

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 242 OF 1998

Vinayak Sahebrao Furde
Age 38, Resident of Kandalgaon,
Now resident of Dhake Wadi
Kasba Peth, Barsi,
District Solapur ...Appellant

Vs.

The State of Maharashtra ...Respondent

ALONGWITH
CRIMINAL REVISION APPLICATION NO. 40 OF 1998

Raghunath Bhagwat Nawale ...Applicant
vs.
Vinayak Sahebrao Furde and Anr. ...Respondents

Mr. Pawan Mali – Appointed Advocate for the Appellant
Mr. S. R. Agarkar - APP for the Respondent-State

CORAM : S. M. MODAK, J.
RESERVED ON : 14th DECEMBER 2023
PRONOUNCED ON : 11th JUNE 2024

JUDGMENT :-

1. An old man aged 60 years was killed by pulling him down and throwing a stone on his head on 24/03/1997 in the agricultural field on Barshi-Arangaon Road, District Solapur. The assailant was comparatively

young, aged 38 years. Though prosecution for an offence punishable under Section 302 of the Indian Penal Code was launched, after trial, the Court of Additional Sessions Judge, Solapur convicted him for the offence punishable under Section 304 (II) of the Indian Penal Code. The sentence is 5 years of Rigorous imprisonment and a fine of Rs. 2,000/-.

2. There was a political rivalry amongst both of them prior to the incident. This rivalry had come under two context. Was there any reason to falsely implicate the Appellant? The F.I.R. was filed by PSI Katkar attached to Barshi Police Station on 24/03/1997. He is not an eyewitness to the incident of assault. He was on patrolling duty. It was a Dhulivandan day. When he reached Bhosale square at about 5.30 p.m., he was informed by PW-2 Ramesh Kale about assault by a young person on aged person and his family members took the assailant into custody.

3. As part of duty, PSI Katkar went to the spot and took the assailant i.e. the Appellant into custody and also shifted the dead body of Bhagwat Nawale to the hospital. Appellant was dropped in the Police station. During preliminary inquiry, he came to know about Court cases against Nawale party and Furde party. Appellant is from Furde family. Whereas deceased belongs to Nawale family. He concluded murder was the outcome of anger. That is why, when it was suggested during evidence, trial Court refused to

accept suggestion of false implication.

4. When it was suggested during trial that murder is an outcome of political rivalry, on this aspect prosecution examined PW-9-Raghunath Nawale being son of the deceased Bhagwat. He is not eye witness to the incident. He has thrown light on the previous quarrels amongst Nawale party and Furde party. However trial Court has not believed this as a motive for committing murder. Trial Court has also elaborated why the previous enmity cannot be considered as a reason for this Appellant to eliminate the deceased. (para no. 45)

Judgment of trial Court

5. It is true that the trial Court has not believed few of the circumstances believed by the prosecution so to say previous enmity as a motive, blood of deceased as blood group “o” found on the shirt of the deceased. At the same time, trial court has refused to give benefit to the defence about few lacunae in prosecution evidence, so to say, not carrying out arrest panchnama immediately at Police station when Appellant was brought at 5.45 p.m.. (Whereas it was carried out at 10 p.m. on the same date).

6. There was a dilemma in prosecution evidence so to say “if political rivalry is there, how deceased and Appellant ate consumables (Bhajji) together and walked together from Jawahar Hospital (Where witness PW 8

parks his hand cart to the place of incident at village Khandalgaon”). After scrutinizing the entire evidence, trial Court concluded about Appellant being responsible for killing the deceased but has not considered it as a murder.

7. After hearing Mr. Mali for the Appellant and learned APP and after going through the evidence, I find no fault in the conclusion drawn by the trial Court. **There are two proceedings before me.** One is the appeal filed by the Appellant/accused and **another** is the revision filed by son of the deceased. Neither Appellant’s advocate appeared nor the son’s Advocate. That is why Advocate Mali was appointed to represent Appellant. There is a prayer for remanding the matter in the revision. This Court has heard learned APP on that point also.

About the trial Court judgment

8. With their assistance, I have read the judgment. It is true that it is a very lengthy and detailed one (page no. 129 to page no. 207) **There is no restriction on number of pages of judgment.** The only crux is you must deal with issues raised and give findings with reason. It should not be verbose. It is true that this judgment was delivered in the year 1997. It is also true that there is also change in pattern of judgment due to passage of time.

9. Now a days we also notice that if various contentious issues are

involved, judges have developed the practice of shortlisting the issues at the beginning by encapsulating them and then giving a finding on every issue (we have also seen this practice followed in many judgments dealing with important issues).

10. When I have tried to read the judgment of trial Court, what I find is that the issues are scattered for e.g. *“if issue of spot is there, I find observations at different places instead at one place”*. In such an eventuality, it becomes difficult though not impossible to locate the observations. This could have been avoided by giving titles. That is why Mr. Pawan Mali was kind enough to give synopsis containing the issues involved and relevant page number of the judgment.

Prosecution case

11. Before going through the evidence, the prosecution case needs to be understood. The Appellant plies an auto rickshaw at Barshi. Whereas deceased-Bhagwat works a weighman in the Barshi market yard. The incident took place in the agricultural field on Barshi Arangaon road, at village Kandalgaon on 24/03/1997. There is a distance of 7-8 kms in between village Barshi and village Kandalgaon. Those are two groups in the village Kandalgaon. One called Nawale group. Deceased-Bhagwat though not a leader but is from the Nawale group. Whereas Appellant-Vinayak is a

member of Furde group but not a leader.

Background/motive

12. Deceased-Bhagwat was a Sarpanch of Kandalgaon gram-panchayat for 15-16 years. In the judgment, trial Court has discussed about motive for commission of crime (para no. 42, running page 188). I could not locate from which part of evidence, trial Court has quoted two reasons for quarrel. They are as follows:-

- a) After 1991 - a person from Furde group was Sarpanch.
- b) Furde group took over ration shop which was earlier looked after by Nawale group.
- c) Member from Furde group also became Chairman of Narsingh Deosthan and it was earlier under chairmanship of Nawale group.

Whereas Furde group members including Appellant beat Chandrakant Nawale and Baban J. Nawale on 01/03/1991. Deceased Bhagwat and his son Raghunath-PW9 were also beaten. There was a case instituted under Sections 147, 148, 149, 323, 324 of the Indian Penal Code. There was insistence by Appellant and others to withdraw the case by the deceased Bhagwat. They went one step ahead. Two months earlier to this incident, Appellant and others threatened the deceased Bhagwat of dire consequences if the case is not withdrawn (para 1 of PW 9 Raghunath).

About motive

13. It is always said that human life is complicated. One cannot judge how a person behaves in a particular manner on particular occasion and same person behaves in contradictory manner on another occasion. Trial Court was faced with same difficulty while appreciating the evidence adduced by the prosecution on two kinds of evidence. Trial Court opined that the motive for commission of offence is not proved. The evidence is as follows:-

- a) **Evidence of Raghunath** son of deceased-PW 9 on the point of motive (page no. 85)
- b) **Evidence of cart owner Pramod Gawali-PW8** (on 24/03/1997 firstly the deceased and secondly the Appellant went to his cart for eating consumables).

Trial Court observed if they are at loggerheads against each other, how they can go together (para 44 at page 191 of the judgment)

Actual incident

14. After eating consumables, both the deceased and Appellant went in the **direction of Rajdhani Pan Centre**. After passing from the house of **Ramesh Kale- PW 2**, both went ahead towards village – Arangaon. They were described as **old person** wearing Gandhi cap, shirt and dhoti and

another person who wore pant and shirt. It was at about 5 pm. There was quarrel in between them. Due to push given by young person, old person fell on the ground. **Young person put his leg on the chest of old person and threw stone on the head of the old person.** The old person succumbed to the injuries. He was **deceased-Bhagwat**. Whereas young person is none other than the **Appellant-Vinayak**. When he was about run away from the spot, he was caught by the villagers. It was also informed to PSI Katkar. He came on the spot and took Appellant into custody and shifted dead body to the hospital.

15. On this background, he himself lodged F.I.R. against the Appellant. Appellant was charged for committing an offence punishable under Section 302 of the Indian Penal Code. After trial, Appellant was convicted for an offence punishable under Section 304(II) of the Indian Penal Code. **During trial prosecution examined 13 witnesses on following points:-**

a) motive for the offence

PW 9	Raghunath Bhagwat Nawale, son of the deceased (page no. 85)
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b) Last seen theory

PW 8-	Pramod D. Gawali- Cart holder (page no. 83)
PW 2	Ramesh S. Kale (Page no. 55)

c) Actual incident of assault

PW 6	Dhananjay Kale (Page no.72)
PW 7	Chandrakant Govind Pawar (page no. 79)

d) Post Assault arrest

PW 2	Ramesh Kale (Page no. 55)
PW 6	Dhananjay Kale (Page no.72)
PW 7	Chandrakant Govind Pawar (page no. 79)

e) Taking custody at the spot

PW1	PSI Katkar (page no. 47)
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f) Panchnama

PW 3	Suresh Mohite -spot (page no. 59)
PW 4	Dhondiram Naik (page no. 65)

g) Map

PW 5	Abdul K. Shaikh – TILR (page no. 69)
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h) Identification of dead body

PW 10	Shankar Nawale – nephew of deceased (page no. 89)
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i) Post Mortem doctor

PW 12	Dr. Bharat Gaikwad (page no. 100)
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j) Investigation

PW 11	P. C. Jahagirdar – Carrier – Page no. 91
PW 13	PI Dhure – IO- page no. 105

Trial Court felt it necessary to visit the spot. It was on the application of learned APP. Report is there on record.

Homicidal death

16. Death is homicidal when it is unnatural. It is neither suicidal nor accidental/natural. Someone is responsible. In ordinary parlance, it is called as culpable homicide. Relevant Section is 299 of the Indian Penal Code. However law makes a distinction Culpable homicide is not always a murder. Section 300 of the Indian Penal Code lays when culpable homicide is murder and when it is not a murder.

17. Section 302 of the Indian Penal Code lays down the punishment. If it is not a murder, then Section 304 of the Indian Penal Code lays down the punishment. However this issue will arise later on. First of all, it has to be seen whether it is culpable homicide. The relevant evidence is :-

- a) Inquest Panchnama
- b) Post-mortem report

c) Evidence of M.O.

Findings of the trial Court

18. On the basis of evidence of PW12- Dr. Gaikwad, Trial Court concluded that deceased met with Homicidal Death on 24/03/1997. Dr. has noticed 4 injuries on the dead body of Bhagwan. I do not find any reason to disagree to this conclusion. Cause of death is cardiac arrest due to injury to brain as a result of fracture of frontal bone of the skull cavity (Exh. 42 is the **Post mortem report**). The **inquest panchnama** is at Exh. 13 (Page no. 39).

Evidence about spot of incidents

19. There is a reference of various houses, fields in the prosecution evidence. Trial Court has taken all the pains in understanding the situation at the spot. Though they are nearer to each other, **broadly there are two spots.** One is the spot **where actual assault took place** and second **the spot where the Appellant Vinayak was caught.** The evidence on this aspect consist of :-

a) **PW 5- TILR**

b) **PW 3- Spot panch**

Through the evidence of **PW 5**, the prosecution has brought on record the map at Exh. 30. Whereas through **PW No. 3-Suresh Mohite**, the prosecution has proved the spot panchnama at Exh. 30. So also, we have got

spot inspection report (Exh. 68) on page no. 122 prepared by Learned Additional Sessions Judge. It was prepared in the presence of learned APP and learned Defence counsel. So there is ample material on record to show the description of the spot.

20. In para nos. 22 and 23 of the judgment, the trial Court has also discussed the situation at the spot. So also, the relevant findings are in para no. 28 and para no. 30. As said above, reference of two spots has come. It is the place where the deceased was assaulted and second is the place where the deceased was taken into custody. The following are the details:-

- a) The Barshi - Arangaon Road is west east direction.
- b) The spot is situated on north side of the road in the agricultural field of one Anil Mulge.
- c) At that spot, the soil was wet due to falling of blood.
- d) One big stone was lying having blood stains. So also, one small stone was also lying there. It was human blood (Exh. 55, page no. 112). Even the soil was seized. It was having human blood.
- e) There is a house of Subhash Mulge on the eastern side towards the village Arangaon. The distance is 388 feet from the spot. The learned Trial Judge after visiting the spot, noted one can see what is happening at the spot from the house of Subhash Mulge. (This

Subhash even though participated in catching the Appellant, defence's contention that he was not examined and it is a lacunae).

- f) There is a stream-let (nala) on western side of the spot and it was in the north-south direction.
- g) There is a house of PW No. 2- Ramesh Kale and shop of Govind More on the western side of that stream-let (after assault Appellant left the spot and went towards the shop of Govind More and from there towards the house of one Kondabai).
- h) The house of Kondabai is situated on the southern side of the main road and it is on western side of the stream-let.

21. The evidence of prosecution witnesses is challenged by the Appellant for the reason that it is not possible to witness the incident and prosecution story is improbable but when above circumstances on the spot are considered and relevant findings are considered, contention on behalf of the Appellant cannot be accepted.

Evidence of witnesses

22. It is true that prior to the incident the witnesses were neither knowing the deceased nor the Appellant. The body of the deceased was shifted from the spot to Jawahar hospital by PW 1-PSI Katkar. His body was identified by one Shankar Nawale – PW 10 (Nephew of deceased).

Not holding Test Identification Parade

23. There is much stress by learned Advocate Mr. Mali about not conducting Test identification parade and on that account of the testimony of the eye witnesses cannot be believed. **This objection has got relevance in the context of two sets of witnesses.** One is **PW 8 – Pramod Gawali** (Who has sold the eatables to the deceased and the Appellant on 24.03.1997 at about 3.30 p.m. They were his usual customers. Even he was not knowing them. After the incident he saw the Appellant in the court at the time of giving evidence.

24. Evidence of this witness was adduced to prove the circumstance of last seen together prior to the incident. It is also true that the deceased went to his cart on his bicycle and he kept his bicycle there only and Police noticed that bicycle on the next day. The evidence of this witness was discarded by trial Court on account of not holding of parade (para 19, page 146 and 147). The identification in the Court was not believed for the reason that there is a doubt about correct identification in the Court.

25. The conduct of TIP is having a reference from the point of evidence of three witnesses. They are

- a) PW-2 Ramesh Kale,
- b) PW6- Dhananjay Kale and

c) PW 7- Chandrakant Pawar.

Even though parade is not conducted, their evidence cannot be discarded for the reason that the assailant i.e. the Appellant was taken into custody by the villagers and he was handed over to PSI Katkar.

About injuries to Appellant

26. For this piece of evidence, there is an additional circumstance. There are injuries noticed on the body of the Appellant when he was examined by PW 12. Dr. Gaikwad (page 100). **The medical certificate of the accused is at Exh. 49 (page 104).** Three minor injuries were noticed. According to the prosecution, these injuries were caused during the scuffle between PW6-Dhanjay and the Appellant, Appellant hits the private part of the witness and by way of retaliation he hits the Appellant and that is why the injuries.

27. The Appellant has challenged this part of the evidence for the reason that there is delay in examining the Appellant and PI- Ranjit Dhure (PW 13) refused to take him to hospital. It was denied by PI-Dhure. The trial Court has elaborately dealt with this circumstance in para no. 40, page no. 182.

28. Trial Court also noticed loopholes in the theory put by the Appellant *“about injuries caused to him due to fall”*. Appellant has pointed out some inconsistencies in between the evidence of Panch witness PW-4 and of

Doctor. It is in respect of blood coming from the nose of the Appellant. It was considered as minor. Trial Court has not believed the evidence of panch witness because he was habitual.

About arrest

29. The arrest panchnama was effected on 24.03.1997 from **10.00 pm to 10.30 p.m.** (page 67). Whereas PW 12 has examined him at **9.10 p.m.** PSI-Katkar dropped the accused at Barshi Police Station at about **5.45 p.m.** and went to Jawahar Hospital with the dead body. At that time PW 13-PI Ranjit Dhure was present at the Police Station (page 105). He arrested the accused at 10.00 p.m. He admits during cross that during 6 pm to 10.00 p.m., the Appellant was at Police Station (Para 7, page 110). Trial Court has not considered it as major. I agree.

30. From the evidence of PI- Dhure what transpires is that he has given priority to visiting the spot and collection of materials. It is true that he ought to have arrested the accused earlier, but the F.I.R. was registered at 7 p.m. on 24/03/1997 (Exh. 23). No doubt there is a lapse in not arresting the accused on earlier occasion, but this does not belies the prosecution case. Taking the custody of the Appellant from the villagers on 24/03/1997 and bringing him to Police Station are important circumstances. **If it is so, I do not find that not conducting the parade will affect the prosecution case.**

About motive

31. It is true that, the case is based on direct as well as circumstantial evidence. The prosecution has alleged the previous enmity as the motive for commission of murder. There is also evidence of PW 9-son of Deceased, However, trial Court has not believed his evidence. (para 45, page 194). It is for the reason that it has not come in the evidence as to why both the Appellant and deceased were proceeding together and that too when there are cases. *“If there is previous rivalry how they can walk together”* is an aspect considered by the trial Court but that is why it is said that human behaviour is difficult to judge. One cannot predict why two person behave in a particular way and in a contrary way on another occasion. It is true that only they can tell what was the interaction in between them on that date or “a person who might have heard” can state it. But it is not there. I do not want to upset that findings. Suffice to say, in a case when there is a direct evidence, motive need not be proved mandatorily.

About false implication

32. It is also true that trial Court has overturned the defence contention of false implication of the Appellant. The discussion finds place in para no. 47 page no. 196. It is true that the F.I.R. is lodged by PSI Katkar prior to arrival of the son of the deceased. In the F.I.R. he has stated about the

previous cases and that is the reason for murder. He was not having personal knowledge. However, he said so on the basis of the inquiry made with PW-10 Shankar who is the nephew of the deceased. **I find no reason to upset those findings.**

Evidence of PW No. 2

33. PW No. 2- Ramesh and **PW No. 6** Dhananjay had seen two persons proceeding from Arangaon Road. They were proceeding towards Arangaon. The old man was wearing a gandhi cap, shirt and dhoti and the young man was wearing pant and shirt. It is true that father PW No. 2-Ramesh has not referred the name of his son and Dhananjay as sitting along with him. **This is highlighted on behalf of the Appellant. This contention is correct.** There is no reference of Dhananjay in the evidence of his father Ramesh. But this ground is not sufficient to entirely discard the evidence of Dhananjay. Only the portion relating to “*witnessing two persons passing from their house*” **needs to be excluded.**

34. The evidence of PW 2- Ramesh is on two aspects. One witnessing two persons passing from his house at 5 p.m. and witnessing catching hold the young person and then informing the Police. There are no contradictions in his evidence. Trial Court trusted him. He was not acquainted with the deceased or the accused. Para 24, page 153.

About evidence of PW Nos. 6 and 7

35. Trial Court has also believed the testimony of PW6 Dhananjay and No. 7 Chandrakant Pawar. They have witnessed the evidence from different spots. **Dhananjay** had gone for nature's call. Whereas PW 7- **Chandrakant** had gone for swimming in the well situated in the field of Rajabhau Raut on Arangaon Road and at 5.15 p.m., he was proceeding to his house. Trial Court has not noticed any material inconsistencies in their evidence. Both of them have witnessed the quarrel in between the old man and the young man. Young man pushed the old man. Old man fell down whereas young man put his leg on his chest and threw a big stone on his head.

Not examining material witness

36. Both of them referred of Subhash Mulge. Mr. Mali emphasized that Mr. Mulge was not examined and that is a serious lacunae in the prosecution case. It is true that Chandrakant has referred about Subhash for taking the help. Dhananjay has also referred his name when the assailant was proceeding hurriedly towards Barshi side. Subhash Mulge tried to catch him near the shop of Govind More. However, assailant escaped and tried to run away towards the stream-let, where the Dhananjay was sitting for Nature's call. From there the Assailant went ahead towards the house of Dhananjay when Dhananjay, Subhash and Ishwar tried to catch him.

37. **There was a scuffle between Dhananjay and the Assailant.** Assailant caught the private parts of Dhananjay and he gave a blow to assailant and that is why there were injuries. He was caught near the house of Kondabai Kale. **The evidence of these two witnesses is corroborated on material particulars.** There are few omissions in the evidence of Dhananjay but they are minor in nature. It is dealt with by the trial Court in para no. 34, page no. 172.

38. The trial Court has also noticed whether it was possible for these two witness to witness from their respective places. The findings of the trial Court gains importance because the learned trial Judge has also visited the spot. PW 6-Dhananjay has said about arrival of PW7-Chandrakant when old person was lying in a pool of blood, he has not said about Chandrakant passing by the road when Dhananjay was sitting for nature's call.

39. Trial Court found both these witnesses as natural witnesses (para 36, page no. 175). **After going through the evidence, I do not find any fault in their evidence. They are natural witness and they were knowing neither of the Appellant nor deceased. They are not interested in any one of them. That is why, their evidence gains importance.**

Oaths Act

40. It is true that Mr. Mali has raised an objection about competency

about PW 6-Dhananjay to give evidence. It is true that at the time of giving evidence, he was of 16 years. Mr. Mali referred to two provisions of law :-

a) **Provision of Section 4 of the Oaths Act.**

To buttress his submissions he relied upon the observations in the case of *Pradeep Vs. The State of Haryana*, in Criminal Appeal No. 553 of 2012, dated 05/07/2023.

b) **Section 118 of the Evidence Act.**

41. Whereas according to learned APP those objections are not applicable because witness was above 12 years. I am not upholding the objections raised by Mr. Mali. It is true that anyone can give evidence in Court. There is no age bar. It is also true that the witness is required take oath as per Section 4 of the Oaths Act.

42. We have to read both the provisions harmoniously. Section 118 of the Evidence Act talks about competency of a witness, whereas Oaths Act mandates taking oath prior to giving evidence. **A person is incompetent to give evidence if :-**

- a) He cannot understand the nature of question put to him.
- b) he cannot give rational answers to those questions.

Section 118 lays down three contingencies wherein a witness is not competent :-

- a) by tender age,
- b) extreme old age
- c) by any disease of body or mind
- d) any other cause of the same kind.

43. It is true that law has not laid down what can be 'tender age'. It depends upon facts and circumstances. The provisions of subsection (1) to Section 4 of the Oaths Act 1969 lays down the category of persons to whom oath shall be administered. It includes :-

- a) witnesses,
- b) interpreters
- c) jurors.

There is proviso to this sub-section. It deals with a contingency where the child going to be examined is under 12 years of age. The proviso says to such witness:-

- a) the forgoing provisions of this Section means Section 4 and
 - b) provisions of Section 5 (it talks about affirmation instead of oath)
- will not apply.

However this exclusion is subject to following conditions :-

- a) Court is of the opinion that the witness understands the duty of speaking truth,

Even though he may not understand the duty of speaking truth still there is

one more rider. His evidence is still admissible in absence of oath/affirmation and he is under obligation to tell truth.

However when question of giving of oath arises, a child under 12 years of age can give evidence without administering oath to him. However the Court has to form an opinion that the witness understands the duty of speaking the truth, even though he may not understand the nature of oath.

44. On careful scrutiny of this proviso, the following principle emerges :-

- a) witness understands duty of speaking truth.
- b) even though he may not understand the nature of oath/affirmation,
- c) this satisfaction is arrived by the Court who is going to record the evidence,
- d) then the earlier provisions (foregoing) of Section 4 (relating to giving of oath) is not applicable.
- e) the provisions of Section 5 will not be applicable.
- f) Still such witness is not relieved from telling the truth.
- g) his evidence is not invalid just because oath/affirmation is not administered.

45. It is true that Oaths Act 1969 has repealed the erstwhile Indian Oaths Act 1873. If child is above 12 years of age, the proviso to Section 4 will not be applicable. In the judgment quoted, the witness was 12 years of age.

Going strictly by the age mentioned in the proviso, though the Hon'ble Supreme Court has observed that proviso to Section 4 of the Oaths Act will not be applicable, however, Supreme Court pinpointed the responsibility of the trial Judge to record an opinion about understanding of the witness (para 7). Conviction was set aside for one of this lacunae.

46. The ratio will not be applicable to this case because PW- 6 was 16 years of age at the time of giving of evidence. It is true that in his evidence, there is no opinion expressed by the Court about intelligence of the witness but when his evidence is perused, we can find that oath is administered to him. I have seen English and Marathi deposition from the trial Court record. It is true that competent age to enter into contract is 18 years. The Oath Act and Section 118 of Evidence Act does not refers to any age suitable for giving oath. Proviso only talks about 12 years of age. The learned trial Court Judge when has given oath, he must be satisfied that oath can be administered to PW 6. Oath need not be administered if the child is below 12 years. This is not the case herein. Furthermore, the evidence is not in admissible if there is an omission to take oath. This is the mandate of Section 7 of the Oaths Act.

47. From the above discussion, I hold that the evidence of Dhananjay cannot be discarded.

Evidence of PW 1

48. This witness comes into picture when he met PW2-Kale while on patrolling duty @ 5.30 p.m. on 24/03/1997. From PW 2 he got information about the assault committed by one person on another person and also about the assailant being caught by the villagers. Immediately, he went to the spot and noticed a person lying on the road and there was a head injury with bleeding. He noticed two stones lying there. The villagers introduced the Appellant as assailant. He took the Appellant and the dead body and dropped the Appellant at Barshi Police Station and went with the dead body at Jawahar hospital. So even though this witness is not an eye witness to the incident, of assault, certainly he is a witness about the situation prevailing at the spot.

49. His testimony was challenged on the ground of not lodging of F.I.R. in time and not arresting the accused in time. The trial Court has dealt with evidence on page no. 173, para no. 38. It is true that it is the job of police to collect the materials which can be subsequently produced before the Court. Facts stated to the Police during investigation is not substantial evidence. What is substantial evidence is facts stated by a witness before the Court, preceded by statement to Police. So whatever stated to him by PW 2 and other villagers is not admissible. However, what PW 1 had seen on the spot

is admissible.

50. It was the priority for PW-1 to shift the dead body to Hospital than to complete the formalities of Panchnama and F.I.R.. He had chosen himself to be the first informant and he lodged the F.I.R. @ 7 p.m. on 24.03.1997 (Exh. 23). It was lodged for the offence punishable under Section 302 of the Indian Penal Code. When the doctor has declared Bhagwat Nawale as dead and then it was expected for him to lodge the F.I.R.. He came to Police Station to lodge F.I.R. and further investigation was done by PI Dhure-P.W.

13. I do not find any lacunae or lapse on his part.

51. Trial Court has convicted the Appellant under Section 304 instead of Section 302 of the Indian Penal Code. The relevant discussion finds place in para no. 53, page no. 202. As I have believed the evidence of prosecution, there is no question of setting aside the conviction under Section 304 of the Indian Penal Code.

52. There is a prayer on behalf of the son of deceased to remit the matter as legal issues involved, even though there is no appearance on behalf of the son, this Court can certainly decide the revision. The trial Court has given elaborate reason for not convicting the Appellant under Section 302 of the Indian Penal Code. The trial Court concluded that there was no intention on the part of the Appellant to kill the deceased. Whereas, the incident took

place owing to certain quarrel and in the heat of passion. Trial Court further observed that there was only one blow of the stone. There was no pre-meditation. Though Trial Court observed that there was no material to show who gave the provocation but trial Court inferred in favour of the accused that the provocation was of such nature, so as to compel the Appellant to assault with stone. Trial Court observed the intention to cause a bodily injury which is likely to cause death is absent. Trial Court concluded only knowledge can be attributed and it is about causing injury which is likely to cause death. As per exception 1 to Section 300 of the Indian Penal Code, culpable homicide will not be murder, if death is caused due to provocation.

53. There is a difference in part 1 and part 2 of Section 304 of the Indian Penal Code. If there is intention to cause death or bodily injury which is likely to cause death, it falls under Part 1. If there is any knowledge that death will be caused, it falls under part 2. Trial Court has rightly convicted the Appellant under Section 304(II) of the Indian Penal Code. I do not find any fault in the said conclusion. It has already come in evidence of PW 6 and 7 about the quarrel in between this assailant and the deceased. Stone was not taken by the Appellant alongwith him. It was used from the ground only that is why there is no pre-meditation and with provocation intention

to kill is absent because there was only one blow.

54. I want to add my reasoning to the conclusion drawn by the trial Court. Section 300 is species of Section 299 of IPC. All culpable homicides are not murders. The contingencies prescribed u/s. 299 IPC are elaborated in Section 300 of IPC. Furthermore, first 3 parts of Section 300 deals with intention whereas fourth part deals with knowledge. Then what is the difference between culpable homicide which is murder and culpable homicide which is not murder. Broadly there are two categories which makes the difference. Category first when act even though falling under 3 clauses may not be an act of murder if it falls under any of the five exceptions. Here there is focus on 'intention'. Then it is not a murder and it will fall under Section 304(I) of IPC. Category second when knowledge is imputed (fourth clause) but act does not satisfy ingredients of clause four, then it is an offence under Section 304(II) of IPC.

55. For two reasons trial Court concluded that it is not an act of murder. First there is no intention but knowledge and second it falls under exception of grave provocation.

56. The trial Court has given a modest sentence and no reduction is warranted. So also I do not find any illegality in not convicting him for Section 302 of the Indian Penal Code. Hence following order :-

ORDER

- a) Appeal is dismissed;
- b) His bail bond stands cancelled. Trial Court to take necessary steps by issuing warrant.
- c) Revision is also dismissed.

57. I must appreciate the able assistance given by Mr. Pawan Mali appointed by the legal aid. His fees be paid as per Rules.

[S. M. MODAK, J.]