

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

CRIMINAL APPEAL NO.920 OF 2001

1. Pramod Dadasaheb Bhosale,
2. Sudhir @ Choturam Baban Salunkhe,
3. Prabhakar Sawala Bhosale,
4. Mahavir Baban Salunkhe,
5. Dada Maruti Chaoudhari,
6. Pravin @ Prafull Jalindar Shinde,
7. Bharat Maruti Chaoudhari, (abated) &
8. Dadasaheb Sawala Bhosale. Appellants

Versus

The State of Maharashtra ... Respondent

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Mr. Shirish Gupte, Senior Counsel i/b. Karansingh B. Rajput, Supriya Kak Advocate for the Appellants.

Mr. V.B. Konde-Deshmukh, APP, for the Respondent-State.

Mr. V.V. Purwant, Advocate a/w. Rushikesh Kale, for the original complainant/first informant.

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**CORAM : S. S. SHINDE AND
SARANG V. KOTWAL, JJ.**

RESERVED ON : 12th APRIL, 2022

PRONOUNCED ON : 29th APRIL, 2022

JUDGMENT : [PER SARANG V. KOTWAL, J.]

1 The Appellants have challenged the judgment and order dated 8.11.2001 passed by the II Additional Sessions Judge, Solapur in Sessions Case No.102/1999. By the impugned judgment and order, the Appellants were convicted for commission of offence

punishable under Section 302 read with 149 of the Indian Penal Code and were sentenced to suffer imprisonment for life and to pay a fine of Rs.10,000/- each; and in default to suffer R.I. for three months. The Appellants were convicted for commission of offence punishable under Section 324 read with 149 of IPC and were sentenced to suffer R.I. for six months and to pay a fine of Rs.500/- each; and in default to suffer S.I. for one month. The Appellants were further convicted for commission of offence punishable under Section 147 of IPC and were sentenced to suffer S.I. for six months. The Appellants No.1, 2 and 8 were convicted for commission of offence punishable under Section 148 of IPC and were sentenced to suffer R.I. for six months and to pay a fine of Rs.500/- each; and in default to suffer S.I. for one month. All the substantive sentences were directed to run concurrently.

2 During pendency of this Appeal, the Appellant No.7 Bharat Chaoudhari passed away on 6.6.2014. By a separate order passed in this appeal, the appeal as against the Appellant No.7 was directed to be abated. Therefore, we have considered this appeal for the remaining Appellants. For the sake of convenience, the

Appellants are referred to by their original status as accused in the Sessions Case.

3 Heard Shri Shirish Gupte, learned Senior Counsel for the Appellants, Shri V.B. Konde-Deshmukh, learned APP for the State and Shri V.V. Purwant, learned counsel for the original complainant.

4 The prosecution case is about the incident dated 5.2.1999. It had taken place at about 8.30 p.m. in front of house of one Vasant at village Kumbhej, Taluka Karmala, District Solapur. According to the prosecution case, the accused formed an unlawful assembly and committed murder of Sachin Mutake. In the same incident, the witness Dilip Mutake and Machindra were also assaulted. The FIR was lodged at about 11.30 a.m. on 6.2.1999. The accused were arrested. The investigation was carried out and the charge-sheet was filed. The case was committed to the Court of Sessions.

5 During trial, the prosecution examined 13 witnesses. Out of them, PW-3 Machindra Thormal and PW-8 Dilip Mutake were the eye witnesses and their evidence is important.

6 PW-3 Machindra Thormal was Sachin Mutake's cousin. He was residing on his agricultural land which was situated near village Kumbhej. On the day of the incident, after about 6.30 a.m., he had gone to village Kumbhej for getting food grains and to purchase cattle fodder. He had gone to the shop of one Lalwani. He had taken his bullock-cart there. Sachin was with him at that time. Sachin picked up a gunny bag of fodder and was keeping it in the bullock-cart. At that time, accused No.1 Pramod's cycle struck Sachin and he fell down. Sachin questioned accused No.1 about his negligent act. Accused No.1 Pramod in turn abused Sachin. PW-3 intervened and settled the dispute and said that they would see in the evening. This incident took place around 8.00 a.m. or 8.30 a.m.. In the evening at about 8.00 p.m. or 8.30 p.m., he along with Sachin, Dilip, Bhausahab and others went to Kumbhej. They went to the house of accused No.1 Pramod. PW-3 has stated that they had gone there to question accused No.1 Pramod regarding the incident in the morning and for telling him not to quarrel. At that time, accused No.3 Prabhakar, who was Pramod's uncle was present at the house. He told PW-3 and his group that he would

convince everybody not to quarrel. At that time, all the other accused i.e. accused No.1 Pramod, accused No.2 Chotu, accused No.4 Mahavir, accused No.5 Dada, accused No.6 Prafful, accused No.7 Bharat and accused No.8 Dadasaheb were present at some distance. They were sitting on the ota (platform) of a house. PW-3 and others then came on the road. It is his case that all the accused who were sitting on the ota came near them and started beating them. Accused No.2 Chotu gave blows with cycle chain on the head, arms and back of Sachin. Accused No.1 Pramod gave blows with cycle chain to Sachin on his back, hands and legs. Accused No.8 Dadasaheb assaulted Sachin with a stick on his back. The other accused beat Sachin by fists and kick blows. PW-3 intervened to save Sachin. At that time, accused No.8 Dadasaheb gave a blow with stick to him and caused injury near PW-3's left eye. In the incident, Sachin fell unconscious and lay on the ground. PW-3 then took Sachin to the house of one Mahadeo Pawar. Sachin had bleeding injury on his head. Once the accused left the place, PW-3 called a vehicle. He and others took Sachin to Karmala. On the way to Karmala they went to the police station at Karmala. They

narrated the incident to the police. They took police *yaadi* and took Sachin to cottage hospital, Karmala. According to him, the police officer of Karmala police station advised them to take Sachin immediately to a hospital. On doctor's advice Sachin was taken to Civil Hospital, Solapur. PW-3 himself stayed back at Karmala. On the next day morning at about 8.30 a.m., PW-3 and others received a telephonic message that Sachin had died. They then went to the police station. After that the police recorded his complaint. The FIR is produced on record at Exhibit-25. PW-3 and one Bhausahab Mane were examined for the injuries suffered by them. Bhausahab has suffered injuries on his head, Mahadeo has also suffered injuries on his head.

In the cross-examination, he described the relationship between the accused *interse*. Karmala was at a distance of half hour journey by auto-rickshaw. There was no police patil in their village. In further cross-examination, he accepted that he and others had gone to the house of the accused No.1 Pramod in the evening to question him about the morning incident and about the abuses given by him to Sachin. At that time there was hue and cry.

The incident lasted for about five minutes. He could not explain as to why the FIR did not mention that accused No.8 Dada had assaulted Sachin with a stick on his back or that Pramod accused No.1 had assaulted Sachin on his hands, legs and back.

Exhibit-25 the FIR shows that it was registered at Karmala police station at 11.30 a.m. on 6.2.1999 vide C.R. No.14/1999.

7 The other eye witness is PW-8 Dilip Mutke. He was knowing all the accused as they were from the same village. He was also knowing Sachin. He has stated that, in the evening, he along with Bhausahab had gone to the house of Vasant Bhosale. At that time, he saw the incident on the road in front of Vasant Bhosale's house. He has described the incident. He has stated that accused No.1 was beating Sachin with a cycle chain. Accused No.2 was beating Sachin with cycle chain. Accused No.8 Dadasaheb was beating with cycle chain. He has stated that accused No.7 Bharat, accused No.5 Dada, accused No.3 Prabhakar, accused No.4 Mahavir and accused No.6 Prafulla were beating Sachin with fist and kick blows. Sachin had received injuries on face, back, hands and legs.

PW-3 Machindra was also present there. He was assaulted with the stick on his face. Sachin became unconscious. PW-3 then took Sachin to the house of Mahadev Pawar. Sachin was taken to Karmala. PW-8 and Bhausahab separately went to Karmala. Sachin was first taken to Cottage hospital, Karmala and then to civil hospital, Solapur. PW-8 has himself received injuries on his legs in the incident. That injury was caused by accused No.1 with a chain. PW-8 was also examined by the Medical Officer at Cottage Hospital. On the next day morning, they came to know about the death of the deceased.

In the cross-examination, he deposed that Sachin was his distant cousin. His house is situated near Sachin's house. Pramod's house is at a long distance from his house. He could not explain as to why his police statement did not mention that accused No.8 Dadasaheb was beating Sachin with stick. His police statement also did not mention accused No.6 Pravin taking part in the incident. His police statement did not mention that PW-3 was hit on his face by a stick. He could not assign any reason for these omissions. Mahadev Pawar, to whose house Sachin was taken, was a Medical

officer. However, no medical treatment was given to Sachin in the house-cum-dispensary of Mahadev Pawar. He denied the suggestion that because of political rivalry he was deposing against the accused.

8 Apart from these main witnesses, the prosecution examined PW-1 Baban Raskar, who was a pancha in whose presence a cycle chain was recovered at the instance of accused No.1 Pramod from his house. The cycle chain was blood stained and the panchnama shows that there was a special handle made to hold that chain.

His cross-examination is not of much importance from the point of view of the defence.

In the presence of same PW-1 another cycle chain was recovered at the instance of accused No.2 which was buried under a tree.

9 In the presence of PW-2 Vijay Changude, a stick was recovered at the instance of accused No.8 Dadasaheb from his house.

10 PW-4 Sanjay had carried Sachin to Cottage Hospital at Karmala. PW-5 Damodar Bhosale was a pancha for spot panchnama. PW-6 Digambar Raskar was a pancha in whose presence PW-3 had produced his blood stained shirt. PW-7 Subhash Abhang was a pancha in whose presence the injured Bhausahab Mane had produced the blood stained shirt. PW-10 Sunil Hanchate was a pancha for spot panchnama. PW-11 Chagan Ghadage was the police constable, who had taken the articles to Chemical Analyzer, Pune.

11 PW-13 ACP Bharat Rane had conducted the investigation. He has deposed about carrying out a spot panchnama, recording of statement, seizure of articles, arrest of the accused etc. The C.A. reports were produced on record. Blood was not detected on the cycle chain and the blood group on the shirts sent to C.A. was mentioned as 'inconclusive'. Nothing was mentioned as to whose shirts were sent to C.A..

12 PW-9 Dilip Kamble was a medical officer attached to Cottage Hospital, Karmala. He had examined Sachin at the first instance. He has described the injuries as follows :

- “1. Abrasion on right elbow joint of dimension 3 cm x 3 cm.
2. Abrasion over right forearm on lower 1/3rd on dorsal aspect of dimension 4 cm x 2 cm.
3. Contusion over left chest below the left clavical of dimension 3 cm x 3 cm.
4. Contused lacerated wound over left dorsal of food, in front of ankle joint of dimension 2 cm x 1 cm x 1 cm.
5. Contusion over left lumber region on back side of dimension 4 cm x 2 cm.
6. Contusion over right infra scapular region of dimension 4 cm x 3 cm.
7. Abrasion below right infra scapular region of dimension 2 cm x 2 cm.
8. Abrasions over left side of forehead which were two in numbers.
 - a) abrasion 2 cm x 2 cm.
 - b) abrasion 2 cm x 2 cm.
9. Abrasions over left upper eye-lid on lateral aspect of dimension 2 cm x 2 cm.
10. Abrasion over left maxilla near lateral canthus angle of left eye over 2 cm x 1 cm.”

According to him, the injuries were caused by hard and blunt object. The X-ray of the skull showed sub-dural haemorrhage. This witness had examined the injured. He has

stated that PW-3 Machindra had suffered contusion over left maxilla of dimension 4 cm x 3 cm and abrasion over the left maxilla over the contused part of dimension 2 cm x 2 cm. Dilip Mutake has suffered contusion over the left occipital region of 4 cm x 5 cm. Bhausahab Mane has suffered four injuries on the head, neck, right lumbar region, in the nature of contusions. These injuries were described as simple injuries.

In the cross-examination, he has stated that Sachin's injuries were possible by fall from height. He produced the medical certificates of Sachin as well as the injured.

13 PW-12 Dr. Achut Deshpande had conducted the postmortem examination and he had found the following injuries :

- “1. Small abrasions over right forearm, six in numbers in two vertical lines, three on each side, admeasuring 1/2” x 1/2”.
2. Multiple abrasions over right tibio fibula anteriorly over mid third admeasuring 4” x 3”, blackish in colour.
3. Abrasion over left side of chest, admeasuring 1” x 1/2”.
4. Abrasion on right side of chest, admeasuring 4” x

1/2”.

5. Multiple small abrasion over right parieto-occipital region.
6. Multiple abrasion over right parieto-occipital area(scalp).”

In his view, the probable cause of death was shock and haemorrhage due to head injuries with subdural haematoma all over the right parietal area. Injury No.5 corresponded with the internal injury in column No.19 i.e. injuries to brain. The injury No.5 and the corresponding injuries in the column No.19 were sufficient in the ordinary course of nature to cause death.

. This is the evidence in the entire prosecution.

14 Submissions of Shri Gupte, learned Senior Counsel :

- i. The accused are falsely implicated because of political rivalry. PW-3 had admitted that the accused belonged to party of one Bharat Shinde though he denied that there was another party led by Nana Surve and that he himself and other witnesses belonged to Nana Surve’s party. According to Shri Gupte, this admission showed that the accused being of the other group

are falsely implicated.

- ii. The witnesses and the deceased themselves were the aggressors as they had gone to the house of accused No.1 to question and confront him about the incident that had taken place in the morning. The deceased and these witnesses had no business to go to the house of the accused No.1. They had obviously gone there as aggressors.
- iii. There is no common object among all the accused to commit the offence of murder. There was no unlawful assembly. The accused were sitting on a nearby ota. It is only after the accused and the witnesses went there the incident had taken place. Therefore, there cannot be any common object shared by all the accused.
- iv. Neither of the accused was having any deadly weapon. Accused No.3 Prabhakar in fact had told the witnesses that there should not be any quarrel.
- v. There is exaggeration in the story narrated by the witnesses. False implication of the accused is clear from the fact that the

FIR is lodged much belatedly i.e. at 11.30 a.m. on 6.2.1999 though the incident had taken place at about 8.30 p.m. on 5.2.1999.

- vi. PW-3 has admitted that they had gone to Karmala police station on their way to Cottage hospital. In fact he was very much available at Karmala itself. Sachin was shifted to Civil Hospital, Solapur; and yet, no FIR was lodged for more than fifteen hours and no explanation is offered by any of the prosecution witnesses including the police officers. Thus, it is quite clear that names of the accused are implicated after due deliberation to implicate as many accused as possible.
- vii. Accused Nos.3, 4, 5, 6 and 7 are ascribed the role of assaulting the deceased with kick and fist blows only. There are no corresponding injuries.
- viii. There are omissions about accused No.8's role of assaulting the deceased with a stick in the evidence of both PW-3 and PW-8.
- ix. The C.A. report does not show that there was blood on the

clothes of the accused having blood group of the deceased. The chain which was sent to C.A. does not show presence of blood as per the C.A. report.

- x. There could not be premeditation or preparation to commit murder of Sachin. Though a specific defence regarding a particular exception under Section 300 of IPC is not taken, from the evidence itself it could be seen that it is a much lesser offence and in fact even for the accused who are attributed the role of assaulting the deceased with cycle chain the case would not travel beyond the offence punishable under Section 304 Part II of IPC.
- xi. Shri Gupte then made specific submissions in respect of accused No.4 Mahavir. According to him, accused No.4 Mahavir was less than 18 years of age at the time of incident as he was born on 10th April, 1981. He submitted that the Hon'ble Supreme Court in the case of *Satya Deo alias Bhoorey Vs. State of Uttar Pradesh*¹ by referring to earlier judgments has held that if the accused was less than 18 years of age on the

1 (2020) 10 SCC 555

date of commission of the offence; though at that time the Juvenile Justice Act before the Amendment in 2000 provided age of the juvenile offender as 16 years; such accused would get benefit of the Juvenile Justice Act, 2000 in the pending proceedings.

- xii. He submitted that accused No.4, therefore, is entitled for the benefit under the Juvenile Justice Act, 2000. He relied on the judgment of the Hon'ble Supreme Court in the case of **Abuzar Hossain alias Gulam Hossain Vs. State of West Bengal**² which has laid down that the claim of juvenility can be raised at any stage irrespective of delay in raising the same. It could be raised in appeal even if not pressed before trial Court. It can also be raised for the first time before the Supreme Court even if it was not pressed before trial Court and in appellate court. And it could also be raised before the Supreme Court even after final disposal of the case. Shri Gupte, therefore, submitted that this Appellant's age being below 18 years of age at the time of incident requires serious consideration and

² (2012) 10 SCC 489

it entitles him to be treated with benefit of the Juvenile Justice Act, 2000.

15 Submissions of learned APP Shri Konde-Deshmukh and learned counsel for the first informant Shri Purwant

- i. Both of them submitted that the evidence of PW-3 and PW-8 is sufficient to prove guilt of the accused beyond reasonable doubt.
- ii. For application of the provisions of Section 149 of IPC it is not required that every member of the unlawful assembly should play any particular role or should be attributed any overt act to bring them within the umbrella of Section 149 of IPC. As long as they had a common object to commit the offence and had the knowledge of likelihood of commission of such offence, they could be convicted for the act of others causing death of the deceased.
- iii. There is direct evidence showing that the accused Nos.1 and 2 had assaulted the deceased with a cycle chain. Accused No.2 assaulted on the head. Accused No.8 is also attributed assault

with a stick on the deceased.

- iv. There is no reason to disbelieve the eye witnesses as both the eye witnesses themselves have suffered injuries. Their presence at the scene is natural.
- v. The cycle chains were not ordinary cycle chains, but, they were specially designed to be used in causing the assault.
- vi. Learned APP relied on the judgment of the Hon'ble Supreme Court in the case of **Lalji and others Vs. State of U.P.**³. In this case, the Hon'ble Supreme Court has held that there are two essential ingredients of Section 149 viz. (1) commission of an offence by any member of an unlawful assembly and (2) such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed. Once the Court finds that these two ingredients are fulfilled, every person who at the time of committing of that offence was a member of the assembly is to be held guilty of that offence. After such a finding it would not be open to the

3 (1989) 1 SCC 437

Court to see as to who actually did the offensive act or require the prosecution to prove which of the members did which of the offensive acts. Section 149 created a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149.

Shri Konde-Deshmukh and Shri Purwant, therefore, submitted that all the accused in this case are liable to be held guilty for the offence punishable under Section 302 read with 149 of IPC though the fatal blow was given by accused No.2.

Reasons and conclusions :

16 before discussing our reasons, we are referring to the findings recorded by the trial Court. It was held that the omissions in the evidence of PW-3 and PW-8, who were the eye witnesses;

were not significant. Both of them have deposed consistently. They themselves have suffered injuries. Therefore, their presence cannot be doubted. The trial Court further held that all the accused were present at the *katta* along with weapons. That proved the common object alleged by the prosecution. By virtue of Section 149 of IPC, each of the members of the unlawful assembly was deemed to have committed the murder of the deceased and had voluntarily caused hurt to PW-3, PW-8 and one Bhausahab Mane. This was the finding recorded by the trial Court.

17 The medical evidence in this case is important. As mentioned earlier, two medical officers were examined by the prosecution i.e. PW-9 Dr. Dilip Kamble who had examined Sachin when he was alive; and PW-12 Dr. Achut Deshpande who had conducted the postmortem examination. Though PW-9 had listed ten injuries to Sachin, PW-12 had grouped multiple small abrasions as one injury and hence he has mentioned that there were five injuries on the deceased. The multiple abrasions could be attributable to one single blow given by a cycle chain. This explains a group of multiples of small abrasions at one place, on a particular

part of the body.

18 The next question is, who is responsible for this offence and to what extent. In this context, evidence of the two eye witnesses, PW-3 and PW-8 is obviously crucial. PW-3 Machindra has described the evidence in more detail because he was present in the morning at the time of quarrel that led to the main incident in the evening. In the morning, there was involvement of only accused No.1 Pramod. The quarrel was between Pramod and Sachin. At that time, PW-3 had intervened and had promised to settle the matter in the evening. Accordingly, PW-3 along with the deceased Sachin, PW-8 Dilip, one Bhausahab Mane and others went to the house of accused No.1 Pramod. PW-3 has specifically stated that they had gone there to question accused No.1 regarding the incident and for telling him not to raise any quarrel. This deposition is important. It shows that the deceased and his group, including both the eye witnesses, on their own had gone to the house of accused No.1 Pramod. Those two eye witnesses, of

course, have not stated that the deceased Sachin and others were carrying any weapon. But, it is significant that Sachin and these two witnesses had gone there with intention to question accused No.1. PW-3 has further stated that accused No.3 Prabhakar had in fact told them that he would convince everybody not to raise any quarrel. This also shows that accused No.3 Prabhakar had no intention to join any quarrel or fight which was likely to take place. The other accused i.e. accused Nos.4, 5, 6, 7 and 8 were present at some distance. Except accused No.8, nobody is attributed any weapon by these eye witnesses. Therefore, their presence at some distance cannot be construed to mean that they had formed an unlawful assembly with a common object to commit any offence. When Sachin's group started going back, according to PW-3, they were assaulted. Specific roles are given to accused No.1 and accused No.2 of causing assaults by cycle chains on the deceased. PW-3 has stated that accused No.8 Dadasaheb Bhosale had also given a stick blow on Sachin's back. However, this is an omission from his FIR because in the FIR he has not stated so. Said omission is brought on record. Therefore, the role attributed to accused No.8

is limited to the assault to PW-3 on his left eye. Hence, there is important inconsistency in respect of the role attributed to the accused No.8 as far as the assault on the deceased is concerned. Therefore, to that extent, the benefit of doubt in respect of the allegations of causing assault on the deceased Sachin must go to accused No.8 Dadasaheb Bhosale. His role is restricted to assaulting PW-3 and causing a simple injury.

19 At this stage, a reference can be made to the evidence of PW-8 Dilip Mutake in this respect. PW-8 while describing the incident had stated that he had seen that accused No.8 Dadasaheb was beating Sachin with cycle chain.

In his cross-examination, the omission is brought from his police statement about the accused No.8 Dadasaheb Bhosale's beating Sachin by stick. Thus, there is no clear evidence of accused No.8 giving blow to Sachin either by stick or by a cycle chain. PW-3 has not attributed cycle chain to accused No.8.

20 Both these witnesses, i.e. PW-3 and PW-8, are consistent

about the role ascribed to accused Nos.3, 4, 5, 6 and 7 that they had given kick and fist blows to the deceased.

21 From the cross-examination of PW-8 it is brought out on record that he had not stated in his police statement that accused No.6 Pravin @ Prafulla had taken part in the incident. The case of accused Nos.3, 4, 5, 6 and 7 can be separated from the case of accused Nos.1, 2 and 8. All the main injuries noted by both the doctors were possible due to assault by cycle chains. There were only two abrasions besides the main injuries. Those abrasions were not caused by cycle chain. The role of assaulting by fist and kick blows is attributed to accused Nos.3 to 7 i.e. to five accused. The medical evidence does not support the prosecution case regarding these five accused assaulting the deceased by kicks and fist blows. There is nothing in the medical evidence suggesting even any blunt trauma caused due to kicks and fist blows. This is to be seen in the background of the fact that the assault had taken place at about 8.30 p.m. on 5.2.1999 and the FIR was lodged on the next day morning at about 11.30 a.m.. There is an unexplained delay in lodging the FIR and, therefore, the possibility of exaggeration and

false implication of more accused than those who had actually taken part in the assault, cannot be ruled out. Therefore, we are inclined to give benefit of doubt to the accused Nos.3, 4, 5, 6 and 7. Accused No.7, is of course dead and his appeal has abated.

22 In any case, the evidence in this case is not sufficient to prove that these accused Nos.3 to 7 had shared common object with the other accused. It cannot be said that these accused were members of an unlawful assembly. There is nothing to show that they were aware of the likelihood of accused No.2 giving the fatal blow on Sachin's head.

23 That leaves the case of accused No.1 – Pramod Bhosale, accused No.2 – Sudhir @ Choturam Salunkhe and accused No.8 – Dadasaheb Bhosale. As mentioned earlier, the evidence is doubtful regarding the assault caused by accused No.8 Dadasaheb Bhosale on the deceased, but, there is sufficient material to show that he had assaulted PW-3 Machindra near his left eye. This ocular evidence is supported by the evidence of PW-9 Dilip Kamble , who was the medical officer examining this witness. According to this witness, PW-3 had suffered one contusion over left maxilla of the

size 4 cm x 3 cm; and abrasion over the left maxilla over the contused part of the size 2 cm x 2 cm. These two injuries were described as 'simple injuries' and were caused by hard and blunt object. This assault is attributed to accused No.8 Dadasaheb Bhosale alone. Therefore, the prosecution has proved that he had individually committed the offence under Section 324 of IPC by assaulting PW-3 Machindra with a stick.

24 As far as the question of awarding adequate sentence to accused No.8 Dadasaheb Bhosale is concerned, the incident had occurred on 5.2.1999. The accused No.8 was on bail and there is nothing brought on record to show that he had misused the liberty granted to him and, therefore, some leniency can be shown to him. Sentence of three months' R.I. with a fine of Rs.10,000/- is adequate sentence for him, in our opinion.

25 PW-8 Dilip had suffered injury by chain on the head and that is attributed to accused No.1 Pramod. To that extent, accused No.1 Pramod has committed the offence punishable under Section 324 of IPC individually causing assault on PW-8 Dilip. The nature of injury was described as a simple injury by PW-9 Dr. Dilip Kamble.

26 The next crucial question remains about the roles played by accused No.1 Pramod Bhosale and accused No.2 Sudhir @ Choturam Salunkhe. Both the witnesses PW-3 Machindra and PW-8 Dilip are consistent about the participation of these two accused and the roles as well as the weapons attributed to these two accused. PW-3 Machindra has stated that accused No.2 Choturam had given a blow by cycle chain on the head, arms and back of Sachin. He has further stated that accused No.1 Pramod had assaulted Sachin with cycle chain on his hands, legs and back. This is also supported by the medical evidence discussed earlier.

PW-8 Dilip has similarly stated that accused No.1 Pramod Bhosale and accused No.2 Choturam were assaulting with cycle chain. He has, thus, corroborated the version of PW-3 Machindra. The prosecution has proved that both these accused i.e. accused Nos.1 and 2 had assaulted the deceased by means of cycle chains.

27 According to PW-3 Machindra, accused No.2 had assaulted Sachin on his head which ultimately proved to be fatal. The very fact that these accused had assaulted the deceased with cycle chain which they were having shows that they had common

intention to cause injuries to Sachin. Therefore, both of them are responsible for the assault on Sachin leading to his death. The prosecution has proved that they had shared common intention in that behalf. The question is whether the common intention was to commit murder or was to cause such bodily injury, with such intention which would be covered under first part of Section 304 of IPC.

To decide this issue, the background of this case as discussed earlier will have to be seen. As mentioned earlier, the deceased and his group had approached accused No.1 Pramod to question him about the incident which had taken place in the morning. Both these accused Nos.1 and 2 then reacted by assaulting the deceased. The incident, therefore, has occurred at the spur of moment in a sudden fight and sudden quarrel. Accused No.2 Sudhir @ Choturam has given one blow on the head and accused No.1 Pramod has assaulted on other parts of the body. Their act falls within *Exception 4* mentioned under Section 300 of IPC and, therefore, it can be safely concluded that both of them had committed offence punishable under the First Part of Section 304 of

IPC and that they had shared a common intention to commit this offence. The very fact that accused No.2 had given the blow on the head which was a vital part by metallic cycle chain and the injury led to his death showed that they had the intention to cause such bodily injury. Therefore, the prosecution has proved that both of them i.e. accused No.1 Pramod and accused No.2 Sudhir @ Choturam have committed the offence punishable under Section 304 Part I read with 34 of IPC. The Hon'ble Supreme Court in the case of *Chittarmal Versus State of Rajasthan*⁴ has held that the non-applicability of Section 149 is no bar in convicting the appellants under the main Sections read with Section 34 of IPC, if the evidence discloses commission of offence in furtherance of the common intention. If the offence involves a common intention, the substitution of Section 34 for Section 149 must be held to be a formal matter. It depends on the facts of each case. In that case, the Hon'ble Supreme Court had convicted the Appellants under Section 302 read with Section 34 even though Charge was framed under section 302 read with Section 149 of IPC. Applying the same principles, though the Charge is framed under Section 302 read

4 (2003) 2 Supreme Court Cases 266

with Section 149 of IPC, we are convicting both these Appellants for the offence punishable under Section 304-I read with Section 34 of IPC.

28 While imposing sentence, we are taking into consideration that the incident is old and there is nothing to show that the Appellants have misused their liberty. At the same time, we cannot ignore the fact that a life is lost in the incident. Hence, the sentence of ten years RI with fine should serve the interest of justice.

29 Though Shri Gupte has raised the point that accused No.4 Mahavir Salunkhe was below 18 years of age at the time of offence as his date of birth is 10.4.1981 and, therefore, he deserves the protection of Juvenile Justice Act as mentioned in the judgment relied on by Shri Gupte; we are not deciding that particular aspect because we are acquitting accused No.4 Mahavir and, therefore, further discussion about his age and the consequences thereof regarding the protection under the Juvenile Justice Act is not necessary.

30 Based on the above discussion, the following order is passed :

:: O R D E R ::

- i. The Appeal is partly allowed.
- ii. The conviction and sentence recorded by II Additional Sessions Judge, Solapur in Sessions Case No.102/1999 dated 8.11.2001 is modified to the following extent.
- iii. Accused No.3 Prabhakar Bhosale, accused No.4. Mahavir Salunkhe, accused No.5 Dada Chaoudhari and accused No.6 Pravin @ Prafull Shinde, are acquitted of all the charges.
- iv. Accused No.8 Dadasaheb Bhosale is convicted for commission of offence punishable under Section 324 of Indian Penal Code and is sentenced to suffer R.I. for three months and to pay a fine of Rs.10,000/- (Rupees Ten Thousand Only); and in default of payment of fine to suffer further R.I. for one month.
- v. Accused No.1 Pramod Bhosale and accused No.2 Sudhir @ Choturam Salunkhe are convicted for commission of offence punishable under Section 304 Part I read with 34 of Indian

Penal Code. Both them are sentenced to suffer R.I. for ten years and to pay a fine of Rs.25,000/- (Rupees Twenty Five Thousand Only) each; and in default of payment of fine to suffer further R.I. for three months each.

- vi. Accused No.1 Pramod Bhosale is convicted for commission of offence punishable under Section 324 of IPC and is sentenced to suffer R.I. for three months and to pay a fine of Rs.10,000/- and in default of payment of fine to suffer further R.I. for one month.
- vii. The substantive sentences imposed on accused No.1 Pramod Bhosale are directed to run concurrently.
- viii. Accused No.1 Pramod Bhosale, accused No.2 Sudhir @ Choturam Salunkhe and accused No.8 Dadasaheb Bhosale are granted set off under Section 428 of Cr.P.C.
- ix. Accused No.1 Pramod Bhosale, accused No.2 Sudhir @ Choturam Salunkhe and accused No.8 Dadasaheb Bhosale shall surrender before the authorities within a period of four weeks from today, failing which the trial Court shall take steps to effect their arrest in accordance with law.

- x. All the accused are on bail. Their bail bonds shall stand discharged.
- xi. Accused No.3 Prabhakar Bhosale, accused No.4. Mahavir Salunkhe, accused No.5 Dada Chaoudhari and accused No.6 Pravin @ Prafull Shinde shall execute bail bonds to the satisfaction of the trial Court, within a period of six weeks from today in accordance with Section 437A of Cr.PC.
- xii. The Appeal is disposed of accordingly.

(SARANG V. KOTWAL, J.)

(S.S. SHINDE, J.)

Deshmane (PS)

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by
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PRAKASHRAO
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