

(2016) 07 BOM CK 0086
In the Bombay High Court
Case No : Criminal Appeal No. 739 of 1996

Tukaram Namdeo Yede

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 13-07-2016

Acts Referred:

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 149, 149, 304, 324, 325

Citation : (2016) 3 AIRBomRCri 804 : (2016) ALLMRCri 4108 : (2016) 4 BomCR(Cri) 721 : (2016) 5 MhLJCrI 612

Hon'ble Judges : A.S. Gadkari, J.

Bench : Single Bench

Advocate : Mr. M.S. Mohite a/w Mr. Ashish Sawant a/w Mr. Vivek Babar, Advocates, for the Appellants; Mr. A.S. Patil, APP, for the State

Final Decision : Partly Allowed

Judgement

A.S. Gadkari, J.(Oral)—The appellants have questioned the correctness of the Judgment and Order dated 10th December 1996, passed in Sessions Case No. 1 of 1992, by the learned Additional Sessions Judge, Baramati, thereby convicting and sentencing them as under:-

i) All the appellants are convicted for the offence punishable under Section 147 of Indian Penal Code and sentence to suffer rigorous imprisonment for six months and to pay fine of Rs. 100/- each, in default of payment of fine to further under go rigorous imprisonment for one month.

ii) All the appellants are also convicted for the offence punishable under section 148 of Indian Penal Code and to suffer rigorous imprisonment for nine months and to pay fine of Rs. 200/- each, in default of payment of fine shall suffer further rigorous imprisonment for two months.

iii) All the appellants are also convicted for the offence punishable under Section 325 read with 149 of Indian Penal Code and each of them is sentenced to suffer

rigorous imprisonment for three years and to pay a fine of Rs. 500/- each, in default of payment of fine to further undergo rigorous imprisonment for nine months.

iv) All the appellants are also convicted for the offence punishable under Section 447 read with 149 of Indian Penal Code and sentenced to suffer rigorous imprisonment for one month and to pay fine of Rs. 100/- each, in default of payment of fine to further undergo rigorous imprisonment for 15 days.

v) The Appellant No. 1 ? Tukaram Namdeo Yede, Appellant No. 3 - Baba Baburao Khomane, Appellant No. 4-Attam Baba Khomane, Appellant No. 8 ? Sampat Bhiva Khomane and Appellant No. 9 ? Soma Maruti Khomane are also convicted under Section 304 Part (II) read with Section 149 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs. 1000/- each, in default of payment of fine to further undergo rigorous imprisonment for six months.

vi) The trial court has directed that all the substantive sentences shall run currently.

By the same Judgment and Order, the Trial Court has acquitted all the Appellants from the offences punishable under Section 302 read with 149 of the Indian Penal Code and under Section 506 read with 149 of the Indian Penal Code.

2. The facts which are relevant and necessary to decide the present appeal enumerated from the record, can briefly be stated as under ;

I) The Appellants and the witnesses including deceased Jayaram Khomane were the residents of village Jalgaon-Supe, Taluka Baramati, District - Pune. That there was a dispute between the Appellants headed by Appellant No. 1 Tukaram Yede on one hand and Shantaram Jayram Khomane (PW No. 1) on the other hand, over the possession of piece or parcel of land bearing Gut No. 29 lying and situated at village Jalgaon-Supe. That the said filed was originally belonged to Shri Abu Rama Khomane, who expired on 24.9.1988. It further reveals from the record that during the life time of said Shri Abu Rama Khomane and his wife Smt. Dhanabai, Jayram Khomane (deceased) and his son Shantaram (PW No. 1) were cultivating the said land bearing Gut No. 29 on behalf of the said landlord. The said landlord Shri Abu Rama Khomane was not having any issues and expired intestate. That Smt. Dhanabai after the demise of her husband used to reside with the informant Shantaram (PW No. 1) and his father and therefore the complainant/informant and his father continued to cultivate the land on behalf of Smt. Dhanabai. It is the prosecution case that the Appellant No. 1, Tukaram Yede was having ill motive and with a view to grab the said land, he purportedly produced one "Will-Deed" dated 20.1.1981, allegedly executed by deceased Abu Rama Khomane and claimed ownership over the said disputed land, even to the exclusion of the wife of the deceased namely Smt. Dhanabai Abu Khomane.

II) The Appellant No. 1 filed a civil suit bearing R.C.S. No. 335 of 1989, in the

Court of Joint Civil Judge, Junior Division, Baramati for declaration of possession and injunction. In the said suit, the Appellant No. 1 Tukaram Yede also filed an Application below Exh. 5 seeking temporary injunction against the said Shantaram Jayram Khomane and others. It further reveals from the record that status quo order was passed by the learned Joint Civil Judge, Junior Division, Baramati, in the Application below Exh. 5. That after hearing the parties to the said Application, the learned Joint Civil Judge, Junior Division, Baramati, passed a final order below Exh. 5 (dated 26th August 1991) and dismissed the said Application, holding that the Appellant No. 1 had failed to prove that he was in possession of the said field bearing Gut No. 29. The Appellant No. 1, thereafter, moved an application for continuation of status quo order and an order of stay upto 12th September 1991, was passed, and the trial court directed the defendants therein i.e. the prosecution witnesses herein to maintain status quo in the said R.C.S. No. 335 of 1989. The record further reveals that the Appellant No. 1 subsequently filed another application for extending the stay and the trial court was pleased to grant stay till 24th September 1991.

III) It is the prosecution case that on the date of incident i.e. 20th September 1991, the Complainant along with his family members was carrying out the operation of sowing at about 12:30 p.m. with a tractor and was accompanied by his father-in-law, namely Jalindar and one Mr. Sunil Thorat (PW No. 5) a photographer. The said Sunil Thorat (PW No. 5) was to take photographs while Shantaram (PW No. 1) was carrying out the sowing operations. That at about 3:30 p.m. the Appellants entered the said Gut No. 29, armed with sticks, stone and cycle chain and started abusing the complainant and his family members. That the Appellants also threatened the complainant and others to remove the tractor from the said Gut No. 29. Due to the said threats/directions given by the Appellants, the driver of the said tractor stopped the tractor. It is the further prosecution case that the complainant and his family members informed the Appellants that the Civil Court has decided the said case in their favour. However, the Appellant No. 1 Tukaram Yede and Appellant No. 2 - Zumbhar Yede rushed towards Shantaram Khomane (PW No. 1) and assaulted him with sticks. Jayaram Khomane fell down on the ground. That thereafter the accused persons assaulted Jayaram Maruti Khomane (deceased) i.e. the father of Shantaram Khomane (PW No. 1). That when the complainants sister Renuka (PW No. 3) tried to intervene in the matter with a view to pacify the fight, she was also assaulted by the accused persons. Shri Jalinder the father-in-law of the complainant was also assaulted. That as per the prosecution case Shantaram Khomane (PW No. 1), Sampat Khomane (P.W. No. 2), Smt Renuka (P.W. No. 3) and Shri Sunil Thorat (P.W. No. 5) were assaulted by the appellants at the said time. Shantaram Khomane (P.W. No. 1) thereafter, lodged the First Information Report with the Baramati Taluka Police Station, which was registered as CR No. 55 of 1991 under Sections 307, 147, 148, 149, 325, 324, 447 and 506 of the Indian Penal Code.

IV) Shri Ashok Kashinath Belwate, Police Sub Inspector was then attached to Baramati Taluka Police Station. He received a wireless message, that at Village

Jalgaon-Supe there was a scuffle and some persons were injured and admitted in S.J. Hospital, Baramati. He immediately went to the said hospital, recorded the statement of Shantaram Khomane (PW No. 1) which was treated as First Information Report. The said First Information Report is at Exh. 31. On the basis of the said First Information Report, Crime bearing No. 55 of 1991 came to be registered. The police officer thereafter conducted investigation. He recorded the statements of various witnesses. During the medical examination of Jayaram Khomane, it was revealed to P.W. No. 8 ? Dr. Mahadeo Swami, that he had suffered an intra-cranial haemorrhage and therefore he was admitted as an indoor patient. The record further discloses that Jayaram, since his admission, was deeply unconscious and succumbed to the said injury on 23rd September 1991. During the course of investigation the investigating officer recovered weapons used in the crime i.e. sticks from accused No. 1 Tukaram Yede and the cycle chain from Appellant No. 3 Baba Khomane by effecting necessary panchanama. After completion of investigation the investigating officer i.e. Ashok Belwate (PW No. 9), submitted charge sheet in the Court of Judicial Magistrate, First Class, Baramati, for the offences punishable under Sections 302, 147, 148 read with 149, 325 read with 149, 447 read with 149 and 506 read with 149 of Indian Penal Code.

V) As the offence punishable under Section 302 of the Indian Penal Code was exclusively triable by the court of Sessions, the learned JMFC, Baramati committed the said case to the Court of Sessions as contemplated under Section 209 of Criminal Procedure Code.

VI) After committal of the said case the learned Trial Court framed charge below Exh. 3. The said charge was read over and explained to the Appellants in vernacular language to which they denied and claim to be tried.

It is the specific defense of the appellants that, they were in physical possession of Gut No. 29 and in furtherance of the order passed by the learned Trial Court in RCS No. 335 of 1989 on 12th September 1991, thereby extending the order of status quo, they continued to remain in possession of the suit land. That Shantaram Khomane (PW No. 1) and his family members under the misconception of fact that the status quo order was vacated, tried to forcibly enter into the said Gut No. 29 and with a view to establish their alleged possession in the said land, they had brought with them a photographer and a tractor. That even after informing the complainant and his family members the fact that the Court has extended the status quo order, when the complainant and his family members tried to forcibly enter into the said field and tried to assault the appellants, the appellants resisted it, while exercising their right of private defense and in the said scuffle, PW No. 1 Shantaram Khomane, PW No. 2 ? Sampat Khomane, PW No. 3 Smt. Renuka and PW No. 5 ? Sunil Thorat received some injuries.

VII) The prosecution in support of its case examined in all 10 witness. The Trial Court after recording the evidence and after the hearing parties to the said case

was pleased to convict the appellants by its Judgment and Order dated 10.12.1996 as stated herein above.

3. Heard Mr. M.S. Mohite the learned counsel appearing for the appellants and Mr. A. S. Patil the learned APP for the State and with their able assistance, I have also perused the entire record made available before me.

4. Mr. Mohite appearing for the appellants submitted that it is the fact established on record that there was a dispute going on between the Appellants on one side and Shantaram Khomane (PW No. 1) and his family members, on the other hand over the piece of land bearing Gut No. 29. That the Appellant had filed Suit bearing R.C.S. No. 335 of 1989 and in pursuance of the application filed below Exh. 5, a status quo order was in force on the date of incident, i.e. the Appellants were in possession of the said piece of land. In utter violation of the status quo order the informant Shantaram Khomane (PW No. 1) along with his other family members tried to forcibly enter into the said land with a view to create a scene that they were in possession and i.e. a reason they along with them brought a tractor and a photographer namely Sunil Thorat (PW No. 5). He further submitted that despite informing the fact to the informant and his family members that there was an order passed in the Civil Suit which was in force, the complainant and his family members tried to over power the appellants and in exercise of the right of the private defense, the Appellants have resisted the attack of the PW ? 1 and his family members. He submitted that the weapons in the alleged crime, namely sticks and stones which are the gadgets available in any field in the State. He further submitted that the evidence on record would demonstrate that the death of Jayram Maruti Khomane was caused due to a fall from the tractor and the Appellant Nos. A-1, A-3, A-4, A-8 and A-9 are not responsible for the said death. He submitted that the said Jayram Khomane allegedly received injury on 20th September 1991 and expired in the hospital on 23.09.1991. That there was no external injury caused to the said deceased and therefore it cannot be held that the Appellant Nos. 1, 3, 4, 8 and 9 are in any way responsible for an offence as contemplated under Section 304 (II) of the Indian Penal Code. He submitted that the prosecution has failed to examine independent witnesses who were working in the adjoining fields at the relevant time. That though the photographer (PW No. 5) in his testimony has stated that he had taken photographs of the scene of the spot of incident, no photographs were produced before the Court. He further submitted that the offence under Section 325 of Indian Penal code is not at all made out as the doctor (PW No. 8) has failed to produced the x-ray plate and/or x-ray film, at the time of recording of evidence and merely on the basis of presumption or a general statement made by PW No. 8, the appellants cannot be convicted under section 325 of the Indian Penal Code. He lastly submitted that the present appeal may be allowed and the appellants may be acquitted from the offences charged against them.

5. The learned APP, per contra opposed the present appeal and submitted that the evidence of PW Nos. 1 to 5 coupled with the evidence of PW No. 7 and 8

undoubtedly makes out an offence under Section 304 (II) and 325 read with 149 of the Indian Penal Code. He submitted that the evidence of said witnesses is trust worthy and reliable, to base the conviction of the appellants. He therefore prayed that the present appeal may be dismissed by maintaining the conviction and sentence imposed upon the Appellants by the Trial Court.

6. As stated earlier, the prosecution in support of its case has examined in all 10 witnesses.

Shantaram Khomane ? (PW No. 1), Sampat Khomane ? (PW No. 2), Smt. Renuka ? (PW No. 3), Sunil Thorat ? (PW No. 5) are the injured witnesses. Balu Inamdar ? (PW No. 4) is an eye witness to the incident. Ramdas Khomane ? (PW No. 6) is a punch witness to the discovery of weapons i.e. sticks and cycle chain from Tukaram Yede (Accused No. 1) and Baba Khomane (Accused No. 3) respectively. Dr. Sanjay Ganjale ? (PW No. 7) is a medical officer who had examined Sunil Thorat (PW No. 5) and Jalinder (father-in-law of PW No. 1). This witness has proved the medical certificates issued in favour of PW ? 5 and Jalinder which are Exh. Nos. 40 and 41. Dr. Mahadev Swamy (PW No. 8) has examined the Shantaram Khomane (PW No. 1), Smt. Renuka (PW No. 3) and Jayram Khomane (deceased). The medical certificates of Shantaram Khomane (PW No. 1), Smt. Renuka (PW No. 3) and the deceased Jayram Khomane are Exh. Nos. 43, 44 and 45 on record. Dr. Sayyad Samir (PW No. 10) is the medical officer who has conducted the postmortem of deceased Jayram Khomane. The said postmortem notes are at Exh. 24 and the cause of death certificate issued by the said witness is at Exh. 72.

7. The perusal of evidence on record reveals that PW No. 1, PW No. 2, and PW No. 3 in their testimonies have attributed the role of assault with sticks, and cycle chain on deceased Jayram to appellant Nos. 1, 3, 4, 8 and 9. The conviction of these appellants under section 304 (II) is based on the testimonies of these witnesses. PW No. 1 in his testimony has deposed that the Appellant No. 1 assaulted the deceased, Appellant No. 3 assaulted the deceased with a cycle chain on his head. Appellant No. 4 assaulted the deceased with a stick. Appellant No. 8 assaulted with stick and Appellant No. 9 assaulted the deceased. The PW No. 2 has deposed that the Appellant No. 1 assaulted the deceased with stick, Appellant No. 3 assaulted the deceased with cycle chain, Appellant No. 4 assaulted the deceased with stick and Appellant No. 9 assaulted the deceased with stick. PW No. 3 has deposed that the Appellant No. 3 had assaulted the deceased with cycle chain, Appellant No. 4 is assaulted the deceased with stick, Appellant No. 8 assaulted the deceased with stick and Appellant No. 9 assaulted the deceased with stick.

8. At this stage it is necessary to refer to the deposition of PW No. 8 ? Dr. Mahadeo Swamy and PW No. 10 Dr. Sayyad Samir, the medical officers who examined and treated the deceased Jayram Khomane and the witness conducted the autopsy on deceased Jayram Khomane respectively. Dr. Mahadeo Swamy in his testimony has stated that on 20.09.1991 he examined Jayram Khomane as

indoor patient at the instant of police. He found the following injury on his person.

"Haematoma swelling of left side of scalp, extended from frontal region to occipital region, posteriorly 25cm x 20cm. Pitting oedema present left eye black, eye-ball protruded out, pupil left dilated sluggish reacting, bleeding from thorax present, Irregular respsinal decerebate rigidity present."

He has further deposed that the said patient was deeply unconscious since admission and it was a suspected case of intra cranial haemorrhage and therefore he referred the patient to Sassoon Hospital. In his cross examination he has admitted that the said Jayram Khomane had only one injury on occipital region of scalp. That he did not notice other injuries on the person of Jayram Khomane. He has further admitted that Haematoma is caused if the internal blood vessel is ruptured or injured. He has further admitted that, if a person forcefully falls on the scalp portion and that is against blunt and hard object, injury of haematoma could be possible. Dr. Sayyad Samir ? PW No. 10 who has conducted the autopsy of Jayram Khomane on 23.09.1991 has deposed that on external examination he found :

a) Treacheostomy wound was present over lower neck on the front aspect. It was antimortem.

On internal examination, he found the following injuries:

b) Haemotohage under scalp over left frontal left temporal parietal and occipital regions. There was fracture in pieces of left temporal bone. Crack fracture of base in the left anterior fossa and crack fracture left parietal bone extending from above fracture.

He opined that cause of death was due to "shock and haemorrhage due to fracture of skull". In the cross-examination of this witnesses he has admitted that there was no other injury found externally on the dead body of the deceased Jayram Khomane. That deceased Jayram Khomane was aged about 65 years and in the old age bones are easily fractured even on very slight violence. That subdural haemorrhage is possible due to fall. He has further admitted that the fractures mentioned by him in column No. 19 were inter connected.

9. It is to be noted here that there is no external injury found on the person of the deceased Jayram Khomane. It is the prosecution case that accused Nos. 1, 3, 4, 8 and 9 assaulted the deceased Jayram Khomane with stick, cycle chain. However, the medical officer did not found a single external injury on the person of deceased Jayram, either at the time of his admission to the hospital on 20.09.1991 or at the time of conducting the autopsy on his body on 23.09.1991.

10. In this background, it is to be noted that PW No. 1 Shantaram Khomane in his cross-examination has admitted that on one tractor he and his father Jayram Khomane were sitting for sowing the seeds. That he himself and his father were doing the work of sowing when the appellants came in Gut No. 29. That when the appellants came at the said field, the accused No. 1 Tukaram asked

Shantaram Khomane (PW No. 1) to remove the tractor from the land of the appellant No. 1. That in the evidence of PW No. 3 ? Smt. Renuka, it has been proved to be an omission that, she stated to the police that her brother (PW No. 1) and father (deceased) got down from the tractor. In the cross-examination of PW No. 4 ? Balu Yasin Inamdar, he has admitted that Jayram Khomane did not get down from the tractor at the time of incident. This witnesses has denied that, because he removed the tractor all of a sudden, Jayram Khomane who was standing on the "Chavd" of the tractor fell down accidentally and sustained injuries. An omission which has been brought on record at the instance of PW No. 3 ? Smt. Renuka that her father did not get down from the tractor at the time of incident is further proved at the instance of PW No. 9 Ashok Belwate the investigating officer. PW No. 9 in his cross-examination has deposed that in her police statement, Smt. Renuka ? PW No. 3 did not tell him that at the time of incident, her father get down from the tractor. It is the specific defense of the appellants Nos. 1, 3, 4, 8 and 9 that the deceased Jayram Khomane was sitting on the tractor and particularly on "Chad/Chavd" a gadget fixed to the tractor for sowing operation and when the appellants directed the complainant Shantaram Khomane and his family members to stop the tractor from entering in Gut No. 29 because of the sudden halt the deceased had a fall from the "Chad/Chavd" of the tractor and due to which he suffered the injury to his head, due to which he ultimately died. As stated earlier both the medical officers in their testimonies have not deposed that there were any external injuries found on the person of deceased Jayram Khomane. That the injury caused to deceased Jayram Khomane to his head was an internal fracture to the scalp and which according to PW No. 8 and 10 was possible due to a fall on heavy surface. It is further to be noted here that if the statements of prosecution witnesses PW Nos. 1, 2 and 3 are to be accepted as true and reliable as far as the deceased Jayram Khomane is concerned, there is no corroborative medical evidence at all, to the effect that the deceased suffered any other external injury on his person which would have been caused by the use of stick or cycle chain. In the circumstances I am of the considered opinion that an irresistible inference has to be drawn to the effect that the deceased Jayram Khomane who was sitting on the tractor and as per the witnesses on the "Chad/Chavad" had a fall from the said tractor or the said gadget, after Balu Inamdar (PW No. 4) the driver of the said tractor halted it abruptly under the directions of accused No. 1 ? Tukaram Yede. I am of the view that the said appellants are not instrumental in causing the injury to deceased Jayram Khomane as the said injury was a result of fall of Jayram from the said tractor on the earth.

In view of the above, I am of the considered opinion that there is no evidence on record to hold the appellants Nos. 1, 3, 4, 8 and 9 guilty of offence punishable under Section 304 (Part -II) read with 149 of the Indian Penal Code.

11. As far as the conviction of the appellants under section 149 read with 325 of the Indian Penal Code is concerned, at the out set, it is to be noted here that, a minute scrutiny of the entire evidence on record would reveal that there no role

at all is attributed to the Appellant Nos. 4 ? Uttam Baba Khomane, Appellant No. 5 ? Changdeo Gopinath Khomane, Appellant No. 8 ? Sampat Bhiva Khomane and Appellant No. 9 ? Soma Maruti Khomane and they have been convicted only with the aid of Section 149 of the Indian Penal Code. As per the evidence of prosecution witnesses, the role as contemplated under Section 149 read with 325 of the Indian Penal Code is attributed to accused No. 1 Tukaram Yede, Accused No. 2 ? Zumbar Yede, Accused No. 3 ? Baba Khomane, Accused No. 6 ? Mahadeo Khomane, Accused No. 7 ? Rama Khomane, Accused No. 10 ? Rama Yede and Accused No. 11 ? Vithoba Khomane. It is the prosecution case that PW No. 1, 2, 3 and 5 are the injured witnesses in the present crime. That PW No. 4 ? Balu Inamdar is an eye witness to the incident and was driving the tractor from which the PW No. 1 - Shantaram Khomane and deceased Jayram Khomane were allegedly carrying out the operation of sowing in the field bearing Gut No. 29. It is further the prosecution case that at the instance of Accused No. 1 ? Tukaram Yede and Accused No. 3 ? Baba Khomane, the discovery of weapons used in the present crime i.e. sticks, and cycle chain respectively was effected in presence of panch witness, (PW No. 6) — Ramdas Khomane vide Exh. No. 38-B and 37-B respectively.

The trial court has disbelieved the said discovery at the instance of the said two accused persons on the ground that the said two accused persons were handcuffed at the time of effecting the said discovery. It is further to be noted here that a perusal of a said exhibit Nos. 38-B and 37-B i.e. the discovery panchanama of sticks and cycle chain at the instant of accused No. 1 Tukaram Yede and accused No. 3. Baba Khomane, respectively is concerned, the signatures of the said accused persons are not taken by the investigating officer on the said panchanamas. The Supreme Court in the case of Jackaran Singh v. State of Punjab reported in 1995 Cri.L.J. 3992, has held that, the absence of signature or the thumb impression of an accused on the disclosure statement recorded under Section 27 of the Evidence Act, detracts materially from the authenticity and reliability of the disclosure statement. Therefore even otherwise also the discovery of the said articles at the instant of accused No. 1, Tukaram and Accused No. 3, Baba Khomane is not reliable in view of the ratio laid down by the Supreme Court in the case of Jackaran Singh (supra).

12. As far as injured witness namely Shantaram Khomane ? PW No. 1 and PW No. 3 ? Smt. Renuma and PW No. 5 ? Sunil Thorat are concerned, PW Nos. 7 Dr. Sanjay Ganjale and PW No. 8, Dr. Mahadeo Swamy have examined them on 20.09.1991. PW No. 7 ? Dr. Ganjale in his testimony has deposed that he examined PW No. 5 Sunil Thorat on 20.09.1991 and noticed the following injuries :

i) C.L. W.5" x 7" over left side skull at the occipital region, oblique in direction, blood clotted.

The Medical certificate issued in favour of PW No. 5 ? Sunil Thorat is at Exh. 40. In his cross-examination he has admitted that if a person falls on hard and rough

object, injury found on PW No. 5 ? Sunil Thorat could be sustained.

13. PW No. 8 ? Dr. Mahadeo Swamy in his testimony has deposed that on 20.09.1991 he examined Shantaram Khomane - (PW No. 1) and noticed the following injuries :

- 1) Oblique C.L.W. of 0.5cm./1.5 cm. x 2 cm. At left supra orbital region of forehead, bleeding present, bone and orbit deep, no evidence of fracture of underlined bone, left eyelids swollen, vision normal.
- 2) C.L.W. of 2 cm x 1.5 cm. at left infra orbital region of face, bleeding present, tenderness present, no evidence of fracture.
- 3) Erythematous oblique linear contusion of 10 cm x 2 cm. on lateral aspect of distal ? of left arm, tenderness present, no evidence of fracture.
- 4) Erythematous contusion of 4 cm x 2 cm. on lateral aspect of mid ? or left forearm local temp. no evidence of fracture of underlined bone.
- 5) Erythematous contusion the left thigh at lateral aspect and buttock region, size varying from 2 cm x 1.5 cm. and 3 cm x 2.5 cm. tenderness present, no evidence of fracture.

He has further deposed that he also examined Smt. Renuka (PW No. 3) on 21.09.1991 and noticed the following injuries :

- 1) C.L.W. of 3 cm x 1.5 cm x 1 cm. on posterolateral aspect of proximal ? of right forearm, bleeding present tenderness present no evidence of fracture.
- 2) Tender swelling of 10 cm. x 5 cm. On distal ? on dorsal aspect left forearm fracture colle to be confirmed by X Ray left forearm, local temp.
- 3) Erythematous linear transverse contusion of 15 cm. x 5 at left buttock region, skin erythematous, local temp., no evidence of fracture.

He has deposed that x-ray of injury No. 2 was taken and it showed that there was fracture of head of 5th Meta carpal bone. In his cross-examination this witness has admitted that if a person falls on his fingers, fracture of 5th Meta carpal bone is possible.

14. Mr. M.S. Mohite, the learned counsel appearing for the appellants submitted that the appellants are convicted under Section 149, read with 325 of the Indian Penal Code, only on the basis of the aforesaid statement made by the Dr. Mahadeo Swamy (PW No. 8) that, there was fracture of head of 5th Meta carpal bone. He submitted that though the said witnesses had stated that x-ray of the said injury was taken, he did not produce any thing to support the same before the Court which was necessary to establish the fact. Mr. Mohite in support of his contention placed reliance on the decision of this court in the case of Faizan Ahmed Abdul Wahab Shah v. State of Maharashtra, reported in 2014 (1) Bom.C.R. (Cri) 643, wherein it is held that there cannot be a presumption that the grievous hurt was caused without formal proof of the fact of fracture. The

fact of existence of fracture cannot be diagnosed and certified in the absence of proof of x-ray plates, unless the fact of fractured bones is perceivable barely of perception by naked eyes and sheerly by clinical examination, it is being vivid and palpable.

15. The definition of grievous hurt is enumerated in Section 320 of the Indian Penal Code and the explanation "Seventhly" to it i.e. "fracture or dislocation of a bone or tooth" is treated as a grievous hurt. The minute perusal of the evidence of PW-8- Dr. Mahadev Swami reveals that though he has stated that there was fracture of head of 5th metacarpal bone and x-ray of the said injury was taken, he did not produce the x-ray film or plates before the Court. He has also not stated in his evidence that by clinical examination of the said wound or injury No. 2 mentioned herein above caused to Smt. Renuka, he reached to the conclusion that there was in fact fracture to the said 5th Metacarpel bone. The PW No. 8 Dr. Mahadev Swami has admitted that if a person falls on his finger, fracture of 5th Metacarpel bone is possible (as stated above). PW No. 3 - Smt. Renuka in her testimony has stated that when she tried to pacify the quarrel, the appellants assaulted her. As far as the other injuries received by the PW No. 1 and 5 are concerned, those are injuries caused by the appellants Nos. 1, 2, 3, 6, 7, 10 and 11 by dangerous weapons or means that is either by sticks, stones or cycle chain. In view of the above it creates serious doubt in the mind of this Court to hold that the injury No. 2 caused to Smt. Renuka was in fact a grievous hurt as contemplated under section 320 (Seventhly), and punishable under section 325 of the Indian Penal Code and therefore conviction imposed upon the appellants needs to be modified to a lesser sentence. Considering the aforesaid facts which have come on record from the evidence of the prosecution witnesses, according to me the injuries are sustained by PW No. 1, 3 and 5 by hard and blunt object but by dangerous weapons or means would constitute an offence under section 324 of the Indian Penal Code and therefore the conviction of Appellants No. 1, 2, 3, 6, 7, 10 and 11 is modified from Section 325 read with 149 to section 324 read with 149 of the Indian Penal Code.

16. This leads me to deal with the issue of quantum of sentence to be imposed upon the Appellant Nos. 1, 2, 3, 6, 7, 10 and 11. As stated above, in view of the evidence on record a case as against the Appellant Nos. 1, 2, 3, 6, 7, 10 and 11 only for the offences punishable under Section 324 read with 149 of the Indian Penal Code is clearly made out.

Mr. Mohite learned counsel appearing for the Appellants submitted that the date of incident was 20th September 1991, the Appellants are convicted by the impugned Judgment and Order on 10th December 1996. As on today an approximate period of more than 25 years has lapsed. He submitted that the appellants have undergone approximately 1 month of actual imprisonment. He submitted that except Appellant Nos. 7 and 11 who are about 42 years of age, rest of the convicted Appellants are more than 50 years of age as of today. He submitted that, Appellant No. 1 ? Tukaram Namdeo Yede is today about 75 years

of age, Appellant No. 2 ? Zumber Namdeo Yede is about 78 years of age, Appellant No. 3 ? Baba Baburao Khomane is about 78 years of age, Appellant No. 6 ? Mahadeo Tulsiram Khomane is about 55 years of age and Appellant No. 10 ? Rama Namdeo Yede is about 80 years of age. He therefore submitted that in view of the ratio laid down by the Supreme Court in the case of Roy Fernandes v. State of Goa & Ors, reported in (2012) 3 SCC 221 this Court may reduce the sentence to the period already undergone by the Appellants, having regard to the fact that the incident in question had taken place nearly 25 years back and the Appellants have already suffered the trauma of a prolonged trial and uncertainty of the result of the appeal. He submitted that there was a hanging sword on their head constantly for last about 20 years i.e. after the Appellants were convicted by the Trial Court by the impugned judgment and order. He submitted that the Appellants are agriculturists and have moderate source of income from the agriculture. He also relied on the decision of the Supreme Court in the case of Manjappa v. State of Karnataka, reported in (2007) 6 SCC 231.

17. In the case of Roy Fernandes (supra) the Supreme Court after relying on its decision in the case of Hari Singh v. Sukhbir Singh, reported in (1988) 4 SCC 551 in paragraph 38 and 39 has held as under :

38. Even in Hari Singh case, the Court granted a similar benefit to a convict under Section 325 who had been sentenced to undergo two years rigorous imprisonment. The Court in addition invoked its power under Section 357 CrPC to award compensation to the victim, and determined the amount payable having regard to the nature of the injury inflicted and the paying capacity of the appellant. This Court said: (Hari Singh case SCC pp.557-58, paras 10-11)

"10. Sub-section (1) of Section 357 provides power to award compensation to victims of the offence out of the sentence of fine imposed on accused. In this case, we are not concerned with subsection (1). We are concerned only with subsection (3). It is an important provision but courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the court to award compensation to victims while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way.

11. The payment by way of compensation must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature

of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by instalments, may also be given the court may enforce the order by imposing sentence in default."

39. Section 357 of the Code of Criminal Procedure embodies the concept of compensating the victim of a crime and empowers the courts to award a suitable amount. This power, it goes without saying, shall be exercised by the courts having regard to the nature of the injury or loss suffered by the victim as also the paying capacity of the accused. That the provision is wide enough to cover a case like the present one where the appellant has been found guilty of offences punishable under Section 323 and 325 IPC has not been disputed before us.

18. In the case of Manjappa (Supra) the Supreme Court has held that directing the Appellant to surrender for undergoing remaining sentence is inappropriate after 10 years having passed from the date of the incident and has further held that a sentence already undergone was sufficient and adequate in the facts and circumstances of the said case. However, directed the appellant to pay additional amount of compensation to the injured persons over and above the amount of fine of compensation awarded by the trial court.

In the case of Roy Fernandes (supra) the Supreme Court after taking into consideration the principle enunciated by it in the case of Hari Singh (supra) has emphasised on the implementation of Section 357 of the Criminal Procedure Code for the offences, as in the case in hand. As stated earlier, the date of incident in question was 20th September 1991 and as of today more than 25 years have passed.

19. In view of the above, I am of the considered view that the following order would subserve the ends of justice :-

(a) The appeal is partly allowed.

(b) the conviction of the Appellants Nos. 1, 2, 3, 6, 7, 10 and 11 under Section 325 read with 149 is modified to Section 324 read with 149 of the Indian Penal Code and the Appellants are sentenced to the period of imprisonment already undergone by them.

(c) It is further directed that, each of the Appellant shall pay an additional compensation of Rs. 20,000/- (Twenty Thousand only) each to be paid to the injured persons namely PW No. 1 Shantaram Khomane, PW No. 2 ? Sampat Khomane, PW No. 3 ? Smt. Renuka and PW No. 5 ? Sunil Thorat.

(d) The Appellant Sr. Nos. 1, 2, 3, 6, 7, 10 & 11 shall jointly or severally deposit the said amount in the registry of the trial court and the trial court shall disburse/ distribute the said amount to the aforesaid injured witnesses in equal proportion.

- (e) The aforesaid amount be deposited within a period of 10 weeks from today.
- (f) The trial court is hereby directed to distribute/disburse the said amount to the concerned injured persons immediately after giving them notice of the same. The said exercise shall be completed within a period of 8 weeks from the date of deposit of the said amount in the registry of the trial court.
- (f) All the concerned to act on an authenticated copy of this Judgment and Order.