
(2002) 01 BOM CK 0106

In the Bombay High Court

Case No : Criminal Appeal No's. 456, 533 and 599 of 1996

Sahebrao Dhondiba Patekar

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 22-01-2002

Acts Referred:

Arms Act, 1959 — Section 25, 3

Criminal Procedure Code, 1973 (CrPC) — Section 313

Penal Code, 1860 (IPC) — Section 109, 299, 300, 302, 304

Citation : (2002) 104 BOMLR 118

Hon'ble Judges : S.S. Parkar, J; D.S. Zoting, J

Bench : Division Bench

Judgement

S.S. Parkar, J.

18.1.2002

1. These three Appeals arise from the common judgment and order dated 19th August, 1996 delivered by the learned IInd Additional Sessions Judge, Ahmednagar in Sessions Case No. 411 of 1996, whereby the two accused were convicted, inter alia, for offence of murder u/s 302 of the Indian Penal Code. Criminal Appeal No. 456 of 1996 is filed by the Appellant, original accused No. 2, challenging the judgment and order of conviction and sentence recorded against her for various offences under the provisions of the Indian Penal Code and the Indian Arms Act. Criminal Appeal No. 533 of 1996 has been filed by the Appellant, original accused No. 1, impugning the order of conviction and sentence recorded against him under the provisions of the Indian Penal Code. Criminal Appeal No. 559 of 1996 has been filed by the State for enhancement of sentence against both the accused for offence u/s 307 of the Indian Penal Code. The last appeal does not appear to have been admitted and the only order passed in the said Appeal on 6th December, 1996 is as follows :

No orders necessary.

However, the said Appeal is tagged along with the Appeals filed by the accused against the order of conviction and is on today's Board.

2. Since the above Appeals arise from the judgment and order delivered by the Sessions Court on 19th August, 1996 in Sessions Case No. 411 of 1996 these Appeals were heard together and are being disposed of by this common Judgment.

3. The facts giving rise to the present Appeals are as follows :

4. The incident in question had taken place in the afternoon of 24.7.1994 in the agricultural field of the complainant and the deceased, namely, Gut No. 24, situated in village Malkapur, taluka Shevgaon, district Ahmednagar. The Appellant, original accused No. 1, is the first cousin of complainant Bapusaheb Patekar P.W. 5, and his brother, deceased Suresh. There was dispute between the two families in respect of their agricultural properties since 1980. While a criminal case between the parties was ultimately compromised in the year 1988 in the High Court, the civil case between the two sides was pending on the date of the incident. Both the sides were owning the adjoining lands in the said village. While the family of the accused was the owner of Gut No. 23, the family of the complainant was the owner of agricultural lands bearing Gut Nos. 24 and 129, which were situated in Malkapur shivar. There was a dispute between the parties over a well, which has situated in land, Gut No. 129, belonging to the complainant. The complainant's side had filed civil proceedings in the Civil Court and obtained injunction against accused No. 1 and his father from using the well water. Against the said order of injunction, the complainant's father had preferred an appeal in the District Court, which was pending on the date of the incident. In that appeal, the application moved by the complainant's side for stay of the order of injunction passed by the Trial Court in civil case was dismissed. It is the prosecution case that on the date of the incident, P.W. 6 Kusumbai, mother of the deceased Suresh, was removing grass, which was standing near the central water outlet, when accused No. 1 Sahebrao came there and questioned Kusumbai as to why she was removing the grass and started abusing her in filthy language. Though Kusumbai did not react and kept quiet, accused No. 1 continued to abuse her. Hearing the abuses. Suresh, who was standing near the bandh at a little distance from there along with his brother, complainant Bapusaheb, P.W. 5, went towards his mother and asked accused No. 1 as to why he was abusing his mother. Thereafter, accused No. 1 started abusing Suresh also and threatening that though the Court had given decision in favour of the complainant's side, by granting injunction order against the family of accused No. 1, he will not allow the complainant's side to use the well water. Bapusaheb, the complainant, P.W. 5, hearing the threats and abuses from accused No. 1. called his mother, Kusumbai, and brother, Suresh. In the meantime, accused No. 2, Chandrabhagabai, mother of accused No. 1, came there from their farm house and went towards accused No. 1, concealing something in her saree. When she reached near accused No. 1, she handed over

gun to accused No. 1 and asked him to finish whole family of Suresh, i.e. the deceased. Accused No. 1 took the gun from accused No. 2 and told Suresh that he would not leave him alive and fired a shot at Suresh. Injured by the gun shot, Suresh fell on the spot in the sugarcane crop. After the first shot was fired from the gun by accused No. 1, accused No. 2, Chandrabhagabai, told accused No. 1, that Suresh must not have died and, therefore, he should fire again. Accused No. 1 immediately removed the empty cartridge from the barrel of his gun and reloaded it with another cartridge, Suresh, noticing that accused No. 1 aimed another shot at him, entreated him to desist from doing so. But, accused No. 1 immediately fired second shot with his gun towards Suresh, which missed his target, i.e., Suresh, as Suresh had fallen down on the ground. Apart from Suresh, his brother Bapusaheb, the complainant, and mother Kusumbai, their servant, Karbhari Khose was also near the place of the incident. As the second shot was missed, accused No. 1 told Suresh that he was saved because he had only two cartridges, obviously carrying an impression that the first shot was not fatal. Accused No. 1 and his mother immediately left the place and went towards their farm house. Complainant Bapusaheb and his mother, Kusumbai went to Suresh who was lying in the mud in the crops in unconscious condition. They saw that he was bleeding from his thigh and private part. They lifted Suresh and took him towards the motor cycle which was kept on the adjoining road, near their sugarcane crop. Suresh, who was profusely bleeding, was carried on the motor cycle to their residential house. Bapusaheb arranged for a jeep in the evening from village called Maka. Suresh was taken to Shevgaon in that jeep. First, they went to Shevgaon Police Station, where they secured a Note (Yadi) from the Police Station and took the injured to Rural Hospital at Shevgaon, where P.W. 9, Dr. Ashok Dhaktode gave first aid.

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5. P.W. 9 gave dressing to the wounds. He removed one small pellet from the wounds of injured Suresh. He found that it was not possible for him to remove the other pellets from his body, without there being risk of profuse bleeding, which would have required blood transfusion. As there was no facility for blood transfusion in that hospital, he advised the Police Officer to shift the patient to the Civil Hospital at Ahmednagar, after giving him necessary primary treatment. Thereafter, the patient was removed to the Civil Hospital, Ahmednagar. Within a short time after his admission in the Civil Hospital at Ahmednagar, the patient died. Thereafter, the dead body was sent for post mortem examination. In the meantime, the P.S.I. had deputed two constables to guard the place of offence. Accused No. 1 had, around 10 p.m. in that night, gone to Pathardi Police Station and lodged his report stating therein that deceased Suresh was outraging the modesty of his wife, Mandakinibai, and, therefore, he had to fire shot from his gun for preventing him from doing so, which struck him on his leg. When the patient was admitted in the Rural Hospital at Shevgaon, the F.I.R. of P.W. 5, elder brother of the deceased, was recorded. The complainant had to stay in the hospital until recording of his F.I.R. and, therefore, could not accompany his

injured brother, when he was removed from Rural Hospital, Shevgaon, to Civil Hospital, Ahmednagar. When the complainant went to the Civil Hospital at Ahmednagar, he learnt that Suresh had already succumbed to his injuries. The F.I.R. filed by the complainant was registered as Cr. No. 117 of 1994 at Shevgaon Police Station. The report lodged by accused No. 1 at Pathardi Police Station was also transferred to Shevgaon Police Station and was numbered as Crime No. 118 of 1994 for offence u/s 354, 341 and 323 of the Indian Penal Code. Next morning the scene of offence panchanamas were drawn in both the cases. The statement of another eye witness Kusumbai, P.W. 6, was recorded in the following morning. Similarly, statement of third eyewitness, Karbhari Khose. P.W. 7, was also recorded. The statements of other witnesses also came to be recorded during the course of investigation. Accused No. 1, while lodging his report at the Pathardi Police Station, had surrendered his gun with five live cartridges. The clothes of the deceased, the gun and the cartridges were sent to C.A. for examination. After the investigation was over, the charge sheet came to be filed and the case was committed to the Sessions Court.

6. In the Sessions Court, various charges were framed against both the accused for offences under Sections 302, 302 read with Section 34, 504 read with Section 34, 506 read with Section 34, of the Indian Penal Code; and 25 and 3 of the Indian Arms Act, read with Section 34 of the Indian Penal Code. In addition, charges were also framed against accused No. 2 for offence u/s 302 read with Section 109 of the Indian Penal Code and Section 307 read with Section 109 of the Indian Penal Code.

7. Both the accused pleaded not guilty to the charges framed against them and therefore, the prosecution examined 15 witnesses. P.W. 1 is Ashok Kshirsagar. He is the Circle Inspector, who drew the map of scene of offence, Exhibit 18. P.W. 2 is Motiram Gite, who acted as panch for the seizure panchanama of the gun and five cartridges. Exhibit 37. P.W. 3 is Shankar Khatik, who was panch to the inquest panchanama, Exhibit 39. P.W. 4 is Balasaheb Karale, who acted as panch to the spot panchnama Exhibit 41. P.Ws. 5, 6 and 7 are the eye witnesses. P.W. 5 is Bapusaheb Patekar, the complainant, who is the brother of the deceased and is an eye witness. P.W. 6 is Kusumbai Patekar, mother of the deceased, who is another eye witness. P.W. 7 is Karbhari Khose, the servant, who was working on the farm of the complainant and is an eye witness. P.W. 8 is Rambhau Kusalkar, the driver of the jeep, who took the patient from their wasti to Rural Hospital at Shevgaon. P.W. 9 is Dr. Ashok Dhaktode the Medical Officer attached to Rural Hospital, Shevgaon, who examined the injured first and gave some treatment to him. P.W. 10 is Police Head Constable Gugale, who recorded the F.I.R. lodged by the complainant, which is at Exhibit 52. P.W. 11 is Police Constable Mohamed Shaikh, who carried the articles to the office of C.A. P.W. 12 is A.P.I. Vithal Khandagale, who had investigated the offence. P.W. 13 is Dr. Sham Sawarikar, who performed autopsy on the dead body in Civil Hospital, Ahmednagar, P.W. 14 is Police Head Constable Thorat, who drew the inquest panchanama, Exhibit 39. Lastly, P.W. 15 is Ramteke, the Assistant Chemical Analyser, whose report,

Exhibit 103, is relied on behalf of the prosecution. Besides the above witnesses, the Sessions Court had examined Police Head Constable Kashinath Burhade as a Court Witness to whom accused No. 1 and his wife, Mandakinibai, had lodged their reports giving their own version about the incident in question at the Pathardi Police Station.

8. The defence of the accused No. 2 was of alibi, while the accused No. 1 pleaded the exercise of right of private defence to protect his wife, Mandakinibei, from being molested by deceased Suresh, along with his parents, one of whom is an eye witness, i.e., Kusumbai, P.W. 6.

9. After considering the entire evidence on record led by the prosecution, and the defence of the accused, the learned Second Additional Sessions Judge, Ahmednagar, by his judgment and order dated 19th August, 1976 discarded defence of the accused being totally false and relying on the evidence of the eye witnesses, the medical evidence and other circumstances of the case, convicted both the accused. Appellants before this Court, for offences under Sections 302 and 307 of the Indian Penal Code. So far as accused No. 1, Appellant, Sahebrao Patekar, is concerned, he has been held guilty for offence u/s 302 read with Section 34 of the Indian Penal Code, and sentenced to R.I. for life and to pay a fine of Rs. 500/- in default to suffer R.I. for 3 months. He was also been convicted for offence u/s 307 read with Section 34 of the Indian Penal Code and sentenced to undergo R.I. for one year and to pay a fine of Rs. 200/-, in default to suffer further R.I. for 2 months. The substantive sentences were directed to run concurrently. Accused No. 2, Chandrabhagabai Patekar, was convicted for offence u/s 302 read with Section 34 of the Indian Penal Code and sentenced to R.I. for life and to pay a fine of Rs. 500/-. in default to suffer R.I. for 3 months. She was also convicted for offence u/s 307 read with Section 34 of the Indian Penal Code and sentenced to R.I. for one year and to pay a fine of Rs. 200/- in default to suffer further R.I. for 2 months. She is further convicted for aforesaid offence under Sections 302 and 307, read with Section 109 of the Indian Penal Code, for abetment and sentenced to R.I. for life and to pay a fine of Rs. 500/-, in default to suffer R.I. for 3 months for the first offence, and sentenced to R.I. for one year and to pay a fine of Rs. 200/-, in default to suffer R.I. for 2 months for the second offence. In addition, she was convicted for offence u/s 25 read with Section 3 of the Indian Arms Act and sentenced to R.I. for 3 months and to pay a fine of Rs. 200/- in default to suffer R.I. for 15 days. The substantive sentences in her case also were directed to run concurrently. The said convictions and sentences recorded by the Trial Court against these two accused are under challenge in the two Appeals filed by those accused. The State, aggrieved by the substantive sentence of R.I. for one year recorded by the Sessions Court for offence u/s 307 of the Indian Penal Code against both the accused, has filed Criminal Appeal No. 559 of 1996 for enhancement of the sentences of both the accused. While the Appeals filed by the accused against the orders of convictions and sentences were admitted by this Court and accused No. 2 Pimpalkharei, who was on bail during trial was directed to be released on bail pending her Appeal in

this Court, the Appeal for enhancement filed by the State was not admitted and the only order passed on that Appeal on 6th December, 1996 was as follows :

No orders necessary.

However, appearance has been filed in the State Appeal on behalf of the Respondents-accused by Shri R.N. Dhorde, who is appearing for the accused in their Appeals.

10. We heard both the sides at length. The learned Counsel appearing on behalf of the Appellants accused, after taking us through the evidence of the main witnesses, in particular the three eye witnesses, and the complaints and counter-complaints filed by both the sides, contended, firstly, that the case of the prosecution is fabricated as there seem to be two F.I. Rs., at Exhibits 52 and 72, one of which, Exhibit 72, does not mention even the time of lodging the F.I.R. Secondly, he contended that the prosecution was not fair and the complaint filed by accused No. 1 was hushed up, as within four days, "B" summary was filed in that case, but, ultimately, the case had to be revived as the learned Magistrate refused to accept the "B" summary filed by the Police. Thirdly, it was argued that the gun of accused No. 1, which was surrendered by him in Pathardi Police Station bore No. 42245. However, the forwarding letter to the office of C.A., as well as the C.A. report, mentions the number of the gun as 42215. He also contended that there is suppression of material fact, inasmuch as the injuries found by the doctor on the person of Mandakinibai, the wife of accused No. 1, were not explained nor were brought on record by the prosecution in this case. He next contended that the act of firing from the gun by accused No. 1 was done in exercise of right of private defence and, therefore, it is a case where either the accused should have been completely acquitted or, maximum, it will be a matter of exceeding the right of private defence. Lastly, he argued that the maximum offence that could be made out against the accused is offence u/s 304, Part II, of the Indian Penal Code.

11. As against that, the learned Special Public Prosecutor, contended that the evidence of the eye witnesses goes to show that both the accused intended to kill Suresh and with that intention and with the abetment provided by accused No. 2, the accused No. 1 fired the two gun shots at deceased Suresh, the first of which hit him on his thigh resulting in his death. He also contended that the defence raised by both the accused is false and frivolous, while the three eye witnesses have given cogent and consistent evidence, which deserves acceptance and which makes out offence of murder and attempt to murder against both the accused.

12. It is not in dispute that the incident in question had taken place in the agricultural land of the deceased and the complainant, which is Gut No. 24. The adjoining land, bearing Gut No. 23, is owned by the accused. As per the spot panchanama which is supported by the deposition of panch to the said spot panchanama, Gut No. 23 is a fallow land. This fact is not disputed on behalf of

the accused. So far as land, Gut No. 24 belonging to the complainant is concerned, the same was having crop of sugarcane. Similarly, it is not in dispute that both the sides had inherited the lands in question from their ancestors and the partition by metes and bounds in respect of the family properties had taken place much earlier and both the sides were in possession of their respective lands. Apart from the aforesaid two Gut numbers there is also a land, Gut No. 129, which again belongs to the complainant's side, in which there is a well in respect of which the dispute was pending at the relevant time in the Civil Court. Appeal from that, there were also criminal complaints filed by both the sides against each other, which had resulted in the prosecution of both the sides. While the accused side was acquitted in the Lower Court, a conviction order was recorded against the complainant, P.W. 5. and his father for offences u/s 324 of the Indian Penal Code and the same was also confirmed by the Sessions Court. The said conviction was challenged in the High Court by filing revision application, when it was compromised on the complainant and his father executing bond. That compromise had taken place in the year 1990. The complainant's side had filed Civil Suit against the accused No. 1 and his father in the Court of Civil Judge at Shevgaon bearing No. 208 of 1982 for injunction, which was granted by the Trial Court, restraining the accused No. 1 and his father from drawing well water from the well in Gut No. 129. Against the said order of injunction, accused No. 1 and his father had preferred appeal, being appeal No. 633 of 1990, which was pending in the District Court at the time of the incident in question. However, the application for interim stay of the Trial Court's order of injunction filed by accused No. 1 and his father was dismissed on 18.2.1993. This shows that, not only there was dispute as regards the property between the parties since early 1980s, but the said dispute had continued even at or around the time and date of the incident in this case, i.e., 24.7.1994. The pendency of the dispute between the parties negatives the argument advanced on behalf of the accused that since the criminal case was compounded in the High Court, there was no question of the accused bearing any grudge against the complainant or the deceased or could have any motive or cause to fire shot from the gun at deceased Suresh on some or small pretext, except for outraging the modesty of Mandakini, wife of accused No. 1. by deceased Suresh in the afternoon of the date of offence.

13. The case of the prosecution, as per the eye witnesses, is that on the date of the incident, P.W. 6 Kusumbai, mother of the deceased Suresh, was removing grass from Gut No. 24, which belongs to her family. At that time, their servant, Karbhari Khose, P.W. 7, had gone to the said Gut Number for watering the sugarcane crop, which was standing in about 16 bights of land. Seeing Kusumbai, P.W. 6, uprooting the grass standing at the corner of the central water outlet, accused No. 1, Sahebrao came there and questioned her as to why she was uprooting the grass. He also started abusing her in filthy language. She, however, kept quiet and did not utter a single word. Her sons, complainant Bapusaheb, P.W. 5 and deceased Suresh, were standing on the bandh situated

near Wadule to Dhor Jalgaon Road. Hearing the abuse of accused No. 1, Suresh went near his mother and asked accused No. 1, Sahebrao as to why he was abusing his mother. Thereafter, Sahebrao started abusing Suresh also, and threatened that though the Court had given decision in their favour referring to the civil case for injunction as regards the drawing of the water from the well, he would not allow them to use the well water. The complainant Bapusaheb, with a view to avoid the dispute, called his mother and Suresh towards his side. At that time, accused No. 2, the mother of accused No. 1 came from their farm house towards her son, concealing the gun in her saree. She took out the gun from her saree and handed it over to accused No. 1 and asked him to finish the whole family of Suresh. Accused No. 1 after taking the gun in his hand told Suresh that he will not keep him alive and fired one shot from his gun at him which injured him on the front side of his right thigh. Seeing that the gun shot had struck on the thigh of Suresh, accused No. 2 told accused No. 1 that he might not die and, therefore, he should fire second round at Suresh to kill him. Accused No. 1 came bit closer towards Suresh and fired the second round, but the second shot missed the target. When the second shot missed, accused No. 1 told complainant and Kusumbai that they were saved because he had only two cartridges. After the firing of the first shot, and before the second shot was fired from the gun, Suresh entreated his cousin by addressing him as Dada (that is how an elder brother is addressed by the younger one) not to fire the second shot. Suresh said, "Dada, you have already fired one shot at me, please do not fire again."

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14. The above prosecution case has been stated by all the three eye witnesses without there being any contradictions or material omissions. It is fully corroborated by the F.I.R. immediately lodged by P.W. 5, the elder brother of the deceased. The F.I.R. Exhibit 52, was recorded in the Rural Hospital in Shevgaon, where the injured was taken by the complainant and his mother. The complainant had seen the incident with his own eyes and the first thing he had to do was to rush his injured brother to the hospital to save his life. When the injured Suresh was struggling for life in the Shevgaon hospital and then on the way to the Civil Hospital, Ahmednagar, the Police Officer started recording the statement of the complainant. When the F.I.R. was in the process of being recorded in the hospital, injured Suresh was removed to Ahmednagar Civil Hospital, but the recording of the F.I.R. of the complainant was not stopped. Thus, the F.I.R. was lodged immediately after the incident without giving any time to prosecution witness to concoct the case. In such a situation in which the complainant was placed, when his younger brother was struggling for life, the complainant would not have been in a position to give the details of the events, which took place, but for the fact that he was an eye witness and ear witness to the entire episode. His deposition in the Court has been squarely corroborated by the F.I.R. lodged by him. His evidence is again fully supported in all material particulars by another eye witness, Kusumbai, the mother of the injured and the

complainant. Their testimonies are further corroborated in entire material particulars by yet another eye witness, Karbhari Khose, P.W. 7, whose presence also in the field at the relevant time cannot be doubted. He was engaged by the family of the complainant for watering the sugarcane plants and he stopped it when he saw that Suresh was shot by accused No. 1. The complainant has not mentioned in the complaint or in his evidence the words of Suresh entreating accused No. 1 not to fire at him for the second time. This was possible because the complainant was standing at some distance from the place of incident, where he might not have heard the plea of Suresh to accused No. 1, that he had already fired one shot from his gun and he may not fire second shot. This is deposed to by P.W. 6, Kusumbai, mother of the deceased Suresh, and P.W. 7 Karbhari. They were standing close to the victim of this incident. The complainant, therefore, naturally did not make a mention of it in the F.I.R. lodged by him nor did he venture to improve upon his complaint by stating this fact in his deposition. Both, the presence of all the three eye-witnesses, as well as their evidence, appears to be absolutely natural and it cannot be said that they had given parrot like testimony in the Court, which was the charge repeatedly levelled against the testimony of these witnesses by the learned Defence Counsel before us. After reading the evidence of all these three eye witnesses, we cannot say that their testimony is parrot like testimony, as was sought to be criticised by the learned Defence Counsel, but their evidence appears to be absolutely natural for they were the persons, who were eye and ear witnesses to the incident, in which a young school going boy of 19 years lost his life. There is no reliable evidence that he had provided any provocation or hurled abuses at accused No. 1 or had tried to outrage the modesty of the wife of accused No. 1 as alleged to provide sudden provocation to accused No. 1 to use his licensed gun against Suresh. The complainant, who is more mature person, kept absolutely cool and wanted his mother Kusumbai and his brother Suresh to leave that place, when accused No. 1 started abusing them in filthy language on a slightest pretext and held out threats of life to them.

15. This takes us to consider the defence of the accused Nos. 1 and 2. So far as accused No. 2 is concerned, her defence is of alibi. Doubtless, the onus is on the accused No. 2 to prove her absence from the place of incident and show that at the relevant time, she was at some other place than the place of the incident. No effort has been made in that direction, except only saying that she was not in the field at the relevant time and has been falsely implicated. We are at a loss to understand or visualise how the prosecution witnesses could have concocted the story showing her presence at the place of offence and attributing words and active role to her, during the period from the time Suresh was shot at by accused No. 1 and when he had been rushed to the hospital, first by taking him on the motor cycle by the complainant and his mother to their farm house, and then from there, arrange for a jeep and take him to the hospital at Shevgaon, where the injured was hardly for 10 minutes, during which time, the Police Officer had started recording the complaint of P.W. 5.

16. So far as accused No. 1 is concerned, his defence is that he had used his gun to prevent deceased Suresh from outraging his wife's modesty. According to accused No. 1, his wife, Mandakini, had gone to their field, land Gut No. 23, which undisputedly was a fallow land and no crop was grown therein. According to him, Mandakini and their young son, Yeshwant, had gone to the field in the early afternoon, obviously on foot, from their village, Malkapur which is about 2 Kms. from the field. He followed them in his jeep to his farm house. It is not understood for what reason, Mandakini and her young son went on foot and doing what in the fallow land of theirs in the odd hours of afternoon. According to accused No. 1, he followed them in jeep and went to his farm house and sat reading magazine there. After hearing the shouts and cries of his wife and son, he went to the field armed with his gun, where he saw the parents of Suresh obstructing his wife, naturally physically, and allowing Suresh to outrage her modesty by touching and molesting her breasts. One cannot visualise a situation that the parents were holding Mandakini physically and their son Suresh is allowed by his own parents to molest his elder cousin's wife, aged about 35/36. Accused No. 1 asked Suresh to leave Mandakini, and when he did not do so, he fired one shot in the air. When Suresh continued molesting Mandakini and outraging her modesty, accused No. 1 fires another shot from his gun near the leg of Suresh, which hits him on his thigh. He then leaves the place along with his wife and child, comes to his farm house, and from there, straight to the Pathardi Police Station. He tries to explain that he went to Pathardi, instead of Shevgaon, because he was afraid that on the way, he would be assaulted by the complainant or other people at their instance. He lodges report there. Surprisingly, he comes to the Pathardi Police Station all alone and lodges his report only against Suresh, as per Exhibit 95. He surrenders his gun and five cartridges, as, according to him, he was carrying initially 7 cartridges, out of which 2 cartridges were used by him. After some time, he takes his wife, Mandakini, to the same Police Station for recording her report, in which she implicates not only Suresh, but also his parents, as appears from Exhibit 97. In the statement of Mandakini, it is mentioned that she was physically detained by Suresh and his parents and Suresh was playing with her breasts. She produced her torn blouse also.

17. It is difficult to believe the defence raised by accused No. 1. Deceased Suresh and his brother, complainant Bapusaheb, are the first cousins of accused No. 1. It is incredible that parents of Suresh would hold physically Mandakini to allow or facilitate their son Suresh to molest her on her chest. The defence raised by accused No. 1 leaves many things unexplained, which is indicative of its falsehood. In the information lodged by accused No. 1, he implicates Suresh alone, while Mandakini, whose report was recorded subsequently, implicates all the three. If the parents of Suresh were present and had detained Mandakini physically allowing their son Suresh to molest her, accused No. 1 would not have omitted to mention their names. They introduced even father of Suresh, Paraji Patekar, who was not present there in order to concoct the defence that accused

No. 1 could not have otherwise saved Mandakini from the clutches of three persons, except by use of his licensed gun. It is absolutely incredible and unbelievable that parents of Suresh would catch hold of Mandakini, who was their nephew's wife, to allow or facilitates their own son to outrage Mandakini's modesty. It is equally unbelievable that a school going boy, Suresh, would think of doing such a thing in the presence of his own parents to an elderly lady, who is none other than his own elder cousin's wife, to whom he addresses as "Dada". In the report filed by accused No. 1 Sahebrao, the spot of the incident was not mentioned. The version given in these reports of accused No. 1 and his wife Mandakini is again inconsistent with the written statement filed by accused No. 1 in the Court u/s 313 of the Code of Criminal Procedure. The presence of Mandakini and her young son, aged hardly 10 or 11 years, in the fallow land in the afternoon of 24th July itself cannot be believed and if accused No. 1 was to go to the field in a jeep, why he should have made his wife and young son to go to the field on foot only little earlier. The falsity of defence raised by accused No. 1 becomes absolutely obvious when one considers this defence in the light and in juxtaposition to the medical evidence regarding the part of the body on which Suresh received the injuries. As per the medical evidence, deceased Suresh received shot on his front side of right thigh, which caused injuries even to his private part, as per the diagram in the certificate issued by P.W. 9. P.W. 9, Dr. Dhaktode, who examined injured Suresh first in the Rural Hospital at Shevgaon, stated that there were punctured wounds present over right thigh, over lower abdomen, over scrotum and shaft of penis. These punctured wounds were caused by firearm. He could remove one small pellet while dressing the wounds, which he handed over to the Investigating Officer, P.S.I. Khandagale. The injury certificate issued by P.W. 9 is at Exhibit 65, in which diagram was given showing injuries on the private part of Suresh, That makes it very clear that the injuries were received by Suresh on the front side. During post mortem examination of the dead body of Suresh, about 8 pellets were removed from the front side of thigh of the deceased. The evidence of complainant and P.W. 6, Kusumbai, mother of Suresh, also shows that Suresh had received bleeding injuries on the front side of thigh and on his private part. This is also supported by the evidence of panch to the inquest panchanama. This medical evidence and the diagram, which shows the portion of the body of Suresh, where he received injuries, belies completely the defence taken by accused No. 1. Firstly, accused No. 1 would not have taken any chance of firing the gun at Suresh if he was molesting his wife, Mandakini. One can visualise the situation, because for molesting Mandakini on her chest, Suresh had to be either on the front side of Mandakini, or at the backside of Mandakini. If Suresh was on the front side of Mandakini, he would have received injuries on his back side from the shot which was fired at him by accused No. 1. If Suresh was on the back side of Mandakini, in that event also, the injuries would have been received by Suresh from back side. If Suresh has received injuries on the front side on his body or thigh and on his private part, Mandakini could not have escaped from receiving injuries from the pellets of the cartridge used by accused No. 1. This only shows that Suresh was not molesting

Mandakini or outraging her modesty as alleged by accused No. 1 when the gun shot was fired at him.

18. Much ado was made by the defence Counsel as regards seizure of broken pieces of bangles and slippers of the son of accused No. 1 from the place of incident under spot panchanama, drawn in view of the complaint filed by accused No. 1. First of all, the pieces of bangles may not necessarily be of Mandakini, nor slippers are proved to be of son of accused No. 1 and Mandakini. There was no reason for the son of the accused to leave his slippers there. Even if that be so, much time had elapsed from the time of the incident, which was around 4 p.m. on that day, and 9.50 p.m., when accused No. 1 had reached Pathardi Police Station for lodging his complaint. The police constables who were sent to guard the scene of offence much later could not have been there earlier than 9. p.m. on that night. The complainant, P.W. 5, had reached the Rural Hospital at Shevgaon at about 8.30 p.m. as per the evidence of P.W. 9. Before that, he had gone to the Shevgaon Police Station between 8 and 8.15 p.m. It was thereafter that the constables were deputed. The distance between Shevgaon and the place of incident is about 15 kms, and, therefore, in any eventuality, with utmost expedition, the constables could not have reached the scene of offence for guarding the place earlier than 9 p.m. Accused No. 1, having his jeep at the relevant time, had enough time to arrange to plant the slippers and the broken pieces of bangles at the scene of offence. The burden is always on the accused to establish the plea of self defence, as held by the Apex Court in the case of Partap Vs. The State of Uttar Pradesh, . Reliance placed by the defence advocate on the judgment of the Supreme Court in the case of Harish Kumar and another Vs. State of M.P., to establish plea of right of private defence of the accused is not applicable in the present case.

19. If the defence taken by accused No. 1 is absolutely false, and we have no doubt that it is absolutely and obviously false, there is no question of accused No. 1 exercising the right of self defence, i.e. to protect his wife from being molested by deceased Suresh. We have already considered the evidence of eye witnesses, which is truthful and believable, and the falsity of the defence raised by accused No. 1 further strengthens the truthfulness of the prosecution witnesses. In fact, recently, the falsity of the defence raised by the accused has been considered by the Apex Court to be one of the circumstances, which assumes importance and supplies a link in the chain of circumstances. In the case of Geetha Vs. State of Karnataka, the accused had denied that the dead body and articles belonging to the deceased were found from her house. The said denial was found to be false in the facts and circumstances of the case and, therefore, the Supreme Court held that the false denial of the accused assumed importance and supplied a missing link in the chain of circumstances. Similarly, in the case of Birbal vs. State of M.P., (2000) 10 SCC 212 the accused and the deceased had left together and went towards jungle. There was evidence of a witness that in the evening accused came back alone from the jungle and when asked by the witness, he falsely stated that the deceased would come later on.

The dead body of the deceased was discovered at the instance of the accused. Later on, in Court, the accused, in his statement u/s 313 of the Code of Criminal Procedure, stated that he had never gone to the jungle with the deceased and, therefore, he was not aware about the whereabouts of the deceased. It was held that the false denial or explanation given by the accused was an additional link to the chain of circumstances against the accused.

20. This case is based on the evidence of eye witnesses, who are three in number. The evidence of all the three eye witnesses is consistent without omissions and contradictions, corroborated by the F.I.R. filed immediately in the matter. The falsity of the defence raised by accused No. 1 lends strength to the prosecution case that the incident had taken place in the manner as deposed to by the prosecution witnesses.

21. The defence Advocate tried to argue that the case is fabricated, because there are two F.I. Rs., Exhibit 52 and Exhibit 72. He further points out that Exhibit 72 does not mention the time of the offence or when it was lodged. Exhibit 52 mentions the time as 8.15 p.m. Exhibit 52 was recorded in the hospital, as per the evidence of the prosecution witnesses. P.W. 9 Dr. Dhaktode at Shevgaon Rural Hospital states that injured was brought to him at 8.30 p.m. and, therefore, according to the defence Advocate, Exhibit 52 could not have been lodged at 8.15 p.m. There is not much difference in the timings. Everyone is not very particular about the recording of timing after seeing the watch. Even two watches may give different timings. Either the doctor might have erred or the Police Officer, who showed the time as 8.15 p.m., might have erred. The doctor also may not have attended the patient immediately after his admission in the Hospital. It takes some time before the doctor is called and attends to the patient. There are no two F.I. Rs. The contents of both, Exhibit 52 and Exhibit 72, are one and the same. Exhibit 72 is in the proforma. which was not available with the police in the hospital where the complaint of the complainant was recorded. It is natural that after going to the Police Station, the seine version was taken down after filling the proforma. There is otherwise no discrepancy in the contents of the two documents. It is not even the case of the prosecution that another statement was recorded of the complainant, when he came to the Police Station.

22. The defence Advocate argued that the prosecution was biased against the accused and the counter complaint or the complaint filed by accused No. 1 was hushed up as the same Investigating Officer, i.e. P.W. 12, Khandage, had filed "B" Summary. But that was not accepted by the Magistrate, and, ultimately, charge sheet was filed against the three accused persons and they were acquitted, as charges against the complainant and his parents were not proved in the counter case. It is not in dispute that in that prosecution, registered under Crime No. 118 of 1994, the J.M.F.C. disbelieved the evidence of accused No. 1 and his wife Mandakini. No doubt, in that case, the accused No. 1 had to prove his case beyond reasonable doubt, while, in this case, his defence has to be

considered on the preponderance of probabilities. As we have observed earlier, leave apart the preponderance of probabilities, the defence of accused No. 1 is false.

23. The defence Advocate also contended that the number of the gun of accused No. 1 is mentioned wrongly. The correct number of the gun is 42245, while the report of the C.A., as well as the forwarding letter to the C.A. mentions the number of the gun as 42215. That number is not fully visible to bare eyes and had to be seen with the help of magnifying glass in the Trial Court. The digit "4" before the digit "5" is not fully visible to a bare eye, which looks like "I". That is how the mistake must have been committed. But the gun in question was surrendered by accused No. 1 himself to the Police Station. It is admitted by accused No. 1 in answer to question No. 3 that the gun number is 42245. He has also further admitted in answer to question No. 4 in his statement u/s 313 of the Code of Criminal Procedure that his gun was not having one trigger and, therefore, he fired both the shots from the right barrel. The C.A. report is not relevant, except for this purpose that only one barrel of his gun was working and, therefore, accused had to remove empty cartridge from that barrel before using the second cartridge. Both the empty cartridges were found in Gut No. 23, from where accused No. 1, according to the eye witnesses, fired from his gun. Thus, the C.A. report and the evidence of Assistant Chemical Analyser. P.W. 15 Ramteke, supports and corroborates the prosecution case and it is admitted by the accused No. 1 in his statement u/s 313 of the Code of Criminal Procedure that only one barrel was working. The prosecution case is further supported by the seizure of empty wads from the place of offence, i.e., on the land Gut No. 24, where the deceased Suresh was shot.

24. The argument of the defence Advocate that there was suppression of material fact by the prosecution by not examining the doctor, who examined Mandakini, is also without substance, in the teeth of overwhelming evidence and the falsity of the defence raised by the accused No. 1. The defence could have very well examined Mandakini herself or the doctor, who had examined Mandakini, could have been examined as defence witness. The defence, knowing the weakness of its own case, shirked from doing so.

25. Thus, the prosecution case that accused No. 1 intentionally fired at Suresh with a view to kill him is squarely proved by the evidence on record. Accused No. 2 had brought the gun from her farm house by concealing it in her saree. It cannot be said, as argued by the learned defence Counsel, that it was not possible to conceal such a lengthy gun in her saree by accused No. 2. Accused No. 2 was at the relevant time wearing a saree, regionally or locally called as "Lugade", which is a Nine Yard long saree. Most part of the gun could have been easily concealed by the 9 yards long saree. May be the entire gun may not have been concealed, but, in any event, the prosecution witnesses did not notice it till it was handed over by accused No. 2 to accused No. 1. We, therefore, cannot assume that the prosecution witnesses were falsely saying that the gun was

brought by accused No. 2 by concealing it in her saree. That does not advance the prosecution case at all. They could have very well said that she had brought it openly without concealing it in her saree if they had wanted to falsely implicate accused No. 2. This shows that the prosecution witnesses deposed as to what they had witnessed at the time of the incident.

26. Accused No. 2 has been convicted for offence u/s 302 read with Section 34 as well as read with Section 109 of the Indian Penal Code, i.e. for abetment. The conduct and the words attributed to her by all the witnesses clearly show that it is she who brought the gun and handed it over to accused No. 1, asking him to kill the whole family of Suresh. After the first shot was fired by accused No. 1, accused No. 2 tells accused No. 1 that Suresh must not have died and, therefore, he should fire again. Her defence of alibi was not rightly accepted by the Trial Court, and we see no reason to differ from the finding in the absence of any evidence establishing her absence from the place of incident, which has to be proved by preponderance of probabilities at least. There was absolutely no reason for the prosecution witnesses to falsely implicate this aged lady, the mother of accused No. 1.

27. The Special Public Prosecutor also brought to our notice the suggestion put by the prosecution to Court witness, Burhade, that when accused No. 1 had gone to the Pathardi Police Station, he had left his wife in the house of Athare, an Advocate, who was none other than the father in law of brother of Mandakini. He tried to show that accused No. 1 had prepared this false defence, after taking legal advice from the said Advocate. The learned Special Public Prosecutor also argued that Mandakini's brother is also a practising Advocate. Whether the defence was raised after taking legal advice or not, we are satisfied that the defence of the accused is obviously, palpably and absolutely false one.

28. The question which remains to be decided is what offence the accused can be said to have committed. In addition to conviction u/s 302 of the Indian Penal Code, the accused are also convicted for offence u/s 307 of the Indian Penal Code, i.e., attempt to murder. This conviction was recorded on the basis of prosecution evidence that the second shot fired by accused No. 1 missed. That shot was targeted at Suresh by accused No. 1, when accused No. 2 told him that Suresh must not have died because of the first shot, and, therefore, he should fire again. But, that second shot somehow missed the target. Both the accused are also convicted for the offence u/s 307 read with Section 34 of the Indian Penal Code.

29. We are of the view that when, ultimately, the injured Suresh died, as a result of the first shot fired at him, there was no question of the accused attempting to kill Suresh. Reference may be made in this connection to the judgment of the Supreme Court in the case of Jagtar Singh Vs. State of Punjab, . That was a case where murder of only one person had taken place and the accused was convicted u/s 302, as well as u/s 307, of the Indian Penal Code. The conviction of the accused u/s 307 read with Section 34, in addition to his conviction u/s 302 of the

Indian Penal Code, was set aside by the Supreme Court, maintaining the conviction u/s 302 of the Indian Penal Code. Accordingly, we set aside the order of conviction and sentence recorded against both the Appellants-accused for offence u/s 307 read with Section 34 of the Indian Penal Code, as well as the conviction and sentence recorded against accused No. 2 for offence u/s 307 read with Section 109 of the Indian Penal Code.

30. In view of this, the Criminal Appeal preferred by the State, being Criminal Appeal No. 559 of 1996, for enhancement of sentence for offence u/s 307 should also fail and will have to be dismissed.

31. This leaves us to consider as to what offence can be said to have been committed by the accused for firing gun shot, which resulted in the death of Suresh. On behalf of the defence, it was argued that it will not be murder punishable u/s 302 of the Indian Penal Code, but it should be either culpable homicide punishable u/s 304 of the Indian Penal Code, or, grievous hurt punishable u/s 326 of the Indian Penal Code. This contention is raised, because, according to the defence, the injury received by the deceased Suresh was not on the vital part of his body, but on his thigh, which is not a vital part of a person's body and, therefore, the gun shot was fired, according to the defence Advocate, not with an intention to murder the deceased Suresh. This question has to be considered in the light of the medical evidence, as well as the version of the eye-witnesses and the legal position.

32. So far as the medical evidence is concerned, Exhibit 65 is the medical certificate issued by P.W. 9 Dr. Dhaktode of the Rural Hospital, Shevgaon. As per the said certificate, there were punctured gun shot wounds over thigh, causing about 50 wounds. Those wounds were on the thigh, over lower abdomen, over scrotum and shaft of penis. As per the post mortem report, there were multiple punctured wounds over right upper thigh, round to oval shape. P.W. 9 Dr. Dhaktode had removed one small pellet from his thigh, while dressing the wounds. P.W. 13, who performed the post mortem examination on the dead body, removed 8 pellets from the thigh of deceased Suresh. It is not in dispute that those punctured wounds were caused by firearm, as deposed to by the doctors. In Exhibit 65, there is also a diagram of the injuries, which shows the pellet wounds on the right thigh of the injured, near or in the vicinity of his private part. The diagram also shows some pellet wounds on the private part of the injured Suresh.

33. P.W. 5, the complainant, also deposes that there was profuse bleeding from the thigh and the private part of the deceased. Similarly, it is deposed by the mother of the deceased P.W. 6, Kusumbai. P.W. 5, the complainant, has also stated that there were many holes in the full pant of the deceased Suresh, which was stained with blood and mud. The pant of deceased Suresh was also sent to C.A., and as per the C.A. report, exhibit 6, the diagram of the pant of the deceased also shows that the pant of the deceased was having holes on the thigh portion as well as on the portion covering his private part. The C.A. has also been

examined by the prosecution as P.W. 15. Though P.W. 13, who performed the autopsy on the dead body, does not make a mention of the wounds on the private part of the deceased, he approves the diagram made by P.W. 9, the Medical Officer of Rural Hospital, Shevgaon, on injury certificate, Exhibit 65, and states that it was correctly drawn and confirms that he had found similar injuries on the dead body. P.W. 13 further deposes that, on internal examination of the dead body, he found haematoma in retro peritoneal space and pelvis, and there was injury to right iliac vessels. He further deposes that, as there was injury to the right external area, it was sufficient to cause death. According to him, the external iliac vessel is a big vessel, which supplies pure blood to the lower extremity and drains impure blood from lower extremity. He further deposes that the pellets had sprinkled when the shot was fired and due to those pellets, right external iliac vessel is injured. He further deposes that when artery is disturbed, the blood supply will shut off. It was argued by the defence advocate that since P.W. 13 did not show any injury on penis in the post mortem examination report, it cannot be said that the deceased had received injuries on his private part. It is also pointed out that inquest panchnama is also silent about it. But, inspite of this, both panchas to the inquest panchanama have stated about the injuries on the private part of the deceased. P.W. 3 Panch Shankar Khatik deposed that he found two injuries on the penis and two on the scrotum. The Medical Officer, P.W. 13, Dr. Sawarikar, admits that he was not shown Exhibit 65, the Medical Certificate issued by Dr. Dhaktode, P.W. 9, but he had received inquest panchnama and he had gone through the inquest panchnama before conducting the post mortem examination. But, from his memory, he deposes before the Court that he had seen the injuries or wounds on the private part of the deceased and he also approves the diagram appearing in Exhibit 65, drawn by P.W. 9. He confirms that the diagram on Exhibit 65, was correctly drawn and he had himself found similar injuries on the dead body.

34. The defence Advocate, going by the deposition of P.W. 13 that iliac vessel is not a vital part, contends that since the injuries were not inflicted on the vital part of the body of the deceased, there can be no intention on the part of accused No. 1 to murder Suresh. No doubt, there are judgments of the Supreme Court, which consider this aspect, reference to which would be relevant at this juncture.

35. In the case of Laxman Kalu Nikalje Vs. The State of Maharashtra, as per the evidence of the wife of the accused, who deposed against her own husband, the accused had few words with the deceased, thereafter he took out a knife and stabbed deceased on his shoulder and ran away. As against that, the widow of the deceased had deposed that brother of the deceased had assaulted him and not the accused. The accused was the sister's husband of the deceased. The Sessions Court acquitted the accused, but the High Court accepted the evidence of the wife of the accused and convicted him for offence u/s 302 of the Indian Penal Code. The injury, though appeared to have been inflicted on the shoulder, ultimately cut an auxiliary artery and veins and caused shock and hemorrhage

leading to death. On behalf of the prosecution, it was expressly conceded that the case was not covered by the first or the second clause of Section 300 of the Indian Penal Code. Therefore, the Apex Court proceeded to consider whether the case was covered by clause "thirdly" of Section 300 of the Indian Penal Code, that is, causing intentionally, bodily injury, which was sufficient in the ordinary course of nature to cause death. It was held that the said clause is in two parts, the first part is subjective indicating that the injury must be an intentional one as against the accidental one; and the second part is objective, and the Court must be satisfied that it was sufficient in the ordinary course of nature to cause death. According to the Supreme Court, the first part was complied with, because the injury which was intended to be caused was the one, which was found on the person of Ramrao, but not the second part, because but for the fact that the injury caused the severing of artery, death might not have ensued. That is to say, the accused cannot be said to have intended to cause injury, which would cut the artery, but to wound the deceased in the neighbourhood of the clavicle, which was ruptured, and therefore, according to the Apex Court, the injury was not covered by any of the clauses of Section 300, but the third part of Section 299, and, therefore, was punishable under Part II of Section 304 of the Indian Penal Code. This reasoning has been followed in similar cases by the Apex Court in the subsequent judgments which are reported in *Jayaraj Vs. State of Tamil Nadu*, and *Gokul Parashram Patil Vs. State of Maharashtra*, .

36. In *Jayraj's* case (*supra*), one blow was given in the abdomen with a small knife and the death had taken place after 9 days of the assault. The Sessions Court, applying clause "thirdly" of Section 300, of the Indian Penal Code, convicted the accused for offence of murder, which was upheld by the High Court. The doctor who conducted the autopsy on the dead body deposed that abdominal injury was only likely to cause death. In other words, the injury was not sufficient in the ordinary course of nature to cause any death and, therefore, the Apex Court convicted the accused for offence u/s 304, Part II of the Indian Penal Code, holding that the case was governed by third clause of Section 299 of the Indian Penal Code, and, therefore, amounted to culpable homicide not amounting to murder.

37. Similarly, in the case of *Gokul* (*supra*), the injury was caused on the non-vital part of the body, by giving kick blow on left clavicle. The Apex Court held that it was too much to say that the accused knew that the superior vena cava would be cut, as a result of the wound, which he had inflicted, when even a medical man may not have been able to judge the location of the superior vena cava with any precision.

38. In all the above three cases, single blow was given on the non-vital part of the body, with a knife and the death had occurred due to the corresponding internal injury, which had cut the veins resulting in profuse bleeding. It is pertinent to note that in all these cases, there was no other ocular evidence, attributing any words to the accused, which would spell out his intention to kill.

39. As against that, the learned Special Public Prosecutor relied heavily on the judgment of the Supreme Court in the case of Virsa Singh Vs. The State of Punjab, . That was a case where a single forceful blow were given causing punctured wound, 2" x 1/2" transverse on the left side of the abdominal wall in the lower part of the iliac region, just above the inguinal canal, resulting in three coils of intestines coming out of the wound, as per the medical evidence. The Apex Court held that the case was covered squarely by clause "thirdly" of Section 300 of the Indian Penal Code, observing that the question, so far as the intention is concerned, is not whether the accused intended to kill, or, to inflict an injury of a particular degree of seriousness, but whether he intended the injury in question, and, once the existence of the injury is proved, the intention to cause it will be presumed, unless the evidence or the circumstances warrant an opposite conclusion. In paragraph 13 of the judgment, it was observed that it does not matter that there was no intention to cause death, or, that there was no intention even to cause an injury of a kind sufficient to cause death in the ordinary course of nature, nor, does it even matter that there is no knowledge that an act of that kind was likely to cause death. It was further observed that, once the intention to cause bodily injury, actually found to be present, is proved, the rest of the inquiry is purely objective, where, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. This judgment of the Supreme Court in Virsa Singh's case (supra) was not referred to by the Apex Court in Laxman's Case (supra). No doubt, in Laxman's case, the Apex Court has gone a step further and held that the accused could not have intended to cause injury, which included cutting of the vein, which resulted in the death of the victim.

40. As stated earlier, in the judgments the Supreme Court in Laxman's Jayraj's and Gokul's cases (cited supra) only clause "thirdly" of Section 300 was considered, i.e. whether the accused had intended to cause injury, which was sufficient in the ordinary course of nature to cause death. In those cases, there was no other circumstance from which the intention of the accused to murder the victim could be gathered. The injuries were caused by weapon like knife on the non-vital parts of the bodies. In the instant case, the weapon used is a gun, from which cartridges were fired aiming them at Suresh. Normally and ordinarily, a gun is used with a view to kill a person. If the gun is aimed at on the legs of a person, it will be obvious that the intention was not to kill a person. In this case, the injury was not caused on the legs, but near or just below the abdomen on the upper portion of right thigh, which was near the middle portion of the body, causing wounds even on the private part of the victim. The aiming of the gun shot was preceded and followed by the expression of the intention to kill Suresh by both the accused persons. The evidence of the eye witnesses squarely establishes that the gun shot was aimed at Suresh with a view to end the life of Suresh. It is a different matter that the gun shot struck on the upper part of his right thigh near the abdomen. That only shows that the accused was not very proficient in firing from his gun. He was not a professional shooter, but had the

fancy to have and possess a licensed gun. This is indicated by the second shot, which he fired from his gun, which completely missed his target, i.e., injured Suresh, That second shot was aimed at Suresh, as both the accused were under the impression that the first shot might not result in Suresh's death as intended by them. Accused No. 2 specifically tells accused No. 1 that Suresh might not die because of the first shot and, therefore, he should fire again at him, which was done by accused No. 1. Accused No. 2 also wanted her son to wipe off the entire family of Suresh, as deposed to by the eye witnesses, when the second shot missed the target, accused No. 1 told the complainant and his mother, Kusumbai, P.W. 6, when they rushed towards the injured Suresh, that they were saved because he did not have any more cartridge left with him at that time. This has been deposed to by all the three eye witnesses, the complainant P.W. 5 Bapusaheb, his mother, P.W. 6, Kusumbai, and their servant, Karbhari Khose, P.W. 7.

41. Considering the ocular evidence in this case, supported by the medical evidence, the question which we have to consider in this case is whether the case is covered by first clause of Section 300 of the Indian Penal Code, which defines, culpable homicide, amounting to murder. The said clause reads as follows :

...culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death....

If the ocular evidence is accepted, and we have no reservations for accepting the same, there is sufficient evidence on record, which clearly expresses the intention of the accused to murder Suresh, when he fired from his gun at the deceased. First clause is illustrated by Illustration (a) to the section, which reads as follows :

(a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

Substituting accused No. 1 for "A" and Suresh for "Z" in the above Illustration it makes clear that the above Illustration is meant for the present case. Once that is proved, question is not on which part of the body the injury was caused, but whether the injury results in the death of the victim, Suresh had died in consequence of accused No. 1 shooting at him with his gun with the intention of killing him. Therefore, accused No. 1 commits murder, as defined in the first clause of Section 300 of the Indian Penal Code. If this is so, we need not proceed further to find out whether the act of accused No. 1 is also covered by any other clauses of Section 300 of the Indian Penal Code. A person is guilty of murder whether his case is covered by one or more or all the four clauses of Section 300 of the Indian Penal Code. Looking to clause secondly of Section 300, it appears that this case is covered even by clause secondly of Section 300, according to which, the act has to be done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the

harm is caused. This clause would be applicable even when the case is considered on the basis of the evidence of the eye witnesses, who attributed words to accused Nos. 1 and 2 expressing their intention to kill Suresh. Surely, the accused had the intention of causing such bodily injury, which accused No. 1 has caused to Suresh, may be on the upper portion of his thigh and on his private part, which he knew to be likely to cause the death of Suresh, to whom the injury was caused on his thigh by the gun shot fired by accused No. 1. The person, who uses gun against another person, surely, knows that he would thereby cause injury, which was likely to result in the death of the person to whom such injury is caused. This is not a case where this Court has to consider the intention of the accused only on the basis of the injury caused to the deceased, but the ocular evidence clearly establishes that the gun shot was aimed with the intention to kill Suresh. If that is so, the whole inquiry and discussion on the question whether the case was covered or not by clause thirdly of Section 300 of the Indian Penal Code becomes academic or redundant.

42. Reference maybe made in this regard to the decision of the Supreme Court in the case of Jaspal Singh Vs. State of Punjab, where the following observations were made :

...The nature of the offence does not depend merely on the location of the injury caused by the accused. The intention of the person causing the injury has to be gathered from a careful examination of all the facts and circumstances of each given case. The present is not a case where the appellant merely swung his knife towards the leg of the deceased during some struggle and it happened by sheer misfortune to cut an artery....

That was "of course" a case where knife blow was dealt by the accused in the groin of the deceased which had caused a wound placing both the femoral blood vessels. Thus, the intention of the person causing the injury has to be gathered from the examination of all the facts and circumstances of each given case, which is precisely done by us in this case. We cannot only consider the injury and the part of the body on which the injury was caused, without considering the background, the preceding words used by both the accused and what was said by them subsequently after exhausting two cartridges possessed by accused No. 1 at that time.

43. Similarly, in the case of A.N. Chandra Vs. State of U.P., death was caused due to the gun shot. The defence of the accused was of accidental firing of shot, when he was struggling to defend himself from the deceased. The single injury was caused to the deceased. The Supreme Court held that a single injury theory cannot be made applicable to case where a deadly weapon like firearm is used. It further observed that even a single injury caused by a firearm would only lead to the inference that death was caused intentionally.

44. Reference may also be made to the recent decision of the Supreme Court, brought to our notice by the learned Special Public Prosecutor, in the case of

Ramashraya and Another Vs. State of Madhya Pradesh, . In that case, there was quarrel between the deceased and the accused. The accused tried to hit the deceased on his head with a lathi, but the blow fell on the shoulder of the deceased. Several injuries were inflicted over the deceased. He fell down on the ground and died. The Apex Court, after considering the various judgments of the Supreme Court, including that in Laxman's case (supra), held that in order to decide the question whether murder was committed, or, culpable homicide not amounting to murder was committed, the nature of the injuries sustained by the deceased and the circumstances in which the incident took place are relevant factors, so also, the original genesis of the incident, and Section 304 of the Indian Penal Code cannot be invoked unless the offence could be brought within any of the five exceptions of Section 300.

45. That is precisely what we have done in this case. We have considered not only the injury, but also the weapon used and the intention expressed by the accused before and after the gun shots were fired by the accused No. 1. The facts and circumstances of the case leave us in no manner of doubt that the case is squarely covered by first clause of Section 300 and Illustration (a) to Section 300 of the Indian Penal Code.

46. In that view of the matter, we cannot find fault with the conviction of the accused for offence u/s 302 of the Indian Penal Code.

47. No arguments were advanced on behalf of the accused as regards the application of Section 34 of Indian Penal Code, or, Section 109 of the Indian Penal Code, whereby the accused No. 2 has been convicted along with the accused No. 1. The only argument advanced on behalf of the accused No. 2 was that she was not present at the time and place of the incident. It is observed by us that we see no reason to discard the prosecution evidence with regard to her presence at the time and place of the incident. They had no reason to falsely implicate accused No. 2 and attribute to her an act of bringing the gun from farm house concealed in her saree and then handing it over to accused No. 1 and asking him to finish Suresh and his family and also urging him to fire second time at Suresh, as, according to her, he might not die due to the first shot. Having regard to the evidence of the eyewitnesses, which we have discussed earlier, we have no doubt that accused No. 2 is also liable to be convicted for offence of murder of deceased Suresh along with accused No. 1.

48. Accused No. 2 is also further convicted for offence under the provisions of the Indian Arms Act, on which no arguments were advanced before us. Once we accept the evidence of the prosecution witnesses that it was she who had brought the gun from the farm house and handed it over to accused No. 1 and asked him to kill Suresh and again asked him to fire second shot at Suresh, as he might not have died due to the first shot, we do not find any flaw in the conviction recorded against her by the Trial Court for offence under the provisions of the Indian Arms Act.

49. Accused No. 2 has been convicted twice for offence u/s 302, once with the aid of Section 34 and secondly, with the aid of Section 109, of the Indian Penal Code. We do not think that, for the same incident, a person can be convicted twice for the same offence with the aid of different Sections. To punish a person twice for the same offence would violate the principle of double jeopardy. Since the case is made out against accused No. 2 for offence of murder u/s 302, with the help of both Section 34 as well as Section 109 of the Indian Penal Code, we convict accused No. 2 for offence u/s 302 read with Section 34, and, in the alternative, for offence u/s 302, read with Section 109 of the Indian Penal Code. The order of the Trial Court convicting her separately for the said offence is thus modified.

50. In the result, while we dismiss the State Appeal for enhancement, being Criminal Appeal No. 559 of 1996, we partly allow Criminal Appeal No. 533 of 1996 preferred by accused No. 1 as well as Criminal Appeal No. 456 of 1996 filed by accused No. 2 challenging the order of convictions and sentences recorded against them. We set aside the order of the Sessions Court convicting and sentencing accused No. 1 for offence u/s 307 read with Section 34 of the Indian Penal Code. We also set aside the order of the Sessions Court convicting and sentencing accused No. 2 for offence u/s 307 read with Section 34, as well as for offence u/s 307 read with Section 109 of the Indian Penal Code. We, however, confirm the order of conviction and sentence recorded against accused No. 1 by the Sessions Court for offence u/s 302 read with Section 34 of the Indian Penal Code. We, however, set aside the order of conviction and sentence recorded against the accused No. 2 for offence u/s 302 read with both Section 34 as well as Section 109, of the Indian Penal Code; and, instead, convict and sentence accused No. 2 for offence u/s 302 read with Section 34, and, in the alternative, u/s 109 of the Indian Penal Code and confirm the sentence of R.I. for life and fine of Rs. 500/- in default, R.I. for 3 months imposed by the Trial Court on her. We also confirm the order of conviction and sentence recorded against accused No. 2 by the Trial Court for offence u/s 25 read with Section 3 of the Indian Arms Act. The direction given by the Trial Court that the substantive sentences shall run concurrently is also confirmed. The accused No. 2 Chandrabhagabai to surrender to her bail within two weeks from today.

51. The above Criminal Appeals are disposed of accordingly.