

(1995) 07 BOM CK 0039

In the Bombay High Court

Case No : Criminal Appeal No. 121 of 1989

Pratapsingh Rathod and others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 28-07-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 147, 149, 302, 323, 325

Citation : (1996) CriLJ 790

Hon'ble Judges : R.M. Lodha, J;B.U. Wahane, J

Bench : Division Bench

Advocate : S.V. Manohar, for the Appellant; R.G. Agrawal, Assistant Public Prosecutor, for the Respondent

Judgement

R.M. Lodha, J.—The conviction and sentence of the accused/appellants by the 2nd Additional Sessions Judge, Wardha, awarded on 5-4-1989 in Sessions Trial No. 95 of 1988, whereby the accused/appellants have been convicted for the offence punishable u/s 302 read with Section 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life, is questioned in this appeal.

2. Abridged the prosecution version first.

3. On 27-5-1988 is the night at about 10.00 p.m. the accused/appellants came to the house of P.W. 1 Sonabai armed with iron bars and asked about Manohar - the son of P.W. 1 Sonabai, Manohar was taking meals inside and accordingly P.W. 1 Sonabai told them that he was taking the meals inside. All the accused persons then entered her house and dragged Manohar out of the house. The accused persons dragged Manohar to the near nallah. P.W. 1 Sonabai ran towards the accused/appellants and tried to separate Manohar from the accused persons. At that time, accused/appellants No. 2 Rajendra (A-2) accused P.W. 1 Sonabai near her left ankle by an iron bar and as a result thereof P.W. 1 Sonabai sustained bleeding injury. All the accused persons assaulted Manohar with iron bars, which they were holding at the nallah and then ran away. P.W. 1 Sonabai went near her

son Manohar and found that he sustained bleeding injuries. She lodged the oral report at the early hours on 28-5-1988 at Police Station Arvi. First Information Report was registered at 5.15 O'Clock on 28-5-1988. Police arrived at the spot and Manohar was taken in police Jeep to the Municipal Hospital, Arvi, for treatment. P.W. Sonabai also accompanied Manohar to the hospital. At about 8.00 a.m. on 28-5-1988 Manohar succumbed to the injuries sustained by him in the incident

4. Investigation into the death of deceased Manohar commenced. Inquest panchanama (Exh. 56) was prepared. Body of deceased Manohar was sent for autopsy and the post mortem examination was conducted at about 11.30 a.m. P.W. 1 Sonabai was also medically examined since she had injuries on her person. Spot panchanama was prepared. Clothes of the deceased as well as the accused/appellants were recovered. The iron bars which all the three accused/appellants had, were recovered. Clothes of deceased Manohar, clothes of the accused/appellant, the iron bars recovered from the accused persons were sent for chemical analysis. On conclusion of investigation, all the three accused persons were charged for the offence punishable u/s 302 read with Section 34 of the Indian Penal Code for having committed the murder of Manohar in furtherance of their common intention.

5. Before the trial Court, the prosecution sought to prove its case by examining P.W. 1 Sonabai, P.W. 2 Venubai widow of Laxmanrao Pokale, P.W. 3 Dr. Avinash Shankarrao Lawhale, P.W. 4 Bapurao Fakiraji Ghuse, P.W. 5 Namdeo Nagorao Deokar, P.W. 6 Puran Manraj Chaware, P.W. 7 Arun Hanumantrao Bhadikar, P.W. 8 Ramdas Gotiram Mhatre, and also exhibited number of documents including the oral report lodged by P.W. 1 Sonabai (Exh. 49), printed F.I.R. (Exh. 50), inquest panchanama (Exh. 56) various seizure memoranda (Exh. 59, 60, 79, 84, 85, and 86), post mortem report (Exh. 70), injury report of deceased (Exh. 68) and the Chemical Analyser's report (Exh. 89). The accused persons pleaded not guilty and their statements were recorded u/s 313 of the Code of Criminal Procedure, wherein they have denied having committed any crime.

6. The Second Additional Sessions, Judge, Wardha, heard the Public Prosecutor and the learned counsel for the defence and after considering the arguments advanced and the evidence on record, concluded that in the intervening night of 27-5-1988 and 28-5-1988 at Arvi, Manohar son of Kisan Chaudhari died homicidal death and all the accused persons were responsible for causing the death of deceased Manohar. The trial Court also held that the death of deceased Manohar was caused by all the accused persons in furtherance of their common intention and consequently convicted all the accused/appellants for the offence punishable u/s 302 read with Section 34 of the Indian Penal Code and sentenced them to suffer life imprisonment.

7. We have heard the learned counsel for the accused/appellants and the Additional Public Prosecutor at considerable length and also perused the record with the assistance of the learned counsel.

8. The first and foremost question raised by the learned counsel for the accused/appellants Shri S. V. Manohar is that deceased Manohar's death was not homicidal and the finding recorded by the trial Court that the deceased Manohar died homicidal death is not justified. In this connection, the learned counsel took us through the evidence of P.W. 3 Dr. Avinash Shankarrao Lawhale, the injury report (Exh. 68) and the post mortem report (Exh. 70).

9. Opposing the submission raised by Shri Manohar that deceased Manohar did not die a homicidal death, the learned Additional Public Prosecutor Shri Agrawal, on the other hand, urged that the evidence referred to by Shri Manohar, on the other hand, would reveal that deceased Manohar died a homicidal death and the trial Court did not commit any error in holding as such.

10. The incident occurred in the intervening night of 27-5-1988 and 28-5-1988. Immediately after the incident on 28-5-1988 at about 4.00 a.m. Manohar (since deceased) was examined by P.W. 3 Dr. Lawhale and at about 8.00 a.m. i.e. after about 4 hours, Manohar died. Autopsy of the dead body was conducted by P.W. 3 Dr. A. S. Lawhale on 28-5-1988 at about 11.00 a.m. and the autopsy report (Exh. 70) reveals that deceased Manohar sustained following injuries :

"Surface wounds :

(1) Horizontal marks of contusion with bruise with lacerated wound over left supra consular region of the arm with clear cut evidence of fracture of lower part of humerus. Size of injury 1 cm x 1/2 cm with active bleeding present, by bone deep.

(2) Multiple marks of the longitudinal obliquely placed, contusion marks with bruise over the left arm and shoulder region. 3 over the front aspect of the shoulder and two on the side of the shoulder and upper arm.

(3) Obliquely placed 2 marks of the contusion with bruise over the left mastoid and occipital zone with surrounding haematoma 5" x 3" with overlying abrasion.

(4) Oblique mark of contusion with bruise over the left cheek region, size 5" x 2", bluish discoloration.

(5) 4 marks of the obliquely placed contusion marks over the arm on medical aspect with the Central part of wound shows burnt epidermise, size 3" x 1" and one on lateral aspect of arm.

(6) Contusion lower lip with lacerated wound on mucosal aspect of size 1 cm x 1/2 cm.

(7) Contusion right molar prominence.

(8) Two marks of longitudinal contusion over the left side of the chest wall with bruise size 6" x 1". One is horizontal and other partially verticle, to cross each other on medial aspect on end of contusion, bluish discolouration with evidence 7 and 8 ribs.

(9) Multiple marks of longitudinal contusion over the whole back region, all are about equal in size 6" x 1" with bluish discolouration (portion torn) horizontal and some verticle.

(10) Multiple abrasions over the body.

Other injuries

(1) Supra-condylar fracture of left humerus,

(2) Fracture of ribs left 7th and 8th.

External injuries : (i) Head :- Contusion left mastoid and part of occipital zone. Injuries under the Haematoma in surrounding zone. scalp, their nature : (ii) x x x x x (iii) Brain :- Meninges were congested, Normal in sizes and shape. No evidence of external i.e. extra dural or subdural haematoma. Thorax :- (a) Wall, ribs, cartilages : (a) Right side of the chest wall intact on left side clinically evidence of fracture ribs 7th and 8th with haematoma seen in the chest wall on inner aspect around ribs. Size of haematoma in wall 3" x 3 1/2" ribs spikes not felt. (b) Pleura : Pleura congested with area of ecchymosis coinciding with fracture site. (c) Larynx, Trachea and Mucosal surface shows injected spots Bronchi. with minute food particles seen. (d) Right Lung : Right lung pinkish bluish discolourish with normal in size shapes, feeling heavy on cut section frothy fluid was oozing fast. (e) Left Lung : Same as above, along with postero- lateral aspect of the lower lobe was contused with blackish discoloured about area of 3 1/2" x 3" size. No evidence of laceration pneumothorax or Haemothorax, on cut section frothy watery fluid oozing out and blood from contused part. xxx xxx Kidneys with weight : Left kidney normal in size shape & weight : there was intracapsular haematoma over the converse part of the right kidney of size 2" x 1" size. On opening capsular a small L.W. over the kidney of size 1 cm x 1/2 cm is seen. On cut section congested." 11. In the opinion of P.W. 3 Dr. A. S. Lawhale, the cause of death of Manohar is asphyxia due to aspiration pneumonia with pulmonary oedema, secondary to alcoholic intoxication associated with shock due to injury to vital organ like left lung and right kidney. In his deposition, P.W. 3 Dr. A. S. Lawhale has confirmed that he examined Manohar on 28-5-1988 at about 4.00 a.m. and found the injuries recorded by him in the medical report (Exh. 68). The said Manohar died at about 8.00 a.m. in the Municipal Hospital, Arvi, and the post mortem of his body was conducted at about 11.00 to 11.30 a.m. by him and the injuries as aforesaid were found on the person of deceased Manohar. In his cross-examination, P.W. 3 Dr. A. S. Lawhale has testified that deceased Manohar had consumed alcoholic drink to a large extent with lot of water. He further deposed that if a person takes regular heavy drink then he has a tendency to have infection in the respiratory track. If the person is heavily drunk, his brain is normally congested, as was the case of deceased Manohar. In cross-examination he further deposed that the internal injury described in column No. 21 of the post mortem report was corresponding to external injury No. 9. He further deposed that due to blunt trauma, it was not

possible that the kidney would be affected from abdominal side, unless the kidney was already diseased one.

12. The aforesaid evidence of P.W. 3 Dr. A. S. Lawhale, injury report of Manohar (Exh. 68) and the post mortem report (Exh. 70) would clearly show that Manohar had sustained 10 external injuries. These injuries were caused by hard and blunt object and one of the injuries was because of heated substance. Injury No. 8 would reveal that two marks of longitudinal contusion over the left side of chest wall with bruise of the size 6" x 1" were found; one was horizontal and other was partially verticle, crossing each other on medial aspect with bluish discoloration and there was a fracture of 7th and 8th ribs. Right and left lungs both were found pinkish bluish discolouration with normal size and shape, feeling heavy on cut section and frothy fluid was oozing fast. In addition thereto, in the left lung, postero lateral aspect of the lower lobe was contused with blackish discolouration about area of 3 1/2" x 3", but there was no evidence of laceration of lung. Lacerated wound over the kidney of the size 1 cm x 1/2 cm was found. The other injuries are multiple abrasions or contusions or lacerated injuries on non-vital parts of the body. Deceased Manohar was found having consumed alcoholic drink on large quantity with lot of water. In this back-ground, according to P.W. 3 Dr. A. S. Lawhale, the cause of death of Manohar was asphyxia due to aspiration pneumonia with pulmonary oedema secondary to alcoholic intoxication associated with shock due to injury to vital organs like left lung and kidney. This means, according to P.W. 3 Dr. A. S. Lawhale, the cause of death of deceased Manohar was Asphyxia associated with shock. Asphyxia, according to P.W. 3 Dr. A. S. Lawhale, was because of aspiration pneumonia with pulmonary oedema secondary to alcoholic intoxication. From the aforesaid evidence, it cannot be said that the asphyxia of deceased Manohar was because of the injuries sustained by him or because of the injuries found on his person at the time of post mortem examination. Asphyxia, therefore, had nothing to do with the injuries sustained by deceased Manohar. Asphyxia, according to P.W. 3 Dr. A. S. Lawhale, was because of aspiration pneumonia with pulmonary oedema secondary to alcoholic intoxication.

13. It would be advantageous at this stage to understand the meaning of the medical term "aspiration pneumonitis" Davidson's Principles and practice of Medicine" Edited by Christopher R. W. Edwards Ian A. D. Bouchier, in Sixteenth Edition, explains "Aspiration Pneumonitis" at page 356, as an infection reached alveoli by aspiration from other parts of the respiratory track because of pre-existing abnormality such as nasal sinus infection, bronchial infection or aspiration of secretions or vomit us during episodes of disordered consciousness (e.g. general anaesthesia, drunkenness). Organisms are often of low virulence, and "aspiration pneumonia" is also known as "secondary pneumonia".

14. In "Cecil Text Book of Medicine" edited by Paul B. Beeson and others, at page 1478, "aspiration Pneumonitis" is explained as -

"Aspiration of gastric contents occurs more often in recumbent individuals who

are elderly, are debilitated, or have neurological impairment or diminished consciousness from trauma, drugs or alcohol".

15. It is thus clear the "aspiration pneumonia" may occur to an individual who has diminished consciousness from alcohol. Deceased Manohar was found to have consumed alcoholic drink to a large extent with lot of water, and from the panchanama of the spot of occurrence (Exh. 83), vomitted matter was found on the spot and that means that deceased Manohar had vomitted at the place of the incident. Aspiration pneumonia was due to vomitting during disordered consciousness in drunkenness and thus had nothing to do with the injuries sustained by deceased Manohar, including the injuries on the lungs.

16. Similarly, the medical expression "Pulmonary oedema" is explained in Davidson's "Principles and practice of Medicine" 16th Edition, at page 250, as under :

"Pulmonary oedema; This is persistent breath-less ness resulting from fluid accumulation in the lung as a manifestation of acute left heart failure. The patients looks and feels unwell, and there is peripheral vasoconstriction and tachycardia. Breathing is rapid and shallow, and there is a persistent cough. Sputum is white and frothy, sometimes tinged with pink. Crepitations are heard on auscultation of the chest, initially at the lung bases, later throughout the lungs. Orthopnoea and paroxysmal nocturnal dyspnoea are transient forms of pulmonary oedema."

17. "Cecel Text Book of Medicine" 15th Edition, describes "Pulmonary oedema" as under :

"Pulmonary oedema may begin with a cough, with wheezing, or with breathlessness. Often there is a sense of oppression in the chest. At first, except for the abnormal breathing pattern and the evidences of heart disease, there may be few physical signs. In time, as free fluid enters the distal airways, rales become audible, most marked in the dependent parts of the lungs, but extending upward as the attack worsens. In a severe attack, the patient is pale, sweating, cyanotic, obviously gasping for breath, and usually producing frothy sputum which may be blood tinged."

18. It is thus apparent that asphyxia was caused due to aspiration pneumonia with pulmonary oedema secondary to alcoholic intoxication, and the said asphyxia had nothing to do with the injuries caused to deceased Manohar, nor the said asphyxia could be connected with the injuries sustained by deceased Manohar. However, the matter does not end here since according to the doctor the cause of death was asphyxia associated with shock. As stated above, asphyxia was caused due to aspiration pneumonia with pulmonary oedema secondary to alcoholic intoxication, according to Dr. A. S. Lawhale, and the shock was due to injury to vital organ like left lung and right kidney. Again, a look at the injuries sustained by deceased Manohar on the left lung would reveal that there was no laceration but postero lateral aspect of the lower lobe was

contused. There is no evidence that the postero lateral aspect of the lower lobe of the left lung which was found contused, was because of the external injury No. 8. As observed above, no laceration was found on the left lung by P.W. 3 Dr. A. S. Lawhale while conducting the autopsy of the dead body of Manohar. On the right kidney of course intracapsular haematoma over the converse part of the size 2" x 1" was found, but by an over-all reading of the entire evidence and the cause of death given by P.W. 3 Dr. A. S. Lawhale, it cannot be concluded and in any case not beyond reasonable doubt that Manohar died because of the injuries sustained by him. Thus, the evidence is lacking and there is no definite evidence to conclude that Manohar died a homicidal death. In this view of the matter, the finding recorded by the trial Court that Manohar died homicidal death cannot be sustained and is accordingly set aside. The next question would be that despite the finding that Manohar had not died homicidal death, whether the prosecution has proved the complicity of the accused/appellants for the injuries sustained by him and whether the said injuries were caused by the accused/appellants on the person of Manohar in the intervening night of 27-5-1988 and 28-5-1988 in furtherance of their common intention to cause such injuries.

19. The learned counsel for the accused/appellant in this connection challenged the evidence of P.W. 1 Sonabai and submitted that she was not an eye witness. The learned counsel would urge that there was a pitch dark at the nallah, where the incident is alleged to have taken place and, therefore, she could not have seen the assault. The learned counsel also submitted that the deposition of P.W. 1 Sonabai is not corroborated by the oral report (Exh. 49) lodged by her Shri S. V. Manohar, learned counsel for the accused/appellants in this connection also urged that there was material contradiction in the testimony of P.W. 1 Sonabai and that she has described three different ladies as "Venubai".

20. We have bestowed our thoughtful consideration to the submissions made by the learned counsel for the accused/appellants and have read the deposition of P.W. 1 Sonabai in its entirety, and also in the light of the oral report lodged by her and the medical and other evidence. P.W. 1 Sonabai is the mother of deceased Manohar. She herself has sustained three injuries, which is apparent from the deposition of P.W. 3 Dr. A. S. Lawhale. Immediately after the incident at about 4-15 a.m. on 28-5-1988, P.W. 1 Sonabai was medically examined by P.W. Dr. A. S. Lawhale and on her examination, three injuries, viz -

(1) Contusion over the left shin of tibia upper third region with a lacerated wound over it of the size 1 cm x 1/4 cm. edges were blood stained.

(2) Contusion over the wrist joint.

(3) Multiple marks of longitudinal contusions over the lower back and buttock region were found. According to P.W. 3 Dr. A. S. Lawhale, the said injuries could be caused by hard and blunt object and the said injuries were caused within 6 hours from the time of examination. The injury report of P.W. 1 Sonabai is Exh. 69. She has testified in her deposition before the Court that on the relevant date

at about 10.00 p.m. while she was sleeping on the cot in her house, all the three accused/appellants came to her house and asked about her son Manohar. Since her son was having his meals inside his house, she informed all the three accused/appellants that Manohar was inside. All the accused persons went inside, dragged Manohar out of the house and took him to the nearby nallah. She ran towards the accused persons and tried to separate her son Manohar from the accused persons and at that time accused No. 2 Rajendra assaulted her and she sustained bleeding injury. The accused persons, who were armed with iron bars, assaulted Manohar and as a result thereof he sustained bleeding injuries and fell near the nallah. Of course, there are certain contradictions about the time. Venubai, and number of her statement recorded by the police. But, all these contradictions are not only not material but only relate to collateral facts and do not dislodge the trust worthiness of this witness. P.W. 1 Sonabai is an illiterate woman of the village and if a rustic lady of that age is not consistent about the collateral facts unconnected with material facts of the incident, that would not affect her version. About the incident, she had been consistent in her deposition before the Court so far as the assault to her by the accused/appellants as well as the assault on her son by the accused/appellants was concerned. The testimony of P.W. 1 Sonabai is not at all shaken in cross-examination to that extent. P.W. 1 Sonabai is the mother of deceased Manohar and as a mother of the deceased and victim, she would never like to implicate innocent persons and rather want that the real culprits are brought to book. We find no reason whatsoever, much less justifiable reason, to discard the testimony of P.W. 1 Sonabai, who is the mother of the deceased Manohar and was a witness to the entire incident and had also suffered injuries in the incident. The testimony of P.W. 1 Sonabai is corroborated by the medical evidence. In this view of the matter, it can safely be said that the prosecution has proved that the accused/appellants caused the injuries on the person of deceased Manohar and some of such injuries were grievous and the said injuries were caused in furtherance of common intention.

21. Shri Manohar, the learned counsel for the accused/appellants, urged that for the injuries caused to deceased Manohar, the accused/appellants could be held guilty only u/s 325 of the Indian Penal Code. On the other hand, Shri Agrawal, learned Additional Public Prosecutor, vehemently contended that for the injuries caused to the person of deceased Manohar and the fact that some of the said injuries were on vital part and also grievous and by the weapon by which the death was likely to be caused, therefore, the offence committed by the accused/appellants would be squarely covered u/s 326 of the Indian Penal Code.

22. It would be seen that in all 10 external injuries were found on the person of deceased Manohar. Some of the injuries are on vital part of the body and injury No. 8 also suggested "hot rod burn marks" and that meant that the accused/appellants had used some heated iron bar. From all the accused persons, the iron bars were recovered and the said iron bars were used by the accused/appellants for the commission of the offence. The iron bars are about 3 feet long, having a diameter of 1/2 each. One of the iron bars was found to have half blackish

portion and that meant that the said iron bar was heated. One of the injuries caused to deceased Manohar suggested the hot rod burn mark. Because of the injuries caused from the said iron bars on the chest, the deceased sustained fracture of 7th and 8th ribs. The iron bars used by the accused/appellants were, therefore, definitely deadly and by the use of the said iron bars there was likelihood of causing the death. Apart from this, it is also established that one of the iron bars at the time of its use and at the time of the commission of the offence was heated and thus the accused/appellants caused the injury by the heated substance. Looking to the nature of the injuries caused on the deceased Manohar, number of the injuries, the weapon of the offence, viz, iron bars, used, and the fact that from the use of such iron bars, there was likelihood of causing the death and also that one of the iron bars was heated at the time of its use, the prosecution can be said to have proved beyond reasonable doubt that the accused/appellants has caused grievous hurt by dangerous weapon to the person of the deceased Manohar in furtherance of their common intention and, therefore, the accused/appellants had committed the offence punishable u/s 326 read with Section 34 of the Indian Penal Code.

23. We have heard the learned counsel for the accused/appellants and the learned Additional Public Prosecutor on the point of sentence. Shri Manohar, learned counsel for the accused/appellants would urge that the incident occurred in the year 1988 and the judgment was passed by the trial Court in the year 1989 and for the last more than 6 years during the pendency of the appeal before this Court, the accused/appellants remained on bail and have settled in life. The learned counsel for the accused/appellants also drew our attention to the antecedents of the victim and submitted that since the accused/appellants have undergone the sentence of about 7 1/2 months during the pendency of the trial, in the facts and circumstances of the case, the accused/appellants may be awarded the sentence already undergone and also suitable compensation may be awarded to the mother of the deceased for the loss suffered by her due to the death of her son, and the learned counsel suggested that the accused/appellants are prepared to pay fine/compensation amounting to Rs. 5,000/- each. On the other hand, Shri Agrawal, the learned Additional Public Prosecutor, vehemently contended that though the accused/appellants have not been held guilty for the offence u/s 302 of the Indian Penal Code, the accused/appellants assaulted mercilessly and caused 10 injuries on the person of deceased Manohar. The learned Additional Public Prosecutor also contended that the dangerous weapon, viz, iron bars, were used by the accused/appellants and one of those iron bars was also heated and, therefore, keeping in view the injuries caused to deceased Manohar and other relevant circumstances, the accused/appellants should be awarded minimum sentence of five years.

28th July, 1995.

24. We have bestowed our thoughtful consideration to the submissions made by the learned counsel on the question of sentence.

25. In *Krishan Lal Vs. State of Haryana*, , the Supreme Court by altering the sentence from Section 302 read with Section 149 of the Indian Penal Code to Section 325 and Section 325 read with Section 149 of the Indian Penal Code, on the question of sentence observed as follows : (at p. 830 of Cri LJ)

".....The other question that has to be determined is as to what sentence should be awarded to the appellants. The appellants have served only 3 to 4 months and have been on bail throughout. It would not be conducive in the interest of justice to sent them back to jail after a lapse of 10 years. On the other hand, if the family of the deceased is heavily compensated, that will serve the socio-economic purpose which the modern trend of the policy of sentencing required. For these reasons, therefore, we alter the conviction of the appellants except Ramakant Rai from one u/s 302/149 to Section 325/149 and reduce the sentence to the period already served. In lieu of sentence remitted, we impose a fine of Rs. 5,000/- on each of the appellants in default two years" R.I. The entire fine, if realised, shall be paid to P.W. 1, the widow of Janardan. The sentence u/s 147 is also reduced to the period already undergone."

26. The present incident took place in the year 1988. The accused/appellants were convicted for the offence punishable u/s 302 read with Section 34 of the Indian Penal Code by the trial Court on 5-4-1989. This Court while admitting the appeal against aforesaid conviction and sentence, suspended the sentence passed by the trial Court by an order dated 11-4-1989 and thus during the pendency of the appeal, the accused/appellants remained on bail. We have already held that the accused/appellants cannot be convicted for the offence punishable u/s 302 read with Section 34 of the Indian Penal Code and the accused/appellants could only be held guilty for the grievous injuries caused to deceased Manohar in furtherance of their common intention. It is not disputed that the accused/appellants were not habitual criminals or previous convicts. The accused/appellants have also not misused the liberty extended to them by this Court while suspending the sentence. In the facts and circumstances of the case and taking into consideration the entire conspectus of the circumstances in which the incident took place, the nature of injuries caused and want of motive on the part of the accused/appellants to cause grievous injuries to the victim Manohar, it would be a hard case if the accused/appellants after a lapse of about six years, are required to be sent to Jail. Reformatory sentence is a most prevalent mode of sentencing in the present trend of modern penology, and keeping the entire background of the case in view, in our opinion, interest of justice would be met if the accused/appellants are sentenced to suffer rigorous imprisonment already undergone, which is about 7 1/2 months, and a suitable fine is imposed on each of the accused/appellants. We are fortified by the judgment of the apex Court in *Bashistra Kumar v. The State of Bihar* (1969) 2 SC WR 91, wherein the Supreme Court while altering the conviction from Section 302 of the Indian Penal Code to Section 326 and 323 of the Indian Penal Code, in the facts and circumstances of the case, ordered the sentence to be reduced to the period already undergone.

27. In the result, this criminal appeal is partly allowed and the conviction and sentence awarded by the Second Additional Sessions Judge, Wardha, on 5-4-1989, for the offence committed u/s 302 read with Section 34 of the Indian Penal Code is quashed and set aside. Instead, we convict the accused/appellants u/s 326 read with Section 34 of the Indian Penal Code and award them the sentence of rigorous imprisonment already undergone with a fine of Rs. 5000/- each. In the event of default of fine payable by each of the accused/appellants, they are sentenced to suffer further, rigorous imprisonment for three years each. In case the accused/appellants pay the fine of Rs. 5,000/- each within two months from to-day, out of the said fine, Rs. 10,000/- shall be paid by the State to the mother of deceased Manohar, i.e. P.W. 1 Sonabai. It is made clear that in case the fine, as aforesaid, is not paid by the accused/appellants within two months, they shall surrender to the bail bonds for undergoing the imprisonment as aforesaid and the concerned Authority shall arrest the accused/appellants. Order accordingly.

28. Appeal partly allowed.