

(1992) 02 BOM CK 0015

In the Bombay High Court

Case No : Criminal Appeal No. 180 of 1984

Kantaram Maruti Dabhade and Another

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 17-02-1992

Acts Referred:

Evidence Act, 1872 — Section 3, 45

Citation : (1994) 2 BomCR 315

Hon'ble Judges : D.J. Moharir, J

Bench : Single Bench

Advocate : Niteen Deshpande and Shrikant Shivade, for the Appellant; K.D. Randive, Assistant Public Prosecutor, for the Respondent

Judgement

D.J. Moharir, J.—The appellants here, original accused Nos. 1 and 2, are from amongst 8 others who were put on trial before the Additional Sessions Judge at Pune for committing offences of rioting with deadly weapons, for intentional insult to the complainant, for committing a rash act of indulging in discriminate pelting of heavy stones on the house of the complainant, for committing house trespass after having made preparation to cause hurt and lastly for attempting to commit the murder of two persons. The offences were charged with the aid of section 149 of the I.P.C. while six of the accused persons were acquitted, the two present appellants came to be convicted u/s 324 as also 324 read with section 34 of the I.P.C., 449 of the I.P.C. and 451 read with section 34 of the I.P.C. For the offence u/s 324, each of them was sentenced to R.I. for 3 years and a fine of Rs. 700/- i/d further R.I. for 2 months, for the offence u/s 451 of the I.P.C., R.I. for 2 years and fine of Rs. 100/- in/d 10 days R.I., and for the offence u/s 324 read with section 34 of the I.P.C., each of them was sentenced to R.I. for one year and a fine of Rs. 100/- in default, 10 days" R.I. Only substantive sentences of imprisonment awarded in respect of the conviction u/s 324 and 324 read with section 34 of the I.P.C. have been directed to run concurrently and not the one u/s 451 of the I.P.C. also.

2. All these 8 persons came to be charge-sheeted on facts which, when stated briefly, appear to be as follows :-

The accused as well as the two injured persons Baban P.W. 1 and Vinayak P.W. 5, so also the material eye witnesses to the incident in question are all residents of Koteswarwadi of Talegaon Dabhade, district Pune. It is entirely an undisputed position that for quite some time disputes have been going on between the accused persons on the one hand and the injured complainant and others on the other, over the possession and ownership of vacant plots of land bearing Survey No. 4251 to 4254 - called Bakhal. All these lands stand in the name of one Vithoba Dabhade who was the father of the acquitted accused No. 3 here. An interest in share in all these vacant plots of urban land was claimed by the complainant and others. It appears that some meetings between the parties to bring about a conciliation had failed. Not only that there were chapter cases put up against both these parties by the Police; there were private complaints and civil suits also filed by one party against the other.

3. It is in the context of this strained relationship that the incident dated 25-1-1983 is said to have occurred. It may also be stated that most of these persons, the accused as also the complainant and witnesses are employed at various places in Bombay. They go to Bombay everyday in the morning, returning to their homes in the evening. In this manner, the complainant Baban Dharma Dabhade also returned to the village by about 5.30 p.m. on 25-1-1983. He actually reached home by about 8 p.m. He had washed his hands and face and then went to the nearby Maruti temple for the darshan of the deity. As there was still some time for the dinner to be ready, he sat down to chitchat with one Bhiku Dabhade, father of Kashinath P.W. 7 and 2 or 3 children as also Vinayak P.W. 5 who had made some fire and were warming themselves around it since it was still winter. After he had sat there with these persons for about 10 or 15 minutes, the accused Nos. 1, 3, 6, 7 and 8 all came there, they indulged in filthily abusing Kashinath and dared him to come out so that they would kill him. They indulged in discriminate stone throwing at his house. The appellant-accused No. 1 is also alleged to have then gone back into his house nearby returned armed with an axe-accompanied by the accused No. 2 Ganesh, also armed with an axe. Accused No. 4 also came there and feeling scared, complainant Baban went into the house of Kashinath but was followed by the accused Nos. 1, 2 and 3. They caught up with him and just as Baban had entered the first room in the house, next to the verandah (padvi), he was given blows with the axe by both the accused Nos. 1, 2. Vinayak P.W. 5 ran to his help but was himself also attacked. These two persons fell down under the several blows dealt with the axe to them. A pool of blood formed in the house, in both the rooms thereof. The commotion which was thus caused drew the attention of Kashinath P.W. 7, Kisan P.W. 9 and Chandrakant, who all came running and just as they were entering the house, the accused Nos. 1, 2 and 3 were seen going out of the house, the accused Nos. 1 and 2 were carrying axes which were blood stained, the part played by the accused No. 3 in the incident of assault inside the house lay in his

giving first blows and kicks to Baban after he had fallen down under the axe blows.

4. Kashinath P.W. 7 owns a motorcycle. He took the injured Baban and Vinayak to the Talegaon General Hospital on the motorcycle. From the hospital he informed the Police at the Talegaon Police Station. Head Constable Kang who received the information rushed to the hospital but found both these injured persons in a state of shock unable to give any proper and coherent account of what had happened to them. However, after some time the statement of the complainant Baban was recorded and offence registered there upon. Information was given to the P.S.I. Lavand who was in charge of the Police Station, who also then visited the injured at the Hospital. The P.S.I. also went to the village Koteswarwadi.

5. Investigation was usual-including the recording of the statements of the several witnesses, including Satish P.W. 6, Sonabai and other inmates of the house wherein these two persons had been attacked. The statement of Kashinath and Kisan were also recorded as the persons who had seen the three accused Nos. 1, 2 and 3 coming out of the house and fleeing. The articles of clothing on the persons of the two injured stained with blood were seized. All these accused persons had come to be arrested by about 3.15 a.m. on 26-1-1983. They were also sent for medical examination in view of their claim that they had also sustained injuries. Samples of blood of the two injured as also the eight accused persons were taken, a panchanama of this house in question as the scene of offence was also drawn. During their Police custody and in the course of their interrogation, the appellants-accused Nos. 1 and 2 are said to have been made statements agreeing to show the place where they had concealed the axes and following these statements so made, they had also taken the police to these respective places and the axes were recovered being Articles No. 25 and 26. These axes and other articles of clothing as also samples of blood and blood stained earth taken from the flooring of the house in question were all sent to the Chemical Analyser for its examination and report. After completing the investigation a charge-sheet was presented against all these eight accused persons and the learned Judicial Magistrate, First Class, committed the case for trial to the Court of Sessions at Pune.

6. To the charge for the commission of offences under sections 147, 148, 504, 336, 452 & 307 read with section 149 of the I.P.C., the accused appellants No. 1 and 2 both pleaded not guilty. According to the accused-appellant No. 1 as also the appellant No. 2 had both being deliberately attacked by the complaint and others, while they were returning home after attending a dinner at the house of the accused No. 6. On being attacked and injured they had rushed to the Police Station at Vadgaon where initially the Head Constable refused to entertain any complaint from them, though, only later, they had also been sent for medical examination. It appears that on the complaint as was recorded of the accused No. 1, after an enquiry the Police obtained A summary. The learned Additional

Sessions Judge upon consideration of the entire evidence came to the conclusion that the formation of an unlawful assembly and its indulgence in rioting with deadly weapons as such as was not proved. What was held to be proved upon the evidence of the two injured the complainant Baban P.W. 1 and Vinayak P.W. 5 as also Kisan P.W. 9 and Kashinath P.W. 7 saw that Baban and Vinayak had been in fact attacked by these two accused-appellants with deadly weapons like axes, though causing of any grievous hurt as such was not proved nor the existence of any intention to cause death as such. Therefore, these two appellants were convicted only u/s 324 of the I.P.C. and 324 read with section 34 of the I.P.C. for the injuries caused to by them in pursuance of the common intention of both of them. They were also convicted for house trespass u/s 451 of the I.P.C. They were acquitted of all the other charges and the accused Nos. 3 to 8 were acquitted of each and every head of the charge as was framed.

7. Aggrieved by the judgment of their conviction and the order as the sentence imposed, this appeal has come to be preferred.

8. At the hearing of this appeal learned Counsel for the appellant Shri Niteen Deshpande made and urged a few submissions which according to him when accepted would cause so serious a doubt on the credibility of even the injured witnesses the complainant P.W. 1 Baban and Vinayak P.W. 5, not to mention the others, that the prosecution case would well-nigh have to be rejected and the premise that it was on these accused persons that an attack had made by all these persons that would stand probabalise. It was also submitted by him that the fact of injuries caused to the accused persons in this incident having been established, by the medical evidence of Dr. Kadlaskar P.W. 8, the non-explanation of these injuries by the prosecution ought to prove fatal to the prosecution case. His further submission is also that in view of the admitted enmity between the parties, having its root in the dispute between them over the possession and ownership of the Bakhhal land in the village, in the absence of any other independent evidence, the Court could not proceed to convict them. These submissions may, therefore, now be examined in the light of the entire evidence through which I have been taken by learned Counsel for the appellant as also the learned Additional Public Prosecutor Smt. K.D. Randive. The two star witnesses are of course P.W. 1 Baban and P.W. 5 Vinayak. Satish, a child aged about 13 years was also examined by the prosecution as an actual eye witness to the occurrence. In the eventual assessment, the trial Court found it difficult to place any reliance upon him and no effort has been made here either to canvass in favour of the acceptability of this child witness's version.

8-A. Baban has stated that he returned as usual from Bombay after attending his work. He got down at the Chinchwad Station by about 5.30 p.m., then on way to the house he made some purchases of green grocery and returned home by about 8 or 8.15 p.m. He then had a wash, and went to the Maruti temple nearby and on the way back home, he sat in front of fire which had been made by his uncle Bhiku Dabhade and cousin Vinayak to warm themselves as it was still a

cold evening. Two or three children were also sitting there around the fire. After a few minutes, the accused Nos. 1, 3, 7 and 8 came there, raising shouts in the name of Kashinath, daring him to come out so that they would finish him. Having given such challenging calls, the accused No. 1 had gone back to his house and returned with an axe and at that time he was also accompanied by the accused No. 2 Ganesh, also armed with an axe. At the sight of these persons and sensing danger to his own life, Baban says that he ran into the house of Kashinath who was chased and attacked. Accused No. 1 was the first one to strike a blow near the ear, he received another blow from him whereafter accused No. 2 gave a blow on his cheek and shoulder. In an attempt to ward it off, an injury to his right thumb and the right forearm was caused. Vinayak who had rushed to his rescue, had also been attacked by the accused No. 1. The accused No. 3 who had rushed into the house alongwith the accused Nos. 1 and 2 had indulged in giving kicks to him (Baban) after he had collapsed under the blows of the axes. The inmates raised shouts and cries upon this violence and the assailants then went out. The bleeding wounds were bandaged and by that time Kashinath came into the house and seeing the profusely bleeding condition of both of them, took them to the Talegaon General Hospital and after reaching there, used the telephone of the hospital to inform the Police about this incident. This attack, as the witness explained, was the outcome of the dispute regarding Bakhal land in the village and for the settlement of which dispute, a meeting had recently been held between the two rival claimants-parties and which had also resulted in a failure and only in the administration of threats by the accused and others. This version of Baban is, in the first place, very substantially corroborated by the complainant's complaint Exh. 20 which was recorded of him by the Police Head Constable Kang. A few variances which occur between this complaint and the deposition and to which a reference was made are, however, entirely immaterial and peripheral in my opinion. Baban has stated that he bandaged his own injuries with a piece of cloth while in evidence of Vinayak, it is mentioned that it was the old grandmother Sonabai (not examined as a prosecution witness) who had bandaged the wound temporarily. The witnesses cross-examination would also appear to lead to little difference from these versions in the F.I.R. and the examination-in-chief as such, though one may also mention that, while Baban states in his examination-in-chief that on the arrival of the Police Head Constable at the Talegaon General Hospital, he and Vinayak had not been in a position to describe the occurrence because of their shocked condition and that no written complaint was, therefore, recorded at that time. Head Constable Kang P.W. 11 has stated that he had made some inquiries from these two persons at that time. However, even H.C. Kang is quite-yet-certain that a complaint as such was not recorded at that time because both these two injured persons will not be able to give statement because of their shocked condition. It is, therefore, that it was only after some time, by about 11 p.m., that the complaint Exh. 20 was recorded.

9. As I may observe, cross-examination must be found to be comprised substantially of only suggestions made-and all of them denied by the witnesses.

At best, it would appear from his cross-examination that he has provided an indication that the disputed Bakhal land had been in possession of the accused Nos. 3's father Vithoba Dabhade for a long time and after the demise of Vithoba which was about 10 or 12 years before 1984 (when evidence was recorded in the trial Court) these had come to be recorded in the name of the accused No. 3 also. The plausibility of possession of the land being with the accused No. 3 or for that matter the veracity of the accused persons's claim would therefore, appear to be slightly greater than the complainant and others claimants. I am on purpose using the expression the "slightly greater" for the reason that the civil litigation which would finally put an end to the question of title to this Bakhal land, would appear to be still pending by reason of suits filed by one party against the other and also by reason of chapter cases filed against both these parties by the Police for ensuring that there is no breach of the public peace and tranquillity in the locality.

10. Baban's cross-examination in fact confirms the prosecution case that at the time when this attack on Baban and Vinayak, in-side the house of P.W. 7 Kashinath son of Bhiku Dabhade occurred, Kashinath was himself at the temple along with three others, Kisan, Manik and Chandrakant. That is also corroborated by the version of Kisan P.W. 9, Vinayak P.W. 5 as the other injured, lends the fullest corroboration again to Baban's version. He also states that while he himself, Baban and some children were sitting around the fire which had been made in the vicinity of a electric pole with a tube light mounted on it, four of these accused persons 1,3, 6 and 7 first came, indulged in shouting at Kashinath and then also indulged in threatening these persons to finish them off. At that point of time, it is the version of both Baban and Vinayak that, none of these four persons was armed. It was only thereafter that the accused No. 1 had gone back to his house, which is admittedly nearby, and had returned with an axe and also accompanied by accused No. 2 Ganesh who also wielded an axe. Both of them have quite clearly stated that the accused No. 3 was not armed with any weapon at that time. However, at the sight of these axes with the appellants, Baban was the first one to get scared and ran into the house of Kashinath. He was chased by the accused Nos. 1, 2 and 3 and attacked. Vinayak testifies to this fact and about the accused persons then attacking him also.

10-A. The thrust of the cross-examination, it appears, is directed at establishing the fact that perhaps the prosecution has indulged in shifting of the scene of the offence, the suggestion being that it was in the vicinity of the tube light mounted on the electric pole, near about the place where the fire has been made by these persons that the incident had occurred and that it had been deliberately carried into the house of Kashinath, this for the reason of keeping over the plea of the accused persons that they themselves had come to be attacked near this tube light. Two circumstance would completely disprove any such suggestion and stance. The "panchanama" of the scene of offence at Exh. 27 does not speak for any indication of disorder and violence in the vicinity of the electric tube light pole and the fire. No suggestion was made either to the P.S.I. or to the panchas

to this "panchanama" of the scene of offence that, they had in fact seen signs of bloodshed at this point. The second reason for the rejection of this stance and suggestion is that it was actually inside the house of Kashinath that blood was found, near the door that gives access to the first of the two rooms of the house from the Verandah (Padvi) in front. Blood was also found inside the second in a room, that being the place where according to Vinayak he had gone and found Baban having fallen in the room. Therefore, there would appear no substance in the contention and the cross-examination of either Baban or Vinayak P.Ws. 1 and 5 and cannot be of any assistance in establishing this plea of shifting of the scene of offence and any oblique intention on the part of the investigating agency in so shifting the scene of crime.

10-B Some effort was also made to criticise and bring into doubt the testimony of Vinayak P.W. 5. His statement was recorded on the night between 25th and 26th January, 1983 and it was suggested to him that it was only for the first time in the Court that he had deposed that the accused No. 1 had gone to his house and returned with an axe. Admittedly that omission has occurred; all the same, it is of no consequence inasmuch as Baban has also stated that the accused No. 1 had so gone back to his house but returned armed with an axe and has not been challenged as to the truth thereof. He has not been dislodged from that assertion. The witness also offered an explanation in respect of few other omissions in his previous statement that in his condition still feeling giddy as he was, he might not have remembered to give these details to the Police officers. Indeed if one were to consider the probability of the shocked condition of Baban and Vinayak and the resultant inability to provide all the minute details of the occurrence, one would find considerable support derived from the injury certificate which have been issued in respect of the two of them, by Dr. Kadlaskar, as per Exh. 38 and Exh. 39. On the body of Baban he found as many as six injuries, two of them being in the nature of incised wounds, two being contused lacerated wounds, one being an abrasion and one also being the fracture of the mastoid bone. Vinayak had as many as five injuries, two of them at Sr. Nos. 4 and 5 of injury certificate Exh. 39 being incised wounds, one more being a contused lacerated wound and two others being the abrasions. The description of these injuries would show the intensity with which the blows had been struck and would support the contention of these two witnesses that at the time when the police first made an enquiry from them, they were in so shocked a condition to be unable to describe the entire incident with a clarity, continuity and coherency. The omissions which have, therefore, been pointed out, for criticising their version, would appear to this Court as being only on the fringes and then again explainable for the reason that these witnesses were in such a shocked condition at that time. The medical evidence as also the "Panchanama" of the house of Kashinath, as being the scene of offence, therefore, go to support the version of these two injured persons. The argument advanced was also that in the context of the admittedly strained relations over the disputes about the Bakhal land, the testimony of both these persons, though now to be admitted as

being of injured persons, themselves, would yet not be safe to be acted upon and it was indeed an imperative of the situation that the prosecution should have examined other independent witnesses. Now it will be appreciated that Bhiku Dabhade as the person who was sitting around the fire and the two or three children who were also warming themselves with the fire have not been examined. It has to be appreciated that the fact that the accused persons had come up to this place, has been admitted even by them on their own, if reference is to be made to their examination u/s 313 of the Cr.P.C. The incident of attack on Baban and Vinayak P.Ws. 1 and 5 occurred principally in the house of Kashinath P.W. 7 when the two of them fled from the fire, for safety, apprehending danger at the hands of the appellants-accused Nos. 1 and 2. So far as the house as such was concerned, the only witness examined was the child Satish P.W. 6 and whose version the learned Judge of the trial Court has, for sound reasons, given indeed, declined to accept also. But then inside the house as such, any other independent witness, a stranger to the household could not be expected, nor was it suggested that any such person was present and yet not examined.

11. In these act of circumstances, the previously existing enmity or the strained relationship between the parties would not per se be reason for discarding the version of Baban and Vinayak. In fact one must always continue to remember the well settled law that an injured person would not ordinarily involve a wrong person as being his assailant, for the injuries caused to him. That principle must go into the operation in the set of the facts as presently obtain also.

12. The more corroborative side of the evidence that comes from the prosecution is in the nature of the versions of Kashinath P.W. 7 and Kisan P.W. 9. It needs to be noted that the accused No. 1 admitted in his statement recorded u/s 313 of the Cr.P.C. that Kashinath P.W. 7, Kisan P.W. 9, Manik and Chandrakant had been at that time sitting in the Maruti temple. This temple is at a distance of not more than 50 paces or so from Kashinath's house and it is, therefore, the version of Kashinath and Kisan that on hearing some hue and cry from the direction of Kashinath's house, they got up and ran in that direction and just as they were entering Kashinath's house, the accused Nos. 1 and 2 accompanied by the accused No. 3 came out of it and fled. They had also seen the accused Nos. 1 and 2 each armed with an axe having blood stained. This evidence therefore lends support to the version of Baban and Vinayak P.W. 1 and 5 that when they fled from the place, where they had been warming themselves with the fire and when they ran into house of Kashinath for safe shelter, they had been chased by these appellants Nos. 1 and 2 subjected to blows with the axe causing injuries as are cumulated in the certificates Exhs. 38 and 39.

12A. The argument which has been advanced is that even according to the prosecution on an assumption that the appellant-accused Nos. 1 and 2 had each produced the axe which was seized as per the "panchanamas" Exhs. 30 and 32, preceded by their statements u/s 27 of the Evidence Act as per Exh. 29 and 31

these axes when sent to the Chemical Analyser for ascertaining the presence of any human blood on them and for ascertainment of the group of the blood, if found to be human, the report is entirely unhelpful to the prosecution. The investigation may be said to have ended with this C.A. report, so far as proving the identity of the weapons is concerned but the point remains that Kashinath and Kisan did see these two persons coming out of the house of Kashinath with axes. As for the fact that no human blood was traced either on the metal or the wooden handle of these axes as per the report of the Chemical Analyser as per Exh. 53, it needs to be appreciated that this incident had taken place some time at about 8 or 8.15 P.M. and it was only after about six hours at about 3.15 a.m. on 26-1-1983 that the accused had come to be arrested. Therefore, it is quite clear that there had been sufficient time for the accused assailant to wash, wipe and clean these axes and leave no trace of blood on them. The Chemical Analyser's report in that behalf does not, in my opinion, therefore go further in favour of disproving the offence as against the report limiting the prosecution case from establishing the said axes as the weapons used. That no incident at all as claimed by these injured persons, occurred, would not be a contention conceivable for being advanced on the premise that the two axes did not have any blood stains on them.

13. The testimony of the complainant is thus supported by his own F.I.R. Exh. 20, the testimony of Baban and Vinayak P.Ws. 1 and 5 is further corroborated, partially though, by the evidence of Kashinath and Kisan P.Ws. 7 and 9, it is also corroborated by the medical evidence about the injuries sustained by them, each of them having sustained at least two injuries, which were caused in the nature of incised wounds and therefore, compatible with the evidence about the use of the axes by these two appellants. It will be appreciated that the articles of clothing on the person of these appellants revealed the presence of human blood as per the report of the Chemical Analyser. In that view of the matter, it would be further appreciated that the evidence as a whole, when subjected to a due scrutiny, should appear to defy all just criticism about and against its truth and acceptability. I also find that in dealing with the testimony of P.W. 6 Satish as also in the matter of appraisal of evidence against other accused Nos. 3 to 8, the learned Judge of the trial Court must appear to have been entirely dispassionate and circumspect. He also observed while dealing with the testimony of P.Ws. 1 and 5, the role of pelting of stones was attributed to the accused Nos. 1 to 8 and that there was a shifting when in the oral evidence it was attributed to accused Nos. 3, 6, 7 and 8. The learned Judge observed that the incident of stone pelting was a new story which was coming forward. He has therefore and to that extent of course, disbelieved the evidence of these injured witnesses P.Ws. 1 and 5. It cannot be gainsaid, therefore, that there was any one sided or blind appreciation and acceptance of the testimony of these injured persons by the trial Court. Similarly the learned Judge also observed when these two injured persons apparently failed to testify to the chronology of delivery of blows, the places where the blows had landed on the body of these two victims, the order or the

interception in the continuity of blows to which they had referred, was all a matter which was by reason of the difficulty in remembering each and every details of the blows that had been struck, the order in which these had been given by the accused persons. In my opinion, therefore, the appreciation of evidence as made in regard to the testimony of these four witnesses in particular must be accepted as being unexceptionable indeed. As per the explanation on the part of the accused, it would appear that there are at least two entirely different versions that come forth on record. According to the accused, they both had been invited for a dinner by the accused No. 6 and had been returning from the latter's house. When they came near the electric tube light pole in front of the house of Bhiku Dabhade and found the complainant and several others waiting for them. They were subjected to an attack with sticks by Baban and Vinayak, one Gulab who appears to be the father of the child witness Satish P.W. 6, also came armed with an axe from the house of Kashinath, Kashinath, Kisan, Manik and Chandrakant also came running from the temple and attacked them. He, therefore, sustained injuries on his right wrist, right shoulder and the head as a result of the blows struck to him with the axe which was in the hands of the said Gulab suggestively. He was also attacked with a stick as he says. He and Ganesh then ran towards the Police Station, they wanted to lodge their own complaint against these complainants but the Police Officer there refused to entertain the same. To this latter aspect of their contention I will presently advert. But suffice it to say that the accused do not dispute that they had been eventually, that very night, sent for medical examination and were examined by Dr. Kadlaskar by about 11 P.M. Dr. Kadlaskar on examination of these two appellants found as under:-

On the person of accused No. 1 Kantaram, he found two contusions and three abrasion as stated in Exh. 43. He also found a contusion and three abrasion on examination of the appellant accused No. 2 Ganesh, as per the injury certificate Exh. 44. I will initially deal with a contention advanced that the prosecution has nowhere explained these injuries which have come to be sustained by the two accused persons. What is urged that the entire prosecution evidence would therefore, brought into doubt by reason of this failure to explain the injuries. Two recent decisions of the Supreme Court namely Hare Krishna Singh and Others Vs. State of Bihar, , and 1990 S.C.C. (Cri.) 378, now clearly by it down that it is the nature of the injuries sustained by the accused persons vis-a-vis those sustained by the injured in the prosecution, if the role played and the extent of the injuries is so insignificant and negligible that it does not and cannot change the course of the prosecution evidence as such, though non-explanation of the injuries by the prosecution cannot prove fatal. Here it may be appreciated that the accused tended to contend that Kashinath, Kisan, Chandrakant and Manik had attacked them with sticks, though admitting this premise that these four persons had been sitting in the temple at that time. It would only be very unusual to say that these four persons having as usually gone and been sitting there, they were also at the very same time armed with sticks, had, as if in

expectation of the arrival of these two accused persons, readied themselves to attack these accused persons; that indeed appears quite inconceivable. It is also noteworthy that no suggestion in this behalf was also attempted when Kisan, Kashinath P.Ws. 9 and 7 were under cross-examination. There was no reason, in my opinion, for Kashinath and Kisan or for that matter Baban and Vinayak to be on the look out for these two accused persons for indulging in any reprisal for anything that they had in the recent past done. In fact it is the case of these accused persons also that some meeting which was held for settlement of the dispute about Bakhal land, had been held only in February 1982 or as suggested by prosecution witnesses only in April 1982. Apparently, there had been a lull on the front since then and therefore, it would be entirely unacceptable that these four persons Kisan, Kashinath, Manik and Chandrakant had been lying in wait at the temple, for an ambush of the appellants No. 1 and 2.

14. The learned Judge of the trial Court has also dealt with the question of complaint Exh. 48 which was lodged that night by the accused No. 1 Kantaram at the Wadgaon Police Station. This Complaint is to the effect that he returned home as usual by 6 p.m. to his house at Koteswarwadi. Dinner was over at about 8. 30 p.m. and he was still at home. At about 8. 30 p.m. stones started being pelted at his house and he then came out of the house to see why and who was indulging in this mischief. At that time one stone was hit him near his left eye and he bent down under the pain of it and second stone hit him on the right shoulder and third one at his right hand wrist. He, therefore, went running inside the house and waited. After some time Police came and took him along with other accused persons with them. The complaint Exh. 48 lodged by him further reads; he would not be in a position to tell the names of persons who had pelted the stones though he only suggested that those might be of Koteswarwadi who were on cross terms with him. As the learned Judge has observed this complaint would indicate that whatever has been now taken as the defence plea in the examination u/s 313 of the Cr.P.C., is in its entirety an improvement over only what has happened, including the fact that some injuries were sustained in a stone throwing or by some other reason by these appellant accused No. 1 and may be by the other appellant accused No. 2 also.

15. Now the contention of these two accused persons is that as they were injured and ran towards the Police Station to lodge report against the complainant and others, the Head Constable in charge refused to accept any complaint from them. The learned Judge is right when he observed that this explanation is entirely false when no suggestion has been made to the Head Constable Kang P.W. 11 that he has been harbouring animus towards these accused persons, or has any soft corner for the complainant and others for that matter. Neither this nor that suggestion was made to H.C. Kang. Indeed there would appear no reason why this public servant, who came to be attached to the said police station only in September 1982, should harbour any such animus as to refuse to record their complaint in the first instance and then while recording it, record it in such a false manner as to secure, falsely implication of these accused

person. There is indeed no such explanation, much less even a plausible one, which could be said to be forthcoming from the accused persons when the charge is made that H.C. Kang in charge of the Police Station at the material time, refused to entertain their complaint. The learned Judge is, therefore, right in contending that there has been considerable water of complaining which had flown under the bridge of this prosecution and which resulted in the accused persons raising a plea in defence that they were the persons who had come to be attacked by these complainant and others. As is also the observation of the learned Judge, even the explanation as offered by the accused persons, makes no reference to the fact of any injuries sustained by Baban and Vinayak P.Ws. 1 and 5 when indeed they were so serious and so grave that entire Padvī and the second room of Kashinath's house was blood stained, which blood was for the purpose of sample collected from there sent to the Chemical Analyser and found to be human. It was also found to be of group "O" which is that of Vinayak P.W. 5. In the circumstances the explanation as offered by the appellants, was rightly rejected by the trial Court. The learned Judge observed that the injuries were, however, not to be classed as grievous. I am inclined to differ from him when in fact injuries in the nature of fracture has in fact been certificated by Dr. Kadlaskar and the offence would, therefore, tend u/s 326 of the I.P.C. However, in the circumstances that the prosecution has not challenged this premise of conviction for a lesser offence of 325 as against 326 I.P.C., I would leave the matter, at that. The finding must therefore remain that the accused No. 1 by the use of axe caused injuries to both Baban and Vinayak and that the accused No. 2 Ganesh caused injuries to complainant Baban with axe and therefore, each of them has indecently committed the offence u/s 324 of the I.P.C. and the offence having been committed in pursuance of the common intention of both of them, one is guilty u/s 34 of the I.P.C. for the offence u/s 324 of the I.P.C. committed by the other actually. The evidence of Baban and Vinayak as also Kashinath and Kisan amply establishes that the accused person-appellants 1 and 2 had entered the house of Kashinath armed with axe and that this therefore amounted to house trespass of an aggravated nature since these two persons had followed Baban and Vinayak in the house of Kashinath in order to attack them, and therefore it constitutes an offence u/s 451 of the I.P.C. and the conviction as recorded would have therefore to be unhesitatingly upheld.

16. At the conclusion of the appeal to this extent, learned Counsel Shri Deshpande appearing for the appellant submitted that both these appellants were young men and that they had never been involved in the commission of offences prior to the incident in question and he further submits therefore that the totality of the facts and circumstances would yet justify a decision not to sentence them forthwith to any term of imprisonment. It would be properly in the interest of justice including the need to keep these appellants away from coming into contact with hardened criminals by reason of their incarceration, that they should be released on the probation of good conduct. Upon that submission the hearing was postponed to call for the report of the probation officer of each

of these two appellants. The report has been since received and is now considered. Having regard to the age character as also the antecedent of these two appellants, and not at the same time overlooking the gravity of the acts committed by them, it still appears to me that the case of each of these two appellants is a fit one for extending to him the benefit of the provisions of section 360 of the Criminal Procedure Code as also section 4(1) of the Probation of Offenders Act. The Court, therefore, passes the following order.

ORDER

The conviction of the appellants is hereby confirmed and accordingly maintained. The sentence of fine imposed on each of them for each of the two offences is hereby quashed and set aside. As for the sentence of imprisonment, instead of giving effect to the same, upon confirmation of conviction, each of the appellants is directed to be released on probation of good conduct for a period of two years and in the meanwhile to maintain peace and be of good behaviour. The appellants shall each enter into a bond of Rs. 5000/- with one or two sureties in the like amount for each, for appearing and receiving sentence when called upon during the said period of two years.

Appeal disposed of.