

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.29 OF 2015

Pintu @ Karbhari s/o Murlidhar Wable,
age 29 years, Occ. at present in jail
R/o. Sonewadi, Tq. & Dist. Dhule ..Appellant..
(orig. accused no.2.)

Versus

The State of Maharashtra
Through Dhule Taluka Police Station,
Dhule, District Dhule. ..Respondent..

...

Advocate for Appellant : Mr. Salunke S J a/w Mr. H D
Deshmukh

APP for Respondents: Mr. S D Ghayal

...

WITH

CRIMINAL APPEAL NO.134 OF 2015

1. Ashok Ganpat Chavan,
age 42 years, Occ. Agril,
R/o Sonewadi,
Tq. & Dist Dhule. ..Appellant..

Versus

1. Shivaji Bhivsan Mhaske (Patil),
age major, Occ. Agril,
2. Pintu @ Karbhari Murlidhar Wable,
age 28 years, Occ. Agril.
3. Tukaram @ Kalu Bhivsan Mhaske,
age 40 years, Occ. Agril.
4. Rajendra Daga Wable,
age 35 years, Occ. Agril.

5. Daga Ramchandra Wable,
age 55 years, Occ. Agri.
6. Murlidhar Ramchandra Wable,
age 60 yrs, Occ. Agril,
All R/o Sonewadi,
Tq. & Dist. Dhule.
7. State of Maharashtra,
Through PSI Taluka Police
Station, Dhule. ..Respondents..

...
Advocate for Appellant : Mr. P B Patil
APP for Respondents : Mr. S D Ghayal

...
CORAM : V.K. JADHAV & SANDIPKUMAR C. MORE, JJ.

...
Reserved on : February 22, 2022
Pronounced on : March 11, 2022

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JUDGMENT :- (Per V. K. Jadhav, J.)

1. Criminal appeal no.29 of 2015 is directed against the judgment and order of conviction passed by the learned Additional Sessions Judge, Dhule dated 3.1.2015 to the extent of original accused no.2 Pintu @ Karbhari Murlidhar Wable in Sessions Case No.51 of 2014.

Criminal appeal no.134 of 2015 is preferred by the complainant Ashok Ganpat Chavan against the judgment and order of acquittal passed by the learned Additional Sessions Judge, Dhule dated 3.1.2015 in the

same Sessions Case No.51 of 2014 against accused nos.3 to 6.

2. Prosecution case, in brief, is as follows :-

a] On 15.11.2013 at about 10.00 am, the informant Ashok Ganpat Chavan alongwith deceased Bapu Uttam Shelke had started proceeding towards Dhule for Court work on the motorcycle. Deceased Bapu Shelke was driving the motorcycle and PW-3 informant Ashok Chavan was the pillion rider. On way, they gave lift to one Sahadu Golange on his request. Thus, they were three persons on the motorcycle at the relevant time. They have almost crossed one kilometer distance from village Sonewadi-Dhule road. On the right side of the road, agricultural land of co-accused Shivaji Bhivsan Mhaske is situated and there is also a hut in his land. On the spot, accused no.1 Shivaji came from his field abutting to the road and obstructed to the motorcycle. Accused no.1 Shivaji directed PW-3 informant Ashok Chavan and said Sahadu to get down from the motorcycle and to go at the side. Accused No.1 Shivaji was having one steel bucket in his hand. There was

some liquid substance in it. On seeing that, deceased Bapu started running away. Thereafter, accused no.1 Shivaji thrown said substance from the bucket on the person of deceased Bapu. In consequence thereof, clothes of deceased Bapu were burnt and his body was also burnt. Further, due to falling of that substance, probably acid, on the person of deceased Bapu, he fallen on the ground. Thereafter, the appellant/accused Pintu @ Karbhari Wable gave an axe to accused no.1 Shivaji and accused no.1 Sshivaji gave two blows of said axe on the neck and head of deceased Bapu. So far as accused nos.3 to 6 are concerned, it has been alleged that they had given abuses and threats to deceased Bapu. Deceased Bapu was seriously injured. He was immediately taken to Aarvi on motorcycle and therefrom he was taken to Civil Hospital, Dhule in four wheeler vehicle. PW-3 informant Ashok Chavan meanwhile went to the concerned police Station and lodged the complaint Exh.35.

b]. On the basis of his complaint, crime no.314 of 2013 came to be registered initially for the offence

punishable under sections 307, 326-A, 120-B, 341, 143, 147, 148, 149, 504, 506 r/w 149 of the IPC. Meanwhile, deceased Bapu was shifted to the Hospital, where he succumbed to the injuries on 7.12.2013.

c] In the said hospital, dying declaration of deceased Bapu was recorded. During the course of the investigation, the investigating officer has seized the steel bucket, an axe, burnt pieces of clothes, burnt soil and simple soil from the spot. The investigating officer has also drawn the inquest panchnama, recorded the statements of all the witnesses and on completion of the investigation, submitted the charge-sheet. At the time of the filing of the charge-sheet, accused no.1 Shivaji Mhaske was absconding, however, lateron, he came to be arrested.

d] The learned Additional Sessions Judge, Dhule has framed the charge against accused vide exhibit-12 for the offence punishable under sections 302, 307, 326(A), 120-B, 341 r/w 149 of the IPC and also under sections 143, 147, 148, 149 and 506 r/w 149 of the IPC. All the

accused have pleaded not guilty to the charge and claimed to be tried.

e] In order to substantiate the charges levelled against the accused persons, prosecution has examined total nine witnesses. Statement of the accused under sections 313 of Cr.P.C. came to be recorded. The defence of the accused is of total denial and false implication due to previous enmity.

f] The learned Additional Sessions Judge, Dhule, by judgment and order dated 3.1.2015 has found accused no.1 Shivaji and present appellant/original accused no.2 Pintu @ Karbhari Wable guilty and sentenced them to suffer imprisonment under the various sections of the IPC as detailed in the operative part of the order. The learned Additional Sessions Judge, Dhule has acquitted the accused nos.3 to 6 for all the charges levelled against them. Operative part of the order passed by the Additional Sessions Judge, Dhule is reproduced herein below :-

- 1) The accused No.1 Shiwaji Bhivsan Mhaske (Patil) & accused No.2 Pintu @ Karbhari Murlidhar Wable R/o Sonewadi, Tal & Dist.Dhule, are

hereby convicted u/s 235(2) of the Code of Criminal Procedure for the offence punishable under section 302 r/w/s.34 of the Indian Penal Code and sentenced to suffer life imprisonment and to pay a fine of Rs.5,000/- (Rs.Five thousand only) each. In default of payment of fine, they have to suffer rigorous imprisonment for five months each.

- 2) The accused Nos.1 & 2 are convicted for the offence punishable under section 307 r/w/s.34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for ten (10) years and to pay a fine of Rs.3,000/- (Rs.Three thousand only) each. In default of payment of fine, they have to suffer rigorous imprisonment for three (3) months each.
- 3) The accused Nos.1 & 2 are convicted for the offence punishable under section 326-A r/w/s.34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for ten (10) years and to pay a fine of Rs.5,000/-(Rs.Five thousand only) each. In default of payment of fine, they have to suffer rigorous imprisonment for five (5) months.
- 4) The accused Nos.1 & 2 are convicted for the offence punishable under section 341 r/w/s.34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for one month each.
- 5) Out of the fine amount, Rs.20,000/- (Rs.Twenty thousand only) be paid to the legal heirs of deceased Bapu Uttam Shelke R/o Sonewadi, Tal & Dist.Dhule.
- 6) The above substantive sentences shall run concurrently.
- 7) The accused No.1 is in jail since 26/4/2014 onwards. He is entitled for already undergone period as set-off under section 428 of the Code of Criminal Procedure. The accused No.2 was in jail since 19/11/2013 till 01/03/2014. He is also entitled for set-off.

- 8) The accused Nos.1 & 2 are hereby acquitted u/s 235 of the Code of Criminal Procedure for the offence punishable under sections 120-B, 143, 147, 148, 504, 506 r/w/s.149 of the Indian Penal Code.
- 9) The accused Nos.3 to 6 are hereby acquitted under section 235 of Cri.P.C. for the offence punishable under sections 302, 307, 326-A, 120-B, 341, 143, 147, 148, 504 & 506 r/w/s. 149 of the Indian Penal Code.
- 10) Seized muddemal property being worthless, be destroyed fter the appeal period is over.
- 11) The accused No.2 to surrender his bail bond.
- 12) Bail bonds of the accused Nos.3 to 6 are cancelled.
- 13) The accused Nos.3 to 6 to execute P.R.bond of Rs.15,000/- (Rs.fifteen thousand only) each to appear before the Higher Court as and when such court issues notice in respect of any appeal or petition filed against this judgment, as per section 437(A) of the Criminal Procedure Code.

3. Being aggrieved by the same, the appellant/original accused no.2 Pintu @ Karbhari has preferred the Criminal appeal no.29 of 2015 against his conviction and PW-3 informant Ashok Chavan has preferred the criminal appeal no.134 of 2015 against acquittal of original accused nos.3 to 6.

4. Mr. S.J.Salunke, the learned counsel appearing for the appellant/original accused no.2 Pintu @ Karbhari

Wable in Criminal Appeal no.29 of 2015 submits that, conviction of the appellant/accused Pintu under section 302, 307, 326(A), 341 read with section 34 of the IPC is not justifiable on the basis of the facts and circumstances of the case. Learned counsel submits that guilt of the appellant/accused Pintu @ Karbhari for the punishment with the aid of section 34 of IPC is not proved beyond all reasonable doubts. Learned counsel submits that the role attributed to the present appellant/accused Pintu @ Karbhari about giving an axe to the accused no.1-Shivaji, who gave blow on the neck of the deceased Bapu is concocted and after thought. Learned counsel submits that, there is no mention of the injuries on the neck of the deceased in the inquest panchnama exhibit 30 and the same is fatal to the prosecution story. Learned counsel submits that the evidence of PW-3 Ashok Chavan and PW 4 Sahadu Golange on one side and dying declaration exh.33 does not corroborate the prosecution story regarding the assistance of the appellant/accused Pintu to accused no.1 Shivaji by giving an axe in his hand. Learned counsel submits that the act specifically attributed to

the appellant Pintu at the time of the incident is absent in the dying declaration exhibit 33. The appellant/accused Pintu is thus entitled for the benefit of the doubt. There is no previous enmity between the appellant/accused Pintu and the deceased Bapu. Learned counsel submits that the learned Additional Sessions Judge, Dhule has erred in convicting the appellant/accused Pintu on the basis of the oral evidence of PW 3 Ashok and PW 4 Sahadu exclusively without any corroborative evidence. Learned counsel submits that after the alleged incident, deceased Bapu was taken on a motorcycle. The deceased was profusely bleeding and further his body was allegedly burnt due to acid, however, no blood stains were seen on the clothes of the witnesses or any other visible marks on their clothes. Learned counsel submits that, presence of the so called eye witnesses PW 3 Ashok and PW 4 Sahadu at the time of the incident is doubtful. Learned counsel submits that the cause of death as opined by PW 8 Dr. Shripad Kondekar is due to 'Septicemia due to complications of burns'. In view of the same, even if the role is assigned to the

appellant/accused Pintu of giving an axe in the hand of the accused Shivaji at the time of the alleged incident, no murderous intention can be attributed to the appellant/accused Pintu @ Karbhari.

5. Learned counsel Mr. Salunke in order to substantiate his contentions placed reliance on the following judgments :-

1. Balvir Singh Vs. State of Madhya Pradesh reported in 2019 Cri.L.J. 4100.
2. Ezajhussain Sabdarhussain and another Vs. State of Gujarat reported in AIR 2019 Supreme Court 1525.
3. State of Rajasthan Vs. Taran Singh reported in AIR 2004 S.C. 1080.
5. State of Rajasthan Vs. Teja Singh reported in 2001 All MR (Cri) 994 SC.

6. Mr. Patil, the learned counsel appearing for the appellant/original complainant in criminal appeal no.134 of 2015 submits that there is a clear cut evidence about formation of an unlawful assembly and in prosecution of the common object of the said unlawful assembly, all the accused persons including the respondents in this appeal have wrongfully restrained the deceased when he was proceeding on his motorcycle

towards Dhule and further he was brutally murdered by throwing acid on his person and causing injuries on his neck by giving axe blow. Learned counsel submits that, so far as section 149 of IPC is concerned, it is a constructive liability and every member of such unlawful assembly is liable for the acts of other members equally. Learned counsel submits that, even though deceased Bapu had given reference to all accused persons in his dying declaration exhibit 33 and even eye witnesses PW 3 Ashok and PW 4 Sahadu respectively have also deposed about the presence of the acquitted accused persons on the spot and, further ascribed role to them about giving abuses and threats to deceased Bapu, the Trial Court has committed error of facts and law while acquitting the accused nos.3 to 6.

7. The learned APP, in response to the submissions made on behalf of the appellant/accused in criminal appeal no.29 of 2015 submits that there are eye witnesses to the incident. PW-3 Ashok Chavan and PW-4 Sahadu were travelling on the motorcycle alongwith the deceased Bapu and deceased Bapu was driving the

motorcycle at the relevant time. Thus, their presence on the spot cannot be doubted in any manner. Their evidence is reliable, trust worthy and consistent. Accused no.1 Shivaji has not preferred any appeal against the judgment and order of his conviction, who had thrown Acid brought by him in the bucket on the person of deceased Bapu. Present appellant/accused Pintu has given an axe in his hand. Accused no.1 Shivaji has inflicted injuries on the neck of the deceased Bapu by giving blows of the axe. The learned APP submits that, there is a clear cut evidence about prior concert of mind so far as accused no.1 Shivaji and the appellant/accused Pintu @ Karbhari Wable.

8. Mr. S.D.Ghayal, the learned APP appearing for the state in order to substantiate his contentions placed reliance on following judgments :-

i.Gulab Vs. State of Uttar Pradesh in Criminal appeal no.81 of 2021 decided by the Supreme Court of India.

ii.Suresh Vs. State of U.P. reported in 2001 DGLS (SC) 388 : 2001 AIR SC 1344.

9. We have carefully perused the material exhibits tendered by the prosecution, the evidence of the

prosecution witnesses, the statement of the appellant/accused recorded under section 313 of the Cr.P.C. and the impugned judgment.

10. The prosecution case rests upon the direct evidence as well as the dying declaration of deceased Bapu Shelke exhibit-33.

11. PW-3 informant Ashok Chavan has deposed that the incident had occurred on 15.11.2013 at about 10.00 am. He alongwith deceased Bapu started proceeding towards Dhule for Court work on the motorcycle. Deceased Bapu was driving the motorcycle and he was the pillion rider. On way, PW-4 Sahadu Golange met them. He had requested him to allow him to come with them. Thus, they took PW-4 Sahadu on the motorcycle. They crossed almost one km distance from their village on Sonewadi Dhule Road. PW-3 Ashok Chavan has deposed that there is agricultural land of accused Shivaji and there is also hut in his land. On the left side of the road, there is one small hill and temple is situated. PW 3 Ashok further deposed that on the spot, accused Shivaji obstructed their motorcycle and directed

him and PW-4 Sahadu to go at the side. Accused No.1 Shivaji was having one steel bucket in his hand and there was some substance in the said bucket. Accused No.1 Shivaji tried to throw the said substance from the bucket on the person of the deceased Bapu and deceased Bapu started to run away. PW 3 Ashok has further deposed that, thereafter, accused no.1 Shivaji thrown said substance on the person of the deceased Bapu and due to falling of said substance on the person of deceased Bapu, clothes on the person of deceased Bapu were burnt and his body was also burnt. Thus, PW 3 Ashok Chavan thought that said substance was Acid. He has further deposed that due to falling of said Acid on the person of Bapu, deceased Bapu fallen down on the ground. Thereafter, present appellant/original accused no.2 Pintu gave an axe to accused Shivaji. Accused Shivaji gave two blows of the said axe on the neck and head of deceased Bapu. Bapu was seriously injured. They took him to Aarvi on motorcycle and therefrom Bapu was brought to Civil Hospital, Dhule in four wheeler vehicle. From the hospital, he went to the police Station and lodged the complaint exhibit-35. On

7.12.2013 when deceased Bapu was shifted to the hospital at Nashik, he succumbed to the injuries.

12. PW-4 Sahadu Golange has deposed that on his request, deceased Bapu and PW-3 Ashok Chavan has allowed him to sat on the motorcycle. Deceased Bapu was driving the motor cycle. It was about 10.15 to 10.30 am. They have crossed distance of one km ahead of their village near the spot of the temple. He has further deposed that accused no.1 Shivaji stopped them and asked him to go away from there. Thus, they both went at the side. Accused no.1 Shivaji was having one steel bucket. When deceased Bapu saw that there is something in the bucket, he started to run away by leaving the motorcycle. PW 4 Sahadu further deposed that, immediately, accused Shivaji thrown some substance from the bucket on the person of deceased Bapu. Therefore, clothes of Bapu were burnt and deceased Bapu also sustained burn injuries. Therefore, he thought that it was acid. PW 4 Sahadu has further deposed that the appellant/accused Pintu gave an axe

to accused Shivaji and the accused Shivaji gave blow of axe on the head and neck of deceased Bapu.

(i). PW-3 Ashok and PW-4 Sahadu have simply given reference that other accused persons were abusing deceased Bapu.

(ii). Evidence of PW 3 Ashok is corroborated by the contents of the complaint exhibit-35. There is nothing in the cross-examination of PW-3 Ashok and PW-4 Sahadu to disbelieve their evidence. As discussed above, their evidence is trust worthy, reliable and consistent.

13. Prosecution has examined PW-7 Dr. Pankaj Wadekar, who was serving as Medical Officer at Civil Hospital, Dhule and attached to Civil Hospital, Dhule. He has deposed that on 15.11.2013 he was on duty in casualty ward. At that time, one patient Bapu Uttam Shelke was brought to Civil Hospital at about 11.35 am by PW-3 Ashok Chavan. He has examined him. There was history of assault by an axe and throwing acid on the body. On examination, he found i] deep lacerated wound on neck portion behind size 10 cm x 10 cm x 5 cm, ii] acid burns i.e. 80 percent on back where as 7

percent on neck and 7 percent each on both lower legs. He alongwith Dr. Tushar Pawar have sutured the said deep lacerated wound by giving anesthesia. The nature of injuries were of grievous. According to him, the said injuries might have caused by sharp and hard edged weapon. He has further explained that the age of the injuries were within half an hour. He has accordingly issued injury certificate, which bears his signature. It is marked at exhibit 42. In his considered opinion, deep lacerated wound on neck is sufficient to cause death in ordinary course of nature. He has also opined that said wound is possible by weapon article no.2 Axe shown to him. He has further explained that injuries sustained due to acid is more dangerous than burn injuries sustained in fire. In the cross examination, he has denied that, if the sharp edged portion of the weapon is used, the person may sustain incised wound only. He has explained that sharp side of an axe was used for sustaining injury i.e. deep lacerated wound. He has also stated that the patient himself narrated about the incident and he was in conscious oriented state and in talking condition.

14. Prosecution has examined PW-8 Dr. Shripad Kondekar, who has conducted postmortem examination on the dead body of the deceased Bapu. On 7.12.2013 he has noticed superficial to deep burn around 50%. He has also noted CLW on back of neck in diameter 5cm x 1cm which was sutured. He also found both arms of body had sustained superficial to deep burn with pus pockeb and legs were straight. He has further given details of the superficial deep injuries on the various parts of the body. Accordingly, he has prepared postmortem report and opined that death is caused due to septicemia and due to complications of burns. In cross examination, he has opined that after measurement of CLW, he has mentioned its size. He has further explained that, after suturing of the wound, it is difficult to opine whether it is contused lacerated or incised wound. He has denied that if the person falls in the iron drum containing acid on the side of his neck, injuries sustained by the deceased may be possible.

15. PW-1 Laxman Jagtap, who has acted as a panch on the inquest panchnama exhibit 30. We are referring

his evidence for the sole purpose that the learned counsel for the appellant/accused Pintu has vehemently submitted that there is mark difference between the injuries mentioned in the inquest panchnama and postmortem notes.

16. We have carefully gone through the contents of the inquest panchnama Exhibit-30. Though, the incident had taken place on 15.11.2013, deceased Bapu died on 7.12.2013 while under treatment in the Government Hospital, At Nashik. In the inquest panchnama exhibit 30, burn injuries are mentioned. But, so far as injuries on the neck and head are concerned, in paragraph no.13 and 15 it has mentioned that the bandage was fixed on the head and neck. Obviously, they have not opened the said bandage to mention the injuries on the neck portion of deceased Bapu. We do not find any substance in the submissions made on behalf of the appellant/accused Pintu that there is a difference between mentioning of the injuries in the inquest panchnama and postmortem notes.

17. Prosecution has examined PW 5 Shankar Golange, who has acted as panch on the spot panchnama exhibit 38. Said panchnama was drawn on the road Sonewadi Tq Dhule Shivar on Sonewadi to Aarvi road near the temple of the Goddess Ambika, and, further, it appears from the contents of the panchnama that in presence of the panchnas the investigating officer has seized one stainless bucket with residues of the dry acid, one axe with broken handle, blood stains and acid spots on the broken handle as well as on the blade. Investigating Officer also seized one blue colour pant, one white shirt and one sky colour Banian in pieces due to acid. Investigating Officer has also taken the sample of plain earth and also the acid mixed earth. Except suggestions, there is nothing in the cross-examination to disbelieve the evidence of the panch witness PW 5 Shankar Golange.

18. The prosecution has placed on record C.A. report exhibit 49 in respect of all articles seized during the spot panchnama. As per the result of the analysis, in terms of exhibit 49 Sulphate ions (So4) from Sulphuric

Acid is detected on exhibit nos (1) to (6). Exhibit No.1- Stainless steel bucket, exhibit no.2-stained metallic Axe, exhibit no.3-partly burnt full pant, exhibit 4-partly burnt cloth pieces stated to be of shirt, exhibit 5-partly burnt cloth pieces stated to be of Baniyan, exhibit 6-Earth mixed with ash and stone, and exhibit 7-Earth mixed with stones. Sulphate ions (SO_4) from Sulphuric Acid is detected on exhibit nos.(1) to (6). It is also mentioned in the report that earth in exhibit no.(6) tallies with the earth in exhibit (7) in respect of physico chemical characteristics and hue. So far as sample of the plain Earth is concerned, no sulphate ions (SO_4) from Sulphuric Acid are found in it.

19. Thus, the evidence of PW-3 Ashok Chavan and PW-5 Sahadu is fully corroborated by the medical evidence in terms of the certificate exhibit-42 as deposited by PW 7 Dr. Pankaj Wadekar about the injuries on neck of the deceased Bapu, postmortem notes exhibit 45 (proved through PW 8 Dr. Shripad Kondekar), about burn injuries due to acid and the spot panchnama exhibit 38 and CA report exhibit 49.

20. Prosecution has examined PW-2 Mayanand Bhamre, who has recorded the dying declaration exhibit 33 of deceased Bapu. On 15.11.2013 at about 11.15 pm he has received phone from Dhule Taluka Police station requesting him to come to Civil Hospital, Dhule for recording the dying declaration. The concerned Investigating Officer has also given him letter for recording the dying declaration. Copy of the said letter is marked at exhibit 32. Thereafter, he went to Casualty ward and met Dr. Dahite. He has further explained that Dr. has examined the patient and told that patient is in a condition to give the statement. He himself has also assured that patient is in a condition to give statement. Doctor gave his endorsement on the form of dying declaration. He has thereafter recorded dying declaration of deceased Bapu Shelke as per his version. He has further explained that during recording of statement, except him and doctor, none was present there near deceased Bapu. According to him, deceased has stated before him that accused Shivaji obstructed him and thrown acid on his body and also assaulted him by means of an axe on his head and neck. He has

also given reference to the other accused present there. There is nothing in the cross-examination of his version to disbelieve him. We have carefully perused the contents of the dying declaration exhibit 33.

21. Prosecution has examined PW-6 Dinesh Dahite, who has deposed that said Executive Magistrate PW 2 Mayanand Bhamre has approached to him and informed to him that he wanted to record the dying declaration of patient Bapu Shelke in the hospital. Thereafter, he alongwith PW-2 Mayanand Bhamre went to causality ward. He examined the patient Bapu Shelke. He was in talking condition. He has accordingly made endorsement on his statement. Exhibit 33 bears his endorsement, wherein he has stated that the patient is conscious, oriented to give the statement. After completion of the statement, he has again examined the patient Bapu Shelke and found that he was conscious oriented. Again he made his endorsement to that effect.

22. There is no reason to discard the dying declaration exhibit 33 recorded by PW 2 Mayanand Bhamre after verifying the patient's condition from the concerned

Doctor and also after satisfying himself that the patient was conscious and able to give the statement.

23. Learned counsel Mr. Salunke appearing for the appellant in Criminal Appeal No.29 of 2015 has mainly assailed the prosecution evidence on the ground that so far as dying declaration exhibit 33 is concerned, no reference has been given by the deceased Bapu that axe was given to the accused no.1 Shivaji by the present appellant/original accused No.2 Pintu and, secondly, on the count that by mere giving of an axe to accused no.1 Shivaji at the time of the incident is not sufficient to convict the appellant/accused Pintu @ Karbhari Wable with the aid of section 34 of the Indian Penal Code. Learned counsel for the appellant submits that the cause of death is due to burn injuries and, in view of the same, even the circumstance of handing over an axe to accused no.1 Shivaji is accepted as it is, no murderous intention can be ascribed to the appellant/accused no.2 Pintu @ Karbhari.

24. Informant PW-3 Ashok Chavan and PW-4 Sahadu both have consistently deposed that after noticing the

substance in the bucket, deceased Bapu started running away, and in that situation, the accused Shivaji had thrown the substance in the bucket on the person of deceased Bapu. Consequently, deceased Bapu has sustained burn injuries and his clothes were also burnt. Deceased Bapu fallen down on the ground. Deceased Bapu thus might have not noticed about handing over of the axe to the accused Shivaji by appellant/accused Pintu @ Karbhari. The Informant PW-3 Ashok Chavan and PW-4 Sahadu have consistently deposed that the appellant/accused Pintu @ Karbhari gave an axe to accused no.1 Shivaji and, thereafter, accused Shivaji gave blows of axe on the head and neck of deceased Bapu. Furthermore, injuries on the neck of the deceased Bapu are corroborated by the medical evidence.

25. In the given set of facts of the case, so far as the application of section 34 of the IPC is concerned, learned counsel for the appellant/accused has placed his reliance on two cases i.e. 1] Balvir Singh Vs. State of Madhya Pradesh reported in 2019 Cri.L.J. 4100 and 2]

Ezajhussain Sabdarhussain and another Vs. State of Gujarat reported in AIR 2019 Supreme Court 1525.

In a case of **Balvir Singh Vs. State of Madhya Pradesh** reported in **2019 Cri.L.J. 4100** (supra) , in the facts of the said case, in paragraph no.37 the Supreme Court has made following observations :-

37. Deceased Mohan and accused Harnam Singh were working in the railways and regarding the money transactions, there was enmity between them. It is brought in evidence through PW-2 that 2-3 days prior to the incident, there were arguments and quarrel between accused Harnam Singh and deceased Mohan near the house of PW-2. Accused No.2-Balvir Singh and accused No.3-Bhav Singh are the real brothers of accused No.1-Harnam Singh. Though it is stated that accused Nos.2 and 3 were present along with accused Harnam Singh, the fact remains that they were not armed. After being hit by accused Bharat on the back when Mohan ran, accused Nos.2 and 3 are alleged to have followed him and accused Balvir Singh allegedly caught the right arm of Mohan and accused Bhav Singh held the left arm of Mohan. It is also brought in evidence that accused Bharat was giving lathi blows to Mohan even when he was running. If accused Nos.2 and 3 have shared the common intention, they would also have attacked the deceased; but they were only alleged to have caught hold of the deceased. The prosecution did not bring in evidence that there was prior meeting of minds and that accused Nos.2 and 3 were having knowledge that their brother accused Harnam Singh was armed with katta. The evidence adduced by the prosecution is not convincing to hold that accused Nos.2 and 3 also shared the common intention with the accused Harnam Singh and other accused Bharat in committing the murder of Mohan. Conviction of accused Nos.2 and 3 under [Section 302](#) read with [Section 34](#) IPC is, therefore, liable to be set aside.

26. In a case of **Ezajhussain Sabdarhussain and another Vs. State of Gujarat** reported in AIR 2019

Supreme Court 1525, in paragraph no.16 the Supreme Court has made following observations :-

16. It is clear from the principles laid down that however similar the facts may seem to be in a cited precedent, the case in hand should be determined on facts and circumstances of that case in hand only and the mere similarity of the facts in one case cannot be used to determine the conclusion of the fact in another. Common intention being the state of mind can be gathered by inference drawn from the facts and circumstances established in a given case. The cases involving almost similar facts and circumstances cannot be used as precedent to determine the conclusions on facts in the case in hand.

27. It is thus clear from the principles laid down, particularly, in the case of **Ezajhussain Sabdarhussain and another Vs. State of Gujarat** (supra), that, however, similar the facts may seem to be in a cited precedent, the case in hand should be determined on facts and circumstances of that case in hand only.

28. In the instant case, accused Shivaji has obstructed the motorcycle of deceased Bapu, who was holding the stainless steel bucket having some substance in it. Thereafter, accused Shivaji had thrown substance from the stainless steel bucket on the person of deceased Bapu. It has also come in the evidence of the eye witnesses that on seeing the said substance in the bucket deceased Bapu started running away. It thus

appears that the said possibility of running away must have been considered by accused Shivaji and appellant/accused Pintu @ Karbhari. Consequently, deceased Bapu fallen down on the ground due to burning of his clothes and skin. Immediately, the appellant/accused Pintu has handed over the axe to accused Shivaji, who thereupon inflicted injuries on the head and neck of deceased Bapu by using said axe. In our considered opinion, that was not mere act on the part of appellant/accused Pintu to hand over an axe to accused Shivaji. Thus, the act of giving an axe in the hands of accused Shivaji clearly indicates prior concert of mind between the accused Shivaji and appellant/accused Pintu @ Karbhari. Both of them must have considered the possibility that deceased Bapu may survive even after acid attack and since accused Shivaji was holding the bucket for throwing the acid on the person of deceased Bapu, the appellant/accused Pintu handed over an axe to him after throwing the acid. Thus, the common intention could be gathered from the facts and circumstances as discussed above.

29. We, thus, find no fault in the impugned judgment and order of the Trial Court convicting the appellant/accused Pintu @ Karbhari under section 302 read with section 34 of the IPC.

30. So far as the another aspect which the learned counsel for the appellant has vehemently argued that, even though deceased Bapu had sustained bleeding injuries on his head and neck also sustained burn injuries on various parts of his body, no blood stains or other stains on the clothes of the witnesses were found. We find no substance in the submission made on behalf of the appellant/accused Pintu made in this regard. On careful perusal of the contents of the complaint exhibit 35, it appears that after the incident, injured Bapu Shelke was taken to Aarvi Hospital on the motor cycle of one Punjaram Shelke and thereafter he was taken to Civil Hospital Dhule in the Maruti Car of one Shenpadu Lotan Garde. It is thus not the case that PW 3 Ashok and PW 4 Sahadu took injured Bapu on the motorcycle. On the other hand, motorcycle being driven by the deceased Bapu at the time of the incident was found in

a damaged condition at the spot of the incident. It was a motorcycle TVS Star company. It is also specifically mentioned in the spot panchnama exhibit 38 that there were acid stains on the wheel and petrol tank of the motor cycle. Further, number plate of the said motorcycle was also found blacken. It is thus clear that injured Bapu was not taken on the motorcycle by PW 3 Ashok Chavan and PW 4 Sahadu since the said motorcycle was lying on the spot in damaged condition. Further, as discussed above, there is specific reference that on one another motorcycle injured Bapu was taken to Aarvi and there from to Civil Hospital, Dhule. Thus, the ratio laid down in the above stated two cases i.e. State of Rajasthan Vs. Taran Singh reported in AIR 2004 S.C. 1080 and State of Rajasthan Vs. Teja Singh reported in 2001 All MR (Cri) 994 SC (supra) relied upon by the learned counsel for the appellant cannot be made applicable to the facts and circumstances of the present case.

31. So far as criminal appeal no.134 of 2015 against acquittal is concerned, we do not find the order of

acquittal as perverse. Except the presence of the appellants and further ascribing the role about giving abuses and threats, no specific role has been attributed to accused nos.3 to 6. Even, it is not clear from the prosecution evidence as to why they had given abuses and what sort of threats they had given. The learned Judge of the Trial Court has, therefore, rightly given benefit of doubt to original accused nos. 3 to 6. It is true that the power of re-assessing the evidence of this Court is wide and this Court can re-appreciate the entire evidence on record, however, there must also be the substantial and compelling reasons for reversing the order of acquittal. In the facts and circumstances of the present case, in terms of the provisions of Section 384 of Criminal Procedure Code, after examination of the memo of appeal, copy of the judgment and after giving an opportunity of being heard the counsel for the complainant, we are of the considered opinion that the appeal bearing Criminal appeal No.134 of 2015 preferred by the complainant against the judgment and order of acquittal against accused nos.3 to 6 is liable to be dismissed summarily.

32. The learned Additional Sessions Judge, Dhule has convicted the appellant/accused no.2-Pintu @ Karbhari Murlidhar Wable alongwith accused no.1 Shivaji Bhivsan Mhaske (Patil) and sentenced them in the following manner :-

- [i] The accused No.1 Shiwaji Bhivsan Mhaske (Patil) & accused No.2 Pintu @ Karbhari Murlidhar Wable R/o Sonewadi, Tal & Dist.Dhule, are hereby convicted u/s 235(2) of the Code of Criminal Procedure for the offence punishable under section 302 r/w S.34 of the Indian Penal Code and sentenced to suffer life imprisonment and to pay a fine of Rs.5,000/- (Rs.Five thousand only) each. In default of payment of fine, they have to suffer rigorous imprisonment for five months, each.
- [ii] The accused Nos.1 & 2 are convicted for the offence punishable under section 307 r/w s.34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for ten (10) years and to pay a fine of Rs.3,000/- (Rs.Three thousand only) each. In default of payment of fine, they have to suffer rigorous imprisonment for three (3) months, each.
- [iii] The accused Nos.1 & 2 are convicted for the offence punishable under section 326-A r/w 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for Ten (10) years and to pay a fine of Rs.5,000/- (Rs.Five thousand only) each. In default of payment of fine, they have to suffer rigorous imprisonment for five (5) months.
- [iv] The accused Nos.1 & 2 are convicted for the offence punishable under section 341 r/w 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for one month each.

So far as conviction of the appellant/original accused no.2 Pintu @ Karbhari Wable and accused Shivaji Mhaske under section 307 r/w 34 of IPC and 326-A r/w 34 of IPC besides their conviction under section 302 r/w 34 of IPC is illegal, unwarranted and uncalled for.

33. Section 71 of the Indian Penal Code prescribes that when an offence is made in parts, each of which constitutes an offence, the offender should not be punished for more than one offence unless expressly provided. Section 71 of the Indian Penal Code reads as under :-

Section 71 in The Indian Penal Code :-

71. Limit of punishment of offence made up of several offences.— Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

[Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.]

* Illustrations *

- (a) A gives Z fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make up the whole beating. If A were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.
- (b) But if, while A is beating Z, Y interferes, and A intentionally strikes Y, here, as the blow given to Y is no part of the act whereby A voluntarily causes hurt to Z, A is liable to one punishment for voluntarily causing hurt to Z, and to another for the blow given to Y.

34. In view of the above, if the appellant/original accused no.2 Pintu @ Karbhari Wable alongwith accused no.1 Shivaji Mhaske are convicted for the offence punishable under section 302 r/w 34 of the IPC, their conviction further under section 307 r/w 34 of IPC and 326-A r/w 34 of IPC for causing injuries on the person of the deceased with the help of axe and also causing burn injuries on his person by throwing acid respectively is contrary to the provisions of section 71 of the Indian Penal Code, which prescribes the limit of punishment of the offence made up of several offences. The learned Judge of the Trial Court has rightly convicted the accused Shivaji Mhaske and the appellant/original accused no.2 Pintu @ Karbhari Wable

in criminal appeal no.29 of 2015 for the offence punishable under section 341 r/w 34 of the Indian Penal Code. which is distinct offence.

35. The original accused no.1-Shivaji Bhivsan Mhaske (Patil) has not preferred any appeal against the judgment and order of his conviction. Thus, the question arises before us as to whether the benefit of this decision can also be extended to the similarly situated co-accused even though he has not challenged the order by way of appeal.

In a case of **Md. Sajjad Alias Raju Alias Salim Vs. State of West Bengal** reported in **(2017) 11 Supreme Court Cases 150**, in paragraph no.20, the Supreme Court has made following observations :-

“20. Mr. Mrinal Kanti Mandal, learned Advocate is right in submitting that in certain cases this Court had granted benefit even to a non-appealing accused. In [Bijoy Singh v. State of Bihar](#), this court observed that if on evaluation of the case, a conclusion is reached that no conviction of any accused was possible the benefit of that decision must be extended to the similarly situated co-accused even though he had not challenged the order by way of the appeal. To similar effect was the dictum of this court in [Suresh Chaudhary v. State of Bihar](#) and in [Pawan Kumar State of Haryana](#) and in [Mohinder Singh and Anr. v. State of Punjab and Others](#).

36. We have already observed that the trial court has rightly convicted the original accused no.1/Shivaji Bhivsan Mhaske and appellant/original accused no.2 Pintu @ Karbhari Murlidhar Wable for the offence punishable u/s 302 r/w 34 of the Indian Penal Code, however, their conviction further under section 307 r/w 34 of IPC and u/s 326-A r/w 34 of IPC for causing injuries on the person of the deceased with the help of axe and also causing burn injuries on his person by throwing acid respectively is contrary to the provisions of section 71 of the Indian Penal Code, which prescribes the limit of punishment of the offence made up of several offences. In view of the same, even if accused no.1 Shivaji Mhaske has not preferred any appeal against the judgment and order of his conviction, however, to the extent of the observations made herein above, benefit of this decision is also necessary to be extended to him.

37. In view of the above, the judgment and order of conviction with sentence passed under section 307 r/w 34 of the Indian Penal Code and under section 326-A

read with 34 of the Indian Penal Code need to be quashed and set aside and the order impugned is required to be modified to that extent. Hence, we proceed to pass the following order :-

ORDER

- i. Criminal appeal no.29 of 2015 (Pintu @ Karbhari s/o Murlidhar Wable Vs. The State of Maharashtra) is hereby partly allowed.
- ii. The judgment and order of conviction passed by the Additional Sessions Judge, Dhule dated 3.1.2015 in Sessions Case No.51 of 2014 convicting thereby the appellant/original accused no.2 Pintu @ Karbhari Murlidhar Wable for the offence punishable under section 302 r/w 34 of Indian Penal Code and sentencing him to suffer life imprisonment and to pay a fine of Rs.5,000/-(Rs. Five thousand only) and in default of payment of fine, to suffer rigorous imprisonment for five months **and** the conviction of the appellant/original accused no.2 Pintu @ Karbhari Murlidhar Wable r/o Sonewadi, Tq & District Dhule for the offence punishable under section 341 r/w 34 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for one month stands confirmed.

- iii. However, the impugned order convicting thereby the accused no.1]-Shiwaji Bhivsan Mhaske (Patil) and accused no.2]-Pintu @ Karbhari Murlidhar Wable for the offence punishable under section 307 r/w 34 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for ten (10) years and to pay a fine of Rs.3,000/- (Rs. Three thousand only) each, in default of payment of fine, to suffer rigorous imprisonment for three (3) months each **and** further the conviction of accused nos.1 and 2 for the offence punishable under section 326-A r/w 34 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for ten (10) years and to pay a fine of Rs.5,000/-(Rs. Five thousand only) each, in default of payment of fine, to suffer rigorous imprisonment for five (5) months each, is hereby set aside.
- iv] In consequence of which, clause No.(5) of the operative part of the order to the extent of payment of compensation to the legal heirs of deceased Bapu Shelke is also modified at **Rs.10,000/-** (Rs. Ten Thousand), instead of Rs.20,000/- (Rs. Twenty thousand).
- v. Rest of the judgment and order of the conviction and sentence thereof against the

appellant/original accused no.2 Pintu @ Karbhari s/o Murlidhar Wable stands confirmed including the direction that the substantive sentences shall run concurrently.

vi]. Criminal Appeal No.134 of 2015 [Ashok Ganpat Chavan Vs. Shivaji Bhavsan Mhaske (Patil) and others] is hereby dismissed.

vii]. Both the Criminal appeals are accordingly disposed off.

(SANDIPKUMAR C. MORE, J.) (V.K. JADHAV, J.)

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aaa/-