



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

CRIMINAL APPEAL NO.360 OF 2017

1. Balshiram Bhagaji Wafare,
Age : 43 years,
2. Bhagaji Shivram Wafare, - (abated)
Age : 84 years,
*(Appeal abated against appellant no.2
vide order dated 19.12.2023)*
3. Dnyandeo Sonyabapu Wafare, - (deleted)
Age : 37 years,
4. Santosh Kisan Wafare - (deleted)
Age : 33 years,
*(Names of appellant nos.3 andto 4 deleted
as per court's order dated 16.03.2023)*
5. Nandabai Balshiram Wafare,
Age : 40 years,
Both r/o. Wafarewadi,
Post Karjule Harya, Tq. Parner,
Dist. Ahmednagar ..Appellants
Vs.
The State of Maharashtra,
Through Police Station Officer,
Parner Police Station,
Tq.Parner, Dist. Ahmednagar ..Respondents

**WITH
CRIMINAL APPEAL NO.16 OF 2024**

- Dnyandev s/o. Sonyabapu Wafare,
Age : 42 years, Occ. Nil,
r/o. Wafarewadi, Post Karjule Hariya,
Tq. Parner, Dist. Ahmednagar ..Appellant
Vs.
The State of Maharashtra ..Respondent

WITH
CRIMINAL APPEAL NO.256 OF 2023

Santosh s/o. Kisan Wafare,
Age : 38 years, Occ. Agri.,
r/o. Wafarewadi, Post KarjuleHarya,
Tq. Parner, Dist. Ahmednagar ..Appellant

Vs.

The State of Maharashtra,
Through Police Station Officer,
Parner Police Station,
Tq. Parner, Dist. Ahmednagar ..Respondent

Mr.Nilesh S. Ghanekar, Advocate for appellants in Cri. Appeal No.360 of 2017

Mr.N.B.Narwade, Advocate for appellant in Cri. Appeal No.16 of 2024

Mr.S.R.Sapkal, Advocate for appellant in Cri. Appeal No.256 of 2023

Mr.S.D.Ghayal, APP for respondent – State in all appeals

CORAM	:	R.G.AVACHAT AND NEERAJ P. DHOTE, JJ.
RESERVED ON	:	JANUARY 08, 2024
PRONOUNCED ON	:	JANUARY 18, 2024

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

These are appeals from conviction. The appellants have been convicted for various offences and consequently, sentenced to suffer terms of imprisonments, vide judgment and order dated 01.08.2017, passed by learned Addl. Sessions Judge, Ahmednagar, in Sessions Case No.26 of 2007.

Appellant no.2 - Bhagaji (original accused no.2) in Criminal Appeal No.360 of 2017 expired during pendency of the appeal. Hence, the appeal stood abated as against him. The details of sentence imposed against appellants - Balshiram, Dnyandeo, Santosh and Nandabai are given in the tabular form below:-

Sections	Punishment
302 r.w. 149 of I.P.C.	R.I. for life and to pay fine of Rs.5,000/-, in default, to suffer R.I. for three months,
143 r.w. 149 I.P.C.	R.I. for 03 months and to pay fine of Rs.500/- each, in default, to suffer S.I. for one month
147 r.w. 149 I.P.C.	R.I. for 03 months and to pay fine of Rs.500/- each, in default, to suffer S.I. for one month
148 r.w. 149 I.P.C.	R.I. for 03 months and to pay fine of Rs.500/- each, in default, to suffer S.I. for one month
323 r.w. 149 I.P.C.	S.I. for 03 months and to pay fine of Rs.500/- each, in default, to suffer S.I. for one month
504 r.w. 149 I.P.C.	R.I. for six months and to pay fine of Rs.1,000/- each, in default, to suffer S.I. for two month

The substantive sentences are to run concurrently.

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

PW 2 - Jijabai is widow of Babaji, who hailed from village Wafarewadi, Tq.Parner, Dist. Ahmednagar. The deceased had agricultural land at the village. He was serving as Clearing Agent in Mumbai. He along with his wife and three children would, therefore, reside in Mumbai. Three years before the incident dated 31.10.2006,

his family members shifted to the village. The First Information Report (F.I.R., Exh.93) was lodged by PW 2 - Jijabai. It is her case that she has two brothers-in-law and four sisters-in-law as well. Her parents-in-law are alive. Her husband, deceased Babaji, would provide money for maintenance of all his brothers, sisters and parents. He had purchased agricultural land in the name of his brothers and their wives as well. Since, with the passage of time, his expenditure increased, he stopped providing financial assistance to them. His brothers, therefore, started troubling the informant and her children.

03. On 14/15.10.2006, Bajirao, brother of the deceased - Babaji, had assaulted Satish (son of Babaji). About eight days after the said incident, Babaji had come to the village for Diwali festival. It was 02.00 p.m. of 31.10.2006, Babaji (deceased), his wife PW 2 - Jijabai and their children namely, Mangal (Vishakha) and Satish were in their house on the field. The appellants came together. They told the informant that they propose to hold a meeting of family members on account of the incident of beating by Bajirao (since acquitted) to Satish. PW 2 - Jijabai inquired with them, what purpose would be served by holding such meeting since it was her son, who had been beaten up. Thereupon, the appellants started abusing her.

The appellant - Balshiram gave her threats. Babaji (deceased) inquired with him, whether all of them were going to beat them. The appellants, except Nandabai, therefore, went back to their *Vasti* and returned armed with sticks. The appellants - Balshiram and Dnyandev gave sticks blows on the head of Babaji. Babaji fell down. He was dragged along for some distance. While he was being dragged, the appellants - Santosh and co-accused Bhagaji beat him up with sticks. Jijabai intervened to save her husband. The appellant - Nandabai beat her up. All the appellants beat up Satish and PW 1 - Mangal as well.

04. Babaji was first rushed to Primary Health Centre (P.H.C.) at Takli-Dhokeshwar. Then, he was shifted to Dr.Veer's Hospital at Ahmednagar. The police had come to the hospital on the intervening night of 31.10.2006 and 01.11.2006. Jijabai lodged the FIR of the incident (Exh.93).

05. The Crime, vide C.R. No.259 of 2006, came to be registered for the offences punishable under Sections 307, 143, 147, 148, 323 and 504 read with Section 149 of Indian Penal Code. Babaji succumbed to the head injury on 02.11.2006. Section 302 of I.P.C., therefore, came to be invoked. Investigation of crime had already commenced. Scene of offence panchnama (Exh.98) was

drawn. Statements of the persons acquainted with the case were recorded. The appellants were arrested. The parents of the deceased and his brothers had also been arrested. Pursuant to the disclosure statement given by appellant - Balshiram, sticks (Articles 14 to 17) came to be seized. Medico-legal certificates of the injured were collected. On completion of the investigation, the appellants and others were proceeded against by filing charge sheet.

06. Learned Addl. Sessions Judge, Ahmednagar (trial court) framed Charge (Exh.29). The appellants and others pleaded not guilty. Their defence was of false implication. According to them, the deceased suffered injuries due to fall at his residence first and again, while being taken to the hospital on motor-bike.

07. The prosecution examined eleven witnesses and produced in evidence number of documents. The trial court, on appreciation of evidence, acquitted the original accused nos.6 to 10. The appellants came to be convicted and consequently, sentenced to various terms of imprisonment, as stated in the tabular form above.

08. Heard learned counsel for the parties.

09. Learned counsel for the appellants would submit that no independent witness has been examined. The trial court convicted

the appellants based on the testimony of interested witnesses namely, daughter and widow of the deceased. Genesis of the prosecution case has been suppressed. Had the appellant really rained stick blows, there would have been number of injuries on the person of the deceased. The deceased died of single head injury. According to them, even if we accept the case of the prosecution as it is, it could only be inferred that the appellants had intended or the common object of the so called unlawful assembly, was to cause hurt and nothing more. Our attention has been adverted to the injury certificates. According to them, PW 1 and PW 2 suffered simple and superficial injuries. They got themselves medically examined three days after the incident. The appellant – Nandabai was sister of deceased. No overt-act has been attributed her against. According to learned counsel, the appellants have been in jail since the date of pronouncement of conviction. They were also behind the bars during enquiry and investigation of the crime. Learned counsel, ultimately, urged for allowing the appeals.

10. Learned APP would, on the other hand, submit that it is an offence committed in furtherance of the common object of unlawful assembly formed by the appellants. Each one of them would be criminally liable for the offence of murder of Babaji, in view

of Section 149 of Indian Penal Code. According to learned APP, the deceased and his family members suffered injuries. The deceased was dragged for some distance. The scene of offence panchnama (Exh.98) indicates marks of struggle and dragging as well. The M.L.C. of the deceased and his family members have also been adverted to. According to learned APP, unlawful assembly can be formed on the spot as well. One who is not member thereof at the beginning, may join the same and share its common object. According to learned APP, no interference with the impugned judgment and order is, therefore, warranted. He relied on the judgment of the Apex Court in the case of **Naresh @ Nehru Vs. State of Haryana, (2023)10 SCC 134.**

11. Considered the submissions advanced. Let us advert to the evidence on record. The case is based on the eye-witness account of PW 1 and PW 2, daughter and widow of the deceased. The evidence, which would be relevant in deciding the present appeal, would only be referred to.

12. PW 2 – Jijabai is widow of the deceased. The couple was blessed with three children, Sandeep, Satish and Mangal @ Vishakha. All of them would reside in Mumbai. The deceased Babaji was working as Clearing Agent. About three years before the incident, the

widow and two children, i.e. Mangal and Satish migrated back to the village. The deceased had ancestral as well as self-acquired land at village Wafarewadi. His two brothers, parents and one of the sisters (Nandabai) were also residing at Wafarewadi. Houses of all of them were in the nearby of each others. Although it is the case of the informant that it was the deceased who would support his parents, brothers and sister financially, there is no much evidence in that regard. Same has, however, no much relevance. On 14/15.10.2006, Bajirao (brother of deceased) had beaten up Satish (son of deceased). The deceased had come to the village eight days thereafter, for Diwali festival. It was 02.00 p.m. of 31.10.2006, the deceased and all his family members were home. The appellants came their home. Appellant - Nandabai is real sister of deceased Babaji. Appellant - Balshiram is her husband. Bhagaji is Balshiram's father. Appellants - Dnyandev and Santosh are nephews of appellants - Nandabai and Balshiram. These appellants were noway concerned with the incident wherein, Bajirao had assaulted Satish. There is nothing in the evidence nor in the FIR to indicate the appellants to have ever been on inimical terms with the deceased or his family members. Even, they had no motive. The appellants had come to the residence of the deceased to tell him that a meeting of

the family members would be convened on account of the incident of beating Satish. Admittedly, the appellants were not armed when they first came to the residence of the deceased. PW 2 - Jijabai (informant) told them, 'what purpose would be served by holding a meeting since her son had been beaten up'. An oral wrangle, therefore, ensued between her and appellants - Balshiram and Dnyandev. It is in her evidence that these appellants told her that they would see (beat up) her and her family members. The deceased, thereupon, questioned both of them, whether they wanted to beat him up. Thereupon, the appellants, except Nandabai, went back to their *Vasti* and returned armed with sticks. It is in the evidence of both PW 2 - Jijabai and PW 1 - Mangal @ Vishakha, that both the appellants - Balshiram and Dnyandev gave stick blows one after another on the head of Babaji.

13. PW 1 - Vishakha (Mangal) testified the appellants, except Nandabai, to have said them "तुमचे आज आम्ही कामच करतो" (we will kill them today). She was confronted with the statement to the police, which is silent to record this matter (sentence). As such, the evidence of Vishakha @ Mangal that the appellants told them that they would finish them, was an improvement over her statement to police. It

appears to have been made with a view to attribute the appellants with "intention to kill". The evidence of both these witnesses indicate that Babaji was dragged to some distance. The appellants, except Nandabai, gave him stick blows. When both PW 1, PW 2 and Satish intervened, they were also beaten up.

14. There is evidence to indicate that Babaji was first rushed to P.H.C. of village Wafarewadi. Then, he was shifted to the hospital of Dr.Veer at Ahmednagar. He died of head injury. Although, both PW 1 and PW 2 were subjected to searching and lengthy cross-examination, nothing fruitful has come on record in support of the defence. The question is, whether based on the evidence of these two witnesses, coupled with the medical evidence, it could be said to be an offence of murder committed by the appellants in furtherance of common object of their unlawful assembly.

15. The post mortem report (Exh.132) indicates the deceased died due to head injury. PW 7 - Dr.Bapusaheb conducted post mortem. He noticed following two injuries on the person of the deceased:-

- 1) Sutured CLW over left parietal region over the left ear with "C" shape, "C" facing towards the ear with drain in place with signs of burr hole operation.
- 2) Fracture supra condylar left elbow.

Although the deceased was allegedly dragged on rough surface in the field, no other injury was noticed on his person. The scene of offence panchnama (Exh.98) indicate the soil at some distance from the scene of offence to have been not in order. Same could not be termed to be the marks suggesting the deceased to have been dragged, being relevant under Section 7 of Evidence Act.

16. So far as injuries of PW 1 and PW 2 and Satish are concerned, those are simple and superficial. After 3-4 days of the incident, they approached the civil hospital and obtained their injury certificates.

17. The injury certificates issued by P.H.C, Takli-Dhokeshwar indicates the following injuries to have been noticed on the person of the deceased:-

1. C.L.W. over right temporoparietal region of scalp 4 x 2 x 1 cm.
2. Contusion over left temporoparietal region.
3. Contusion over left elbow joint.
4. Right periorbital edema

Injury No.2 is said to be contusion occurred as a result of injury no.1. As such, the medical evidence on record indicates the deceased to have suffered a head injury and fracture over left elbow. Admittedly, there was no enmity between the appellants on one hand and the

deceased and his family members, on the other. The appellants had been to the residence of the deceased with a view to convene a meeting of all the family members. It appears that Some quarrel ensued between them and the deceased and his widow. The appellants, except Nandabai, returned to their *Vasti*, which is located nearby of the house of the deceased. Admittedly, all of them are agriculturists. Their *Vasti* (houses) were on the field itself. Being agriculturists, the articles like axe, sickle and scythe, etc., are presumed to be readily available with them at their residences. None of them came with such an article. Same suggests that none of them had an intention to do away with Babaji. The appellants, except Nandabai, were armed with sticks. What kind of sticks those were, has not been proved. Although, pursuant to the disclosure statement made by appellant - Balshiram, four articles (Articles 14 to 17) came to be seized, the C.A. report thereof indicates none of the sticks bears blood stains. There is also nothing to suggest the deceased to have been assaulted with the very sticks.

18. For ascertaining, whether it is an offence of murder/culpable homicide not amounting to murder, reference to Sections 299, 300 and 304 of Indian Penal Code is a must. We propose to reproduce the same for better appreciation.

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 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.

Moreover, Sections 141 and 149 of Indian Penal Code also need to be adverted to.

141. Unlawful assembly — An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is—

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.....

Third. - To commit any mischief or criminal trespass, or other offence; or

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149. Every member of unlawful assembly guilty of offence committed in prosecution of common object — If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

Explanation to Section 141 of Indian Penal Code indicates that an assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

19. The evidence on record indicates that the appellants, who were five in number, had come to the house of the deceased

only with a view to tell that a meeting was proposed to be convened. It was not an unlawful assembly when they first came to the house of the deceased. After an oral wrangle, the appellants (four in number), except Nandabai, went back to their *Vasti* and returned armed with sticks. Same suggests that it was not an act of unlawful assembly. Their coming back to *Vasti* and returning with sticks, would lead to infer that it was their common intention to assault the deceased, meaning thereby, to cause him hurt. There is, however, evidence to indicate the appellant – Nandabai to have joined them and even participated in assaulting PW 2 – Jijabai. Thus, the unlawful assembly of the appellants got formed.

20. The sticks, seized pursuant to the disclosure statement made by appellant – Balshiram, could not be said to have been used in committing the offence. As such, there is no evidence to suggest what kind/nature of sticks were used. There was, no premeditation and no prior enmity as well. True, a single blow of stick was proved to be fatal. It is reiterated that had the appellants really intended to kill Babaji, they would have come with sharp weapon. Their coming together armed with sticks indicates that they had intended/or a common object of their assembly, which was formed

instantaneously was to cause grievous hurt. The injury to elbow was grievous in nature since it caused fracture. The appellants are, however, to be presumed to have knowledge that anyone of them may inflict a forceful blow on the vital body part of Babaji. As such, the knowledge that anyone of them would make fatal assault, has to be attributed to one and all of them. Had the appellants really intended to kill the deceased, all of them would have rained stick blows either on his head, face or any other vital part of his body. Two injuries were noticed on his person. One is head injury and other being fracture to left elbow.

21. In our considered view, the appellants could be said to have formed an unlawful assembly with the common object of causing grievous hurts. At the same time, they are to be presumed to have knowledge that anyone of them may assault on the vital part of the body of deceased, which may prove fatal. The second limb of Section 149 of Indian Penal Code speaks about knowledge of any of the members of unlawful assembly as to nature of offence likely to be committed in prosecution of the common object. To be precise, Section 149 of Indian Penal Code is *".....or such as the members of that assembly knew to be likely to be committed in*

prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence". As such, in our view, it would be an offence punishable under Section 304 Part II of Indian Penal Code.

22. Since nothing further has been argued by any of learned counsel for the appellants, we are inclined to allow the appeals by simply converting the conviction for offence under Section 302 read with Section 149 of Indian Penal Code into the offence under Section 304 Part II read with Section 149 of Indian Penal Code. We are not inclined to interfere with the order of conviction for rest of the offences.

23. It is reiterated that the deceased died of head injury, which was caused by a single blow of stick given by appellant – Balshiram. Another injury in the nature of fracture of elbow of the deceased was there. It is, however, not clear from the evidence, as a result of whose assault, the said injury has been caused. As such, appellant – Balshiram is being held guilty for offence under Section 304 Part II of Indian Penal Code and other appellants are being held guilty for the offence punishable under Section 304 Part II of Indian

Penal Code, based on the principle of constructive criminal liability (Section 149 of IPC).

24. The Apex Court in the case of **Dalip Singh and others Vs. The State of Punjab, AIR 1953 SC 364**, has observed :-

40.In cases where the facts are more fully known and it is possible to determine who inflicted blows which were fatal and who took a lesser part, it is a sound exercise of judicial discretion to discriminate in the matter of punishment. It is an equally sound exercise of judicial discretion to refrain from sentencing all to death when it is evident that some would not have been if the facts had been more fully known and it had been possible to determine for example, who hit on the head or who only on a thumb or an ankle; and when there are no means of determining who dealt the fatal blow, a judicial mind can legitimately decide to award the lesser penalty in all the cases. We make it plain that a Judge is not bound to do so, for he has much right to exercise his discretion one way as the other. It is impossible to lay down a hard and fast rule for each case much depend on its own facts. But if a Judge does do so for reasons such as those indicated above, then it is impossible to hold that there has not been a proper exercise of judicial discretion.”

The Apex Court in the case of **Hiralal Mallick vs. The State of Bihar, (1977)4 SCC 44**, has observed :-

6. When a crime is committed by the concerted action of a plurality of persons constructive liability implicates each participant, but the degree of criminality may vary depending not only on the injurious sequel but also on the part played and the circumstances present, making a personalised approach with reference to each. Merely because of the fatal outcome, even those whose

intention, otherwise made out to be far less than homicidal, cannot, by hindsight reading, be meant to have had a murderous or kindred *mens rea*. We have, therefore, to consider in an individualised manner the circumstances of the involvement of the appellant, his nonage and expectation of consequences.....

25. The facts of the present case indicate that appellant – Nandabai did not assault her deceased brother. Although, other appellants (four in number), allegedly, assaulted the deceased with stick blows, two injuries were noticed on his person. One is head injury caused by appellant – Balshiram. The prosecution could not make out the case as to who was author of the other injury (fracture of elbow). In our view, therefore, we would be justified in exercise of judicial discretion to discriminate in punishment/quantum of sentence.

26. In the result, the appeals partly succeed. Hence, the following order:-

- (i) The appeals are partly allowed.
- (ii) The judgment and order dated 01.08.2017 passed by learned Addl. Sessions Judge, Ahmednagar, in Sessions Case No.26 of 2007, to the extent of convicting and sentencing the appellants for the offence punishable under Section 302 read with Section 149 of Indian Penal Code, is set aside.

Instead, the appellants are convicted for the offence punishable under Section 304 Part II read with Section 149 of Indian Penal Code.

(iii) The appellant - Balshiram Bhagaji Wafare is sentenced to suffer rigorous imprisonment for nine years and to pay a fine of Rs.5,000/-, in default, to suffer rigorous imprisonment for three months, for the offence punishable under Section 304 Part II read with Section 149 of Indian Penal Code.

(iv) The appellants - Dnyandev s/o. Sonyabapu Wafare and Santosh s/o. Kisan Wafare are sentenced to suffer rigorous imprisonment for six years and to pay a fine of Rs.5,000/- each, in default, to suffer rigorous imprisonment for three months, for the offence punishable under Section 304 Part II read with Section 149 of Indian Penal Code.

(v) The appellant - Nandabai is directed to suffer rigorous imprisonment for the period, which she has already undergone, and to pay a fine of Rs.5,000/-, in default, to suffer rigorous imprisonment for three months, for the offence punishable under Section 304 Part II read with Section 149 of Indian Penal Code.

(vi) The appellant - Nandabai need not surrender back to jail.

(vii) The appellants - Dnyandev s/o. Sonyabapu Wafare and Santosh s/o. Kisan Wafare be released forthwith, if not required in any other case.

(viii) Rest of the judgment and order dated 01.08.2017 passed by learned Addl. Sessions Judge, Ahmednagar, in Sessions Case No.26 of 2007, to stand unaltered.

[NEERAJ P. DHOTE, J.]

[R.G. AVACHAT, J.]

KBP