
(2013) 07 BOM CK 0116
In the Bombay High Court
Case No : Criminal Appeal No. 03 of 2000

Machindra and Ayub

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 23-07-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 357
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 141, 147, 148, 149, 300

Citation : (2013) 5 ABR 268 : (2013) ALLMR(Cri) 4189 : (2013) ALLMR(Cri) 4177

Hon'ble Judges : Naresh H. Patil, J; A.I.S. Cheema, J

Bench : Division Bench

Advocate : H.F. Pawar holding for Mr. A.H. Kapadia and Mr. Satej S. Jadhav, for the Appellant; V.H. Dighe, Assistant Public Prosecutor, for the Respondent

Final Decision : Partly Allowed

Judgement

A.I.S. Cheema, J.—Criminal Appeal No. 03/2000 has been filed by original accused No. 1 Machindra Dashrath Jadhav and original accused No. 6 Ayub Umar Pathan. Criminal Appeal No. 05/2000 has been filed by original accused No. 5 Umar Daulu Pathan, original accused No. 8 - Nasibabee Shaikh Umar and original accused No. 19 Yasin Biban Pathan. These five are out of 19 accused against whom charge-sheet was filed by Police Station, Waluj on the complaint of one Ahmedkhan Lalkhan Pathan in Crime No. 111/1994 under Sections 302, 147, 148, 149 and 324 of the Indian Penal Code, 1860 ("IPC" in brief). Judicial Magistrate, First Class, Gangapur, Dist. Aurangabad committed the case to Court of Sessions and the 19 accused were tried before 2nd Additional Sessions Judge, Aurangabad for the charge under Sections 147, 148, 302 r/w 149, 324 r/w 149 of IPC. By judgment dated 23.12.1999, the above five accused came to be convicted and were sentenced to imprisonment for life u/s 302 r/w 149; rigorous imprisonment for one year u/s 147; rigorous imprisonment for one year u/s 148; and rigorous imprisonment for one year for offence punishable u/s 323 r/w 149

of IPC. Fine was also imposed. Thus, these appeals. Case of the prosecution in brief can be stated to be as under:-

(a) One Maheboob Khan and his father Lalkhan were residing at village Turkabad, Tq. Gangapur. He has uncles Hasankhan and Chandkhan. Near their field, there is field of (original accused No. 7) Shaikh Imam. There was on going quarrel between family of Maheboob Khan and Shaikh Imam over dispute of a way from "bandh" since 10 to 12 years. Even Court cases had been filed. Accused persons had fields near the spot of incident and there was dispute of way from the "bandh" with Maheboob Khan and his family. On 26.12.1994, there was festival of "Kunda" and Maheboob Khan who works in Maharashtra State Electricity Board had come to his house. Incident took place in the morning at about 8 A.M. Case of the prosecution is that suddenly, all the accused persons came near the house of Maheboob Khan. Due to dispute of way from the field they came carrying spade, sickle and sticks and suddenly started abusing. Accused No. 1 Machindra and accused No. 6 Ayub hit spade and sickle on the head of Maheboob Khan. Other accused gave stick blows causing bleeding injury to the face and injury to the back by stick blow. Because of the assault, Lalkhan suffered bleeding injury on the head and Anwar Khan, the cousin brother of complainant Ahmedkhan suffered bleeding injury to the head. Chandkhan Vajirkhan also suffered grievous injury by spade, stick and sickle. There was swelling on the back of Hasan Khan. In such incident, one Asaram Mohan Sonwane, Laxman Sonwane, Mijaj Badshah, Noorkhan, Ramanath, Vishnu Sonwane, Sandu Hyder, Kadu Fattu intervened and separated the quarrel.

(b) F.I.R. with contents like above was submitted by Ahmed Khan at the Police Station, Waluj. Head Constable Eqbal Ahemad received the complaint at Police Station, Waluj at about 9 a.m. Injured Chandkhan, Anwarkhan, Maheboob Khan had also been to the Police Station. P.I. Sonar forwarded the injured to GHATI Hospital and F.I.R. of Ahmedkhan was recorded. Spot panchanama was done on the same day and from the spot blood stained mud was seized. Two pieces of sticks were also found. Chandkhan expired on 27.12.1994 at about 1.40 a.m. Shyamrao Digaonkar, then an Assistant Commissioner of Police took over the investigation. Inquest panchanama was drawn. Provisional certificate regarding cause of death of Chandkhan was obtained. Postmortem was also got done. Earlier the offence had been registered u/s 307 of IPC, but now it was converted into Section 302 of IPC. Clothes of deceased Chandkhan were seized. Clothes of the injured persons were also seized. Police recorded memorandum statement of accused No. 1 Machindra, accused No. 13 Rakhamaji, accused No. 11 Laxman, accused No. 5 Umar, accused No. 6 - Ayub and accused No. 3 - Naseemabee and there was discoveries of the sticks used in the incident as well as spade and sickle from different places. Attached muddemal was sent to Chemical Analyser and C.A. Reports were obtained. On completing the investigation, charge-sheet came to be presented.

2. In the trial Court, the prosecution brought on record the oral and documentary

evidence it wanted. Prosecution brought on record the evidence of PW-1 Maheboob Khan and his wife PW-2 Zahedabee, regarding the incident. PW-3 Sattar Khan is son of deceased Chandkhan. He was tendered as eye witness but turned hostile as far as regards witnessing actual incident. PW-6 complainant Ahmedkhan, who filed the F.I.R. claimed that he was in his house situated in the village and his son came and told him that incident had taken place and that is how he came to know about the same. PW-7 Anwar son of Hasankhan, injured in the incident, turned hostile. PW-8 Hasinabee, the sister of PW-1 Maheboob Khan, stepped in as eye witness but she also turned hostile. PW-14 - Lalkhan, who was also injured in the incident, also turned hostile.

There is evidence of Chief Medical Officer Dr. Laxmikant Manohar Shende (PW-9) available, who soon after incident had examined the injured. Doctor who carried out postmortem, Dr. Jinturkar deposed as PW-10. It appears that the first Investigating Officer, P.I. Sonar has expired and was not available at the time of recording of evidence. The other Investigating Officer, now Dy. S.P., Shyamrao Digaonkar has given his evidence as PW-12.

3. The defence is that because of dispute of way, the accused persons have been involved as they have fields near the spot. Statement of accused no. 1 Machindra u/s 313 of Code of Criminal Procedure, 1973 ("Cr.P.C." in brief) claims that on the day of incident, he was going to his land and the complainant and witnesses insulted him and tried to strangulate him when Ayub, Laxman, Karbhari, Hari intervened and separated the quarrel. He claimed that he had filed F.I.R. in this regard. Certified copy of the document has been marked at Exhibit - 98.

4. Trial Court after considering evidence has convicted the above five accused out of 19. The other accused were acquitted mainly on the ground that in the incident no overt act was attributed to them by the witnesses.

5. It has been argued by learned counsel for appellants - accused that evidence has been led about all accused assaulting Chandkhan and other witnesses with instruments like sticks, sickle and spade, however the Medical evidence does not match. PW-2 deposed that after incident accused persons threw weapons on the spot and went away, but still discoveries have been shown u/s 27 of the Indian Evidence Act, 1872. There are different versions as to how many spades were used in the incident. There are various differences in the versions regarding the incident as deposed to by PW-1 vis-a-vis PW-2. Trial Judge did not appreciate the previous history of various complaints by complainant and his relatives involving accused persons in the dispute relating to way. No independent witness has been examined though available. Even panchas did not support the prosecution. As regards injuries to Chandkhan, it is argued that other than injury no. 3 no other injury was fatal and doctor has deposed that injury no. 3 was possible by fall. It has been submitted that the judgment of trial Court is not maintainable and needs to be set aside.

Against this, learned A.P.P. has submitted that due to strained relations the

accused persons with common object assembled on the spot and deceased Chandkhan and witnesses were attacked near the house of PW-1 and thus the incident took place. It has been argued that judgment of trial Court needs to be maintained.

6. Looking to the material on record, there are certain facts in the matter regarding which there does not appear to be any dispute. Evidence shows that PW-1 Maheboob Khan, who is in service at Gurudhanera, Tq. Gangapur, has house at Turkabad, Tq. Gangapur near field where his father also is residing. His brothers and sisters reside in the village. His uncle Hasankhan, Chandkhan and his father have their agricultural fields at Turkabad. Near their fields there are fields of accused No. 2 Shaikh Abdul and accused No. 7 Shaikh Imam. The other accused have also got fields nearby and there is a dispute between the accused persons on one side and PW-1 and his father and uncles on the other. Apart from the accused there are other owners of the nearby lands and houses which are on the eastern side of fields of PW-1 and his family, who have claimed right of way from the boundary of land of PW-1 and matters were filed in the Court as well as before Tahsildar. PW-1 and his uncles have their houses near concerned fields and near the spot. Apart from the fields of PW-1 - Maheboob Khan and his family, there are also houses of some of the accused. On 26.12.1994 apart from complainant Ahmed Khan filing report to the Police Station regarding the incident taken place at 8 a.m., there was yet another complaint filed by accused No. 1- Machindra claiming the incident to have taken place at 7.30 a.m. In both the F.I.Rs. cause of quarrel was shown as the dispute regarding way from the "bandh". Near the spot there is public road going to Kharadi-Kimbejalgaon. Chandkhan expired while admitted in the hospital in the night between 26.12.1994 to 27.12.1994.

7. We will discuss the incident in the later part of the judgment. Here, it needs to be mentioned that evidence discloses that after incident took place on 26.12.1994 along with other injured, Chandkhan had also gone to the Police Station and from there Chandkhan and the other injured were sent to GHATI Hospital. At GHATI Hospital, Aurangabad, C.M.O. Dr. Laxmikant Manohar Shende (PW-7) examined the injured as well as Chandkhan. As regards Chandkhan, who was examined at 10.25 a.m. Doctor recorded the following injuries:

He had C.L.W. on scalp on vertex of size 8 x 3 x 1 1/2 c.m. Bleeding was present. Edges were rough. He was suspected to have concussion.

According to PW-9, Chandkhan was admitted in emergency ward. After death of Chandkhan, PW-12 Dy. S.P. Syamrao carried out inquest panchanama Exhibit 34 and PW-10 Dr. Anil carried out postmortem. PW-10 has deposed regarding the surface injuries noticed as under:-

(1) An obliquely placed slightly curved sutured wound over right fronto-parietal region, surrounding area was markedly contused and 4" in length, reddish dark colour.

(2) An obliquely placed incised wound at margins of left ear external pinna, involving entire flesh portion of pinna and also cartilaginous part partially, it was 1" X 3/4" in dimensions, it was tapering medially, adherent blue cloths seen at edges of wound, margins clean cut.

(3) An oval dark reddish colour haematoma of size 2 1/2" x 1 1/2" over left temporoparietal region, fractures of underlying bones felt.

(4) An irregular dark reddish abrasion over anterolateral aspect of left knee, it was obliquely placed.

(5) An oval dark reddish abrasion over dorsum of right foot, dried blood stains seen at it's lower part, it was 1 1/2" 1/2" size."

He also felt fracture of skull bones on left side by palpation. All these injuries were ante-mortem in nature, he has deposed.

The witness proved provisional postmortem report Exhibit 54 and postmortem report Exhibit 55. According to the doctor the cause of death was head injury in the form of contusions of brain with intracranial hemorrhage as the result of fissured fracture of skull bones.

Although, how incident took place is disputed, the evidence of doctor that Chandkhan died due to injuries as above is not disputed. Looking to the evidence, prosecution has proved that Chandkhan did meet homicidal death.

8. Now, the questions that survive relate to whether prosecution proves that accused persons were members of an unlawful assembly and if they were armed with deadly weapons and with common object caused injuries to PW-1 Maheboob Khan and his family members and murdered Chandkhan.

9. (a) Regarding the incident, the prosecution is mainly relying on PW-1 Maheboob Khan and PW-2 Zahedabee, who is wife of Maheboob Khan. Evidence of these two witnesses is to the effect that on the day of incident i.e. 26.12.1994 they were at home at Turkabad and time was about 8 a.m. The accused persons at that time came near their house. PW-1 Maheboob Khan has deposed that the 19 accused started assaulting him. Accused No. 1 Machindra had a spade and accused No. 6 Ayub had a sickle. Accused No. 1 Machindra assaulted him on the head by spade while accused No. 6 Ayub assaulted him with sickle on his head and he sustained injuries. PW-2 Zahedabee has also deposed that all the accused beat her husband in which accused Machindra gave blow of spade on head and accused Ayub assaulted him with sickle on head causing injury. She claimed that her husband had bleeding injuries. Thus, regarding causing of hurt to witness Maheboob Khan, PW-1 and PW-2 are corroborating each other.

(b) Evidence of PW-1 and PW-2 is further to the effect that when Maheboob Khan was attacked by accused persons his father Lalkhan intervened to separate, at which time accused no. 6 Ayub gave blow by sickle on the head of his father and other accused started beating his father with sticks. Regarding this, PW-2

Zahedabee has claimed that when her father-in-law Lalkhan came to rescue her husband Maheboob, it was accused no. 5 Umar who assaulted Lalkhan with spade while accused no. 8 Nasibabee assaulted Lalkhan with stick.

(c) PW-1 has then deposed that in such incident his uncle Chandkhan and Hasankhan also came to separate quarrel. PW-1 Maheboob claimed that accused no. 19 Yasin was also having spade and he assaulted Chandkhan on the head while accused no. 6 Ayub gave blow of sickle on the head near the ear to Chandkhan. If evidence of PW-2 Zahedabee is perused, she claims that Chandkhan and Hasankhan came to separate the quarrel and they were assaulted by accused No. 19 Yasin with spade. She has deposed that accused no. 6 Ayub assaulted Chandkhan with sickle causing injury to his head because of which Chandkhan fell down. Her evidence is, all the accused beat Chandkhan with sticks. PW-1 has deposed that Hasankhan was beaten with stick by the accused persons.

(d) PW-1 Maheboob Khan has deposed that his brother Anwar came to separate the quarrel and he was also assaulted by all the accused persons, who caused injury to his head.

(e) PW-1 Maheboob Khan claims that at such time his brother Ahmed (complainant) came along with Sandu, Haidar, Kadu, Fattu and separated the quarrel and then accused went away.

10. Learned Advocates for appellants-accused argued that there are differences in the versions of PW-1 and PW-2. We find that in incidents of present nature different witnesses may have slightly different versions, as, when in quick succession acts of assault are taking place minds of different witnesses may register different parts of the incident differently. We would not give much weight to these differences in versions. Such differences rather lend credence to the fact that the witnesses are not tutored.

11. Looking to the evidence of PW-1 and PW-2, if now the evidence of PW-14 Lalkhan S/o Vajirkhan Pathan (father of PW-1 and brother of deceased) is perused, he deposed that the 19 accused were indeed there when incident took place at 8 a.m. near his house. His evidence is that when he came out, he saw that Maheboob Khan (PW-1) had fallen down. He claims, he did not see who had actually assaulted Maheboob Khan. According to him, when he tried to pick up Maheboob, he was also assaulted on his head and when he had fallen down he was again beaten with stick. He claimed that he cannot tell by what weapon he was assaulted on head or who has given blow to him on his back. He however, insisted that the accused were present while he was beaten. The witness was declared hostile and in cross examination by A.P.P. he has stated that the accused were in possession of spade, stick and sickle. He stated that it is true that because of blow given by accused no. 1 Machindra and accused no. 6 Ayub, Maheboob Khan sustained injuries. However he was not ready to accept that accused Ayub gave him blow by sickle on his head. He accepted that accused No.

8 Nasibabee assaulted on his back. He admitted having said to the Police that accused No. 19 Yasin had assaulted Chandkhan with spade and that accused no. 6 Ayub had assaulted Chandkhan with sickle. He further accepted that Anwar had sustained injury on his head and that the accused were abusing. Clothes of Maheboob and Anwar were stained with blood was admitted in the cross examination by A.P.P.

The further cross examination of this witnesses by the accused persons reveals that he cannot hear or see properly. He admitted the dispute over right of way between the parties and that the Tahsildar had given right of way to the accused. He accepted the suggestion of accused that near the house, there is a road and it had got blocked as traffic stopped and the people were seeing as to what was happening. He admitted, he did not see who assaulted Chandkhan.

Such evidence of this witness Lalkhan if read with evidence of PW-9 Dr. Laxmikant Shende, it can be seen that soon after the incident this witness was examined and doctor issued the certificate Exhibit 50 which shows that he had contused lacerated wound on his scalp on right parietal area and there was contusion on the back. Although, the medical certificate Exhibit 49 of Maheboob Khan shows that he was advised X-ray of skull no such advise appears to have been given to this witness Lalkhan. Injuries of Lalkhan appear to have been simple, but however, the injuries were there. The witness frankly says that he cannot hear and see properly. He cannot hear or see properly does not mean that he cannot hear or see at all. Due to such vision, the witness may not have been able to register in his mind as to by what weapon he got hit. This happens in a quarrel like in the present matter with sudden actions taking place. The witness was frank in his admissions even when accused cross-examined. Thus, this old person of 70 years appears to be reliable regarding his evidence as regards the incident as witnessed by him. In the result, PW-1 and PW-2 are corroborated to some extent regarding their evidence.

12. It appears that injured Hasankhan was not available when the matter went to trial as he had expired. Prosecution examined another injured Anwar S/o Hasankhan Pathan (PW-7). He deposed that when he was returning from his field he saw many people had gathered near the home and he heard that the quarrel had taken place. When he reached the spot, he found that Maheboob Khan as well as Chandkhan had sustained injuries on their head. He says that the persons who had beaten Maheboob Khan and Chandkhan had gone away. He claims that they had gone to police and they were sent to GHATI Hospital. According to him, Maheboob Khan (PW-1) and Chandkhan were also hospitalized. In evidence he was not accepting how he got injured and the witness was declared hostile and he was cross examined. In the cross examination, the witness was not ready to accept the suggestions regarding the accused persons being there on the spot and regarding assault by them. He however did accept that he sustained injury to the head and was hospitalized and discharged on the same day.

Evidence of PW-9 Dr. Laxmikant shows that this witness had contused lacerated

wound on his scalp and that injury was simple. Witness was confronted with Police statement but denied the contents regarding the details of the incident. His statement to the Police has been proved by PW-12 Dy. S.P. Syamrao, at Exhibit 83. Thus, it appears that although injured in the incident, the witness is not coming out with truth.

13. Then, there is evidence of PW-3 Sattar Khan son of deceased Chandkhan, PW-8 Hasinabee, (the sister of PW-1 Maheboob Khan) and PW-11 Jafarkhan (the son of deceased Chandkhan) who were all examined by the prosecution as witnesses of the incident, but turned hostile and have not deposed to seeing actual assault. PW-3 Sattar Khan stated that quarrel did take place between his neighbours (accused no. 1) Machindra, (accused no. 4) Bhikan, (accused no. 18) Biban, (accused no. 19) Yasin and other accused and his father. However, he claimed that he was sleeping at that time and when he got up his father was already brought home and had injuries on his head. He claimed, on hearing shouts he came out and at that time saw all the accused. He deposed that accused were having stick, spade and sickle. Thus, though he turned hostile, prosecution brought on record through him corroboration to peripheral parts of incident as deposed to by PWs 1 and 2. The witness however was not ready to say that he himself saw the accused beating his uncle and his father. Even PW-8 Hasinabee stated that incident took place at about 8 a.m. and Maheboob Khan, Chandkhan, Anwar Khan and Lalkhan sustained injuries but claimed that she did not herself see the incident. Even PW-11 Jafarkhan claimed that when he returned after attending the call of nature, he saw that his father and brother were lying injured. PW-11 Jafarkhan was also cross-examined but did not claim to have seen the actual assault.

14. The Investigating Officer (PW-12) Dy. S.P. Shyamrao has proved the statement which PW-3 Sattar Khan had given to the Police at Exhibit 82 and what PW-11 Jafarkhan stated to the police at Exhibit 94. Thus, as far as these two witnesses are concerned, it can be said that they are not coming out with the whole truth but still corroborate to some extent. As regards PW-8 Hasinabee, this Investigating Officer said that her statement was not recorded by him. As such, the evidence of Hasinabee is material only to the extent that the incident took place at about 8 a.m. on the day of incident and her brothers Maheboob Khan, Chandkhan, Anwar Khan and Lalkhan had sustained injuries.

Though the witnesses were declared hostile as not supporting case of prosecution as regards the actual assault, the admissions of the incident as regards peripheral parts, lend credence to evidence of PWs 1 and 2 who we are finding to be reliable.

15. The F.I.R. was lodged by PW-6 Ahmedkhan S/o Lalkhan Pathan. He deposed that the incident took place on 26.12.1994 at about 8.00 a.m. According to him, he has agricultural field Gut No. 259 and adjoining to his field, there is field of accused no. 7 Shaikh Imam and there was quarrel between them over the way. He deposed that at the time of incident, he was in house which is situated in

village and his son had come to tell him regarding the incident. He came to the field and saw that Maheboob Khan and his uncle and his father were injured. They were near the house in the field. According to him, he took them to Waluj Police Station and Police sent them to GHATI hospital and then he lodged the complaint which is at Exhibit 41. In the cross-examination, this witness deposed that PW-7 Anwar had disclosed to him the name of accused and he had accordingly given the F.I.R. F.I.R. Exhibit 41 refers to the dispute of way and that there was injunction order and due to such dispute, the 19 accused named in the F.I.R. had on that day of 26.12.1994 at 8 a.m. come to the house carrying sickle, spade and sticks when his father Lalkhan, brother Maheboob Khan, Anwar Khan, Chandkhan, Hasankhan were all at home and the accused picked up quarrel of the way and after abusing started beating. F.I.R. mentions that accused no. 1 Machindra, accused no. 6 Ayub had hit Maheboob Khan by spade and sickle on the head and others had beaten by sticks causing bleeding injuries to the face and injury to the back. F.I.R. mentions that Lal Khan had also suffered injury to the head and cousin brother Anwar Khan had also injury to his head. F.I.R. states that Chandkhan Vajirkhan had suffered serious injuries as he was beaten by spade, stick and sickle and Hasankhan was also beaten on the back. Names of persons who intervened were also mentioned in the F.I.R. which came to be registered on the same day at 9.45 a.m.

F.I.R. has been criticized by the learned counsel for the accused on the plea that the evidence on record shows that Ahmedkhan had not himself witnessed the incident and when injured went to the police station, they were immediately sent off to Hospital and Police preferred to record the F.I.R. from Ahmedkhan who had actually not seen the incident.

The evidence available shows that when injured had gone to the police station, P.I. Sonar who was in Police Station had immediately forwarded them to GHATI hospital along with memo. Evidence of PW-13 Eqbal Ahemad, the head constable discloses this. This witness stated that he thereafter recorded the complaint of Ahmedkhan. This witness Eqbal Ahemad has deposed that P.I. Sonar expired 10 to 12 days before his evidence. Even PW-1 has deposed (at para 7) that when they had gone to the police station, police orally enquired from them and also his uncle Chandkhan and they disclosed the incident to the police and after they were sent to hospital, the complaint was got reduced in writing from Ahmedkhan.

Although, it would have been appropriate that P.I. Sonar should have recorded the F.I.R. immediately from any of the injured who had simple injury, still that by itself will not be sufficient to throw out the whole prosecution case. After all in the injured, there was also Chandkhan regarding whom doctor Laxmikant (PW-9) has stated that he was suspected to have had concussion and was required to be admitted in emergency ward. Even the other injured mostly had injuries on the head and may be, in the situation the P.I. Sonar thought it fit to immediately first send of the persons to hospital and asked Ahmedkhan to stay back and lodge complaint.

16. Prosecution examined PW-4 Mirajkhan Badshahkhan Pathan and PW-5 Ganesh Kashinath Magar, panchas of the spot. The spot panchanama is at Exhibit 39. Panch Mirajkhan turned hostile but in the cross examination admitted that pieces of stick were seized from the spot. Panch Ganesh deposed that Police attached mud and mud mixed with blood and sticks from the spot and panchanama was done. According to him, muddemal Articles 3 pieces of sticks were seized from the spot. This panch Ganesh was taken by Police even for discoveries but he has not supported the prosecution on that count. Regarding attachment and discoveries, there is evidence of Dy. S.P. Shyamrao (PW-12). His evidence shows that he seized blood stained clothes of Chandkhan (vide Exhibit 61) and clothes of injured (vide Exhibit 62) and recorded memorandum statements in presence of panchas of accused No. 1 Machindra, accused No. 13 Rakhmaji, accused No. 11 Laxman, accused No. 5 Umar, accused No. 6 Ayub and accused no. 8 Nasibabee regarding which documents Exhibits 64 to 69 were prepared. The evidence of this Investigating Officer shows discoveries given by accused No. 1 Machindra of spade, accused No. 13 Rakhmaji of stick, accused No. 11 Laxman of stick, accused No. 5 Umar of stick, accused No. 6 Ayub of sickle and accused no. 8 Nasimabee of stick regarding which seizure panchanama Exhibit 70 was drawn. PW-12 Dy. S.P. Shyamrao recorded memorandum of accused Yasin and accused Biban proposing to show where instruments spade and stick were kept. Memorandum Exhibits 71 and 72 were recorded and in presence of panchas the instruments were recovered as recorded in panchanama Exhibit 73. This witness identified the muddemal articles in the Court. He claims that same were sent to Chemical Analyzer and C.A. Reports received are at Exhibit 75 to 79.

The above evidence brought on record by the prosecution has been questioned by the accused on the ground that PW-2 Zahedabee has deposed in her cross examination (para no. 2) that accused had thrown spade, stick and sickle on the spot and ran away.

If the evidence is appreciated in proper perspective, it can be seen that from the spot some pieces of sticks were indeed seized. PW-2 may have thus taken the impression that the accused threw the articles used for assault on the spot and ran away. After all, when her husband and other immediate relatives had just been assaulted and were having bleeding injuries and crowd had gathered, it is likely that her mind registered the fact of accused dropping sticks on the spot and going away. When in the cross examination it was suggested, partially on the basis of what she actually saw and partially on the basis of impressions, she may have accepted that the accused threw spade, sickle and sticks on the spot and ran away. This by itself does not make her unreliable or discoveries done by the Police doubtful.

Learned counsel for appellants-accused have further argued that PW-2 deposed that only one person was carrying spade and one person was carrying sickle and others were armed with sticks. This is admission taken in the cross examination.

In fact, same PW-2 Zahedabee has given specific evidence that accused Machindra was having spade in his hand which was used to assault her husband. She has also deposed that when Hasankhan and Chandkhan came, they were also assaulted by accused Yasin with spade. In fact, her evidence is also to the effect that accused Umar assaulted Lalkhan with spade. The discoveries made show that two spades were recovered. PW-1 Maheboob Khan deposed regarding Machindra using spade and accused Yasin using spade at the time of incident. PW-1 Maheboob Khan was person who was facing assault in the incident while PW-2 Zahedabee was witness of the same. At a time when in quick succession acts are taking place and various persons are involved in a quarrel, minds of different witnesses may register different parts of the incident, differently. That by itself does not make the eye witnesses unreliable. Considering the admitted facts in the matter and oral and documentary evidence, PWs 1 and 2 need to be assessed. Their evidence is supported by medical evidence and although no independent witness was examined, we find from the manner in which PWs 1 and 2 deposed, they can be relied on.

17. Now reference may be made to the evidence regarding strained relations between the parties. PW-1 Maheboob has admitted in cross examination (para 4) that it is true that there is dispute as accused were asking for road from northern side of his land from the common "bandh" and all accused had given applications seeking right of way in which Maheboob Khan and his uncle and father were made parties. He has admitted (in para 5) that they had received notice from Tahsildar for enquiry and his father and his uncle had gone to Tahsil Office. He admits that people of the village were insisting that it was their usual way used since long. He admits that they may have lodged 3-4 criminal complaints against accused persons for passing on the "bandh". He accepts that accused no. 7 Imam had called for Surveyor to measure the land and accordingly, Surveyor had measured the land and had shown that this witness PW-1 Maheboob Khan had encroached over the land of accused No. 7 Imam. The witness claimed that it was false that he had encroached. PW-1 Maheboob admitted (in para 10) that before incident oral argument took place regarding use of disputed way. He has also admitted (in para 5) that they had lodged 3-4 criminal complaints against accused persons for passing on the "bandh". PW-2 has also admitted (in para 2) that the entire episode took place because of dispute over the "Bandh" and people intervened to separate the "quarrel". Defence brought on record complaint Exhibit - 98 which was filed by accused Machindra on 26.12.1994 itself. In that complaint he claimed that the incident of 26.12.1994 was of 7.30 A.M. and referred to Lalkhan, Hasankhan, Maheboob Khan, Anwar Khan and Chandkhan picking up quarrel when he was using the way on "bandh". Although contents of the document may not be treated as proved, what is relevant for present matter is that counter complaint with such allegations was made.

It is thus clear from record that parties had strained relations and the accused were asserting right of way. Quarrel appears to have taken place in such background.

18. Evidence of PW-1 shows (in para 9) that house of accused No. 6 - Ayub and accused No. 18 Biban is near their house. PW-1 has deposed that on the day of incident he saw some of the accused coming from their fields and some were coming from the village side. He says that accused Machindra and accused Ayub and Rakhma (accused No. 13) came from the side of field.

19. The injured and accused are having fields near each other. It was morning time when it is natural for agriculturists to proceed towards fields. In the absence of evidence sufficient to record that there was prior concert between accused, carrying spade or sickle or sticks in such circumstance cannot be doubted. PW-1 Maheboob Khan and his other relatives PW-7 Anwar Khan, PW-14 Lalkhan and Hasankhan had houses nearby. The parties had old dispute regarding way from the field. In such circumstance, on obstruction to way if quarrel started, accused may have on the spur of the moment formed unlawful assembly with common object to resist and if required cause hurt to obstructionist.

In the matter of Sukhbir Singh Vs. State of Haryana, , it was observed by Hon"ble Supreme Court that "it is true that the common object does not require prior concert and a common meeting of mind before the attack. It can develop even on spot but the sharing of such an object by all the accused must be shown to be in existence at any time before the actual occurrence.

20. The evidence discussed above discloses that the appellants-accused with such common object caused hurt by means of spade, sickle and sticks to PW-1 Maheboob Khan, PW-14 Lalkhan, PW-7 Anwar, Hasankhan and deceased Chandkhan.

21. Now the question is whether the homicidal death of Hasankhan can be said to be murder. We have already discussed the evidence of PW-9 and PW-10 regarding the injuries of Chandkhan. It needs to be further mentioned that PW-9 Dr. Laxmikant claimed to have examined Chandkhan and that, he had a contused lacerated wound on scalp on vertex which was bleeding, the medical certificate of Chandkhan was not brought on record by the prosecution while those of other injured were proved at Exhibits 49 to 52. Although, PW-9 has referred only to one contused lacerated wound on the person of Chandkhan, PW-10 Dr. Laxmikant noticed five surface injuries on the person of Chandkhan, which we have already referred to. Doctor PW-10 admitted (in para 8) that the inquest panchanama (Exhibit 35) which he had while conducting postmortem had not shown injury no. 3. It is this injury no. 3 of fractures below left temporoparietal region which PW-10 has deposed was the fatal injury. Injury No. 2 was incised wound to pinna involving cartilaginous part partially. Chandkhan was 70 years old and doctor has deposed that there was evidence of coronary arteriosclerosis, both sides containing blood. According to doctor athermanous scaring on internal coat of aorta signifies aging and degeneration changes. Doctor admitted that a patient with atheromatous scaring may have problems, hypertension, giddiness. It is deposed that in such cases and pathology there could be spontaneous haemorrhages in the brain resulting into death.

22. The evidence on record shows that there was quarrel due to accused themselves enforcing right of way. The instruments they were carrying were those which in ordinary course agriculturists carry while going to or coming from their fields. Thus, only because they have such instruments will not mean that the object was to murder Chandkhan. The facts established show that the quarrel started with PW-1 Maheboob Khan and when Maheboob Khan was assaulted, his cousin, brother, father and his uncles intervened. In the process it appears that accused no. 6 Ayub and accused no. 19 Yasin in the heat of the moment forgot the advanced age of Chandkhan and the assault by spade and sickle was made towards upper part of body and landed on the head. It does not appear as regards accused no. 1 Machindra, accused no. 5 Umar and accused no. 8 Nasibabee that they shared common object of giving any such injury to Chandkhan which could cause death. Although, unlawful assembly of the accused persons appears to have shared common object as mentioned above there is no sufficient material to show that they shared the intention of accused no. 6 Ayub and accused no. 19 Yasin to cause such hurt to Chandkhan as may cause his death.

23. Coming to the acts of accused no. 6 Ayub and accused no. 19 Yasin what appears from the evidence is that after PW-1 Maheboob Khan and then his father Lalkhan were assaulted when, Chandkhan and Hasankhan also intervened, both of them assaulted Chandkhan with the help of sickle and spade which they were carrying. In the process they appear to have developed the common intention to cause hurt to upper part of body of Chandkhan ignoring his age. Their intention may not have been to cause death of Chandkhan. The act was not committed with premeditation. It occurred in sudden fight and in the heat of passion upon sudden quarrel. It does not appear that accused persons had Chandkhan as their target. Incidentally, Chandkhan intervened and in the sudden moment got so injured that his death occurred.

24. Reference needs to be made to the case of Gurmukh Singh Vs. State of Haryana, ". In that matter the incident had occurred on the spur of moment and appellant therein had given single "lathi" blow on the head of deceased. It was held that there was no intention or premeditation in mind of appellant to inflict such injuries to deceased as were likely to cause death in ordinary course of nature. Benefit was given and offence u/s 302 was converted to 304 II of IPC. In fact in the judgment, the Hon"ble Supreme Court has discussed various earlier judgments of the Supreme Court dealing with similar issue and referred to the facts of those various matters and where it was found by the Hon"ble Supreme Court that instead of Section 302 of IPC, Section 304 of IPC needs to be applied. In yet another matter in the case of Bhagwati Prasad Vs. State of M.P., " the accused had given spear blow to the victim and in the postmortem, it was found that death was caused because of the piercing blow, due to which right lung was damaged by penetrating spear. The High Court of M.P. had converted the offence from Section 302 of IPC to Section 304 II of IPC. The Hon"ble Supreme Court upheld the decision of the High Court.

25. In the matter of "Sukhbir Singh V/s State of Haryana (supra), the son of deceased was sweeping the street when some mud splashed and stuck to the appellant, who was passing in the street. When appellant and son of deceased were abusing each other, the deceased separated them and gave two slaps to the appellant. The appellant went home and came along with 8 other accused variously armed and the appellant gave two thrust-blows with his "bhala" on the upper right portion of chest of deceased. The Hon"ble Supreme Court considering that matter under Sections 141, 149 and 302 of IPC observed as follows:-

19. The High Court has also found that the occurrence had taken place upon a sudden quarrel but as the appellant was found to have acted in a cruel and unusual manner, he was not given the benefit of such exception. For holding him to have acted in a cruel and unusual manner, the High Court relied upon the number of injuries and their location on the body of the deceased. In the absence of the existence of common object, the appellant cannot be held responsible for the other injuries caused to the person of the deceased. He is proved to have inflicted two blows on the person of the deceased which were sufficient in the ordinary course of nature to cause his death. The infliction of the injuries and their nature proves the intention of the appellant but causing of such two injuries cannot be termed to be either in a cruel or unusual manner. All fatal injuries resulting in death cannot be termed as cruel or unusual for the purposes of not availing the benefit of Exception 4 of Section 300 IPC. After the injuries were inflicted and the injured had fallen down, the appellant is not shown to have inflicted any other injury upon his person when he was in a helpless position. It is proved that in the heat of passion upon a sudden quarrel followed by a fight, the accused who was armed with bhala caused injuries at random and thus did not act in a cruel or unusual manner.

26. In the facts of the present matter also, evidence does not show that accused Ayub and Yasin caused any specific hurt to Chandkhan after he fell down. In fact, the injury inflicted by accused Ayub and Yasin from the evidence appears to have been inflicted almost simultaneously. It appears that their act was with the knowledge that the same is likely to cause death but however as it does not appear that there was intention to cause death, the knowledge as mentioned needs to be attributed to them and the conviction and sentence needs to be converted. Keeping in view the Exception 4 of Section 300, we find that accused No. 6 and accused no. 19 must be held guilty of culpable homicide not amounting to murder.

27. The appellants-accused who had common object to cause simple hurt by means of instruments like spade, sickle and sticks should have been punished u/s 324/149 of IPC. Trial Court, however, convicted them u/s 323/149 of IPC without recording reasons as to how it was ignoring the fact that the injuries were caused using instruments which when used as weapon of offence are likely to cause death. However, State has not filed appeal for enhancement of sentence. Thus, we will not interfere in that part of sentence passed by

subordinate Court. We need not disturb the sentence under Sections 147 and 148 of IPC also. The incident is of 1994 and as such for punishment u/s 304 II, 5 years imprisonment would be justified as no other offence is brought to our notice.

Although we are proceeding to maintain the conviction u/s 323/149 of the accused persons and u/s 304 II read with section 34 of IPC for accused No. 6 and accused No. 19, looking to the facts and circumstances of the matter and the incident, we do not think that this is fit case to invoke Section 357 of the Code of Criminal Procedure, 1973 to award compensation.

For the above reasons, appeals are partly allowed.

The judgment and order of conviction and sentence against accused no. 1 Machindra, accused no. 5 Umar and accused No. 8 Nasibabee u/s 302/149 of IPC is set aside and they are acquitted from that charge.

The order of conviction of accused no. 6 Ayub and accused no. 19 Yasin u/s 302 read with 149 of IPC is converted to conviction u/s 304 II read with Section 34 of IPC and each of them is sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs. 5,000/- (Rs. Five Thousand) each. In default, the defaulting accused to undergo further rigorous imprisonment for six months.

The order of conviction and sentence of appellants-original accused nos. 1, 5, 6, 8 and 19 u/s 323/149 of IPC as imposed by Trial Court is maintained. The order of conviction and sentences passed by trial Court under Sections 147 and 148 are also maintained.

The Appellants - Accused to surrender to their bail bonds.