
(2010) 02 BOM CK 0110

In the Bombay High Court

Case No : Criminal Appeal No.1034 of 2008

Arunkumar @ Kallu Rajendraprasad Pande, Ashok @ Guddu
Rajendraprasad Pande and Santosh @ Lallu Rajendraprasad
Pande

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 18-02-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235(2)
Penal Code, 1860 (IPC) — Section 300, 302, 323, 324, 34

Citation : (2010) 112 BOMLR 1099 : (2010) 1 Crimes 774

Hon'ble Judges : R.G. Ketkar, J;P.B. Majmudar, J

Bench : Division Bench

Advocate : Sudeep Pasbola, for the Appellant; V.R. Bhosale, APP, for the Respondent

Judgement

R.G. Ketkar, J.—This appeal is preferred by the original accused Nos. 1 to 3 challenging the judgment and order dated September 17, 2008 passed by the learned Additional Sessions Judge, Greater Bombay in Sessions Case No. 449 of 2003. By the impugned judgment and order, the learned Sessions Judge found all the accused guilty u/s 235(2) of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") of the offence punishable under Sections 302 r/w. 34 Indian Penal Code (for short "IPC"). The accused were sentenced to suffer imprisonment for life and to pay fine of Rs. 5,000/ each, in default to suffer R.I. for three months each. The accused No. 2 was convicted u/s 235(2) of the Cr.P.C. for the offence punishable u/s 324 IPC and sentenced to suffer R.I. for 3 years with fine of Rs. 2,000/, in default, to further suffer R.I. for one month. The sentences of the accused No. 2 were to run concurrently. The case of the prosecution is as under.

2. Jahid Khan informant in the present case (P.W.2) along with brother Laik Khan (hereinafter referred as "the victim"), his brotherinlaw Zulfikar Khan PW 3 along with others were residing in New Iqbal Bakery, situate at Munna Estate, in front

of Cafe Naaz Hotel, Khairani Road, Sakinaka, Mumbai - 400 072. They were buying bakery products from the said bakery and also were buying milk, eggs and breads and used to sell those articles in Hiranandani Complex, Powai and Jalwayu Vihar Society as hawkers between 5:00 am. and 9:00 am. in the morning and 5:30 pm. and 10.30 pm. in the evening.

3. The accused were resident of Bengali Chawl, Yadav Nagar, Khairani Road, which was situate at a distance about 1 k.m. from the said bakery. The accused were also dealing in the said bakery products by purchasing them from the said bakery and also used to sell milk, eggs and breads at other places. About 3 to 4 days prior to the incident in question, a quarrel took place between Zulfikar PW 3 and uncle of the accused No. 1, as the accused were selling the bakery products, milk, eggs in Hiranandani Complex, being the area where PW 2 Jahid and PW 3 Zulfikar used to sell the said products. On April 3, 2003, accused Nos. 1 and 2 came to the bakery at about 4 pm. and started abusing PW 3 Zulfikar. After the exchange of hot words. The accused told that they will come on the next date and will see what to do. They left the bakery.

4. On April 4, 2003, at about 4 p.m. all the accused came to the said bakery and started abusing PW 3 Zulfikar. Munshi of the said bakery and PW 2 Jahid tried to pacify the accused persons. Since there was no response, PW 2 Jahid and the victim told them that they will lodge complaint to the police. When PW 2 Jahid started for Sakinaka police station from rear side Galli from the rare side door, he saw some persons standing in the galli. He felt that they were from the side of accused. He got frightened and came back to the bakery. PW 2 Jahid started for the police station from the main road through Saibaba Galli. At that time, the victim and PW 3 Zulfikar were with him. When they reached near Siddivinayak General Stores, suddenly accused came to the spot and intercepted them. Accused No. 2 was holding belt. All the three accused started assaulting victim and PW 2 Jahid. In order to defend himself, the victim picked up a wooden plank. The accused No. 3 picked up stone and gave blow on the head of the victim. The victim fell down. The Victim tried to get up and at that time, the accused No. 2 caught hold of the legs of the victim and accused No. 1 gave blows of the stone on the head of the victim. PW 2 Jahid tried to save the victim. While the accused No. 1 was trying to get up, he fell down on the wooden plank. The accused No. 2 gave blow of belt to PW 2 Jahid and, consequently, he sustained injury on the head from the backside. He ran towards bakery. PW 2 and the Munshi of the bakery along with one Mujjabin and Badkun came to the spot where they saw the victim lying in the injured condition and the accused had run away.

5. It is a case of the prosecution that Mujjabin and Badkun and PW 2 Jahid Khan brought the Victim to Rajawadi Hospital, Ghatkopar. On examination, the Doctor declared him dead. PW 2 Jahid was treated by the Doctor. PW 4 Rizwan reported this fact to the bakery. At that time, the accused No. 1 also reached the hospital as he sustained injury on account of fall on the wooden plank. The police also reached to the hospital and PW 2 Jahid told the police that the accused had killed

the victim. The cloths of the victim namely one Khaki brown pant, one off white full shirt having blood stains, one Sandow green baniyan and one nicker were seized by the police. The accused No. 1 was arrested by the police. He was provided medical treatment. PSI Nandkishor Taksalkar [PW 9] registered crime No. 85 of 2003 under Sections 302, 324 r/w. 34 IPC. The inquest panchnama of dead body was prepared (exhibit 37), likewise, he prepared panchnama of scene of offence (exhibit 16) in the presence of two panchas. PW 9 also seized two blood stained stones, one wooden plank, blood mixed earth from the spot under the same panchnama. He collected the post mortem notes. The further investigation was thereafter conducted by Police Inspector Ramsiddha Somanna Narote PW 10. He arrested the accused, seized their cloths, recorded the statements of witnesses, seized the cloths of the deceased. He sent the cloths of the deceased and accused and the property seized from the spot to the Chemical Analyzer, Mumbai. He collected the C.A. Reports which are at exhibits 40 to 45. He also collected the injury report of the PW 2 Jahid and accused No. 1 which are at exhibits 27 and 28. After completing the investigation, the charge sheet was filed in the Court of the learned 22nd Metropolitan Magistrate, Andheri, Mumbai.

6. By order dated July 14, 2003, the learned Metropolitan Magistrate committed the case to the Sessions Court, Greater Bombay, for trial according to law.

7. The charge was framed against the accused u/s 302 r/w. 34 IPC. In so far as the accused No. 2 is concerned, he was charged for offence punishable u/s 324 IPC for causing voluntarily hurt to PW 2 Jahid Khan by means of belt. The Charge was read over and explained to the accused in vernacular. They pleaded not guilty and claimed to be tried. The defence of accused is total denial and about false implication in the case. It is the defence of the accused No. 1 that at the time of incident in question, the victim had assaulted him, hence, the crowd gathered on the spot and somebody from the crowd had pelted stones which hit the victim and he sustained injuries and finally lost the life. It is the further defence of the accused that the victim assaulted accused No. 1 by a wooden plank and the blood appeared on the wooden plank as would be evident from the perusal of the CA report (Exhibit 41). Further, the prosecution suppressed the said fact throughout and consequently, the genesis of the prosecution's case as also evidence of the PW 2 to PW 4, is not trustworthy.

8. It is the defence of the accused, that PW 3 Zulfikar Khan and PW 4 Rizwan had no occasion to witness the incident, however, since they are the relatives of PW 2 Jahid and victim, they came to be planted as the witnesses to the incident and their evidence is full of omissions and contradiction and deserves to be discarded in to.

9. The accused also raised defence that PW 3 Zulfikar and PW 4 Rizwan were not present when the victim was shifted to the Rajawadi hospital by PW 2 Jahid with the help of others. This fact establishes that at the time of incident PW 3 and PW 4 were not present on the spot.

10. In order to prove the charges against the accused, the prosecution had examined 10 witnesses who can be broadly classified into the following categories:

11. On the basis of the material on record, as stated earlier, the learned Sessions Judge convicted the accused u/s 302 r/w. 34 IPC and sentenced to suffer R.I. For life and to pay fine of Rs. 5,000/, in default, to suffer R.I. for 3 months each. The accused No. 2 who was convicted for the offence punishable u/s 324 IPC and sentenced to suffer R.I. for the 3 years with fine of Rs. 2,000/, in default, further R.I. for one month. The sentences of the accused No. 2 were to run concurrently.

12. In support of this appeal, we have heard Mr. Sudeep Pasbola, learned Counsel for the appellants and Mrs.V.R. Bhosale, Learned APP for respondent - State. The learned Counsel for the parties have taken us through the evidence on record.

13. Mr. Pasbola, learned Counsel for the appellants submitted that it is the case of the prosecution that the incident took place at about 4 pm. on April 4, 2003 in a busy locality. However, the prosecution has not examined any independent witness to substantiate its case. The eye witnesses PWs 2, 3 and 4 are the interested witnesses and the Court has to consider their evidence with due care and caution. He further submitted that admittedly in the instant case, the accused No. 1 sustained injury and the prosecution has not offered any explanation on this aspect. He relied upon several judgments in support of this contention. Mr. Pasbola also submitted that PW 3 Mohd. Zulfikhar and PW 4 Mohd. Rizwan were not present on the spot and their presence is extremely doubtful. They cannot be termed as an eye witness. This is substantiated from the evidence of PW 2 Jahid exhibit 17 as also FIR exhibit 18. He further submitted that, at any rate, in the facts and circumstances of the case, Section 34 IPC has no application. As also, Section 302 IPC has no application. The case squarely falls under the exception 4 of Section 300 IPC. He submitted that the accused were not carrying any weapon and it shows that there was no intention on the part of the accused to commit offence punishable u/s 302 IPC. On the contrary, from the evidence of PW 2 Jahid, it would be evident that, it was the victim who picked up the wooden plank, and thereafter, the accused picked up the stone. He submitted that the accused were not aggressors. Mr. Pasbola further submitted that the case of the prosecution is that the accused No. 3 picked up the stone and gave blow on the head of the victim. The accused No. 3 did not know that thereafter the accused No. 2 will catch hold of the legs of the victim. The accused No. 2, in turn, did not know/was not aware that thereafter the accused No. 1 will give blows on the head of the victim. Thus, in the instant case, Section 34 IPC has no application whatsoever. In support of this submission Mr. Pasbola relied upon several judgments which will be referred in the due course.

14. On the other hand, Mrs. V.R. Bhosle, learned APP supported the impugned judgment. She submitted that in the present case, there are three eye witnesses

and one of them namely PW 2 is an injured witness. The cloths of the accused were recovered and there were blood stains on it. The injuries were caused by stones i.e. Articles C1, C2 on which blood group "O" was found. PW 5 Dr. Marathe opined that injury No. 4 caused to the victim was sufficient in the ordinary course of nature to cause death. She submitted that in the FIR names of the three accused were mentioned. The prosecution has explained the injuries on accused No. 1. Doctor examined accused No. 1 and PW 2. The history was narrated to the effect that the assault was made by many persons with multiple objects. She submitted that there are no fatal contradictions/omissions in the evidence of the eye witnesses.

15. In order to appreciate the rival contentions raised on behalf of the parties, let us examine the evidence laid by the prosecution. In order to prove the guilt of the accused, the prosecution has examined three eye witnesses apart from the panch witnesses, the Doctors and the investigating officers. PW 2 Zahid Khan is the complainant. He deposed that on April 3, 2003, the accused Nos. 1 and 2 came to the bakery and started abusing PW 3 Zulfikar. After the exchange of hot words, they told that they will come on the next day and will see what to do, and thereafter, they left. On April 4, 2003 at 4 pm. All the three accused came to the bakery and started abusing PW 3 Zulfikar. The Munshi of bakery namely Khujir and Jahid tried to pacify the accused persons. Since there were no response, Jahid and PW 3 Zulfikar told them that they will lodge complaint to the police. When Jahid started for Sakinaka police station from the rear side galli from the rear door, he saw some suspicious persons. He felt that they are from the side of accused. He came back to the bakery and started to the police station from the main door through Saibaba galli. At that time, the victim and PW 3 Zulfikar were with Jahid. When they reached near the Sidhivinayak General Stores, suddenly the accused came and intercepted them. Accused No. 2 was holding a belt. All the three accused started assaulting the victim and Jahid. Therefore, the victim picked up a wooden plank to defend himself. The accused No. 3 picked up a stone and gave blow on the head of the victim. The victim fell down. Then he tried to get up, at that moment the accused No. 2 caught hold his legs and accused No. 1 gave repeated blows of stone on the head of victim. PW 2 Jahid tried to save the victim. While the accused No. 1 was getting up, he fell on the wooden plank. Accused No. 1 gave blow of the belt to Jahid and he sustained injury on the head from backside. He ran towards the bakery to tell the incident to the Munshi of the bakery. Then Jahid and Munshi of bakery namely Khujir along with Mujjabin and Badkun came to the spot where then saw that the victim was lying in the injured condition and accused had run away. He further deposed that Mujjabin and Badkun and Jahid brought the victim to Rajawadi Hospital, Ghatkopar and on examination the Doctor declared him dead. Jahid was also treated by the Doctor. By that time, the accused No. 1 reached the hospital as he also sustained injuries due to the wooden plank. The police also reached to the hospital and then Jahid told the police that the accused have killed the victim.

16. In the crossexamination PW 2 Jahid deposed that 45 days prior to the date of

incident, quarrel took place between PW 3 Zulfikar and uncle of accused No. 1 at Hiranandani Complex. There was minor verbal abuse on account of customers of each other. Mr. Pasbola, learned Counsel for the appellants, submitted that there is omission in the deposition of PW 2 Jahid to the effect that though he stated to the police that 46 persons standing in the galli were found suspicious to him, it was not specifically mentioned in the FIR to that effect. Again he could not explain why it was not stated in the FIR that PW 3 Zulfikar was also with them while going to the police station. Again he could not explain the omission in the FIR to the effect that the victim did not try to run away. PW 2 Jahid also could not explain why it was not recorded in the FIR that accused No. 2 started weaving belt. Mr. Pasbola submitted that the victim picked up the wooden plank, and thereafter, stone was picked up by the accused. Thus, the accused were not aggressors. He further submitted that PW 2 Jahid deposed that it is not true that when he started running towards the bakery, PW 3 Zulfikar was also running towards the bakery. He also invited our attention to the omission in the evidence of PW 2 to the effect that though he claims to have informed the police that along with the Munshi of bakery and himself, Mujjabin, Badkun and Rizwan had came on the spot of offence, the said fact is not found in the FIR. It is also not found in the FIR that PW 4 Rizwan telephoned from the hospital to bakery and reported the incident to the Munshi of Bakery. Mr. Pasbola also submitted that when the Doctor attached to the hospital asked him about the history of injuries, the PW 2 did not tell the Doctor that they assault was by many people by multiple objects. As against this, PW 6 Dr. Bhoir, the Casualty Medical Officer attached to Rajawadi hospital deposed that the injured PW 2 Jahid gave the history of assault by many people by multiple objects. He invited our attention to the injury report exhibit 27 which supported the statement of PW 6 that many people assaulted Jahid with multiple objects. On the basis of this material, Mr. Pasbola submitted that the mob was gathered on the spot and assaulted PW 2 Jahid and none of the accused have assaulted him.

17. PW 3 Zulfikar deposed that one of the accused tried to do the business in their area i.e. Hiranandani Complex. He told him not to go to the said area for doing the business. On that count, there was quarrel between him and one of the accused. On April 3, 2003 at about 4 pm. Accused No. 1 and 2 abused him in filthy language. At that time, PW 2 Jahid and victim were present in the bakery. Accused Nos. 1 and 2 threatened him and informed that they will carry on the business in Hiranandani Complex area. They also threatened that they will see him tomorrow. On the next day i.e. April 4, 2003, between 3:45 pm and 4 pm. all the three accused come to Iqbal bakery and started abusing. They started quarreling with him. Munshi of the bakery tried to pacify the accused persons. Accused continued the quarrel, and therefore, he told them that he is going to lodge the complaint in the police station. The victim and PW 2 Jahid started to proceed from the rear side galli of the bakery. They saw the crowd in the said galli and therefore they came back. Thereafter, he started from the main door of the bakery. The victim was followed by PW 2 Jahid and Zulfikar. When they

reached upto Siddhivinayak store, all of a sudden, the accused came on the spot. Accused No. 2 started weaving the belt and assaulted the victim. The victim picked up a wooden plank which was lying in the galli for his defence. At that time, accused No. 3 picked up a stone and gave blow to the victim on his head. The victim fell down and again tried to get up. At that time, the accused no 2 caught hold of the legs of the victim and accused No. 1 gave him 45 blows successively on his head. PW 2 Jahid rushed there to save the victim. At that time, accused No. 2 gave blow to PW 2 Jahid. He got assault on his head from backside. In order to save himself, he ran towards the bakery. Accused No. 1 chased, but, fell down. Zulfikar also ran towards the bakery and accused No. 1 followed him. PW 2 Jahid shouted "mar dala, mar dala" while running to the bakery. Thereafter, the Munshi of bakery namely Khujir, Mujjabin, Padaku and PW 4 Rizwan came out of bakery and they went to the scene of offence. They saw that the victim was lying down and he was injured with the pool of blood. All the accused had already run away from the scene of offence. The Munshi of bakery advised them to take the victim to the hospital. Badkun and Mujjabin took the victim to Rajawadi hospital, Ghatkopar, in a taxi. PW 3 Zulfikar reached the hospital within half an hour's time. Then he came to know that the victim was already dead. He identified the wooden plank and stones. He, however, could not identify the belt.

18. Mr. Pasbola, learned Counsel for the accused submitted that there is contradiction in the deposition of the PW 3 in respect of the hot exchange and abuses. He invited our attention to the portion of the evidence of PW 3. It is submitted that when the attention of the PW 3 was invited to the portion marked "A" in his statement dated April 5, 2003, he deposed that he, along with PW 2 Jahid, ran towards the bakery together, however, PW 2 Jahid deposed that he alone went to the bakery. He submitted that in the statement recorded by the police, it is not recorded that PW 3 told the accused that he is going to lodge a complaint in Sakinaka police station. PW 3 could not explain why the following details are not reflected in the statement recorded by the police viz (1) that Jahid, victim and himself started to go from the rear side galli of the bakery and after observing the mob of people in the galli they came back to the bakery; (2) that near the Siddhivinayak Stores all of a sudden the accused came; (3) that accused No. 2 started weaving his belt and assaulted the victim; (4) that accused No. 3 picked up a stone and give blow to the victim on his head; (5) that he told the police that accused No. 1 gave 45 blows of stone to the victim on his head. Mr. Pasbola, therefore, submitted that in view of this fatal omissions and contradictions the very presence of PW 3 at the time of incident, creates grave doubt.

19. PW 4 Rizwan deposed that on April 4, 2004 at 4 pm., he was sleeping in the bakery. He heard commotion outside the bakery. He saw the three accused quarreling with Jahid, Zulfikar and the victim. They were abusing each others. The Munshi of bakery came out and settled the dispute between them. Thereafter, PW 2, victim and PW 3 Zulfikar told the accused that they are going

to lodge the complaint with the police, and accordingly, they left the place. He noticed that the accused followed them. After sometime, he followed them as he thought that they might again quarrel among themselves. When the accused reached near Siddhivinayak galli, they started assaulting the victim and PW 3. He saw the belt in the hand of accused No. 2. At that time, the victim picked up a wooden plank which was lying at the place of offence. In the meantime, accused No. 3, picked up a stone and gave blow of stone on the head of the victim. The victim fell down. The victim tried to get up, however, then the accused No. 2 caught hold of the legs of victim and accused No. 1 gave two or three blows of the stone on the head of victim. PW 2 tried to save the victim. Thereafter, PW 2 ran towards the bakery. When PW 2 tried to save the victim, accused No. 2 gave blow of belt on the head of PW 2. Therefore, he frightened on account of said incident, and thereafter, all the accused fled away from the scene of offence. After sometime, the Munshi of bakery, PW 2 Jahid, Mujjabin, and Badkun came there. Mujjabin and Badkun took the victim to the Rajawadi Hospital, Ghatkopar along with PW 2 in a taxi. Thereafter, he went to the Rajawadi Hospital where he met PW 2 Jahid. PW 2 informed him that he should go to bakery and inform that the victim is dead. Accordingly, PW 4 Rizwan gave a telephone call to the Munshi of bakery and informed that the victim is dead. He identified the belt used by accused No. 2 as also the two stones. He, however, was not in a position to say which stone namely Article "C1" and "C2" were in the hands of which accused. He also identified the wooden plank.

20. In the crossexamination, PW 4 Rizwan deposed that he rushed to the Rajawadi hospital at around 6:30 pm. At that time, he did not notice the police at the hospital. He also did not see accused No. 1 at Rajawadi Hospital. He did not notice any injury on the person of accused No. 1 at the time of incident. On the day of incident, accused No. 1 fell on a wooden plank while running away. Though he saw him falling on the wooden plank, he could not tell as to on which part of the body the accused No. 1 sustained injury. He did not notice any injury on the head of the accused as also on his shoulder or on his back. When he went to the bakery, the Munshi of bakery was not present. At that time, the police had not arrived at the bakery. His statement was recorded by the police on the next day. After the incident, till he visited to Sakinaka police station on the next day, he did not disclose the incident to anyone. He did not come across the police after the incident till his statement was recorded on the next day. He further deposed that there were number of planks and stones lying on the scene of offence and he had no specific reason to identify Articles "A" "C1" and "C2" in the hands of accused. He identified the belt because at the time of incident he had seen the belt in the hands of the accused. He further deposed that it did not happen that Jahid came to the bakery premises and intimidated him, Munshi, Zlfikar and Badkun that the victim has been killed, therefore, he along with others visited the scene of offence. He further deposed that he had not seen PW 3 Rizwan at the place of offence. Mr. Pasbola submitted that PW 4 Rizwan is not an eye witness. He was not present at the time of incident. He submitted that PW

2 deposed that when he went to the bakery to report to Munshi that the victim is killed, at that time, Mujjabin, Badkun and PW 4 Rizwan were present in the bakery. It therefore follows that PW 4 was not present at the time when the incident occurred. Even, PW 2 did not disclose the presence of PW 4 at the time of occurrence of incident. It is only after the incident, PW 2 went to report the incident to the Munshi of bakery. At that time PW 4 Rizwan was present in the bakery. This, therefore, rules out the presence of PW 4 Rizwan when the incident occurred. He further submitted that even the perusal of deposition of PW 3 indicates that PW 4 was not present when the incident in question occurred. In fact, PW 4 in cross-examination deposed that he had not seen PW 3 Zulfikar at the scene of the offence at the time of incident. Mr. Pasbola further submitted that PW 3 Zulfikar, on the other hand, deposed that he along with PW 2 Jahid ran towards the bakery together. However, PW 2 Jahid specifically deposed that it is not true that when he started running towards the bakery, PW 3 Zulfikar was also running towards the bakery. PW 2 Jahid further admitted that the presence of PW 3 Zulfikar is not spelt out in the police station while recording the FIR. On that basis, he submitted that PW 3 Zulfikar and PW 4 Rizwan are not the eye witnesses.

21. We are unable to accept the submission of Mr. Pasbola that PW 3 Zulfikar is not an eye witness to the offence. It is relevant to note that the incident in question is not disputed by the appellants. The case of the prosecution is that as the accused were carrying on the business in Hiranandani Complex where PW 2 and 3 and the victim were also carrying on the same business in the same area. Therefore, there was dispute between them on the point of the area of business and on that count the quarrel took place between PW 3 Zulfikar and one of the accused. On April 3, 2003, the accused Nos. 1 and 2 came to the bakery and abused PW 3 Zulfikar in the presence of PW 2 Jahid and victim. On the next day i.e. April 4, 2003, the accused came to the bakery at about 4 pm and started quarreling with PW 3 Zulfikar. The Munshi of bakery tried to pacify the accused persons and since there was no response, PW 2 Jahid, PW 3 Zulfikar and victim decided to lodge the complaint to police. The origin of the incident in question is basically the business rivalry between PW 3 on one hand and the accused on the other. Merely because the presence of PW 3 is not mentioned in the FIR, one cannot reach to the conclusion that PW 3 was not present. The evidence of PW 2 Jahid and PW 3 Zulfikar on the point as to how the incident in question took place is coherent and consistent. Merely because in the deposition PW 2 Jahid stated that "it is not true that after the assault on the victim he started running towards the bakery PW 3 Zulfikar was also running towards bakery" on one hand and in the deposition PW 3 stated that he and PW 2 Jahid were running together, there is contradiction in that regard, it cannot be said that PW 3 Zulfikar was not present. The presence of PW 3 Zulfikar at the time of incident is quite natural in the background of the facts and circumstances of the case. We are also not impressed by the submission advanced by Mr. Pasbola to the effect that PW 3 Zulfikar deposed that PW 2 Jahid, after the assault on victim, while running

towards the bakery shouted "mar dala, mar dala" and this fact is not recorded in the statement of PW 3 Zulfikar recorded by the police. In our opinion, the accused cannot take advantage of this omission. The omission is insignificant. We are therefore not impressed by the submission that PW 3 Zulfikar was not present at the time of incident and consequently he is not an eye witness.

22. In so far as PW 4 Rizwan is concerned, we find that PW 2 Jahid deposed that after the assault on the victim, he went to the bakery for reporting and at that time PW 4 Rizwan was present. PW 3 Zulfikar also had not deposed the presence of Rizwan at the time of incident. We are, therefore, of the opinion that PW 4 cannot be said to be an eye witness to the said incident. It is however true that PW 4 Rizwan visited the hospital.

23. The prosecution has examined PW 6 - Dr. Sunil Bhoir, a Casualty Medical Officer attached to the Rajawadi Hospital. He examined PW 2 Jahid as also the accused No. 1 Arunkumar. He deposed that PW 2 Jahid gave the history of assault by many people by multiple objects. He also examined accused No. 1 who also gave history of assault with multiple object by many people. He deposed that the accused No. 1 sustained multiple contusion marks on the back and shoulder and the said injury could have been possible due to fall on hard and blunt substance. Mr. Pasbola, learned Counsel for the appellants, submitted that the prosecution has not explained the injury of accused No. 1. He submitted that the non explanation of the injury sustained by accused No. 1 at the time of occurrence or in the course of incident is very important circumstance, from which, the court can draw the following inferences:

- a) That the prosecution had suppressed the genesis and origin of the occurrence and has thus not presented the true version.
- b) That the witnesses denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable.
- c) That in a case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

He submitted that the omission on the part of the prosecution to explain the injuries on the person of the accused No. 1 assumes much greater importance where the evidence consists of the interested or inimical witnesses or where the defence gives a version which competes improbability with that of the prosecution version. In support of this submission, Mr. Pasbola, learned Counsel for the appellants, relied upon a decision of the Apex Court in the case of Lakshmi Singh and Ors. v. State of Bihar 1976 SCC (Cri) 671.

24. On the other hand, Mrs. Bhosale, learned APP for respondent State, has submitted that the prosecution has satisfactorily explained the injuries of accused No. 1. She submitted that in the FIR at exhibit 18 lodged by PW 2 Jahid,

he clearly stated that when he went to save the victim, the accused No. 1 while getting up, fell down on the wooden plank. This version is supported by PW 3 Zulfikar when he deposed that PW 2 Jahid apprehending further attack ran towards the bakery and on account of assault on the head, but, accused No. 1 then followed him. However, while running, accused No. 1 fell down, and therefore, he sustained injury. From the nature of injuries received by the accused No. 1, it would appear that the same were simple and minor ones. Mrs. Bhosale, learned APP therefore submitted that the prosecution has satisfactorily explained the injuries. She submitted that even otherwise the non-explanation of the injuries on the accused cannot ipso facto be ground for throwing out the prosecution case especially when it is supported by the eye witnesses including the injured witness. She relied upon the judgment of the Apex Court in the case of Amar Malla and Others Vs. State of Tripura, and submitted that the prosecution has proved its case beyond reasonable doubt.

25. In the FIR exhibit 18, PW 2 Jahid Khan had stated that the accused No. 1 while getting up, fell down on the wooden plank. This version is supported by PW 3 Zulfikar in his oral evidence. PW 6 Dr. Sunil Bhoir deposed that the injury is possible if one falls on a hard and blunt surface. As held by the Apex Court in the case of Amar Malla (Supra) even otherwise the non explanation of the injuries on the accused can not ipso facto be ground for throwing out the prosecution case especially when it is supported by the eye witnesses including injured witness PW 2. From the evidence on record we are satisfied that the accused were aggressors and the prosecution has already brought on record the genesis and origin of the occurrence. We are, therefore, satisfied that the prosecution has satisfactorily explained the injury of the accused No. 1. That apart, in the present case, PW 2 Jahid and PW 3 Zulfikar are the eye witnesses and as observed earlier they have given coherent and consistent version about the occurrence of the incident.

26. The prosecution has examined PW 5 Dr. Rajaram Marathe, Medical Officer attached to the Rajawadi Hospital, who conducted autopsy on the dead body of the victim and issued P.M. notes exhibit 24. The prosecution has duly proved the P.M. report at exhibit 24. The prosecution has also examined PW 7 Tanaji Sakhambar Shinde who is the witness to the seizer panchnama of belt exhibit 33 and PW 8 Jagannath Baburao Udugare who is the panch witness to the seizer panchnama exhibit 35 under which the cloths of the accused were seized. The prosecution has proved these panchnamas.

27. Mr. Pasbola, learned Counsel for the appellants, submitted that in the facts and circumstance of this case, Section 34 IPC is not applicable. He submitted that the incident in question occurred at the spur of moment and it is not outcome of a prearranged plan. There was not meeting of minds of the accused persons. He submitted that the victim initially picked up the wooden plank, and thereafter, accused No. 3 picked up the stone and gave blow on the head of the victim, due to which the victim fell down. At that time, accused No. 1 did not

know that accused No. 2 will catch hold of the legs of the victim. Accused No. 2, in turn, did not know that, thereafter, accused No. 1 will give blows on the head of the victim. In support of this submission Mr. Pasbala relied upon the following judgments:

- (1) Shambhu Kuer Vs. State of Bihar, .
- (2) Dajya Moshya Bhil and Ors. v. State of Maharashtra 1984 SCC (Cri) 611..
- (3) Harbans Nonia and Anr. v. State of Bihar 1993 SCC (Cri) 257.
- (4) Kashmira Singh v. State of Punjab 1995 SCC (Cri) 890.
- (5) Badruddin v. State of U.P. 1998 SCC (Cri) 1619.
- (6) Mithu Singh v. State of Punjab 2001 SCC (Cri) 668.
- (7) Babu Ram and Anr. v. State of U.P. and Ors. 2002 SCC (Cri) 1400.

28. On the other hand, Mrs. Bhosale, learned APP submitted that Section 34 really means that if two or more persons intentionally do a common thing jointly, it is just the same as if each of them had done it individually. It is a well recognised cannon of criminal jurisprudence that the Courts cannot distinguish between coconspirators, nor can they inquire, even if it were possible as to the part taken by each in the crime. Where parties go with a common purpose to execute a common object each and every person becomes responsible for the act of each and every other in execution and furtherance of their common purpose; as the purpose is common, so must be the responsibility. She relied upon the judgment of the Apex Court in the case of Parasa Raja Manikyala Rao and Another Vs. State of A.P., .

29. From the evidence on record, it cannot be said that the accused had a common intention from the beginning regarding committing murder of the victim as they were not following the victim with any deadly weapon. As per the evidence of prosecution, none of the accused were having any deadly weapon with them. However, after chasing the victim and others, they started exchanging the words and altercation took place between both the sides. At that time, accused No. 3 picked up a stone which was lying on the road and gave blow on the head of the victim. Accused No. 2 caught hold of the victim and thereafter accused No. 1 gave series of successive blows on the head of the victim. It cannot be said that accused followed the victim with an intention to commit murder. However, in a given case, common intention can be developed even at the spur of a moment. The fact that accused No. 2 caught hold the legs of the deceased and prevented him from being run away, which facilitated accused No. 1 to give fatal blows to the deceased, would suggest that at a spur of moment common intention was developed between accused No. 1 and 2. As we have stated earlier that it cannot be said that from the beginning the accused had gone with an intention to commit murder of the deceased as they had not gone with any deadly weapon with them. However, ultimately unfortunate

incident happened in which accused Nos. 1 and 2 actively participated in committing the murder of the deceased. In our view, accused No. 1 and 2 even for their individual act, can be said to have committed act of brutal murder of the deceased and they are required to be convicted for the offence punishable u/s 302 IPC. In the instant case it is not possible to say that there was a common intention of all the accused to commit murder of the victim. The individual role of each of the accused is required to be considered to find out as to which crime he has committed. Since the accused No. 3 had given one blow of the stone on the head of the victim, it cannot be attributed to be a vital injury. Therefore, he cannot be convicted u/s 302 IPC. We have thoroughly gone through the evidence on record and we have found that there was no common intention on the part of accused No. 3 to commit the murder of the victim.

30. Accused No. 2 was holding belt and for the purpose of defence the victim picked up a wooden plank. At that point of time, accused No. 3 picked up a stone and gave blow on the vital part of body of the victim namely head. The impact of blow was such that victim fell down. At that time, accused No. 2 caught hold of the legs of the victim when he tried to get up. If the accused No. 2 were not to hold the legs of the victim, possibly he could have escaped. However, since the accuse No. 2 caught hold of the legs of the victim he could not escape, and thereafter, the accused No. 1 gave repeated blows of stone on the vital part of the victim namely head. The accused No. 2 clearly facilitated the assault made by the accused No. 1 on the victim. The prosecution has established that there was a common intention of the accused No. 1 and 2 which was developed at the spur of the moment. So as to ensure that PW 2 Jahid, PW 3 Zulfikar and the victim do not report the matter to the police and each of them had participated in the same manner in the act constituting offence. We are, therefore, satisfied that the prosecution has established a common intention as also applicability of Section 34 IPC in so far accused No. 1 and 2 are concerned.

31. In the case of Shambhu Kuer (Supra), the conviction of appellant therein was upheld by the High Court with the findings that he continued to hold the deceased till the assault was completed by Mandip. One of the three injuries on the deceased one which had pierced the right lung, was according to the medical witness, sufficient to cause the death in the ordinary course. In that the eye witness did not clearly state that the appellant continued to hold the deceased till the assault was over. It appeared in the evidence that Shambhu Kuer caught hold of the deceased and the latter scuffled to get himself released. Immediately thereafter Mandip took out a knife and started assaulting the deceased. In that context it was held that from the mere fact that the appellant caught hold of the deceased and scuffled with him, while Mandip took out a knife and commenced the assault, it cannot be inferred beyond reasonable doubt, that he shared the intention of Mandip to murder the deceased. In the instant case, we have already held that the accuse No. 2 caught hold of the legs of victim and accused No. 1 gave successive blows on the head of the victim. In fact, as the accused No. 2 caught hold of the legs of the victim he could not escape. The case of Shambhu

Buer (supra) does not advance case of the appellants any further.

32. In the case of Dajya Moshya Bhil (supra) the appellants No. 2 and 3 therein along with appellant No. 1 chased Gunjarya when he tried to escape from the scene of occurrence. It was also brought in the evidence that the appellant Nos. 2 and 3 pelted stones but no one said whether the stones hit Gunjarya. The gap in the evidence in this behalf was sought to be filled in by a reference to the medical evidence which indicated that Gunjarya had suffered two lacerated wounds. The prosecution has laid the evidence in the instant case which clearly bring home the sequence in which the accused assaulted victim as also PW 2. The Judgment in the case of Dajya (Supra) does not advance the case of the appellant any further.

33. In the case of Harbans Nonia (Supra) on the basis of material on record the Apex Court came to the conclusion that the two appellants before it did not have any intention to participate with one Shyambali Nonia to cause death of the deceased. The facts in the present case are materially different from the facts in the case of Harbans Nonia (Supra). In the case of Kashmira Singh (Supra) it was observed by the Apex Court that the appellant tried to pick the pocket of PW 5 who called the deceased and the deceased tried to catch hold of the appellant and it was a sudden act on the part of William who picked out a knife from his pocket and inflicted a single injury on the deceased. Under these circumstances, it was held it could not be said that the appellant and Sukhchain Singh had prior knowledge that William was armed with a knife and the part played by William could not be a conjoint act so as to attract the element of common intention on the part of the appellant as well as Sukhchain Singh.

34. We have already held that in the instant case the prosecution has established applicability of Section 34 IPC as accused No. 1 and 2 had a common intention to commit the offence. It is also relevant to note that in the case of Kashmira Singh (Supra), the learned Sessions Judge had acquitted the appellant and Sukhchain Singh which was reversed by the High Court. In that context, the Apex Court in paragraph No. 3 observed that the High Court did not examine reasons given by the Sessions Court for acquitting the appellant and Sukhchain Singh. It may be possible that two views are possible, but the view taken by the Sessions Judge in that case could be said to be unsound.

35. In the case of Badruddin (Supra) the Apex Court came to the conclusion that it was difficult to sustain the conclusion that there was common intention between the appellant and other persons to kill the deceased. It was also observed that though establishing common intention is a difficult task for the prosecution, yet, however difficult it may be, the prosecution has to establish by evidence, whether direct or circumstantial, that there was a plan or meeting of mind of all the assailants to commit the offence, be it prearranged or on the spur of the moment but it must necessarily be before the commission of the crime. Where direct evidence is not available, it has to be inferred from the circumstantial evidence. In the present case, from the material brought on

record by the prosecution we are satisfied that the prosecution has established its case.

36. In the case of Mithu Singh (Supra) on facts it was held by the Apex Court that there was nothing on record to draw the inference that the coaccused had gone to the house of the deceased with the intention of causing her death and such intention was known to the appellant, much less shared by him. It was observed in paragraph No. 6 as under:

6. To substantiate a charge u/s 302 with the aid of Section 34 it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of both. Common intention has to be distinguished from same or similar intention. It is true that it is difficult, if not impossible, to collect and produce direct evidence in proof of the intention of the accused and mostly an inference as to intention shall have to be drawn from the acts or conduct of the accused or other relevant circumstances, as available. An inference as to common intention shall not be readily drawn; the culpable liability can arise only if such inference can be drawn with a certain degree of assurance

37. In the case of Babu Ram (Supra) the Apex Court recorded that the prosecution case itself was that there was no prior meeting of the minds of coaccused. In view of this, in the present case, the reliance placed by Mr. Pasbala, learned Counsel for the appellants, on the judgment of the Apex Court referred herein above is of no assistance to the appellants.

38. Mr. Pasbala submitted that the incident in question occurred at the spur of moment. He further submitted that the accused were not carrying any weapon, and therefore, they had no intention to kill the victim. He submitted that, Section 302 IPC is not applicable. In support of his submission he relied upon the following judgment :

(1) Ram Karan and Ors. v. State of Uttar Pradesh 1982 SCC (Cri) 386.

(2) Arvind Kumar v. State of Uttar Pradesh 1988 SCC (Cri) 132.

(3) Khuman Singh and Ors. v. State of M.P. 2005 SCC (Cri) 1451.

On the other hand, Mrs. Bhosale, APP submitted that the accused in furtherance of their common intention committed the offence. There was prearranged plan among the accused to ensure that PW 2 Jahid, PW 3 Zulfikar and victim do not report the matter to the police. They have also threatened these persons earlier that they will see what to do next. Since PW 3 Zulfikar insisted that the accused persons should not carry on the business in their area and since the accused persons intended to carry on their business in the same area, accused committed offence in question.

39. In the case of Ram Karan and Ors. (Supra) in paragraph No. 6 the Apex Court observed that both sides were in an exasperated mood. Suddenly at the spur of the moment there ensued a quarrel. Prakash Chandra and Umesh

Chandra on the side of the prosecution died and Chhotelal on the side of the accused died and each of them met a homicidal death. On the side of the prosecution Dinesh Chandra was injured, on the side of accused Ram Karan was injured. From this an irresistible inference ensued that Exception 4 to Section 300, IPC would be attracted. The exception provides that culpable homicide is not murder, if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner. In the present case, we have already held that the accused No. 3 cannot be held guilty of the offence u/s 302 IPC and the common intention was developed between the accused No. 1 and 2 at the spur of the moment. The case of Ram Karan (Supra) does not advance the case of present appellants any further.

40. In the case of Arvind Kumar (Supra), on the fateful day, the appellant Arvind Kumar and the deceased Om Prakash Gupta, who were the student of Motilal Nehru Regional Engineering College, Allahabad, came late and were not allowed to join their classes. They took the key from PW 4 Ajit Singh and went to his room in the hostel. When PW 4 came to his room he found the appellant and the deceased playing a game of cards. There was a sudden quarrel leading to an altercation and the appellant whipped out a knife and struck two blows on the deceased resulting in his instantaneous death. The facts in the case at hand are different from the facts in the case of Arvind Kumar (Supra).

41. In the case of Khuman Singh (Supra) the Doctor who conducted post mortem examination did not state that he had found any injury which was sufficient in the ordinary course of nature to cause death. In paragraph 10, the Apex Court, on the basis of material on record, observed that the occurrence took place suddenly and there was no premeditation on the part of the appellants. The case of Khuman Singh (Supra) also is of no assistance to the present appellants.

42. The prosecution has examined PW 5 Dr. Rararam Narayanrao Marathe at exhibit 23. At the relevant time he was working as the Medical Officer at Rajawadi Hospital. He carried out post mortem examination of the victim on April 5, 2003. On external examination, he found following external injuries:

- i. CLW 4 cm X 1 cm bone deep verticle with contuse margin 1.5 cm on right forehead.
- ii. CLW 3 cm X 1 cm. Bone deep verticle with contuse margin 1 cm on left forehead.
- iii. CLW 5 cm X 1 cm bone deep, oblique with contused margin 1 cm on left forehead.
- iv. CLW 3 cm X 1 cm bone deep, horizontal with contused margin 1 cm on frontal region with depressed fracture on frontal bone.
- v. CLW 2 cm X 1 cm skin deep, oblique behind left ear.

vi. Contusion 5 cm X 4 cm reddish colour on left scapular region.

vii. Contusion 5 cm X 2 cm reddish colour on behind neck. viii. Minor contusion on left shoulder, below left angle of mandible left cheek and right cheek.

On internal examination, he noticed depressed fracture of frontal bone. There was subdural hemorrhage on frontal lobe. According to this witness, the cause of death was shock due to fracture skull. It was unnatural. The injuries were fetal in ordinary course of nature. He deposed that the injuries mentioned by him were possible by use of article "C1" and "C2". In the cross-examination, he deposed that it is true that the injury No. (iv) was connected to internal injury mentioned in column No. 19(ii) of his report exhibit 24. External injury No. 19(iv) corresponding to internal injury No. 19(ii) was the cause of death.

43. The prosecution also examined PW 6 Dr. Sunil Wamanrao Bhoir at exhibit 26, the Casualty Medical Officer attached to Rajawadi Hospital, Ghatkopar. He examined PW 2 Jahid and noted following injuries on his body:

i. CLW left temporal 1 1/2 cm X 1/2 cm X 1/2 cm.

ii. CLW left forehead 3/4 cm X 3/4 cm X 3/4 cm.

To that effect, he produced notes at exhibit 27. He also examined accused No. 1 on April, 4, 2003 and noted the following injuries:

i. Multiple contusion marks on the back and shoulder.

He produced notes to that effect at exhibit 28. He opined that the aforesaid injuries are possible if one falls on a hard and blunt substance. In the cross-examination, he deposed that the multiple contusion on the shoulder and back of accused No. 1 could have been possible by any hard and blunt object.

44. The prosecution has also relied upon the inquest panchnama dated April 4, 2003 at exhibit 37 which discloses the nature of injuries sustained by the victim. This evidence is substantiated from the C.A. Report (Exhibit 40) which indicates that the muddamal stones marked as exhibit 14 by the C.A. were the stones with human blood group "B". It is clear from the said C.A. report that on the cloths of the victim namely trouser, Sando Baniyan and nicker, stains of human blood group "B" were found. The blood group of the victim was "B". The blood group of PW 2 Jahid was "AB" as is evident from the C.A. report exhibit 41. The blood group of accused No. 1 is "O" as per the C.A. Report exhibit 45. As far as blood group of accused No. 2 is concerned, it could not be determined as the result was inconclusive as is evident from the C.A. report exhibit 42. The blood group of accused No. 3 is "O" as is evident from the C.A. report exhibit 43. The prosecution has established that the Articles "C1" and "C2" were used as weapons in the commission of offence. Thus, the prosecution has established the commission of offence on the basis of this material as also on the basis of evidence of eye witnesses PW 2 and PW3.

45. On behalf of the appellants an attempt was made to submit that at the time

of incident other persons also gathered on the spot and they pelted stones on the victim. On account of this pelting stones from the mob, the victim sustained injuries and in consequence he died. The learned Sessions Judge has rightly observed in paragraph Nos. 23 to 25 that it was accused Nos. 1 and 3 who gave blows of the stones to the victim. Even, the post mortem notes at exhibit 24 prepared by PW 5 Dr. Marathe indicate that there was subdural hemorrhage and fracture on the frontal bone and the cause of death was shock due to fracture of skull and frontal bone. This leads to the conclusion that the death of the victim was homicidal.

46. PW 2 Jahid and PW 3 Zulfikar had deposed that about 4 to 5 days prior to the incident in question a quarrel took place between the PW 3 Zulfikar and uncle of accused No. 1 as the accused were selling the bakery products, milk, eggs in Hiranandani Complex where PW 2 Jahid and PW 3 Zulfikar used to sell the said products. On April 3, 2003, the accused Nos. 1 and 2 came to bakery at about 4 pm. and started abusing PW 3 Zulfikar. After the exchange of hot words, the accused told them that they will come on the next day and will see what to do. They left the bakery thereafter. On April 4, 2003 at about 4 pm. of the accused came to the said bakery and started abusing PW 3 Zulfikar. The Munshi of the bakery and PW 2 Jahid started to pacify the accused. Since there was no response, PW 2 Jahid and PW 3 Zulfikar and victim told them that they will lodge complaint to the police station. When the victim, PW 2 Jahid and PW 3 Zulfikar proceeded to lodge the complaint to Sakinaka police station, at that time, near Siddhivinayak General Stores suddenly accused came and intercepted them. Accused No. 2 was holding belt and the victim in order to defend himself picked up a wooden plank lying there. Accused No. 3 gave blow on the head of the victim and the victim fell down. When he tried to get up, accused No. 2 caught hold of the legs of the victim. Thereafter, accused No. 1 picked up stone and gave successive blows on the head of the victim. Thus, accused No. 2 facilitated the assault made by accused No. 1 by the victim and played prominent role in the incident. Thus, accused Nos. 1 and 2 are found guilty with the intention of committing murder of the victim. The prosecution in order to sustain the Charge u/s 302 r/w. 34 IPC has proved that the death of the victim was caused by accused Nos. 1 and 2 and/or it was outcome of consequence of the act of these accused. Accused Nos. 1 and 2 knew that the injury by means of stone may cause death of the victim.

47. We, therefore, uphold the conviction of accused Nos. 1 and 2 u/s 302 r/w. 34 IPC. Accused Nos. 1 and 2 are found guilty u/s 235(2) of Cr.P.C. of the offence punishable u/s 302 r/w. 34 IPC and are sentenced to suffer imprisonment for life and pay fine of Rs. 5,000/ each, in default, to suffer R.I. for three months.

(i) As far as accused No. 2 is concerned, he is found guilty of the offence punishable u/s 324 IPC in causing voluntary hurt to PW 2 Jahid. He is, accordingly, sentenced to suffer R.I. for three years with fine of Rs. 2,000/, in default, to suffer R.I. for one month. Accused No. 2 shall suffer the above said

sentences concurrently.

(ii) As far as accused No. 3 is concerned, the learned Sessions Judge held him guilty of the offence punishable u/s 302 r/w. 34 IPC and sentenced him to suffer life imprisonment. After considering the material on record, we are of the opinion that the learned Sessions Judge was not justified in convicting accused No. 3 for the offence punishable u/s 302 r/w. 34 IPC and sentencing him for life imprisonment. We, therefore, set aside the conviction of the accused u/s 302 r/w. 34 IPC as also sentence of life imprisonment awarded by the learned Sessions Judge. Having regard to the material on record, we are of the opinion that the accused No. 3 is guilty of the offence punishable u/s 323 IPC and is sentenced to suffer RI for one year.

(iii) Appeal is partly allowed in the aforesaid terms.