

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 338 OF 1998

1 Namdeo Tulshiram Mohadkar
2 Pundlik Tulshiram Mohadkar
3 Dilip Mahadu Raut

.. Appellants
(Orig.Accused Nos.
1, 2 and 7)

Versus

The State of Maharashtra for
Sitaram Kashiram Gahale, Age 45 yrs,
r/o Ghubadsaka, Tal. Peinth,
District Nashik

.. Respondent

...

Mr. M.K. Kocharekar with Mr. Sachin Gite for the appellants.
Mr.Y.Y. Dabake, APP for the State.

CORAM: BHARATI DANGRE, J.
RESERVED : 2nd JULY 2021
PRONOUNCED : 16th NOVEMBER, 2021

JUDGMENT :-

1 The appellants have filed the present Appeal, being aggrieved by their conviction under the impugned judgment dated 11th February 1998 by the Addl. Sessions Judge, Nashik in Sessions Case No. 6 of 1997, thereby convicting all the three appellants under Section 324 of Indian Penal Code (hereinafter

for short 'IPC') and sentencing them to suffer RI for six months and to pay fine of Rs.500/- each, in default to undergo SI for two months. The appellant nos.1 and 2 are also aggrieved by their conviction for the offence punishable under Section 325 of the IPC, and being sentenced to undergo RI for five years and to pay fine of Rs.500/- each, in default to undergo SI for two months.

2 While admitting the Appeal on 26th February 1998. The appellants were ordered to be released on bail and the sentence of Imprisonment came to be suspended till the decision of the Appeal. It is informed that all the Appellants have deposited an amount of fine as ordered and are presently on bail.

3 The appellants came to be charge-sheeted by the Addl. Sessions Judge, Nashik along with four other accused in respect of an incident which is alleged to have taken place on 18th August 1996 at village Ghubadsaka at around 8.30 p.m, when they are alleged to have formed an unlawful assembly, with the common object of committing an offence of rioting with deadly weapons being armed with sticks and wooden logs. All the seven accused persons were also charged for an offence punishable under Section 148 and 149 of IPC and under Section 302 IPC, for causing death of one Sitaram Ramji Tumbade. Further, for assaulting one Namdeo Shivram Gahale and one Sitaram Kashiram Gahale with wooden sticks, they were charged for the

offence punishable under Section 324 read with Section 34 of IPC along with the relevant provisions of the Bombay Police Act. In the alternative, accused nos.1 and 2 were charged for committing an offence punishable under Section 302 read with Section 34 of IPC for committing murder of Sitaram Tumbade in furtherance of the common intention on the date of incident, pursuant to which he succumbed to the injuries. Accused nos.4 and 5 came to be charged under Section 324 r/w Section 34 of the IPC for assaulting Namdeo Gahale. Similarly, accused nos.6 and 7 were also charged under Section 324 of the IPC for assaulting Soma Dive with sticks and voluntarily causing hurt to him.

4 All the accused persons pleaded not guilty of the charge and were put to trial.

In order to establish the case of the prosecution against the accused persons, the prosecution examined 13 witnesses which included the complainant being examined as PW 1, along with eye witness and the injured witnesses PW 5 - Soma Dive and PW 6 - Namdeo Gahale. Apart from this, an independent eye witness Shrawan Govinda Gavit came to be examined as PW 10. Janabai - the widow of deceased Sitaram Tumbade is examined as PW 11, whereas his son - Santosh is examined as PW 12. The prosecution also included in its list the concerned Doctors who treated the deceased as well as the injured

and they are examined as PW 2, PW 7 and PW 8. Two panch witnesses to the recovery of stick/stones from the spot and *dhol* are examined as PW 3 and PW 4. PW 9 is another panch witness who was examined to prove the recovery of stick from accused no.1 under the discovery panchnama under Section 27 of Evidence Act.

5 The prosecution rests its case on the evidence of the aforesaid witnesses, apart from the post mortem report, spot panchnama, injury certificates etc. The learned Sessions Court formulated the points for consideration in the following manner :-

	Points	Findings
1	Does prosecution prove that on 18.8.96 the accused nos.1 to 7 have committed murder of Sitaram Ramji Tumbade at Village Ghubadsaka?	No, but it is proved that accused nos.1 and 2 have voluntarily caused grievous hurt to Sitaram Tumbade and committed an offence u/sec.325 of IPC.
2	Is it proved that on 18.8.96 the accused nos.1 to 7 had formed an unlawful assembly and in prosecution of the common object were armed with deadly weapons like stick and wooden logs?	No.
iii	Is it proved that the accused nos.1 to 7 have voluntarily caused hurt to p.w.s. Namdeo Shivram Gahale, Soma, Janu Dive, Tanaji Kashiram Gahale and Sitaram Kashiram Gahale by means of any instrument	Yes, but it is proved only against accused nos.1, 2 and 7 and not against other accused nos.3 to 6.

	for shotting stabbing or cutting or by using a stick as a weapon of offence ?	
iv	Is it proved that on 18.8.96 by promulgation of an order of District Magistrate Nashik, People were prohibited from carrying weapons like sticks?	No.
v	It is proved that the accused nos.1 to 7 have committed breach of order of District Magistrate promulgated u/s.37(1)(3) of Bombay Police Act ?	No.
vi	What order ?	Accused Nos.1 & 2 are convicted for the offence u/s.325 IPC and accused no.7 is convicted for the offence u/s.324 of IPC.

The learned Judge proceeded to determine the guilt of the accused in the backdrop of the evidence led before it by the prosecution, and at the end of the trial, the accused nos.1 and 2 have been found to be guilty of voluntarily causing grievous hurt to deceased - Sitaram and they stood convicted under Section 325 of the IPC. Accused nos.1, 2 and 7 are held guilty of causing hurt to Namdeo Gahale, Soma Dive, Sitaram Gahale, Tanaji Gahale by using a stick, whereas the accused nos.3 to 6 came to be acquitted. As an outcome of the judgment, accused nos.1 and 2 are convicted for the offence punishable under Section 325 of the IPC and conviction accused nos.1, 2 and 7 are convicted for the offence punishable under Section 324 of the IPC. All the accused

stand acquitted of the offence under Section 302, 148, 149 of the IPC.

6 Being aggrieved by the said judgment, the appellants are before this Court.

PW 1 is the complainant narrated the happenings of the events which took place in Gubhadsaka at around 7.00 p.m. As per Sitaram Gahale, after having his meals, he noticed that Dhol was being played in Maruti Temple which was situated at a distance of 25 feet from his house. He noticed that on the beats of Dhol, Namdeo Tulshiram Mohodkar (A1), Pundlik Tushiram Mohodkar (A2), Dashrath Savliram Mohodkar (Accused no.5), Chintaman Raut (Accused no.6) and Dilip Mahadu Raut (Accused no.7) were dancing. When he raised an objection about their dancing in the temple, they assaulted him and Namdeo, Pundlik and Dilip Mahadu are specifically named as the assailants and PW 1 identified them in the Court. He alleged that he was assaulted by sticks. While the incident was going on, Sitaram Tumbade, Soma Dive and Namdeo Gahale arrived at the spot and it is alleged that accused Namdeo, Dashrath and Dilip assaulted Sitaram Tumbade by sticks and when Soma Dive attempted to rescue him, accused no.1 Namdeo hit him with stick on his head. On receiving the blows, Sitaram and Soma fell down. Thereafter, accused no.1 Namdeo is alleged to have given forcible blow of stick on left hand of Namdeo Gahale. PW 1 has

further deposed that accused no.3 Mahadu Dharma Raut was instigating the assailants. Thereafter, Sitaram Tumbade's wife Janabai (PW 11) carried him to his house. As per PW 1, he went to the police Patil to lodge a complaint, but did not find him at home. On the next day, he along with the other persons carried Sitaram Tumbade by Doli to Umbarpada from where he was taken to Government hospital at Peinth but on Doctor's advice, Sitaram was further taken to Civil hospital, Nashik by jeep. The complainant did not accompany the injured Sitaram to Nashik but he approached the police station and lodged a complaint (Exhibit-36). While undergoing treatment, Sitaram succumbed to the injuries.

The said witness is subjected to extensive cross-examination and it was even suggested to him that since it was a dark night, he was not able to identify the assailants and even a suggestion was given to him that an incident included pelting of stones and shouting, and Sitaram sustained injury in stone pelting, which suggestion was denied by him. He specifically denied that he had falsely implicated the accused persons. He reiterated his stand in the chief, that accused Namdeo, Pundlik and Dilip assaulted the injured. There is omission about his statement before the police about the accused Dashrath and Dilip also assaulting Sitaram Tumbade with sticks. There is also an omission about the accused no.1 assaulting injured Soma Dive as it is not stated by him to the police. As far as role of accused no.1

Namdeo in assaulting Namdeo Gahale and causing injury to his hand, has also surfaced as an omission. Further, his statement in examination-in-chief that accused no.3 Mahadu Dharma instigating the assailants is also an omission which is duly proved through the Investigating Officer PW 13. His extensive cross-examination when read, along with his complaint dated 19th August 1996 establish that he was assaulted by Namdeo and Pundlik; Accused nos.1 and 2 by sticks and the deceased Sitaram was also assaulted by them by means of stick, which made him unconscious.

7 In order to find corroboration in the testimony of the complainant, it is necessary to refer to the other two witnesses, who are themselves injured in the said incident Soma Dive, PW 5 has deposed that in the evening hours, after taking his meal when he was sitting near the hearth, he heard a commotion and proceeded to the house of Namdeo and Pundlik where he saw Sitaram lying on the ground with Namdeo and Pundlik, standing close to him. He deposed that Pundlik and Namdeo had assaulted Sitaram by sticks and when he went to his rescue, he also assaulted on his head and left ear by them. He has identified A1 and A2 in the dock. Due to the bleeding, he felt unconscious and did not witness anything further, is his version. In the cross-examination, this witness has given an admission that he had not seen who had beaten Sitaram Tumbade. He also admitted he has

not seen the complainant Sitaram Gahale being present there. He, however, denied the suggestion that he was not assaulted by Namdeo and Pundlik.

Turning to PW 6 Namdeo Gahale who is another injured, who corroborate the incident of dhol being played in Maruti Mandir in the presence of Pundlik, Mahadu, Chintaman, Dashrath and Namdeo on the spot. He was informed by Shravan Gavit that there was some problem in Maruti Mandir and Namdeo and Pundlik had beaten Sitaram Tumbade by bamboo stick and upon receiving such an information, he rushed to the spot where he noticed Sitaram and Soma Dive lying in an unconscious condition. Namdeo depose that Sitaram was shifted to the house by his wife Janabai and his son Santosh and when he tried to shift Soma, he was assaulted by Namdeo by means of a bamboo stick on his left hand. He also speak of presence of accused Pundlik and Dashrath and state that he ran away from the spot, on being assaulted.

8 I shall now turn to the testimony of PW 10, an independent witness. His testimony is of great significance, since in the cross-examination of PW 1, PW 5 and PW 6 who are the injured, attempt is made to discredit their testimony on account of their relationship with one another and about a past rivalry between the families.

PW 10 corroborate about the time of the incident and has deposed that his house is situated at a distance of 100 ft from the temple. On hearing the commotion, when he rushed to the spot, he saw that Namdeo and Pundlik were beating Sitaram Tumbade by sticks. PW 10 identified the accused nos.1 and 2 by pointing out finger at them who were present in the Court. He further deposed that some boys were throwing torch light on Sitaram Ramji and therefore, he could identify the accused nos.1 and 2 and on beating, Sitaram fell down. PW 10 further deposed that accused Namdeo, Pundlik, Tulshiram, Dilip Mahadu Raut, Mahadu Raut, Chintaman Raut, Dashrath Savliram were also present and they were also beating Sitaram. He admit that he did not make any attempt to rescue him. He also mention about presence of Sitaram Gahale (complainant) on the spot and has deposed that the dhol was being played in the house of Sitaram Gahale and when he visited his house, Santosh and other persons were there and he asked them to stop the beating of dhol. When he returned to the spot, he saw the accused Namdeo and Pundlik beating Sitaram Tumbade and Sitaram's wife Janabai and his son Santosh carrying him to his house. This witness further deposed that when Soma Dive had gone to rescue Sitaram Tumbade, accused Namdeo and Pundlik assaulted him with sticks. It is also deposed by him that the sticks used by the accused are bamboo sticks and he identified the sticks at Article 2.

In cross-examination, he has admitted that he had stated to the police about some boys throwing torch light on Sitaram Tumbade and therefore, he identified the accused Namdeo and Pundlik who were beating him, but it was not recorded in his police statement. There is also an omission about accused nos.3 to 7 being present and beating Sitaram. Other omissions which are brought on record are not of material consequence and therefore, I refrain from referring to the same.

9 Other two witnesses whose depositions must be referred to are PW 11 - Janabai and PW 12 Santosh. Janabai is the widow of deceased Sitaram, who deposed that her husband had gone to the house of one Parshram Gaikwad and her son Santosh was at home. She state that accused Namdeo, Pundlik, Tulshiram, Dashrath, Dilip and Chintaman were dancing in the temple of village and the complainant asked them to stop dancing when he was assaulted by Namdeo and Pundlik. They carried Sitaram (complainant) to his house when her husband arrived on the road and thereafter, accused no.1 Namdeo and accused no.2 Pundlik beat him by stick. She deposed that she witnessed this beating in torch light as accused Namdeo threw torch light on her husband. Janabai also depose that Namdeo and Pundlik gave stick blow on the head of her husband, which made him unconscious. Soma Dive who arrived at the spot was also assaulted by Namdeo and Pundlik as per PW 11. Thereafter, she

carried her husband to the house and she corroborate PW 1 who has stated that on the next day, her husband was carried by doli to Umbarpada, from where he was shifted to Government Hospital at Peinth and thereafter shifted to Civil Hospital, Nashik where he passed away. She identified the sticks shown to her as the one which were used for assaulting her husband.

In her cross-examination, the credibility of the witness is not shattered as the omission which has been brought on record is about giving blow by the stick on the head of her husband. The other omissions are not of much significance.

10 PW 12 is the son of Janabai - PW 11, who is not an eye witness but on being informed by Shravan Gavit, he reached the spot on being told that Namdeo, Pundlik, Dilip, Tulshiram, Dashrath, Mahadu and Chintaman were beating his father. When he reached the spot, his father was lying on the ground and he mentioned about presence of the accused persons Namdeo, Pundlik, Dilip, Tulshiram, etc. being present there along with sticks. He further deposed that they were beating his father and Sitaram Gahale - complainant and he further state that he was also beaten by them. He deposed that he saw accused Namdeo, Pundlik, Mahadu, Chintaman and Dilip beating his father by sticks and he pointed out to accused nos.1, 2, 3, 6 and 7 in the Court. PW 12 has further stated that accused Mahadu and Chintaman were throwing torch light on his father and the other

accused were beating him by bamboo sticks. He identified Article no.2 before the Court which was used for assault. He was also extensively cross-examined, but nothing worth damaging the case of the prosecution has been brought on record.

11 PW 13 is the Investigating Officer, who has proved the complaint which resulted in registration of C.R.No.20 of 1996. He has proved the spot panchnama where a cap, three stones, broken pieces of roof tiles and six sticks including 4 bamboo sticks were seized under a panchnama. He also proved hand sketch drawn by him and exhibited at Exhibit-49. The Investigating Officer also proved the memorandum panchnama vide Exhibit-43 under which the accused no.1 Namdeo led to a stick concealed in his house, which was attached vide Exhibit-44 and identified as Article 7. In the cross-examination, the Investigating Officer admit that Namdeo Sitaram Gahale had come to the police station on the same day at about 11.45 am and he lodged a complaint vide C.R.No.21/96. The said complaint was lodged against Sitaram Tumbade, Santosh Gahale, Namdeo Gahale, Chintaman Gahale, Sitaram Gahale, Trimbak Gahale and Parshram, some of whom were cited as witnesses in C.R.No. 20/96. He has proved the omissions from the testimony of PW 6 Namdeo Gahale as well as PW 10 Shravan about some boys throwing torch light on Sitaram and accused nos.1 and 2 beating him and the identification by the witnesses on account of the

torch light. The omission from PW 11 Janabai about giving blow of stick on the head is also proved through this witness.

12 Apart from the aforesaid ocular evidence through the above mentioned witnesses, prosecution rely upon the medical evidence and PW 2 is the Medical Officer from Civil Hospital, Nashik who has conducted post mortem on deceased Sitaram. The post mortem referred to the following injuries on the deceased :-

- (i) *contusion over skull on vertex 4 cm x 3 cm*
- (ii) *tracheotomy wound in superasternal notch 2 1/2 cm x 1 1/2 cm red in colour.*

The witness also deposed about the fracture of both parietal region of the skull and about the hematoma on the skull. On internal examination, PW 2 has deposed that there was haematoma on the skull over vertex and both parietal bones along with transverse fractures on both parietal bones. He further deposed that there was a large extradural haematoma on both parieto temporal region 14 cm x 10 cm x 6 cm, along with intracerebral hemorrhage as well as fracture on base skull. PW 2 state that injuries in Column no.17 is corresponding in all injuries in column no.19 and any one injury mentioned in Column no.19 is sufficient to cause death of a person. The Medical Officer further deposed that the injuries shown in column no.17 can be

caused by hard and blunt object and it can be caused by any one of the stick, Article nos.1 to 7. The cause of death was opined to be on account of 'shock due to head injury'.

Paragraph no.8 of the deposition of this witness assume significance as that forms basis on the reasoning adopted by the learned Judge in granting acquittal to the accused persons under Section 302 of the IPC and I deem it appropriate to reproduce the same

"8 I have not preserved the viscera of a dead person. I cannot say as to how many hours after the meals the death was caused. It is not true that the injuries are not possible by the stick. It is true that if immediately after the injury neurosurgical aid was given to the patient there was a chance of his survival".

13 Apart from this witness, PW 7 has been examined as a witness who has issued certificate of injuries on examining Namdeo Shivram Gahale. His injuries are described as 'simple injury' with tenderness and abrasion, 1 cm x 1 cm on left elbow. No fracture was noted and Medical Officer opined before the Court that this injury can be caused by sticks and in cross-examination, he gave an admission that the said injury is superficial and is possible to a person while working in a field during his agricultural work. PW 8 who had examined another injured Soma Dive has deposed that the patient was having the following injuries :-

(I) CLW 3 x 1 cm x 1/4th cm on left parietal region.

It was a fresh injury.

(II) CLW at right temporal region near middle suture. It was a bleeding injury.

The above injuries were described as 'simple' in nature and PW 8 has deposed before the Court that these injuries can be caused by sticks like Article 12. In cross-examination, he admit that these injuries are possible by fall on rough substance.

14 It is in the backdrop of the aforesaid evidence which was laid by the prosecution before the learned Judge, the points for determination were resolved by him. By the impugned judgment, he acquitted all the accused i.e. Accused nos.1 to 7 of the charges levelled under Section 148, 302 read with Section 149 of the IPC along with Section 139 of the Bombay Police Act. The reasoning adopted by the learned Judge for acquitting the accused under Section 302 of the IPC is contained in para-22 of the impugned judgment, by which the learned Judge has reasoned the acquittal of the accused nos.1 and 2 for the offence punishable under Section 302 of the IPC. The learned Judge has observed as under :-

"The injured Sitaram Tumbade was shifted by his wife Janabai, son Santosh and Jaywant to his house. For the whole night he was kept in the house without medical aid, then on the next day morning

he was shifted, in the first instance to Umbarpada, then immediately to PHC Peinth. It was about 9 a.m. of 19.8.1996 when he was reached to P.H.C. Peinth. The Medical Officer at Peinth advised to shift Sitaram Tumbade immediately to Civil Hospital and accordingly he was shifted to the Civil Hospital at Nashik. Then on the next day i.e. on 20.8.96 Sitaram Tumbade succumbed to his injuries. Thus, the injured died on the third day of the incident. The injured who had sustained grievous head injury was kept without medical aid for atleast 14 to 16 hours may be because that time P.W. Janabai, Santosh and complainant were bewildered by the incident, may be out of fear of the accused or out of illiteracy or poverty, but the fact remains that for about 16 hours injured was kept without medical aid. In such circumstances, as the medical officer says that if the injured would have given immediate medical aid there were chances of his survival. The accused nos.1 and 2 cannot be held solely responsible for the death of Sitaram Tumbade."

15 The aforesaid reasoning apparently is erroneous and is based on the opinion given by PW 2, where he has deposed to the effect that if immediately after the incident, the injured would have been removed to the hospital and if neurosurgical aid was provided, the injured would have survived. Admittedly, the incident had taken place on 18th August 1996 at 8.30 p.m and the learned Judge record that the whole night, injured was kept in the house without medical aid and he was offered treatment

only on being taken to the Civil Hospital at Nashik i.e. on 19th August 1996 and the delay in treatment had proved to be fatal.

The learned Judge has utterly failed to refer to the post mortem notes and the remaining portion of the testimony of PW 2 where he has assigned the cause of death as '*shock due to head injury*' and who has categorically deposed that the injuries in column no.17 can be caused by hard and blunt object and he has positively asserted that it can be caused by any one of the sticks - Article nos.1 to 7. Referring to the injuries mentioned in column no.17, which refer to fracture of both parietal region and on reference to para 19 of the post mortem notes which take note of hematoma under the scalp over vertex and both parietal bones and which also record the fracture of both parietal bones, transverse 18 cm long as well as fracture at skull base on left side. The learned Judge has failed to advert to column no.19 with the final opinion as to cause of death and in spite of a specific admission by PW 2 that all the injuries are possible by any of the stick Article nos.1 to 7, has given weightage to a suggestion given to the Medical Officer where he admits that if immediately after the injury, neurosurgical aid was given to the patient, there was chance of his survival and the aforesaid admission is accepted in totality and the learned Judge has blamed the delay in taking the patient to the hospital to be a ground for acquitting the accused nos.1 and 2 of the offence punishable under Section 302 of the IPC.

16 It is an admitted position that against the acquittal of the accused persons under Section 302 with Section 148 and 149 of the IPC, the State has not preferred any Appeal. It is too late in the day for an appeal to be preferred since the accused persons are acquitted of the charge of murder u/s.302, 149, 149 of the IPC on 11th February 1998.

17 The learned APP has vehemently submitted before me that in absence of the Appeal being preferred by the State, it is always open for this Court to enhance the sentence imposed and Mr.Dabake has placed reliance on two decisions of the Hon'ble Apex Court, one in case of Sahab Singh Vs. State of Haryana, AIR 1990 SC 1188, and in case Kumar Ghimirey Vs. State of Sikkim, 2019 Cr.L.J.3141.

By relying upon the aforesaid judgments, the learned APP would advance submissions to the effect that this Court can exercise its revisional powers while exercising the powers conferred on a Court of Appeal by Section 386, 389, 390 and 391 of the IPC.

18 Per contra, the learned counsel Mr.Kocharekar has placed on record a decision of the Hon'ble Apex court in case of State of Andhra Pradesh Vs. Thadi Narayana, AIR 1962 SC 240, which has been subsequently followed by the Apex Court in case

of Appasaheb and Anr Vs. State of Maharashtra (2007) 9 SCC 721.

19 In the wake of the aforesaid rival contentions, it would be apposite to refer to the scheme contained in the Code of Criminal Procedure and in particular, Chapter XXXIX. The cardinal procedure contained in Section 372 should be kept in mind vide exercising the power by the Appellate Court, which reads as under :-

372 : No appeal to lie, unless otherwise provided. No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or any other law for the time being in force.

20 Section 374 of the Code is a provision of Appeal by a person who has been convicted on a trial to the High Court and to the Supreme Court. Section 377 is a provision for Appeal by the State against the sentence and the said Appeal can be preferred to the Court of Sessions, if the sentence is passed by the Magistrate and to the High Court, if the sentence is passed by any other Court. Section 378 is a provision for an appeal by a State to the Court of Sessions from an order of acquittal passed by a Magistrate and to the High Court from an original/appellate order of acquittal passed by any Court other than the High Court or the order of acquittal passed by the Court of Sessions. Section 386 enumerates the powers of the Appellate Court which, after

perusing the record and hearing the Appellant or his pleader would pass the orders in an Appeal under Section 377 or 378 and it may either dismiss the Appeal or may pass the following orders in the following manner :-

Power of the Appellate Court:- After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence,

or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the Same;

- (c) *in an appeal for enhancement of sentence-*
 - (i) *reverse the finding and sentence and acquit or discharge the accused or order him to be re- tried by a Court competent to try the offence, or*
 - (ii) *alter the finding maintaining the sentence, or*
 - (iii) *with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;*
- (d) *in an appeal from any other order, alter or reverse such order;*
- (e) *make any amendment or any consequential or incidental order that may be just or proper; Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement: Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.*

21 With these provisions in the background, Section 401 is to be read which reads as under :-

401 High Court's powers of revisions

- (1) *In the case of any proceeding the record of which has been called for by itself or Which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers*

conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Nothing in this section shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5) Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice.

22 On perusal of the statutory scheme mentioned above, in an Appeal preferred against an order of acquittal, it is permissible for the Appellate Court to reverse such order and direct further inquiry to be made or the accused can be re-tried or committed for trial and on finding him guilty, the appellate Court can pass a sentence according to law. In an Appeal from conviction, the finding and the sentence can be reversed by the

Appellate Court and an accused can be acquitted or discharged or re-tried by the Court of competent jurisdiction. The finding can be altered by the Appellate Court by maintaining the sentence or with or without altering the finding, it is permissible for the Appellate Court to alter the nature or the extent, or the nature and the extent of the sentence, but not to enhance the same. In an Appeal which has been filed for enhancement of sentence, the Appellate Court can reverse the finding and sentence and acquit or discharge the accused, or alter the finding maintaining the sentence, or with or without altering the finding, alter the nature or extent and the nature of extent of the sentence so as to enhance or reduce the same.

23 The power to be exercised under Section 401 is safeguarded by sub-section (2) which provide that no order shall be made to the prejudice of the accused or other person unless he had an opportunity of being heard either personally or by a pleader in his own defence. Sub-section (3) of Section 401 imposes a further embargo on the power of a High Court and the restriction is to the effect that the High Court shall not convert a finding of acquittal into one of conviction and by virtue of sub-section (4) of Section 401, where under the Code an Appeal lies but no Appeal is brought, no proceedings by way of a revision, shall be entertained at the instance of the party who could have appealed.

In the wake of the aforesaid statutory scheme, since the State has failed to file an Appeal being aggrieved by the acquittal which it was permitted to do so, cannot justify invocation of power under Section 401, and particularly so as to convert the finding of acquittal into one of conviction in view of the interdiction set out in sub-sections (3) and (4) of Section 401. The decision of the Apex Court in case of Saheb Singh (supra) is delivered in the peculiar facts where the appellants were convicted by the Addl. Sessions Judge under Section 148, 323/149 and Section 302/149. Appeal was preferred against the order of conviction by the appellants and the High Court dismissed their Appeals and altered the find awarded under Section 302/149 from Rs.200/- to Rs.5,000/-. Being aggrieved by this enhancement of fine, the appellant preferred the Appeal limited to the question of enhancement only. It is in the backdrop of this factual aspect, the power of revision by the High Court as well as the Sessions Court was examined along with Section 401. In the wake of the facts, their Lordships of the Apex Court have held as under :-

"4. It is clear from a conjoint reading of Sections 377, 386, 397 and 401 that if the State Government is aggrieved about the inadequacy of the sentence it can prefer an appeal under S.377(1) of the Code. The failure on the part of the State Government to prefer an appeal does not, however, preclude the High Court from exercising suo motu power of revision under

S.397 read with S. 401 of the Code since the High Court itself is empowered to call for the record of the proceeding of any court subordinate to it. Sub-section (4) of S. 401 operates as a bar to the party which has a right to prefer an appeal but has failed to do so but that sub-section cannot stand in the way of the High Court exercising revisional jurisdiction suo motu. But before the High Court exercises its suo motu revisional jurisdiction to enhance the sentence, it is imperative that the convict is put on notice and is given an opportunity of being heard on the question of sentence either in person or through his advocate. The revisional jurisdiction cannot be exercised to the prejudice of the convict without putting him on guard that it is proposed to enhance the sentence imposed by the Trial Court.

5. *Now, in the present case the appeal was filed under S. 374(2) of the Code by the convicts against the order passed by the Additional Sessions Judge. No appeal was filed by the State under S. 377(1) of the Code against the sentence awarded by the trial Court for the offence under S. 302/149, I.P.C on the ground of its inadequacy. Nor did the High Court exercise suo motu revisional powers under S. 397 read with S. 401 of the Code. If the High Court was minded to enhance the sentence the proper course was to exercise suo motu powers under S. 397 read with S. 397 read with S. 401 of the Code by issuing notice of enhancement and hearing the convicts on the question of inadequacy of sentence. Without following such procedure it was not open to the High Court in the*

appeal filed by the convicts to enhance the sentence by enhancing the fine. The High Court clearly acted without jurisdiction. For the above reasons we are clearly of the opinion that the appeal must succeed."

Further, a decision in case of Apex Court in Ghimirey Vs. State of Assam (supra), relying upon the decision in case of Saheb Singh (supra), the decision of the High Court insofar as it enhances the sentence from 7 years to 8 years was found to be in accordance with the procedure prescribed and the judgment of the High Court was set aside.

The aforesaid decisions, therefore, do not support the propositions sought to be canvassed by the learned APP.

24 On the other hand, in case of Thadi Narayana (supra), the Apex Court was confronted with a question of law which was set out "In dealing with the Appeal preferred by a convict person against an order of conviction and sentence; the question formulated was whether it is permissible for the High Court to reverse the finding of acquittal recorded by the trial Court in favour of the appellant in respect of an offence which is directly not the subject matter of the Appeal".

On account of the uncertain position of law, the scheme contained in the Code was exhaustively dealt with, by their Lordship of the Higher Courts and following observations are relevant :-

“7 Section 423(1)(a) expressly deals with an appeal from an order of acquittal and it empowers the Appellate Court to reverse the order of acquittal and direct that further inquiry be made or that the accused may be tried or committed for trial,

8 Section 423(1)(b) (1) in terms deals with an appeal from a conviction, and it empowers the Appellate Court to reverse the findings and sentence and acquit or discharge the accused or order a retrial by a Court of competent jurisdiction subordinate to such Appellate. Court or committed for trial. In the context it is obvious that the finding must mean the finding of guilt. The words "the finding and sentence" are co-related. They indicate that the finding in question is the cause and the sentence is the consequence; and so what the Appellate Court is empowered to reverse is the finding of guilt and consequently the order as to sentence. There is no difficulty in holding that S.423(1) (b) (1) postulates the presence of an order, of sentence against the accused and it is in that context that it empowers the Appellate Court to reverse, the finding of guilt and sentence and then to pass any one of the appropriate orders: therein specified. In our opinion S.423(1) (b) (1) is, therefore, clearly confined to cases of appeals preferred against orders of conviction and sentence, and the powers exercisable under it are therefore conditioned by the said consideration. It is impossible to accede to the argument that the powers conferred by this clause can be exercised for the purpose of reversing an order of acquittal passed in favour of a

party in respect of an offence charged in dealing with an appeal preferred-by him against the order of conviction in respect of another offence charged and found proved. There can thus. be no doubt that the order passed by Naidu, J. cannot be justified under this clause.

Further, in para-10, it has been observed as under :-

10 The scheme of Section 423 itself clearly shows that when appeals against conviction are brought before the Appellate Court by the convicted person it is only with the orders of conviction and matters incidental thereto that fall to be decided by the Appellate Court. An order of acquittal passed in favour of an accused person can be challenged by an appeal as provided by s.417 of the, Code, and s.423(1) (a) therefore expressly deals with the powers of the High Court in dealing with such appeals against orders of acquittals. Prima facie,if an order of acquittal is not challenged by an appeal as contemplated by s.417 and if no action is taken by the High Court under s.439 the said order of acquittal becomes final and cannot be impugned indirectly by the State in resisting an appeal filed by a convicted person against his conviction. In a case where several offences are charged against an accused person the trial is no doubt one; but where the accused person is acquitted of some offences and convicted of others the character of the appellate proceedings and their scope and extent is necessarily determined by the nature of the appeal preferred before the Appellate Court. If an appeal is preferred against an order of acquittal by the State and no appeal

is filed by the convicted person. against his conviction it is only the order of acquittal which falls to be considered by the Appellate Court and not the order of conviction. Similarly, if an order of conviction is challenged by the convicted person but the order of acquittal is not challenged by the State then it is only the order of conviction that falls to be considered by the Appellate Court and not the order of acquittal. Therefore the assumption that the whole case is before the High Court when it entertains an appeal against conviction is not well-founded and as such it cannot be pressed into service in construing the expression "alter the finding".

25 The said position of law has been re-iterated in Appa Saheb (supra) with the following observations:

"As already stated, the appellants were also charged under Sections 498-A and 306 read with Section 34 IPC but were acquitted of the said charges by the learned Sessions Judge, which order has attained finality for the reason that the State did not prefer appeal against the same. The appeal before the High Court and also in this Court has been preferred by the appellants challenging their conviction under Section 304-B read with Section 34 IPC. It has been held in State of A.P Vs. Thadi Narayana that Section 423(1)(b)(i) of the Code of Criminal Procedure, 1973 is clearly confined to cases of appeals preferred against orders of conviction and sentence, the powers conferred by this clause cannot be exercised for the purpose of reversing an order of acquittal passed in favour of a party in respect of an

offence charged, in dealing with an appeal preferred by him against the order of conviction in respect of another offence charged and found proved".

26 The position of law as emanating from the aforesaid authoritative pronouncements do not permit me to render any finding against the acquittal of accused nos.1 and 2 under Section 302 IPC, and under Section 148 and 149 of the IPC, since the State has not chosen to prefer any Appeal and in an Appeal filed by the accused persons, assailing their conviction under the impugned judgment, it is not permissible to convert the finding of acquittal under Section 302 of the IPC into that of conviction though the evidence of record will justify conviction of accused nos.1 and 2. It is not open for me to do so by invoking the powers under Section 401 in view of the specific restraint imposed vide sub-section (3) and sub-section (4) of the very said section.

 This course of action, not being available to me, I proceed to deal with the challenge in the Appeal filed by the three appellants.

27 Restricting myself to the conviction of the accused nos.1 and 2 under Section 325 of the IPC and that of accused nos.1, 2 and 7 under Section 324 of IPC, on marshaling of the evidence, it can be stated, that the accused nos.1 and 2 have rightly been convicted under Section 325 for voluntarily causing

grievous hurt as they had assaulted the deceased by means of sticks resulting into fracture of the bone. The evidence of the eye witness support the prosecution case, that accused no.1 and accused no.2 assaulted the deceased by sticks. The learned Judge by the impugned judgment has held them guilty of committing an offence under Section 325 of the IPC and sentenced the appellant nos.1 and 2 to undergo RI for five years and to pay fine of Rs.500/- in default to undergo SI for two months.

28 I am not inclined to interfere with the finding recorded by the Sessions Judge against appellant nos.1 and 2, which is based on evidence on record, for convicting them under Section 325 of the IPC and imposing sentence of five years RI along with fine. As far as conviction of the accused nos.1, 2 and 7 under Section 324 IPC is concerned, it is informed that accused nos.1 and 2 have undergone Imprisonment of 1 ½ years before they were released on bail. Thus, the accused nos.1, 2 and 7 have already undergone the punishment imposed on them on being convicted for the offence punishable under Section 324 of the IPC.

29 In the wake of the aforesaid, the conviction of the appellant nos.1 and 2 under Section 325 IPC and the sentence imposed thereupon is upheld.

The impugned judgment to that extent do not call for any interference. As far as accused nos.1, 2 and 7 are concerned who have already undergone RI for six months on being convicted under Section 324 of the IPC and since they have already deposited the amount of fine, the impugned judgment do not warrant any interference in the said conviction and the sentence imposed.

30 Resultantly, by upholding the impugned judgment, the Appeal is dismissed.

31 The appellant nos.1 and 2 shall undergo the remaining term of Imprisonment to which they are sentenced for committing an offence punishable under Section 325 IPC. The appellant nos.1 and 2 shall surrender themselves before the Addl. Sessions Judge, Nashik, within a period of six weeks from the date of pronouncement of the judgment.

SMT. BHARATI DANGRE, J