer blow on the head of Arun. It was his case in defence that the complainant and his group had hatched the criminal conspiracy to assault him and some of the other co-accused, and after having alcoholic drinks, they had come in the vehicles near his house, blew the horn of the vehicles and started abusing them with filthy abuses. They had come out of the house to see what had happened and why they were shouting upon which the complainant and his group had started assaulting their group and there was a scuffle between them. The complainant and his group were having deadly weapons and that during such time the weapon of assault used by the complainant group fell on Arun, since deceased, and

due to which he sustained injuries on his head. This plea in defence is not at all believable much less plausible looking to the location of the injury on the head of Arun and the violence of the blow which had caused damage to the brain matter after causing multiple fractures to the skull.

51. The accused examined A5 Ashok Dw1 as their defence witness who revealed that on the afternoon of 19/01/2013 Arun, since deceased, had asked him about the construction of the shed in the temple, restrained him and slapped him on his face for which he had gone to the Police Station and lodged a complaint. He was in his house on the same night sitting outside near the tulsi alongwith A6 Subhash, A8 Ramrai, A10 Ulhas and A1 Rupesh talking to each other when Nilesh Pw3, Tarzan Pw7, Sagar Pw4, Samir Pw2 and Kishor Pw5 came in front of their house drunk and started abusing them in filthy language. Arun, since deceased, came soon thereafter and also started abusing them in filthy language and besides giving an affront that he was a person of the minister and would show them. They had gone away, removed dandas, hammer, rods from their motorcycles and all of them had started assaulting them with the weapons due to which they had sustained injuries. Nilesh Pw3

had brought the hammer and was going to assault them and at which time the hammer fell on Arun on the back of his head and he sustained injuries and fell down. The tenor of his testimony particularly on the incident of assault by the group of the complainant does not at all inspire confidence.

52. The case of the prosecution consistently was that the accused had stopped the group of the complainant when they were passing by their houses abusing them with filthy words and thereafter had started assaulting them. On the arrival of Arun, since deceased, A1 Rupesh had brought a hammer, gone behind Arun who was astride the scooter and assaulted him with the hammer on the right side of his head causing his fall on the ground and bleeding from the head injury. The medical examination of all the accused except A10 Ulhas does not at all inspire confidence in his version when all of them had sustained simple injuries and not traceable to any weapon of assault. The other witness examined by the accused in defence was Sham Dw2 who came with the plea of alibi that he had come back home on the night of 19/1/2018 at 10:00 p.m. and went to sleep. He had woken up on the next day at 05.30hours and left his house by 5.45 hours to go to his workplace when he was telephonically

informed by his brother at about 12.30 noon that he had been implicated in the case. He had accordingly surrendered before the police despite the fact that he was not at all involved in the crime. His examination was actually not at all relevant for the case of the defence inasmuch as he had disclaimed his presence at the time of the incident on the night of 19/01/2013 and only to put forth the plea of alibi.

53. The learned Additional Sessions Judge on an examination of the evidence in its totality including that in defence clearly concluded and rightly so that there was no cogent material on record that the complainant group had come to the scene of offence armed with dandas, hammer etc. nor was there any cogent evidence that the accused persons who were at the spot were armed with dandas etc. The learned Judge had concluded that there was a scuffle between the two groups assaulting each other with fist blows and kicks, that it was A1 Rupesh who had come with the hammer and inflicted the hammer blow on the head of Arun while he was astride the scooter and caused his fall to the ground in a bleeding condition. The learned Judge had examined the evidence of the Doctor who had examined the accused and clearly come to a finding

that the complainant group were not armed with any deadly weapons and if it was so, the injuries on the person of the accused would have been different and they would have secured grievous injuries. The learned Additional Sessions Judge was fortified in her conclusion that there was eyewitnesses account that it was A1 Rupesh who had assaulted Arun, since deceased, with the hammer on his head resulting in grievous injuries to him which had turned fatal. The learned Judge had also found favour with the case of the prosecution that the hammer used by A1 Rupesh was recovered at his instance and duly attached under a panchanama and from a place within his exclusive knowledge.

54. The learned Additional Sessions Judge for that matter had rightly concluded that there was no criminal conspiracy on the part of the accused persons who assaulted the complainant group and to kill Arun, since deceased. Rather the evidence on record had clearly borne out that there was a sudden fight between two groups without any premeditation and in the heat of passion upon a sudden quarrel and without A1 Rupesh taking any undue advantage had assaulted Arun with a hammer on his head and caused the fatal injury on his person. The Judge for that matter rightly concluded that the

prosecution had made out the offence against A1 Rupesh alone under Section 304 part I IPC being a case falling within the exception 4 of Section 300 IPC and there was nothing to connect the other accused with the crime entitling them to the benefit of doubt.

55. The Additional Sessions Judge had found from the material on record and rightly concluded that there was no basis in the defence plea that A1 Rupesh acted in self defence when it was not at all shown from the material on record how the complainant group including the deceased came to the spot armed with deadly weapons and that there was such grave provocation to A1 Rupesh as to deflect the aggression on his person by inflicting a hammer blow on the head of Arun, a vital part of the body. Such a plea of self defence also militates against the defence plea that the hammer was carried by the group of the complainant and that in the course of a free fight between the two groups, the hammer accidentally fell on Arun and he sustained fatal injuries to his head. Therefore, unlike the contention of Shri S.R. Rivankar, learned Public Prosecutor for the State that it was a fit case to reverse the conviction against the accused No.1 to that under Section 302 IPC amongst other or that

accused Nos.2 to 14 had also to be convicted alongwith him for the offence under Section 302 IPC cannot stand the test of scrutiny.

56. The learned Additional Session Judge had properly appreciated the material in all its angles and rightly concluded that the offence under Section 304 part I was made out as against A1 Rupesh alone and there was no offence made out against any of the other accused as to rope them in the said act with the aid of Section 120B r/w. 149 IPC. The learned Additional Sessions Judge had therefore rightly acquitted the accused Nos.2 to 14 while holding A1 Rupesh guilty under Section 304 part I IPC and sentencing him appropriately. We therefore do not find any reason to interfere with the judgement passed by the learned Additional Sessions Judge on any of parameters urged before us which are neither plausible nor legally tenable and in view thereof, we pass the following order:

ORDER

The Criminal Appeal No.20/2017 filed by A1 Rupesh challenging the judgment of conviction under Section 304 Part I IPC and the Criminal Appeal No.38/2017 filed by the State seeking his

conviction under Section 302 IPC alongwith the other accused Nos.2 to 14 are dismissed.

NUTAN D. SARDESSAI, J.

M. S. SONAK, J.

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