

**IN THE HIGH COURT OF BOMBAY AT GOA****CRIMINAL APPEAL NO. 65/2014**

Kamlesh Malkarnekar,  
s/of Vasant Malkarnekar,  
aged 43 years, service,  
resident of House No.224,  
Malcornem, Sanguem, Goa.

... Appellant.

**Versus**

The State of Goa,  
Through Police Inspector,  
Quepem Police Station,  
Quepem, Goa.

... Respondent

Shri Ryan da Piedade Menezes, Advocate for the Appellant.

Shri Gaurish Nagvekar, Addl. Public Prosecutor for for the  
Respondent.

**Coram: NUTAN D. SARDESSAI, J.**

**Reserved on : 23<sup>rd</sup> January, 2020**

**Pronounced on: 10<sup>th</sup> February, 2020**

**JUDGMENT:**

The appellant has offered challenge to the judgment of  
the learned Addl. Sessions Judge, South Goa, Margao dated

16.10.2014 pursuant to which the learned Addl. Sessions Judge sentenced the accused under Section 324 I.P.C. to undergo simple imprisonment for a period of three months and to pay the compensation of ₹20,000/- in terms of Section 357(3) Cr.P.C., in default to undergo simple imprisonment of one month and directed that the amount be paid to the injured as compensation for the injuries caused to him. The accused was sent up to face trial by the Quepem Police Station under Section 307 and 506(ii) of I.P.C. on the premise that sometime on 08.05.2012 at about 16.00 hours the appellant had assaulted the husband of the complainant with an iron bar on his head and chest and due to which he had sustained injuries on his body and also threatened the complainant with dire consequences on account of previous enmity. The case was committed to the Court of Sessions by the learned Judicial Magistrate, First Class, Quepem. Thereupon the appellant was tried before the learned Addl. Sessions Judge, Margao who convicted the accused under Section 324 I.P.C. instead of Section 307 and 506(ii) I.P.C. The parties would be referred to as the appellant and the State for brevity's sake hereinafter.

2. The State had examined 9 witnesses in support of its case and thereafter the accused came to be examined under Section 313 Cr.P.C. when he denied the case of the prosecution as put to him and did not lead any evidence in

defence nor examined himself in defence. Be that as it may, the learned Addl. Sessions Judge on hearing the learned Public Prosecutor and the learned defence Advocate held the appellant guilty of the offence under Section 324 I.P.C. and sentenced him accordingly which sentence is under challenge in this appeal coming up for disposal today.

3. Shri Ryan Menezes learned Advocate came to be heard on behalf of the appellant who submitted that though the charge was framed under Section 307 and 506(ii) I.P.C., the learned Addl. Sessions Judge had convicted him under Section 324 I.P.C. It was his contention that even the evidence was not sufficient and there were serious gaps in the version of the material prosecution witnesses. The recovery of the weapon of assault was more than four days after the alleged incident which aspect was not considered by the learned Addl. Sessions Judge. The learned Addl. Sessions Judge had also not considered that there were civil disputes between the family of the accused and the complainant. There was reasonable doubt and the case that was brought forth was not at all believable. He adverted to the evidence on record and submitted that there were serious omissions and contradictions in the case brought forth on behalf of the prosecution and therefore, on that premise alone, the appellant was entitled to the benefit of doubt and an order of acquittal in his favour.

4. It was his further contention that the panchanama was not properly drawn at the scene of crime. The medical evidence was also inadequate inasmuch as the contents of the medical certificate were not proved, though a doctor was examined by the State. He placed reliance on **Freddy Joaquim Fernandes Vs. State (through the Public Prosecutor) {2008 (1) Bom. C.R. (Cri) 51}, State of Maharashtra Etc. Vs. Jagmohan Singh Kuldip Singh Anand & ors. {2004 DGLS (SC) 1217}, Pradeep Krishna Mashelkar Vs. State, through Police Inspector {2005 BCI 70}**, to substantiate his contention. It was his argument in the alternative that in the event this Court was inclined to uphold the same, it could be restricted to the sentence undergone by the appellant and instead the compensation in favour of the complainant could be enhanced.

5. Shri Gaurish Nagvekar, learned Addl. Public Prosecutor on behalf of the State submitted that there was ample corroboration between the statement of the complainant who was the wife of the injured victim and the injured himself. There was nothing amiss in the case of the prosecution which was amply proved by the examination of the witnesses. The evidence of the eye witness also inspired confidence and there was no reason to discard their testimony against the State. He placed reliance in **Abdul Sayed {(2010) 10 SCC 259}, Shri Umesh Bondre Vs. Mr. Wilfred Fernandes {2007 (1) ALL**

**MR 791}** in the matter of the identification of the final medical certificate by Dr. Amonkar. He placed further reliance in **Ramesh and other Vs. State of Haryana {(2017) 1 SCC 529}**, **Gali Venkataiah Vs. State of Andhra Pradesh {(2007) 14 SCC 475}** and **C. Muniappan & Ors. Vs. State of Tamil Nadu, {AIR 2020 SC 3718}**. It was his case that the offence under Section 324 I.P.C. attracts imprisonment for a term of three years unlike the impugned judgment where he was sentenced to undergo imprisonment only for three months. This was a fit case for dismissal of the appeal. Besides, Shri Menezes, learned Advocate placed his written synopsis on record in support of his case.

6. I have considered the submissions of Shri Ryan Menezes, learned Advocate for the Appellant and Shri Gaurish Nagvekar, learned Addl. Public Prosecutor on behalf of the State, the evidence led on record, the judgments and last but not the least the written synopsis placed on record by the appellant to decide the appeal accordingly.

7. In **Abdul Sayed** (supra), the Hon'ble Apex Court held at paragraph 28 that the question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness

is generally considered to be reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of crime and is unlikely to spare his actual assailant in order to falsely implicate someone. Convincing evidence is required to discredit an injured witness. It further summarised the law on the point to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there were strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.

8. The Apex Court further held by relying in **Bhagirath Case {1999 SCC (Cri) 658}**, that where the medical evidence is at variance with the ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the variable keeping the medical evidence as the constant. In **Ramesh** (supra), the Hon'ble Apex Court held at paragraph 39 that it was becoming a common phenomenon, almost a regular feature, that in criminal cases

witnesses turn hostile. There could be various reasons for this behaviour or attitude of the witnesses. It is possible that when the statements of such witnesses were recorded under Section 161 of Cr.P.C. by the police during investigation, the investigating officer forced them to make such statements and, therefore, they resiled therefrom while deposing in the court and justifiably so. However, this is no longer the reason in most of the cases. This trend of witnesses turning hostile is due to various other factors. It may be fear of deposing against the accused/delinquent or political pressure or pressure of other family members or other such sociological factors. It is also possible that witnesses are corrupted with money considerations.

9. In **Ramesh** (supra), the Hon'ble Apex Court considered the judgment in **State Vs. Sanjeev Nanda, {(2012) 8 SCC 450}**, where the Court felt constrained in reiterating the growing disturbing trend that witnesses turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but of late, we see, especially in many high profile cases, there is a regularity in many witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law, thereby eroding

people's faith in the system. It reiterated the judgment in **State of U.P. Vs. Ramesh Prasad Misra, {(1996) 10 SCC 360}**, wherein it was held that it is equally settled law that the evidence of a hostile witness could not be totally rejected, if spoken in favour of the prosecution or the accused, but it can be subjected to closest scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted.

10. In **Gali Venkataiah** (supra), the Hon'ble Apex Court referred to the judgment in **Dalip Singh Vs. State of Punjab, {AIR 1953 SC 364}** where it was held that a witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last person to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge alongwith the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of

prudence.

11. In **C. Muniappan** (supra), the Hon'ble Apex Court reiterated the settled proposition of law that even if there are some omission, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate the truth from the untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witness. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to occur in the statements of witnesses.

12. In **Freddy Fernandes** (supra), a learned Single Judge of this Court while dealing with the quantum of sentence had found that the learned Trial Court had accepted that the accused was a first offender and it further accepted that Section 324 I.P.C. did not make imposition of imprisonment compulsory. At the same time the learned Trial Court had observed that in case the accused is let off by imposing fine only, it will boost the confidence of the accused and in order

to deter the accused punishment was required to be imposed. The learned Trial Court in imposing the said punishment observed that the circumstances, the situation, the weapon, the part of the body and its effect on the bystanders had also to be seen. The learned Sessions Judge had denied the benefit of the provisions of the Probation of Offenders Act, 1958 and observed that it was not a fit case to release him by giving him the said benefit. The learned Single Judge observed that the punishment to be inflicted must always be proportionate to the crime committed though in law there are no golden scales to measure the same. In considering the overall facts of the case, the ends of justice would be met by modifying the sentence imposed by the learned Magistrate and accordingly ordered the accused to undergo simple imprisonment for one day till the rising of the Court and to pay to the complainant the compensation of ₹15,000/-.

13. In **Jagmohan Singh** (supra), the Hon'ble Apex Court found from the submissions made that the incident was of the year 1990. The parties were educated and neighbours and there was a plea that the benefit of the Probation of the Offender's Act, 1958 cannot be granted to the accused which found favour with Their Lordships. The dispute was between the neighbours over a trivial issue of cleaning of drainage. The incident took place in a fit of anger. All the parties were educated and also distantly related. The incident was not such

as to direct the accused to undergo sentence of imprisonment and therefore ordered that the accused be released on Probation by directing him to executed a bond of one year for good behaviour.

14. In **Pradeep Mashelkar** (supra), a learned Single Judge of this Court was seized with the case where the learned Judicial Magistrate First Class had declined to extend the benefit of probation merely because the offence committed by him was held to be under Section 326 of I.P.C. which was punishable with life. The learned Judicial Magistrate, First Class at the same time had noted that the accused was a first offender and that there was no previous conviction against him and that the incident had occurred on the spur of the movement on account of the property dispute between the accused and two others. At the same time the Magistrate had found that flinging of Sulphuric Acid on humans could not be taken lightly as Sulphuric Acid was a dangerous corrosive substance and in that view of the matter held that it was not a fit case to extend the benefit of Probation of Offender's Act, 1958 to the accused while reducing the conviction under Section 326 I.P.C. to that of Section 324 I.P.C. and sentenced him to undergo imprisonment for a day till rising of the Court and to pay compensation to the injured.

15. Coming to the facts of the case in appeal a complaint was lodged by the wife of the injured to the effect that while they were carrying out the works of repairs to the fencing as on 08.05.2012, the Forest Officials had come near them and started discussion with her husband in connection with the complaint filed against the accused. It was her case that while her husband was busy talking to them the appellant had come and forcibly taken the iron bar from her hand and assaulted her husband with the iron bar on his head on his back side and then on his chest due to which he fell down on the ground and became unconscious resulting in bleeding injuries to his head. Accordingly the charge sheet was laid against him under Section 307 and 506(ii) I.P.C. The learned Addl. Sessions Judge on committal ordered charge to be framed against the accused under Section 307 and 506 (ii) I.P.C. and the trial proceeded after the accused pleaded not guilty to the said charges and claimed to be tried. The prosecution examined the complainant who broadly stated that she had lodged the complaint as the accused had assaulted her husband on 08.05.2012 near the fencing on the side of the property. They were in the course of repairing the fencing with the help of iron bar (parroi) when two Forest Officers named Rohidas Velip and Amit Dabolkar came at the site as her husband had lodge complaint against the accused that he had chopped the branches of the Ashoka Trees and Teak trees which were on the border of their property.

16. She revealed that while their discussion was on, the Forest Officials had called one Shambu Gaonkar, president of the Mallikarjun temple and one Shedu Gaonkar committee member of the temple in connection with the chopping of the branches of the trees and the accused was also present at the site who was called by his daughter. He had come and threatened them by saying 'yo dakoita tumkam' and forcibly took the iron bar from her hand and with the help of the said iron bar assaulted her husband on the back of his head and chest and due to which he fell on the ground and became unconscious and blood started oozing from his head. Seeing this both the Forest Officers and Shedu fled away from the scene while Shambu who was present tried to restrain the accused from giving the third blow with the iron bar on the chest of her husband. Shambu was instrumental in phoning 108 ambulance but since it did not come her husband was taken in the police jeep to Curchorem PHC and from there to the Hospicio Hospital, Margao. The accused had thrown the iron bar at the spot and went to his house threatening them by saying that he will break the legs and hands of her husband.

17. Dhanashree Pw1 had further stated that the iron bar was about 1.5 mts. in length and 5 cms. in width. Her husband was wearing a white colour short sleeves shirt and

red colour shorts at the time of the incident. She had accompanied him to the Hospicio Hospital where he continued for three days and was then discharged. Thereafter he was undergoing treatment at home for about six months. She had admitted during her cross examination that the incident had taken place on the pathway which led to the house of the accused who was otherwise a Committee member of the Mallikarjun Devasthan. It was also brought on record that the accused had damaged their pipeline two years prior to the incident and for which they were not talking with each other. At the same time, she maintained that there was no property dispute between them and the accused and there was an opening kept in the fencing for the accused to go to his house.

18. It was further brought on record that the accused had laid a claim to the Ashoka trees as belonging to him which they disputed and her husband had complained to the Forest Department about the chopping of the branches of the Ashoka trees on 02.04.2012 and had also told the accused not to chop the branches. She however was unshaken in the material part of the testimony that she was holding the iron bar (parroi) in her hand and was facing her husband at the time of the incident when the accused came and snatched it from her hand followed by the assault on her husband on his head and also on the chest. No doubt there was an omission in her complaint that the accused had threatened that he would

break the legs and hands of her husband which she could not account but that does not detract from her testimony that the accused had come to the spot and assaulted her husband. She was also confronted with her complaint that one of the forest officials Shambu had tried to restrain the accused from giving the third blow of the iron bar on her husband when she maintained having stated so in the complaint and proved as an omission. Nonetheless, these omissions are minor and do not detract her from her testimony.

19. Dhanashree Pw1 was otherwise unshaken in her testimony that her husband was assaulted by the accused with the ironbar on his chest due to which he had a fall on the ground after the initial assault with the iron bar on the back of his head. She had otherwise identified the shirt worn by her husband at the relevant time which had blood stains on it and also the iron bar (parroi) upon it being received from the office of the CFSL Hyderabad. She was a rustic witness and therefore due concession had to be made in respect of her statement that the police had taken the iron bar without covering the same. Moreover that aspect of the testimony would be discussed later while considering the attachment panchanama drawn by the Police. Suffice it to say that she was unshaken on the material aspect of her testimony that the accused had come to the spot and assaulted her husband with the iron bar on his head and thereafter on his chest and

caused bleeding injuries to him on the rear side of his head.

20. The injured Dhananjay Pw2 corroborated her version that she had lodged the complaint against the accused who had come to the spot on the evening of 08.05.2012. He had earlier lodged the complaint against the accused with the Forest Department for trimming one teak wood tree and two to three Ashoka trees. The Forest Officials had come from Quepem being Devidas Velip and Amit Dabolkar and who made inquiries about the ownership of the property and when he disclosed that the property belonged to Mallikarjun Devasthan. He had then called the president of the Devasthan Shambu Gaonkar who immediately came to the spot alongwith another member Shedu. He further stated that while the Forest Officer Velip and the president of the Devasthan Shambu Gaonkar were talking to each other, the accused came with his motor cycle from the main road and entered the internal road/pathway to proceed to his house. His wife Dhanashree Pw1 was repairing the fence with the help of a koita and a crowbar nearby. The accused stopped his motor cycle and threatened him saying 'Tuka dakopak zai' and thereafter parked his motor cycle on the pathway. The accused then forcibly snatched the crow bar from his wife's hand and hit it on the back side of his head due to which blood started oozing out from his head. He managed to hold the wound with his hands and at that time the accused gave a

blow on his chest due to which he fell on the ground. He was trying to give the third blow with the bar but the President of the Committee Shambu prevented the accused from giving the third blow and thereafter he lost consciousness.

21. Dhananjay PW2 further reiterated that he was taken to the Cacora PHC and from there he was referred to Hospicio Hospital Margao where he was treated for three days. He too further corroborated the version of PW1 that the iron bar was about 1.25 mts. in length and 1 and 1/2 inches in diameter. He further revealed that in 2008 the accused had forcibly constructed a road with the help of JCB without their consent and they had lodged several complaints to the water department, Police Station, Panchayat etc. and in that process the water pipeline of their house was damaged. He had made attempts to ask the accused who raised a quarrel and they were left without tap water for one and a half years. They were not on talking terms with each other since 2008. He maintained despite his cross examination that his property was bearing distinct survey no.23/28 unlike the property of Devasthan which was surveyed under no.35/1, 2 and 3 which lay beyond their fencing. The trees trimmed by the accused were situated in his property bearing survey no.23/28.

22. He was however unshaken on the material fact that while the President of the Committee, members of the

Committee and the foresters were talking to each other, the accused came at the spot from the internal road and thereafter he issued threats and followed by the assault on his head and chest with the iron bar resulting in his fall. He also maintained that the accused had snatched the iron bar from his wife but he had not seen him hitting it on his head. The accused had hit him with the crow bar on his head not with the pointed portion but with the middle portion. He also fairly relented that there was no bleeding injury on the chest but maintained that the accused was behind him when he gave the first blow on his head. It was nowhere suggested to him and earlier to Dhanashree Pw1 that in the course of the scuffle, he had fallen backward and had sustained injury to his head. A pertinent reference is made to this aspect since a plea was sought to be taken in defence that the injury suffered by the injured was on account of a fall and not due to the assault by the accused.

23. Shedu Pw3 to whom a pertinent reference was made to by Dhanashree PW1 and Dhananjay Pw2 clearly resiled from the case of the prosecution making a flippant statement that there was some quarrel between Dhananjay Pw2 and the accused in connection with the pathway and not shedding any light on the incident of assault whatsoever thereby prompting the prosecution to seek the permission of the court to cross examine him. During such time he had denied his previous

statement to the Police in which he had admitted having witnessed the incident of assault and was therefore found to be a witness not supporting the case of the prosecution on vital aspects and donning the mantle of a hostile witness. The only statement which he made during the course of the cross examination at the instance of the accused was that there were rocks at the place of the incident and nothing further.

24. Shambu Pw6 stated that he knew Dhananjay Pw2, Dhanashree Pw1 and also the accused apart from him being the president of Mallikarjun Devasthan. He had been called by the Forest Guard Amit telephonically and requested to remain present at the residence of Dhananjay Pw2 in connection with the property dispute between him and the Devasthan. He had gone to the spot with Shedu Pw3 and found Dhanashree Pw1, Dhananjay Pw2 apart from the accused and his mother present at the spot. He was talking to Shedu Pw3, the forest guard and the officer and at that time Dhananjay was not present. After discussing about the property dispute he called Dhananjay Pw2 who was at some distance from where his wife was repairing the fencing and in the meantime saw the accused come on his motor cycle. The accused had then parked his motorcycle and walked to the place where Dhanashree Pw1 was repairing the fence. The accused had then pushed Dhananjay and threw him down and there was a scuffle between Dhananjay Pw2 and the accused and due to

which Dhananjay sustained bleeding injuries to his head.

25. Shambu Pw6 was instrumental in calling 108 ambulance and shifting Dhananjay Pw1 to PHC Curchorem and thereafter to the Hospicio Hospital Margao. He too was declared hostile at the instance of the prosecution and leave was sought to cross examine him since he too did not support the case of the prosecution in material particulars, no doubt completely resiling like Shedu Pw3. During such time he denied having stated previously to the Police that the accused had removed the iron bar from the hands of Dhanashree Pw1 and assaulted Dhananjay Pw2 with the iron bar on his head and thereafter on his chest due to which Dhananjay sustained bleeding injuries on his head. He was given due opportunity to explain this contradiction but he denied having stated so to the Police. He too like Shedu Pw3 stated that the place where Dhananjay Pw1 had fallen was a rocky area and nothing more. It was not suggested even remotely that in the course of the scuffle Dhananjay Pw2 had fallen down and sustained injuries on the rocky surface.

26. PSI Parab Pw7 was attached to the Quepem Police Station on 08.05.2012 when he had received a phone call from the PCR Panaji informing that one Dhananjay Pw2 had been assaulted at Molcornem and had sustained head injury. Thereafter the PCR van was diverted at the place of offence

and in which the injured was shifted to PHC Cacora for medical examination and then to the Hospicio Hospital Margao. He had visited Dhananjay Pw2 at the Hospicio Hospital Margao where he was undergoing treatment for his head injury. He had contacted his wife Dhanashree Pw1 at the hospital, recorded her complaint and thereafter on returning to the Police Station registered the offence under Crime No.28/2012 under Section 326 and 506(ii) I.P.C. He had visited the Hospicio Hospital and recorded the statement of Dhananjay, Pw2 after obtaining the permission from the medical officer. He had also attached the shirt of Dhananjay Pw2 on 09.05.2012 and on the following day i.e.10.05.2012 he had visited the scene of offence and drawn a detailed scene of offence panchanama in the presence of the pancha witnesses and attached the weapon of assault i.e. the crow bar (parroi) under the scene of offence panchanama and the accused came to be arrested on the same day. He had recorded the statement of Shedu Pw3, requested the Asst. Engineer, Water Resources Department, Quepem to depute a draftsman to draw a sketch of the scene of offence and then requested the Police Surgeon of the Hospicio Hospital Margao to conduct the blood grouping of the victim on 17.08.2012. He had forwarded the exhibits namely the white colour shirt and the crow bar to the CFSL Hyderabad for examination through the office of the SP, CID Crime Branch, Panaji and in the meantime obtained the birth certificate of the victim

Dhananjay, Pw2.

27. PSI Parab, Pw7 stated further that he had recorded the statement of Shambu Pw6, produced the final medical certificate issued by Dr. Francis Pereira, the arrest panchanama drawn by him and concluded on the nature of investigation carried out by him. In his examination, the omissions and contradictions in the statement of Shedu Pw3 and Shambu Pw6 were duly proved through him as the material statements made by them to the Police and from which both of them were resiling during their examination at the instance of the State. He had also clarified in his cross examination at the instance of the accused that initially an offence against the accused was registered under Section 326 and 506(ii) I.P.C. but later on 307 I.P.C. was added as the accused had assaulted over the head which was a vital part of the body and moreover the condition of the victim was critical and that the doctor had opined that the injuries were therefore dangerous.

28. Though he was cross examined at length, the defence was not able to make a dent in his statement and quite on the contrary it was revealed that there was a civil dispute between Dhananjay Pw2 and the accused relating to the property of the Devasthan. Pralhad Pw5 was the panch to the attachment panchanama on 09.05.2012 of the white colour shirt which

had blood stains on it. The shirt was duly packed in a polythene bag then in another packet and sealed. The lady who produced the shirt was the wife of the injured Dhananjay Pw2. He had acted as a panch at the instance of PSI Parab Pw7 apart from acting as a panch to the scene of offence Panchanama. He was also instrumental in seeing that the crow bar lying by the side of the pathway was attached under the scene of offence panchanama which was 1.25 mts. to 1.15 mts in length and about 4 cms. in diameter. The iron bar was wrapped in white cloth and thereafter it was packed and sealed and thereafter their signatures were obtained by the Police. He was not at all shaken despite the cross examination at the instance of the defence except to bring forth that the shirt was not opened and shown to them but nonetheless, he could make out the stains being of blood though he could not say whether it was short sleeves or a full sleeves shirt. He had duly identified the shirt in the Court as also the iron bar (parroi) being that attached from the scene of offence.

29. Dr. Dessai Pw8 had carried out the blood grouping examination of Dhananjay Pw2 and found it to be O Rh positive with no rebuttal of her testimony while Dr. Amonkar Pw9 identified the signature of Dr. Francisco Pereira on the final certificate on the basis of records and being familiar with his signature.

30. Although an attempt was made on behalf of the defence to take advantage that two witnesses had turned hostile one wholly and the other one partially, nonetheless, the evidence of Shambu Pw6 to some extent supports the case of the prosecution that the accused had pushed Dhananjay Pw2 and thrown him on the ground and that he had sustained bleeding injuries to his head and though suppressing the genesis that the bleeding injuries was the outcome of the injuries inflicted on his head with the help of an iron bar. The evidence of Dhananjay Pw2 and Dhanashree Pw1 respectively inspire confidence in the case of the prosecution although a doubt is sought to be raised on the premise that there was a doubt about the recovery of the iron bar from the scene two days later. No doubt, the prosecution had not brought the CFSL report on record to confirm that the iron bar contained blood of Dhananjay Pw2 but on that premise alone the case of the prosecution cannot be thrown overboard when the version of Dhanashree Pw1 and Dhananjay Pw2 inspires enough confidence. It is only for the first time during his examination under Section 313 Cr.P.C. that the accused took a plea in defence that there was a verbal altercation between him and Dhananjay Pw2 and in the melee he fell on the rocks and sustained injuries. Such a plea in defence at the cost of repetition was not put to Dhanashree Pw1 or Dhananjay Pw2 or even Shedu Pw3 and Shambu Pw6 though they were apparently won over witnesses at the

instance of the defence. The learned Sessions Judge had therefore, rightly held the accused guilty of the commission of the offence though punishable under Section 324 of I.P.C. and acquitted him of the offences punishable under Sections 307 and 506(ii) I.P.C. The learned Addl. Sessions Judge had sentenced the appellant to imprisonment for a period of 3 months and ordered him to pay compensation of ₹20,000/- in terms of Section 357(3) of the Code of Criminal Procedure.

31. Shri Menezes, learned Advocate for the appellant in the alternative had prayed for leniency and for reduction of the sentence to the period undergone while conceding that the compensation to the complainant could be enhanced. It is apparent that there was no previous record of criminality attached to the appellant nor any history of previous conviction to his discredit. Therefore, considering the judgment in Freddy Fernandes (supra), the impugned judgment is required to be modified to the remaining extent on the point of sentence.

32. In the result therefore, i pass the following:-

### **O R D E R**

The conviction of the accused under Section 324 I.P.C. is upheld but the sentence to which he is sentenced to

undergo imprisonment is reduced to the period he has been in custody from the date of his arrest till his release on bail and the compensation to be paid to the complainant is enhanced from ₹20,000/- to ₹50,000/-.

The rest of the order on the destruction of the M.O. property stands.

**NUTAN D. SARDESSAI, J.**

**MF/-**