
(2011) 03 BOM CK 0052
In the Bombay High Court
Case No : Criminal Appeal No. 648 of 2009

Shrawan Pawar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 25-03-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 299, 300(3), 302, 307, 324

Citation : (2011) 03 BOM CK 0052

Hon'ble Judges : T.V. Nalawade, J; Naresh H. Patil, J

Bench : Division Bench

Advocate : Sadhana S. Jadhav, for the Appellant; K.G. Patil, Assistant Public Prosecutor, for the Respondent

Judgement

T.V. Nalawade, J.—This appeal is filed against the judgment and order of Sessions Case No. 83/2006 decided by District Judge¹ & Additional Sessions Judge, Shrirampur. By the decision dated 30.10.2009 the Trial Court has convicted and sentenced the Appellant for the offence punishable u/s 302 and also for the offence punishable u/s 324 read with 34 of the Indian Penal Code (IPC).

2. In short, the facts leading to the institution of this appeal can be stated as follows:

(a) Shridhar Dhumal lives with his family in a house constructed in his field from Devgaon Shivar, Tahsil Newasa, District Ahmednagar. At the relevant time, his wife Sumanbai, his mother Housabai and his deceased son Ravindra alias Bhausahab were also living in this house. The agricultural land of Dagdu Pawar, father of Appellant Shrawan, is situated adjacent to the land of Shridhar. At the relevant time, Dagdu Pawar was living in his house with Appellant, other son Ganesh and wife Mainabai. On north side of these two houses, there is Devgaon Saoundala cart road. One footpath starts from the house of Shridhar and it meets Devgaon Soundala road after passing by the side house of Dagdu Pawar. Deceased Bhausahab was using this footpath for going to his college on bicycle.

Other members of the family of Shridhar were also using this road for approaching Devgaon Soundala road.

(b) On the previous day of incident i.e. on 10.9.2006 Bhausaheb was intercepted on this road by Appellant and his father and they said that Bhausaheb should not use this road. They gave threat to teach lesson to Bhausaheb on the next morning. This incident of evening was narrated by Bhausaheb to his parents after reaching home.

(c) The incident took place on 11.9.2006 at about 8 to 8.15 a.m. As the Cri. Appeal No. 648/09 3 tire of bicycle of Bhausaheb was in punctured condition, he started on foot for college at about 8 a.m. When Bhausaheb was proceeding towards Devgaon Soundala road by using the disputed road, Sumanbai, mother of deceased was present on the terrace of the house. Sumanbai noticed that the Appellant, his father and brother Ganesh had intercepted the deceased. Sumanbai rushed to her husband and she told about this incident to Shridhar. Shridhar and Sumanbai started on motorcycle for the spot and they reached spot within no time. Housabai, mother of Shridhar, started for the spot on foot.

(d) After reaching of Shridhar and Sumanbai to the spot, Dagdu Pawar, his wife, Appellant and other son of Dagdu Pawar namely Ganesh started quarreling with Shridhar and his family members. Accused and the other persons of his house started rushing at Bhausaheb and they were holding weapons like sword, iron bar and stick. Appellant/accused was holding a sword which was small and it was looking like Gupti. Ganesh was holding iron bar and Dagdu was holding stick. Kiran Shinde and Kabir Sayyed were studying in the college of deceased and while proceeding towards college, they noticed that quarrel was going on by the side of Devgaon Soundala road. They learnt about the reason behind the quarrel. Dagdu Pawar and his two sons then attacked Shridhar, deceased and wife of Shridhar by using aforesaid weapons. When they were attacking, they were saying that they would not allow Cri. Appeal No. 648/09 4 the family of Shridhar to use the disputed approach road. Shrawan used the sword against Bhausaheb, Shridhar and Sumanbai. Blows of sword were mainly given to Bhausaheb. One blow of sword was given on the head of Shridhar and one blow of the sword hit on right hand of Sumanbai. When Kiran Shinde and Kabir Sayyed tried to intervene in the incident, the Appellant gave blow of sword on the right hand of Kiran Shinde. Dagdu Pawar gave blow of stick on the head of Kabir. Accused Ganesh gave blow of iron bar on the hands of Sumanbai and her bangles were broken in the incident. Dagdu Pawar gave blows of stick to Shridhar and his wife. Bhausaheb sustained bleeding injury below shoulder bone, in the chest due to use of sword. Bhausaheb sustained one more injury on his hand. Sumanbai and Shridhar also sustained bleeding injuries.

(e) Bhausaheb, Shridhar and Sumanbai were first taken to a dispensary from Kukana and from there they were taken to Surya Hospital at Ahmednagar. On the way to Ahmednagar, Bhausaheb disclosed the incident of assault and previous incident to the persons who were present in the jeep and he gave the

names of Dagdu Pawar and his two sons as assailants. Bhausaheb succumbed to injuries on the way to Ahmednagar.

(f) After the death of Bhausaheb, Kiran Shinde gave report to A.S.I. Devdhe who was attached to Newasa Police Station. Crime No. 160/2006 came to be registered for the offences punishable under Sections 302, 307, 504, 506 and 34 of IPC. Police Inspector Khandagale took over the investigation on the same day. Khandagale visited spot of offence and he prepared spot panchanama in presence of two panch witnesses. One motorcycle bearing No. MH17/ Q8468 was present on the spot and it was told that the motorcycle belonged to deceased. There was blood on the ground and there was blood on the motorcycle. One stick and iron bar having blood stains were lying on the spot. There were green pieces of bangles lying on the spot. There were two white buttons and there was piece of collar of white shirt. All these articles came to be seized under panchanama. The spot is situated right at the point where the approach road meets Davgaon Soundala road. The distance between the house of accused and the spot of offence was noted as one furlong and the distance between the house of deceased and spot of incident was noted as two furlongs.

(g) Post mortem examination of the dead body came to be done on the same day. Doctor gave opinion that the death took place due to injuries sustained on the chest and it had cut left lung. Injury certificates in respect of other injured persons like Shridhar, his wife and Kiran Shinde came to be collected during the course of investigation. The clothes of deceased, clothes of injured persons and the clothes of Cri. Appeal No. 648/09 6 Appellant/accused and his brother came to be seized. Khandagale recorded statements of eye witnesses. While in police custody Appellant Shravan gave the statement that he had concealed the weapon, sword in the heap of fodder which was lying in his field. Appellant took police and pinches to the spot, but the heap of fodder was found to be burnt by somebody. From the heap of ash which was lying on the spot, a sword came to be recovered and it came to be seized under panchanama. Khandagale arranged for preparing the map of scene of offence by writing a letter to revenue authority. Khandagale arranged to send all the articles seized during investigation and blood samples of deceased and accused to C. A. Office. After completion of the investigation Khandagale filed chargesheet against Dagdu Pawar, his two sons and his wife in the Court of Judicial Magistrate, First Class, Newasa.

(h) The J.M.F.C. committed the case to the Sessions Court, Ahmednagar. The District Judge 2, Shrirampur framed charge against the accused. Plea of the accused came to be recorded. All the accused persons pleaded not guilty. The prosecution examined in all 17 witnesses. The statements of all the accused came to be recorded u/s 313 of Code of Criminal Procedure (Code of Criminal Procedure). The accused took the defense that the family of Shridhar Dhumal was committing theft of electricity from connection taken by Dagdu Pawar on his well and when it was expressed that report will be given to police, the family of Shridhar Cri. Appeal No. 648/09 7 became angry. The accused took the defence

that at the time of incident Shridhar and his family members and four friends of deceased like Kiran Shinde, Kabir Sayyed, Ankush Wagh and Santosh came to the house of Dagdu and they started quarrel. It is the case of the defence that initially Shrawan was not at home as he had already left the home for shoe shop situated at the distance of 3 k.m. It is contended that due to fear of the aforesaid persons Dagdu Pawar and others started proceedings towards Devgaon Soundala road. It is contended that on the way they came across Shrawan who was called by Ganesh and who had started for home. It is contended that the deceased was holding a Gupti and he attacked Shrawan. It is contended that to save himself, Shrawan held the sword with his two hands and the scuffle started. It is contended that there was pushing and pulling between Shrawan and deceased and in that incident, the weapon caused injury to Bhausaheb. The accused contended that after this incident they directly went to Kukana outpost.

For defence, Dr. Sanap came to be examined for giving evidence on the nature of injuries sustained by the Appellant and for giving evidence in respect of injuries sustained by deceased which are mentioned above.

(i) The Trial Court has held that the offence committed by the Appellant Shrawan falls u/s 300(3) of IPC and so he is convicted and sentenced for the offence punishable u/s 302 of IPC. The Appellant is also convicted and sentenced for the offence Cri. Appeal No. 648/09 8 punishable u/s 324 read with 34 of IPC as other persons were also injured.

3. The advocate of the Appellant did not dispute that the conviction given for the offence punishable u/s 324 read with 34 of IPC is sustainable. Dagdu and Ganesh are also convicted for the offence punishable u/s 324 read with 34 of IPC by the Trial Court and they are released on executing bond of good behavior. In the appeal it was submitted for Appellant that the prosecution evidence is not sufficient to infer that there was intention to commit murder of Bhausaheb. It was submitted that the evidence given by witnesses show that there was scuffle and there are also the circumstances to create the probability that Appellant was exercising his right of private defence. It was submitted that there was no intention to murder Bhausaheb and the injury in question was also not intentionally caused. It was submitted that if the Court comes to the conclusion that there was no exercise of right of private defence, on the basis of evidence, scuffle can be inferred and the Appellant can be convicted and sentenced for an offence punishable u/s 304 Part-II of IPC. The attention of this Court was drawn to the written say given by the accused along with the statements u/s 313 of Code of Criminal Procedure in the Trial Court. The attention of this Court was also drawn to the suggestions given to the eye witnesses in this regard for the defence.

4. From the suggestions given by witnesses, the say given in writing by the accused persons in Trial Court and the submissions made in this Court for Appellant, it appears that the Appellant is not disputing that the vital injury that caused the death of Bhaurao was caused due to weapon like sword. Doctor

Ingale, PW 9, conducted the post mortem (PM) examination of the dead body of Bhaurao and he has given evidence to prove the PM report. There is also the evidence given through the panch witness, PW 1, to prove the inquest panchanama. The evidence of two witnesses is at Exhs. 39 and 74 respectively. The inquest panchanama is at Exh. 40 and the PM report is at Exh. 75. This evidence shows that there was injury near left shoulder and also over right palm. Injury No. 1 found near left shoulder which was on the chest, had cut left lung as it's depth was 5 inches. Portion of lung up to length of 4 inches was cut and lung had collapsed. Doctor has given evidence that such injury can be caused by weapon like sword, Article No. 15. Doctor has given evidence that injury found on right hand can be caused by hard and blunt object. Doctor has given evidence that external injury No. 1 coupled with vital injury caused to the lung caused the death. There is extensive cross examination of the Doctor and suggestions are given to almost all the witnesses to suggest that Bhaurao could have been saved, if proper treatment was given. Doctor has denied the suggestion. Though Dr. Kolte, who is relative of deceased, has not given Cri. Appeal No. 648/09 10 his clear opinion on this point, in view of the provisions of law, such defence is not available to the Appellant/accused. Dr. Kolte had no opportunity to see the internal injury.

5. Attention of this Court was drawn by the State to the explanation (2) of Section 299, IPC. Explanation (2) reads as under:

Explanation 2. Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented

In the present case injury No. 1 mentioned in the PM report caused the death and the doctor has given evidence that there was no possibility of saving of deceased. Bhaurao died due to this injury on the same day and so this injury was proximate cause of death. In view of aforesaid explanation, the probabilities that better medical treatment was not available or such medical treatment was not given, do not affect the nature of offence. Thus, when a person causes injury which results in death without intervention of other cause, such person is deemed to have caused the death. The defence of the Appellant/accused that there was scuffle, can be considered after ascertaining nature of death. The degree of criminal responsibility would depend upon the knowledge or intention which can be gathered from the proved facts. In view of the aforesaid evidence and position of law, this Court has no hesitation to Cri. Appeal No. 648/09 11 hold that Bhaurao died homicidal death. Thus the Trial Court has not committed any error in holding that the death of Bhaurao is homicidal.

Only the proof of homicidal death is not sufficient for prosecution for getting punishment u/s 302 of IPC and the prosecution is further required to prove that it is the Appellant/accused who caused injury and the case falls u/s 300 of IPC.

6. Advocate of the Appellant argued in respect of other surrounding circumstances. It was submitted that prosecution has suppressed genesis and origin of occurrence and true version is not presented before the Court. It was submitted that eye witnesses have admitted that there was dispute/quarrel and there was virtually scuffle. It was also submitted that the incident took place near the house of accused and the accused also sustained injuries on both his hands and so inference of exercise of right of private defence can be drawn in favour of the Appellant/accused. It was submitted that injuries found on the hands of Appellant are not explained by prosecution. It was submitted that in view of the circumstances, probability is created in favour of Appellant and the case at the most may fall under either exception (2) or exception (4) of Section 300 of IPC. On this point, case reported in Lakshmi Singh and Others Vs. State of Bihar, in the case of Lakshmi Singh and Ors. v. State of Bihar was cited for the Appellant. In view of the facts of this reported case which show that the prosecution case was doubted and there was a Cri. Appeal No. 648/09 12 probability that genesis and origin of occurrence was suppressed, the accused were acquitted. On the other hand, the prosecution has relied on two cases reported in Dharminder and Durga Nand Vs. State of Himachal Pradesh, . and (2006) 3 Mah.L.R. 862 (SC) in the case of Arun Nivalaji More v. State of Maharashtra. In the first case, the Apex Court has observed that only because injuries found on the person of accused are not explained, the prosecution case cannot fail. The Apex Court has observed that in criminal case all the relevant circumstances need to be considered by the Court. In the second case, the Apex Court has observed that only due to circumstance that a single injury was inflicted by a dangerous weapon the case against the accused cannot be brought u/s 304 Part-I or 304 Part-II of IPC and in such cases other relevant circumstances need to be kept in mind. These observations were made in view of the facts of the reported cases and there cannot be dispute about the proposition made by the Hon''ble Apex Court.

7. Before appreciating the prosecution evidence and considering the probability suggested for defence, it is necessary to consider the general position of law in this regard. It is already observed that after proving the fact of homicide, the prosecution is required to prove other ingredients of the offence of murder. In Indian Penal Code the homicides in the cases like present one are classified in two categories. The definition of "culpable homicide" is given in Section 299 of IPC and murder it is Cri. Appeal No. 648/09 13 defined in Section 300 of IPC. The two sections run as under:

299. Culpable homicide. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Explanation 1. A person who causes bodily injury to another who is laboring under a disorder, disease or bodily infirmity, and thereby accelerates the death of

that other, shall be deemed to have caused his death.

Explanation 2. Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3. The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

300. Murder. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by Cri. Appeal No. 648/09 14 which the death is caused is done with the intention of causing death, or 2ndly.

If it is 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. or 3rdly.

If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or 4thly.

If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1....

Exception 2. Culpable homicide is not murder if the offender in the exercise in good faith of the right of private defence or person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3....

Exception 4. Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation. It is immaterial in such cases which party offers the provocation or commits the first assault.

The offence of murder is made punishable u/s 302 of IPC and the offence of culpable homicide is made punishable u/s 304 of IPC. These two provisions run as under:

302. Punishment for murder. Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.

304. Punishment for culpable homicide not amounting to murder. Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

Section 304 of IPC shows that it has two parts. If the prosecution is able to prove the "intention", the offence will fall under part I and if "knowledge" can be gathered from material on the record the offence will fall under part II of Section 304 of IPC. The categorization of the homicides this way is made by Hon'ble Apex Court in the case reported as Madhu Limaye Vs. The State of Maharashtra, . The Apex Court has compared aforesaid two definitions and also Sections 302 and 304 of IPC. The Apex Court has observed that due to aforesaid definitions all murders are culpable homicides, but all culpable homicides are not murders. It is observed that culpable homicide is genus and the murder is species and unless special characteristic of murder mentioned in Section 300 are established, culpable homicide cannot amount to murder. It is further observed that proportionate to the gravity of culpable homicide in Sections 302 and 304 of IPC, three degrees of culpable homicide can be found viz.

(a) culpable homicide of the first degree: the gravest form of culpable homicide which is defined in Section 300 as murder,

(b) second degree of culpable homicide punishable u/s 304 I, and

(c) third degree of culpable homicide which is lowest type of culpable homicide and which is punishable with lowest sentence as given in Section 304 Part-II of IPC.

The aforesaid provisions of IPC and the observations made by the Apex Court show that it is the duty of the Court to see whether special characteristic or elements mentioned in Section 300 to constitute the offence of murder exists. For this purpose, burden is not on defence to show that it's case comes under the exceptions mentioned in Section 300 of IPC.

8. For giving benefit of exception No. 2 of Section 300, the ingredients of Section 96 and 97 of IPC need to first exist. Further, this right of private defence is subject to the restrictions mentioned in Section 99 of IPC. The relevant provisions run as under:

96. Things done in private defence. Nothing is an offence which is done in the exercise of the right of private defence.

97. Right of private defence of the body and of property. Every person has a right, subject to the restrictions contained in Section 99, to defend

First. His own body, and the body of any other person, against any offence affecting the human body;

Secondly. The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

99....

Extent to which the right may be exercised. The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

9. The combined effect of aforesaid three sections with regard to the exercise of right of private defence is that for taking a life of a person on the plea of private defence, four conditions must be satisfied, like:

- (a) The accused must be free from fault in brining about the encounter,
- (b) There must be present impending peril to the life or create actual harm either real or apparent as to create honest belief of existing necessity,
- (c) There must be no safe or reasonable mode of escape by retreat, and (d) There must have been a necessity of taking life.

10. After satisfying above four conditions i.e. if the material on record shows that the right of private defence was there and probability is created that the right was exceeded, then exception No. 2 to Section 300 of IPC comes in to play. In view of the wording of exception No. 2 of Section 300, it is necessary to show that accused caused death, (i) without premeditation and (ii) there was no intention of accused to cause more harm then was necessary for defence, even if infact he caused more harm that was not necessary for the purpose of defence.

11. Exception No. 4 to Section 300 shows that three conditions must be satisfied for using this exception and they are:

- (a) sudden fight,
- (b) absence of premeditation, and
- (c) no undue advantage or cruelty.

12. In the cases reported as (1) : Jumman and Others Vs. The State of Punjab, and Indubhai Ambalal Patel and Others Vs. State of Andhra Pradesh, the Apex Court has discussed both the aforesaid exceptions. If the aforesaid exceptions

are considered together, it can be said that if sudden fight develops and there is no reliable evidence to show that as to how it started and as to who was aggressor, the plea of private defence on other side cannot be permitted and the case must be dealt with as under exception No. 4 of Section 300 of IPC.

13. In view of the discussion of law made above, in the present case, the evidence of spot panchanama needs to be considered first. It is the case of the prosecution that there was dispute over use of road which passes by the side of house of accused. The defence has suggested other motive. Babasaheb (PW 2), a panch witness, has given evidence at Exh. 41 that spot of offence is situated near Devgaon Soundala road and it is on Bandh of Gat No. 506 of Devgaon. Two weapons like stick and iron bar (Article 1 and 2) stained with blood were lying on the spot. The panch witness has given evidence that the motorcycle of deceased bearing No. MH17/Q8468 was present on the spot and there were blood stains on the motorcycle. He has deposed that there were pieces of green bangles and police took over all the articles along with earth mixed with blood. He has given evidence that the spot of offence is situated at the distance of 1 k.m. from tar road and after this tar road, the bullock cart road starts. The witness has given evidence that the house of accused is situated at the distance of one furlong from the spot of Cri. Appeal No. 648/09 21 incident and house of deceased is situated at the distance of one and half to two furlongs from the spot. The witness has given evidence that there is another road from the house of accused directly leading to the main road and so two roads start from the house of deceased. The witness has admitted that the spot of offence lies in the land of accused. There is also evidence of Investigating Officer Khandagale on the spot panchanama and panchanama is duly proved as Exh. 42.

14. Exh. 42 shows that foot path starts from the house of deceased and it goes towards Devgaon Soundala road after crossing the house of accused. It also shows that the family of Shridhar has created a separate cart way from their house which directly goes to Devgaon Soundala road. The 7/12 extract produced at Exh. 107 is of land Gat No. 506 situated at Devgaon. The wife of Shridhar has share of 83 R. portion and the family of Dagdu (accused) has share of 1.68 H. portion in the said land. One Munir has also share in this property. The 7/12 extract shows that the family of deceased and Munir have together taken a new bore well in the land (in the year 2001). The 7/12 extract further shows that both these families had taken sugarcane and other crops in their respective portions in 2006/2007.

15. The judgment delivered by the Trial Court shows that the Presiding Officer did the spot inspection in presence of advocates of Cri. Appeal No. 648/09 22 both the sides. At Exh. 151 there are notes of spot inspection. If this document is compared with the aforesaid evidence of spot panchanama, it can be said that the document is not consistent on many points with Exh. 42. As Exh. 151 was prepared by the Court in the presence of APP and defence counsel, necessary importance needs to be given to this document. In Exh. 151 map of road starting

from the house of deceased is shown. Only one road is shown in Exh. 151 which can be used as cart way and it starts from the house of deceased and it is described as "Shivacha Kachha Road". It goes towards main road, but the distance between this road and house of accused is shown to be long. The spot of offence is shown by side of this road and the road takes a turn for reaching the main road. Devgaon Soundala road is shown as tar road in Exh. 151. Thus, only one road is in existence which starts from the house of deceased. The suggestions given to the prosecution witnesses for defence also show that they are not disputing that the family of Shridhar has the right to use this road and this road is being used by almost all villagers including the adjacent land holders. There is not much dispute about the spot of offence shown at Exh. 151 which shows that it is situated at some distance from the house of accused and it is also situated at more distance from the house of deceased.

16. Shridhar alias Shirish (PW 5), the father of deceased is examined at Exh. 59, Shinde (PW 2) is examined at Exh. 47 and Sayyed is examined Cri. Appeal No. 648/09 23 at Exh. 48 by prosecution. The mother of deceased Sumanbai who was also eye witness according to the prosecution is not examined.

17. Shridhar (PW 5) has given evidence that he and members of his family have been using the disputed road, but the family of the accused created dispute over it. He has deposed that Dagdu, father of Appellant and other members of family of Dagdu were giving abuses to them to prevent them from using this road. He has deposed that on previous day of incident at about 5.30 p.m. deceased Bhausaheb disclosed to him that Dagdu and Appellant had threatened him to teach him a lesson on the next morning as he was using the disputed road. He has deposed that the incident took place on 11.9.2006 and on that day deceased left home at about 8 to 8.15 a.m. by foot to college. He has deposed that on that day deceased did not use bicycle as a tire of the bicycle was in punctured condition. Shridhar has deposed that his wife Sumanbai was watching from the terrace of the house and she saw that Dagdu, his two sons and the wife of Dagdu had intercepted and stopped the deceased near their field in which cotton crop was standing. He has deposed that he and Sumanbai immediately went to the spot on their motorcycle. He has deposed that after reaching the spot, Dagdu and members of his family started abusing them in loud voice and they started questioning as to why the deceased was using the disputed road. Shridhar has deposed that Appellant Shrawan was holding a Gupti like sword, Ganesh was Cri. Appeal No. 648/09 24 holding iron pipe and Dagdu was holding a stick. He has deposed that all the accused started assaulting them. He has deposed that in the meantime two friends of deceased viz. Shinde and Sayyed came there. He has deposed that Appellant Shrawan gave blows of Gupti like sword to deceased. He has deposed that Shrawan gave a blow of this weapon on his head and blow of this weapon hit Sumanbai on her hand.

18. Shridhar (PW 5) has further deposed that his wife sustained cut injury on her hand, he sustained injury over his head and Bhausaheb fell down due to the

injuries sustained by him. He has deposed that after inflicting such injuries accused left the spot. He has given evidence that he and other injured were taken to Devgaon, then to Kukana and then to Ahmenagar for treatment. He has deposed that from hospital of Ahmednagar he returned to the village in the evening, but he and his wife were again admitted in the same hospital for few days. He has deposed that the clothes of injured were produced before the police. He has identified the weapons produced in the Court as muddemal property. He has described the clothes of Appellant/accused which were on person of the accused and he has identified these clothes in the Court.

19. In the cross examination Shridhar (PW 5) has admitted that the disputed "Shivacha Road" shown in Exh. 151 is used by all the adjacent Cri. Appeal No. 648/09 25 land owners. He has admitted that his Vasti (house) is situated at the distance of half k.m. from the house of accused and the spot of offence is situated at the distance of 1500 to 2000 fts. from his own house. He has deposed that his house is not visible from the spot of offence. Investigating Officer Khandagale has given evidence that the distance between the two houses is around one furlong and then there is a spot of offence. Though the evidence of Investigating Officer shows that he referred the matter to revenue authority for preparing the map of scene of offence, the map is not produced in the Court. In Exh. 151 also the Presiding Officer of the Trial Court has not mentioned the distance between the spot of offence and house of accused on one hand and the distance between the spot of offence and the house of deceased on the other. Sumanbai is not examined when Shridhar has tried to say that after learning about the starting of incident he left home with Sumanbai. In view of this circumstances, and admissions given by Shridhar (PW 5) in his cross examination, it does not look probable that Sumanbai was keeping watch or she was in a position to see the spot of offence from the terrace of her house. Thus, the evidence given by the prosecution on the point of starting of incident is doubtful in nature. The evidence on reason, motive for incident is also not convincing.

20. Kiran Shinde (PW 3), a friend of deceased, has given evidence that he and Sayyed (PW 2) were proceeding towards college on their Cri. Appeal No. 648/09 26 respective bicycles from village Devgaon side and they reached the spot of offence at about 8 to 8.15 a.m. He has deposed that he noticed that quarrel was going on between the members of family of Dagdu Pawar and the members of family of deceased. He has deposed that there was dispute over the use of road by the family of Shridhar and Dagdu was disputing the right of Shridhar to use this road. Kiran has deposed that initial verbal exchanges culminated into scuffle. He has deposed that accused Shrawan was holding a Gupti and with this Gupti Shrawan assaulted deceased Bhausahab and parents of deceased. He has deposed that when he tried to intervene, he sustained blow of Gupti. He has deposed that Shrawan inflicted injuries on the shoulder, chest and other parts of the body of deceased. He has deposed that Sumanbai sustained injuries to her fingers. He has deposed that he and the deceased were taken in one jeep to

Aurangabad and then they were taken to Civil Hospital. In his evidence, the report at Exh. 48 given by him to police is proved. He has identified the weapons. If the report given by Kiran is compared with his substantive evidence, it can be said that the report is consistent with the substantive evidence on material points. It categorically states that Shrawan/accused No. 2 had used the dangerous weapon in the incident against the deceased.

21. Sayyed (PW 4), other friend of deceased, has given similar evidence. He has specifically stated that Shrawan assaulted on the chest Cri. Appeal No. 648/09 27 of deceased near the shoulder and Shrawan inflicted injuries on the other part of body also by using Gupti. He has given evidence that Shrawan used Gupti against Sumanbai also. In cross examination, he has said that three blows of Gupti were given to deceased by Shrawan. This evidence of Kiran and Sayyed is consistent with the evidence given by Shridhar on material points, though there is exaggeration in respect of number of blows given by Appellant.

22. The prosecution wanted to prove that Bhausahab gave dying declaration when he was being taken in the jeep to Ahmednagar. Kiran Shinde (PW 3) has stated in his evidence that he was present in the same jeep. Kiran has not given such evidence and there is no mention of any dying declaration in the report at Exh. 48. Sayyed has tried to give such evidence. It can be said that the prosecution wanted to create the evidence on motive. Dr. Kolte (PW 13) and Shaikh (PW 14) have given evidence that there was such dying declaration given by deceased. There is no convincing medical evidence on the condition of the deceased, when he was being taken to Ahmednagar. The aforesaid medical evidence shows that the left lung of deceased had collapsed and there was haemothorax. No medical evidence is brought on record to create probability that the deceased was in a position to utter any word or he was conscious. The deceased was taken to two other places prior to shifting him to Ahmednagar and in view of these circumstances, it does Cri. Appeal No. 648/09 28 not look probable that the deceased was conscious or he was in a position to speak. In view of these circumstances, this Court holds that the evidence of so called dying declaration of Bhausahab is not reliable. The Trial Court has accepted this evidence against the accused and so the Trial Court has committed error in this regard.

23. Baban Gilbile (PW 6) is examined at Exh. 61 to prove the statement given by the accused Shrawan with regard to concealment of weapon by him. The witness has given evidence that as per the statement, the weapon was concealed in the heap of fodder, which was in the field of accused. The evidence shows that there was no such heap in existence and somebody had set on fire the heap of fodder. There was only heap of ash. The witness has tried to say that the sword like Gupti (Article 15) was recovered from the heap of ash. The memorandum of statement is proved which is at Exh. 62. C.A. report in respect of weapon shows that no blood was detected on the weapon (Exh. 62A). No more discussion is necessary in respect of this part of evidence as the defence has admitted that

sharp weapon caused fatal injury to deceased Bhausahab. Even if the evidence on the point of discovery of weapon is ignored, due to the defence taken by Appellant, it can be inferred that sharp weapon like sword cum Gupti was used.

24. Dr. Kardile (PW 7) is examined at Exh. 67. Doctor has given Cri. Appeal No. 648/09 29 evidence that he examined witness Kiran and Sayyed on 12.9.2006 in between 10.30 a.m. and 11.30 a.m. He has deposed that one contusion over right forearm, one CLW over left forearm and multiple abrasions on face and upper limbs of Kiran were found. He has deposed that one CLW over temporal region and abrasions over back and chest of Sayyed were found. The injury certificates are proved as Exhs. 68 and 69. This evidence corroborates the version of Kiran and Sayyed that they were present on the spot of incident at the relevant time. The defence has also not disputed the presence of these two persons on the spot at the relevant time. Further at Exh. 70 there is one more certificate issued by General Hospital Ahmednagar in respect of injuries found on the person of Kiran and it is dated 11.9.2006. The age of injury is shown as within 12 hours and the injury was caused by hard and blunt object. Though no injury was caused by sharp weapon like Gupti, in view of defence taken by accused, not much can be made out due to this discrepancy.

25. Dr. Prasanna (PW 8) is examined at Exh. 71. This doctor was working in private hospital i.e. Surya Hospital at Ahmednagar. He has deposed that he examined Shridhar (Shirish) at about 10.30 a.m. on 11.9.2006 and he found one CLW on occipital region, of size 5 x 5 x 2 c.m. and one CLW over left hand at wrist of the size 1 x 1 x 1/2 c.m. The injury certificate is proved as Exh. 72. Doctor has given evidence that on the same day he examined Sumanbai and he found one CLW on the right Cri. Appeal No. 648/09 30 palm of size 7 x 2 c.m. and there was fracture dislocation of distant IB joint of right index finger. He has deposed that there were multiple abrasions on the left palm. The injury certificate is at Exh. 73 and is consistent with the oral evidence. He has given evidence that the injuries found on the persons of Shridhar and Sumanbai can be caused by weapon like Gupti. The presence of these two witnesses on the spot at the relevant time is not disputed by the defence. The conviction for offence punishable u/s 324 read with 34 of IPC is also not challenged. So there is no need to discuss more evidence with regard to medical examination of these two person.

26. The defence has brought on record injury certificate in respect of Shrawan as Exh. 76A, injury certificate in respect of Ganesh is also brought on record. These injury certificates were issued by General Hospital, Ahmednagar. Though the Doctor is not examined, the Trial Court has given exhibits to the two certificates and Investigating Officer has admitted that as Shrawan had sustained such injuries he was referred to Government Hospital. The certificate shows that injuries were present on palms of both hands of Shrawan and Doctor described it as scratches. The cause is shown as sharp and pointed object. The presence of Shrawan on the spot is not disputed though the defence is taken that he came to

the spot subsequently. The defence taken is that Shrawan attempted to hold weapon when deceased attempted to give blow of this Cri. Appeal No. 648/09 31 weapon to Shrawan. The defence has examined Dr. Sanap and he has deposed that such injuries can be caused by Gupti like Artilec 15. The weapon has shape of sword, but it has less width and less length and so it is described as Gupti.

27. Evidence is given by Kardile (PW 10), panch witness at Exh. 79 that clothes of accused No. 1 Ganesh and clothes of accused No. 2 Shrawan were seized by police in his presence and there were blood stains on the clothes. The presence of Ganesh on the spot is also not disputed. The shirt of Ganesh is of white colour and one button of the shirt is not in the place. The collar portion is found to be in torn condition. In the spot panchanama, Exh. 42, it is mentioned that such piece of cloth and two white buttons of shirt were found on the spot. The panchanama at exh.81 is consistent with the evidence given by Kardile and Investigating Officer.

28. The defence has brought on record that the accused persons had gone to Kukana out post and they were arrested there by police. The injury certificates in respect of Shrawan and Ganesh show that they were referred to Government Hospital by police and they were examined between 1.10 p.m. and 1.30 p.m. on 11.9.2006. The arrest panchanamas which are at Exhs. 94 and 96 were prepared subsequently. These circumstances show that the accused had gone to out post of Kukana Cri. Appeal No. 648/09 32 directly and they were not absconding. The Investigating Officer has given evidence in cross examination that separate crime was registered against some of the villagers in Newasa Police Station on the allegation that the villagers had set on fire the Vasti and fodder of the accused and also electric motor and cattle shed ect. These circumstances create probability that to save themselves from the mob, the accused had gone to police on their own after the incident. In view of these circumstances, necessary importance needs to be given to the panchanamas of seizure of clothes of accused Shrawan and Ganesh and to the spot panchanama. They also show that there was no scope to accused to deny the incident.

29. The prosecution has given evidence of Pokle (PW 2) and Police Officer Devdhe (PW 12) to prove the seizure of clothes of deceased. The documents at Exh. 43 shows that there was tear near the left shoulder of the shirt of deceased. Evidence is given by PW 15 Khandagale that blood samples of accused Shrawan and deceased were sent to C.A. Office along with all aforesaid articles. The office copies of forwarding letters are at Exhs. 103 and 109. There is evidence of two carrier constables at Exhs. 125 and 126. This evidence shows that the muddemal property was forwarded to C.A. Office on 19.9.2006 and 6.10.2010. At Exhs. 110 to 114 there are C.A. reports in respect of these articles. There is description of articles at Exhs. 103 and 109. This evidence shows that no blood was detected on the weapon Gupti cum sword. The deceased was having Cri. Appeal No. 648/09 33 blood of group AB and Shrawan is having blood of group B. The blood group AB was detected on the clothes of Shrawan. This evidence needs no more

discussion as Shrawan has come with the defence that there was scuffle and he tried to defend himself.

30. If the aforesaid direct evidence and circumstantial evidence is considered together, inference can be drawn that incident took place at the distance of 2 furlongs from the house of deceased and the spot of offence is situated at the distance of 1 furlong from the house of Shrawan. Though the spot is situated near the approach road, which was in the use of family of deceased, the spot is situated in the field owned by the accused persons. There was motorcycle of family of deceased on the spot of offence. From the side of complainant, there were atleast four adult male persons like Shridhar, Bhausahab, Shinde and Sayyed. The defence has tried to say that two more friends of Bhausahab were present on the spot, but there is nothing on record to create such probability. There is evidence to show that Shridhar and his wife sustained injuries in the incident. Deceased sustained one injury due to dangerous weapon like sword produced in the Court. Shinde (PW 3) has admitted in his evidence that initially there was verbal exchange and then scuffle started. On the side of accused, there were three male persons like Dagdu, Shrawan and Ganesh. The evidence shows that both Shrawan and Ganesh sustained injuries in the incident and Shrawan Cri. Appeal No. 648/09 34 sustained injuries probably due to pointed weapon. Two weapons like stick and iron bar were lying on the spot of offence and the defence has admitted that third weapon was sharp like a sword. Two buttons of white shirt and a piece of collar of white shirt were lying on the spot. The shirt of Ganesh which is shown to be recovered is in torn condition at the same place and it is not having one button at its place. There is no convincing explanation from complainant's side as to why all of them together went to the spot. The evidence on motive viz. the dispute about the use of road does not appear to be probable in nature and the story of prosecution that Sumanbai saw the starting of the incident from the terrace does appear to be true. No books or note books which must have been taken by deceased with him if he was going to the college were found on the spot. Thus, the case of the prosecution that deceased was proceeding to his college does not appear to be probable in nature.

31. The aforesaid circumstances show that the genesis or origin of occurrence is probably suppressed by the prosecution. At about 8 to 8.30 a.m. the members of the families of Shridhar and Dagdu had gathered there and the incident took place in the land of Dagdu. The injuries which were found on the palms and fingers of Shrawan are not explained. In view of the nature of injuries and the incident described by the prosecution witnesses, it was necessary for them to give explanation with regard to injuries found on the person of Shrawan. The accused Cri. Appeal No. 648/09 35 persons directly went to out post and they did not try to run away from police. All these circumstances have created probability that there was scuffle.

32. The case of defence that accused Shrawan was called from his shop by Ganesh also does not appear to be probable. The incident took place at about 8

to 8.30 a.m. and the shop of Shrawan is at the distance of 3 k.m. from the house. It does not look to be probable that Shrawan had left for shop at about 8 a.m. Further, the prosecution has proved that Shrawan used sword cum Gupti in the incident. It does not look probable that after starting of incident and when the complainant's side was giving beating to Dagdu and his family members, Ganesh had left the spot. If deceased was holding Gupti and assault was made on Dagdu and others before arrival of Shrawan, some of them would have sustained injuries due to Gupti, but no such injury was found on persons of Ganesh or father of Shrawan. Due to these circumstances, the defence taken by Appellant/accused does not appear to be probable.

33. The evidence of two friends of deceased shows that they have tried to exaggerate the things by saying that many blows of sword were given to deceased by Shrawan. The medical evidence shows that only one injury was found near left shoulder and it had pierced the chest. The site of injury is very peculiar. The weapon had entered the chest cavity at Cri. Appeal No. 648/09 36 the gap between the second and third rib and it had cut lung and had caused haemothorax. Thus, only one blow of dangerous weapon was given in the scuffle. In the case of Arun More cited for prosecution in respect of single blow, the facts were totally different and there was no scuffle as such. In the present case, on the basis of aforesaid direct evidence and the circumstantial evidence, no inference can be drawn with regard to intention of Appellant to commit murder or intention of causing such injury. Further, if the other accused persons had common intention to cause only simple injuries, it was necessary for the prosecution to show that special characteristic of murder exists in the case filed against Shrawan. In view of the facts of the present case inference can be drawn that there was knowledge to accused No. 2 Shrawan that due to use of such weapon in the incident, he was likely to cause death. As the facts reported in (2006) 3 Mah.L.R. 862 (SC) in the case of Arun Nivalaji More v. State of Maharashtra cited supra are totally different, on the basis of the observations made by the Apex Court in the said case, the Appellant cannot be convicted for offence punishable u/s 302 of IPC. The facts of this reported case shows that the accused had grudge against the deceased as deceased had cancelled the license of accused. The accused had entered the office of deceased with knife. He had waited for opportunity and then he had given blow of knife on the left side of stomach of deceased. In the present case, there is clear probability of scuffle and so such intention Cri. Appeal No. 648/09 37 cannot be inferred in the present case. Only one injury was caused and so it cannot be said that Shrawan took undue advantage or acted in cruel manner. So this Court holds that the case falls under exception No. 4 to Section 300 of IPC and the offence is punishable u/s 304 Part-II of IPC.

34. Both the sides are heard on the point of sentence. For the State, it was submitted that young boy of 22 years was killed in the incident and Shrawan who was running a shoeshop must have knowledge that the use of such dangerous weapon was bound to cause fatal injury. In view of the other record of the

present case and the fact that the property of family of Dagdu was totally burnt there is clear probability that the side of the accused wanted to create fear in the mind of complaint's side.

Only because dangerous weapon was used and the injury has caused the death, the punishment needs to be given u/s 304 Part-II of IPC. The Appellant is from backward class and the record shows that his family had no support in the village. In view of these peculiar circumstances, this Court is of considered view that sentencing the accused Shrawan, with R.I. for seven years and fine would be just and sufficient. The conviction and sentence for the offence punishable u/s 324 read with 34 of IPC needs to be maintained as it is.

(1) So the appeal of Shrawan is partly allowed and the judgment and Cri. Appeal No. 648/09 38 order of the Trial Court convicting and sentencing the Appellant with imprisonment for life for offence punishable u/s 302 of IPC is set aside.

(2) Shrawan stands convicted for the offence punishable u/s 304 Part-II of IPC and he is sentenced to suffer R.I. for seven years and to pay fine of Rs. 5,000/.In default of payment of fine, Shrawan is directed to undergo further R.I. for one year.

(3) The judgment and order of conviction in respect of offence punishable u/s 324 read with 34 of IPC against Shrawan is maintained.

(4) Copy of this judgment is to be supplied free of cost to the Appellant and the information is to be given to Appellant Shrawan about his right to challenge the decision of this Court.