

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.514 OF 2013**

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| 1. Amol Ankush Parge | |
| Age 22 years, Occu. Electrician | .. |
| 2. Santosh Baban Parge | |
| Age 33 years, Occu. Rickshaw Driver | .. (Abate) |
| 3. Anil Ankush Parge | |
| Age 19 years, Occu. Electrician | .. |
| 4. Ganesh Rohidas Parge | |
| Age 24 years, Occu. Plumber.. | |
| 5. Baban Sopanrao Parge | |
| Age 66 years, Occu. Agriculturist | .. |
| 6. Ankush Baban Parge | |
| Age 54 years, Occu. Labour | |
| All R/o. Pargewadi, | |
| At Agalambe, Post Kudje, | |
| Taluka Haveli, District Pune | .. Appellants
(Original accused
Nos.1 to 5 and 8) |

vs.

The State of Maharashtra	
(Through Abhiruchi Police Station)	.. Respondent

Mr. Nitin Pradhan, Senior Advocate with S. D. Khot, Ameeta Kuttikrishnan, Shehen Pradhan, Shambhavi Desai, Anthony Nadar and Danish Patel for the Appellants.

Mr. Shreekant V. Gavand APP for the Respondent-State.

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

**RESERVED ON : 12th FEBRUARY 2024
PRONOUNCED ON : 25th APRIL 2024**

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

- 1) All the six Appellants have been convicted for the offences punishable under Sections 302 and 324 with the aid of Section 149 of the

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Indian Penal Code, 1860 ('The I.P.C.', for short), by the Judgment and Order dated 12th April 2013, passed by the Additional Sessions Judge at Pune, in Sessions Case No.277 of 2012. On first count, the Appellants have been sentenced to suffer rigorous imprisonment for life and on the second, to suffer rigorous imprisonment for one year and to pay a fine of Rs.500/- each and in default to suffer further rigorous imprisonment for three months. The substantive sentences to concurrently. Hence Appeal.

1.1) Original accused Nos.6 and 7 have been acquitted of the charge. Further, the accused Nos.1 to 5 and 8 have been acquitted of the charge of the offences under Sections 307, 341 read with 149 of the I.P.C.

1.2) The Appellant No.2/accused No.2 has expired during pendency of the Appeal, hence, his Appeal stands abated and disposed off.

2) Heard learned senior Advocate for the Appellants and learned A.P.P. for the Respondent-State. Perused entire record.

3) The Prosecution story giving rise to this Appeal is as under:-

3.1) The informant, Ramesh Kerba Thakar (PW1), resides at Dattawadi, Pune, but originally hails from the village of Aglambe, located in the Haveli Taluka of Pune District. His uncle, Tanaji Sambhaji Thakar @ Anna, along with his family, resides in Thakarwadi, Aglambe. Datta and Bharat were the two sons of Anna. Both Ramesh Thakar (PW1) and Anna own agricultural land in the village of Aglambe. Additionally, Anna is

involved in the milk business.

3.2) On November 16, 2011, at around 6:00 p.m., while Anna and his son Datta were in process of milking buffaloes, accused No.2-Santosh Parge, accused No.3-Anil Parge and accused No.7-Ganesh Gofane arrived at their cattle shed and aggressively blew the horns of their bikes. This sudden noise startled the buffaloes, prompting objections from Datta and Anna. A verbal altercation ensued between them, during which accused No.3 used abusive language towards Anna. Consequently, Anna slapped on the face of accused No.3. Datta intervened to separate them. Subsequently, the accused individuals left the scene but not before issuing threats of dire consequences to Datta and Anna.

3.3) On 17th November 2021, at about 8 a.m., Ramesh Thakar (PW1), Anna, Aunt Alka, Datta and Bharat were working in their field. During this time, Datta informed Ramesh Thakar (PW1) about the incident of the previous evening. After finishing their work in the field, around 6:00 p.m., they all returned home to Thakarwadi. Subsequently, Datta left for Pune on a motorcycle to deliver milk. Meanwhile, Bharat's friend, Dnyaneshwar @ '*Mauli*' Dasvadkar (Mauli-PW13), R/o. Dhabade, had come to Thakarwadi to visit his grandmother, Gangubai Chandekar. Bharat expressed his intention to visit his Aunt Vithabai and decided to take Mauli (PW13) with him. Bharat and Mauli then departed on foot.

3.4) After having dinner, Ramesh Thakar (PW1) went to the nearby Vitthal Temple and engaged in gossip with Dattatraya Vittal Thakar (PW8) and Sunil Chorge. At about 10 p.m., all three heard commotion coming from Pargewadi, Aglambe, prompting them to go there. At that time they saw that, accused No.2-Santosh Parge and accused No.3-Anill Parge were assaulting Bharat with *Koyta* (sickle) and an Axe, respectively. Accused No.7-Ganesh Gofane was assaulting Mauli (PW13) with an Axe. Additionally, accused Nos.1, 4, 5, 6 and 8 were assaulting Bharat and Mauli (PW13) with sticks and iron rods. The incident was visible to the three eyewitnesses due to the illumination from a streetlamp and nearby houses. Upon shouting, the accused fled towards the hills. Residents from the *Wadi* and nearby areas gathered at the scene. Bharat had sustained injuries to his head and face, rendering him unconscious. Both Bharat and Mauli (PW13) were found lying at the scene of the attack.

3.5) Immediately, Bharat and Mauli (PW13) were driven to Pune in Sunil Chorge's private car and admitted to Rakshak Hospital, at Sinhagad. Unfortunately, Bharat had succumbed to the injuries by then. During the journey to the hospital, at 10:45 p.m., Ramesh Thakar (PW1) contacted Datta on phone to inform him of the incident. Datta revealed that, on the same day, around 8 p.m., at Aglambe Phata, accused Nos.1 to 4, 6 and 7 had assaulted him with iron rods and sticks. He has come to Abhiruchi

Police Chowky to lodge a report thereof. Subsequently, Ramesh Thakar (PW1) lodged the First Information Report (FIR) on 18th November 2011, detailing the incident as described. Police registered this crime under Sections 302, 307, 143, 147, 148, 149, 341 and 323 of the I.P.C. against all the accused.

3.6) Investigation Officer PI. Sardar Patil (PW16) recorded the Spot Panchnamas (Exh.90 and Article 42) related to this incident and the incident of assault on Datta, at Aglambe Phata, respectively. After Inquest Panchnama (Exh.142), Bharat's body was subjected to Post-Mortem Examination.

3.7) Further, PI. Sardar Patil (PW16) recorded the statement of the witnesses from time to time. He seized the blood stained clothes of Ramesh Thakar (PW1), Sunil Chorge, Mauli (PW13) and Bharat. He arrested the accused persons between 18th November to 29th November 2011 and seized the clothes which the accused persons had worn at the time of incident. On 24 November 2011, accused No.1 gave a disclosure statement (Exh.112) and recovered Koyta (Article-33). It was seized under recovery panchnama (Exh.113). On the same day accused No.2 gave a disclosure statement (Exh.115) and recovered 2 Axe, 3 wooden sticks and 2 iron rods (Article Nos. 34 to 40). Said weapons were seized under recovery panchnama (Exh.116). Further, PI. Sardar Patil (PW16) obtained the Post-Mortem

Examination Report and Injury Report of Mauli (PW13); forwarded the *muddemal* Articles to R.F.S.L. for Chemical Analysis and obtained a statement of Mauli (PW13) recorded under Section 164 of Cr.PC.

3.8) The investigation uncovered that due to the incident involving the slapping of accused No.3 by Anna on the evening of 16th November 2011, accused Nos.1 to 4, 6 and 7 formed an unlawful assembly on 17th November 2011, around 8:00 p.m. at Aglambe Phata. With the common objective of this assembly, said accused wrongfully restrained and assaulted Datta using sticks and iron rods.

3.8.1) Additionally, on the same day, around 10:00 p.m., in front of the house of accused No.8, all eight accused individuals formed an unlawful assembly. Pursuing the common objective of this assembly, accused No.1 with a stick and a Koyta (sickle), accused No.2 with a Koyta, accused Nos.3 and 7 with an Axe, accused Nos.4 and 6 employed sticks and accused Nos.5 and 8 using iron rods assaulted to Bharat and Mauli (PW13), resulting in the murder of Bharat and an attempted murder of Mauli (PW13).

3.9) Accordingly, PI. Sardar Patil (PW16) submitted the charge-sheet in the Court of the learned Judicial Magistrate First Class, Court No.15, at Shivaji Nagar, District Pune. After complying with Section 207 of Cr.PC., the learned Magistrate committed the case to the Court of Sessions.

4) The learned Judge of the trial Court framed the charge at

Exh.66 of the offences punishable under Sections 143, 147, 149 r/w.302 *alternatively* 302 r/w.34, 149 r/w.307 *alternatively* 307 r/w.34, 149 r/w.323 *alternatively* 323 r/w.34 and 149 r/w.341 *alternatively* 341 or 341 r/w.34 of the I.P.C. The charge was read over and explained to the Appellants in Marathi vernacular. The Appellants pleaded not guilty to the charge and claimed to be tried. Their pleas are recorded at Exhs.67 to 74.

5) In the course of trial, the prosecution examined 16 witnesses in support of its case and relied on various documents in evidence including the seized material objects. The Appellants in their defence, denied their involvement in entirety contending that, Datta Thakar had specially brought Mauli (PW13) from Pune to assault the accused No.3. From 7 p.m. on 17th November 2011, Bharat and Ramesh Thakar (PW1) were monitoring accused No.3. At about 9 p.m. members of informant party were chasing accused No.3 in the vicinity of Kudaje. During this pursuit, Bharat met with an accident and the informant party reached the house of accused No.8, where they attacked on his house, assaulted him, fractured his leg, threw stones and broke the door of his house. Bharat and Mauli sustained injuries by their own weapons due to the dark. Then while going, the informant party members hid their weapons near the house of Bajirao Pote.

5.1) After the prosecution closed its evidence, statement of the Appellants under section 313 of Cr.P.C. were recorded (at Exhs.155, 158,

161, 164, 167, 170, 173 and 176). The Appellants Nos.1 and 8 have added their written statement to that. The Appellants did not examine to themselves nor examined any witness in defence.

6) The learned Judge of the trial Court after considering the evidence in the light of rival arguments, convicted and sentenced the Appellants as noted above for committing murder of Bharat and voluntarily causing hurt to Mauli (PW13).

7) Mr.Pradhan, learned senior Advocate for Appellants submitted that, the spot of incident is outside the house of accused No.8. Stones were lying there and door of the house was broken. The F.I.R. No.753 of 2011 was registered on the report of accused No.8 in respect of causing him grievous injury by the eye witnesses and their relatives. The investigation and consequent filing of charge-sheet in that crime confirmed the truth of said F.I.R. No.753 of 2011. The injury to accused No.8 is not explained. This all clearly indicate that, the informant side was aggressor. Therefore, the accused side reacted to said sudden and grave provocation. As such, the element of forming an unlawful assembly is absent here. No motive has been attributed to the accused persons to assault Bharat and Mauli (PW13) in furtherance of their common intention.

7.1) The learned counsel submitted that, the spot of incident was not visible from Vithal Temple where Ramesh Thakar (PW1) and other eye

witnesses were sitting nor the commotion occurred at Pargewadi was audible at the said Temple. The distance between Vitthal Temple and Pargewadi is about 4-5 minutes by walk. The incident was over within 1½ minutes. Therefore, it is highly doubtful that, said eye witnesses could hear the commotion at Pargewadi, go there and witness the entire incident in such a short time. Admittedly, the incident occurred at night. The Spot Panchnama is silent about the source of light. Therefore, identification of the Appellants and weapons by the witnesses, is doubtful.

7.2) The learned counsel submitted that, the previous incident of assault on Datta, at 8 p.m., at Aglambe Phata, was not proved as Datta is not examined. There are material discrepancies in the depositions of the witnesses and mainly eye-witnesses. There were residential houses near the spot of incident at Pargewadi and Vitthal Temple. However, not a single independent witness from that area was examined during the course of investigation and at trial. The eye witnesses and injured are interested being relatives and friend of Bharat. The eye witnesses claimed that, the Appellants gave repeated blows of the weapons for long time. As such there ought to have more injuries on the body of Bharat, than noted in the Post-Mortem Report, which are very less. Mauli (PW13) has sustained only 3 simple injuries.

7.3) The learned counsel submitted that, no blood is detected on

the clothes of the accused persons nor on the weapons allegedly recovered by accused Nos.1 and 2. No specific Axe, iron rod or stick is attributed to specific accused due to dark. Said weapons were identified by the witnesses in general, thus, there is no *interse* corroboration amongst the eye witnesses as regards weapons of the assault and the role played by each individual accused and other persons at the scene of offence. No other corroborative evidence is available which is must in the aforesaid background. There are lapses in the investigation as relevant station diary entries were not recorded. Additionally, there is delay in recording the F.I.R. and statement of witnesses. The medical evidence has been collected in haphazard manner. All these circumstances casts serious doubt about truthfulness of the prosecution story i.e. presence and involvement of all the Appellants in the incident. The benefit of said doubt therefore goes to Appellants.

7.4) The learned counsel submitted that, despite the abovesaid facts and circumstance, the trial Court convicted and sentenced the Appellants as above. Hence, the impugned judgment and Order is not sustainable in law.

7.5) To support the arguments the learned counsel has relied upon the following decisions :-

- (i) *Ganesh Bhavan Patel & Anr. vs. State of Maharashtra*, (1978) 4 SCC 371.
- (ii) *Jabbar Ali and Ors. vs. State of Assam*, 2022 SCC Online 1440.
- (iii) *Mala Singh and Ors. vs. State of Haryana*, (2019) 5 SCC 127.

(iv) *State of U.P. vs. Ram Swarup and Anr.*, (1974) 4 SCC 764.

(v) *Lakshmi Singh and Ors. vs. State of Bihar*, (1976) 4 SCC 394.

8) Per contra, Mr. Gavand, learned A.P.P. has submitted that, there is overwhelming evidence produced by the prosecution which includes the testimonies of two eye witnesses and one injured. Said testimonies have been supported by the medical evidence and recovery of weapons by the accused persons. On the strength of the said evidence it has been proved that, the accused persons have committed this crime forming an unlawful assembly and using dangerous weapons. The motive for the crimes was to take revenge of the incident of slapping to accused No.3 by Anna that occurred in the previous evening. There is nothing adverse in the said evidence. The defence of the accused persons is highly improbable. Therefore, the assessment of the evidence and the conclusion recorded by the learned Judge of the trial Court is absolutely justified. As such, the impugned conviction and sentence need not be interfered with.

9) Considering the rival submissions, a question that first needs to be answered is whether the death of Bharat is homicidal or not.

10) In this context, the evidence of Dr.Amol Shinde (PW11) shows that, he alongwith Dr. Sanjog conducted the Post-Mortem Examination. There were following external injuries on the body of the deceased:-

“(1) Abrasion present over root of nose 1 x 1 cm irregular and reddish.

- (2) Abrasion present over right ala of nose 3 x 1 cm, reddish.
- (3) Incised laceration present over right cheek horizontal 5 x 1 cms bone deep reddish.
- (4) Incised laceration present over left ala of nose 7 x 1 cms. bone deep oblique reddish associated with contused abrasion infero laterally 3 x 1 cms.
- (5) Laceration present over occipital region 3 x 1 cms oblique reddish.
- (6) Two contusions present over left side of chest and abdomen 3.5 cms x 1 cm each with intervening area of 1.5 cms vertical. All the injuries were antemortem”.

10.1) The internal injuries noted were as under:

“**Head**-under scalp haematoma over occipital region, no fracture. Subdural haemorrhage about 50 ml and subarachnoid haemorrhage over occipital lobe. Brain matter oedematous. It has also come that the Injury Nos.3, 4 and 5 mention in column No.17 having corresponding injury mentioned in column No.19 namely scalp haematoma over occipital region, Subdural haemorrhage and subarachnoid haemorrhage over occipital lobe. The injury Nos.3, 4 and 5 of column No.17 are sufficient to cause death. The cause of death was multiple injuries.”

10.2) Dr. Amol Shinde (PW11) deposed that, Dr. Sanjog recorded the Post-Mortem Examination Report (Exh.118). Amol Shinde (PW11) deposed that, the external injuries in column No.17 and internal injuries in column No.19 are possible by the weapons produced before the Court. The external injury Nos.1 and 2 are possible by hard and blunt object. Injury Nos.3 and

4 are possible by sharp cutting and heavy object. Injury Nos.5 and 6 are possible by hard and blunt object like rod. Said injury Nos.3, 4 and 5 are sufficient in the ordinary course of nature to cause death.

10.3) The evidence of Dr. Amol Shinde is consistent with the Post-Mortem Report. There is nothing in his cross examination to accept the contention on behalf of the Appellants that, the injuries sustained by Bharat were caused due to a fall. On the contrary, looking at the said injuries and testimony of Dr. Amol Shinde (PW11), it is evident that said internal and external injuries were caused at a time by inflicting blows of sharp cutting and heavy object and hard and blunt object. That apart, in the alternate, it is suggested to the witnesses that the seized weapons were carried by them and said injuries were resulted by their own weapons.

10.4) In view thereof, we are in unison with the finding given by the learned trial Judge that, the death of Bharat is homicidal.

11) Now question is whether it is proved that, the Appellants had formed an unlawful assembly and in prosecution of the common object of said assembly or in furtherance of their common intention, wrongfully restrained and assaulted Datta, then assaulted Bharat and Mauli (PW13) by means of the weapons stated above and caused hurt to Datta, committed murder of Bharat and caused hurt to Mauli (PW13).

11.1) However, in order to understand the rival claims and before

adverting to said questions, first, it would be useful to consider the settled principles of 'the law of evidence' which are applicable in such cases.

11.2) In the case of the *State Of Maharashtra vs Balram @ Nam Amarsingh Talwar, 1997 All MR (Cri) 327*, this Court held that, before evidence of an injured witness can be accepted by a Court, it should be satisfied that, said witness is truthful witness and the account given is in tune with probabilities. It is further held that, a witness is independent is no guarantee of the fact that, his/her evidence is credible. Criminal Courts do not merely accept the testimony of a witness because he/she is independent. Then only accept the testimony of a witness if they find the same to be cogent, truthful, reliable and in consonance with probabilities.

11.3) As highlighted by the Hon'ble Supreme Court, in *Ranbir Yadav vs. State of Bihar, (1995) 4 SCC 392*, where there are party factions, there is a tendency to include the innocent with the guilty and it is extremely difficult for the Court to guard against such a danger. It was pointed out that the only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on acceptable evidence which in some measure implicates such accused and satisfies the conscience of the Court.

11.4) As held in the case of *Kuldeep Yadav and Othrs. vs. State of Bihar, (2011) 5 SCC 324*, "the provision of Section 149 of I.P.C. makes it clear that before convicting accused with the aid of Section 149 of I.P.C., the

Court must give clear finding regarding nature of common object and that the object was unlawful. In the absence of such finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove common object. Section 149 creates a specific offence and deals with punishment of that offence. Whenever the Court convicts any person or persons of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but also that the object was unlawful. Before recording a conviction under Section 149 IPC, essential ingredients of Section 141 of I.P.C. must be established. The above principles have been reiterated in the case of *Bhudeo Mandal and Others vs. State of Bihar, (1981) 2 SCC 755.*”

11.5) In the case of *Rajendra Shantaram Todankar vs. State of Maharashtra and others, reported in (2003) 2 SCC 257*, the Hon’ble Supreme Court, in paragraph 14, has held as under:

“14. Section 149 of the Indian Penal Code provides that 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. The two clauses of Section 149 vary in degree of certainty. The first clause contemplates the commission of an offence by any member of an unlawful assembly which can be held to have been committed in prosecution of the common object of the assembly. The second clause embraces within its fold

the commission of an act which may not necessarily be the common object of the assembly, nevertheless, the members of the assembly had knowledge of likelihood of the commission of that offence in prosecution of the common object. The common object may be commission of one offence while there may be likelihood of the commission of yet another offence, the knowledge whereof is capable of being safely attributable to the members of the unlawful assembly. In either case, every member of the assembly would be vicariously liable for the offence actually committed by any other member of the assembly. A mere possibility of the commission of the offence would not necessarily enable the Court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. It is difficult indeed, though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behaviour of the members soon before, at or after the actual commission of the crime. Unless the applicability of Section 149--either clause—is attracted and the Court is convinced, on facts and in law, both, of liability capable of being fastened vicariously by reference to either clause of Section 149 IPC, merely because a criminal act was committed by a member of the assembly every other member thereof would not necessarily become liable for such criminal act. The inference as to likelihood of the commission of the given criminal act must be capable of being held to be within the knowledge of another member of the assembly who is sought to be held vicariously liable for the said criminal act.”

11.6) As observed in the case of *Mala Singh and Ors.* (supra), it is well settled that, if several persons numbering five or more, do an act and intend to do it, both sections 34 and section 149 may apply. If the common object does not necessarily involve a common intention, then the

substitution of section 34 for section 149 might result in prejudice to the accused and ought not, therefore, to be permitted. But if it does involve a common intention then the substitution of section 34 for section 149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. The non applicability of section 149 is, therefore, no bar in convicting the appellants under section 302 read with section 34 IPC, if the evidence discloses commission of an offence in furtherance of the common intention of them all.

11.7) In a recent decision in the case of *Rajesh Yadav & Anr. v/s. State of U.P.*, (2022) 12 SCC 200; the Hon'ble Supreme Court held as under :-

“12. Section 3 of the Evidence Act defines “evidence”, broadly divided into oral and documentary. “Evidence” under the Act is the means, factor or material, lending a degree of probability through a logical inference to the existence of a fact. It is an “Adjective Law” highlighting and aiding substantive law. Thus, it is neither wholly procedural nor substantive, though trappings of both could be felt.

13. The definition of the word “proved” though gives an impression of a mere interpretation, in effect, is the heart and soul of the entire Act. This clause, consciously speaks of proving a fact by considering the “matters before it”. The importance is to the degree of probability in proving a fact through the consideration of the matters before the Court. What is required for a Court to decipher is the existence of a fact and its proof by a degree of probability, through a logical influence.

14. Matters are necessary, concomitant material factors to prove a fact. All evidence would be “matters” but not vice versa. In other words, matters could be termed as a genus of which

evidence would be a species. Matters also add strength to the evidence giving adequate ammunition in the Court's sojourn in deciphering the truth. Thus, the definition of "matters" is exhaustive, and therefore, much wider than that of "evidence". However, there is a caveat, as the Court is not supposed to consider a matter which acquires the form of an evidence when it is barred in law. Matters are required for a Court to believe in the existence of a fact.

15. Matters do give more discretion and flexibility to the Court in deciding the existence of a fact. They also include all the classification of evidence such as circumstantial evidence, corroborative evidence, derivative evidence, direct evidence, documentary evidence, hearsay evidence, indirect evidence, oral evidence, original evidence, presumptive evidence, primary evidence, real evidence, secondary evidence, substantive evidence, testimonial evidence, etc.

16. As an exhaustive interpretation has to be given to the word "matter", and for that purpose, the definition of the expression of the words "means and includes", meant to be applied for evidence, has to be imported to that of a "matter" as well. Thus, a matter might include such of those which do not fall within the definition of Section 3, in the absence of any express bar.

17. What is important for the Court is the conclusion on the basis of existence of a fact by analysing the matters before it on the degree of probability. The entire enactment is meant to facilitate the Court to come to an appropriate conclusion in proving a fact. There are two methods by which the Court is expected to come to such a decision. The Court can come to a conclusion on the existence of a fact by merely considering the matters before it, in forming an opinion that it does exist. This belief of the Court is based upon the assessment of the matters before it. Alternatively, the Court can consider the said existence as probable from the perspective of a prudent man who might act on the supposition that it exists. The question as to the choice of the options is best left to the Court to decide. The said decision might impinge upon the quality of the matters before it.

18. The word “prudent” has not been defined under the Act. When the Court wants to consider the second part of the definition clause instead of believing the existence of a fact by itself, it is expected to take the role of a prudent man. Such a prudent man has to be understood from the point of view of a common man. Therefore, a judge has to transform into a prudent man and assess the existence of a fact after considering the matters through that lens instead of a judge. It is only after undertaking the said exercise can he resume his role as a judge to proceed further in the case.

19. The aforesaid provision also indicates that the Court is concerned with the existence of a fact both in issue and relevant, as against a whole testimony. Thus, the concentration is on the proof of a fact for which a witness is required. Therefore, a Court can appreciate and accept the testimony of a witness on a particular issue while rejecting it on others since it focuses on an issue of fact to be proved. However, we may hasten to add, the evidence of a witness as whole is a matter for the Court to decide on the probability of proving a fact which is inclusive of the credibility of the witness. Whether an issue is concluded or not is also a Court’s domain.”

12) Having considered the aforesaid principles, now, we deal with the evidence of the case in hand. In order to hold the impugned conviction and sentence lawful, the prosecution has heavily relied on the testimonies of Ramesh Thakar (PW1), Dattatraya V. Thakar (PW8) and injured witness Mauli (PW13). Further, the prosecution is relying on the evidence as to the Spot Panchnamas, seizure of blood stained clothes of Bharat, Ramesh Thakar (PW1), Mauli (PW13) and Sunil Chorge which they had worn at the time of incident and the recoveries of weapons.

12.1) Learned counsel for the Appellants has not put much

controversy as to the spot of the incident at Pargewadi and seizure of the said clothes. Because, apparently, said incident occurred in front of the door of the house of accused No.8 and the relevant Spot Panchnama (Exh.90), has been admitted by the defence. There is no blood on the clothes of the accused persons. Hence, we are dispensing with the discussion on the said aspect for brevity purpose.

12.2) Even though learned Advocate Mr. Pradhan submitted that, due to dark the witnesses could not see the assailants of Bharat and Mauli (PW13), in the same condition, accused Nos.1 and 8 claimed to have seen Bharat, Datta, Ramesh Thakar (PW1), Dattatray V. Thakar (PW8), Mauli (PW13) and 3 others, who are accused in R.C.C. No.3088 of 2012, arose out of F.I.R.No.753 of 2011 for they allegedly assaulted accused Nos.1 and 8 and caused fracture to left leg of accused No.8. The date, time and place of both the incident is same. Therefore, the Appellants cannot dispute their identification by the witnesses in this case.

13) Ramesh Thakar (PW1), at the out set, deposed that on 17th November 2011, at about 9.30 a.m. when he, Anna and others were working in the field, Datta told him the incident occurred on 16th November 2011, at about 6 p.m., near their cattle shed, when the act of blowing horn of their bikes by accused No.2-Santosh Parge, accused No.3-Anil Parge and acquitted accused No.7-Ganesh Gofane resulted in altercations during

which the accused No.3 abused Anna; hence, the latter slapped the accused No.3; Datta separated them; then said accused persons left but threatening that, they would see them (Thakars). Ramesh Thakar (PW1) deposed that, after finishing the work for the day, they all returned home.

13.1) Further Ramesh Thakar (PW1) revealed that, thereafter Anna, Datta and Bharat milked the buffaloes. Datta carried the milk to Pune. Then, his Aunt Alka asked to dine, but Bharat said that, first he will go to Pargewadi at his maternal Aunt Vithabai and then he will dine. At that time Mauli (PW13) had come to visit his grant mother Gangubai Chandekar. Bharat said that, he will take Mauli (PW13) along with him to meet Aunt Vithabai. Ramesh Thakar (PW1) deposed that, then he dined and sat on the platform of the Vitthal Temple. Then he, Sunil Chorge and Dattatraya V. Thakar (PW8) involved in gossiping. At that time, Bharat and Mauli (PW13) went towards Pargewadi. Ramesh Thakar (PW1) deposed that, thereafter, they heard commotion from the direction of Pargewadi. Immediately, they rushed to the spot and saw that, accused No.2-Santosh Parge and accused No.3-Anil Parge were assaulting Bharat with sickle and Axe respectively. The rest accused were assaulting Bharat and Mauli (PW13) with iron rods and sticks. Ramesh Thakar (PW1) deposed that, he shouted for help. Then all the accused fled towards hill.

14) Testimony of Dattatraya V. Thakar (PW8) shows that, on 17th

November 2011, at 6 p.m. he returned home from field. Then he dined and went to Vitthal Temple. Ramesh Thakar (PW1) and Sunil Chorge were sited on the platform of Vitthal Temple. Bharat and Mauli (PW13) came walking and told that, they are going to Bharat's Aunt at Pargewadi and went towards Pargewadi. Then they heard shouts from Pargewadi. He, Ramesh Thakar (PW13) and Sunil Chorge ran towards Pargewadi. There, they saw that, in front of the house of accused No.8 accused No.2-Santosh Parge and accused No.3-Anil Parge were assaulting Bharat with sickle and Axe respectively. The rest accused were assaulting Bharat and Mauli (PW13) by means of sticks and iron rods. They screamed, therefore, the accused persons ran towards hill.

15) Ramesh Thakar (PW1) and Dattatray V. Thakar (PW8) deposed that, both Bharat and Mauli (PW13) were injured. Bharat was unconscious. They alongwith Sunil Chorge removed Bharat and Mauli (PW13) to the hospital at Pune, by the car. On the way, Ramesh Thakar (PW1) phoned to Datta and informed him the incident. Ramesh Thakar (PW1) deposed that, at that time Datta told him that, just at about 8 p.m., accused Nos.1 to 4, 6 and 7 wrongfully restrained and assaulted him at Aglambe Phata, somehow he escaped and came to Abhiruchi Police Station. Accordingly, they admitted Bharat and Mauli (PW13) in Rakshak hospital. On examination, doctor declared Bharat as dead. Thereafter he lodged the F.I.R./Report

(Exh.88). Dattatraya V. Thakar (PW8) deposed that, Datta was present there and he told them about the assault on him at Aglambe Phata.

16) Mauli (PW13) has testified that, on 16th November 2011, in the night, when he had been to attend *Kirtan*, at Vitthal Temple, Kothrud, Datta asked him to come to Thakarwadi with him. He replied in the affirmative. On the next day, in the morning, Datta gave him a key of his bike and said that, he will come by another bike. Mauli (PW13) deposed that, at about 12:00 noon he went to Thakarwadi. Thereafter he went to his Maternal Uncle's house and after spending some time there, had a round in the village. Then he returned to his Uncle's house, dined and went to the Vitthal Temple. After some time Bharat came there and asked to accompany with him to his Aunt's house. Then, they both went towards Pargewadi.

16.1) Mauli (PW13) deposed that, when he and Bharat were passing from the house of accused No.8, all the accused persons started assaulting Bharat with sickle, bamboo, Axe and rods. When he tried to rescue Bharat, the accused persons assaulted him on the head. He sustained bleeding injury to head. On seeing Ramesh Thakar (PW1), Dattatray V. Thakar (PW8) and Sunil Chorge, the accused persons fled away. Then they brought Bharat to Thakarwadi. There, they boarded in the car of Sunil Chorge and came to Rakshak Hospital. Mauli (PW13) deposed that, doctor treated his head injury. Police recorded his statement. Thereafter, his statement

(Exh.130) was recorded by the Judicial Magistrate.

17) Lastly, Ramesh Thakar (PW1), Dattatraya V. Thakar (PW8) and Mauli (PW13) have identified the seized weapons.

18) Dr.Bhagwan Gore- Chief Physician (PW12), deposed that, on 17th November 2011, at about 11.30 to 11.45 pm, Datta, Bharat and Mauli (PW13) were in the casualty ward of Rakshak hospital. Bharat and Mauli (PW13) were in serious state. He attended Mauli (PW13) who complained of pain at the injury to scalp and both knee joints. On examination of Mauli (PW13), there was lacerated wound on his scalp, of size 3 x 2 x 2 cm deep and bleeding was present; mild abrasion over joint knee and mild abrasion on left knee. Said injuries were caused by blunt object like wooden or iron rod. Necessary entries were taken in the OPD and M.L.C. Register and he issued the Medical Certificate (Exhs.123, 124 and 125 respectively).

19) The evidence of PI. Sardar Patil (PW16) relates to the steps which he had taken during the course of investigation i.e. recording the Spot Panchnamas, statement of witnesses, seizure panchnamas, disclosure dtatements, effecting recoveries of the weapons, sending *muddemal* articles to C.A., collecting P.M. Report, injury certificate etc. Since the prosecution story has been noted in detail at the out set, we have avoided to reproduce the material in the evidence of PI. Sardar Patil (PW16).

19.1) In the cross-examination of PI. Sardar Patil (PW16), it has

come that, he did not make station diary entry of the information that two injured were coming to the hospital. He did not verify the source of said information. Datta met him at the police Chowky on 18th November 2011. He recorded statement of Datta in the afternoon, but cannot tell the exact time when he met Datta and the time of recording his statement. However, he recorded said statement before the second Spot Panchanam (at Aglambe). He cannot tell whether Datta had come to the police Chowky in between 1st and 2nd Spot Panchnamas and at that time, he recorded his statement.

19.2) P.I. Sardar Patil (PW16) admits that, he did not investigate who threw stones at the house of accused No.8; who and how M/cycle No.MH-12/EV-4635 was brought near the spot of the incident (Spot Panchnama Exh.90). He had informed full names of all the accused in the letter to the Magistrate (Exh.149) for recording statement under Section 164 of Cr.P.C. He admits that before registration of the crime, he had issued the letter (Exh.151) to Sassoon hospital for medical examination and Injury Certificate of Datta. He volunteered that, Datta had not been to Sassoon hospital. He admitted that, on 18th November 2011, Datta had told him that, he had not taken treatment anywhere. He admits that, Balu Gofane and Dinkar were not made accused. He admits that, Mauli (PW13) has not stated in his statement about the involvement of accused Nos.6 and 7.

Final Analysis :-

20) As discussed above, the prelude of this incident was the incident of Anna slapping accused No.3 on account of the latter abused Anna during the altercation that occurred due to blowing motorcycle horn harshly by accused Nos.2, 3 and 7 on 16th November 2011, at about 6 p.m., when Anna and Datta were milking buffaloes. In this regard what Ramesh Thakar (PW1) has deposed remained unshaken. Therefore, there is no difficulty in accepting the said incident.

21) In so far as assault on Bharat and Mauli (PW13) and witnessing said assault by Ramesh Thakar (PW1) and Dattatray V. Thakar (PW8) is concerned, the testimonies of these three witnesses is consistent with one another and the F.I.R. (Exh.88). In view of the settled principle of law, Mauli (PW13) being an injured witness, his testimony stands on higher pedestal. However, considering the principles enunciated in the reported cases referred above, testimony of said witnesses must be cogent, truthful, reliable and in consonance with probabilities.

22) According to Ramesh Thakar (PW1), soon after he arrived at the Vittal Temple, Dattatray V. Thakar (PW8) and Sunil Chorge came there. However, testimony of Dattatraya V. Thakar (PW8) shows that, when he came at the Temple, Ramesh Thakar (PW1) and Sunil Chorge were already sited on the platform there. Ramesh Thakar (PW1) admits that, he came to

Vitthal Temple at about 9:45 p.m. and there were no other persons on the platform where they were sited. Dattatraya V. Thakar (PW8) also admits that, there was no other person at the Temple except they three. However evidence of Mauli (PW13) shows that, he was already present at the Vitthal Temple and as he admitted in the cross-examination, he had come there at about 9 p.m., Bharat met him there after about 40-45 minutes, they talked there for some time and then they went towards the house of Bharat's maternal Aunt. Yet this fact is not stated by Ramesh Thakar (PW13) even though, as admitted by him, he was at the Temple by 9:45 p.m. and therefore, he could see Bharat and Mauli (PW13) talking with each other at that time. Similarly, Mauli (PW13) has not deposed that, when he came to the Temple, Ramesh Thakar (PW1), Dattatraya V. Thakar (PW8) and Sunil Chorge were present. Even though Ramesh Thakar (PW1) has claimed that, Bharat and Mauli (PW13) went towards Pargewadi when he, Dattatraya V. Thakar (PW8) and Sunil Chorge were sited at the Temple, this fact is missing in the F.I.R. (Exh.88). On the contrary, the F.I.R. (Exh.88) and evidence of Ramesh Thakar (PW13) suggests that, he had dined at about 9 p.m. after Bharat left with Mauli (PW13) for Pargewadi. Ramesh Thakar (PW1) admits that, he did not talk with Bharat (when Bharat passed from Vitthal Temple). However, Dattatray V. Thakar (PW8) deposed that, when he was sited at Vitthal Temple platform, Bharat and Mauli (PW13) came

there walking and told that, they are going to Bharat's Aunt at Pargewadi and went towards Pargewadi. Considering the aforesaid discrepancies in the evidence of Ramesh Thakar (PW1), Dattatraya V. Thakar (PW8) and Mauli (PW13), it is doubtful that, Ramesh Thakar (PW1), Dattatraya V. Thakar (PW8) and Sunil Chorge had seen Bharat and Mauli (PW13) together while going towards Pargewadi.

23) Statement of Mauli (PW13) recorded by the Judicial Magistrate (Exh.130) mentions that, first Bharat took him to his Aunt's place and after they left from there, the accused persons assaulted them at the door of the house of accused No.8. This fact indicates that, before the assault, Bharat and Mauli (PW13) must have spent some time at Bharat's Aunt. Therefore, it is safe to infer that, Bharat and Mauli (PW13) had come to Pargewadi at earlier point of time than what the witnesses have claimed. However, evidence of Dattatray V. Thakar (PW8) shows that, he heard the commotion within short time after Bharat and Mauli (PW13) met him at the Temple, meaning thereby the duo were assaulted while going to Bharat's Aunt. Moreover, Mauli (PW13) has not deposed that, they were assaulted when they left from the place of Bharat's Aunt. These circumstances also make it doubtful that, Ramesh Thakar (PW1), Dattatray V. Thakar (PW8) and Sunil Chorge saw Bharat and Mauli (PW13) together while going to Pargewadi.

24) As admitted by Ramesh Thakar (PW1), Vitthal Temple is near

the house of Anna. Walking distance between Vitthal Temple and Pargewadi is of 5 minutes. Dattatray V. Thakur (PW8) and P.I. Sardar Patil (PW16) have also admitted that, distance between Pargewadi and Thakarwadi is about 4/5 minutes by walk. This fact indicates that, said distance may be around 250-300 meters.

24.1) According to Ramesh Thakar (PW1) and Dattatray V. Thakur (PW8), on hearing commotion, immediately they alongwith Sunil Chorge rushed to Pargewadi. As admitted by Dattatray V. Thakar (PW13), the noise of quarrel was continued till they arrived at the spot. Dattatray V. Thakur (PW8) stated that, they reached there within 1½ minute. Ramesh Thakar (PW1) admitted that, there are houses surrounding Vitthal Temple; the house of Vithabai (Bharat's Aunt) is ahead of the house of accused No.8, and it is to the left; and there may be 15 to 20 houses in Pargewadi, sharing distance of 5 to 6 ft./10 to 15 ft. In the cross-examination Mauli (PW13) admitted that, house of Bharat's Aunt is at a distance of 200 feet from the house of accused No.8. Ramesh Thakar (PW1) admitted that, when he shouted 'save save', many people from Pargewadi and near villagers rushed there. Admittedly, the assault lasted for 1½ minutes, so, naturally, there must be more shout when the three eye witnesses reached at the spot. Ramesh Thakar (PW13) admits that, he saw the incident when he was at a distance of 15 feet from the spot. However, it is not the case that, first,

people from the nearby houses at Pargewadi reached at the spot, before Ramesh Thakar (PW1), Dattatray V. Thakar (PW8) and Sunil Chorge reached there. No one from Thakarwadi rushed with them to the spot, even though according to Ramesh Thakar (PW1) while he was sited at Vitthal Temple, there, he heard the voice of Bharat and of all the accused. However, as admitted by Dattatray V. Thakar (PW8) the commotion he heard was of altercation amongst 2 or 3 persons only and he could not realise the voice of anyone. Considering these discrepancies and distance between Vitthal Temple and Pargewadi, it is doubtful that, when Ramesh Thakar (PW1) and Dattatray V. Thakar (PW8) were sited on the platform of said Temple, they heard the shout of quarrel coming from the direction of Pargewadi, then they rushed to the spot of incident and witnesses the entire incident of assault.

25) The evidence in cross-examination of Ramesh Thakar (PW1), Dattatray V. Thakar (PW8) and Mauli (PW13) shows that, at a time all the 8 accused were continuously assaulting Bharat and Mauli (PW13) with the weapons stated above. The accused were assaulting them simultaneously giving repeated blows and as admitted by Mauli (PW13), they were assaulted for long time. As admitted by Ramesh Thakar (PW1) and Dattatray V. Thakar (PW8), the assault continued for 1½ minutes in their presence. However, Mauli (PW13) has sustained only one simple injury to

head and 2 minor injuries to knees and Bharat sustained only six injuries. As stated in the F.I.R. (Exh.88), accused No.7-Ganesh Gofane was assaulting Mauli with an Axe. Yet, Ramesh Thakar (PW1) has not deposed the said fact and nor Mauli (PW13). Surprisingly, according to Dr. Bhagwan Gore (PW12), the injuries of Mauli were caused by blunt object.

25.1) Mauli (PW13) has admitted that, he did not state before the police that, Balu Gofane and Dinkar Thakar were present with the accused persons. He cannot assign any reason as to why their name are recorded in his police statement (portion 'A'). However, P.I. Sardar Patil (PW16) has admitted that, Balu Gofane and Dinkar are not made accused, and there is no explanation for this by the prosecution. Mauli (PW13) admits that, Balu Gofane had not held him and said fact in his police statement is incorrect (Portion 'B'), but P.I. Sardar Patil (PW16) deposed that, said fact was stated before him. Mauli (PW13) admitted that, he had stated before the police that Baburao Gofane (accused No.6) and Ganesh Gofane (accused No.7) came along with other accused persons, surrounded and assaulted them, but, he cannot assign any reason as to why name of accused Nos.6 and 7 are not recorded in his statement. However, P.I. Sardar Patil (PW16) admits that, Mauli (PW13) has not stated before him about the involvement of accused Nos.6 and 7. Yet according to Ramesh Thakar (PW1) and Dattatray V. Thakar (PW8), accused Nos.6 and 7 were also assaulting Bharat and

Mauli (PW13). That apart, statement of Mauli (PW13) recorded before the Judicial Magistrate (Exh.130) shows that, only children (पोरांनी) of accused No.8 had assaulted him and Bharat. The accused Nos.2, 4 and 5 are not children of accused No.8. There was no motive for accused Nos.1, 4, 5 and 8 to assault Bharat and Mauli (PW13), as they were not involved in the prelude of this incident. As admitted by Dattatray V. Thakar (PW8), the commotion he heard was of altercation amongst 2 or 3 persons only and he could not realise the voice of anyone.

25.2) In view of the aforesaid discrepancies, that there is 4/5 minutes walking distance between Vitthal Temple and Pargewadi, there is no testimony of an independent witness and that, the testimonies of the eye witnesses and Mauli (PW13) is inconsistent with the medical evidence of Dr.Bhagwan Gore (PW12), it is doubtful that all the Appellants had assaulted Bharat and Mauli (PW13) and Ramesh Thakar (PW1) and Dattatray V. Thakar (PW8) both have witnesses the incident.

26) Ramesh Thakar (PW1) has admitted that, he was not annoyed on hearing that, accused No.3 abused his Uncle Anna. Bharat and Datta were also not angry on account of said incident. They did not take the incident seriously as accused No.3 was a young boy. This evidence indicates that, there remained no grudge with informant's side after the incident of abuse to Anna by accused No.3 and the matter was pacified from their end.

However, considering the evidence of Ramesh Thakar (PW1) that, when Datta separated the quarrel, the accused No.3 and two other accused with him threatened Datta and Anna with dire consequences, it is highly possible that, the situation created on account of Anna slapped to accused No.3, was not mitigated from the side of accused No.3.

27) Looking at the evidence of Ramesh Thakar (PW1) it is evident that, taking milk to the dairy at Pune by Datta, was a routine. Therefore, his evidence is reliable that, after returning from the field in the evening on 17th November 2011, Datta left for Pune to deliver milk.

27.1) The evidence of Ramesh Thakar (PW1) is consistent with the F.I.R. (Exh.88) that, when he phoned to Datta on the way to Pune and informed him this incident, Datta told that, just at about 08:00 p.m., at Aglambe Phata, accused Nos.1 to 4, 6 and 7 beaten him. However, Ramesh Thakar (PW13) did not state the weapons by which Datta was assaulted. Even though Dattatray V. Thakar (PW8) has stated that the weapon told by Datta were iron rods and sticks, he did not talk with Datta on phone. There was no reason for accused Nos.1, 4 and 6 to assault Datta as they were not involved in the earlier incident of blowing horn near the cattle shed and altercations with Anna. The evidence is inconsistent about participation of accused Nos.6 and 7 in the assault on Bharat. If indeed Datta was assaulted by 6 persons with sticks and iron rods, he would have suffered several

injuries on his body with 1 or 2 serious.

27.2) However, it is significant to note that, in the cross-examination of Ramesh Thakar (PW1) it has been brought that, there were blue-black marks on the body of Datta. PI.Sardar Patil (PW16) has deposed that he had given requisition (Exh.151) to Sassoon hospital, Pune to get an injury certificate of Datta about the assault on him at 8 p.m. It is not expected of PI.Sardar Patil (PW16) that he would unnecessarily record the Spot Panchnama (Art.42), at Aglambe Phata. These facts coupled with the evidence of Ramesh Thakar (PW13) indicate that, Datta was assaulted at Aglambe Phata. However, Datta is not examined. Only accused No.3 was slapped by Anna on account of he abused Anna on 16th November 2011. Datta was freely moving after the said incident. As noted above, the situation created on account of Anna slapped to accused No.3 was not soften from the side of accused No.3. In the backdrop and looking at the version of defence, it is safe to infer that, when Datta was carrying milk to Pune, the accused No.3 restrained him at Aglambe Phata and assaulted with stick/iron rod, therefore, Datta had sustained some injuries.

28) Admittedly, both Datta and Ramesh Thakar (PW1) were carrying mobile phone. However, Datta did not immediately call Ramesh Thakar (PW1) or any other family member and informed them about the assault on him at Aglambe Phata. Datta did not lodge report in respect of

said assault even though he had come to Abhiruchi police Choky as per prosecution case. The prosecution has not explained as to why Datta did not lodge such report. As stated in the F.I.R. (Exh.88), Ramesh Thakar (PW1) phoned Datta at about 10:45 p.m., but said time is not deposed by Ramesh Thakar (PW1) and Dattatray V. Thakar (PW8) nor the prosecution informed Datta's whereabouts from 8 p.m. till Ramesh Thakar (PW1) called him at about 10:45 p.m. As admitted by Ramesh Thakar (PW1), Aglambe Phata is at about 5-6 kms. from their house (Thakarwadi). By M/cycle, it takes about 20-25 minutes to cross said distance. However, Datta went to Pune which was at longer distance. Datta had suggested Ramesh Thakar (PW1) to directly bring the injured to Rakshak hospital. The evidence of Ramesh Thakar (PW1), Dattatray V. Thakar (PW8), Mauli (PW13) and Dr. Bhagwan Gore (PW12) clearly shows that, first Datta met them at said hospital only. The evidence of P.I. Sardar Patil (PW16) shows that, Datta did not meet him before he went to Rakshak hospital. Considering the evidence of P.I. Sardar Patil (PW16) in the cross-examination, there is delay in recording statement of Datta. In this background and considering the evidence as a whole, it is safe to infer that, Datta and the car carrying the witnesses, Bharat and Mauli (PW13) reached the hospital at the same time.

29) Looking at the evidence of the P.I. Sardar Patil (PW16) and Spot Panchnama (Exh.90), it is evident that, Bharat was assaulted in the

Courtyard, in front of the door of the house of accused No.8 and not on the road, where the witnesses have claimed. As can be gathered from the evidence of P.I.sardar Patil (PW16) and the Spot Panchnama (Exh.90), the house of accused No.8 is sufficiently inside from the road by which Bharat and Mauli (PW13) were going. The prosecution has not explained as to why Bharat and Mauli (PW13) went up to the Courtyard/door of the house of accused No.8. Even though distance between Thakarwadi and Pargewadi is just 4-5 minutes by walk and accused persons had sufficient weapons, they did not assault the informant side by coming to the house of Anna. It was not the case that, the accused persons knew that, Bharat and Mauli (PW13) were coming to Bharat's aunt. As can be seen from the certified copy of the Final Report (below list Exh.181) and admissions by the witnesses, Ramesh Thakar (PW1), Dattatray V. Thakar (PW8), Mauli (PW13) with Daulat Parage, Datta, Bharat, Tanaji Sambhaji Thakar and Ganesh Kerba Thakar are accused in R.C.C. No.3088 of 2012 registered for the offences punishable under Sections 143, 147, 148, 149, 452, 325 and 323 of the I.P.C. for they allegedly assaulted accused Nos.1 and 8 giving kick-feast blows and sword and causing fracture to left leg of accused No.8. The date, time and place of both the incident is the same. The prosecution, however, has not explained said fracture/injury sustained by accused No.8.

30) As admitted by Ramesh Thakar (PW1), Datta had two bikes. As

recorded in the Spot Panchnama (Exh.90), Datta's one bike bearing registration No.MH-12/EV-4635 was found on a foot-way towards Thakarwadi, at a distance of 500 feet from the spot of incident. Therefore, and considering that Datta had reached to Pune independently, it is evident that Datta went to Pune by his another bike. The unjustifiable incidents of accused No.3 abusing Anna and then same accused assaulting Datta occurred at short intervals. The informant side was not responsible for either of the said incidents. In this background and in view of the forgoing discussion, it is highly probable that, said criminal conduct of accused No.3 caused rage to Datta. As a result, after getting assaulted at Aglambe Phata, Datta returned to Thakarwadi. Then taking Bharat and Mauli (PW13) together on another bike, Datta went to the house of accused No.8 just to question him about the assault on him and conduct of accused No.3. Therefore, the accused Nos.1, 2, 3 and 8 came out of the house, they all being family members. Then quarrel started between the rival parties and suddenly escalated to free fight during which some one from the Datta's side assaulted to accused No.8 by whatever weapon available there and the accused Nos.1 and 3 i.e. sons of accused No.8 assaulted Bharat by means of stick and Axe respectively and accused No.1 assaulted to Mauli (PW13), when he tried to save Bharat. Such tools of agriculture are easily available with an agriculturist. Still, unfortunately Bharat sustained serious injuries

which cost him life. This logical conclusion is supported by Mauli's (PW13) statement before the Magistrate (Exh.130) recorded on 14th February 2011, wherein he has blamed only sons of accused No.8 without naming them (i.e. accused Nos.1 and 3), even though he (Mauli) knew the names of all the eight accused on 18th November 2011 itself and thus, had ample time to state their name before the Magistrate on 14th February 2012, blaming them for assaulting him and murder of Bharat.

30.1) Mauli's statement dated 13th February 2011 (Exh.129) recorded by the Judicial Magistrate shows that, he was given one day time to give his statement (Exh.130) with his free will and without pressure. Mauli (PW13) has identified his signature on his both the statement (Exhs.129 and 130) and in cross-examination he has admitted that said statements are correct and as per his narration. Section 114 (e) of the Evidence Act provides that, the Court may presume that judicial acts have been regularly performed. Said statements are falling in the word "matter". If the maker of such statements himself is giving some benefit to certain accused persons and it is not disputed by the prosecution, then such evidence cannot be ignored and kept out of consideration. Therefore, those accused whose names are not in mentioned in the said statement (Exh.130), necessary benefit thereof should be given to said accused.

31) Considering the numbers of injuries sustained by Bharat, it is

probable that, the assault was over within 1 to 1½ minutes. There is an admission to that effect by Dattatray V. Thakar (PW8). Mauli (PW13) has sustained only one simple injury to head and two minor abrasion to knees. Vitthal Temple is at a walking distance of 4/5 minutes from Pargewadi. Therefore, and in view of our forgoing discussion, it is safe to conclude that, immediately after suntanning the blow over head, Mauli (PW13) ran towards Vitthal Temple and alerted Ramesh Thakar (PW1), Dattatray V. Thakar (PW8) and Sunil Chorge, and Bharat being seriously injured, Datta rushed to Pune on his another bike. Latter on both parties filed their respective F.I.R. but exaggerating the story to some extent and the numbers of assailants, to suit their purpose, due to the earlier incident of slapping to accused No.3 by Anna.

32) The testimony of pancha Manoj Falke (PW9) is in consonance with the disclosure statement of accused No.1 (Exhs.112) and recovery of the Axe at his instance under recovery Panchanamas (Exhs.113). Said testimony is consistent with the testimony of P.I.Sardar Patil (PW16). However, there is no evidence that, accused No.1 used the recovered Koyta in the offence. As such, the recovery of the Koyta at the instance of accused No.1 is of no avail to the prosecution.

32.1) Prashant Mandekar (PW10) testified that, accused No.2 made the disclosure (Exh.115) and recovered the rest weapons which the police

seized under recovery panchnama (Exh.116). This evidence is corroborated with the testimony of PI.Sardar Patil (PW16). However, it is not proved that, accused Nos.2, 4, 5 and 8 were involved in the offence. The recovery of the weapons by accused No.2 was from the same place from where the accused No.1 recovered the Axe. As such the recovery at the instance of accused No.2 is not free from a reasonable doubt. No doubt, Ramesh Thakar (PW1), Dattatray V. Thakar (PW8) and Mauli (PW13) have identified the recovered weapons. However, they have not informed as to on what basis they have identified the said weapons. Be that as it may, said circumstances are not sufficient to disbelieve the involvement of accused Nos.1 and 3 in the assault.

33) Now question is whether accused Nos.1 and 3 are guilty of murdering Bharat and voluntarily causing hurt to Mauli (PW13) in furtherance of their common intention. In this regard it would be apt to refer the decision of the Hon'ble Supreme Court in the case of *Anbazhagan v/s. The State, 2023 SCC Online SC 857*, wherein in para 60 (4) and 60 (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'.

34) As informed by Dr.Amol Shinde (PW11), the external injury Nos.(1) abrasion over root of nose 1 x 1 cm irregular and reddish and (2) abrasion over right ala of nose 3 x 1 cm, reddish, are possible by hard and blunt object. The injury Nos.(3) incised laceration over right cheek, horizontal 5 x 1 cms bone deep, reddish and (4) incised laceration over left ala of nose 7 x 1 cms. bone deep, oblique reddish, associated with contused

abrasion infero laterally 3 x 1 cms. are possible by sharp cutting and heavy object. The injury Nos.(5) laceration present over occipital region 3 x 1 cms oblique reddish and (6) two contusions present over left side of chest and abdomen 3.5 cms x 1 cm each with intervening area of 1.5 cms vertical are possible by hard and blunt object like rod. Said injury Nos.3, 4 and 5 were sufficient in the ordinary course of nature to cause death. As deposed by Dr.Bhagwan Gore (PW12), the injuries sustained by Mauli (PW13) were caused by blunt object. Mauli (PW13) had hardly enough time to properly see the weapons of the offence. Therefore, it is highly probable that, accused No.1 used either an iron rod or a wooden stick; hard and blunt like iron rod.

34.1) However, looking at the injury Nos.3 and 4 and that the same were caused by an Axe, it is probable that, the accused No.3 assaulted Bharat with an intention to cause the bodily injuries and as informed by Dr.Amol Shinde (PW11), the said intended injuries were sufficient in the ordinary course of nature to cause death, therefore, the act of causing death of Bharat by accused No.3 will fall in clause *3rdly* of Section 300 of I.P.C.. Yet, it is significant to note that, if Bharat, Datta and Mauli (PW13) had not gone to the house of accused No.8, probably, this incident would not have occurred. Undoubtedly, the incident occurred suddenly. These circumstances clearly indicate that, homicidal death of Bharat was without

premeditation, in a sudden fight, in the heat of passion upon a sudden quarrel and without the accused no.3 having taken undue advantage of the situation or acting in cruel or unusual manner. Otherwise, he could have also dealt more injuries to Bharat and similar serious injuries to Mauli (PW13). Therefore, we are of the considered view that the act of Appellant No.3 i.e. causing death of Bharat is covered by Exception 4, to Section 300 of the I.P.C. Accordingly, we hold that, Appellant No.3 is guilty of the offence punishable under Section 304 (I) of I.P.C.

34.2) To support our conclusion above, reliance is placed on the decision in the case of *Sukhbir Singh vs. State of Haryana*, reported in (2002) 3 SCC 327, wherein in paragraph 17, the Hon'ble Supreme Court held that "To avail the benefit of Exception 4, the defence is required to probabalise that the offence was committed without pre-meditation in a sudden fight in the heat of passion upon a sudden quarrel and the offender had not taken any undue advantage and the offender had not acted in a cruel or unusual manner. The exception is based upon the principle that in the absence of pre-meditation and on account of total deprivation of self-control but on account of heat of passion, the offence was committed which, normally a man of sober urges would not resort to. Sudden fight, though not defined under the Act, implies mutual provocation. It has been held by Courts that a fight is not *per se* palliating circumstance and only

unpre-meditated fight is such. The time gap between quarrel and the fight is an important consideration to decide the applicability of the incident. If there intervenes a sufficient time for passion to subside, giving the accused time to come to normalcy and the fight takes place thereafter, the killing would be murder but if the time gap is not sufficient, the accused may be held entitled to the benefit of this exception.”

34.3) However, there is no evidence to conclude that, accused Nos.1 and 3 shared common intention for assaulting Bharat or that the accused No.1 knew that, the accused No.3 intended to cause the said injury Nos.3 and 4. There is no internal fracture below the injury No.5. This indicates that, the accuse No.1 did not apply much force behind the blow. Dr.Amol Shinde (PW12) did not attribute the injury Nos.1, 2 and 6 to the cause of the death of Bharat even though said injuries were caused over root of nose, right ala of nose and over the left side of chest involving abdomen. The rest evidence of the prosecution is insufficient to conclude that the injury No.5 was caused by accused No.1 with intent to cause death of Bharat or with such intention that accused No.1 knew that in any event said injury No.5 would cause death of Bharat. Moreover, as noted above, the homicidal death of Bharat was without premeditation, in a sudden fight, in the heat of passion upon a sudden quarrel and without the accused no.1 having taken undue advantage of the situation or acting in cruel or unusual

manner. However, considering the injury No.5 and the object (weapon) with which it was caused, it is safe to conclude that, while inflicting the injury No.5 alongwith injury Nos.1, 2 and 6 the accused No.1 knew that he is likely to cause death of Bharat. Hence, we hold that, accused No.1 is guilty of the offence punishable under Section 304 (II) of I.P.C.

35) In view thereof, the Criminal Appeal deserves to be allowed partly. Hence, the following Order :-

35.1) Criminal Appeal No.514 of 2013 is partly allowed.

35.2) The impugned Judgment and Order of conviction and sentence recorded against the Appellant Nos.1, 3, 4, 5 and 6 for the offence punishable under Section 302 read with 149 of I.P.C. is quashed and set aside. The said Appellants are acquitted from the said charge.

35.3) Instead, Appellant No.1 Amol Ankush Parge is convicted for the offence punishable under Section 304 (II) of I.P.C. and is sentenced to suffer rigorous imprisonment for a period of ten years.

35.4) Appellant No.3 Anil Ankush Parge is convicted for the offence punishable under Section 304 (I) of I.P.C. and is sentenced to suffer rigorous imprisonment for a period of ten years and pay fine of Rs.1,000/- in default to suffer simple imprisonment for one month.

35.5) The impugned conviction and sentence recorded against Appellant Nos.3, 4, 5, and 6 for the offence punishable under Section 324

read with Section 149 of I.P.C. for voluntarily causing hurt to Mauli (PW13), is quashed and set aside.

35.6) The impugned conviction and sentence recorded against Appellant No.1 Amol Ankush Parge for the offence punishable under Section 324 of I.P.C. for voluntarily causing hurt to Mauli (PW13) is upheld.

35.7) The sentences imposed on Appellant No.1 Amol Ankush Parge shall run concurrently.

35.8) The aforesaid sentences shall be inclusive of the period of set off permissible under Section 428 of Cr.P.C.

35.9) Appellant No.1 Amol Ankush Parge is on bail. His bail bonds stands surrendered. Appellant No.1 Amol Ankush Parge shall surrender before the trial Court within a period of two weeks from the date of uploading of this Order on the official website of Bombay High Court. Appellant No.1 to undergo the remaining sentence of imprisonment.

35.10) Appellant No.3 Anil Ankush Parge has already undergone his sentence of imprisonment. Presently, Appellant No.3 is detained in Yerawada Central Prison, Pune. Hence, he be released forthwith on payment of the fine amount, if not required to be detained in any other case/s.

(SHYAM C. CHANDAK, J.)

(A. S. GADKARI, J.)