

::1:: Cri Apeal 892, 893, 724 of 2015

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 893 OF 2015

Chotelal Rambrij Paswan
Age-40 yrs, Occu-
R/o Bhim Nagar, Dongri
Zopad Patti, Achole Rd. Nala Sopara (E),
Tal. Vasai, Dist- Palghar
(Presently in Central Jail Thane as convict)

Appellant.....
(Orig. Accused No.4)

V/s.

State of Maharashtra
Through Nala Sopara Police Station,
Tal. Vasai, Dist. Palghar

Respondent.....
(Orig. Complainant)

WITH

CRIMINAL APPEAL NO. 724 OF 2015

Manoj Chhotelal Paswan
Age 20 years, Occu.
R/o. Bhim Nagar, Dongri,
Zopad Patti, Achole Rd.,
Nalla Sopara (E), Tal. Vasai,
Dist. Palghar.
(Presently in Central Jai, Thane, as convict)

Appellant.....
(Orig. Accused No.3)

V/s.

State of Maharashtra
Through Nalla Sopara Police Station,
Tal. Vasai, Dist. Palghar

Respondent.....
(Orig. Complainant)

::2:: Cri Apeal 892, 893, 724 of 2015

WITH

CRIMINAL APPEAL NO. 892 OF 2015

Rampravesh Ramavtar Singh

Appellant.....
(Orig. Accused No.1)

V/s.

State of Maharashtra

Respondent.....
(Orig. Complainant)

Ms. Payoshi Roy i/b Mr. Yug Mohit Chaudhry for the Appellant in Appeal No.892/2015.

Mr. Prosper D'souza for the Appellant in Appeal No.893/2015 (appointed by Legal Aid).

Mrs. Nasreen Ayubi for the Appellant in Appeal No.724/2015 (appointed by Legal Aid).

Mrs. M.M. Deshmukh, APP for the Respondent-State.

<u>CORAM</u>	: <u>PRASANNA B. VARALE & S.M. MODAK, JJ.</u>
<u>RESERVED ON</u>	: <u>28/01/2021</u>
<u>PRONOUNCED ON</u>	: <u>09/04/2021</u>

JUDGMENT : (PER S.M. MODAK, J)

The issue involved in these appeals is *“in respect of one incident when Court found that the incident is an act of unlawful assembly- then whether Court is justified in convicting three appellants (out of six accused) by taking recourse to the provisions of Section 34 of*

the Indian Penal Code?” The first incident refers to the assault on PWs-2, 3 and 4 (being the outcome of an act of unlawful assembly) whereas second incident refers to shifting the deceased by these appellants from one spot to another. Whether trial Court was justified *“in holding that accused Nos.2, 5 and 6 have withdrawn themselves from the unlawful assembly when accused Nos.1, 3 and 4 shifted deceased from the first spot to another spot?”*

02] The above issues have arisen from the judgment dated 12/01/2015 delivered by the Court of Additional Sessions Judge, Vasai, District Thane in Sessions Case No. 44/2013. There were six accused persons put to trial. They were tried for committing offences punishable under Sections 147, 148, 323, 324, 302 read with Section 149 of the Indian Penal Code and in the alternative for the offences punishable under Sections 323, 324, 302 read with Section 34 of the Indian Penal Code. There were two injured witnesses viz. PW-2 Hiralal Balu Jaiswal (first informant) and his wife PW-3 Mantha Jaiswal. Whereas, name of the deceased is also Hiralal, but he is Hiralal Deepchand Jaiswal. The outcome of the impugned judgment is as follows:-

a) Sections 147,148 read with Section 149 of the Indian Penal

Code. All accused Nos. 1 to 6 were convicted.

b) Section 323 read with Section 149 of the Indian Penal

Code. All accused Nos. 1 to 6 are convicted for causing simple hurt to PW-2 Hiralal, PW-3 Mantha and PW-4 Dharmendra.

c) Section 324 read with section 149 of the Indian Penal

Code. All accused are convicted for causing hurt to PW-2 Hiralal and PW-3 Mantha by dangerous weapons.

d) Section 302 read with Section 34 of the Indian Penal Code.

Accused Nos. 1, 3 and 4 are convicted (It means accused Nos. 2, 5 and 6 are acquitted).

03] In these three appeals, we are concerned with correctness of the judgment of conviction of these three appellants for the offences punishable under Sections 147, 148, 323, 324 read with Section 149 and Section 302 read with Section 34 of the Indian Penal Code. Original accused Nos. 2, 5 and 6 have not preferred appeals (as confirmed by learned Additional Public Prosecutor Smt. Deshmukh).

04] So, we have heard learned Advocate Ms. Payoshi Roy (Appeal No.892/2015), learned Advocate Prosper D'souza (Appeal No.893/2015),

learned Advocate Mrs. Nasreen Ayubi (Appeal No.724/2015) and heard learned APP Smt. Deshmukh and also perused the record and citations.

05] Summary of argument of all the learned Advocates for appellants is-

- a) Accused Nos. 3 and 4 are not concerned with the initial manhandling to PW-3 Mantha.
- b) No independent witnesses were examined though available.
- c) There is no evidence about what happened after deceased was taken from the first spot to the second spot.
- d) Delay in lodging the F.I.R. on the part of PW-2, PW-3 and PW-4.
- e) PW-4 Dharmendra is not injured in the fight and it creates doubt about his presence at the spot.
- f) There are material improvements in the evidence of PW-2, PW-3 and PW-4.

Whereas the learned A.P.P. supported the judgment.

06] The trial Court in the impugned judgment gave findings on various issues. They are:-

- a) absence of motive.

- b) probability in defence of the accused.
- c) not seizing any incriminating articles from the spot.
- d) blood stains on clothes of accused.
- e) delay in lodging of F.I.R.
- f) reliability of evidence of PW-2 Hiralal, PW-3 Mantha and PW-4 Dharmendra.
- g) effect of omissions and contradictions.
- h) formation of unlawful assembly while assaulting PW-2 and PW-3.
- i) cessation of unlawful assembly when deceased was taken to the second spot by accused Nos. 1, 3 and 4.

07] So, we are supposed to decide the appeals on following the points:

- a) Whether the evidence of three eye witnesses viz. PW-2 Hiralal, PW-3 Mantha and PW-4 Dharmendra is reliable and trustworthy?
- b) Whether PW-2 Hiralal was justified in lodging F.I.R. on 08/11/2012 at 10.30 a.m., when the incident took place in the intervening night of 07/11/2012 and 08/11/2012 after 12 midnight?

- c) Whether the trial Court was right in convicting accused Nos. 1, 3 and 4 for the offence punishable under Section 302 read with Section 34, when they were charged along with offences under Section 302 read with Section 149 of Indian Penal Code?
- d) Whether the impugned judgment requires interference?

INITIAL OBSERVATIONS

08] On reading the judgment and record, what we find is that-extramarital relationship with PW-3 Mantha is shown as point of dispute between prosecution witnesses and accused (though it is not substantiated). What we find is that it is not the accused who went to the prosecution witnesses but it is other way round. What we further find is that background dispute was only between PW-3 Mantha and accused Nos.1 and 2. What we further find is that accused Nos.3 to 6 along with others came on the spot after call was given by accused No.1/2. What we further find is that there is no evidence of *“what happened at second spot and who shifted deceased to private hospital”*. With these observations, we will deal with the issues.

PROSECUTION STORY

- a) On 7/11/2012, accused No.1 entered the house of PW-3 Mantha for asking her to reduce the volume of radio. He misbehaved with her. At 9:30 p.m., her brother-in-law PW-4 Dharmendra returned home. Accused Nos.1 and 2 again came and they torn the shirt of PW-4.
- b) PW-2 Hiralal and deceased Hiralal returned home at midnight. PW-3 Mantha told these incidents to her husband PW-2 Hiralal. Then husband went to accused No.1 for questioning him. He was followed by PW-3 Mantha, PW-4 Dharmendra and deceased Hiralal.
- c) There scuffle took place. Accused No.1/2 called and then accused Nos.3 to 6 and others came with weapons. The prosecution witnesses and deceased was assaulted accused Nos.1, 3 and 4 and one more non-chargesheeted accused and they took deceased to the second spot.
- d) PW-4 Dharmendra took PWs-2 and 3 to private hospital. He again went to spot but could not see deceased Hiralal.

e) On next day, PW-2 Hiralal lodged complaint with Nalasopara Police Station after knowing about death of Hiralal. In such a way, criminal law was set in motion. And in all, 6 accused were chargesheeted.

HOMICIDAL DEATH

09] We have no hesitation in upholding the findings of the trial Court on this issue. PW-1 Dr. Dongare attached to Nalasopara Primary Health Centre has performed the postmortem. He has noticed six injuries externally. Whereas, he has noticed hematoma under the scalp. So also he has noticed depressed fracture with crack over occipital region. He has opined

“Hypovolaemic shock due to head injury” as a cause of death.

a) He had not seen the weapons. He was also cross-examined, but in vain. He has opined age of injury - *“within 30 minutes to one hour”* in postmortem report. According to appellants, this timing does not match with the knowledge about timing of death stated by first informant PW-2 Hiralal. Timing stated by PW-2 is as follows:

He was admitted in hospital. Next day morning at 07:00 a.m.,

he came to know that police admitted Hiralal in Alliance Hospital and he is alive. Then he came to know at 9 a.m. that Hiralal died.

They compared this timing with probable time of assault. If we go back one hour from 04:00 p.m. of 08/11/2012 (time of receipt of dead body) probable time of assault comes to 03:00 p.m. of 08/11/2012. This is not the story of any witness that assault took place on 08/11/2012 at 03:00 p.m. But the incident took place in the intervening night of 07/11/2012 and 08/11/2012.

10] We cannot overlook the fact that probable timing given about age of injury by the Medical Officer is only an opinion. We have got duly proved Inquest Panchanama at Exh. 68 through the Investigating Officer PW-8. The timings are 11:00 a.m. to 12.30 p.m. of 8/11/2012. It was carried in Alliance Hospital. So, we are not inclined to give any weightage to the opinion given by the Medical Officer about probable timing about age of injury. Only gray area, we find is prosecution has not tendered in evidence as to who took deceased to hospital, when, whether any treatment was given or whether he was brought in dead condition. Later on, we will see whether it has got any effect on prosecution case. But, certainly there is sufficient evidence to prove homicidal death of Hiralal

Deepchand Jaiswal.

MOTIVE

11] Behind every incident, there is some reason. In legal parlance, it is called as motive. Law on this point is very clear. The Investigating Agency may be successful in collecting evidence on the point of motive. The trial is conducted on the basis of evidence, which can be adduced legally. The Investigating Agency collects various materials, but evidence cannot be adduced on every material. So, in a given case, it may happen that evidence is collected on the point of motive, but evidence cannot be given legally. In another case, it may also happen that evidence could not at all be collected on the point of motive.

12] Law considers all these practical aspects. That is why, it is established principle that *“motive is not mandatory aspect in a case based on direct evidence”*. That is to say, we have got eye witness account available, then why to insist for evidence on the point of motive and then disbelieve eye witness account for want of evidence on the point of motive.

13] There is also a human angle. What will prompt/compel you to take law into ones hand, one cannot predict. Ultimately, it is human

psychology. In this case, it is also argued that motive is absent and incident took place in a sudden fight.

PREVIOUS INCIDENT

14] There are two sets of accused. The prosecution witnesses were engaged in the business of selling panipuri. They used to return home late. Accused Nos. 1 and 2 were involved in the incident since beginning, since the time PW-3 Mantha was molested. Whereas, accused Nos. 3 to 6 came on the scene when accused Nos. 1 and 2 shouted. There are two minor incidents that took place during daytime on 07/11/2012.

15] Accused No.1 entered the house of PW-3 Mantha on 07/11/2012 at 4.30 p.m. It is on account of asking the witness to reduce the volume of radio. This is what suggested by PW-3. She was abused and molested (attempted to rape). Accused No.2 followed and he also abused her. This is the first incident. Second incident took place at 9.30 p.m. PW-4 Dharmendra returned home. Accused Nos. 1 and 2 again came. At that time they threatened PW-4 and torn his shirt.

16] The evidence of PW-3 Mantha is challenged on the ground of her immoral character. She admits that several times, she changed her

place of residence (para 13). But she never admits the reason for this change and it being her bad character. Even there is attack on the blood relationship of PW-4 Dharmendra with PW-2 Hiralal. They are real brothers. But, defence claims that PW-4 is not the real brother and he did not possess any document. According to defence, this was done by PW-4 in order to hide his illicit relations with PW-3 Mantha and to represent to the public that he is the real brother of PW-2 Hiralal. Witness has denied.

17] Defence is not successful in bringing any material to support this theory. It is also not the theory of defence and particularly of Accused Nos. 1 and 2 that both have entered the house of Mantha to lure her/called by her. What has come in evidence is entry in the house by Accused No.1 under the pretext of reducing the volume of radio. Accused No.1 had not gone back from the house after finishing the work, but he tried to misbehave with PW-3 Mantha. In absence of any material, we cannot opine about immoral character of PW-3 Mantha.

18] There are certain improvements in the evidence of PW-3 Mantha and PW-4 Dharmendra. Questions were put to PW-3 (Para 14) and PW-8 Investigating Officer (Para 19). We think improvement only

pertains to *“attempt to commit rape”*. Similarly, questions were put to PW-4 Dharmendra (Para No.9) and Investigating Officer PW-8 (Para No. 22). After PW-4 returned home, PW-3 Mantha told PW-4 about the incident that happened at 4.30 p.m. So, the improvement only pertains to fact *“of committing rape by Accused No. 1 and Accused No. 2”* disclosed by PW-3 to PW-4.

19] There is one more improvement pointed out in the evidence of PW-4. *“Accused No. 1 and Accused No.2 torn his shirt”*, is the improvement. It happens when both came to the house at 09:00 p.m. after arrival of PW-4 Dharmendra.

20] So, only the portion referred above needs to be excluded from the evidence of PW-3 and PW-4. So, what remains is entry of Accused No.1 and Accused No.2 one after another at 04:30 p.m. and entry of Accused No. 1 and Accused No. 2 at 09.30 p.m. From the above discussion what we gather is that the prosecution witnesses have one after another in fact have gone to question accused Nos.1 and 2 about their conduct. So it is not that accused Nos.1 and 2 have met the prosecution witnesses. What was the exact discussion in between the prosecution witnesses on one hand and accused Nos.1 and 2 on the other

hand is not made known to us. Because it is not reflected in their evidence. After the initial scuffle, accused No.1/2 have called and other accused have arrived at the spot. So it transpires that there were three prosecution witnesses and deceased whereas from the side of the accused, there were only two accused. So there is every reason to believe that accused No.1/2 must have called other accused for help. There is every reason to believe that accused Nos.1 and 2 got annoyed due to questioning about their conduct of misbehaving with PW-3 Mantha. Apparently this seems to be the motive for the offence.

MAIN INCIDENT

21] In the main incident apart from accused Nos. 1 and 2, in all ten persons were involved. All were not charge-sheeted. Only four were charge-sheeted. They are accused Nos. 3 to 6.

EVIDENCE OF PWs-2, 3 & 4

22] On this background, if evidence of three eye witnesses is perused, we can find that accused Nos.1 and 2 were present at the first spot from the beginning. Accused Nos.3 to 6 along with non-chargesheeted accused persons came at the spot on the call given by accused Nos.1 and 2. There is improvement in the evidence of PW-3

Mantha, how the other accused came to the spot. Whether they came to the spot on the call given by accused No.1. There is improvement on the point, whether accused no.1 gave a call (para 18). This improvement was put to Investigating Officer – PW-8. He admits that Mantha has not stated that fact. This cannot be said to be a material improvement. Improvement can be said to be material, if it relates for e.g. name of the accused. It is not the fact.

23] The evidence of these three eye witnesses is consistent on the point of beating to them and by which accused, and beating to deceased - Hiralal and by which accused. Deceased - Hiralal came at the spot at the end. That is to say that after PW-2 Hiralal, PW-3 Mantha and PW-4 Dharmendra came at the spot. Deceased - Hiralal was not having any dispute with any of the accused. Even, he is not involved in the incident of entering the house of witness Mantha by accused Nos.1 and 2. But the fact remains and it is that he was a victim of the crime.

24] All these witnesses have stated the weapons of wooden log, iron rod in the hands of the accused who came later. Amongst them, are accused Nos.3, 4 and non-chargesheeted accused. Deceased was hit with those weapons. He had fallen unconscious. Accused Nos.2, 3 and 4 and

one Sonu Sahani took the deceased from the spot. It has come in the evidence of PW-2 Hiralal that no street light were there on the road, below the valley and on the road going towards the valley.

25] Much is said about illicit relations of PW-3 Mantha with several persons. Much is said that PW-2 Hiralal was fed up with attitude of his wife. Even he tried to commit suicide and he was persuaded by accused No.4 Chhotelal. All allegations have been denied by PW-3 Mantha. Similar allegations are also made with PW-4 Dharmendra. Even defence have tried to allege similar relationship in between witness Mantha and deceased Hiralal. All allegations were denied by witness Mantha. It is true that PW-4 Dharmendra is not injured in the incident.

26] According to defence, it is surprising that absence of injury can be one of the ground for discrediting the witness. However, if we peruse his evidence, we can find that he had given details of the incident. Not receiving any injury, even though the witness is present on the spot, depends upon various factors. It depends upon where the witness was standing. This witness was also cross-examined on the point of illicit relationship of Mantha with deceased - Hiralal with the witness. He had denied it.

27] We think it is halfhearted suggestion, the defence has nowhere said that the prosecution witnesses have come to the house of accused Nos.1 and 2 to protest the illicit relationship with witness Mantha. They have nowhere said that in that interaction the incident took place. We do not find any reason to disbelieve these three eye witnesses on the point of assault on the deceased.

INJURY OF PW-2 HIRALAL AND PW-3 MANTHA

28] The injuries caused to these two witnesses are simple and they are contused lacerated wound. The certificates are proved through Dr. Shushant Mahalle at Exhs.61 and 62 for offence under Section 323 and Section 324 hurt is the common ingredient. If hurt is caused by deadly weapon, Section 324 of the Indian Penal Code gets attracted. There are certain procedural lapses pointed out on the part of Dr. Shushant Mahalle. Instead of writing the history on the certificate, he wrote it down on admission papers. Certificates at Exhs.61 and 62 does not contain the date of examination and date of discharge. Though they were not there at appropriate place, it does not make the evidence of Dr. Shushant Mahalle untrustworthy. This may be due to unawareness of procedure or lack of taking adequate care. Medical Officer is not from

government hospital but from private hospital.

29] Trial Court held accused Nos.1 to 6 guilty for the offence punishable under Sections 323, 324 read with Section 149 of the Indian Penal Code. In the operative order of the judgment, Trial Court has clarified which accused has caused which witness the hurt and by deadly weapons. We are not concerned with the conviction of the accused Nos.2, 5 and 6 because they are appellant before us. Accused Nos.1, 3 and 4 are convicted as follows:

Accused	Section	Witness
Accused No.1	323, 324 read with Section 149 IPC	PW-2 Hiralal
Accused No.1	323, 324 read with Section 149 IPC	PW-3 Mantha
Accused No.1	323 read with Section 149 IPC	PW-4 Dharmendra
Accused No.3	323, 324 read with Section 149 IPC	PW-2 Hiralal
Accused No.3	323, 324 read with Section 149 IPC	PW-3 Mantha
Accused No.3	323 read with Section 149 IPC	PW-4 Dharmendra
Accused No.4	323, 324 read with Section 149 IPC	PW-2 Hiralal
Accused No.4	323, 324 read with Section 149 IPC	PW-3 Mantha

Accused No.4	323 read with Section 149 IPC	PW-4 Dharmendra
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30] As said above, PW-4 Dharmendra was not examined by Dr. Shushant Mahalle. However, PW-4 Dharmendra during chief examination has said “*he had also received some injuries*”. Though he had shown the injuries to doctor, he was not having injury certificate. Trial Court has not given any specific finding on the point of causing hurt to PW-4 Dharmendra. For offence under Section 323, no injury is required. Simple pain is sufficient. But when the witness has described receiving injuries, it encompasses some injury and not merely bodily pain. Trial Court has not considered the difference between plain hurt and hurt caused by deadly weapon. We feel that the evidence does not justify proof of an offence under Section 323 against these appellants for causing hurt to PW-4 Dharmendra.

DELAY IN F.I.R.

31] Much is said about not lodging the F.I.R. immediately. The F.I.R. is lodged at Nalasopara Police Station on 8th November, 2012 at 10:30 a.m. PW-4 Dharmendra got admitted PW-2 Hiralal and PW-3 Mantha in Manorma Nursing Home, Nalasopara. The intimation was

given from the hospital to Nalasopara Police Station on 8th November, 2012 at 10:00 a.m. The relevant intimation is at Exhs.63 and 64. It is proved through PW-7 Dr. Shushant Mahalle. He has examined PWs-2 and 3 and issued certificate. Conviction for causing hurt to them is not challenged by accused Nos.2, 5 and 6. It is very well true that PWs-2, 3 and 4 were not aware about what has happened to deceased - Hiralal Deepchand. When PW-2 Hiralal was in the hospital, at 9:00 a.m. he came to know that Hiralal Deepchand has expired. Complaint of PW-2 was lodged in the police station. It has come in the evidence of Investigating Officer PW-8 Dhananjay Uttam Jadgale.

32] There is emphasis on inaction on the part of these three witnesses to keep quiet till 10:00 a.m. of 8th November, 2012. If the incident has taken place in the midnight of 7th November, 2012 and 8th November, 2012 and if the F.I.R. is lodged at 10:00 a.m. of 8th November, 2012, it cannot be said that there is unreasonable delay in lodging the F.I.R. Though, F.I.R. is not lodged immediately, it was lodged as soon as all priority work was over. It includes giving treatment to PWs-2 and 3 and making them stable. It is clear from the evidence that both these injured witnesses were admitted in the hospital at 2:00 a.m. in the

intervening night.

33] Learned Advocate Ms. Payoshi Roy relied upon a judgment in case of **Ganesh Bhavan Patel and Another Vs. State of Maharashtra** reported in **AIR 1979 SC 135 (para 15)**. *“If there are concomitant circumstances to suggest that investigator took time deliberately so that he can give shape to the case and eye witnesses account, delay of few hours may also be fatal”*. According to her, the foundation of the prosecution case is weak and when it is weak, it cannot stand to the scrutiny of the law. To buttress this submission, she relied upon a judgment in case of **Bhagirath Vs. State of Madhya Pradesh** reported in **(1976) 1 SCC 20**. Hon’ble Supreme Court was pleased to set aside the conviction and one of the ground was falsely in the eye witnesses account. It has been observed as under:

“18. When the substratum of the evidence given by the eyewitnesses examined by the prosecution was found to be false, the only prudent course, in the circumstances of this case, left to the court was to throw out the prosecution case in its entirety against all the accused”.

34] We are afraid that observations made in above two cases will

be helpful to the appellants. We think that the chain of events has been established right from the incident at the spot till lodging of the F.I.R. The incident took place in the intervening night after 12:00 o'clock. Both the injured witnesses were admitted at 2:00 a.m., intimation was given to police by the doctors at 10:00 a.m. and F.I.R. was lodged at 10:30 a.m. So we do not find any deliberate delay. It is natural period. If you say that witnesses are telling falsehood, you must build a case by way of cross-examination. That is to say, what was done during intervening period, to whom they have met and how story is concocted. Nothing is there in cross-examination. Whereas, the defence has only alleged about illicit relationship of witness Mantha with several persons. But they have nowhere tried to correlate it with the incident. So we do not find that foundation of the case is based on falsehood.

INVOLVEMENT OF ACCUSED

35] There are two circumstances relied upon by the prosecution. One is recovery of weapons at the instance of accused No.1 and noticing bloodstains on the cloths wore by accused Nos.1 to 6. There are also C.A. reports at Exhs.93, 94 and 95.

36] We are not inclined to accept the circumstance of noticing bloodstains on the cloths wore by accused Nos.1, 3 and 4. Though seizure panch Nizamuddin is examined as PW-6, he has not supported. The seizure panchanama are at Exhs.78 to 83, it bears the date 12th November, 2012. There is a mention of their arrest on 8th November, 2012 in the panchanamas itself. During this period, they were in police custody. So what prevented the police from seizing the cloths having bloodstains on 8th November 2012 that is a date on which they were arrested. Whether police were not knowing about importance of seizure? All this delay raises suspicion about presence of bloodstains on the cloths of accused Nos.1, 3 and 4. Trial Court has not considered this fact. We do not accept this circumstance against accused Nos.1, 3 and 4. Hence, we did not feel it necessary to discuss about the C.A. report.

37] Accused No.1 has shown readiness to produce two iron rods used in the crime. The memorandum statement is at Exh.75 and the panchanama is at Exh.76. From the second spot i.e. from the road from village Achole to Santosh Bhawan, the police have seized two wooden logs. Out of them, one log was broken into four pieces. Whereas the C.A. report is at Exh.93. Human blood is found on four pieces of wooden log

(Exh.1) and on (Exh.2). Whereas human blood is also found on iron rod Exh.5. The group is inconclusive. The blood group of deceased also could not be ascertained.

38] When we have read the evidence of Investigating Officer, we do not find that his testimony is seriously challenged. In paragraph 25 of the judgment, Trial Court has concluded about seizure of two iron rods. We accept that circumstance against accused No.1. Much is said about non-seizure of any incriminating article from the place in front of house of PW-2 Hiralal. Even though, PWs-2 and 3 were having contused lacerated wound. No blood was found from that spot. It was also brought on record that no blood was found on road which passes from the house of PW-2 Hiralal to place where dead body was found (paragraph 16 of evidence of Investigating Officer).

39] It is true that certain personal belongings of the deceased were found at the second spot. It is also true that after the deceased was taken from the first spot to the second spot, there is no evidence what has happened to deceased at that spot. There are also suggestion that PWs-2 and 3 have in fact chased the deceased and during that chase, they received injuries. Dr. Shushant Mahalle has admitted that contused

lacerated wound may be possible by fall on hard surface. Except this, there is no other material to support this theory.

40] We do find certain gray area in the prosecution case. It is on the point how the deceased was transferred from the second spot to Alliance Hospital. We do find certain gray area what happened to him after he was taken from first spot to the second spot. But unfortunately, we can say that defence was not successful to materialize these gray areas. Assault on the deceased at the first spot has certainly given the injuries to the deceased which were instrumental in causing his death. So even if these gray areas are there, they are not sufficient to disbelieve the prosecution case in its entirety. Such gray areas remained because it does not click to Investigating Officer or evidence could not be collected. Sometimes it also due to not taking steps by the prosecutor incharge to convert the material into legal evidence. But Court has to scrutinize what is brought on record and what is not brought on record. If what is brought on record is sufficient to believe the prosecution story by applying the test of prudent man, Court is justified in accepting the prosecution case. It has happened in this case.

LAW ON THE POINT OF UNLAWFUL ASSEMBLY AND COMMON

INTENTION

41] The trial Court was cautious enough to alter the charge under Sections 323, 324, 302 read with Section 149 and in the alternative read with Section 34 was framed. We have seen the record. Original charge was framed on 26/11/2013. The trial Court amended the charge on 9/1/2015 (i.e. after matter is closed for judgment) judgment is delivered on 12/1/2015. We do agree that certain defects were cured. That is to say alternate charge read with Section 34 of the Indian Penal Code was not originally framed. It is permissible. In fact, by way of abundant precaution, it ought to have been brought to the notice of accused. But Court proceeded with judgment. Considering nature of alteration, we think that accused are not prejudiced. The findings of the trial Court on this point is as follows:-

“It is evident that they have formed unlawful assembly. Every accused has participated in the assault (para No. 39)”

Trial Court further observed-

“It is also evident that first incident was broken since when accused Nos. 1, 3 and 4 started taking the deceased at another

place by beating. The ocular witnesses are silent about the continuing act of the remaining accused in beating the deceased. Apparently, the place has changed and unlawful assembly was broken (para 39)”

On the point of liability of accused persons trial Court observed:-

“So it cannot be said that remaining accused, who did not participate in the killing of the deceased, have the common intention to kill him. On the contrary, it appears that accused Nos. 1, 3 and 4 have formed common intention to commit the murder of the deceased” (Para 39).

42] Finally, the trial Court held every accused responsible being member of an unlawful assembly and punishable under Sections 147, 148, 323 & 324 read with Section 149 of the Indian Penal Code and held accused Nos.1, 3 & 4 guilty for the offence under Section 302 read with Section 34 of the Indian Penal Code (Para 39). Something needs to be said about unlawful assembly and sharing of common intention.

43] It is true that principle of vicarious liability is accepted to certain extent in a criminal trial. Sections 34, 106, 120-B and 149 of the Indian Penal Code recognizes this principle. The intention of the

legislature is that, no wrongdoer of any degree, even though it may be slightest does not escape from the clutches of the law. It is also difficult to categorize the manner of commission of the offence. It depends upon the facts and the psychology of the offender. One offender may decide everything and may employ persons to do minor acts so as to accomplish the goal. There may be offenders who may come together since beginning and decides how to commit an offence. There may be offenders who does not play important role but actually they abets the principal offender. There may be offenders whose object or goal to achieve same in common. Whereas there may be offenders whose intention is common and they perform different acts in furtherance of the common intention.

44] So, in order to fall an act within the purview of Section 141 of the Indian Penal Code, there must be at least five persons and their common object must be falling under either of the Clause of Section 141 of the Indian Penal Code. So if their number goes down below five, naturally the offence committed by the assembly does not fall under Section 141 of the Indian Penal Code. Furthermore, even if one person commits an offence in a prosecution of the common object, other four

persons are also responsible being members of the unlawful assembly (even if they have not committed any act). Whereas, when the provisions of Section 34 of the Indian Penal Code are invoked, there is no restriction on number of accused persons. What is the precondition is 'criminal act' must be committed and it must in furtherance of common intention. The Court has to deal with different contingencies wherein the trial is to be conducted or evidence is to be assessed. There may be more than five persons- some are named and some are not named. There may be known five persons and all are arrested. There may be five named persons and some are arrested and some are absconding. There is an occasion for Hon'ble Supreme Court to deal with such contingencies. It has happened in case of **Mohan Singh and Another Vs. State of Punjab reported in AIR 1963 SC 174.** The summary of analysis made in that case is-

"If involvement of five persons in the offence is proved, it is immaterial how many of them are before the Court. However, if either the trial Court or the High Court or Hon'ble Supreme Court has acquitted few of five named chargesheeted persons, automatically offence will not fall under Section 141 of the Indian Penal Code".

45] In that case, Court has scrutinized the evidence on the basis of the principles laid down in Section 34 of the Indian Penal Code. In that case, there were in all more than five persons originally tried and when matter went to Hon'ble Supreme Court, there were only three persons. Hence, Hon'ble Supreme Court altered the conviction from Section 302 read with Section 149 to Section 302 read with Section 34 of the Indian Penal Code.

46] On this background, the facts of this case needs to be looked into. There were in all six named accused persons, who are charged. There is no reference in the charge that these six accused along with some named accused persons have formed an unlawful assembly. Though the evidence of the first informant Hiralal discloses that ten friends of accused No.1-Pintu and accused No.2-Dinesh came on the spot. Out of these ten persons, only accused No.3-Manoj, accused No.4-Chotelal and the acquitted accused No.5-Rajesh and accused No.6-Manish are chargesheeted. We do not know what has happened about rest of the six non-chargesheeted accused persons. When we saw the findings of the trial Court regarding formation of an unlawful assembly at the spot, Court has held that chargesheeted accused Nos.1 to 6 have

formed the unlawful assembly. However, when deceased was taken from first spot to second spot, it is the accused Nos.1, 3 and 4 have taken him there. That is how, trial Court has held that there was cessation of an unlawful assembly.

47] For arriving at this conclusion, Trial Court considered change of place of an offence as the factor. Initially, the spot was situated in front of the house of first informant PW-2 Hiralal Balu Jaiswal at Bhim Nagar, Dongri, Nalasopara East. Whereas the second spot is situated on road which passes from village Achole to Santosh Bhawan. In fact, the police ought to have drawn the map showing both the spots. Furthermore, on reading the spot panchanama at Exh.57, it is difficult to ascertain the distance in between the two spots.

48] Trial Court convicted the appellants/accused Nos.1, 3 and 4 for being responsible for the murder of Hiralal Deepchand. According to Trial Court, these three accused have not committed the act in prosecution of the common object of unlawful assembly but Trial Court opined that the said was in furtherance of the common intention. While arriving at the said conclusion, Trial Court believed the ocular testimony of PWs-2, 3 and 4. According to them, these three accused have taken the

body of the deceased toward road from village Achole to Santosh Bhawan.

49] As said above, though there is no evidence about what has happened at the second spot after deceased was taken there by accused Nos.1, 3 and 4. There is no evidence as to how deceased went to Alliance Hospital. There is every reason to believe that injuries noticed on the dead body were caused due to assault by accused Nos.1, 3, 4 and Sonu Sahani. In that sense of the matter, in fact, the assailants present at the first spot ought to have convicted by the trial Court for an offence under Section 302 read with Section 149 of the Indian Penal Code including accused Nos. 2, 5 and 6.

50] The unlawful assembly can be formed even at the spot. Accused Nos.1 and 2 were involved in an incident with PW-3 Mantha. Accused Nos.3 to 6 along with the others came at the spot along with the weapons. Not only that they have used the weapons. It can certainly be said that the object of the assembly was to commit an offence which is recognized under Section 141 of the Indian Penal Code. As appeals of appellant Nos.2, 5 and 6 are not before us, we are not expressing any further comment.

51] The accused Nos.1, 3, 4 and Sonu Sahani first assaulted the deceased Hiralal and then took him to the second spot. It is certainly a criminal act. We agree with the trial Court that accused Nos.1, 3 and 4 shared a common intention and according to us, it is either to dispose of the body or to beat him further.

52] So PWs-2, 3 and 4 specified about involvement of accused Nos.1, 3 and 4 in causing the death of the deceased and in causing hurt and grievous hurt to PWs-2 and 3. We are satisfied that all the accused have formed an unlawful assembly and they have used force and violence with deadly weapons. Conviction of the appellants is proper under Sections 147, 148 read with Section 149 of the Indian Penal Code. But we have got slightest of doubt as to whether offence under Section 302 of the Indian Penal Code is made out.

53] Hence, we are inclined to hold accused Nos.1, 3 and 4 have committed an offence punishable under Section 304 Part II of the Indian Penal Code.

54] We say so because accused No.1 even though present since beginning has not possessed any weapon. Accused Nos.3 and 4 were not having any dispute with the witnesses. On the call, they immediately

come to the spot. There is no evidence about prior meeting or making a plan. There is reason for coming to this conclusion. Admittedly, there is no evidence of any dispute with deceased Hiralal Deepchand. Though the case of illicit relationship of PW-3 Mantha with several persons is projected, it could not be substantiated and its relation with the incident was not substantiated. That is why, we intend to convict accused Nos.1, 3 and 4 for offence punishable under Section 304 Part II of the Indian Penal Code. Hence the following order is passed:

ORDER

- i. These appeals are partly allowed.
- ii. The conviction of accused Nos.1, 3 and 4 for the offence punishable under Section 323 read with Section 149 for causing hurt to PW-4 Dharmendra is set aside.
- iii. The conviction of the appellants for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code is modified as follows:
 - a) Accused No.1 - Rampravesh Ramavtar Singh @ Pintu, accused No.3 - Manoj Chhotelal Paswan and accused No.4 - Chotelal Rambrij Paswan are convicted for the

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offence punishable under Section 304 Part II read with Section 34 of the Indian Penal Code for causing the death of Hiralal Deepchand Jaiswal.

- b) The accused Nos.1, 3 and 4 are sentenced to rigorous imprisonment for 10 years.
- c) The sentence of amount of fine and imprisonment for default to pay fine is maintained.
- d) They are entitled for set up for the period they have already undergone. Rest of the order against these appellants is maintained.
- e) These appeals are disposed of accordingly.

(S.M. Modak, J.)

(PRASANNA B. VARALE, J.)