



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

**CRIMINAL APPEAL NO.75 OF 2020 WITH
CRIMINAL APPLICATION NO.1754 OF 2024**

1. Sunil s/o Jogiram Chandaliya,
Age 31 years, Occ. Agri.,
R/o Salampurenagar,
Pandharpur, Aurangabad
2. Mukesh s/o Jogiram Chandaliya,
Age 31 years, Occ. Agri.,
R/o as above.
3. Naresh @ Sonu Jogiram Chandaliya,
Age 36 years, Occ. Agri.
R/o as above.
4. Santosh s/o Popat Jadhav,
Age 27 years, Occ. Agri.
R/o as above.

... APPELLANTS

(Orig. Accused Nos.1 to 3 & 10)

VERSUS

The State of Maharashtra
through Gangapur Police Station
(Copy to be served on A.P.P.,
High Court of Bombay,
Bench at Aurangabad)

... RESPONDENT

.....
Mr. S.S. Thombre, Advocate for appellants
Mr. G.A. Kulkarni, A.P.P. for respondent – State
.....

WITH

CRIMINAL APPEAL NO.67 OF 2020

1. Sunil s/o Jogiram Bidlan
Age 39 years, Occ. Labour.,
R/o Krushnagar, Ranjangaon,
Tal.Gangapur, Dist. Aurangabad

2. Pradip s/o Jagdish Bidlan,
Age 24 years, Occ. Labour,
R/o Krushnagar, Ranjangaon,
Tal.Gangapur, Dist. Aurangabad ... **APPELLANTS**
(Orig. Accused Nos.5 & 4)

VERSUS

The State of Maharashtra
(Copy to be served on A.P.P.,
High Court of Bombay,
Bench at Aurangabad) ... **RESPONDENT**

.....
Mr. M.V. Salunke, Advocate for appellants
Mr. G.A. Kulkarni, A.P.P. for respondent – State
.....

**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ.**

Date of reserving judgment : 20th August, 2024.

Date of pronouncing judgment : 26th September, 2024.

JUDGMENT (PER R.G. AVACHAT, J.) :

The challenge in both these appeals is to a judgment and order of conviction and consequential sentence passed by the Court of Additional Sessions Judge (Trial Court), Vaijapur on 9/12/2019 in Sessions Case, No.47/2016. Both these appeals are, therefore, being decided by this common judgment.

2. 11 persons were put on trial in the said Sessions Case. 5 of them namely original accused Nos.6, 7, 8, 9 and 11

have been acquitted in toto. The State has not preferred appeal against their acquittal. The order of conviction and consequential sentence recorded against the appellants herein is given below in a tabular form :

Convictions under Sections	Punishment imposed
143 IPC	R.I. for 6 months and to pay fine of Rs.1000/- each, in default R.I. for 1 month.
147 IPC	R.I. for 1 year and to pay fine of Rs.1000/- each, in default R.I. for 3 months.
148 IPC	R.I. for 2 years and to pay fine of Rs.1000/- each, in default R.I. for 3 months.
302 r/w 149 IPC	Imprisonment for life and to pay fine of Rs.1000/- each, in default R.I. for 1 year
307 r/w 149 IPC	R.I. for 7 years and to pay fine of Rs.1000/- each, in default, R.I. for 6 months.
324 r/w 149 IPC	R.I. for 2 years and to pay fine of Rs.1000/- each, in default R.I. for 3 months
452 r/w 149 IPC	R.I. for 2 years and to pay fine of Rs.1000/- each, in default, R.I. for 3 months.

3. The facts giving rise to these appeals are as follows :

Appellants Sunil Chandaliya and Naresh Chandaliya are the real brothers. Sonam (P.W.3) and Aarti (P.W.8) are the real sisters. Atish (P.W.2) and Ganesh (deceased) were the real brothers of Sonam (P.W.3) and Aarti (P.W.8). Sunita (P.W.1) is the mother of these 4 siblings. Aarti

married appellant Naresh while Sonam (P.W.3) married appellant Sunil Chandaliya on one and the same day in the year 2009. After about a year's joint stay at matrimonial home, both the couples started residing separately from their in-laws and themselves as well. Appellant Sunil Chandaliya allegedly started harassing Sonam (P.W.3) so as to coerce her to bring Rs.60,000/- from her mother for purchase of a motorbike. His demand was not met. He continued to ill-treat her. She, therefore, left him and started residing at the house of her mother Sunita and brothers Atish and Ganesh. It appears, all was not well between the couple Naresh and Aarti as well. Aarti too started residing separately from her husband and joined the company of her brothers and mother. The evidence in that regard is, however, hazy. Since according to Sunita (P.W.1) Aarti was residing along with her husband appellant Naresh until the preceding of the incident. Aarti has also admitted in her cross-examination to have had visited her husband in jail. Be that as it may.

4. It appears that, Sonam had filed a case under Section 498-A and even a matrimonial proceeding against appellants Sunil Chandaliya and her parents-in-law. Admittedly, the couple (Sonam and Sunil) is blessed with a

child- Manveer. In a Court proceeding, it was agreed that, Manveer would remain in the custody of appellant Sunil Chandaliya from Monday to Friday every week and on rest of the days he would be in the custody of his mother. Learned advocate for the appellants placed on record certified copy of the order regarding custody of minor – Manveer.

5. It so happened that, on 1 May 2016, Atish (P.W.2) made a call to his brother-in-law, appellant Naresh. It appears that, heated exchange of arguments took place between the two. He asked Naresh to treat his sister Aarti well since already life of one of his sister, namely Sonam was disturbed by his brother – appellant Sunil Chandaliya. It is also the case of the prosecution that, on the following day i.e. on 2 May, Atish (P.W.2) was severely beaten up by appellants Naresh, Sunil and their friends. Both of his legs and one of the hands had to be plastered. He was brought home in evening the same day.

6. The incident in question took place by little past 12.00 noon on 3 May 2016. Sunita (P.W.1) was feeding Atish (P.W.2). The appellants along with 10-12 unknown persons came their house. The appellants were armed with sticks and

iron rods. They first pulled hair of Sunita. Appellants Sunil Chandaliya and Mukesh assaulted her with rod and stick respectively. The neighbours were said to have rescued her. She ran inside. All the appellants entered the house. First they assaulted Atish (P.W.2). Sunita and Sonam got themselves confined in kitchen room, closing the door from inside with a view to save themselves. Ganesh and his friend Sumit (P.W.5) went upstairs (on the terrace) to save themselves. The appellants followed them. Aarti too followed them. One of the appellants pushed her back. The appellants then mercilessly thrashed Ganesh. Appellant Mukesh assaulted on the head of Ganesh with an iron rod. Others thrashed him. Ganesh suffered multiple injuries. After having realized Ganesh to have passed away, all the appellants fled away but not before taking Master Manveer with them.

7. It is also the case of the prosecution that, pelting of stones (brickbats) took place on large scale. Number of brickbats were found in front of the house of informant Sunita and even on the terrace.

8. Both Ganesh and Atish were rushed to Ghati Hospital, Aurangabad. Sunita too was examined thereat. On

the same day by 10.00 p.m., Sunita lodged First Information Report (F.I.R. – Exh.90) with M.I.D.C. Waluj Police Station. A crime vide C.R. No.212/2016 was registered for the offences punishable under Sections 120(B), 307, 452, 324, 143, 147, 148, 149, 504, 427 of the Indian Penal Code and Section 135 of the Bombay Police Act. A crime scene panchanama (Exh.123) was drawn. The appellants were arrested one after the other. Clothes on their person were also seized. On 8 May Ganesh passed away. Section 302 of the IPC came to be additionally invoked. Statements of persons acquainted with the facts and circumstances of the case were recorded. Identity of some unknown accused was disclosed. They too were arrested. Upon completion of the investigation, a charge sheet was filed against the appellants and 5 others.

9. The Trial Court framed the Charge (Exh.54). Appellant abjured the guilt. Their defence was of false implication. According to them, appellant Sunil Chandaliya and Pradip Bidlan had visited the informant's house for custody of Manveer. The quarrel, therefore, ensued at the spur of the moment. Persons gathered outside the house pelted stones. Many of the stones hit Ganesh. He too was pelting stones on the persons present on the road. According to learned

Advocate for the appellants in Criminal Appeal No.75/2020, it would at the most be an offence under Section 304, Part II of the Indian Penal Code. He did not urge for allowing the appeal in toto. According to him, the appellants have been behind the bars for long. No intention could be attributed to them. The incident took place in a spur of moment. He would further submit that, number of witnesses have been examined. The evidence of the witnesses examined is not consistent with each other. The incident on the terrace has not been witnessed by anyone. Presence of Sumit at the house was doubtful. Even if his presence was admitted, the investigating officer recorded his statement 20 days after the incident. Learned Advocate relied on the following judgments of the Apex Court.

- (1) Anbazhagan Vs. State Represented by the Inspector of Police (2023 SCC OnLine SC 857)
- (2) Harbeer Singh Vs. Sheeshpal & ors.
2016 DGLS (SC) 1120
- (3) N. Ramkumar Vs. State Rep. by Inspector of Police
2023 DGLS (SC) 964

10. Learned Advocate for the appellants in Criminal Appeal No.67/2020 would submit that, these appellants had neither any intention nor any motive to indulge in the incident.

Their presence would at the most be assumed to have accompanied their friends to get custody of minor Manveer. This Court has, therefore, suspended their sentence. He would further submit that, the evidence of none of the prosecution witnesses is consistent with each other. In spite of availability of independent witnesses, none has been examined. Even 2 innocent persons (on-lookers) were hurt due to pelting of brickbats by Ganesh. Statement of Sumit (P.W.5), so called eye witness was recorded 20 days after the incident. His evidence, therefore, was rendered unreliable. Learned Advocate in this regard relied on the judgment of the Apex Court in case of Harbeer Singh (supra). He would further submit that, by non-examination of independent witnesses, though available, rendered the evidence of so called interested eye witnesses unreliable. He, therefore, urged for allowing the appeal of these appellants with benefit of doubt. In the alternative, he would submit that a single assault by one of the appellants would not be sufficient to infer that he had intention to kill the deceased. In support of his contention, he relied on the judgment of N. Ramkumar (supra).

11. Learned A.P.P. would, on the other hand, submit that, it was a preplanned murder. The appellants along with

10-15 unknown persons had come together. The appellants were armed with iron rods and sticks. Their other companions kept themselves outside the house. They indulged in pelting of stones. The appellants forcibly entered the house of the informant and first assaulted her. Then they targeted Atish, who was unable to move on account of previous day's assault on him by some of the appellants. He would further submit that, the appellants then turned to Ganesh (deceased). Learned A.P.P. drew our attention to post mortem examination report to indicate Ganesh to have suffered 30 injuries. According to him, the same suggests the appellants to have assaulted him mercilessly. He would further submit that, Sumit (P.W.5) was an independent witness. His presence has been admitted during his cross-examination and other prosecution witnesses as well. Number of injuries on the person of the deceased would indicate the appellants had a common object to commit murder of Ganesh and assault his other family members. He would submit that, it is not that a single assault on vital part causing death did not constitute an offence of murder. He would further submit that, in case of rioting, examination of more than one witness is necessary. According to him, the evidence of injured eye witness has great weight. The appellants admit their presence and even the incident as

well. According to him, three more independent witnesses have been examined. The wives of appellants Sunil Chandaliya and Naresh have no reason to falsely implicate their respective husbands putting at stake their matrimonial life. According to learned A.P.P., the evidence has been recorded three years after the incident. A minor variation in the evidence of the prosecution witnesses, therefore, bound to occur. He would further submit that, mere delay in examination of witnesses for few days cannot in all cases be termed to be fatal, particularly when the delay is explained. The learned A.P.P. took us through the evidence on record and relying on the following authorities, ultimately urged for dismissal of the appeals.

- (1) Pulicherla Nagaraju @ Nagaraja Reddy Vs. State of A.P. 2006 AIR (SC) 3010

Murder- Evidence of eye-witnesses – Close relatives of deceased – Reliance of – Evidence of a witness cannot be discarded merely on the ground that he is either partisan or interested or closely related to the deceased, if otherwise found to be trustworthy and credible.

Indian Penal Code, 1860 – Sections 302, 304 Part II, 324 – Murder – Evidence – Stabbing – Sentence – Appellant-accused was carrying a “Barisa”, a dangerous weapon – There was previous enmity. There was an earlier incident, about half an hour earlier when the father and brother of deceased had been attacked by appellant and his father – Deceased was unarmed – There was no provocation, sudden quarrel, or fight –

There was no indication of any cause for apprehension on the part of appellant that the deceased may attack him – The stabbing was with great force, causing an injury on a vital part of body, sufficient in the ordinary course of nature to cause death – Post-mortem report – The intention to cause death or at all events intention of causing bodily injury which is sufficient in the ordinary course of nature to cause death was made out – The circumstances to bring the case under Exception (4) to S.300 did not exist – No interference with decision of High Court convicting the appellant, upheld.

Indian Penal Code, 1860 – Sections 302 and 324 – Sentence– Murder – Evidence – Judgment of High court reversing the acquittal by trial court challenged – High Court, on appreciation of evidence convicted A-3 under S.302 and sentenced him to undergo imprisonment for life and a fine of Rs.1000/- - A-1 and A-3 convicted under S. 324 IPC for causing injuries to PW-1 and PW-2 and sentenced each of them to pay a fine of Rs.5000/- and in default, to undergo simple imprisonment of six months – Upheld – Appeal dismissed.

- (2) Masalti : Munga Ram, Bhagwati, Chandan Sinali, Laxmi Prasad Vs. State of Uttar Pradesh
1965 AIR (SC) 202

Evidence Act – Section 134 – Witness – Number of witnesses – Solitary trustworthy witness is sufficient for conviction but where large number of persons are involved, it is usual to seek corroboration from more witnesses.

Under the Indian Evidence Act, trustworthy evidence given by a single witness would be enough to convict an accused person, whereas evidence given by half a dozen witnesses which is not trustworthy would not be enough to sustain the conviction.

But where a criminal Court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident.

In a sense, the test may be described as mechanical; but it is difficult to see how it can be treated as irrational or unreasonable.

It is, no doubt, the quality of the evidence that matters and not the number of witnesses who give such evidence. But sometimes it is useful to adopt a test like the one which the High Court has adopted in dealing with the present case.

- (3) Lal Bahadur & ors. Vs. State (NCT of Delhi)
2013 AIR (SCW) 2161

Indian Penal Code, 1860 – Section 302 and 299 – Murder Trial – Requirements to prosecution – Held – In a murder case to substantiate the case of prosecution it is not required that dead body must have been made available for the identification and discovery of dead body is not sine qua non for applicability of Section 299, I.P.C.

Murder Trial – Delay in examination of witnesses – Scope – Held – Mere delay in examination of witnesses for few days cannot in all cases be termed to be fatal so far as the prosecution case is concerned when the delay is explained.

Murder Trial – Applicability of testimony – Held – Mere marginal variation and contradiction in the statements of witnesses cannot be a ground to discard the eye-witness who is none else but the widow of deceased.

12. Considered the submissions advanced. Perused the evidence on record and the judgment impugned herein. Let us advert to the evidence on record and appreciate the same.

13. The family of informant– P.W.1 Sunita was comprised of herself, her two daughters Sonam and Aarti and two sons Atish and Ganesh. Appellants Sunil Chandaliya and Naresh Chandaliya are the real brothers. They married Sonam and Aarti respectively on one and the same day in the year 2009. The evidence on record indicates that, it was an arranged marriage. Their financial background and antecedents were verified before the informant gave her daughter to them in marriage. After a year's joint stay at the matrimonial house, both the brothers along with their respective wives started residing separately from their parents and themselves as well. Although it is the case of the informant that appellant Sunil Chandaliya started asking Sonam (P.W.3) to fetch Rs.60,000/- for purchase of a motorbike, there is no convincing and reliable evidence in that regard. The evidence, on the contrary, indicates that while Sonam (P.W.3) married Sunil Chandaliya, she had passed 12th Standard examination. She completed graduation post marriage. Her education expenses were incurred by appellant Sunil Chandaliya. All was well between the couple. The couple was blessed with a child, Manveer. There is no concrete evidence to indicate what made the couple live separate from each other. It appears that, after two years of

marriage, Sonam (P.W.3) started residing at her parental house. She even filed a case under Section 498-A against Sunil Chandaliya and in-laws. A civil proceeding was also instituted. According to the informant, the appellant Naresh started harassing Aarti (P.W.8) with a view to ensure Sonam (P.W.3) would take back the Court cases filed against Sunil Chandaliya and other family members. As per the evidence of the informant, Aarti too started residing away from Naresh for about 5-6 months next before the incident. She too came to reside at her (P.W.1 Sunita) residence. While in another breath she testified that until the day before the incident she was residing with her husband- appellant Naresh. It is only after Atish (P.W.2) was assaulted by Sunil Chandaliya and Naresh and their friends, she came to her residence to see him and started residing there.

14. P.W.1 Sunita testified that the appellants along with 10-15 unknown persons came to her residence. The appellants entered her house. They caught her hair and pulled her out of the house. Appellants Sunil Chandaliya and Mukesh assaulted her with rod and stick respectively. The family members rescued her. She thereafter ran inside the house. It is further in her evidence that, appellant Mukesh said that they

will finish them today. Aarti (P.W.8), Sonam (P.W.3) and Ganesh (deceased) also came to rescue her. It is further in her evidence that, appellant Mukesh assaulted on the head of Ganesh with iron rod. She, therefore, locked the gate. Appellants Sunil Chandaliya, Mukesh and Naresh broke the lock of the gate. She (P.W.1 Sunita) and Sonam (P.W.3) went into the kitchen and closed the door from inside. Ganesh and Aarti went on the terrace to save themselves. Aarti thereafter came running down shouting Ganesh was killed. She, therefore, opened the door and took her in the kitchen room and closed the door. The appellants thereafter were shouting, “गणेश और आतिश मर गये. जल्दी भागो.” (Ganesh and Atish have been killed, Let’s flee away.) It is further in her evidence that, Sunil Chandaliya and Mukesh broke the door of the kitchen and snatched Babu (Manveer) from her custody and went away. Thereafter police came and took Atish and Ganesh to Ghati Hospital. Ganesh breathed his last on 8/5/2016. It is further in her evidence that, her supplementary statement was recorded 10-12 days after the incident, wherein she claimed to have identified the appellants on having been shown by the police. She identified all the appellants before the Court.

15. She was subjected to a searching cross-examination, wherein she admitted that after having verified financial status of appellants Sunil Chandaliya and Naresh with their antecedents, she gave her daughters to them in marriage. Sonam started residing with her 2 years after her marriage. While Aarti separated from Naresh 5 to 6 months before the incident. She again corrected herself to state that, Aarti was residing with her husband– appellant Naresh until the preceding day of the incident. No F.I.R. was lodged as regards assault on Atish on the preceding day i.e. on 2 May 2016. She admitted that, Sonam had filed an affidavit before a Court at Aurangabad, giving consent to keep Manveer with his father Sunil Chandaliya from Monday to Friday. On the fateful day, Manveer was with her (P.W.1 Sunita). She claimed to have not remembered that it was Tuesday on 3 May 2016. She admitted that, it was the case of Sunil Chandaliya that on that day Manveer should have been with him. She offered explanation with a say that since nobody came to take Manveer and hence, on that day he was with her. She has also admitted her both sons namely Atish (P.W.2) and Ganesh (deceased) were arrested because of assault on appellants Sunil Chandaliya and Naresh. Her house was situated in a thickly populated area. Her evidence further indicates that, on

1 May there was a call between her son Atish and appellant Naresh. Naresh was asked not to spoil life of his sister Aarti since already life of his another sister (Sonam) was spoiled by his brother – appellant Sunil Chandaliya.

16. It is further in her cross-examination that, appellant Sunil Chandaliya was asking for dissolution of marriage with a decree of divorce. She, however, denied that therefore they were annoyed with him. During the 2 years stay of Sonam with her, none of them requested Sunil Chandaliya to get Sonam back to his residence. On the previous day i.e. on 2 May, Atish was assaulted. His both legs and one of the hand were plastered. He was, therefore, unable to feed himself. It is further in her evidence that, on the given day, except all her family members, none else (meaning thereby Sumit as well) was present in her house. According to her, Ganesh was assaulted by appellant Mukesh on their arrival in the house. Ganesh then went upstairs. She claimed ignorance about Ganesh to have assaulted appellants Sunil Chandaliya and Pradip with pelting of bricks. She claimed to have not seen any injury on the person of appellants Pradip and Sunil Chandaliya. When Ganesh went upstairs, she (P.W.1 Sunita), Sonam and Manveer were in the kitchen. Aarti went behind

Ganesh. It is further in her evidence that, the appellants assaulted Atish in his room. She went on to state that, she was not knowing all the accused persons except her sons-in-law namely Sunil Chandaliya and Ramesh. Her son told her their names and, therefore, those figured in the F.I.R. According to her, the appellants recorded statements of Sonam, Atish and Aarti 12 days after the incident. She testified that, Sumit and Amar had not come to her residence on the given day. She admitted that, two of the persons gathered outside the house sustained injuries because of pelting of bricks. She, however, denied that, therefore, the persons gathered outside also started pelting stones towards Ganesh on terrace.

17. She was confronted with the F.I.R. Exh.90 and her attention was drawn to a statement portion marked "A", which reads, "somebody out of above (appellants) beat on her right arm with a stick." She denied to have stated the said statement to the police. She also could not assign any reason as to why her F.I.R. is silent to record that Mukesh hit on the head of Ganesh with iron rod. Her F.I.R. was also silent to record that appellants Sunil Chandaliya and Mukesh assault her with rod and stick respectively.

18. P.W.2 Atish testified that, on the preceding day of the incident, he was assaulted by the appellants at his work place. He was rushed to Ghati Hospital. His both the legs and one of the hands were bandaged and plastered as well. He came home the same day. The F.I.R. of the said incident was, however, not lodged.

It is further in his evidence that, on the following day i.e. on 3 May, he was present in the front room. The appellants came in front of his house and started abusing. His mother (P.W.1 Sunita) went to see who were there. Appellant Sunil Chandaliya came and pulled his mother's hair. Appellant Sunil Chandaliya and Mukesh started beating his mother with wooden stick. While appellants Naresh, Sunil Chandaliya, Mukesh came to his room and started beating him with stick and rods. He became unconscious for a while. When he regained consciousness, he heard appellants Sunil Chandaliya and Mukesh saying, "Ganesh and Atish both were dead, Let's leave". It is further in his evidence that, thereafter Ganesh and he were taken to Ghati Hospital.

19. During his cross-examination, he admitted that, Ganesh and he were arrested for offence of assault on appellant Sunil Chandaliya. It was an offence under Section 326 of the Indian Penal Code. Due to injuries suffered on the previous day, he was unable to stand up on his own. He sustained bleeding injury. He did not remember what he talked with Sunil Chandaliya about Manveer. He was very much conscious when taken to the hospital and until his discharge on 8 May. His statement was recorded on 12 May 2016 i.e. 9 days after the incident. According to him, no stranger was present in the house except their family members. He meant to say, Sumit (P.W.5) too was not present in the house. Since he was unable to move, he could not know about other happenings in the house.

20. P.W.3 Sonam testified that, by 12.00 noon on the fateful day, she was present in the house. her mother was feeding Atish. The appellants came to their house. Appellant Sunil Bidlan, her husband Sunil Chandaliya and Mukesh took her mother from the room by catching her hair. Both Sunil and Mukesh Chandaliyas beat her mother with stick. Mukesh said, "We will kill both the brothers" (Atish and Ganesh). Then Sunil Chandaliya, Mukesh, Sunil Bidlan and Pradip went to the

room of Atish. They beat up Atish with iron rod and stick. It is further in her evidence that, her husband Sunil Chandaliya said not to spare his wife. She ran into the kitchen and bolted the door from inside. Her mother too joined her in the kitchen. She saw others (acquitted) standing outside the house. They were armed with iron rods and sticks. According to her, Ganesh was on the terrace. Those who were present outside including Santosh Jadhav (appellants in Criminal Appeal No.75/2020) were pelting stones towards her brother on the terrace. They asked the neighbours not to intervene as it was their personal matter. Then Sunil Chandaliya, Mukesh, Naresh, Pradip, Sunil Bidlan and Santosh broke open the channel gate and went on the terrace. They beat up Ganesh and his friend Sumit on the terrace. Aarti (P.W.8) was also there on the terrace. Sumit came down. He had also suffered various injuries. Then the appellants came downstairs. Sunil Chandaliya, Mukesh and Sunil Bidlan broke open the kitchen door. Sunil Chandaliya and Mukesh snatched away her son Manveer and went away. While leaving, they said, “आतिश और गणेश मर गये”. Ganesh then came downstairs. He was severely injured. Both Atish and Ganesh were taken to Ghati Hospital.

21. She was subjected to a searching cross-examination. We propose to restrict her cross-examination in relation to the incident since the facts about her marriage her post marriage education etc. has been referred to above. According to her, Sumit (P.W.5) had come to their residence prior to the incident. In the second breath, she testified that, no other person had come to their house the entire day. She knew Rani Chandaliya. According to her, a hue and cry took place. So many neighbours had gathered on hearing hue and cry. Two of them suffered injuries because of pelting of stones. A commotion, therefore, took place. Because of the commotion, she could not see who beat whom at that place. She denied that, stones were also pelted from the terrace. Since she was on the ground floor, she did not know what had happened on the terrace. She saw persons from the mob throwing bricks towards terrace. Ganesh had not sustained injury prior to commotion. She saw Ganesh injured after throwing of bricks towards the terrace from outside. She did not go on to the terrace. She did not meet police from 3 May to 8 May. According to her, she did not see Sunil and Pradip had suffered injuries. She was, therefore, confronted with her police statement and particularly the matter – portion marked “A”, which reads :-

“ते घेऊन जात असतांना मी पहिले तेव्हा माझे पती सुनील चंडालिया व प्रदीप बीडलान यांना मार लागून राख निघत होते.”

She denied to have stated to the police accordingly.

She denied that, appellant Sunil Chandaliya and Pradip had come to their house for taking Manveer and, therefore, they beat them up.

22. It is in the evidence of P.W.8 Aarti that, the appellants came to the house of her mother. They firstly beat up Atish. Ganesh, therefore, ran towards terrace. All of them followed him. She too followed them. Appellants Sunil and Mukesh Chandaliyas pushed her. Because of the same, she came down from the terrace. When she was on terrace, she saw appellants Sunil Chandaliya, Mukesh and Naresh beat up Ganesh with an iron rod. Then they shouted, “भागो, गणेश मर गया.” Mukesh and Sunil Chandaliya broke the door of kitchen and took Manveer and then went away.

23. During her cross-examination, she admitted that, appellants Naresh and Sunil Chandaliya had filed complaint

against her brothers Ganesh and Atish about having been assaulted by them. She was staying with her mother for about 4 months before the incident. Thereafter she was going to join her husband. Except the family members, none else was present in the house. She gave a vital admission that appellants Sunil Chandaliya and Pradip had come to their house on the fateful day for getting custody of Manveer. Even after the incident, she had been to jail to meet her husband. According to her, hurling abuses had taken place in between her mother on one hand and appellants Sunil Chandaliya and Pradip on the other. Ganesh had not suffered before going on the terrace. She did not know why Sumit had come to their residence on that day. Sumit was present on the terrace. She learnt that, persons from outside of their house were throwing stones and bricks on the terrace. She, however, did not see Ganesh and Sumit throwing the bricks back on the persons present on the road. She denied to have informed the police that Ganesh hit Sunil Chandaliya and Pradip by throwing bricks. Her attention was, therefore, drawn to a matter – portion marked in her police statement, which reads thus

“त्यातील एक वीट सुनील चंडालिया व एक वीट प्रदिप बिलडान याला लागली.”

She denied to have stated the same. Accordingly, Sumit (P.W.5) brought Ganesh downstairs. It is further in her evidence that, after funeral, when all of them came back to their house, they had discussed about the F.I.R. to be lodged and what is to be told to the police. Rest of the questions in the nature of denial of her examination-in-chief.

24. These 4 witnesses are the family members, namely, mother and her 3 children. We have evidence of 3 more witnesses. P.W.4 Kishor was serving with a sugarcane juice centre. He claimed to have had close friendship with Ganesh (deceased). According to him, Rani Chandaliya told him that appellant Mukesh, Sunil Chandaliya and Naresh along with their friends had planned to beat up Ganesh. They have made preparation in that regard and even assembled to proceed towards the house of Ganesh. She had asked him to report the same to Ganesh. It is further in his evidence that, he, therefore, went to the house of Ganesh and reported the same. He claimed to have seen the appellants to have assembled and proceeding towards the house of Ganesh.

25. During his cross-examination, it has come on record that, Ganesh was his very close friend. The appellants

were on motorcycle. His Master, owner of sugarcane juice centre did have a cell phone. He was at the house of Ganesh until 12.00 noon. When he left the house, he did not see the appellant nearby the house of Ganesh. It is only after 5 days of death of Ganesh, he told family members of Ganesh that he had told Ganesh what Rani had asked him tell Ganesh been told by him Rani Chandaliya. His statement was recorded on 16 May at Police Station. He did not on his own went to the Police Station or reported or phoned what he had learnt from Rani Chandaliya.

26. Then there is evidence of P.W.7 Wajid Pinjari. It is in his evidence that, on 3 May by 12.00 noon he saw 10-12 persons present in front of the house of Pradip Bidlan. Sunil Chandaliya was also present thereto. He was armed with iron rod while Pradip was holding wooden bamboo. Others were also armed with sticks and rod. They started proceeding towards the house of Atish. He followed them. P.W.1 Sunita was present outside of the house. Sunil Chandaliya caught hold of her hair and beat her up. At that time, Ganesh was on the terrace. Sunil broke the lock of the channel gate. Other 4 persons went on terrace. Father of Pradip Bidlan was standing

on the terrace of front building and throwing bricks towards Ganesh (A new theory has been brought on record).

27. During his cross-examination, he admitted to have been a good friend of Atish. Although he followed the appellants and others, he did not intervene to save Atish and his family members. He even did not make a call to Police Station when those persons armed with sticks and iron rods started proceeding towards the house of Ganesh. He was present while police came on the spot. He was, however, scared of Sunil. He did not report to the police about the incident for the next 15 days.

28. P.W.5 Sumit testified that, Ganesh had come to his house on the morning of 3 May 2016. He joined Ganesh to his house.

29. Kishor (P.W.4) had come to the house and informed Ganesh that 10-12 persons have gathered and there was possibility of quarrel. By 12.15 noon, he saw persons gathered outside the house and were abusing. One of them attempted to inflict blow on his head. He resisted the same with his hand. The blow fell on his hand. He thereby suffered

injury. The appellant beat up Atish. Thereafter he and Ganesh ran towards the terrace. Stone pelting started from the terrace of opposite side building (Ganga Tank). All the appellants came on the terrace. They were armed with iron rod and sticks. Mukesh assaulted on the head of Ganesh with iron rod. Ganesh fell down. Others then beat up Ganesh with the articles in their hands. The appellants threatened him if he intervened. Aarti had come onto the terrace, but those persons pushed her down. The appellants then went away after beating Ganesh. He brought Ganesh down. Both Ganesh and Atish were taken to Ghati Hospital, Aurangabad. He too was there as his presence at Ghati Hospital is deposed to by P.W.2 Atish.

30. During his cross-examination, he testified that, from the place where he was, nothing could be seen what was happening with Atish in his room. Atish was taken to the hospital in the condition in which he was seen by him in the morning. This suggests that Atish did not receive any visible injury. According to him, Sunil Chandaliya and Pradip did not suffer any injury as a result of bricks thrown by Ganesh. He had not stated so to the police in his statement to the police. He was, therefore, confronted with his police statement and

particularly the matter- portion marked "A", which speaks about the same. According to him, one Amar was also with him on the terrace. There was commotion on the road in front of the house. About 25 persons from the lane had gathered. Persons from the road also threw bricks and stones on terrace towards Ganesh in resistance. Ganesh also suffered injuries because of stones and bricks pelting on the road. Amar ran away by jumping down from the terrace. He admitted that, Sunil talked with Sonam and her mother and thereafter scuffle started. He went on to admit that as a result thereof quarrel took place. He admitted that, so many bricks and stones were lying on the terrace. Same was the state in front of the house of Ganesh. He was at his own residence up to 22 May post incident. He did not approach police to lodge the report and give his statement until then in spite of having been in good mental frame.

31. P.W.6 Sagar is the witness to the panchanamas (Exhs.123 to 128-A). Panchanama Exh.123 is crime scene panchanama. Panchanamas Exh.124 and 125 pertain to seizure of clothes. Exh.126 pertains to arrest of appellants Pradip Bidlan and seizure of his clothes. Exh.127 is inquest panchanama. Exh.128 is a disclosure statement by appellant

Sunil Chandaliya, pursuant to which an iron rod was seized from open place under a tamarind tree.

32. This witness, in his cross-examination, testified the contents of disclosure statement were already kept written by the police when he visited the Police Station on the given date. The evidence of this witness is therefore of little consequence for the prosecution. The crime scene panchanama (Exh.123), however, indicates that, that there were blood stains on the floor of the front room. Door of the kitchen was broken. Brickbats were seen lying in front of the house, but not beyond the channel gate. Pieces of bricks and stones were also seen on the terrace.

33. P.W.10 Vitthal did the investigation of the crime. His evidence indicates that, appellant Pradip Bidlan was injured in the incident. The omissions amounting to contradictions in the statements of Aarti (P.W.8), Sumit (P.W.5) and other prosecution witnesses have been duly proved through his oral evidence. According to him, both appellants Sunil and Pradip had sustained injuries in the incident. The information received at the control room was that the injured sustained injuries in quarrel. Same was the case about the

information given in the hospital. He recorded the statements of the witnesses post 15 May in spite of having been aware, they being the eye witnesses.

34. P.W.9 Dr. Sachin was the Medical Officer at Ghati Hospital, Aurangabad. He conducted the autopsy on the mortal remains of Ganesh on 9 May 2016. He noticed following injuries :-

- (1) Obliquely placed, linear sutured wound of length 5.5 cm with 6 sutures in situ present over right frontal region. On opening the sutures, wound margins was irregular, ragged, partly healed at periphery, bone deep, suggestive of laceration.
- 2) Five intermingled tramline contusions of sizes ranging from 3 cm x 1.5 cm to 9 cm x 2.5 cm. Present over lateral aspect of upper 1/3 of right arm (including deltoid region) dark brown.
- 3) Vertically placed, abraded tramline contusion of size 8 cm x 1.5 cm present over lateral aspect of middle 1/3 of right arm, brownish scab.
- 4) Two obliquely placed, abraded contusions of size 2.5 cm x 1.5 cm each, present over antero-lateral aspect of lower 1/3 of right arm, just above right cubital region, blackish brown scab.
- 5) Three intermingled tramline abraded contusions of sizes ranging from 4 cm x 1 cm to 13 cm x 1.5 cm present over postero-lateral aspect of right elbow, brownish scab.

- 6) Contusion of size 4.5 cm x 4 cm present over middle 1/3 of dorsal aspect of right forearm greenish brown.
- 7) Tramline contusion of size 5 cm x 2 cm present over dorsal aspect of right wrist.
- 8) Contusion of size 2 cm x 1 cm present over dorsal aspect of proximal phalynx of right ring finger with fracture of underlying 1st plalynx, dark brown.
- 9) Contusions of sizes ranging from 1 cm x 1 cm to 2.5 cm x 1 cm present over knuckles of right hand, dark brown.
- 10) Partly healed, adherent, laceration of size 1 cm x 0.1 cm present over dorsal aspect of distal phalynx of right ring finger.
- 11) Contused abrasion of size 7.5 cm x 3.5 cm present over middle 1/3 of anterior aspect of right forearm, brownish.
- 12) Abrasion of size 5 cm x 3 cm, 2.5 cm present on left side of back, supra-scapular region, blackish brown scab.
- 13) Contused abrasion of size 6 cm x 4 cm present on over left lumber region of back, 6.5 cm from midline, brownish scab.
- 14) Horizontally placed tramline abraded contusion of size 4 cm x 1.5 cm present over right iliac region of abdomen, brownish scab.
- 15) Vertically placed tramline contusion of size 7 cm x 1.5 cm present over deltoid region of left arm, dark brown.
- 16) Obliquely placed tramline contusion of size 4 cm x 1.5 cm present over right lower (iliac) region of abdomen, dark brown.
- 17) Two obliquely placed tramline contusions of sizes 5 cm x 1.5 cm (proximal) and 3 cm x 1.5 cm (distal) present over lower 1/3 of dorsal aspect of left forearm, dark brown.

- 18) Obliquely placed tramline contusion of size 10 cm x 1.5 cm present over dorsal aspect of left hand, greenish brown.
- 19) Abrasion of size 1 cm x 0.8 cm present on dorsal aspect of left wrist, brownish scab.
- 20) Abraded contusion of size 5 cm x 1 cm present on antero-medial aspect of left knee, brownish scab with greenish brown contusion.
- 21) Abraded contusion of size 2.5 cm x 1 cm present on upper 1/3 of anterior aspect of left leg, brownish scab with greenish brown contusion.
- 22) Multiple obliquely placed tramline contusions of sizes ranging from 5 cm x 1.5 to 7 cm x 1.5 cm present over posterior aspect of left thigh and leg, brown.
- 23) abrasion of size 2.5 cm x 1 cm present on medial aspect of left foot, blackish brown scab.
- 24) Contusion of size 3 cm x 2.5 cm present on left medial malleolar region, greenish brown.
- 25) Multiple contusions of sizes ranging from 3 cm x 2 cm to 6 cm x 4 cm present on left sole dark brown.
- 26) Multiple obliquely placed tramline contusions of sizes ranging from 5 cm x 1.5 to 7 cm x 1.5 cm present over dorsal aspect of right thigh and leg, greenish brown.
- 27) Obliquely placed, linear sutured wound of length 5 cm with 4 sutures in situ present over lateral aspect of lower ½ of right leg. On opening the sutures, the margins are irregular, ragged, partly healed, adherent x muscle deep, suggestive of laceration.
- 28) Multiple contusions of sizes ranging from 2 cm x 2 cm to 3 cm x 3.5 cm present on right sole, dark brown.

- 29) Multiple abrasions of sizes ranging from 0.2 cm x 0.5 cm x 1 cm over anterior aspect of knee joint and upper ½ of right leg, blackish brown scab.
- 30) Pinpoint puncture mark of i.v. line present over right supra-clavicular region with an adjacent stay suture, reddish.
- 31) Pinpoint puncture mark of i.v. line present over left side of neck with an adjacent stay suture, reddish.

35. According to him, the last two injuries were caused during treatment. Rest of the injuries were ante mortem. On internal examination of head, he noticed two injuries in the nature of under-scalp contusion. The injuries noticed on the person of Ganesh were sufficient to cause death in the ordinary course of nature. The post mortem examination report (Exh.143) records the cause of death as head injury with multiple contusions.

36. Then we have injury certificates of Sumit (P.W.5). The same indicates him to have suffered contused lacerated wound on left forearm. It was simple in nature. The same was proved by the evidence of P.W.11 Dr. Saba. It is at Exh.152.

37. Then the injury certificate Exh.153 is of Atish (P.W.2). The injury certificate has been admitted by the

appellants. Atish is shown to have suffered contusion on the right side back and abrasion on right elbow dorsal. Both the injuries were simple in nature. While P.W.1 Sunita's injury certificate (Exh.154) indicates contusion on right arm, which is simple in nature.

APPRECIATION :

38. P.W.1 to P.W.4 are the blood relations. The evidence of P.W.5 Sumit regarding assault on deceased Ganesh in his presence is concerned, is to be tested with a pinch of salt. During suggestions given to some of the prosecution witnesses and himself and defence appears to have admitted his presence while other prosecution witnesses i.e. family members rule out presence of any third person during the entire day. As such, it is a case of admission against implied admission through suggestions. P.W.5 Sumit claimed to have suffered injury at first instance no sooner the appellants entered the house. While the evidence of P.W.1 Sunita indicates that he was not at all present in the house or at least in the front room. The injury suffered by him is simple in nature. Even we take his presence to have been proved, his conduct is very unnatural. He was a good friend of Ganesh. He was present in Ghati Hospital while both the injured were

rushed there. He did not disclose to the police anything about the incident until his statement was recorded 20 days after the incident. True, the learned A.P.P. has relied on the case of Lal Bahadur (supra) wherein it has been observed that, delayed recording of statement is not fatal if the delay is duly explained. In this case, neither the investigating officer nor P.W.5 Sumit offered any explanation as to why there was delay of not less than 20 days in recording or giving the statement. According to him, Ganesh received head injury on the terrace. While according to P.W.1 Sunita, Mukesh assaulted Ganesh no sooner he entered the house. True, there being number of witnesses and assailants were also more than 5 in number, and the evidence to have been recorded three years after the incident, some inconsistency here and there is bound to occur. We will refer to the conclusion recorded by the Trial Court as regards offence against each individual. Let us take first case of Atish. The Trial Court convicted the appellants for offence punishable under Section 307 read with 149 of the Indian Penal Code. While the injury certificate of Atish indicate him to have suffered (1) contusion on right side of back and (2) abrasion on right elbow dorsal aspect. The incident dated 2 May was not the subject matter of the case. It is just surprising as to how the Trial Court found the said assault to be a bid on

the life of P.W.2 Atish. We are, therefore, not in agreement with the findings recorded by the Trial Court regarding convicting the appellants and consequently sentencing them for offence punishable under Section 307 read with 149 of the Indian Penal Code, so far as regards assault on P.W.2 Atish is concerned. It would be an offence under Section 324 read with 149 of the Indian Penal Code.

39. True, the assailants were 6 in number. Their coming together and indulging in commission of the crime would itself indicate they either formed unlawful assembly before entering the house after or entering the house of P.W.1 Sunita they indulged in commission of assault. As such, the offence of criminal trespass, punishable under Section 452 and being members of unlawful assembly, indulged in rioting, duly gets proved. We do not propose to interfere with the finding recorded by the Trial Court in that regard. The injury certificate of Sumit (P.W.5) and Sunita (P.W.1) also indicate them to have suffered simple injuries. The conviction recorded by the Trial Court for assault on them in prosecution of the common object and consequently sentencing for offence punishable under Section 324 read with 149 separately also found no cause for interference.

40. The question is, whether the appellants committed murder of Ganesh in prosecution of the common object of their unlawful assembly. Before appreciating the evidence in that regard, we need to refer to Sections 299, 300 and 304 of the Indian Penal Code. The Sections read thus :

299. Culpable homicide.—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

300. Murder.—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

2ndly.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

3rdly.—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

4thly.—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

304. Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder shall be punished with 1 [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.”

41. The learned A.P.P., relying on the judgment in case of Pulicherla Nagaraju (supra), submitted that, evidence of witnesses cannot be discarded merely on the ground that they are either partisan or interested or closely related to the deceased, if otherwise found to be trustworthy and credible. In the very judgment, particularly paras 16 to 19, we find observations regarding what constitutes offence punishable under sections 302, 304 Part I or Part II as well. True, in para No.17.2 it has been observed that there was no justification for the assertion that the giving of a solitary blow on a vital part of the body resulting the death must always necessarily reduce the offence to culpable homicide not amounting to murder punishable under Section 304, Part II of the Code. If a man

deliberately strikes another on the head with a heavy log of wood or an iron rod or even a lathi so as to cause a fracture of the skull, he must, in the absence of any circumstances negating the presumption, be deemed to have intended to cause the death of the victim or such bodily injury as is sufficient to cause death. The whole thing depends upon the intention to cause death, and the case may be covered by either clause Firstly or clause Thirdly.

42. In our view, in criminal cases, reliance on the authorities would be a good guide. After all, each case has to be decided on the facts and circumstances of each case.

43. The facts of the present case indicate the sisters namely Sonam (P.W.3) and Aarti (P.W.8) were married appellant Sunil Chandaliya and Naresh respectively on one and the same day. Sunil and Sonam were blessed with a child – Manveer. Something went wrong between the couple and after two years, Sonam started residing away from her husband Sunil. She took shelter at the house of her mother and brothers. She instituted a case under Section 498-A against her husband and in-laws. It also appears that, some matrimonial proceedings too were instituted. So far as custody

of Master Manveer is concerned, some understanding was arrived at between both of them. It was agreed that, Manveer would remain in the custody of his father (appellant Sunil) during Monday to Friday. The incident took place on Tuesday, 3 May. On the given day, the custody ought to have been with the appellant Sunil. It appears that, a phone call between Atish and Naresh dated 1 May triggered the incident. Atish called Naresh and requested to ensure that matrimonial life of his another sister, Aarti (P.W.8) would not be spoiled since marital life of his one sister Sonam was already spoiled. It then appeared that, on the following day, Atish was assaulted. Since the said incident is not the matter in question before us, nothing could be observed in that regard that the assailants were the appellants and none else. Needless to mention that, no F.I.R. was lodged in respect of the said incident. On the following day i.e. on the fateful day, at about little past 12.00 noon, the appellants Sunil, Mukesh and Naresh went to the house of the informant. It is in the evidence of Aarti and Sumit that a quarrel took place between Sunil and P.W.1 Sunita. The evidence of Arti indicates that, post funeral, all the family members discussed over the matter and decided what to report to the police. The F.I.R. is a fall-out of such discussion. It is further in her evidence that, there was quarrel in progress

between Sunil and Pradip on one hand and her mother on the other. She was specific to state that, appellant Sunil and Pradip had come to their house for taking custody of Manveer on 3 May 2016. She being a prosecution witness, was not declared to have been won over. True, the learned A.P.P. would say that she might have deposed so as to save her marital life. The fact remains that the appellants had visited the house of the informant to take the custody of Manveer as per the understanding given in writing before the Court. It might be that they were armed with stick or iron rod only with a view if any resistance is put up by Ganesh (deceased) or his brother. We have reason to infer so because, admittedly both, the deceased namely Ganesh and Atish were arrested for assault on appellant Sunil. An offence punishable under section 326 read with 34 was registered against them. Had the appellants really come with an intention to do away with both the brothers or any of their family members, they would have been armed with sharp weapons and no sooner they entered the house, they would have started assaulting each and everyone in the house indiscriminately. We have already observed above that, Atish suffered simple injury. The same could not constitute offence punishable under Section 307 of the Indian Penal Code. P.W.1 Sunita appears to have been

manhandled. In her F.I.R. itself she stated that, one of the appellants assaulted her with a stick. She improved her version before the Court and named Sunil and Mukesh as assailants. It is reiterated that, Sunit's (P.W.5) statement has been recorded after 20 days without there being any plausible or reasonable explanation as regards delay in recording of his statement. In fact, his presence at the house was itself in dispute. In view of great inconsistency inter-se the evidence of the prosecution witnesses, since according to the family members no stranger was present in the house. It also appears that, presence of Amar was also introduced, who was said to have fled after jumping from the terrace. The question is, whether Aarti (P.W.8) has really witnessed the incident on the terrace. According to her, no sooner she followed the appellants towards terrace, she was pushed by appellants Sunil and Mukesh. She claimed to have seen appellants Sunil, Mukesh and Naresh (brothers) to have assaulted Ganesh with iron rod. She did not name other appellants as assailants. According to her, hurling of abuses was continued. The investigating officer has admitted that, appellants Sunil and Pradip had suffered injuries. Aarti had in her police statement, stated to the police that they suffered injuries as a result of Ganesh to have pelted brickbats on their person. True, it was

qualified statement. According to her, those were thrown in self defence. The same is not in her substantive evidence. The fact thus remains that, two of the appellants namely Sunil and Pradip had suffered injuries in the incident. Admittedly, the evidence on record indicates that, pelting of stones took place for long. It is not known as to why the persons who had gathered on the road just outside the house of the informant pelted stones at Ganesh on the terrace. There is also evidence to indicate that Ganesh in retaliation, pelted stones downwards. Admittedly, two of the innocent persons gathered outside the house, as onlookers, suffered injuries as a result of stone pelting. It appears that, the investigating officer did not make further investigation to find that those who were present outside the house and indulged into pelting of stones had come there along with the appellants.

44. When Master Manveer ought to have been in the custody of appellant Sunil on the given day, he was admittedly in the custody of the informant. It is reiterated that, Aarti had testified both Sunil and Pradip had come to their house to get custody of Manveer. Prosecution witnesses (family members) also admit that before leaving the house, they (Sunil and Mukesh) broke open the door of the kitchen wherein P.W.1

Sunita and her two daughters namely Sonam and Aarti had locked themselves inside. Then both of them snatched Babu (Manveer) and went away. The same undoubtedly indicate that, arrival of the appellants was with a view to get custody of appellant Sunil's minor child, Manveer. On their arrival at the house of the informant, a quarrel took place and a major incident happened, wherein Ganesh unfortunately lost his life.

45. Appellant Mukesh is said to have given iron rod's blow on the head of Ganesh. The said injury proved fatal. Other injuries noticed on the person of Ganesh indicate those were contusion, although very many in number. P.W.5 Sumit, however, admitted in his evidence that, Ganesh too suffered injury due to pelting of stones on his person. The Medical Officer, in cross-examination, admitted that, contusion may also occur due to hit of stones. It is true that, appellants have assaulted Ganesh on the terrace with stick or iron rods. The incident on the terrace was only witnessed by Sumit and Aarti. She claimed to have witnessed appellants Sunil, Mukesh and Naresh beat up Ganesh with iron rods. While Sumit, whose statement was recorded after 22 days, testified that all the appellants reigned stick and iron bar blows on the person of Ganesh. We find his evidence but shaky for more than one

reason, namely his presence at the house was doubtful. Even if we accept his presence due to implied admission during suggestion by the defence, his statement was recorded after 22 days, he having been on the terrace and witnessing the assault on Ganesh, the appellants left him unhurt. He too did not intervene to save Ganesh. Sumit's statement to have been recorded 23 days after the alleged incident and the fact that he had every opportunity to approach the police and report about the incident on the very day or within a reasonable time lead us to disbelieve his evidence. Ganesh had already been booked for assault on Sumit and was even arrested. The same suggests that, there must have been some altercations between these three appellants and Ganesh. The F.I.R. is outcome of deliberations and the witnesses are from one and the same family and close friends, and the fact that the appellants had come to get the custody of minor Manveer, lead us to infer the appellants to have had no intention to kill Ganesh at all or any of the family members. The evidence indicates that, all the appellants had first been to the room of Atish. Had they been there with such an intention, they would have first assaulted him mercilessly. They even would not have spared the female members. Although Ganesh died of head injury associated with multiple contusions, some of the

contusions have admittedly been caused due to stone pelting. The head injury is attributed to appellant Mukesh. In our view, therefore, Mukesh has to be attributed with knowledge that the said assault may result into death. Had he really been intended to finish off Ganesh, he would have given further blows on his head. As such, in our view, it is an offence punishable under Section 304 Part II of the Indian Penal Code.

46. Needless to mention, an unlawful assembly could be formed in a spur of moment. All the appellants had been to the house of the informant. Some of them were armed with wooden sticks and iron rods. Someone of them had assaulted P.W.1 Sunita with a stick. It would, therefore, be an offence punishable under Section 324 read with 149 of the Indian Penal Code. Some of them assaulted Atish. The injury certificate of Atish (Exh.153) indicates him to have suffered two simple injuries that too on his back and the other one with right elbow dorsal aspect. Conviction of the appellants for committing offence punishable under Section 307 read with 149, therefore, needs to be set aside, replacing with conviction for offence punishable under Section 324 read with 149 of the Indian Penal Code. Although Sumit's presence was doubtful, since the defence during its suggestion to the witnesses

admitted his presence, his injury certificates indicate him to have suffered a simple injury to his left forearm. Again it being an offence punishable under Section 324 read with 149 of the Indian Penal Code, for all these three offences, we proposal to sentence the appellants for rigorous imprisonment for a term of one year with fine of Rs.1000/- each, and in default of payment of fine, simple imprisonment for one month.

48. Already we have observed above, Aarti to have seen only Mukesh, Naresh and Sunil Chandaliyas to have assaulted her brother Ganesh on the terrace. We have already held it to be an offence punishable under Section 304 Part II of the Indian Penal Code. These three appellants have already undergone an imprisonment of little over eight years. We propose to sentence them for the said offence with rigorous imprisonment for eight years each and fine with default stipulation.

49. We are inclined to maintain the conviction and consequential sentences of the appellants for the offences punishable under Section 143, 147 and 148 of the Indian Penal Code.

50. The appellants stand acquitted of the offence punishable under Section 302 read with 149 of the Indian Penal Code. The three appellants namely Sunil Jogiram Chandaliya, Mukesh Jogiram Chandaliya and Naresh @ Sonu Jogiram Chandaliya, however, are convicted for the offence punishable under Section 304 Part II read with 149 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for nine years and to pay fine of Rs.1000/-, in default of payment of fine, rigorous imprisonment for one month.

51. Conviction of the appellants for the offence punishable under Section 452 read with 149 of the Indian Penal Code is maintained, however the sentence is reduced to rigorous imprisonment for one years and to pay fine of Rs.1000/- each, in default of payment of fine, rigorous imprisonment for three months.

For the aforesaid reasons, we proceed to pass the following order :-

ORDER

(i) The Criminal Appeals are partly allowed.

(ii) Convictions and consequential sentences imposed against the appellants for the offences punishable under Sections 143, 147 and 148 of the Indian Penal Code and section 452 read with 149 of the Indian Penal Code, and fine with default stipulations, by learned Additional Sessions Judge, Vijapur on 9/12/2019 in Sessions Case, No.47/2016 is maintained.

(iii) Conviction of the appellants for the offence punishable under Section 302 read with 149 of the Indian Penal Code is set aside. The appellants are acquitted of the offence punishable under Section 302 read with 149 of the Indian Penal Code. However, the three appellants namely Sunil Jogiram Chandaliya, Mukesh Jogiram Chandaliya and Naresh @ Sonu Jogiram Chandaliya in Criminal Appeal No.75/2020 are convicted for the offence punishable under Section 304 Part II read with 149 of the Indian Penal Code and they are sentenced to suffer rigorous imprisonment for nine years and to pay fine of Rs.1000/- each, in default of payment of fine, they shall undergo rigorous imprisonment for one month.

(iv) Conviction of the appellants for the offence punishable under Section 307 read with 149 of the Indian Penal Code is set aside. The appellants are acquitted thereof. Instead, the appellants are convicted for the offence punishable under

Section 324 read with 149 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs.1000/- (Rupees one thousand) each, in default of payment of fine, they shall undergo rigorous imprisonment for one month.

(v) Conviction of the appellants for the offence punishable under Section 324 read with 149 of the Indian Penal Code (for the offence against Sunita - informant) and the sentence imposed against them and fine with default stipulation is maintained.

(vi) All the substantive sentences to run concurrently.

(vii) The appellants are entitled for the benefit of set-off under Section 428 of the Cr.P.C.

(viii) In view of disposal of the Criminal Appeals, Criminal Application No.1754/2024 stands disposed of.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

fmp/-