

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 643 OF 2016

Vivek Buddhinath Mishra, Aged about 25 years, Residing at 11, Bhavganga Society, Siddhatek Nagar, Kamatwade, Nashik, Taluka District Nashik, At present undergoing the sentence imposed upon him at Nashik Road Prison, Nashik.

....Appellant.

Versus

The State of Maharashtra (at the instance of Senior Inspector of Police, Ambad Police Station, Nashik vide C.R. No. 161 of 2010.)

....Respondent.

Mrs. Pooja N. Sejpal, Advocate i/b Mr. Nitin Sejpal, Advocate for Appellant.

Mrs. Geeta Mulekar, Addl. Public Prosecutor for Respondent-State.

CORAM:

**A. S. GADKARI, &
PRAKASH D. NAIK, JJ.**

RESERVED ON:

9th March 2023

PRONOUNCED ON:

13th October 2023.

JUDGMENT - (Per : Prakash D. Naik, J.) :-

1. The appellant has preferred this appeal under Section 374(2) of Criminal Procedure Code, 1973 challenging the judgment and order dated 4.12.2014 passed by learned Additional Sessions Judge Nashik

in Sessions Case No.104/2010 whereby appellant has been convicted for the offence punishable under Section 302, 307, and 506 IPC and sentenced to suffer rigorous imprisonment for life for the offence punishable under Section 302 of IPC and to suffer imprisonment for 10 years for the offence punishable under section 307 of IPC and three years for offence punishable under Section 506 IPC.

2. The case of the prosecution is as under:-

Factory of M/s Solic Foods Pvt. Ltd is situated at Plot No.J 36 Ambad MIDC Area, Nashik. Chandrasen Kingar, Ajay Kingar and Shashikant Kingar were the owners of this Company. They were engaged in manufacturing of chocolates and toffees. Accused Nos.1 to 3 are the real brothers. They were appointed as workers in this company. The work was conducted in two shifts and the timing was from 8.00 a.m to 8.00p.m and 8.00p.m to 8.00a.m. About 50 workers were employed in the company. On 17.3.2010 accused were posted in morning shift. They started work at 8.00 a.m. At 4.30 p.m Ajay Kingar came to the factory. He heard some noise and felt that something is thrown out of the compound wall. He went near the compound wall. He noticed that accused no.1 was peeping from the compound wall. Packet of coffee powder which is used in the factory for preparation of chocolates was found in the bushes. Ajay Kingar was under the belief that accused no.1 had stolen packet of coffee and thrown it out of the compound. Ajay Kingar called security guard and

informed him that accused no.1 has thrown coffee packet outside the compound wall. He was told to call accused no.1. Record indicate that accused no.1 was appointed in the company through labour contractor Mr.Mishra. On instructions from Ajay Kingar, Labour contractor was called in the factory. Security guard Dulal brought accused no.1 at the gate of the factory. Ajay Kingar asked accused no.1 as to why he committed theft of coffee packet. Accused no.1 denied the charge. Ajay Kingar along with accused no.1 and labour Contractor Mishra had been to the office of the factory where Ajay Kingar asked accused no.1 to confess the guilt otherwise he will handover him to the police. Accused no.1 refused to confess. He was asked to go out. Manager of the factory namely Manguesh Kurade was present along with Ajay Kingar. Labour Contractor Mishra gave understanding to accused no.1. He was not ready to admit his guilt. At about 7.00p.m elder brother of Ajay Kingar namely Chandrasen Kingar came to the factory and he was informed about the incident by Ajay Kingar. Chandrasen Kingar decided to give understanding to accused no.1 after completion of shift. At about 7.45 p.m. labourers and other employees working in the factory heard hue and cry and one of the worker Asad Shikh shouted as “Mar Diya Mar Diya”. Mangesh Kurade and others entered into the office of the factory. Ajay Kingar and Chandrasen Kingar were lying in pool of blood. Mangesh Kurade came out of the office. Accused no.1 was present by

holding iron rod. He was swinging the same in the air and threatening the workers by saying “Mar Dalunga Mar Dalunga”. Accused nos. 2 and 3 were also present with accused no.1. Accused nos.1 to 3 were going outside the factory. Accused no.2 was caught by security guard Dulal. Accused no.1 threatened security guard Dulal hence he released accused no.2. Accused nos. 1 to 3 fled away from the place of incident. Chandrasen Kingar and Ajay Kingar were shifted to hospital. Chandrasen Kingar succumbed to injuries. Mangesh Kurade approached the police and filed complaint against accused. Crime No.161/2010 was registered against the accused nos.1 to 3 for the offence under Sections 302, 307, 504, 506 read with 34 IPC. Investigation proceeded. Statements of the witnesses were recorded. On completion of investigation chargesheet was filed.

3. Charge was framed against accused nos.1 to 3 for the offence under Section 302 read with 34 IPC, 307 read with 34 IPC, 504 read with 34 IPC, 506 read with 34 IPC, Section 37(1) of Bombay Police Act and Section 135 of the Bombay Police Act.

4. Learned Sessions Judge vide Judgment and Order dated 4.12.2014 convicted accused no.1 for the offence punishable under Sections 302, 307 and 506 of IPC and acquitted him for the offence under Section 504 of IPC and Section 135 of Bombay Police Act. Accused no.1 was sentenced to suffer rigorous imprisonment for life for offence under Section 302 IPC and to pay fine of Rs. 15,000/- and

sentenced to suffer imprisonment for 10 years for the offence punishable under Section 307 IPC. Accused no.1 was also sentenced to suffer imprisonment for three years for the offence punishable under Section 506 of IPC. All the sentences were directed to run concurrently. Accused nos. 2 and 3 were acquitted for the offence punishable under Sections 302, 307, 504, 506 of IPC and Section 135 of the Bombay Police Act.

5. Prosecution examined 15 witnesses. PW1 Nitin Girase is owner of the adjacent company. PW2 Sanjay Nikam is a tea stall vendor. PW3 Dulal Malakar is security guard of M/s Solic Foods Pvt. Ltd. PW4 Gurmukh @ Ghansham Nandwani is panch witness for memorandum panchanama for clothes of deceased and accused. PW5 Pramodkumar Mahato. He saw accused no. 2 running and on asking the reason informed that his brother has assaulted the owner and police would catch him. PW6 Mangesh Kurade is the first informant. PW7 Dr. Mandakini Barve is the Medical Officer who performed Autopsy on the dead body of the deceased Chandrasen Kingar. PW8 Anand Roy is panch for spot panchanama. PW9 Asad Shaikh is the employee of the company. PW 10 Dr. Nemichand Jain is the doctor at Wockhardt hospital. PW11 Amit Kumadh is adjacent factory owner. PW12 Pankaj Singh works as an operator in the company. PW13 Vasudev Atram is the Investigating Officer. Pw14 Arun Shirke seized clothes of deceased. PW15 Jaiwant Kadhare is

the Assistant Police Inspector. He conducted further investigation and filed chargesheet.

6. Defence of the accused was of total denial. Accused did not dispute the presence at the factory at the time of incident. They did not state any other employee of the company or outsider had assaulted the victim and the injured.

7. Learned counsel for the appellant submitted that there is no evidence to convict the appellant. Prosecution case suffers from doubt. There is delay in recording statements of PW2, PW3 and PW5. PW4 acted as panch in various cases. There is no eye witness to the incident of assault. There are contradictions regarding the nature of weapon. There are discrepancies in the evidence adduced by the prosecution. Prosecution failed to prove that appellant has committed offence under Sections 302 and 307 of IPC. Appellant ought not to have been convicted for the alleged offences. There is no direct evidence to connect the appellant with the alleged incident. None of the witnesses have deposed that appellant had assaulted the deceased. Witnesses have stated that, they had seen iron rod in the hand of the appellant while he was proceeding towards factory gate. Statement of the witnesses were recorded belatedly. Witnesses have admitted that police were present at the spot of the incident in the factory and the hospital. Witnesses were available to the police, inspite of that there was delay in recording their statements. The

version of the witnesses do not corroborate each other *inter se*. Prosecution has not examined injured victim Ajay Kingar who was allegedly assaulted by the appellant. No explanation is offered for non-examination of injured victim. Witnesses on the aspect of actual assault were not examined. The trial Court has given undue weightage to alleged recovery. Prosecution has failed to prove its case.

8. Learned Addl. Public Prosecutor submitted that there are strong circumstances which proves the involvement of the appellant in the crime. Trial Court has appreciated the evidence while convicting the appellant. One person was murdered and the other had suffered serious injuries. The appellant was seen by the witnesses with weapon in his hand. The appellant had motive to commit the crime. There is recovery from the appellant. There is substance in the appeal. Hence, appeal may be dismissed.

9. PW1 Nitin Girase has stated that company M/s Solic Foods is located near his industry. On 17.3.2010 at about 7.30p.m he was sitting in his company. After hearing hue and cry he came out of the company. He went at the gate of M/s Solic Foods Company. Workers of said company were saying in loud voice "Mar Dala Mar Dala". Workers of Solic Food brought Chandrasen Kingar and Ajay Kingar in injured condition at the gate of the company. Workers who were running out of the gate of M/s Solic Food Company by saying "Mar

Dala Mar Dala” were the accused sitting in dock and one more accused who is not before the Court. Iron rod was in hand of the worker out of those three who was running out of the gate. Thereafter he put one injured in his car and another injured was put in car of another person and they were taken to the hospital. Iron rod was like a crowbar. He identified the same. It was marked as article no.1. Today he cannot say in whose hand article no.1 was out of those three workers. He was cross examined. He stated that before the incident he was not knowing the accused by their names. He did not state in his statement before the police that while running from the gate of the company accused was saying as “Mar Dala Mar Dala”. He did not try to catch hold the accused persons while running from the gate. In his presence other workers of the company did not chase the accused. When he went to the gate of the company he came to know that assailant had ran away. It is not in his statement that he can identify the iron rod which was looking like “Pahar”. Police met him on 17.3.2010. He did not give information to the police but gave the information to the police on 18.3.2010 though police made inquiry about the incident on 17.3.2010. His statement was recorded on 18.3.2010 at that time police had arrested all the three accused.

10. PW2 Sanjay Nikam conducts tea stall in front of Solic Food company. He used to supply tea to the workers as well to the officers and staff members of the Solic Food company. He knows the owners,

workers and staff members of M/s Solic Food Company. He know all the three accused sitting in the dock. On 17.3.2010 he had gone inside the company to serve tea to Ajay Kingar who was sitting in the chamber. Contractor Mishra came at that place. Accused no.1 was present. Mishraji(accused no.1) was asked to admit the guilt otherwise he would be handed over to the police. At that time accused no.1 stated that “Kabhi na Kabi Chhutke Ayenge sab”. After serving tea he left the premises. In the cross examination he stated that he did not disclose the incident which he narrated to the police on his own from 18.3.2010 till 23.3.2010 till his statement was recorded by police. He was called by police on 23.3.2010. Police made inquiry with him and he narrated the incident to the police. On 18.3.2010 he came to know about C. K. saheb. He did state in his statement that he had gone to the company at 6.30 a.m to serve tea but said fact is not appearing in his police statement. He did state in his statement that he used to serve tea in the said company at 6.30 p.m. The said fact is not there in his statement. He did state to the police that contractor Mishra along with bodyguard had come to the office. But said fact is not mentioned in his statement.

11. PW3 Dulal Malakar is working as security guard in M/s Solic Foods company. He knows the accused. He gave names of the accused. His duty is to maintain attendance register of the workers of the company and to keep check on incoming goods and out going

goods of the company and to take personal search of the workers of the company. M/s Solic Foods company works in two shifts. Incident took place on 17.3.2010. He was at the gate of the company. He produced attendance register of the workers of the company. On 17.3.2010 accused were uploading the goods from the truck. Ajay Kingar was standing outside the gate of the company. He told him that Vivek Mishra had thrown, some goods of the company outside in the jungle and asked him to go there to see as to what were those goods. He called supervisor Kurade at the gate. They went to the spot and found coffee packet of 1 kg lying in the bushes. Ajay Kingar asked him to call Vivek Mishra at the gate of the company. Thereafter he started searching Vivek Mishra but did not see him in the company premises. After five minutes he saw Vivek Mishra and called him and told him to stand at the gate of company. Ajay Kingar asked Vivek Mishra as to why he did so which was denied by Vivek. Ajay Kingar, accused no.1 Vivek Mishra and supervisor Kurade went to the office of the company. Chandrasen had come to the company. He went to the office of the company. Gopal Mishra, Contractor who had kept Vivek Mishra for the work had come with his body guard in the office of the company. PW2 who used to serve tea had come with tea and went to the office of the company. Gopal Mishra and his bodyguard in order to return back had come to the gate of the company. Gopal told him that Vivek Mishra had stolen coffee packet

but he is not ready to accept the said fact in front of owners of the company. At 7.45 p.m accused no.1 Vivek Mishra was moving one iron rod in the air in front of office of the company and saying in loud voice as “Mar Dala Mar Dala”. Accused Vivek Mishra was also saying whomsoever come ahead, he would kill him. Accused no.1 Vivek came at the gate and told him to move aside or else he would kill him. Accused no.1 jumped over the gate of the company and went outside. Accused no.2 Varun and accused no.3 Arun started running after accused no.1 Vivek and in that process he immediately opened lock of the gate of the company and caught accused no.2. At that time accused no.1 Vivek by holding his bicycle in one hand and holding iron rod in another hand had gone to some distance away from the gate of the company. At that time accused no.2 Varun told Vivek that he has been caught by security guard and after hearing the same accused no.1 Vivek told him to leave his brother otherwise he would kill him. After hearing the same he left accused no.2 Varun. Workers of the company came out. All the three accused ran away. Thereafter he came to know that accused no.1 had assaulted Chandrasen Kingar and Ajay Kingar. They were taken to hospital. He identified iron rod and coffee packet. He was cross examined. No workers followed the accused persons in order to catch them while accused were running. He shouted and told the workers of the company to catch them. Workers had come running to the gate of the company, but by that

time all the three accused had ran away. He cannot give any reason as to why he did not disclose on his own about the incident to the police on 17th, 18th and 19th March 2010. He disclosed the incident for the first time on 24.3.2010 and police have recorded the same as per his say. Police had come to the company on 24.3.2010. He was taken to the police station. Police read over the statement recorded earlier. He stated in his statement that he called supervisor Kurade at the gate and they went in the jungle to see what was those goods and they saw coffee packet of 1 kg lying in the bushes. He stated in his statement before the police that Akay Kingar asked him to call Vivek Mishra at the gate of the company he started searching him and thereafter he saw Vivek Mishra and called him. This is not reflected in his statement. Thereafter he stated that he waited at the gate of the company and Ajay Kingar, accused no.1, supervisor Kurade went to the office of the company. This fact is not reflected in his statement. He stated in his police statement that he saw accused no.1 Vivek while moving iron bar in the air but this fact is not reflected in his statement. He has stated in the police statement that accused no.1 Vivek by holding his bicycle in one hand and iron bar in another hand had gone. He cannot assign any reason as to why police has not mentioned in his statement the said facts.

12. PW4 Gurmukh @ Ghansham Nandwani is panch witness. He was called by police on 18.3.2010. Clothes of the injured were

produced. Clothes of the deceased were also produced. Arrest panchanama was recorded at his instance. Clothes of the accused were recovered. Iron rod was recovered at the instance of the accused no.1. In the cross examination he stated that on 17.3.2010 he did not visit the place of incident. Brother of deceased told him that I could act as panch witness in this case. Thereafter he went to Ambad police station. In Wockhardt hospital itself brother of the deceased had told him that the bar was to be seized from accused no.1. They went to the house of accused no.1. Accused no.1 took out Article no.1. panchanama was recorded. In the cross examination he stated that police did not sealed the clothes of the accused nos. 2 and 3 after recording the panchanama.

13. PW5 Pramodkumar Mahato has stated that he was serving in Solic Foods company. He knows the accused. The incident took place on 17.3.2010. Accused no.1 after changing his company clothes was standing in front of the gate. He asked accused no.1 whether work is over. He told him work is not over but employer is calling police. He was accused no.2 running with duty clothes. He asked accused no. 2 as to why he was running. Accused no. 2 told him that his brother has assaulted owner and if he would not ran then police would caught him. He ran to catch him. Gate of the company was opened. Accused Varun was caught by security guard, accused Varun gave call to accused Vivek. Accused Vivek told security guard to leave his brother

otherwise he would kill him. Accused Vivek was holding iron bar, hence security guard left Varun. Injured persons were taken to the hospital. In the cross examination he stated that he was on duty. Place where he was working was an open place. Police had got in the company and he narrated before police whatever he deposed. Police recorded his statement on 5.4.2010. He was taken to police station. At the time of incident though he had narrated the incident to the police, the police did not record it and hence he was taken to the police station on 5.4.2010. After incident police used to come to the company daily. Till 5.4.2010 he was regularly attending the office. He was read over and explained police statement before he entered the witness box. He did state in his statement before police that when he came near plate no.1, Vivke Mishra had already changed his work clothes and he cannot assign any reason why police did not make mention of the said fact in his statement. He stated to the police that accused no. 2 was running with duty clothes and Varun told him that if he does not run police would catch him. This is not stated in his statement.

14. PW6 Mangesh Kurade has stated that he was working with Solic Foods company. He knows the accused. The incident took place on 17.3.2010. At 4.30 p.m. Ajay Kingar came to the company. He heard sound of something falling in the bushes. He saw 1 kg packet of coffee lying in the bushes. He saw accused no.1 peeping in the bushes.

Ajay Kingar called security guard. He pointed out 1 kg packet. Ajay Kingar called him to show him packet. He called Vivek Mishra. Ajay Kingar, contractor and accused Vivek went to the office of the company. They gave understanding to Vivek Mishra. He was not in a position to listen. Chandrasen Kingar came to the spot. Accused Vivek was made to stand outside the office of the company. After the first shift was over the main owner of the company was to give understanding to the accused no.1. He heard shouting of the workers “Mar Dala Mar Dala”. He saw Ajay Kingar and Chandrasen Kingar in injured position. He saw accused no.1 holding iron rod and moving it in the air while going to main gate. He saw brother of accused no.1 going with him. Security guard tried to obstruct accused nos. 2 and 3. Accused no.1 rushed on the person of the security guard and allowed accused nos.2 and 3 to go. Injured were taken to hospital. He had seen coffee packet. He identified iron rod.

15. PW7 Dr. Mandakini Barve deposed that she conducted post mortem on body of Chandrasen Kingar. She found external injuries as well as internal injuries in the nature of lacerated wound on right side of head over frontal parietal, temporal and occipital region. She deposed that cause of death was due to severe head injuries with lacerations to brain with intra cerebral bleeding due to fracture of skull bone. Injury nos. 1 and 2 mentioned in column no. 17 and 19 of Exh. 57 are corresponding to each other and sufficient in ordinary

course of action to cause death.

16. PW8 Anand Roy is a witness for spot panchanama. Relating to article no. 8 mobile phone soaked in blood from spot of incident. PW9 Asad Shaikh is the employee of the company. After brief narration he turned hostile. PW10 Dr. Nemichand Jain has stated that on 17.3.2010 Ajay Kumar who was admitted in Wockhardt hospital. History of assault was given by him. He sustained injuries on his head nose and his left side was paralyzed. In the cross examination he stated that Dr.Borse had made medical certificate but he had resigned from the hospital in the year 2010. PW10 is acquainted with his signature and handwriting and he stated that medical certificate was made by Dr. Borse.

17. Record indicates that statement of Ajay Kingar could not be recorded because of physical and mental condition. Because of loss of memory and because of injuries sustained by him.

18. PW11 Amit Kumadh stated that he is the owner of the factory adjacent to the factory of the victims. On 17.3.2010 he was present at the factory. He was informed that owners have been assaulted by workmen of Solic Food Company. He took his vehicle at the gate of Solic Food Company. Ajay Kingar was kept in his car. He made call to the police station. Ajay was stating that someone has assaulted him. He was semi-conscious. He also stated that Mishra had assaulted both of them. He had informed to the police that Ajay had

sustained injuries. He is shifting him to the hospital. On that date he had not informed Ambad police station that Ajay had told him that Mishra had assaulted both of them. He is having friendly relationship with Kingar family.

19. PW12 Pankaj Singh has stated that on 17.3.2010 he was present in the factory. Accused no.1 was also present in the factory. Accused no.1 thrown away coffee powder. This was noticed by Ajay Kingar. Ajay Kingar informed them that Vivek Mishra committed theft of coffee packet. Ajay Mishra called Vivek Mishra in his office for inquiry. Vivek Mishra came out of the office with iron rod and he ran away from the premises. At that time his two brothers followed him. Security guard apprehended Varun. Vivek Mishra came back and threatened to kill the person who will intervene. Security guard released Varun. Ajay Kingar and Chandrasen Kingar were lying in injured condition. Ajay Kingar told him that Vivek Mishra assaulted him. In the cross examination he stated that he had told Amitkumar about the disclosure made by Ajay Kingar that accused no.1 assaulted him. When they entered the office Chandrasen Kingar did not disclose anything. It did not happen that both Ajay Kingar and Chandrasen Kingar made disclosure about the incident before him. His statement was recorded on the next date. On the next date of incident police had called all the workers to the police station. His statement was recorded. Inquiry was made with him in life Care

hospital. It did not happen that when they enter office Ajay and Chandrasen were shouting that accused no.1 Vivek assaulted them by iron rod. He has stated before the police that accused no. 2 was apprehended by security guard and accused no.1 threatened him and thereafter all the accused ran away.

20. PW13 Vasudev Atram stated that he was attached to Ambad police station as police sub inspector. Investigation was handed over to him. He conducted investigation, recorded statement of the witnesses. He admitted that he had not recorded statement of Pankaj Singh on 18.3.2023. Pankaj Singh did not stated that when accused nos.2 and 3 followed accused no.1 towards gate of the factory, accused no. 2 was apprehended by security guard. He had also not stated that accused no.1 came back and threatened to kill the person, who will intervene and therefore, accused no.2 was released by security guard.

21. Pw14 Arun Shirke was attached to Ambad Police station. On 18.3.2010 report was filed by police Naik Sonar and produced clothes of the deceased Chandrasen Kingar. Panchanama was recorded. PW15 Jaiwant Kadhare was attached to Ambad police station is the Assistant Police Inspector. He recorded statement of Sanjay Nikam. He issued letter to Wockhardt hospital. He recorded statement of Dulal Malakar on 13.4.2010. He was told by Doctor that Ajay Kingar was not fit to give statement. He collected medical certificate of Ajay

Kingar from the hospital.

22. Post mortem report establishes cause of death. Death was due to severe head injuries with lacerations to brain with intra cerebral bleeding due to fracture of skull bone. Chemical analysis report in respect of item nos.1 to 17 records that clothes and weapon indicate that blood found was human. Blood group was inconclusive. Item no.8 was shirt of the deceased. It was human blood and blood group B. Banyan of the deceased was having blood stains which was of human blood and blood group B. Pant of the deceased was having human blood with blood group B. Shirt was having moderate blood stains ranging from 0.1 to cms to 2 cms having human blood with blood group B. Pant of the appellant was having moderate number of blood stains ranging from 0.1 to 2 ms in diameter spread at front portion of having human blood with blood group B. Blood sample of the deceased Chandrasen Kingar showed that blood group was B. Deceased was having blood group B Blood of group B was found on the shirt and pant of the applicant. Iron rod was stained with blood. It was human blood but blood group was inconclusive.

23. Prosecution has examined several witnesses. PW1 is working in the adjacent company. He is not an eye witness to the incident of assault. He identified iron rod. He stated that one of the accused was holding iron rod. However he was not confident in saying who was holding article no.1. It is pertinent to note that deposition was

recorded after gap of time. Evidence of PW2 indicates that there are some omission but his entire evidence cannot be discarded. Evidence of PW3 also suffers from certain omission about moving of the iron bar in the air by accused. However other factors deposed by him corroborates prosecution's case. There is delay in recording statement of some of the witnesses, but that by itself is not sufficient to brush aside their evidence. Evidence of PW5 inspires confidence. He has referred to involvement of accused no.1. His evidence does not suffer from any omission. PW6 Mangesh Kurade has referred to involvement of accused with iron rod. There is no reason to disbelieve him. PW11 Amit Kumadh has supported the prosecution. He referred to the disclosure made by the injured. PW12 Pankaj Singh is consistence about possession of the iron rod by accused/appellant. Clothes of the accused/appellant were found bearing blood stain of injured person.

24. Prosecution has proved the following circumstances:-

- i. On 17.03.2010, accused Nos.1 to 3 were present in the factory of Solic Foods from 8.00 a.m. till the happening of the incident.
- ii. At about 4.30 to 5.00 p.m., Ajay Kingar came to the factory and suspected that accused No.1 thrown packet of coffee powder outside the premises of factory,
- iii. Then Ajay Kingar called accused No.1 and made

inquiry and accused No.1 refused to admit his guilt.,

- iv. At about 6.30 p.m., PW 2 Sanjay Nikam was present in the factory of Solic Foods and at that time Chandrasen threatened accused No.1 to hand over him to the police.
- v. At about 7.30 p.m., accused No.1 changed his duty clothes and informed PW5 that owner is calling the police,
- vi. At about 7.45 p.m., accused No.2 informed PW 5 that his brother has assaulted the owner,
- vii. At about 7.40 p.m., accused came out of office of Solic Foods and at that time he was holding one iron rod in his hand,
- viii. After coming out of office, accused No.1 went outside the premises of Solic Foods and accused Nos.2 and 3 followed him and at that time accused No.2 was apprehended by PW 3, but released because of threatening given by accused No.1.

25. PW4 has categorically deposed that, in his presence clothes of deceased Chandrasen and clothes of accused were seized and they were found stained with blood. He also deposed that on 18.03.2010 itself accused No.1 gave memorandum statement Exhibit 42 and one iron rod Article 1 was recovered at his instance from his house. During cross examination it has been brought on record that the seizure panchanama was prepared after returning to the police

station. However, that by itself is not sufficient to discard this piece of evidence as nothing has been brought on record by the defence. Similarly, merely because PW 4 is having friendly relations with the family of deceased, he cannot be branded as an unreliable witness when his testimony inspire confidence. It cannot be overlooked that merely because a person is having friendly relations with the victim, he would falsely depose against a person to whom he is not knowing. Admittedly, PW 4 is not a habitual panch and there appears no reason for him to depose falsely against the accused No.1. Therefore, it can be said that prosecution has proved recovery of iron rod at the instance of accused No.1 with the help of evidence of PW 4.

26. PW10 Dr. Jain has deposed before the Court that on 17.3.2010, injured Ajay was admitted in Wockhardt hospital at 10.40 p.m. and on the basis of treatment papers of Ajay, this witness has deposed that at the time of admission, history of assault was given and there were injuries on the head and nose of Ajay and his left side was paralyzed and injuries sustained by Ajay were grievous. This witness has duly proved medical certificate of Ajay which is marked as Exhibit 95. Perusal of this certificate shows that at the time of admission, history of assault was given to the Doctor and at that time Ajay was unconscious and found sustained head injury. It also appears that Ajay had sustained contused lacerated wound on

parietal region and those injuries were sutured and left side was paralysed. During the course of trial it has also come on record that statement of Ajay could not be recorded because of his mental and physical condition and there was loss of memory because of the injury sustained by him and therefore prosecution could not examine this injured before this Court. Therefore, these circumstances are sufficient to show that a deadly assault was made on the person of Ajay by accused No.1 and the only intention was to commit murder of Ajay at the time of assault. So far as evidence of PW 13 and 15 is concerned, both of them have conducted investigation in this matter and they have categorically deposed about the manner in which investigation was carried out. Though PW 13 failed to identify accused No.1 as the person from whom he seized iron rod article 1, however it cannot be overlooked that this witness has deposed before Court after a period of 4 years from the date of incident and therefore being a police officer, possibility cannot be ruled out that he would have forgotten identity of accused No.1. PW4 has specifically identified accused No.1 as the person at whose instance iron rod was recovered in his presence.

27. Hence, prosecution has succeeded in proving charge against the appellant. Defence of the appellant has no substance in the light of the incriminating circumstances established against him. Appeal is therefore required to be dismissed.

28. Hence the following order :-

ORDER

Criminal Appeal No. 643 of 2016 is dismissed.

PRAKASH D. NAIK, J.

A. S. GADKARI, J.

VINITA VIKAS NAIK Digitally signed by VINITA VIKAS NAIK
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