

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

CRIMINAL APPEAL NO. 22 OF 2015

- 1) Eknath Laxman Shinde
Age : 27 years, Occ. : Vegetable Seller,
R/at : Kute Wada, Opp. : Maruti Temple,
Akurdi Gaonthan, Pune.

- 2) Bhaishya Asaram Pardeshi
Age : 24 years, Occ. : Service,
R/o : Indira Gandhi Chowk,
Bhima Kalbhor Chawl,
Akurdi, Pune.

.... Appellants
(Original accused nos.1 and 2)

v/s.

The State of Maharashtra
(Through Nigdi Police Station,
Pune)

..... Respondent

**WITH
CRIMINAL APPEAL NO. 1053 OF 2022**

Abhijeet @ Chochya Ashok Sangare
Age : 35 years, Occ. : Driver,
R/o. Giriraj Housing Complex,
Bldg. No.A, Room No.12, Bijalinagar,
Chinchwad, Pune.

.... Appellant
(Original accused no.3)

v/s.

The State of Maharashtra
(Through Nigdi Police Station,
Pune)

..... Respondent

Mr. Daulat G. Khamkar for the Appellants in APEAL/22/2015.
Mr. Aashay B. Topiwala a/w. Mr. Vrushabh M. Savla for the Appellant
in APEAL/1053/2022.
Mrs. A.A. Takalkar, APP for the State.

**CORAM : A.S. GADKARI AND
SHYAM C. CHANDAK, JJ.**

**RESERVED ON : 12th JANUARY, 2024.
PRONOUNCED ON : 8th MARCH, 2024.**

JUDGMENT [PER : SHYAM C. CHANDAK, J.] :-

1) Present Appeals are directed against the Judgment and Order dated 12th December 2014, passed by the learned Additional Sessions Judge, Pune in Sessions Case No.570/2012 whereby Appellants (*hereinafter referred to as 'accused Nos.1, 2 and 3'*) have been convicted under Section 302 read with Section 34 of the Indian Penal Code (*for short 'the I.P.C.'*) and sentenced to suffer imprisonment for life and to pay a fine of Rs.2,000/- each i/d. to suffer rigorous imprisonment for one month and further been convicted for the offence punishable under Section 37 (1) r/w. Section 135 of the Bombay Police Act and sentenced to suffer rigorous imprisonment for four months and to pay a fine of Rs.500/- each i/d. to suffer rigorous imprisonment for 15 days. The substantive sentences are directed to run concurrently.

1.1) Initially, Criminal Appeal No.22/2015 was jointly filed by all the three accused. Later on, accused no.3 filed a separate Appeal being Criminal Appeal No.1053/2022. Hence, both Appeals are decided by this common Judgment.

2) Heard Mr. Daulat Khamkar, learned Advocate for the accused nos.1 and 2, Mr. Vrushabh M. Savla, learned Advocate for the accused no.3

and Ms. A.A. Takalkar, learned APP for the Respondent-State. Perused entire record.

3) The prosecution case leading to the Appeals is as under :-

3.1) In May 2012, Manisha Shingade (PW5) her mother-Mangal Shingade (PW2), brother-Aakash and uncle-Balkrishna Shingade (PW6) were residing at Ajinkya Tara Housing Society Pradhikaran at Nigdi, Pune. The first informant-Rukmini Barge (PW1), her son-Prashant (*hereinafter referred to as 'the deceased'*) and family were also residing in the same society.

3.2) On 03rd May 2012, at about 11:30 a.m., at Amardeep Chowk, while Manisha (PW5) was returning home from college along with her friend-Revati, accused No.3 teased her. Immediately, Manisha informed this incident on phone to Mangal (PW2) who conveyed the same on phone to Balkrishna (PW6). In turn, Balkrishna phoned the deceased and asked him to go to the spot. Accordingly, the deceased went there along with Mangal. Then Mangal asked the accused No.3 as to why he is harassing Manisha. The deceased also tried to give an understanding to accused No.3, however, he behaved adamantly and threatened the deceased with dire consequence. Meanwhile, public gathered there, hence the accused No.3 went away. Thereafter deceased, Manisha and Mangal returned home.

3.3) On the same day, at about 02:30 p.m., after having lunch the deceased was sitting at the door of his house. His mother Rukmini (PW1)

was at home. At that time, accused No.1 Eknath @ *Ekky* came there along with his two companions (accused nos.2 and 3), armed with iron bar and wooden log. Then, they all assaulted the deceased on his head and leg by said weapons in their hands. The commotion attracted the attention of Rukmini, Mangal, Sandeep, Manisha and Balkrishna (PWs 1,2,4,5 and 6 respectively) and they came at the spot. Balkrishna (PW6) tried to intervene, but one of the assailants threatened him. Meanwhile people gathered there, hence the accused persons ran away.

3.4) The said assault resulted in head injury and fracture to right leg etc. of the deceased. Immediately, Sandeep (PW4) removed the deceased to Lokmanya Hospital, Nigdi by car of Mr. Khamkar and admitted there giving the history of assault followed by a fall from a height of 10 feet. Dr. Modak (PW12) examined the deceased, noted his injuries and forwarded the M.L.C. Report (Exh.58) to police.

3.5) In turn, PSI Tekawade (PW15) went to Lokmanya Hospital. The deceased was not in a condition to give statement. Then PSI Tekawade returned to the police station along with Rukmini (PW1) where she lodged the report (Exh.19). Accordingly, this C.R. No.107/2012 was registered under section 325 read with 34 of I.P.C. by PHC Gawari. On the same day, PHC Gawari recorded the spot panchanama (Exh.35). PSI Tekawade did the initial investigation, during which he recorded the statement of witnesses and seized the blood stained clothes of the deceased on 04th May 2012

under seizure panchanama (Exh.69). The injuries being serious, offence under section 307 of the I.P.C. was added.

3.6) During further investigation, API Bhosale (PW16) arrested the accused nos.1 and 2 on 06th May, 2012 and accused no.3 on 07th May, 2012. There were injury marks on the body of accused No.3 at the time of his arrest. On 07th May 2012, the deceased was shifted to the hospital of Dr.Phalke (PW10) *i.e.*, Max Neuro Hospital, Kasarwadi. On 8th May 2012, accused Nos.1 and 2 made disclosure statement leading to recovery of iron bar (Exh.42 & 43-Article No.1) and wooden log (Exh.61 & 62, Article No.2) respectively. On 9th May 2012, accused nos.1 to 3 recovered their clothes by leading to the house of maternal uncle/their house respectively. The same were seized under seizure panchnama (Exh.87).

3.7) The deceased expired on 11th May 2012. PSI Kailase recorded the inquest panchnama (Exh.53) and referred the body for postmortem examination. On 12th May 2012, between 00:40 hrs and 01:20 hrs, at YCM Hospital, Dr. Rokade (PW11) held the postmortem and issued the P.M. Report (Exh.55) reserving his opinion as to the cause of death. On 13th May 2012, API Bhosale (PW16) recorded the supplementary statement of the witnesses. On 14th May 2012, API Bhosale added the charge under section 302 of I.P.C. and forwarded the viscera samples etc. and the seized *muddemal* articles to Pathology Department, BJ Medical college and C.A. respectively. On referring the viscera, histo-pathological report etc., Dr.

Rokade (PW11) gave the final opinion as to the cause of death as “Complications following head injury” (Exh.56).

3.8) On completion of investigation, API Bhosale (PW16) submitted the charge-sheet in the Court of Judicial Magistrate First Class at Pimpri, District Pune. After complying with Section 207 of Cr.P.C., the learned Magistrate committed the said case to the Court of Sessions. The trial Court framed the charge (Exh.8). The charge was read over and explained to the accused persons in Marathi vernacular. The accused persons pleaded not guilty to the charge and claimed to be tried. The defence of the accused persons was of denial and false implication.

3.9) To bring home the charge of accused persons, the prosecution has examined total 17 witness and produced various documents in evidence. Closure of the prosecution evidence was followed by recording statement of the accused persons under Section 313 of Cr.P.C. The accused persons did not examine to self nor examined any witness in their defence.

3.10) The learned Judge of the trial Court after considering the evidence in the light of the rival arguments, convicted and sentenced the accused persons as noted above.

4) In view of the rival submissions, the questions that arise for determination are whether death of the deceased is homicidal and whether the accused persons committed murder of the deceased in furtherance of their common intention by assaulting the deceased by means of iron bar

and wooden log, and thus they are guilty of the offence punishable under Section 302 r/w. 34 of the I.P.C. and under Section 135 of the Bombay Police Act.

4.1) Even though the prosecution has examined 17 witnesses, the evidence of Rukmini, Mangal, Sandeep Manisha and Balkrishna (PWs 1,2,4,5 and 6 respectively), who are eye witnesses to the incident, is most relevant for deciding the Appeals. The medical evidence is also important to be discussed.

4.2) Besides the testimony of the above witnesses, the prosecution has also relied upon recovery of the weapons and blood stained clothes at the instance of the accused persons pursuant to their disclosure statement. Learned Advocates for the accused persons have not taken any serious exception to that. We are, therefore, not discussing on the said aspect in great detail for the brevity.

5) As regards the genesis of the prosecution case, Manisha (PW5) has categorically deposed that on 03rd May 2012, at about 11:00 a.m., at Amardeep Chowk, while she was returning from College with her friend, the accused no.3 met her there and told that he wants to speak to her. Hence, she got frightened and gave a phone call to Mangal (PW2) through the phone of friend Revati and informed her the aforesaid act of accused No.3. This narration is corroborated by Mangal (PW2) as she testified that at the relevant time, she had received the information of the above incident

on a phone call by Manisha (PW5). Thereafter, as deposed by Rukmini, Mangal and Balkrishna (PWs 1,2 and 6), Mangal informed to Balkrishna about the phone call by Manisha (PW5), hence, Balkrishna immediately contacted the deceased on phone and asked him to go to the spot along with Mangal. Accordingly, both went to the Chowk. Cumulatively, the testimony of Mangal and Manisha (PW2 and 5) shows that, when Mangal and the deceased arrived at Amardeep Chowk, they found that the accused no.3 was talking with Manisha. Therefore, Mangal objected to the accused no.3 as Manisha did not want to talk with him. At this juncture, the deceased also pacified the accused no.3, however, the latter threatened the deceased not to interfere otherwise he would see him (deceased). Absolutely, there is no inconsistency or lacunae in the aforesaid evidence of Rukmini, Mangal, Manisha and Balkrishna (PWs 1,2,5 and 6). The said testimony of the four hardly saw any challenge in the cross-examination. They and the deceased were residing in the same society. As such, it being a matter of concern about the teenaged girl and the deceased being young man, it is natural that Balkrishna would ask the deceased to help out the situation in which the young girl was. Therefore, we have no hesitation to rely upon the said version.

6) Having given enough clarity as to the genesis of the occurrence, now we turn to the evidence as regards the assault on the deceased. Rukmini (PW1) has testified that, on 03rd May 2012, at about

02:30 p.m., the deceased was sitting at the door of the house. At that time, accused No.1 and his 2 associates came there armed with stick and iron rod and assaulted the deceased on his head and leg. As a result, the deceased sustained injury to head and fracture to right leg and fell down. She raised a hue and cry, therefore, the accused persons ran away. This evidence is very consistent with the FIR (Exh.19) which was lodged immediately after admitting the deceased in the said Hospital.

6.1) In support of the above evidence, Mangal (PW2) has deposed that, at the time of incident, she was at home. Immediately after hearing commotion on account of the incident, she rushed to the gallery of her house and saw that, the accused persons were assaulting the deceased by iron bar and stick. She and Balkrishna (PW6) came down. The latter intervened, however, one of the assailants manhandled him, picked up a rod to assault and threatened him not to intervene. Meanwhile, other members of the Society gathered there. Hence, the accused persons fled from the spot.

6.2) From the testimony of Sandeep Sawant (PW4) we get that, on 3rd May he was at home. At about 2:30 p.m., he heard noise of commotion coming from out side. Hence, he came out of his house and saw that, the deceased was running towards his house (PW4's). Two-three boys were following the deceased abusing as 'आई घाल्याला मारा' 'पळु देऊ नका'. Out of them, one was armed with wooden log and one with iron bar. Sandeep

deposed that then he came at the spot where the deceased was lying on the ground. At that time, the accused no.1 and his 2 associates went away.

6.3) In so far as the evidence of Manisha (PW5) is concerned, she has deposed that at the time of incident, she, Mangal and Balkrishna (PWs 2 and 6) were residing on the 1st floor and the deceased was residing at the ground floor in the same building. On 3rd May 2012, she was at home. At about 2:30 p.m., on hearing shout coming from the backside of her building, she, Mangal and Balkrishna came down and saw that the accused no.3 Abhijeet and 2 unknown boys were assaulting the deceased by iron bar and wooden log. Balkrishna tried to intervene, but one of the assailants threatened him not to intervene otherwise they will kill him. People gathered there, hence the assailants fled from the spot.

6.4) Balkrishna (PW6) has testified that, at the relevant time he was at home. At that time he heard noise of commotion from backside of his house. Immediately, he came down and saw that, three boys were assaulting the deceased by means of wooden log and iron bar. He tried to intervene but one of the boys rushed on his person holding iron bar and threatened him as, 'if you intervene, you will be killed'. People gathered there, hence the assailants ran away.

7) The aforesaid assertion of Rukmini, Mangal, Sandeep, Manisha and Balkrishna (PWs 1,2,4,5 and 6) that, in all three persons assaulted the deceased by means of iron bar and wooden log did not shatter in their

cross-examination in any manner so as to disbelieve the same. Their presence at the scene of occurrence is natural. Therefore, they are worthy of reliance. Accordingly, we hold that the deceased was assaulted as above.

8) From the evidence of Rukmini, Mangal, Sandeep, Manisha and Balkrishna (PWs 1,2,4,5 and 6) coupled with the evidence of Dr. Modak (PW12) and the M.L.C. Report (Exh.58), it is proved that, Sandeep (PW4), Balkrishna (PW6) and one Mr. Khamkar took the deceased by car to Lok Manya Hospital, at Nigdi. The deceased had an injury to head, pain and swelling at right leg, bleeding punctured wound at right leg middle 1/3rd, scalp haematoma over right temporal region and abrasion over the left elbow. There was history of loss of consciousness. Hence, an emergency decompression *i.e.* right fronto-temporo-parieto craniotomy was done by Dr. Umesh Phalke (PW10) on the same day. The aforesaid evidence corroborates with the testimony of Rukmini, Mangal, Sandeep, Manisha and Balkrishna (PWs 1,2, 4,5 and 6) that three persons had assaulted the deceased.

9) The evidence of Rukmini (PW1) and Dr. Phalke (PW10) is that on 07th May 2012, the deceased was shifted to Max Neuro Hospital of Dr. Phalke. The deceased was unconscious. The deceased was operated for large hemorrhage on right side of the brain. He was kept on artificial respiration. Dr. Phalke deposed that, the deceased was medically treated and its entries were taken by him and resident doctors from time to time.

Lastly, Dr. Phalke deposed that, the deceased expired on 11th May 2012. In this regard, Dr. Phalke has referred the indoor case papers (Exh.49).

9.1) The abovesaid oral and documentary evidence has virtually went unchallenged in the cross-examination.

10) Dr. Rokade (PW11), Medical Officer and the autopsy surgeon, has deposed that, he performed the autopsy on 12th May 2012, between 00:20 hrs. to 01:20 hrs., at YCM Hospital, at Pimpri He had found following external and internal injuries on the body of the deceased :-

EXTERNAL INJURIES Column No.17 :-

(i) Stitched wound, right side scalp, right sided fronto tempero parietal craniotomy wound seen extending from the hair line frontal region in front thence upwards behind and backward parietal region thence laterally and downwards upto the upper aspect of the ear, 22 cms with intact 18 sutures, semicircular, Huge heamatoma underneath with craniotomy wound right frontal temporal and parietal bone size 12 cms x 10 cms with organized extradural clots noted with bulging of the meninges found incised under the craniotomy brain injury as mentioned in column 19 (iii).

(ii) Contused abrasion- right upper limb, at the axilla anterior aspect, upper arm mid aspect, 2 cms x 1 cms and 1 cm x 1 cm, irregular.

- (iii) Injection mark - right supra calvicular region, over the anterior triangle of jugular area, blood stained area noted, pin point, irregular.
- (iv) Contused abrasion - right upper limb, over the right elbow to forearm bluish black in colour, 10 cms x 5 cms x 1 cm, diffused, heamatoma underneath.
- (v) Contused abrasions - right upper limb, at the right upper arm, 5 cms x 2 cms, diffused, heamatoma underneath.
- (vi) Contused abrasions - right upper limb, over the right quadriceps 2 cms x 1cm, irregular, ecchymosis underneath.
- (vii) Healing contused abrasions - left upper limb, over the patellar region of knee, 2cms x 1cm, irregular Ecchymosis underneath.
- (viii) Infected tracheostomy wound - mid aspect of neck, in the midline of the neck, with ragged inverted margins, 1.5 cms diameter, oval, thick blood stained mucoid secretion with heamorrhagic areas in and around the wound.
- (ix) Contused abrasions - back, left side scapula in the midaspect, 5 cms x 2 cms, irregular, Ecchymosis.

INTERNAL INJURIES Column No.19 :-

- (i) Injuries under the scalp – on exploration of craniotomy wound healing with granulation tissue at the margins, with huge

heamatoma under the right frontoparieto temporal region with organised clots seen over the exposed brain tissues under the craniotomy site.

(ii) Injuries as regards to skull – right frontoparieto-temporal craniotomy of size 12 cms anteroposteriorly and 10 cms transversely heamatoma in and around craniotomy site with extradural clots noted.

(iii) Injuries as regards to brain – Meninges incised under the craniotomy site with bulging of brain tissue, brain soft edematous with subdural and subarachnoid heamorrhages seen over the right temporal lobe anterolaterally 3 cms x 2 cms, posteriorly heamatoma 3 cms x 3 cms.

(iv) As regards to thorax – tracheostomy 1.5 cm diameter with ragged margins with heamorrhagic in and around the wound with thick mucoid blood stained frooth.

(v) Injuries regarding right lung – Adhesions anteriorly, firm cut section congestion with edematous blood with lower lobe consolidation.

(vi) Injuries regarding left lung – partly collapsed firm to spongy, pale upper lobes cut section congestion with edematous blood with lower lobe consolidation.

10.1) Dr. Rokade (PW11) has deposed that, the internal injuries were

corresponding to the external injuries as mentioned in column No.17. The injuries in column No.17 and 19 were antemortem. The injuries at Sr.No.1, 3 and 8 in column No.17 were surgical wounds. The injuries nos.2,4,5,6,7 and 9 can be caused by hard and blunt object like wooden log. The injury no.1 to the brain with corresponding internal injury to the brain was sufficient to cause death of a person in an ordinary course of nature. Accordingly, he issued the P.M. Report (Exh.55). After receiving the histopathological report, he issued the final cause of death as “complications following head injury” (Exh.56).

10.2) The aforesaid evidence of Dr. Rokade (PW11) has been substantiated by his P.M. Report (Exh.55). Nothing significant has emerged in the cross-examination to disbelieve his said testimony, P.M. Report (Exh.55) and the final cause of death (Exh.56). Thus, it has supported the testimony of Rukmini, Mangal, Sandeep, Manisha and Balkrishna (PWs 1,2,4,5 and 6) that the deceased was assaulted by means of iron bar and wooden log.

10.3) In the cross-examination of some eye witnesses it has come that there is a wall near the spot of incident, where the deceased was assaulted. In the cross-examination Dr. Rokade (PW11) has admitted that, the injury to brain mentioned at Sr. No3 in column No.19 without external injury to head may be possible due to fall or assault. In the M.L.C. (Exh.58) it is noted that, there was history of assault followed by fall from a height of

10 feet. In view of these facts, it has been argued on behalf of the accused persons that, the deceased had a fall as above, consequently he suffered the head injury. The said injury developed complications leading to the death of the deceased. But we completely disagree with this argument because no suggestion was given in the cross-examination to any eye witness that, the deceased had a fall as above and it caused him only internal head injury. Secondly, the evidence as to height of the wall is varying. Thirdly, there was no reason for the deceased to climb the wall. Fourthly, the history noted in the M.L.C. (Exh.58) was given by Mr. Sandeep Yadav, who was not an eye witness. Therefore, there is no hurdle to hold that, the death of the deceased was a direct result of the injuries caused to him due to assault by three persons by means of iron bar and wooden log.

10.4) In view of the above discussion, we hold that, the death of the deceased was homicidal.

11) Now we deal with the question of identity of the accused persons. In this regard it is important to note that, before the trial Court, Mangal and Manisha (PWs 2 and 5) have identified the accused no.3 as the same person who teased Manisha. Similarly, Rukmini, Mangal, Sandeep, Manisha and Balkrishna (PWs 1,2,4,5 and 6) have identified to all the accused persons as the assailants of the deceased.

12) In this context, in the F.I.R. (Exh.19) Rukmini (PW1) has only stated that accused no.1 *Ekky*a Shinde and his 2-3 associates assaulted the

deceased as above. However, name of accused nos.2 and 3 were not stated therein. Rukmini has deposed that, from police she came to know the name of accused nos.2 and 3, but this fact is not stated in the F.I.R. (Exh.19). In the cross-examination Rukmini has admitted that, she had never seen the assailants/accused persons prior to the incident. She has not given the description of the assailants in the F.I.R. (Exh.19). Sandeep (PW4) was with her in the car while taking the deceased to Lokmanya hospital. She was in the hospital till 6:30 p.m. and then she went to lodge the F.I.R. (Exh.19).

12.1) In the cross-examination Mangal (PW2) has admitted that, she had not seen the accused persons in her society prior to the incident. Mangal has admitted that, even after admitting the deceased in the hospital, she did not disclose to Rukmini (PW1) that she knew the accused no.3. Mangal has admitted that, on the same day, at about 6:00 p.m. to 6:30 p.m. Rukmini met her and at that time she had disclosed the name of accused no.3 to Rukmini. However, name of accused no.3 is not stated in the F.I.R. (Exh.19). In the cross-examination, Sandeep (PW4) has admitted that, he was not knowing the assailants prior to the incident. In the cross-examination, Manisha (PW5) has admitted that, before shifting the deceased to the hospital she had disclosed the name of accused no.1 Abhijeet as '*Chochya*'. Manisha has admitted that, at that time she was not knowing that the name of accused no.3 is Abhijit. Manisha has admitted that, on the next day of the incident her friend Rajeshwari Gaikwad told her

the name of accused no.3 Abhijit as '*Chochya*'. Rukmini (PW1) has deposed that, on 6th May 2012, police had called her in the police station, police shown her the accused persons and she identified them as the assailants of the deceased. In the cross-examination Sandeep (PW4) has admitted that, on 08th May, 2012 police had arrested three persons and they were shown to him, Rukmini and other members of his society. Balkrishna (PW6) has deposed that, on 08th May, 2012 police had called him in the police station, at that time the accused persons were in police custody, he saw the accused persons there and then identified them as the assailants of the deceased.

12.2) In view of the above evidence, learned Advocates for the accused persons have submitted that, since beginning Rukmini, Mangal, Sandeep, Manisha and Balkrishna (PWs 1,2,4,5 and 6) were not knowing the accused who had teased Manisha (PW1) and the assailants of the deceased. Description of said assailants is not stated in the F.I.R. (Exh.19). However, name of accused no.1 is stated in the F.I.R. (Exh.19) and even though the name of accused no.3 was revealed before lodging the F.I.R. (Exh.19), his name was not mentioned therein. That apart, no Test Identification Parade was held to confirm the identity of the assailants of the deceased and instead, the accused persons were directly shown to the said witnesses in the police station and then their alleged identity has been confirmed, which is illegal. Therefore, the identity of the accused persons before the trial Court by the aforesaid eye witnesses (PWs 1,2,4,5, and 6) is

neither reliable nor admissible in evidence without a corroborative evidence which is very much lacking in this case.

12.3) However, we are not in unison with the aforesaid arguments. In this regard it is important to note that, on the day of incident, Mangal and Manisha (PW2 and 5) had seen the accused no.3 twice that too within a short interval. The incident of teasing Manisha (PW5) was very peculiar and it had occurred in day time. As such, it was very fresh in the memory of Mangal and Manish when they witnessed the assault on the deceased. In the cross-examination of Mangal it has come that, except accused no.3, the other accused were unknown to her. In the cross-examination of Manisha it has come that, she was knowing the accused no.3 by face. These facts indicate that, the accused no.3 has not disputed his identity by Mangal and Manisha (PWs 2 and 5). In the cross-examination of Rukmini (PW1) it has come that, she came to know the name of accused No.1. at the time of incident and from police she came to know the name of accused nos.2 and 3. API Bhosale (PW16) has deposed that, on 6th May 2012, he was taking search of all the accused.

12.4) Considering the aforesaid facts and the evidence as a whole, according to us, it is highly probable that, immediately after the assault, all the eye witnesses started inquiring about the accused no.3 and others with him as only accused no.3 had teased Manisha (PW5) and in that process, Rukmini (PW1) got the name of accused no.1 and hence, she immediately

lodged the F.I.R. (Exh.19). However, being in trauma, she did not inform the source from which she got the name of accused no.1. Further, it is probable that, in due course, the police confirmed the involvement of accused nos.1 to 3 in the assault and arrested them. Hence, only Rukmini, Sandeep and Balkrishna (PWs 1,4 and 6) were called at the police station to identify the accused persons. The incident of assault had occurred in day time and it went on for about 2 minutes. As such there was sufficient time and opportunity for the witnesses to see and observe the appearance of the accused persons sufficiently and retain it in memory to identify them before the trial Court convincingly. Probably therefore, the Investigation Officer avoided to hold the Test Identification Parade. There is no iota of evidence that, the aforesaid witnesses have identified the accused persons at the instance of police. Said witnesses have no Axe to grind against the accused persons. Therefore, the irregularity *i.e.*, showing accused persons to witnesses in the police station and non holding of the TIP will not be sufficient to upset the identification of accused persons by the witnesses. In view of these circumstances, no fault can be found with the finding of the learned Judge of the trial Court that, the accused no.3 was the same person who teased Manisha (PW5) and all the accused persons are proved to be assailants of the deceased.

13) In view of the genesis of the assault on the deceased, weapons used in the offence, nature of the injuries and assertion by Dr.Rokade

(PW11) that the injury to head was sufficient in the ordinary course of nature to cause death, learned APP submitted that, the act of causing homicidal death of the deceased has been well covered by Section 300, Clause 3rdly of the I.P.C., therefore, the learned Judge of the trial Court was right in holding the Appellants guilty of the offence punishable under Section 302 r/w. 34 of the I.P.C and sentencing them, accordingly. Therefore, the Appeals be dismissed.

13.1) As against this, learned Advocates for the respective accused have submitted that, considering the facts and circumstances of the case, the impugned conviction can be brought down to the offence punishable under Section 304 of the I.P.C. and the accused persons may be sentenced accordingly. In this regard, the learned Advocates have submitted that, even though the accused persons were armed with iron bar and wooden log, there was only blow to the head of the deceased. Most of the other injuries were simple except the fracture to right tibia-fibula 1/3rd. Thus, it is clear that, the accused persons did not take disadvantage of the fact that, the deceased was defenceless. The injury to the head immediately did not prove fatal. All this indicate that, the homicidal death of the deceased was committed without intention and premeditation in a sudden fight in the heat of passion upon a sudden quarrel. Accordingly, the Appeals may be decided.

14) Considering the controversy raised by the rival submission it is

apposite to refer here the decision of the Hon'ble Supreme Court in the case of *Anbazhagan v/s. The State, Cril. Appeal No.2043 of 2023*, cited by Mr. Topiwala, learned Advocate, wherein in para 60 (4) and (5) it has been enunciated as under :-

“60 (4).....Even if single injury is inflicted, if that particular injury was intended, and objectively that injury was sufficient in the ordinary course of nature to cause death, the requirements of Clause 3rdly to Section 300 of the I.P.C., are fulfilled and the offence would be murder.

60 (5).....Section 304 of the I.P.C. will apply to the following classes of cases: (i) when the case falls under one or the other of the clauses of Section 300, but it is covered by one of the exceptions to that Section, (ii) when the injury caused is not of the higher degree of likelihood which is covered by the expression 'sufficient in the ordinary course of nature to cause death' but is of a lower degree of likelihood which is generally spoken of as an injury 'likely to cause death' and the case does not fall under Clause (2) of Section 300 of the IPC, (iii) when the act is done with the knowledge that death is likely to ensue but without intention to cause death or an injury likely to cause death.

To put it more succinctly, the difference between the two parts of Section 304 of the IPC is that under the first part, the crime of murder is first established and the accused is then given the benefit of one of the exceptions to Section 300 of the IPC, while under the second part, the crime of murder is never established at all. Therefore, for the purpose of holding an accused guilty of the offence punishable under the second part

of Section 304 of the IPC, the accused need not bring his case within one of the exceptions to Section 300 of the IPC”.

15) In the case in hand, from the evidence of Dr.Phalkhe, Dr.Rokade and Dr.Modak (PWs 10, 11 and 12) coupled with the Indoor Case Papers, Summary Sheet, P.M. Report and M.L.C. Report (Exhs.49, 50, 55 and 58) it is clear that, there was only one injury to head i.e. ‘*scull heamatoema*’ meaning thereby said injury is attributable to only one weapon and single blow. The evidence of API Bhosale (PW16) and arrest panchnama (Exh.64) show that, at the time of arrest, the accused no.3 had nail abrasions over chest and right neck with an abrasion over right wrist. The deceased was assaulted just 2-3 hours after the incident of teasing to Manisha (PW5). At that time, accused no.3 had threatened to the deceased. These circumstances indicate that as the deceased objected the accused no.3 for he teased Manisha (PW5), the accused no.3, being a young man took the accused nos.2 and 3 with him. Then they went just to beat the deceased, to teach him a lesson. At that time scuffle took place between accused no.3 and the deceased, therefore the accused persons assaulted the deceased. However, unfortunately one blow was given on the head resulting in a serious injury leading to death of the deceased.

15.1) Dr.Modak (PW12) was the first one who examined the injuries of the deceased and medically treated him. However, he did not give the size of the injury to head. It is not the case that, the blow to head by means

of hard and blunt object had resulted in a fracture to the skull. As noted in the M.L.C. Report (Exh.58), on 1st admission the deceased was obeying all verbal commands and moving all his four limbs. The injury to head immediately did not prove fatal as the deceased survived for 7 days after the incident. These circumstances clearly indicate that, even though the accused persons were carrying two weapons, they restricted themselves to only one injury on the vital part of the body (head) and that too without exercising much force, otherwise there would have been at least a fracture to the skull like to the right tibia-fibula. As noted above, the deceased died due to complications following the head injury. These circumstances clearly indicate that, the homicidal death of the deceased was without premeditation, in a sudden fight, in the heat of passion upon a sudden quarrel and without the accused persons having taken undue advantage of the defenceless condition of the deceased or acting in cruel or unusual manner. Moreover, from the evidence it is not certain as to which accused dealt that blow to the head. Therefore, we find it difficult to conclude that, the injury to head was caused intentionally.

15.2) However, looking to the external and internal nature of the head injury coupled with the fracture caused to the right leg of the deceased, it is safe to conclude that, the injury to the head was inflicted with the knowledge that it is likely to cause death. Therefore, the homicidal death of the deceased is not murder. Yet, said act of the accused persons is

certainly falling in Section 304 (Part-II) read with Section 34 of the I.P.C.

15.3) To support our conclusion above, we have considered the decision in the case of *Ganga Dass alias Godha v/s. State of Harayana, 1994 Cri.L.J. 237*, cited by Mr. Khamkar, learned Advocate, wherein the Doctor had found only one injury on the head of the deceased and that was due to single blow inflicted with an iron pipe. Having regard to the circumstances of the case, it was difficult to hold that, the accused intended to cause death nor that, he intended to cause that particular injury. The deceased was operated but unluckily he expired 18 days after the incident due to septicemia and other complications. Therefore, the conviction under Section 302 of I.P.C. was altered to Section 304 (Part-II) I.P.C.

16) Conspectus of the above discussion is that, considering the evidence on record and the facts and circumstances established therefrom, this Court is of the view that, the act of causing death committed by the accused persons in furtherance of their common intention comes within ambit of Section 304 (Part-II) read with Section 34 of the I.P.C. However, it cannot be ignored that, the act of the accused persons took the life of an innocent young man who just wanted to correct the accused no.3 as he teased a young girl. There is need to keep under control such instances of teasing young girls, which are common and often become reason for another offence and sometime to serious one. Therefore, stringent punishment should be imposed on the accused persons for the offence of

Section 304 (Part-II). Considering the evidence, we find no error on the part of the learned Judge of the trial Court in so far as the impugned conviction and sentence under Section 37(1) read with 135 of the Bombay Police Act is concerned.

16.1) Hence, the following Order :-

(a) The impugned Judgment and Order dated 12th December 2014 is quashed and set aside and instead the Appellants-Eknath Laxman Shinde, Bhaishya Asaram Pardeshi and Abhijeet @ Chochya Ashok Sangare are held guilty for commission of crime under Section 304 (Part-II) read with Section 34 of the I.P.C. and are sentenced to suffer rigorous imprisonment for a period of ten years and to pay a fine of Rs.25,000/- each, in default of payment of fine to further undergo rigorous imprisonment for one year.

(b) The impugned conviction and sentence for the offence punishable under Section 37(1) read with Section 135 of the Bombay Police Act is upheld.

(c) Both the sentences to run concurrently.

(d) Record indicates that, the Appellants/accused nos.1 and 2 were arrested on 06th May, 2012 and accused no.3 was arrested on 07th May, 2012. The Appellants/accused nos.1 and 3 are in jail till today and thus have undergone entire sentence including in default sentence. Therefore, they are entitled to be released from jail forthwith, if not required in any other case/cases.

(e) The Appellant Bhaishya Asaram Pardeshi (accused no.2)

was granted bail by this Court on 31st August 2015, therefore his bail bonds stand surrendered. Accordingly, Appellant Bhaishya Asaram Pardeshi (accused no.2) shall immediately surrender before the trial Court to undergo the remaining substantive sentence.

(f) Appeals are partly allowed in the aforesaid terms.

17) As per record, the Appellants Eknath Laxman Shinde and Abhijeet @ Chochya Ashok Sangare *i.e.* accused nos.1 and 3 are lodged in Kolhapur Central Prison and Yerwada Open Prison, Pune respectively, and therefore the learned A.P.P. is directed to communicate present operative part of Order to the Superintendent, Kolhapur Central Prison and Yerwada Open Prison, Pune, immediately.

18) All concerned to act on the basis of an authenticated copy of this Judgment and Order.

(SHYAM C. CHANDAK, J.)

(A.S. GADKARI, J.)

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