

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 1265 OF 2011

1. Vishal Rajendra Jadhav
Age : 27 years
R/ at- Ramwadi, Pogul Mala, Plot No.40,
Solapur.
2. Shri. Vinayak Rajendra Jadhav
Age 25 years,
R/ at- Ramwadi, Pogul Mala, Plot No.40,
Solapur.
3. Shri. Rajendra Sidhram Jadhav
Age 56 years
R/ at- Ramwadi, Pogul Mala, Plot No.40,
Solapur.
4. Shri. Vinod Rajendra Jadhav
Age 30 years
R/ at- Ramwadi, Pogul Mala, Plot No.40,
Solapur.

.. Appellants

Vs.

The State of Maharashtra
Through Salgarvasti Police Station,
Solapur.

.. Respondent

with

CRIMINAL APPEAL NO. 1206 OF 2011

1. Vivekanand Nagnath Jadhav
Age 19 years, Occ.- Education,
R/ o – Settlement Free Colony No.6
Solapur.
2. Vishnu @ Baban Bajarang Gaikwad
Age – 60 years, Occ. - Rtd. Servicemen,
R/o – Gaibipeer Nagar, H.No.12, Limayewadi,
Solapur.

3. Pavan Vishnu @ Baban Gaikwad
Age – 20 years, Occ. - Education,
R/o – Gaibipeer Nagar, H.No.12,
Limayewadi, Solapur.

.. Appellants

Vs.

The State of Maharashtra

.. Respondent

.....

Mr. Daulat G. Khamkar for Appellants.

Mr. Arfan Sait, APP for the Respondent-State.

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**CORAM : B.P. DHARMADHIKAR AND
PRAKASH D. NAIK, JJ.**

Date of Reserving the Judgment : 22nd April 2019.

Date of Pronouncing the Judgment : 12th June 2019.

Judgment (per - Prakash D. Naik J.) :

The Appellants are convicted vide judgment and order dated 08th September 2011 passed by Learned Ad-hoc Additional Sessions Judge, Solapur in Sessions Case No. 136 of 2009 for the offences under Section 302 read with 149 of Indian Penal Code, 307 read with 149 of IPC, Section 323 read with 149 of IPC, Section 147 and Section 148 of IPC. They were acquitted for the offences under Section 504 read with 149 and Section 37(1) read with Section 135 of Bombay Police Act.

2. The Appellants have challenged the aforesaid judgment and order of conviction by preferring these appeals by invoking Section 374(2) of Code of Criminal Procedure.

3. The prosecution case is that there was altercation between accused No. 1 and PW-6 on 05.01.2009. On 27.01.2009 while PW-6 was proceeding, to answer nature's call, accused Nos. 1 and 2 with

juvenile yogiraj came on a Motor Cycle and had altercation with PW-6. They started assaulting him. PW-6 started running to save himself. Accused No.1 hit him on his back by stone. After seeing this Manoj Gaikwad, Renuka Gaikwad, Sujata Gaikwad, Rajesh and Sachin Gaikwad came there. Manoj (deceased) was assaulted by accused Nos. 1 and 2 with iron rod and iron pipe. Rajendra Jadhav, Baban Gaikwad Pavan Gaikwad, Vinod Jadhav and Vivekanand Jadhav came at this spot. Accused No. 5 assaulted Renuka (PW-9) on her head with a sword. Accused No. 3 assaulted with blunt portion of the axe on the right hand of Sachin (PW-8). Accused No. 2 assaulted Sujata. Rest of the accused assaulted Raju Gaikwad with fist and kick blows. In the meantime Yuvraj, Deepak and Sumeet persons gathered on the spot hence the accused ran away. Manoj Gaikwad was taken to civil hospital where he was declared dead. FIR was registered vide C.R. No. 6/2009 under Sections 302, 307, 323, 504, 147 and 149 of IPC and Section 135 of Bombay Police Act. Accused Nos. 1 to 7 were arrested on 28.01.2009. Statements of witnesses were recorded. On completing investigation chargesheet was filed.

4. Charge was framed by order dated 20.08.2009. As per the charge, the accused were members of unlawful assembly and in prosecution of common object of such assembly committed murder of Manoj Gaikwad by intentionally causing his death by assaulting on his head by iron rod and iron pipe and thereby committed offence punishable under Section 302 read with 149 of IPC. The accused were members of unlawful assembly and in prosecution of common object of such assembly one of the member of such unlawful assembly viz accused No. 6 assaulted Renuka with sword on her

head and attempted to commit murder of Renuka and also assaulted complainant and other prosecution witnesses by means of axe, stick stone with such intention or knowledge and under such circumstances that if by that act they had caused the death of complainant and other prosecution witnesses, they would have been guilty of murder under Section 302 of IPC and that they had caused hurt to the complainant and other witnesses and thereby committed offence under Section 307 read with 149 of IPC. The accused being members of unlawful assembly and in prosecution of common object of such assembly to assault complainant and other prosecution witnesses assaulted with axe, sword, stick, iron rod, iron pipe and stone etc. and thereby committed offence under Section 323 read with 149 of IPC. The accused were members of unlawful assembly and in prosecution of common object of such assembly to assault complainant and other witnesses Renuka Gaikwad, Sachin Gaikwad, Sujata Gaikwad, Rajesh Gaikwad and prosecution witnesses committed the offence punishable under Section 147 of IPC. The accused were members of unlawful assembly and in prosecution of common object to assault complainant and other witnesses committed the offence with deadly weapons like sword, iron rod, stick stone etc. which are likely to cause death and committed offences under Section 148 of IPC. The accused being members of unlawful assembly and in prosecution of common object and in furtherance of common intention intentionally insulted complainant and others witnesses by abusing them and committed the offence punishable under Section 504 read with 149 of IPC. The accused were members of unlawful assembly and in prosecution of common object of such assembly were in possession of axe, sword, stick, iron rod, iron pipe and stones etc which are deadly weapons in

contravention of prohibitory order issued by Deputy Commissioner of police, Solapur and thereby committed offence punishable under Section 135 of Bombay Police Act.

5. While convicting the accused, the trial Court has observed that the incident dated 27.01.2009 was the product of earlier incident of 05.01.2009 and therefore it was pre-planned and pre-meditated and unlawful assembly was formed with the common object of causing death of Amar Gaikwad. The accused were armed with weapons and they assaulted Amar Gaikwad but Manoj intervened and he was assaulted by accused causing his death.

6. The prosecution examined 13 witnesses in support of its case, PW-1 B.S. Katthan Halli is the Panch for inquest panchnama. PW-2 Ramesh Gaikwad has acted as an Panch of seizer of blouse of Renuka, articles of deceased, recovery of Motor Cycle, recovery of iron rod, axe, clothes of accused Rajendra Jadhav and Baban Gaikwad. PW-3 Sameer Shaikh acted as a panch for recovery of weapons from accused No. 1 PW-4 Ameen Shaikh with the panch for spot panchnama. PW-5 Khaleel Pirjade acted as panch for seizure of clothes of accused Vishal, Vinod, Yogiraj, Pavan, Vinayak and Vivekanand. PW-6 Amar Gaikwad is the complainant and injured eye witness. PW-7 Sujata Gaikwad is injured eye witness. PW-8 Sachin Gaikwad is the eye witness. He sustained injuries. PW-9 Renuka Gaikwad is the injured eye witness. PW-10 Deepak Gaikwad is the eye witness to the incident. PW-11 Rajesh Gaikwad is the injured witness. PW-12 Dr. Uma Zad is the medical officer who conducted postmortem. PW-13 Shivaji Kolhe is the investigating officer. PW-14 Dr. Ravindra Punde, the medical officer who is

examined witness. The prosecution relied upon documentary evidence in the form of panchnama, postmortem report, CA report, map, injury certificates.

7. Learned Advocate for the Appellant, Mr. Khamkar submitted that the appellants are falsely implicated in this case Section 149 of IPC has been wrongly invoked for convicting the appellants. Accused Nos. 4, 6 and 7 allegedly came at the spot after fatal blow was given to deceased Manoj. Thus they cannot be held responsible for committing murder of Manoj by invoking Section 149 IPC. Accused Nos. 4, 6 and 7 have not assaulted deceased. They were not holding any weapons, no role is attributed to accused No. 4 and 7. Accused No. 6 assaulted Rajesh by hand and the injured has sustained simple injury. The injury certificates of witnesses were issued on 25.07.2009 although the incident is of 27.01.2009. Section 302 of IPC is not attracted in this case. It is submitted that the accused Nos. 1 and 2 at the most could have been convicted for the offence under Section 324 of IPC. There cannot be conviction under Section 307 of IPC for assaulting Renuka as she had sustained simple injuries. There are discrepancies in the evidence. The witnesses have suppressed the genesis of incident. The injured witnesses except PW-6 had intervened all of a sudden. Deceased Manoj had also intervened alongwith other injured witnesses therefore it cannot be said that there was a pre-planned attack and there was a common object for assaulting and committing murder of Manoj by all the accused.

8. Learned APP submitted that although the incident had started with assault on PW-6 Amar Gaikwad, the accused Nos. 1 and 2 were

armed with weapons. They apprehended PW-6 and started assaulting him. He started running and that time he was chased by accused Nos. 1 and 2. At the same time, the other witnesses had intervened and simultaneously, the accused Nos. 3 to 7 participated in the assault. They were armed with deadly weapons and thus there was a common object in assaulting deceased and witnesses. The accused had planned to attack PW-6, common object can be formed instantaneously. The evidence of injured witnesses cannot be brushed aside. The accused were attributed specific overt-act. There is recovery of weapons used in commission of crime. Manoj Gaikwad had sustained serious injuries on his head which has resulted in his death. The accused were armed with dangerous weapons like sword, iron rod, iron rod, axe etc. All of them members of unlawful assembly and common object to assault the injured witnesses and the victim. The injured witnesses had sustained injuries which is corroborated by injury certificates. The clothes of the witnesses, accused and the weapon used in crime was strained with human blood. The iron pipe, iron rod and axe were having blood of B-group. There is no reason to disbelieve the version of several eye witnesses were sustained injuries. The prosecution has thus proved all the charges against the accused. They have been rightly convicted for the offence as the act of assault for committed in furtherance of common object.

9. We have scrutinized the evidence of witnesses, the documents exhibited in evidence. The trial Court has convicted all the accused – appellants for the offence under Section 302, 307 and 323 IPC. The conviction under Section 302 was based on murder of Manoj. The charge under Section 307 was framed for assaulting Renuka on head

and all the other witnesses. The charge under Section 323 of IPC was also invoked for assaulting all the injured witnesses other than deceased. However by invoking Section 149 of IPC. It is held that all the accused had committed the act in furtherance of common object and thereby they were convicted for the aforesaid offences.

10. Apparently, the trial Court has committed an error while invoking Section 149 of IPC. There is non-application of mind to the evidence on record. Deceased Manoj and the other injured persons except PW-6 had entered into the picture all of a sudden. The incident started with confrontation with PW-6. He was assaulted. He tried to run away to save himself from assault. The deceased and other witnesses were sitting in the nearby vicinity. They intervened. It is pertinent to note that the fatal blow of assault of Manoj was attributed to accused Nos. 1 and 2 before the other accused have participated in the allegedly assault.

11. We have perused the evidence of the witnesses minutely. PW-6, PW-7, PW-8, PW-9, PW-10 and PW-11 are the injured eye witnesses to the incident. PW-6 Amar Gaikwad have deposed that on 05.01.2009 there was a procession of Moharram. When it reached near pogal mala Area, PW-6 and Vijay were dancing on beat of drums. Accused No. 1 had altercation with him for taking procession. Vinod Jadhav and Vikram Gaikwad pacified the dispute. Accused Nos. 1 and 2 were angry with him on 27.01.2009 while he was proceeding to answer nature's call through the light of sodium vapour lamp, accused No.1 Vishal, Accused No.2 Vinayak and Juvenile yogiraj came thereon Motor Cycle. They pushed him. They got down from the Motor Cycle and started assaulting him. Hence

he started running away. Accused Vishal hit him on his back with a stone. After seeing Manoj (deceased), Renuka Gaikwad (PW-9), Sujata Gaikwad (PW-7), Rajesh (PW-11) and Sachin (PW-8) came there. Accused No. 1 assaulted on the head of Manoj by an iron rod and Accused No. 2 assaulted him by iron pipe. In the mean time, Raju Gaikwad (Accused No.3), Baban Gaikwad, Vinod Jadhav (Accused No. 5) with Vivekanand (Accused No. 4) came there. Vinod was armed with sword, accused Raju Gaikwad was armed with axe and others brought sticks with them. Vinod assaulted by sword on the head of Renuka Gaikwad. Raju Gaikwad assaulted by blunt portion of axe on right hand of Sachin Gaikwad. Accused No. 2 Vinayak gave blow of wooden log on stomach of Sujata Gaikwad. The other accused assaulted Raju Gaikwad by fist and kick blows. In the mean time Yogiraj Jadhav and Deepak and Sumit Jadhav came there. The accused ran away from the place of incident. Manoj was taken to the hospital. He was declared dead. The injured persons were treated for the injuries. In the cross-examination PW-6 have stated that deceased Manoj is his paternal uncle, Sachin Gaikwad is the son of his paternal uncle. Sujata and Renuka are close relatives. Rajesh is paternal uncle. Vishal, Vinayak, Vinod are sons of accused Rajendra. Oral altercation occurred on 05.01.2009 was of trivial nature and the argument had ended there itself. There was no quarrel afterwards. The locality in which he went to attend nature's call is densely populated. On both sides of road there were houses. There was hue and cry at that moment. There were elections prior to the incident for the post of Mayor and Deputy Mayor at Solapur Municipal Corporation. Accused No.1 had contested for the corporator post.

12. PW-7 Sujata Gaikwad is another injured witness. She has deposed that on 27.01.2009 at about 08:30 pm. PW-6 went to attend nature's call in the open space when he had reached the sodium vapour lamp of corporation. Vishal Jadhav, Rubiraj and Vinayak came there and dashed him by Motor Cycle. There was an altercation between them. The accused got down from the Motor Cycle and assaulted PW-6. He started running Vishal assaulted on his back with a brick. The witnesses were sitting on the platform along with Manoj, Rajesh, Renuka and Sachin. They intervened to save Manoj Vishal assaulted Manoj with iron rod on his head. Vinayak also assaulted him with iron pipe on head. In the mean time, the other accused came there. Vinod assaulted Renuka with Sword on her head. Rajendra assaulted Sachin with blunt side of axe on his right hand. Vinayak assaulted PW-7 on her stomach with wooden stick. Pawan Gaikwad (Accused No. 7) assaulted Rajesh on his stomach by giving blows. In the mean time, Yuvraj, Deepak and Sumit arrived there and hence the accused ran away. In the cross-examination, she has stated that Raju Gaikwad is her husband. The word open space is not mentioned in her statement. The fact that accused No. 1 hit on the back of PW-6 with a stone is not mentioned in her statement. The fact that she was sitting on the platform near the Bathroom with Manoj, Rajesh, Sachin is not appearing in her statement. It is also not mentioned that injured Manoj is taken to the hospital by Amar and Vijay. Around 25 to 30 persons had collected at the time of incident. There is no person by name Pankaj Baban Gaikwad involved in the incident. He is Pawan and not Pankaj. She did not lodge any report or inform about the incident to Salgar Police Station or Ramwadi Police Chowki. PW-8 Sachin Gaikwad is a nephew of deceased. He is the eye witness. He has deposed about

the participation of Vishal, Vinayak and Rubiraj as the persons who came on Motor Cycle and is altercation with PW-6. He also stated that Vishal threw brick on back of Amar Gaikwad (PW-6). He alongwith Sujata, Manoj, Renuka and Rajesh intervened to save Amar Gaikwad. Vishal assaulted Manoj and Vinayak also assaulted him on his head. Vinod assaulted his mother Renuka on head with sword. Rajendra assaulted with the handle of axe on his right hand elbow, other accused Baban, Vinayak, Rubiraj and others assaulted Sujata and Rajesh with wooden stick and blows. Vinayak assaulted Sujata with a stick. Manoj was declared dead. Her statement was recorded on 28.01.2009. The fact that she was present on 02.01.2009 when there was oral altercation between PW-6 and accused No.1 is not mentioned in her statement. The act of throwing brick by Vishal on the back of PW-6 is not appearing in her statement. She cannot state that the names of the persons who had gathered. PW-6 is her cousin. People who collected started throwing stones and bricks. There is no person by name Pankaj Gaikwad. By mistake she stated that Pankaj Gaikwad was present. She did not personally go to Ramwadi Police Chowki for lodging complaint. It takes two minutes to Ramwadi Police Chowki from the spot by Auto. She did go to Salgar Police Station to lodge report.

13. PW-9 Renuka Gaikwad is also the eye witness and injured persons according to her accused Nos. 1 and 2 assaulted Manoj. Vinod assaulted her by sword on head. Raju Gaikwad assaulted Sachin on hand by blunt axe. Vinayak assaulted Sujata by stick and others assaulted Rajesh by fist blows and kicks. In the cross-examination, she had stated that while Amar was running away Vishal threw brick at him and hit his back is not appearing in her

statement. She had been to the Police Station after the incident. Police did not make any inquiry with them at the Police Station. They did not state anything at the Police Station. She had been to the hospital. She did not make any inquiry with PW-6 whether lodged he had complaint with the police.

14. PW-10 Deepak referred to incident dated 05.01.2009. He also stated that on 27.01.2009 Manoj, Renuka, Sachin, Rajesh intervened. Accused No. 1 and 2 assaulted Manoj on his head by iron rod and iron pipe. Rajendra, Vinod, Baban Gaikwad, Pawan come there, Vinod Jadhav was having a sword in his hand. Rajendra was having axe. Vinod assaulted Renuka on her head. Rajesh assaulted Sachin, Vinayak assaulted Sujata on her stomach with stick. Baban and Pawan assaulted others and Rajesh with hand blows and kicks. In the cross-examination, he stated that he did not go alongwith Manoj when he was taken to hospital. He had not stated that he had accompanied others while taking Manoj to hospital. He did not go to Salgar Vasti Police Station or Ramwadi Police Chowki. He did not inform the police about the incident.

15. PW-11 Rajesh is also the eye witness to the incident. He has given similar version like other injured persons. In the cross-examination, he has stated that police have not shown weapons to him during the course of investigation. He saw the weapon for the first time in Court. He has not stated names of Sujata, Sachin, Renuka specifically while recording his statement. He was not aware as to who lodged the report. While recording his statement he did not state that Amar Gaikwad had lodged the report with the police.

16. Thus while analyzing the evidence of these witnesses, it is apparent that the incident had commenced with confrontation of accused Nos. 1 and 2 and PW-6. All the witnesses have consistently stated that PW-6 was running to save him and hence the deceased and others had intervened. At that time, Accused Nos. 1 and 2 assaulted Manoj on his head. In the evidence of witnesses, it is not stated that while accused Nos. 1 and 2 had altercation with PW-6, they were armed with any weapons and had assaulted him with weapons. While the deceased and witnesses intervened, it is alleged that they were assaulted by weapons. The other accused were not present when the assault took place qua Manoj. The fatal blows were attributed to Accused Nos. 1 and 2 on his head before the other accused appeared on the scene. The deceased Manoj fell down due to assault. Thereafter accused No. 5 assaulted Renuka Gaikwad, Accused No.3 assaulted Sachin, accused No. 2 assaulted Sujata by wooden log and others assaulted Rajesh Gaikwad and Sachin Gaikwad.

17. PW-1 is the panch witness for inquest panchnama exhibit-27. He has stated that he noticed injury on the back side of head of the deceased. He knows complainant since childhood. PW-2 is the panch witness for several panchnama viz. Seizure of blouse of Renuka article of deceased, recovery of Motor Cycle, iron rod, axe, clothes of accused Rajendra Jadhav, Baban Gaikwad. In the cross-examination, he has stated that all the articles were sealed as narrated by him but the word "seal" is not mentioned in any panchnama. PW-3 Sameer Shaikh is panch for seizure of weapons from accused No. 1. The weapons were received from bushes. The weapons were sword, iron rod, bamboo stick.

18. PW-4 Ameen Shaikh is the panch witness for spot panchnama. The panchnama was exhibited at exhibit-37. He knows uncle of PW-6 who is working in police department. Police collected blood stained earth from spot and simple earth. One chappal, brick and shirt were found at the place of incident. PW-5 Khaleel Pirjade is the panch witness for close of accused Vishal, Vinod, Yogiraj, Vinayak and Vivek. PW-12 Dr. Uma Zad is the medical officer attached to Solapur City Hospital. She conducted postmortem. She has stated that she noticed external injury in the form of lacerated wound on vertex on right side 8 cm. x 1 cm. x Bone deep with extravasation of blood in surrounding tissue. Fresh. On internal examination she found the injuries in the nature of haematoma under scalp in the right temporal parietal region, crack fracture of right parietal bone corresponding injury No. 1, Sub-dural haematoma over right temporal parietal region with diffused a sub-arachnoid haemorrhage brain congested edematous, Lungs congested edematous, on cut section frothy discharge, Semi digested in the stomach, liver, spleen kidneys were pale. She stated that cause of death was head injury. She produced postmortem report and deposed that Injury No. 1 mentioned in column no.17 corresponding to internal injury mentioned in column no.19 are sufficient in the ordinary course of nature to cause death. These injuries may be possible by iron rod and iron pipe. In the cross-examination, it is stated that before conducting the postmortem, it is necessary to go through inquest panchnama. If there is discrepancy, police officer should be directed to carry out inquest panchnama afresh. There was no injury on the occipital area but that re-inquest was not directed. Rigour morties had fully developed from top to bottom.

It may be possible that if a person is under the influence of toddy brain becomes very weak and death is accelerated if there is an injury to the head. Possibility cannot be denied in case the person is under the influence of toddy, a slight injury to his head may result in his death. The Court questioned whether from the postmortem she can say that the deceased had consumed toddy. The witnesses deposed that viscera has been preserved and from that it can be stated so the report of viscera is not with her. There was no particular smell or alcohol or any other poison. She also stated that abrasion to head can also be called as head injury. The police did not call for opinion by sending the weapons as to whether those injuries can be caused by these weapons referred in the evidence. Cause of injury in column No.17 is not mentioned. Position of the injury is not mentioned in column No.17 whether vertical, horizontal, straight or oblique.

19. X-ray of injury was not taken. The injury stated in column No. 17 is possible due to a forcible fall on hard surface when head strikes on that hard surface. Such injury mentioned in column No. 17 can be possible by pelting of stones or brick article No. 1. She did not conduct any test to find out whether the injury was ante mortem or postmortem. The edematous / swelling to his brain is possible due to infection, injury or due to consumption of alcohol. In case of heavy drinking of alcohol there may be edematous of the brain. She admitted that viscera is not preserved in each and every case. It is preserved to rule out any case of poisoning. The opinion as to the cause of probable cause of death reflected in the postmortem report is head injury.

20. PW-13 Shivaji Bhimsha Koli is the Assistant Police Inspector who conducted investigation. He stated that the weapons were handed by accused No. 3 at the police station. Certain omissions were proved in the cross-examination. He did not make any investigation in respect to Moharram procession. He did not record statements of Vikram, Vijay and family members of deceased. He did not record the statements of rickshaw-wala who tooked Manoj in his auto rickshaw. The copy of the FIR is sent to the to the Court , is not in the file. Madan Gaikwad is serving in Police Department.

21. The articles collected during the course of investigation were sent to CA. The CA report with regards to viscera indicate that general specific chemical does not reveal any poison. The CA report with regards to blood and clothes of accused No.2 is inconclusive. The CA report with regards to blood and clothes of juvenile yogiraj, accused Vishnu Jadhav, Vivekanand, Pawan Gaikwad, Rajendra Jadhav, Vishal Jadhav were inconclusive. The said documents are exhibited in evidence. The CA report in connection with the blouse, shirt and sleeper indicate that it was containing blood and b-group. The CA report in respect to earth is inconclusive and other sample on earth indicate that there was no blood. The Lungi was found with blood group. Blood group on the T-shirt and Banian, pant were inconclusive. The blood group found at Exhibit-11 and 12 that is pant and shirt indicated that there was no blood. The sword was containing blood group B. The blood group of the blood on bamboo was inconclusive. Iron pipe, iron rod and axe had human blood of group B. The CA report in respect to blood and clothes of Sachin is inconclusive. CA report in respect to blood and clothes of Amar Gaikwad is also in conclusive. Similarly the CA report in respect to

blood and clothes of Renuka, Sujata, Vishal Jadhav, Rajesh Gaikwad and Manoj were inconclusive.

22. PW-14 had examined Sujata, Rajesh, Amar and Sachin. He has produced the injury certificate. He stated that he had examined Sujata on 28.01.2009 and noticed injury in the form of blunt trauma on abdomen. He examined Rajesh on the same date and noticed contusion admeasuring 4 x 3 cm on left thigh upper 1/3rd caused by blunt and hard object. Abrasion 1 x 1 cm. Leftankle, caused by hard and blunt object. He had also examined Amar Gaikwad and found contusion 3 x 2 cm. Left scapula middle border just lateral to vertical column. Caused by hard and blunt object and contusion 3 x 2 cm. Upper lateral to above injury caused by blunt and hard object. He also examined Renuka on 28.01.2009 and found CLW 3 x 1 cm. bone deep right parietal immense caused by blunt and hard object. This is simple in nature. He also examined Sachin Gaikwad and noticed contusion with abrasion 3 x 2 cm and 1 x 2 cm respectively left arm above elbow caused by blunt and hard object. All the injuries are likely to be caused by stick. These injuries may be caused by the stick and iron rod which is present before the Court. In the cross-examination, he stated that he has not brought the case papers or police yadi in this case. Sujata Gaikwad had not complained about any injury on her person. No external injury was noticed by him but she was stating that she had pain in the stomach due to assault. No treatment was given to her. He cannot say whether the injuries are self-inflicted. He has not mentioned the time on examination of injured person.

23. The injury certificates of the injured witnesses are exhibited in

evidence. The certificate of Sujata Gaikwad (Exhibit-73) indicate that the same was issued on 25.07.2009, she was examined on 28.01.2009. The injury is allegedly on abdomen. It is mentioned that no superficial injury is noted, the injury certificate of Rajesh (Exhibit-74) refers to contusion, abrasion on thigh and leftankle which are simple in nature. The injury certificate of Amar Gaikwad refers to contusion of scapula middle border and upper hand which are simple in nature. The injury certificate of Renuka refers to CLW 3 x 1 cm. bone deep right parietal and simple in nature. The injury certificate of Sachin indicates three contusion with left arm elbow which are also caused by blunt and hard object and simple in nature. All these certificates, injury certificates were issued on 25.07.2009.

24. The trial Court has erroneously invoked Section 149 of IPC for convicting the appellants for offences under Section 302, 307 and 323 IPC. Section 149 relates to constructive criminal liability. It has its foundation on constructive liability which is sine-quo-non for its operation. The emphasis is on the common object and not on common intention where common object of an unlawful assembly is not proved the accused cannot be convicted with the help of Section 149. It is settled principle of law that Section 149 of IPC makes every member of an unlawful assembly at the time of committing the offence guilty of the offences. The Section creates vicarious liability for the unlawful acts committed pursuant to the common object by any other member of the assembly. Thus once the Court holds that certain accused formed an unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that

object, every member of that unlawful assembly is to be held guilty of that offence. There is distinction between common object and common intention. Accused Nos. 1, 2 had altercation with PW-6. He was assaulted. The other injured persons were not party to the said altercation. The assailants had no knowledge that the other injured would intervene in the altercation with PW-6. The evidence indicates that PW-6 in order to avoid the assault from accused Nos. 1 and 2 started running away. On noticing that, deceased Manoj and other persons who were sitting together had intervened to save PW-6. The accused Nos. 3 to 7 were not members of unlawful assembly while Manoj was assaulted. Accused Nos. 1 and 2 assaulted Manoj as a result of which he fell down and thereafter accused Nos. 3 to 7 had arrived at the scene of offence. Manoj was not in the picture when altercation with PW-6 had commenced. There was no enmity between accused with Manoj. There is no evidence on record that the accused had conspired in premeditated/ preplanned and intended to attack the victim and injured persons. The earlier quarrel of 05.01.2009 was between PW-6 and accused No.1. The said quarrel was of trivial nature. The quarrel came to an end with the intervention of others, there was no quarrel thereafter. There were no threats to PW-6 or any other persons between 05.01.2009 to 27.01.2009, since accused Nos. 3 to 7 were not present when Manoj was assaulted it cannot be inferred that they had common object of assaulting him after joining the assault subsequently. They were not present at the scene of offence while Manoj was assaulted. It cannot be determined that they were members of unlawful assembly in the absence of their presence at the scene of offence, to assault Manoj. There was no apparent intention to assault Manoj. The incident had commenced by confrontation with PW-6. The deceased Manoj PW-7,

PW-8, PW-9 and PW-11 had intervened in the quarrel all of a sudden. It cannot be presumed that all the accused had knowledge they would intervene. The evidence also do not substantiate that common object was formed to assault others at the time of incident. The intervention of deceased and all the witnesses was sudden. There is nothing on record to infer that accused Nos. 1 to 7 had common object to assault PW-6, deceased Manoj and all other injured persons.

25. Section 149 reads as follows :

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 that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

26. On reading the aforesaid provision it is crystal clear that every member of unlawful assembly is guilty of offence committed in prosecution of common object. Unlawful assembly has been defined under Section 141 of IPC. As per the said provision, an assembly of five or more persons is designated an “unlawful assembly” if the common object of the persons composing that assembly is to commit the acts enumerated under the said penal provision. In the present case, PW-6 was being assaulted he was chased by the accused Nos. 1 and 2. Manoj and others had intervened and they were assaulted by different accused persons. Accused Nos. 3 to 7 had participated at that stage while Manoj was assaulted, only two assailants had participated in the crime i.e. accused Nos. 1 and 2. Thus at the time of assault upon accused Nos. 1 and 2, there was no existence of unlawful assembly as contemplated under Section 141 of Negotiable

Instrument Act. In the absence of unlawful assembly, the constructive liability incorporated under Section 149 of IPC cannot be invoked. Thus for the act of assault and consequential death of deceased Manoj, accused Nos. 3 to 7 cannot be convicted by invoking Section 149 of IPC. Similarly for the individual act attributed to the accused persons qua assault on PW-6, PW-7, PW-8, PW-9 and PW-11 all of them cannot be convicted for the offences by invoking Section 149 of IPC.

27. In the recent decision of Supreme Court in the case of Balmukund Sharma and others Vs State of Bihar in criminal appeal No. 1382-1384 of 2014 the question of applicability of Section 149 IPC was considered. The trial Court had convicted the accused for offence under Section 302 read with 149 IPC. While analysing the facts to consider applicability of constructive liability, it was observed that, in the said case accused initially chased the informant up to his house and on failing to get hold on him set fire to portion of his house and caught hold of his nephew (deceased) who was in field and was done to death by one of the accused. The murder of deceased was itself not the common object of unlawful assembly. The act of main accused of shooting deceased was sudden and knowledge of likelihood of the same could not be attributed to the rest of the accused. Though the other accused followed main accused who shot the deceased. The evidence could not conclusively and beyond reasonable doubt, show common object shared by the other accused in commission of murder. It is well-settled that to determine whether an accused, being a member of an unlawful assembly is liable for a given offence it needs to be seen whether such act was committed in prosecution of common object of the

assembly, and alternatively whether the members of the assembly knew that the offence was likely to be committed in prosecution of common object.

28. As far as accused Nos. 4, 6 and 7 are concerned, their involvement in the crime itself is doubtful. PW-6 has stated that accused Nos. 1 and 2 assaulted Manoj and Sujata. Accused No. 5 assaulted Renuka Gaikwad. No specific role of assault is attributed to accused Nos. 4, 6 and 7. However, PW-6 have stated without mentioning the names of the aforesaid accused that the other accused had assaulted Raju Gaikwad by fist and leg blows. Apart from that Raju Gaikwad has not been examined by the prosecution. PW-7 have mentioned names of Baban, Pawan as persons who assaulted Rajesh Gaikwad on stomach by fist blows and kicks blows. Name of accused No. 4 Vivekanand is not mentioned by the said witness. In the cross-examination, the said witness have stated that there is no person by name Pankaj Baban Gaikwad involved in the incident. Accused No. 6 have been impleaded as Vishnu @ Baban Gaikwad and accused No.7 is impleaded as Pavan Vishnu. The witnesses further stated that she had not informed the name of Pankaj but the name of Pawan. She had stated the name of Pankaj Baban, Baban Gaikwad and Pawan Vishnu as the assailants. There is person by name Pawan Vishnu Gaikwad, in existence. Thus there is confusion in the mind of the witness with regards to involvement of accused Nos.6 and 7. PW-8 Sachin Gaikwad has stated that Baban Jadhav, Pawan and others assaulted Sujata and Rajesh. The witnesses has not given clear name of accused Nos. 6 and 7. He has not referred to participation of accused. The role of assaulting Sujata by wooden stick was attributed to Vinayak (accused No.2). Thus

again there is suspicion about the involvement of the accused Nos.4, 6 and 7 in the crime. PW-9 Renuka Gaikwad has stated that others had assaulted Raju Gaikwad by bolws and kicks. She has not mentioned the name of accused Nos. 4, 6 and 7 as assailants or participants in the crime. PW-10 has stated that Baban and Pawan assaulted others and Rajesh Gaikwad with hand blows and kicks. In the cross-examination, he has stated that the persons of name Pankaj Baban Gaikwad is in existence and he was present there. PW-11 Rajesh Gaikwad has stated that Baban and Pankaj assaulted him with fist and kick blows. He also stated that others present started assaulting him with fist and kicks. Considering the aforesaid circumstances, it cannot be said that the involvement of accused Nos. 4, 6 and 7 has been established by the prosecution and hence the said accused deserves to be acquitted of all the charges.

29. As far as accused Nos. 1 and 2 are concerned, it is evident that there is consistent evidence of the injured eye witnesses about their presence at the scene of offence. Specific role has been attributed to them for assaulting Manoj Gaikwad and Sujata Gaikwad. The evidence of medical officer PW-12 refers to the injury sustained by Manoj. It is pertinent to note that accused Nos. 1 and 2 were allegedly armed were with iron rod and iron pipe. They assaulted Manoj by giving blow on his head. The quarrel had commenced with altercation with PW-6. Manoj had intervened all of a sudden. PW-6, PW-7, PW-8, PW-9, PW-10 and PW-11 have specifically stated that accused Nos. 1 and 2 assaulted Manoj. However considering the manner in which the incident had occurred and the medical evidence on record, it cannot be said that there was an intention to commit murder of Manoj. PW-12 has referred to the nature of injuries

sustained by Manoj. The injuries are referred to herein above. The cause of death was head injury. Both the accused gave one blow allegedly on the head of the deceased. Although PW-12 had stated that the injury No. 1 mentioned in column No. 17 corresponding to internal injury in column No.19 as sufficient in the ordinary course of nature was death. It doesn't appear that the accused had intended to kill him. It was not a preplanned attack. There is no animosity between Accused Nos. 1 and 2 and deceased. PW-12 have admitted that there was no injury on the occipital area. He also stated that the injury stated in column No. 17 is possible due to a forcible fall on hard surface when head strikes on that hard surface. Column No.17 refers to lacerated wound on vertex on right side 8 cm. x 1 cm. x Bone deep with extravasation of blood in surrounding tissue. On internal examination he found the injuries in the nature of haematoma under scalp in the right temporal parietal region, crack fracture of right parietal bone. In the light of the aforesaid evidence, the accused Nos. 1 and 2 had a knowledge that the death would be caused on account of the assault by them but certainly there was no intention to commit murder which is requirement constitute the offence under Section 302 of IPC. The offence therefore would at the most come within purview of Section 304 (Part-II) of IPC.

30. The Accused No.3 Rajendra Jadhav was attributed role of assaulting Sachin Gaikwad by PW-6. PW-7 has stated that he assaulted Sachin Gaikwad with blunt side of axe on right hand. PW-8 has stated that accused No.3 had assaulted him by handle of axe on right hand. Similar role is attributed to accused No.3 by PW-9, PW-10 and PW-11. The injury certificate of Sachin Gaikwad mentioned that he had sustained simple injury. Accused No.5 has

been attributed role of assaulting Renuka Gaikwad by sword on her head. No other accused was attributed role of assaulting Renuka Gaikwad. We have perused the injury certificate of Renuka, the injury appearing therein is simple in nature. There was CLW 3 x 1 cm. on right parietal into bone deep. Involvement of accused No.3 and 5 has been established by evidence. The injury sustained by Renuka Gaikwad PW-9 and Sachin Gaikwad (PW-8) would attract Section 324 of IPC. In the aforesaid circumstances, the conviction under Section 302 of IPC and Section 307 of IPC are required to be quashed and set aside. The accused No. 2 is also attributed role of assaulting Sujata Gaikwad on stomach by stick. Sujata had not sustained any injury. The medical certificate does not indicate any superficial injury. The medical officer has also stated that he could not notice any injury on Sujata Gaikwad. Thus her version is doubtful and the accused cannot be convicted for assaulting her. The accused Nos.3 and 5 can be convicted for an offence under Section 324 of IPC. The trial Court had framed the charge under Section 302 r/w 149 of IPC for committing murder of Manoj Gaikwad. The trial Court had convicted all the accused for the said offence. The second charge was relating to Section 307 r/w 149 regarding assault on Renuka Gaikwad (PW-9) assault on PW-6 and others by weapons such as axe, stick, stone and attempting to commit murder. The trial Court convicted all the accused under Section 307 r/w 149 IPC and they were sentenced to suffer imprisonment for 7 years. The third charge was relating to Section 323 r/w 149 of IPC for assaulting complainant and others. The trial Court convicted all accused for the said offence and sentenced them to suffer

imprisonment for 1 month. The accused were also convicted for offence under Section 147, 148 IPC and sentenced to suffer imprisonment for 6 months.

31. For the reasons stated above accused Nos. 1 and 2 are convicted for offence under Section 304 (II) IPC. Accused Nos. 3 and 5 are convicted for offence under Section 324 of IPC. Accused Nos. 4, 6, 7 are acquitted of all charges. Accused Nos. 3 to 7 are acquitted of charge under Section 302 and 307 of IPC. The Counsel for applicant submitted that accused Nos. 1 and 2 are in custody for 10 years and accused Nos. 3 and 5 were in custody for 8 months. Hence they are sentenced to suffer imprisonment for sentence which they have undergone.

:: ORDER ::

1. Criminal Appeal No. 1265 of 2011 and Criminal Appeal No. 1206 of 2011 are partly allowed ;
2. The impugned judgment and order dated 8th September, 2011, passed by the Learned Ad-hoc Additional Sessions Judge, Solapur in Session Case No.136/2009, convicting accused Nos. 4, 6 and 7 for the offences under Section 302 read with 149, Section 307 read with 149, Section 323 read with 149, Section 147 and 148 is quashed and set aside and they are acquitted of all charges ;
3. The conviction and sentence imposed on accused Nos. 1

and 2 is modified and they are convicted for an offence under Section 304 (Part-II), they are directed to be released on the basis of sentence undergone by them immediately unless their custody as required in any other case ;

4. The conviction of accused Nos. 1 to 7 for offence under Section 307 read with 149 of IPC is quashed and set aside. The accused Nos.3 and 5 convicted for offence under Section 324 of IPC and sentenced to undergo the imprisonment for a period of 6 months which is already undergone by them ;

5. The accused are entitled for set off ;

6. Muddemal property be dealt with in accordance with law.

(PRAKASH D. NAIK, J.)

(B.P. DHARMADHIKARI, J.)