

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

CRIMINAL APPEAL NO. 483 OF 2010

1] Deepak Maruti Ghatе.
2] Krishna Maruti Ghatе.

**..Appellants
(Orig.Accused Nos.1 & 3)**

Vs

State of Maharashtra
(Through Neral Police Station)

..Respondent

**WITH
CRIMINAL APPEAL NO. 482 OF 2010**

1] Dilip Mahadu Ghatе.
2] Ravi Dehu Shinare.

**..Appellants
(Orig.Accused Nos.5 & 7)**

Vs

State of Maharashtra
(Through Neral Police Station)

..Respondent

**WITH
CRIMINAL APPEAL NO. 818 OF 2010**

The State of Maharashtra
Vs.

..Appellant.

1] Manohar Vasant Tare
2] Rajan Mahadu Ghatе
3] Dilip Mahadu Ghatе
4] Maruti Pandurang Ghatе
5] Ravi Dehu Shinare
6] Sandeep Janu Rane.

**..Respondents
(Orig.Accused Nos.2 and 4 to 8)**

Mr. Srikant Shivade a/w Shri M.S. Mohite, Mr. Ashish Sawant, Mr. Shantanu Phanse, Mr. Vivek Babar, and Mr. Viral Babar for Appellants in Appeal Nos.483 and 482 of 2010 and for the respondent Nos.1 to 6 in Appeal No.818 of 2010.

Ms. P.P. Shinde, APP for the Appellant in Appeal No.818 of 2010 and for the Respondent-State in Appeal Nos.483 and 482 of 2010.

CORAM : A.S.OKA AND A.S.GADKARI, JJ.

DATE : 13th and 14th February 2019.

ORAL JUDGMENT : (A.S.Oka, J.)

Criminal Appeal No.482/2010 is preferred by the accused Nos.5 and 7. Criminal Appeal No.483/2010 is preferred by the accused Nos.1 and 3. Criminal Appeal No.818/2010 is preferred at the instance of the State Government challenging the acquittal of accused Nos.2 and 4 to 8 for the offences punishable under section 302 of the Indian Penal Code.

2. By the impugned judgment and order dated 7th May 2010 passed in Sessions Case No.150/2007, the learned Additional Sessions Judge-1, Raigad, Alibag convicted the accused Nos.1 and 3 for the offences punishable under section 302 of IPC and were sentenced to suffer rigorous imprisonment for life. The accused Nos.1 and 3 were held guilty of the said offence for committing

murder of Krishna Gomare. The accused No.5 was convicted under section 326 of IPC for voluntarily causing grievous hurt to the deceased Krishna Gomare. The substantive sentence imposed upon him is rigorous imprisonment for four years. The accused No.7 has been convicted for the offence punishable under section 326 of IPC for voluntarily causing grievous hurt to Gurunath Gomare (PW2). The substantive sentence imposed is rigorous imprisonment of two years.

3. The learned Additional Sessions Judge acquitted accused No.2, 4, 6 and 8 for the offences punishable under sections 143, 147, 148, 302, 324 read with 149, 34 and 504 of IPC and sections 3 and 25(1) of the Arms Act. Accused Nos.1, 3, 5 and 7 were acquitted for rest of the offences alleged against them.

4. With a view to appreciate submissions advanced across the bar, it is necessary to briefly summarize the prosecution case. According to the case of the prosecution, the accused No.1 had taken a contract of supplying building material to one Vasant Joglekar who was having a large property in the concerned village. Even the deceased Krishna Gomare who was the Sarpanch of the concerned village was given a contract of supply of building material by the said Vasant Joglekar. Hence, there was a dispute between them about the said contract. The allegation is that the accused No.1 conspired with accused Nos.2 and killed the deceased. The

allegation of the prosecution is that the accused came in a tempo at the scene of the offence. They were carrying dangerous weapons such as swords, iron pipes, iron rods, tommy etc. The allegation is that accused Nos.1 and 3 assaulted deceased Krishna Gomare by swords in their hand. Further allegation is that after the deceased Krishna fell down, witness Gurunath Gomare who was the nephew of the deceased came to the site when accused No.5 assaulted him on his head by use of a tommy. Further allegation is that accused Nos.2, 4, 5 and 6 by using iron rod assaulted the prosecution witnesses and deceased Krishna. The allegation against the accused No.6 is that he assisted the other accused for running away from the site by the tempo. After investigation of the crime, chargesheet was filed by the Investigation Officer against the accused persons.

5. The prosecution examined 10 witnesses. PW1- Macchindra Gomare and PW2- Gurunath Gomare are related to deceased Krishna Gomare. According to the prosecution case, both the witnesses are victims of the offence in the sense they are injured. PW3- Nandkumar Mhaskar is also an injured witness. PW4- Ashok Joshi is alleged to be an eye witness. PW5- Prakash More was examined to prove the memorandum under section 27 of the Indian Evidence Act, 1872 and seizure Panchanama of recovery of weapons of the offence viz. pipe, sword, tommy, iron rods and stick at the instance of the accused No.1. PW6- Sanjay Khade is a Panch Witness to the memorandum under section 27 of the Indian Evidence

Act and the Seizure Panchanama of recovery of sword at the instance of accused No.3. PW7 and PW10 are Panch Witnesses. PW8- Dr.Pritam Patil is examined to prove injury certificate of PW2- Gurunath and the case papers of the said witness. PW9- Dr.Sampat Deshmukh, Autopsy Surgeon who conducted post-mortem on the body of the deceased is also examined to prove injury certificates of injuries on the person of PW1 and PW3.

6. The learned counsel appearing for the accused has taken us through the record and the evidence of prosecution witnesses. Firstly, he pointed out that after recording of the evidence of PW1 to PW10, the statements of accused were recorded under section 313 of Cr.P.C. Thereafter, written statements of the accused were placed on record. Subsequently, on an application made by the prosecution, PW11- Barkat Ali Abdul Razzak Bazi was examined as a prosecution witness. He submitted that the defence of the accused in the written statement was that PW11- Barkat Ali was the only alleged independent witness and the failure to examine him was fatal. Moreover, the genesis of the prosecution case was not proved as a result of the failure to examine the said witness. He invited our attention to the evidence of PW11-Barkat Ali in support of his contention that it was the deceased- Krishna Gomare and PW1 to PW4 who were the aggressors.

7. In short, the contention of the learned counsel appearing for the appellants is that even if their case for acquittal is not accepted, as the prosecution has failed to prove the motive alleged and the genesis of its case, the plea raised in the alternative by the accused of the exercise of the right of private defence becomes a plausible defence which needs to be accepted. Moreover, he pointed out that sections 34 and 120B were applied but the finding of the trial Court is that the prosecution has failed to prove applicability of the said sections. The learned counsel for the appellants further submitted that as there is no appeal preferred against acquittal by the State as far as the accused Nos.1 and 3 are concerned, now the issue of applicability of section 34 or 120B of the Indian Penal Code cannot be gone into by this Court. His submission is that the accused Nos.1 and 3 have been attributed a role of making assault on deceased Krishna by using swords, but the medical evidence is against the said theory. He, therefore, submits that there is no justification for the finding of the learned trial Court holding the accused Nos.1 and 3 guilty of the offence punishable under Section 302 of the Indian Penal Code.

8. As far as the accused No.7 is concerned, his submission is that though the injury certificate of PW No.2 mentions fractures, the same have not been proved and only the production of X-Ray report without examining the concerned doctor or the technician for proving the existence of the fractures is not sufficient. He states that

the finding recorded as regards the accused No.5 of committing the offence punishable under Section 326 of the Indian Penal Code has no basis.

9. His argument in the alternative based on the plea taken by the accused in the statement under Section 313 is that once it is established that the deceased Krishna and his colleagues were aggressors and a stick is found at the spot with blood-stained hair attached to it, the plea of exercise of right of private defence becomes a plausible defence. He submits that, the genesis of the case is brought on record by examining PW No.11- Barkat Ali. It supports the plea of private defence. He would submit that in the alternative that the Court will have to accept the plea of private defence and acquit the accused persons.

10. The learned APP while supporting the impugned order, urged that there is an appeal against acquittal filed by the State. She pointed out that as regards the use of a sword as a weapon of assault by accused Nos.1 and 3, there is a consistent evidence of four eye-witnesses namely PW Nos.1 to 4 and the said ocular evidence will prevail over the opinion of the doctor. She invited our attention to the findings recorded by the learned trial Judge and submitted that once the finding regarding assault made by the accused Nos.1 and 3 by using sword is accepted, their conviction under Section 302 of the Indian Penal Code will have to be upheld.

11. Turning to the appeal filed against acquittal, the learned APP pointed out that the accused Nos.2 and 4 to 8 are parties to the appeal against acquittal. Her submission is that, in the said appeal, the grievance of the State is as regards the failure to apply Sections 34 or 120B of the Indian Penal Code and consequently there is a challenge to the acquittal of the said accused for the offence punishable under Section 302 read with 34 or Section 302 read with 120B of the Indian Penal Code. Her submission is that there is an overwhelming evidence on record for applying the said sections to all the accused and therefore, the interference by this Court is called for as far as the appeal against acquittal is concerned.

12. The learned counsel for the appellants relied upon various decisions including the decision of the Apex Court in the case of the *State of U.P. v. Hari Prasad & Ors.*¹ He also relied upon the decision of the Allahabad High Court in the case of *Jumma Vs State of U.P.*² A reliance was also placed on the decision of the Apex Court in the case of *Radhey Shyam Khemka & Anr Vs. State of Bihar*³.

13. We have carefully considered the submissions. While dealing with the issue of proof of the motive alleged, we must note that the case of the prosecution is that one Vasant Joglekar (who was

1 (1974) 3 SCC 673.

2 Mnu 1104/1192

3 1993 SCC (Cri) 591 : (1993) 3 SCC 54

cited as a prosecution witness but was not examined) had undertaken a scheme of construction of bungalows. As per the version of PW No.1- Macchindra, the scheme was of construction of 100 bungalows. The work of supply of the building material was given by the said Joglekar to the accused No.1 and deceased Krishna. The work of supply of material in relation to 35 bungalows was given to the accused No.1 and the work of supply of material for 13 bungalows was given to deceased Krishna. According to the prosecution, the accused No.1 was aggrieved as a part of the work of supply of material was given to Krishna and that was the reason for a quarrel between the accused No.1 and the deceased Krishna fifteen days before the date of incident. The case of the prosecution is that due to said quarrel, a conspiracy was hatched by the accused No.1 along with other co-accused against Krishna. The case made out in the written statement filed by the accused No.1 under Section 313 of the Code of Criminal Procedure (for short "Cr.P.C.") is that the entire work of supplying the building material was given to the accused No.1 under the agreement dated 7th November 2005 and in fact the agreement dated 7th November 2005 was produced along with the statement under section 313 of Cr. P.C. This becomes relevant as though the owner Vasant Joglekar was cited as a prosecution witness who could have thrown light on the issue whether the contract was given in its entirety to the accused No.1 or partly to the deceased Krishna, he has not been examined. There was one more aspect which needs to be noted. In the evidence of PW No.2

Gurunath, he deposed that the contract of supply of building material was given to accused No.1. He has not spoken about a part of it being given to the deceased Krishna. Thus, conclusion which can be recorded is that, the prosecution has failed to prove the motive. We are conscious of the fact that as far as the guilt of the accused persons is concerned, the motive may not be relevant, as this is a case where the prosecution case rests on the evidence of eye-witnesses. Nevertheless the issue of motive is of some significance as it has a bearing on the question as to who were the aggressors.

14. Now we turn to the evidence of PW Nos.1 to 4. Perusal of the evidence of the said witnesses show that three of them claimed to be the injured witnesses and all four of them are relatives or close associates of the deceased Krishna. Therefore, there is bound to be a tendency of indulging in exaggerations and improvements. The evidence of the said witnesses suggests that the said witnesses proceed on the hypothesis of the existence of the aforesaid motive and conspiracy made by the accused No.1 with the other accused against deceased Krishna. According to the version of the witness PW1- Macchindra, on 12th April 2007 at 3.00 p.m., he was walking towards Neral. PW 1 is related to deceased Krishna. His case is that, he was given a lift by PW4- Ashok on his motorcycle. They came near the service centre of PW11- Barkat Ali. In front of service centre of PW1, there was a workshop of PW3- Nandkumar. His case is that deceased Krishna and PW2- Gurunath were sitting along with PW3-

Nandkumar in the welding workshop. After seeing him and PW 4, deceased Krishna along with PW2- Gurunath and PW3- Nandkumar came near the service centre of PW11- Barkat Ali. PW4 had given his motorcycle for servicing at the service centre. They sat in front of the service centre on chairs. At that time, one tempo came near the service centre which was owned by the accused No.1- Deepak. The accused No.8 Sandeep was driving the same. The accused Nos.1 and 3 got down from the said tempo. They started abusing Krishna. The accused No.1 asked Krishna as to why he has accepted the work of supplying building material to Joglekar. There was an exchange of words between them. Thereafter, the accused No.1 and the accused No.3 went to the tempo and took out swords from rear side cabin. Thereafter, the accused Nos.2, 4, 5, 6 and 7 got down from tempo who were holding weapons like iron bars, iron pipes and tommy in their hands. It is alleged that the accused No.2 Manohar was having iron pipe in his hand and the accused Nos.4 and 6 were having iron bars with them. The accused Nos.1 and 3 rushed to Krishna with swords and assaulted Krishna on his head by using the swords. The accused No.5 gave blow with iron pipe on both legs of deceased Krishna. As a result, Krishna fell down. Thereafter, the accused Nos.6, 7 and 8 gave blows with iron pipe and iron rods on the person of Krishna. When PW1 along with PW2 went to rescue his uncle, at that time, the accused No.7 gave blow on the head of the PW1. The accused No.2- Manohar assaulted PW3- Nandkumar with iron pipe on his leg and hand. PW1 has further claimed that the accused No.4-

Rajan and accused No.6- Maruti assaulted him by means of iron rods. The said two accused ran behind the service centre. The accused Nos.1, 2 and 4 to 7 went inside the service centre and from the back door, they ran away from the spot. It is alleged that Krishna died on the way to the hospital and PW Nos.1 and 2 suffered injuries. The evidence of PW Nos.2, 3 and 4 is more or less consistent on the role attributed to various accused persons. After having carefully perused the evidence of the said four prosecution witnesses, we find that their evidence cannot be discarded as far as the complicity of the convicted accused is concerned.

15. Now we turn to the evidence of recovery which has been partly disbelieved by the Trial Court. There are two parts of the evidence regarding recovery. According to the prosecution, at the instance of accused No.1, there was a discovery of one pipe, one sword, one tommy, three iron rods and one stick. We may note here that Exhibit-108 is a letter dated 16th April 2007 addressed by the Investigating Officer to the Forensic Science Laboratory in which item No.10 is described as a stick of bamboo having blood stains and hair sticking to it. A panchanama of recovery refers to the stick of bamboo having blood stains on it and hair attached to it.

16. We must note here that PW 10 Sanjay Babar (Investigating Officer) was confronted with contents of the letter (Exhibit-108). He accepted that he has mentioned that item No.10 is a stick found at the site having blood stains and hair attached to it.

Thus, there is an evidence on record to show that the stick which is mentioned in the memorandum panchanama which is allegedly discovered at the instance of the accused No.1 was found at the scene of offence by the police. This is one reason why the theory of discovery at the instance of the accused No.1 becomes doubtful as the same stick is also shown as discovered at his instance. The second reason is that even according to the prosecution case, the sword was sealed at the police station and not at the place where it was recovered.

17. As far as this part of the evidence is concerned, as noted earlier, the learned Trial Judge has disbelieved the case of the prosecution. Since there is an appeal against acquittal, we have examined the finding recorded by the Trial Court on this aspect. After considering the evidence of the panch-witness, the learned Trial Judge noted that the spot panchanama was prepared on 12th April 2007 and the accused No.3 was arrested on 12th April 2007. The Trial Court observed that it is not the case of the prosecution that the accused persons had taken the weapons from Neral service centre after assault and they kept it in the corner of the tyre puncture shop and, thereafter they left the shop. The Trial Court observed that no one would keep the weapons used in the crime in such a way that all weapons will be found by the police in a well arranged manner in the corner of the shop. The Trial Court has further observed that it is also not the case of the prosecution that under the direction of

accused No.1, other accused persons also kept the weapons in the corner of the tyre puncture shop. Therefore, the Trial Court opined that it cannot be accepted that at the instance of accused No.1, the weapons were discovered.

18. As regards the discovery of sword at the instance of accused No.3, PW6- Sanjay is a panch-witness. The discovery was shown from a place in the rear side of the service centre. The spot of incident was visited by the Investigating Officer on 12th April 2007. However, the discovery shown on 18th April 2007. That is why the evidence of discovery of sword at the instance of accused No.3 has been also disbelieved.

19. After having assessed the evidence of the prosecution witnesses and, especially PW 5 and PW6, we find that the finding of the Trial Court on this aspect deserves no interference.

20. At this stage, we may turn to the evidence of PW9- Dr.Sampat D. Deshmukh, an autopsy surgeon. We have carefully perused his evidence. In his deposition, in paragraph No.2, he stated that on external examination, he found ante-mortem injuries over the dead body of Krishna. The injuries found by him are as under:-

- (1) Contused lacerated wound of size 1 x 1 x 7 cms on left parietal area;
- (2) Fracture of left parietal bone approximately 1 x 1.5 cms;

- (3) Contused lacerated wound sized 2 x 0.5 x 5 cm on left frontal area;
- (4) 1 cm deep injury above right brow;
- (5) 7th teeth broken from lower jaw left side;
- (6) contused lacerated wound of size 2 x 5 cms below left lower lip on chin;
- (7) 1 cm deep injuries on both knee joint;
- (8) Both side fracture of tibia bone just below knee level;
- (9) Hamatoma of size 2 x 5 cms on right side of chest;
- (10) Fracture of left arm bone.

21. Emphasis of the learned counsel for the appellants is on the opinion expressed by the said doctor in paragraph No.5 which mentions that Injury No.2 is sufficient in ordinary course of nature to cause the death. The said Injury No.2 is Fracture of left parietal bone having size of approximately 1 x 1.5 cms. Moreover, the said doctor opined that the Injury Nos.1 and 2 mentioned in column No.17 of the report are less likely to be caused by the weapons marked as Article Nos.15 and 22 i.e. swords shown to him. The argument was that apart from the fact that the evidence of discovery of articles at the instance accused Nos.1 and 3 has been disbelieved, even the medical evidence shows that there was no injury on the person of the deceased which could be attributed to use of a sword.

22. In the cross-examination, PW9– Dr.Deshmukh has accepted that except the skull, there was no injury to any vital organ of the body. He also accepted that there is no injury or damage to the

brain. He accepted that the injury Nos.1 and 2 are possible by one impact and the injury Nos.3 and 6 are possible due to fall on a hard surface. It is true that the evidence of the prosecution witnesses indicates that the deceased fell down on a hard surface. As the accused No.5 is convicted for the offence punishable under Section 326 of the Indian Penal Code for causing injuries on the person of deceased Krishna, we must note here that the injury No.8 is of both side fracture of tibia bone just below knee level and injury No.10 is of fracture of left arm bone. PW9 opined that injuries could be caused by the weapons marked as Article Nos.16 to 21 which were shown to him which include iron rods. PW9 disclosed that PW2-Gurunath suffered three fractures which are described as under:

- “(1) Fracture to let leg mid-shaft
- (2) Fracture of right radius lower end
- (3) Multiple fractures of left hand.
- (4) Contused lacerated wound over occipital area, sized 8 cm x 1 cm x scalp deep
- (5) Contusion on right shoulder.”

He stated that the injuries could have been caused by use of hard and blunt object like a tommy or iron rod. This evidence against the accused Nos.5 and 7 corroborates the evidence of eye witnesses.

23. As narrated earlier, the evidence of prosecution witnesses and in particular PW1 to PW4 is consistent about the accused Nos.1 and 3 taking out swords from the tempo and assaulting the deceased

Krishna on his head by the use of swords in their hands. Much reliance was placed on the aforesaid version of PW9- Dr.Deshmukh who opined that injury Nos.1 and 2 on the head of deceased are less likely to be caused by the weapons marked as Articles 15 and 22 which are the swords. There is a consistent ocular evidence of the prosecution witnesses regarding the accused Nos.1 and 3 assaulting by swords on the head of the deceased Krishna. It is not possible to disbelieve to this evidence. Veracity of this testimony cannot be affected by the opinion expressed by PW9 - Dr.Deshmukh and the fact that the evidence of discovery has been disbelieved by the Trial Court. Therefore, it is not possible to find fault in the finding of the Trial Court that the accused Nos.1 and 3 are the authors of the injuries suffered by Krishna which ultimately caused his death.

24. Now we turn to the evidence of PW11- Barkat Ali. We must note here that PW11 was cited as a prosecution witness who was the owner of the concerned service centre. In the written statement recorded under Section 313 of Cr.P.C of the accused No.1, it is a specific grievance made about the prosecution withholding an important witness namely PW11- Barkat Ali. It is true that the prosecution ought to have earlier examined PW11- Barkat Ali, however, the action of examining Barkat Ali after recording the statements under Section 313 of Cr.P.C., cannot be said to be illegal, especially when there is no prejudice to the accused persons as they were permitted to cross-examine the said witness. It is true that

PW11 was a witness who could have thrown light on the genesis of the prosecution case and his evidence was initially withheld. We may note here that the evidence of PW11 is an evidence of an independent witness. He deposed that he was running Neral Auto Service Centre for a period of 10 years and he was also having a tyre puncture shop adjacent to his service centre. He deposed that the shop of PW3 is adjacent to his service centre. He deposed that he knew deceased Krishna as well as PW1 to PW4. He deposed that on 12th April 2007 at about 11.00 a.m., deceased Krishna visited his service centre and told him that he should not wash vehicles of the accused No.1- Deepak and his family. He deposed that there was some dispute between the deceased Krishna and the accused No.1 regarding supply of construction material. On the same day at about 1.30 p.m, the accused No.1 came to his service centre and told him that he has brought his vehicles for washing. PW11 further deposed that he told the accused No.1- Deepak that deceased Krishna has directed him not to wash his vehicles. Thereupon, the accused No.1 told PW11 that he should not be afraid and told him that he will bring his vehicle for washing in the afternoon on the very same day and thereafter, the accused No.1 went away. It has come in the cross-examination that he was washing the vehicles of accused No.1 at his service centre for about three years prior to the incident. He stated that the accused No.1 went away and immediately thereafter he tried to make a call to the deceased Krishna. As he could not contact the deceased Krishna, he made a call on cellphone of PW2-

Gurunath and he spoke to Krishna and informed him about the fact that the accused No.1 had been in his service centre and he will be bringing his vehicles for washing. He further stated that at about 3.00 p.m when he was taking water for drinking, his servant informed him that Krishna had come to his shop. When PW11 went to his spare part shop, at that time, Krishna, PW2, PW3 and PW4 were sitting on the chairs in the shed of his service centre. At 3.30 p.m., the accused No.1- Deepak and the accused No.3 came there when there was an exchange of words between the accused No.1 and Krishna. After thinking that there may be some incident between them, PW11 left the service centre from the back side door. The evidence of PW11 taken as correct establishes the fact that the deceased Krishna had an objection for the said witness washing vehicles of the accused No.1 at his service centre. On learning from that the PW11 that the accused No.1 was to bring his vehicle in the afternoon to the service centre, that the deceased Krishna accompanied by PW Nos.1 to 4 came to the service centre and were already sitting in the shed of service centre when the accused No.1 arrived with his vehicle. It is neither the prosecution case nor it is proved by the prosecution that the accused Nos.1 and 3 or co-accused were aware that the deceased Krishna and his associates were to visit the service centre of PW11 - Barkat Ali when the accused No.1 was to bring his vehicle for washing at the service centre of PW11.

25. Thus, the evidence of PW11- Barkat Ali brings on record a very important fact that the deceased Krishna and his colleagues deliberately came to the site where the offence took place after being informed that the accused No.1 was to arrive at the service centre for washing his vehicle and that the accused No.1 and his colleagues were not aware that the deceased Krishna and his colleagues were to arrive at the service centre of PW11. It creates a serious doubt about the case of the prosecution that the accused No.1 and co-accused were aggressors. This has to be appreciated in the context of the fact that the alleged motive is not established by the prosecution.

26. At this stage, we must note here that there is no appeal against acquittal preferred by the State against the accused Nos.1 and 3. This is relevant in the context of the fact that the Trial Court has recorded a finding that the prosecution has failed to prove the offence under Sections 34 and 120B of the Indian Penal Code. The Trial Court held that the prosecution has failed to prove the existence of unlawful assembly.

27. Perusal of the Section 141 of IPC shows that at highest, clause (iii) will be applicable which is “to commit any mischief or criminal trespass, or other offence”. We must note here that PW11 has admitted in his cross-examination that he had told Krishna that the accused No.1 was to arrive for washing his vehicle and that the accused No.1 and his colleagues came to the service station. The

accused were not aware that the said Krishna was to remain present at the service centre at 3.00 p.m. Therefore, it is not possible to accept the prosecution case that there was assembly of five or more persons with the common object of committing any offence.

28. At this stage, we must note one more important fact. PW3 has deposed that at the time of incident, the accused No.2 was profusely bleeding on his face. Moreover, the Exhibit-113 is memorandum/yadi dated 23rd June 2007 issued by the Assistant Police Inspector of Neral Police Station to the Medical Officer, Neral hospital. It records that there were injuries on the person of the accused Nos.1, 2, 3 and 8 whose names are mentioned therein and therefore, a request was made to Medical Officer to issue medical certificates regarding injuries sustained by them. It appears that the medical certificates were not produced by the prosecution of the injuries sustained by the said four accused though the said letter clearly records that they had sustained injuries.

29. At this stage, we make a reference to the written statement filed by accused No.1 under section 313 of Cr.P.C in which he has stated that when he reached the service centre of PW11 for washing of his tempo, the deceased and PW Nos.1 to 4 came there with weapons such as swords and iron rods in their hands and threatened the accused No.8 to kill him. We must note here that further defence is that the accused No.8 was locked by them in the

puncture shop. Thereafter, the accused No.1 with accused No.2 were assaulted by deceased Krishna by using a sword. When the group led by deceased Krishna tried to assault the accused No.1 and others, the accused No.2 picked up a tommy lying on the floor of the puncture shop and used the said weapon to defend himself and the accused No.3 picked up a stick and started brandishing it to defend himself. As noted earlier, a stick made of bamboo was found at the scene of offence which was stained with blood and hair attached to it. The prosecution did not send it to a Forensic Expert. Thus, the fact that the deceased Krishna and his associates were present at the scene of offence after knowing from PW11 that the accused No.1 was to arrive there, the fact that the accused No.1 and other accused persons were not aware that the deceased Krishna and his colleagues were to come to the scene of offence, the injuries sustained by the accused Nos.2 as well as other accused and that the fact that blood stained stick with hair sticking to it was found at the site makes the plea of exercise of private defence a plausible defence.

30. As far as the accused Nos.1 and 3 are concerned, they used swords to attack deceased Krishna. Therefore, it can be certainly said that they exceeded the right of private defence. Therefore, the case will be governed by Exception 2 to Section 300. As there was no intention on the part of accused Nos.1 and 3 to kill the deceased Krishna, the case will fall under Part II of Section 304 of the Indian Penal Code.

31. Now coming to accused No.5, the two fractures sustained by Krishna on his leg are attributed to him. There is evidence on record to show that the said act was done by the accused No.5 after deceased Krishna fell on the ground. Therefore, in his case, he exceeded the right of private defence. The accused No.5 was convicted under Section 326 causing grievous injuries to deceased Krishna.

32. As regards the accused No.7, we must note here that the argument that X-rays were not proved by the prosecution cannot be accepted, as the medical certificate on record proves that on physical examination it was found that PW 2- Gurunath sustained multiple fractures. This is the evidence of PW9. Hence, the conviction of the said two accused will have to be sustained. In fact leniency has been shown to the accused No.7.

33. Now coming to the appeal against acquittal, as the prosecution has not challenged the finding recorded by the Trial Court regarding applicability of Sections 120B and 34 of the Indian Penal Code as regards the accused Nos.1 and 3, the applicability of the said provisions cannot be gone into even as regards the other accused. As regards the acquittal of the accused Nos.4 and 6, we have examined the findings recorded by the Trial Court. The finding of the Trial Court is that the clothes on the persons of accused Nos.4

and 6 were not even seized by the police. The Trial Court observed that if the accused Nos.4 and 6 were present at the scene of offence, their clothes would have been stained with blood. As regards the accused No.8, even according to the prosecution case, he was driving a tempo which was brought to the service centre of PW11. As regards the accused No.2, the Trial Court found no evidence about his participation in the offence. Taking into consideration the evidence of PW1 to PW4 as it is, the said findings of the Trial Court are certainly possible findings which could have been recorded on the basis of the evidence adduced by the prosecution. Therefore, it is not possible to interfere with the findings recorded by the Trial Court in favour of the accused persons who were acquitted by the impugned judgment and order. However, the sentence imposed on the accused Nos.5 and 7 will have to be altered.

34. As observed earlier, the accused Nos.1 and 3 are guilty of the offence punishable under Part II of Section 304. Considering the nature of the finding which we have recorded, the substantive sentence of rigorous imprisonment for 10 years will have to be imposed upon them. The conviction of the accused Nos.5 and 7 under Section 326 of the Indian Penal Code cannot be sustained, as we have found that the plea of private defence is a plausible defence and therefore, we convict them for the offence punishable under Section 325 of the Indian Penal Code. The accused No.7 is the author of one multiple fracture and two fractures on the person of

PW2- Gurunath. We sentence them to suffer rigorous imprisonment for 3 years.

Accordingly, we dispose of these Appeals by passing following Order:-

O R D E R

- (a) Criminal Appeal Nos.483 and 482 of 2010 are partly allowed;
- (b) The conviction of the accused Nos.1 and 3 Deepak Maruti Ghate and Krishna Maruti Ghate respectively for the offence punishable under Section 302 of Indian Penal Code under the Judgment and Order dated 7th May 2010 passed by the learned Additional Sessions Judge-1, Raigad at Alibag in Sessions Case No.150 of 2007 is hereby set aside and both the accused are convicted for the offence punishable under the Part II of Section 304 of the Indian Penal Code. They are sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.1000/- each. In default of payment of fine, they shall further undergo rigorous imprisonment for one year;
- (c) The conviction of the accused Nos.5 and 7 namely Dilip Mahadu Ghate and Ravi Dehu Shinare respectively for the offence punishable under Section

326 of the Indian Penal Code under the impugned Judgment and Order dated 7th May 2010 passed by the learned Additional Sessions Judge in Sessions Case No.150 of 2007 is hereby set aside and they are convicted for the offence punishable under section 325 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 3 years each. In default of payment of fine, they shall further undergo rigorous imprisonment for six months;

- (d) Order granting set off to the convicted accused for the period they have undergone sentence is confirmed;
- (e) Criminal Appeal No.818 of 2010 is hereby dismissed;
- (f) All the concerned to act on an authenticated copy of the Operative part of the Order in this Judgment.

(A.S.GADKARI, J.)

(A.S.OKA, J.)