



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.**

Criminal Appeal No. 8 of 2020

Ganesh S/o Pralhad Thengade
Aged about 32 years, Occ : Labour,
R/o. Bhivani Nagar, Washim,
Tq. & Distt. Washim.

... Appellant

- Versus -

The State of Maharashtra, through
Police Station Officer, Police Station,
Washim (City), District Washim.

... Respondent

with

Criminal Appeal No. 94 of 2020

Afsar Khan Haider Khan
Aged about 57 years, Occ : Labour,
Resident of Devpeth, Washim.

... Appellant

- Versus -

(1) State of Maharashtra, through
P.S.O., P.S. Washim City,
Washim.

(2) Akash Pralhad Thengade,
Aged 22 years, Occ : Labour,

(3) Vishal Kisan Ingale,
Aged 23 years, Occ : Labour,

(4) Pralhad Ganpat Thengade,
Aged about 70 years, Occ : Labour,

Respondent nos. 2 to 4 R/o Bhavani Nagar,
Washim, Dist Washim.

... Respondents

Mr. A. M. Jaltare, Advocate for the appellant in Cri. Appeal 8/2020
Mr. M. N. Ali, Advocate for the appellant in Cri. Appeal 94/2020 (and
for assist to prosecution in Cri. Appeal 8/2020)
Mr. K. R. Lule, APP for the State/respondent no. 1
Mr. R. S. Kurekar with Ms. K. M. Shekhar, Advocates for respondent
nos. 2 to 4 in Cri. Appeal 94/2020

CORAM : ANIL L. PANSARE AND
SIDDHESHWAR S. THOMBRE, JJ.

Date of reserving judgment : 03-10-2025
Date of pronouncing judgment : 08-10-2025

JUDGMENT (Per : ANIL L. PANSARE, J.)

These appeals arise out of the judgment and order dated 2-11-2019 passed by learned Additional Sessions Judge, Washim in Sessions Case No. 44/2018 thereby convicting the appellant - Ganesh Pralhad Thengade in Criminal Appeal No. 8/2020 and acquitting the respondent nos. 2 to 4 in Criminal Appeal No. 94/2020 for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code (IPC). The respondent nos. 2 and 3 were, however, convicted for the offence punishable under Section 324 of IPC, whereas respondent no. 4 was convicted for the offence punishable under Section 323 of IPC. Accordingly, Ganesh Thengade has preferred appeal being Criminal Appeal No. 8/2020. The informant (father of victim) has preferred appeal, being Criminal Appeal No. 94/2020 under Section

372 of the Code of Criminal Procedure, 1973 (for short 'the Code') against the judgment of acquittal.

2. The appellant in Criminal Appeal No. 8/2020 and respondent nos. 2 to 4 in Criminal Appeal No. 94/2020 shall be hereinafter referred to as accused nos. 1 to 4 respectively. Thus, by the impugned judgment, accused no. 1 was convicted for the offence punishable under Section 302 of IPC whereas accused nos. 2 to 4 were convicted for a lesser offence.

3. Briefly stated, the case of the prosecution was that on 7-4-2018, the informant lodged report with Police Station, Washim City stating therein that his brother's wife Najama informed him that in front of country liquor shop at Bhavaninagar, some persons have beaten her son, namely, Wasim Khan and he was taken to Washim Critical Hospital. The informant directly proceeded to the said hospital and met Wasim Khan. He had sustained injuries on head, abdomen and neck. The informant asked him about the incident, to which, Wasim responded by saying that at about 8.15 p.m. when he was returning by his car, the accused persons assaulted him by iron rod, iron pipe and knife. He also informed that the incident was witnessed by Sachin Ufale and Ibrahim Qureshi. Based on information, police registered offence against the accused under Section 307 read with Section 34 of the IPC

vide Crime No. 138/2018. During treatment, Wasim Khan expired in Icon Hospital, Akola and, accordingly, offence under Section 302 of the IPC was added.

4. The police swung into the action. They visited the spot and prepared panchanama, seized clothes of the accused, prepared inquest panchanama and referred the body for postmortem. The police recovered weapons viz. shock-up rod and iron pipe under Section 27 of the Indian Evidence Act. The blood stained clothes of accused and witnesses were also seized and sent to chemical analysis. The police also seized the car in which the Wasim was taken to hospital. The statements of witnesses were recorded. The accused were arrested and referred to medical examination. After complete investigation, the police filed charge-sheet which was registered as R.C.C. No. 152/2018.

5. Learned Magistrate committed the case to the Sessions Court in terms of Section 207 of the Code. The Sessions Court framed charge vide Exhibit 9. The accused pleaded not guilty and claimed to be tried. The prosecution then examined eight witnesses to bring home guilt of the accused. Statements of accused under Section 313 of the Code came to be recorded. The defence of the accused is of total denial and false implication. They did not examine any witness in defence.

6. The trial Court considered the evidence led before it as also the arguments made by the parties. The trial Court found that there is sufficient evidence against accused no. 1 for committing offence under Section 302 of IPC, however against accused nos. 2 to 4, the case was made out for a lesser offence under Section 324 and 323 of the IPC. Accordingly, the trial Court convicted the accused no. 1 for the offence punishable under Section 302 of the IPC and others for lesser offence.

7. We have heard Mr. A. M. Jaltare, learned counsel for accused no. 1, Mr. R. S. Kurekar, learned counsel for accused no. 2 to 4, Mr. M. N. Ali, learned counsel for the informant and Mr. K. R. Lule, learned Additional Public Prosecutor (APP) for the State/respondent no. 1. We have gone through the evidence, documents and judgments placed before us. We will refer to the same to the extent necessary to decide the following points that arise for our consideration. We have recorded our findings thereon for the reasons to follow.

Sr. No.	<u>Points</u>	<u>Findings</u>
1.	Has the prosecution proved that Wasim Khan Ajij Khan suffered homicidal death ?	In the affirmative.
2.	Has the prosecution proved that on 7-4-2018, in front of country liquor shop at Bhavaninagar, Washim, accused persons	In the affirmative.

	in furtherance of their common intention, caused death of Wasim Khan Ajj Khan intentionally and knowingly by assaulting him by iron pipe and knife ?	
3.	Whether interference is called for in the impugned judgment, if yes, to what extent ?	In the affirmative, as per final order.
4.	What order ?	As per final order.

REASONS

As to Point Nos. 1 to 3

8. These points being interlinked are decided by common reasoning. The prosecution was under obligation to prove that Wasim Khan suffered homicidal death and that the death has been caused by the accused persons. The learned trial Court relied upon postmortem report, Exhibit 53, which was admitted by the accused. As per the postmortem report, following injuries were found on the body of Wasim Khan.

- “1] Stitched wound over left parietal region of size 11 cm x 9 cm
- 2] Stitched wound over left Occipital region of size 1 cm x 5 cm.
- 3] Two abrasion just above the medial end of right eyebrow of size 1cm x 0.5cm and 1 cm x 0.3 cm
- 4] Abrasion over right cheek of size 3cm x 2.5cm

- 5] Abrasion over lower back on left side of Size 3cm x 3cm
- 6] Intravenous puncture mark (as a part of treatment).
- 7] Under-scalp haematoma over right temporo-Posterior-Parital region of 15 cm x 13cm and left posterior-parieto-occipital region 14cm x 13cm.
- 8] Linear undisplaced fracture of left occipital bone extending over posterior fossa left side of length 9 cm.
- 9] Evidence of subdural hemorrhage over right cerebral hemisphere of size 19 cm x 9cm.
- 10] Evidence of subarachnoid hemorrhage over right fronto temporo parietal region of sized 16 cm x 7 cm.”

The cause of death of Wasim Khan was shown as ‘head injury’. The injuries were antemortem. The testimony of witnesses will disclose, how the above injuries were caused.

9. P.W. 1 is the informant. He deposed in terms of the report lodged by him with the police. His evidence as regards incident is hearsay because his sister-in-law Najama had informed him about the incident. He had not seen accused beating Wasim. His evidence on the point of occurrence of incident, therefore, is inadmissible. What is admissible is that upon receiving information of the incident, he proceeded directly to Washim Critical Hospital. He met Wasim at the

hospital and inquired about the incident. Wasim said that Ganesh Thengade (accused no. 1) had assaulted him with shock-up rod, Akash (accused no. 2) had beaten him with iron pipe, Vishal (accused no. 3) with iron pipe and Pralhad Thengade (accused no. 4) had beaten him with hands and kicks. P.W. 1 then approached police station and lodged report, Exhibit 27. Thus, the First Information Report (FIR) has been promptly lodged. P.W. 1 then deposed that Wasim Khan expired. He identified the accused before the Court.

10. In the cross-examination, the informant deposed that prior to the incident, he had an opportunity to go to Washim Critical Hospital. The defence has then brought on record that when the treatment was being given to Wasim Khan in ICU, he himself (informant) and other relatives were present in the said room. He also deposed that family members of other brothers and their children were also present. Similarly, couple of doctors and five nurses were present in ICU. He denied the suggestion that when he reached Critical Hospital, Wasim Khan was unconscious due to head and neck injury. He deposed that Wasim was then referred to Akola within 30 minutes of the treatment. He also deposed that at that time, doctors informed them that Wasim's condition is highly serious and accordingly he is being referred to Akola. The defence has then brought on record a vital

evidence, where informant said that Wasim told him about assault by accused only because he reached the hospital first. It is also brought on record that when he reached hospital, doctors were suturing wounds of Wasim.

11. Thus, the defence has brought on record that Wasim was given treatment at the hospital, namely, Washim Critical Care Center. He was in the hospital for about 30 minutes. Wasim narrated the incident to him (PW. 1). His condition was serious. Thus, the defence has admitted that prior to death, Wasim has disclosed to informant the details of the incident wherein he not only named each accused, but has assigned a specific role to each one of them. Oral dying declaration is accordingly substantiated by the defence. According to dying declaration, accused no. 1 Ganesh assaulted Wasim with shock-up rod, accused Akash and Vishal had beaten him with iron pipe and accused Pralhad had beaten him by hands and kicks.

12. PW. 2 is a panch witness to spot panchanama. He said that spot of incident was between Patni Chowk to Shivaji Chowk i.e. Bhavaninagar. He has also deposed that the blood mixed soil, stones containing blood stains and CCTV camera was seized by police. He is also panch to the seizure of clothes of the accused. He has identified their clothes. In the cross-examination, he said that there is country

liquor shop near the spot of incident and that the said shop is situated in a residential area having thick population. He also deposed that informant was present with them on the spot. Nothing more has been brought on record through this witness.

13. Mr. A. M. Jaltare, learned counsel for accused no. 1 and Mr. R. S. Kurekar, learned counsel for accused nos. 2 to 4 argued that CCTV camera was not produced before the trial Court and, therefore, vital evidence is concealed. Learned APP submits, and rightly so, that merely because CCTV camera was not produced before the trial Court, it would not affect the case of prosecution in as much as neither the witness deposed in chief- examination that he has seen CCTV footage covering the incident nor has defence put up a case that CCTV camera seized by police contained the footage of the incident. He submits that, had the footage of incident captured in CCTV camera, the prosecution would have placed it before the trial Court. Thus, merely on the ground of non production of CCTV camera, one cannot jump to the conclusion, firstly, that the incident was captured in CCTV footage and secondly, the accused persons were not seen in the CCTV footage. In fact, such case is not put up by defence.

14. P.W. 3 is the panch witness to the disclosure of the weapon at the instance of accused. Discovery is under Section 27 of the Indian

Evidence Act. He deposed that Ganesh was in police station and said that he would take out the iron pipe which he had concealed. The panchanama is at Exhibit 39. Ganesh led them to his house situated behind the country liquor shop at Bhavaninagar. He took out the shock-up rod from his house. Police seized the same under seizure panchanama, Exhibit 41. The witness then testified about recovery of iron pipe at the instance of Akash. It was recovered from his house. The iron pipe was also seized under panchanama, Exhibit 42. Similar is the status of Vishal. He also took out iron rod from his house. It was seized under panchanama, Exhibit 43. The witness identified these three weapons. In the cross-examination, the witness said that accused did not sign panchanama and memorandum statement in his presence. Witness then denied the suggestion that accused did not show their willingness to show any place nor any weapon seized at their instance.

15. The argument of defence is that discovery of weapon is not proved because the witness has not specified the place where the weapons were concealed. The witness has only deposed that each accused had kept the weapon in the house and brought the same from their house. The witness also stated that panchanama and memorandum statement were not signed by the accused in his presence. Thus, according to defence, recovery is doubtful.

16. The submissions appears to us to be relevant. The prosecution, if intends to rely on discovery of weapon under Section 27 of the Indian Evidence Act, it is under obligation to prove that the place where weapon was concealed was within the exclusive knowledge of the accused. In that sense, the details of the space including its location within the house should have been brought on record. The house of accused is otherwise accessible to all other family members and, therefore, cannot attribute exclusive knowledge of the house to the respective accused. The recovery of weapons will have to be, therefore, ignored.

17. P.W. 4 is an eye witness. He is also friend of Wasim. According to him, the incident occurred on 7-4-2018 at 8.00 p.m. He and Wasim met at pan shop. Thereafter Wasim proceeded to his house in four wheeler. P.W. 4 was on way to his house on two wheeler. He took a turn near country liquor shop at Bhavaninagar. The witness proceeded further. When he reached Dighewadi Square, he received phone from Wasim saying that quarrel occurred between him and Ganesh. Accordingly, Wasim called him. The witness then proceeded towards spot. In between, Sachin Ufade met him and accordingly, both went towards spot. When they reached spot, they saw all the accused beating Wasim. Having seen him(witness), the accused nos. 2 to 4 fled

away. However, Ganesh continued beating Wasim by shock-up rod. He (witness) obstructed Ganesh by pulling him. He saw Wasim had sustained bleeding injury on his head. Wasim's cousin was passing by said road, accordingly, the witness, Sachin and Wasim's cousin Mujju removed the injured to hospital. While on way to hospital, Wasim told the witness that the accused assaulted him on the ground of removal of motorcycle from the road. Wasim was admitted to Critical Hospital. Wasim's uncle came to hospital.

18. Thus, P.W. 1's presence in the hospital is substantiated by the testimony of P.W. 4. Apart from that, he has witnessed the incident. He identified the accused in the Court. The defence brought on record that incident took place at about 8.00 p.m. It is then brought on record that on way to spot, the witness informed Sachin Ufade that there occurred quarrel between Wasim and some persons. It is then brought on record that when the witness reached spot, 10 to 15 persons were already present there and Wasim was lying on the ground. The witness picked up Wasim and took him to hospital. He denied the suggestion that he (Wasim) was unconscious. He then showed ignorance to the case put up by defence that there occurred quarrel between Datta Walke and Wasim.

19. The defence has, through aforesaid cross-examination, made an attempt to show that P.W. 4 has not seen the incident and secondly, that there occurred quarrel between Datta Walke and Wasim on the same day at the same time. In doing so, the defence has brought on record that the witness reached the spot and that Wasim was lying on the ground. Thus, the presence of witness at the spot has been certified and along with it, was certified that Wasim sustained injuries. Such a cross-examination coupled with what the witness has deposed in chief-examination will support the prosecution's case that P.W. 4 had seen the accused beating Wasim. Accused nos. 2 to 4 fled away whereas accused no. 1 continued beating Wasim by shock-up rod.

20. Thus, involvement of accused persons in the crime has been well established through the testimony of this witness. Further, his testimony, if read with testimony of P.W. 1, not only the involvement of all accused in the crime is established but also the role played by each one of them. P.W. 4 has seen all the accused beating Wasim. He has also seen Ganesh beating Wasim by shock-up rod. Said part of the incident has been corroborated by P.W. 1. In addition, P.W. 1 has, in the form of dying declaration, spelt out the role played by other three accused. Thus, evidence of P.W. 4 is significant. The only issue is whether on the same day and at the same time, there occurred quarrel

between Datta Walke and Wasim, and if such quarrel occurred, whether there is evidence to show that Datta Walke is the one, who has committed Wasim's murder.

21. P.W. 5 is a Doctor attached to Icon Hospital, Akola. He deposed that Wasim Khan was admitted in the hospital on 7-4-2018 with the history of head injury. The Doctor has treated him and has given information that injuries sustained by Wasim might have been caused by heavy, hard and blunt object, resulting into intracranial hemorrhage, which ultimately resulted into his death. In the cross-examination, the defence got the admission that injuries sustained by Wasim may lead to his health deteriorating to Coma and that patient can become unconscious and/or go into Coma immediately after the injuries. The doctor further admitted that Wasim was brought to Icon Hospital in unconscious condition. He also admitted that the injuries sustained by Wasim can be caused, if he falls on hard and blunt object. Such admissions, in the light of evidence of P.W. 1 and P.W. 4 as also P.W. 7, which we will discuss later, will be of no consequences, rather, will support the case of the prosecution that the assault was made with the intention to eliminate Wasim.

22. P.W. 6 is yet another doctor. He is attached to Washim Critical Care Center where Wasim was brought immediately after the

incident. The doctor deposed that Wasim was brought to hospital with history of assault but before examining and giving treatment, people accompanying him decided to shift him to Akola for further treatment. Accordingly, he issued certificate, Exhibit 52. In the cross-examination, he stated that when Wasim was brought to hospital, he was appearing unconscious.

23. The counsels for the defence harped upon his statement that when he was brought to hospital, he was appearing unconscious. According to defence, if Wasim was brought to hospital in unconscious state, there was no question of P.W. 1 interacting with him.

24. Thus, according to defence, the theory of dying declaration is washed away by the testimony of this witness. We do not find substance in the argument in as much as the witness has not admitted that Wasim was brought unconscious. What is said by the witness is that Wasim was appearing unconscious. Thus, the witness was not certain whether Wasim was unconscious or not. It appears that P.W. 6 is running private hospital and, therefore, avoided to take responsibility to treat the patient sustained injury in crime. His evidence, if tested in the light of testimony of P.W. 1, will show that he has suppressed the fact of he giving initial treatment to Wasim.

Even the cross-examination of P.W. 1 show that Wasim was treated in this hospital.

25. P.W. 7 is yet another eye witness, namely, Sachin Ufade. He met P.W. 4 when he was on way to spot. He deposed that on 7-4-2018, at about 8.15 p.m., P.W. 4 came to him and told that Ganesh was beating Wasim and accordingly, both proceeded towards the spot viz. country liquor shop at Bhavaninagar. When they reached spot, they saw all accused beating Wasim. He then deposed that accused nos. 2 to 4 fled away from the spot but Ganesh continued beating Wasim on his head. P.W. 4 pushed Ganesh and rescued Wasim. Wasim sustained injuries to his head and neck. He then deposed that they took Wasim to Washim Critical Hospital and on way, Wasim told them that accused assaulted him on the point of parking of vehicle. He also deposed that in the hospital, doctor treated him on the ground floor and thereafter he was taken to upstairs.

26. Thus, his testimony is in tune with the evidence of P.W. 4 and would further substantiate the prosecution version. In the cross-examination, he admitted that at the time of incident, 10 to 12 persons were present in front of country liquor shop. It is then brought on record that when P.W. 4 and the witness were traveling on motorcycle, P.W. 4 informed him that there occurred quarrel between Wasim and

Ganesh. Thus, the defence has supported P.W. 4's version that Wasim told him that there occurred quarrel between him and Ganesh.

27. The argument of defence, however, is that P.W. 4 has stated that he informed Sachin that there occurred quarrel between Sachin and some person. Wasim did not name Ganesh whereas Sachin has stated that P.W. 4 informed him that there occurred quarrel between Wasim and Ganesh. In our view, such minor discrepancy in evidence of P.W. 4 will not be sufficient to infer that P.W. 4 and P.W. 7 have not witnessed the crime particularly when in cross-examination, defence itself has brought on record that P.W. 4 informed Sachin about quarrel between Wasim and Ganesh. He admitted that Wasim was lying on the spot and was taken to hospital but denied the suggestion that he was unconscious. Thus, the testimony of P.W.7 has strengthened the prosecution's case.

28. P.W. 8 is the Investigating Officer. He has supported the prosecution's theory and deposed about the evidence collected by him during investigation. In the cross-examination, he admitted that on 7-4-2018 at about 8.30 p.m., Wasim had picked up a quarrel with Datta Sawke, an employee of country liquor shop and had assaulted him. The N.C. report was lodged. He further admitted that on same day

and time, accused Vishal had also lodged report with police station about some Muslim persons entering his house and assaulting him.

29. On the basis of aforesaid evidence, the counsels for defence argued that there occurred quarrel between Wasim and Datta Sawke, who is employee of country liquor shop and, therefore, the possibility of Wasim getting injured in the said quarrel cannot be ruled out.

30. We are not impressed with the argument in as much as merely because Datta Sawke, who was employee of country liquor shop will not mean that Wasim and Datta Sawke had quarreled in front of country liquor shop. Further, the Investigating Officer is not an eye witness to the said incident. He deposed on the basis of information lodged with the police station. Most importantly, he deposed that Wasim had assaulted Datta Sawke and, therefore, the defence cannot argue that Datta Sawke has assaulted Wasim or that it is he who was responsible for the injuries sustained by Wasim. As stated earlier, the Investigating Officer is not witness to the incident that allegedly occurred between Wasim and Datta Sawke. There is nothing on record to show that said incident had occurred at a particular time and place. That being so, merely because some report was lodged on the same day of the incident, it cannot be read in isolation to overturn the well established case of the prosecution.

31. Mr. A. M. Jaltare, learned counsel for the appellant Ganesh argued that the evidence of eye witnesses is not trustworthy. According to him, it is doubtful whether P.W. 4 and P.W. 7 have actually witnessed the incident. According to him, on the date of incident, there occurred two quarrels, that too, at the same time. P.W. 4 and P.W. 7 have not stated anything about second quarrel and, therefore, it is unlikely that they have witnessed the incident. Another contention is that there is delay in lodging FIR. In support, he has relied upon following judgments.

(1) ***Hallu and ors. Vs. State of M. P [1974 Cri.L.J. 1385]***. In the said case, the appeal was against acquittal involving charge of murder. The Supreme Court emphasized on the point, considering the evidence led in the said case, that when there are multiple plausible interpretations of the evidence, the Court should refrain from interfering with acquittal decisions. The Supreme Court also highlighted the importance of credibility and reliability of the testimony of the eye witnesses, the significance of discrepancies in report and medical evidence and the proper understanding of the legal requirements for reports to qualify as first information reports. Accordingly, the Supreme Court held that where the evidence was not conclusive for establishing guilt beyond

reasonable doubt, the Court should have exercised caution in disturbing an acquittal.

We do not find support of the aforesaid judgment to the appellant Ganesh. Firstly, he has been convicted by the trial Court and, therefore, the question of giving benefit of the judgment of acquittal will not arise. Most importantly, here is a case where not only the prosecution, by examining two eye witnesses, whose evidence is supported by the oral dying declaration of the deceased, has established the guilt of accused but also the defence in the cross-examination has cemented the prosecution's version.

As regards occurrence of two quarrels, we find that the argument is imaginary. The Investigating Officer's evidence on this point is hearsay and is based on the report lodged with the police. Neither the spot of incident is disclosed nor is there cogent evidence to believe that on that day, at the same time, there occurred two quarrels to jump to the conclusion, firstly, that both quarrels took place at the same place and secondly, that Wasim sustained injuries in the said quarrel. In fact the report that was lodged with police indicates that Wasim assaulted Datta Sawke. In the circumstances, the argument that P.W. 4 and P.W. 7 have not witnessed the incident is without any substance and is accordingly rejected.

So far as delay in FIR is concerned, it is well settled that there cannot be straitjacket formula to doubt the informant's version only on the basis of delay in lodging FIR. If the delay is justified, the Court should consider the case accordingly.

In the present case, one cannot even argue that there is delay in lodging FIR. The informant (P.W. 1), after receiving information of the assault on Wasim, proceeded to the hospital where he was taken. Informant is uncle of Wasim. It is but natural that he will first visit hospital to enquire about Wasim's health. He has accordingly visited the hospital, spoken to Wasim and acquired knowledge about the details of assault on him. Thereafter Wasim was taken to Akola for further treatment. Informant approached police station and lodged FIR. One may visualize here that once informant approached the police station, what will follow is the narration of incident. The same will be then taken down and other formalities completed. This process will depend on the capability of a person to narrate the incident in the sense it will depend on capability of each individual to narrate the incident within certain time. One person may narrate it within few minutes, another may take some time. Accordingly, a pragmatic approach will have to be taken while assessing the evidence.

The printed FIR, Exhibit 28 indicates that information was received at police station on 7-4-2018 at 23.44 Hours. The time of

occurrence of offence is mentioned as between 20.30 to 20.45 Hours. In the oral report (Exhibit 27), the informant has stated that at about 8.45 p.m. (20.45 Hours) on 7-4-2018, while he was taking dinner, he received phone call from her sister-in-law, namely, Najama saying that her son Wasim Khan was beaten by boys of Bhavaninagar and that Wasim has been taken to Washim Critical Hospital for treatment. Thereafter, he proceeded to the hospital where he saw that his nephew Wasim was being treated for injury which is sustained on neck and stomach. Thereafter Wasim informed that he was beaten by four accused by means of iron rod, iron pipe, knife etc. Names of four accused were also mentioned. The description of weapon has been also stated. It is nobody's case that informant has acquired this knowledge from any other source. Informant then approached police and lodged report saying that four accused made an attempt to kill Wasim. Accordingly, FIR under Section 307 read with Section 34 of the IPC was lodged.

Thus, informant received information at about 8.45 p.m. He then proceeded to Washim Critical Hospital. He met Wasim at hospital, who narrated the incident. Wasim was given initial treatment. Thereafter, informant proceeded to police station and lodged report at about 11.45 p.m. In this process viz. receiving information of incident while taking dinner, till reaching police station, he spent three hours,

which appears to us to be probable. We are, therefore, of the firm view that there is absolutely no delay in lodging FIR. The informant was not even aware that Wasim Khan has in fact succumbed to the injuries while he was taken to hospital at Akola and accordingly, he lodged FIR alleging attempt to murder. Such a prompt reporting of FIR will not only inspire confidence but will also meet the requirement of valid dying declaration. The report also mentions of presence of P.W. 4 Sachin and P.W. 7 Ibrahim at the spot and they having witnessed the incident. Thus, names of accused, weapons used by them in assault and the persons who have witnessed the incident is all mentioned in the oral report that was lodged by P.W. 1. This report having been lodged promptly and since there is nothing to indicate that P.W. 1 had received this information from any other source, his statement is significant to establish the nexus of accused with the crime.

(2) *Jamuna Chaudhary and others Vs. State of Bihar [1974 Cri.L.J. 890]*. This judgment is cited in support of the argument that the duty of Investigating Officer is not merely to bolster up a prosecution case with such evidence as may enable the Court to record a conviction but to bring out the real unvarnished truth.

The aforesaid finding is given by the Supreme Court in the background of the case where large scale violence occurred, many

individuals including the appellant therein were accused of participating in an attack resulting in multiple injuries and death. The Supreme Court scrutinized the evidence and noted that many witnesses did not mention the injuries to the deceased or specific role of appellant in causing injury. The Court found that evidence was not sufficient to prove guilt of appellant for causing death beyond reasonable doubt. Accordingly, his conviction was reduced from murder to rioting.

Such is not the case here. Evidence led by the prosecution here has established involvement of the accused persons in the crime as also the manner in which they have played a role. This is not a case where many individuals were involved in the crime or that the evidence is vague as regards involvement of accused in the crime.

(3) ***State of Karnataka Vs. M. S. Basappa and others [(2019) 16 SCC 242]***. This judgment is cited in support of argument that FIR was lodged after 4 Hours despite police party have reached the scene of occurrence immediately after the incident. We have gone through the judgment. The High Court there identified several discrepancies in the prosecution's case which included inconsistent and delayed registration of FIR as also unnatural conduct of witnesses, contradictory versions regarding the time and place of the incident etc. It is, in the aforesaid background, the delay in registration of FIR was found

significant. Thus, this is not a case where conviction has been set aside only on the ground of delay in lodging FIR. In any case, we have noted that there is no delay in lodging FIR. Further, the police arriving at a spot on receiving information is one thing and lodging FIR is another. The normal conduct of police and all concerned will be to control the situation and/or to attend the victim and try to save his life. Thus, the first priority will be to take the victim to the hospital for treatment. Thus, multiple activities will occur on in such a situation which is a normal conduct. In that context, we would reiterate that there is absolutely no delay in lodging FIR and no benefit could be drawn by the accused on this count.

(4) ***Mahtab Singh and another Vs. State of Uttar Pradesh [(2009) 13 SCC 670]***. This judgment is also relied upon on the point of benefit to be extended to the accused where there is delay in lodging FIR. In the said case, FIR was lodged in 45 minutes after the incident. The argument is that despite lodging FIR in 45 minutes, the Supreme Court found that it was not prompt reporting of the FIR and therefore, the case of prosecution should be not believed. We have gone through the judgment to find that the Supreme Court's views about delay in lodging FIR were altogether in different context.

It was a case where trial Court had meticulously examined entire evidence and concluded that the prosecution failed to prove the charges beyond reasonable doubt and accordingly accused persons were acquitted. The High Court reversed the acquittal, finding that the evidence of prosecution witnesses was convincing. The Supreme Court noted that High Court's decision to overturn the trial Court's acquittal order was without sufficient and plausible grounds, particularly, when the trial Court's findings were reasonable and supported by the evidence. In the said case, the incident occurred at 9.00 p.m. The deceased had been to betel shop of *R* to purchase bidi. While he was returning, only few steps away, the incident had occurred. In fact P.W. 1 therein had admitted in his deposition that *R*'s shop was hardly 2-3 steps away from the place of occurrence. The Supreme Court noted that *R* though available, his statement was neither recorded under Section 161 of the Code nor was he tendered in examination before the Court. The Supreme Court then noted other flaws in the investigation and thereafter commented on the time taken to lodge FIR. The Supreme Court took note of the finding of the High Court wherein the High Court has overturned the judgment of acquittal *inter alia* on the ground that FIR was lodged merely 45 minutes after the incident. The Supreme Court held that the High Court failed to consider that police station was so close from the spot of incident that it was visible

therefrom and yet P.W. 1 did not go immediately to police station to lodge report but first went to C to have a written report prepared and then went to the police station with written report. The Supreme Court was of the view that the first version of the incident could have been reported at the police station within 5 minutes of its occurrence. In that context, the Court held that P.W. 1, thereon took 45 minutes in reporting the incident and thus creates doubt about its truthfulness, particularly when he had grudge against the appellant therein due to some civil dispute between them.

Thus, the context in which the finding is rendered is something which the counsel should look into before placing reliance on a judgment. As observed earlier, the fundamental rule is that, if delay in lodging FIR is justified, one cannot take advantage of such delay to argue that the prosecution's case should be disbelieved. The judgment, therefore, will be of no help to the defence.

(5) ***Ashraf Hussain Shah Vs. State of Maharashtra [1996 Cri.L.J. 3147]***. This is yet another judgment where the defence has highlighted the issue of delay in lodging FIR. In the said case, two witnesses, who had allegedly seen the incident were in fact friends of the deceased, but failed to lodge FIR. It appears that both the witnesses were present in the police station but remained silent for two days. Such a conduct was

found to be highly suspicious and improbable. The Court also found contradictions in their statements and questioned whether they had witnessed the incident, specially for their failure to report the incident immediately. Overall, the evidence suggested that FIR might have been lodged after deliberation rather than immediately after the incident.

Such is not the case here. As stated earlier, FIR has been lodged at the earliest possible opportunity. The story of prosecution has been cemented by the defence in cross-examination. The accused, therefore, will not get any advantage of the said judgment.

(6) ***Suresh Maruti Shinde (Waikar) Vs. The State of Maharashtra [2018 ALL MR (Cri) 3328]***. This judgment is cited in context with recovery of weapons at the instance of the accused persons. We need not delve upon this judgment in as much as we have noted that evidence on the point of recovery of weapons at the instance of accused will have to be excluded. Our finding is mainly based on testimony of P.W. 1, P.W. 4 and P.W. 7. It is well settled that, if the testimony of eye witness is credible, the prosecution will be fully justified in resting its case on such credible evidence without furnishing corroboration. The judgment cited, therefore, will not carry any weightage in favour of the accused persons.

32. We shall now proceed to refer to the arguments of learned APP as also learned counsel, who appears for the victim's father. Learned APP submits that the FIR has been lodged within reasonable time. The names of eye witnesses were also mentioned in FIR. He further submits that eye witnesses have supported the prosecution version. Nothing has been brought on record in the cross-examination to disbelieve their testimony. He further submits that postmortem report is admitted by defence. The postmortem report itself is sufficient proof of homicidal death. The intention of accused persons was common while assaulting the deceased. Both the eye witnesses have stated that Ganesh was beating deceased by means of shock-up rod on his head. The cause of death of deceased is head injury. Accordingly, he submitted that conviction of Ganesh may not be disturbed. He has also supported the case of the victim's father, however, failed to justify as to why State has not preferred the appeal.

33. Nonetheless, father of deceased is before the Court. Mr. Mir Nagman Ali, learned counsel for the victim, taking further the arguments put forth by the learned APP, has invited our attention to the findings of the trial Court to acquit accused nos. 2 to 4. The same appears in paragraph no. 19 of the judgment, which read thus :

“19. Considering entire oral and documentary evidence, and argument of both side, I have come to conclusion that Wasimkhan was beaten by shock-up rod by accused Ganesh. It had caused bleeding injuries to head which ultimately resulted into his death. Having seen Sk.Ibrahim and Sunil Uphade, accused Akash. Vishal and Pralhad had fled away. As per evidence, Pralhad had beaten by hands and kicks. He was not having any weapon. Accused Akash and Vishal were beating by iron rod and pipe. But, it is not proved that their assault had caused any fatal injury on head. However, use of those iron rod and pipe is duly proved. Those are definitely dangerous weapon considering their big size. Accused Pralhad had beaten by hands and kicks only. Ganesh had continued beating to Wasimkhan on his head by shock-up even when other co-accused had fled away.

This clearly shows that Ganesh had intention, motive and preparation to kill Wasimkhan. Therefore, element of common intention to commit the murder of Wasimkhan is missing so far as other accused are concerned. Moreover, when clothes of accused were sent to C.A., it is revealed that Shirts of accused and Vishal, Pralhad were stained with human blood, Pant of Vishal was also stained with human blood. No explanation is given by these accused for presence of human blood on their clothes. It is also incriminating evidence against them. Thus, their presence on the spot, actual assault on Wasimkhan is proved beyond reasonable doubt.

Thus, offence punishable U/sec.302 of 1.P.C, is proved against the accused No.1 Ganesh only and offence punishable U/sec. 324 of 1.P.C against the accused No.2 Akash and Accused No. 3 Vishal and 323 of I.P.C against accused No.4 Pralhad.

Here, I stop to hear accused and prosecution on the quantum of punishment.”

Mr. Ali submits that the trial Court has held that Ganesh assaulted Wasim by shock-up rod, causing bleeding injury to his head, which ultimately is cause of his death. The trial Court also noted presence of

other three accused and that accused Pralhad had beaten by hands and kicks and other two accused had beaten Wasim by iron rod and pipe. The trial Court further noted that use of iron rod and pipe is duly proved and that these weapons are dangerous considering their size. Despite such status, the trial Court has acquitted accused nos. 2 to 4 for the offence punishable under Section 302 of IPC solely on the ground that they have not caused fatal injury and accordingly held accused no. 1 Ganesh guilty of offence punishable under Section 302 of IPC, accused no. 2 Akash and accused no. 3 Vishal guilty of offence punishable under Section 324 of IPC and accused no. 4 Pralhad guilty of offence punishable under Section 323 of IPC.

34. Mr. Ali has relied upon following judgment to contend that testimony of witnesses, if found wholly reliable, same can be relied upon even without corroboration.

Ravi Vs. State represented by Inspector of Police [2008 ALL SCR 2011]

The case was based on the testimony of single eye witness. The Supreme Court on the law relating to approach of the Courts, in such cases, held that when prosecution version essentially rests on the testimony of a single witness, the same may be relied upon without corroboration depending on the facts and circumstances of each case. The Supreme Court held that as a general rule, Court can and may act

on the testimony of single witness though uncorroborated. It is so because one credible witness outweighs the testimony of a number of other witnesses of indifferent character. The Supreme Court further noted that unless corroboration is insisted upon by statute, the Court should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example, in a case of child witness or of a witness whose evidence is that of an accomplice or of an analogous character.

35. This judgment, in our view, will further substantiate the prosecution version. In the present case, there are more than one eye witnesses whose testimony is credible. That apart, there is corroboration in the form of testimony of P.W. 1 wherein oral dying declaration is proved. Further, his testimony as regards treatment given to Wasim in hospital indicating that he sustained head injury and other injuries is also believable.

36. Thus, the prosecution has, by credible evidence, established the role played by each accused. Their involvement in the crime has been recognized by the trial Court. However, the trial Court got swayed away with the nature of injury caused by each accused. Accordingly, the punishment is imposed individually. The trial Court was of the view

that common intention to commit murder of Wasim Khan is missing. This finding has been criticized by the victim's father. We will accordingly delve upon the law of common intention. As such, counsel for accused nos. 2 to 4 vehemently argued that the High Court should not interfere with the order of acquittal, if two reasonable views are possible. According to him, the view expressed by the trial Court is possible view. He submits that assessment of evidence of the witnesses is something which should be left to the discretion of the trial Court.

37. The aforesaid principles of law are well established. However, the common intention under Section 34 of the IPC is not dependent only on the nature of injury caused by each accused. In a given case, the accused may facilitate commission of crime without inflicting any injury, say by holding hands of the victim rendering him defenceless, which will be sufficient to prove that he along with other accused carried common intention to execute the crime. Thus, the common intention is dependent on sharing intention to achieve a particular result.

38. In the case of *Ramesh Singh alias Photti Vs. State of A.P [(2004) 11 SCC 305]*, the Supreme Court held as under :-

“12. To appreciate the arguments advanced on behalf of the appellants it is necessary to understand the object of incorporating Section 34 in the Indian Penal Code. As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held guilty. By introducing Section 34 in the Penal Code the legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section 34 IPC embodies the principle of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered from the manner in which the accused arrived at the scene and mounted the attack, the determination and concert with which the attack was made, and from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this regard even an illegal omission on the part of such accused can indicate the sharing of common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted. (See Noor Mohammad Mohd. Yusuf Momin v. State of Maharashtra)”

Thus, one may not get direct proof of common intention shared by the accused and will have to be gathered from the conduct of all the

accused and not the individual act actually performed. It could be gathered from the manner in which the accused arrived at the scene and mounted attack, the reason of attack, the nature of injury caused by one or some of them and also the acts of the persons who were not responsible for the injury but the manner in which they conducted themselves subsequent to the attack. Thus, totality of circumstances will have to be taken into consideration in arriving at the conclusion whether the accused had common intention to commit offence committed by them.

39. In the light of above, if the conduct of the accused herein is examined, we find that they shared common intention. The first reason for such conclusion is that, three out of four were armed with weapons, which the trial Court categorized as deadly weapons. The fourth accused though was not armed with weapon but assaulted Wasim by fists and kicks. In that sense, overt act is attributed to him as well. The second reason is that the postmortem report indicates that multiple injuries were sustained by Wasim and those injuries could be caused by heavy, hard and blunt object. Wasim suffered injuries not only on head but also other parts of the body viz. face, lower back, neck and stomach. The injury includes fracture injury to left occipital bone extending over posterior fossa left side. Thus he was mercilessly beaten by all accused.

As such, the incident occurred on the ground of quarrel between the two in respect of parking vehicle, however, the manner in which the accused assaulted Wasim is something that would attract Section 302 read with Section 34 of the IPC. Thirdly, there appears no reason why should accused persons attack Wasim by means of shock-up rod, iron pipe and iron rod. The assault was such that he succumbed to injuries on the same day. Fourthly, there is no evidence that the incident occurred at the spur of the moment. The attack by weapons is indicating premeditated assault.

40. Thus, the accused persons would share collective responsibility for the fatal blows inflicted by accused no. 1 Ganesh. The trial Court, in our view, committed error in assessment of the role played by other accused and for no valid reason, has separated their role only on the count that the injuries caused by them were not responsible for causing death of Wasim. The trial Court failed to recognize the conduct of the accused while imparting blows to Wasim. The conduct of accused no. 4 also is not such that he did not share common intention to achieve the same result which the other three accused intended to in the sense while accused no. 1 continued repetitive assault on the head of Wasim, neither he nor other two accused made an attempt to prevent continuation of attack.

41. The sum and substance of the above discussion is that the prosecution has successfully established involvement of each accused in crime. The trial Court thus committed error in imposing lesser punishment to accused nos. 2 to 4. Accordingly, we answer point nos. 1 to 3 in affirmative.

As to Point No. 4

42. Having answered point nos. 1 to 3 in affirmative, the trial Court's findings convicting appellant Ganesh Pralhad Thengade will have to be upheld whereas its finding against other three accused will have to be overturned.

43. As such, in such a situation, accused nos. 2 to 4 should be heard in terms of Section 235(2) of the Code before imposing sentence, however, none of them is present before the Court. We have accordingly heard Mr. Kurekar, learned counsel for accused nos. 2 to 4. He prayed for leniency. We accept the submission and are inclined to impose minimum sentence for the offence punishable under Section 302 of the IPC. Hence, following order.

ORDER

- (i) Criminal Appeal No. 8/2020 is dismissed.

- (ii) Criminal Appeal No. 94/2020 is allowed.
- (iii) Accused, namely, Akash Pralhad Thengade, Vishal Kisan Ingale and Pralhad Ganpat Thengade are hereby convicted for the offence punishable under Section 302 read with Section 34 of the IPC and are sentenced to suffer life imprisonment and to pay fine of Rs. 10,000/- (Rupees Ten Thousand) each and in default shall suffer imprisonment for one year.
- (iii) Their bail bonds stand cancelled.
- (iv) The accused shall surrender before the Additional Sessions Judge, Washim for undergoing imprisonment within 15 days from today, failing which, the Sessions Court shall take appropriate steps to arrest them for undergoing sentence.
- (v) Criminal appeals are disposed of in above terms.
- (vi) Copy of the order shall be served upon trial Court for compliance.

(S. S. THOMBRE, J.)

(Anil L. Pansare, J.)