2023:BHC-AUG:17177-DB

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.569 OF 2016

Bhimrao w/o Tatenath Shinde
Age: 32 years, Occu.: Alms,
Tq. Betmogra, Tq. Mukhed,
Dist. Nanded .. Appellant

Versus

The State of Maharashtra,
Through Police Station Officer,
Police Station Mukhed,
Tq. Mukhed, Dist. Nanded .. Respondent

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Mr. Gajanan G. Kadam, Advocate for the appellant.
Mrs. V. S. Choudhari, APP for the respondent – State.

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CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.

RESERVED ON : 10th July, 2023
PRONOUNCED ON : 11th August, 2023

JUDGMENT [Per Smt. Vibha Kankanwadi, J.] :-

. Present appeal has been filed by the original accused challenging his conviction by learned Additional Sessions Judge, Kandhar, Link Court, Mukhed, Dist. Nanded in Sessions Case No.11 of 2014 on 04.08.2016 after holding him guilty of committing offence punishable under Section 302 of Indian Penal Code. Deceased Bhaurao Bapunath Shinde was aged around 25 years resident of

village Betmogra, Tq. Mukhed, Dist. Nanded. He belong to Gosavi community, who depend on begging (Bhikshuki) for the livelihood. He was residing with his parents. He has brother Uttam (P.W.1) and brother Tukaram. Many persons from his community were residing in Betmogra. Informant P.W.1 Uttam lodged FIR on 08.02.2014 to Police Station Mukhed contending that he himself, Tukaram and Bhaurao are residing separately in the same village. They have four sisters, who are married. He himself, his brothers and father had gone to Mukramabad on 07.02.2014 and returned around 4.00 p.m., after collecting Bhiksha. There was dispute between one Dharmanna Laxman Chavan and Tanaji Taterao Shinde around 10.30 to 11.00 p.m. The said dispute was separated/settled by Uttam and Bhaurao. On the next day i.e. 08.02.2014, in the morning, Bhaurao, his brother-in-law Bapunath Siddhu Shegar and one Shivnath Khandu Chavan had gone to take tea on the hotel of one Arun Patil. Uttam had also gone behind them for taking tea. It was around 10.00 a.m., at that time, present appellant - Bhimrao Tatenath Shinde went to the said hotel and started saying it to Bhaurao as to why he has taken the side of Dharmanna in the earlier night, he would then be killed. Accused took out one wooden log meant as firewood and gave blow of the same on the head of Bhaurao. As a result of said blow, Bhaurao

sustained severe injury to his head and he became unconscious. After seeing him getting unconscious, accused fled away from the spot. The persons who were present at the hotel had seen the incident. Blood was oozing out of the injury of Bhaurao and he was not talking anything. Informant, Bhaurao's wife and other persons took him to Government Hospital, Mukhed, but since he was serious he was referred to Government Hospital, Nanded after giving preliminary treatment. When Bhaurao was still undergoing treatment, P.W.1 Uttam lodged report with the police station. On the basis of it, offence vide Crime No.14 of 2014 came to be registered under Section 307 of Indian Penal Code and investigation was undertaken.

2. Panchanama of the spot was got executed and statements of the witnesses were also recorded. Later on while undergoing treatment, Bhaurao expired on 11.02.2014 at about 21.50 hours. Thereafter, Section 302 of Indian Penal Code came to be added. The fact was informed to Vazirabad Police Station, Nanded. Thereafter, the inquest panchanama was carried out and the dead body was sent for postmortem. After the postmortem was executed, the dead body was handed over to the relatives. Supplementary statements as well as statements of witnesses under Section 161 of the Code of Criminal

Procedure as well as under Section 164 of the Code of Criminal Procedure by learned Special Judicial Magistrate came to be recorded. While in custody, the clothes of the accused came to be seized by executing seizure panchanama on 11.02.2014 and also the wooden log which was allegedly used as a weapon of murder, under memorandum panchanama, under Section 27 of the Indian Evidence Act. The seized Articles were sent for chemical analysis and after the completion of investigation, charge-sheet came to be filed.

3. After the committal of the case, trial was conducted. Prosecution has examined in all eleven witnesses to bring home the guilt of the accused. After considering the evidence on record and hearing both sides, the learned Trial Judge has held that the prosecution has proved the offence beyond reasonable doubt. The appellant has been sentenced to suffer imprisonment for life and to pay fine of Rs.1000/-, in default to suffer rigorous imprisonment for one month for the offence punishable under Section 302 of Indian Penal Code. Set off has been granted under Section 428 of the Code of Criminal Procedure. Hence, this appeal.

4. Heard learned Advocate Mr. Gajanan G. Kadam for the appellant and learned APP Mrs. V. S. Choudhari for the respondent -

State and perused the record and proceedings.

5. It has been vehemently submitted on behalf of the appellant that the learned Trial Judge has not appreciated the evidence properly. The learned Advocate for the appellant has taken us through entire record and submitted that P.W.1 Uttam is the brother of deceased and P.W.2 Bapunath is the brother-in-law of the deceased. They have been posed as eye witnesses, however, it is to be noted that P.W.2 Bapunath is also the panch to the inquest panchanama. His name was already reflected as eye witness in the FIR, still the investigating officer has taken him as panch to the inquest panchanama. This shows that the investigation was one sided. Same is the case with P.W.4 Masnaji Barhale. He is stated to be the eye witness, yet he has been taken as panch to the memorandum panchanama under Section 27 of the Indian Evidence Act. The cross-examination of these witnesses would show that they are *inter se* related and, therefore, they being the interested witnesses, the prosecution ought to have examined independent witnesses, who were allegedly present in the hotel at the relevant time. Further, the alleged incident of quarrel, that had taken place on 07.02.2014, was not against the accused. He was not involved in that incident in any

manner. Then why he would go on the next day merely to say that as to why Bhaurao had taken the side of Dharmanna. Even as per P.W.1 Uttam, he had taken part in settlement on the earlier day, but then he does not say that though he was also present in the hotel, the accused had tried to do anything against him. P.W.1 Uttam, P.W.2 Bapunath have not stated that they had not tried to intervene. The contradiction in their statement as alleged eye witness from the fact that as per P.W.1 Uttam in examination-in-chief as well as in the FIR only one blow was given by the accused, but P.W.2 Bapunath says that the accused had given the blow of stick on the head of deceased and then deceased fell down and accused gave second stroke on his head by which deceased suffered bleeding injury. P.W.2 has used the word stick, whereas P.W.1 has used the word burning wood. P.W.4 Masnaji states about the single blow. If we consider the testimony of P.W.9 Dr. Maroti Dake, the autopsy doctor, then he had noted in all four external injuries on the dead body. Therefore, the ocular evidence and the medical evidence, as regards the blows were given, are not matching. When there was presence of independent witnesses, they ought to have been examined.

6. Learned Advocate for the appellant has further submitted that

even if we take the evidence that has been led by the prosecution as it is, then the alternative submission would be that accused had not come armed/prepared. He has taken the wood from the firewood kept for the purpose of hotel and gave blow. It was only one blow and, therefore, it cannot be said that he had intention to kill. The blow should be sufficient to cause death. Therefore, the case in hand would adversely fall under Section 304 (II) of Indian Penal Code and not under Section 302 of Indian Penal Code. The incident has taken place all of a sudden. He, therefore, alternatively prayed for showing leniency and reducing the sentence to already undergone by holding that offence under Section 304 (II) of Indian Penal Code is proved.

7. Per contra, the learned APP strongly opposed the appeal. She has supported the reasons given by the trial Court. She submitted that there was no enmity between the deceased and the accused. Therefore, there was no question of falsely implicating the accused, but on account of the incident on the earlier day, accused came to the said hotel and it appears that he was angry because immediately after coming to hotel, he directly started questioning the deceased as to why he was taking side of Dharmanna earlier night. Though he had not come armed, yet he was conscious enough to the surrounding.

He took the wooden log from the firewood and gave blow on the head of deceased. The intention lies in the heart of the accused. It has to be gathered from the actions. The said one blow even if we consider the case as one blow case, as per the experts opinion, that one blow was sufficient to cause death of Bhaurao. P.W.1 Uttam, P.W.2 Bapunath and P.W.4 Masnaji cannot be said to be interested witnesses. They were present at the said spot and the presence of general public cannot be said to be unnatural. P.W.2 Bapunath himself is the person, who accompanied the deceased. P.W.1 Uttam says that he went to the said hotel behind deceased, Bapunath and Sakharam. P.W.4 Masnaji had come to the hotel on his own. Hotel being the public place, their presence cannot be doubted. The weapon has been discovered by the accused from his house. P.W.4 Masnaji was not related to deceased and informant. There was no wrong in taking him as panch witness to the discovery panchanama. The testimony of P.W.9 Dr. Dake would show that it was homicidal death. Accused had uttered the word that he would kill the deceased and it can be seen from the description of injury No.1 i.e. lacerated injury which was then opened as it was then sutured, it was found that the underlying bone had fracture. This shows the force with which the wooden log was hit. Therefore, those circumstances are sufficient to

infer that deceased had intention to kill. There is no merit in the present appeal. It deserves to be dismissed. Accordingly, it be dismissed.

8. Here, in this case the prosecution case is depending on the testimony of three eye witnesses and it is thereafter supported by the medical evidence and the discovery of the murder weapon. Therefore, it is necessary to see whether the testimony of the eye witnesses is supporting to each other. P.W.1 Uttam has stated about the earlier incident. In his examination-in-chief, he has not given the date of the earlier incident. The learned APP, who was conducting the case before the learned Trial Judge, has not taken pains to bring the said date on record. But in his FIR, he has stated that the said incident had taken place around 10.30 to 11.00 p.m. on 07.02.2014 i.e. the earlier day of the incident. Except denial in the cross, there is nothing in respect of the said incident. Rather when he had not given the date of the earlier incident in his examination-in-chief, yet in his cross-examination, the question was asked as to whether he had told to police at the time of FIR that the dispute occurred between Dharmanna and Tanaji on 07.02.2014 and then he has answered that he had made statement about the same. It appears that word dispute

was used and, therefore, he has explained that in fact he had stated the word quarrel in the FIR. Whether it was dispute or quarrel, it has rather been brought on record through his cross that some incident had taken place on 07.02.2014 and in the said incident, P.W.1 Uttam and deceased Bhaurao had intervened and settled that dispute.

9. The testimony of P.W.1 Uttam as regards the incident dated 08.02.2014 in the Hotel of Arun Patil around 10.00 a.m. stands corroborated by the testimony of P.W.2 Bapunath and P.W.4 Masnaji. P.W.1 Uttam and P.W.2 Bapunath were specific on the fact that while assaulting Bhaurao, accused asked him as to why he was taking the side of Dharmanna and he would kill him. It appears that while recording testimony of P.W.1 Uttam, the learned Judge has taken the word "burning wood" wrongly in English deposition and, therefore, we have considered the Marathi deposition of P.W.1 Uttam which is the deposition recorded in the language of the Court and in which he has deposed, it uses the word "tGrkups ykdqM", meaning thereby it is the firewood and not the burning wood. If we consider the spot panchanama Exhibit-27, which is the hotel, then it can be seen that there is an open space in front of the hotel. There were table and chairs on the cement concrete *Ota*. Therefore, it appears that the said

wooden log and sometimes it is referred as stick */ Dhepli / Danduka* was brought from the outside. According to these witnesses, some other persons were also present at the spot. Now, the ground has been raised that independent witnesses have not been examined. In fact, P.W.4 Masnaji appears to be not related to deceased Bhaurao, P.W.1 Uttam and P.W.2 Bapunath. No such suggestion was given to him in the cross-examination. At that time, he was the President of Tanta Mukti of the village. He has also stated that there was a quarrel between accused and deceased in the evening on the previous day of the incident. In his cross-examination, he has admitted that there are two groups in Gosavi community in his village. Dharmanna Laxman Chavan, P.W.1 Uttam and other persons are from one group, whereas Dharmanna Babar and Bhaurao Jagannath Babar and others are from the different group. He denied the suggestion that there used to be quarrel between the two groups often, but then he admits that in his statement under Section 164 of the Code of Criminal Procedure before the learned Magistrate he had stated that there used to be quarrels between the two groups. It appears that his statement in examination-in-chief that earlier day there was dispute/quarrel between deceased and accused is an improvement and he was unable to assign any reasons for the omission. The contradiction further as

regards the day of incident is concerned is in respect of description of the weapon. In his examination-in-chief, he has stated that the firewood was used for the assault, whereas in his statement under Section 161 of the Code of Criminal Procedure, he has used the word stick. According to us though the firewood would be different from the wooden stick, yet it would depend upon the size of the stick as to what should be called to the said weapon. Even a stick can be used as a firewood and there may be certain specially cut wood, firewood, to be put in hearth. What has been recovered under Section 27 of the Indian Evidence Act is the firewood and one end of the same was partially burnt. Therefore, by examining P.W.4 Masnaji, we can say that independent witness has also been examined, who has supported the testimony of P.W.1 Uttam and P.W.2 Bapunath. No doubt, they have not stated as to for what purpose they wanted to take tea in the hotel at that time when they have their own houses in the village. A different version about it is given in the statement under Section 164 of the Code of Criminal Procedure by P.W.4 Masnaji and it appears that he and some other persons had gone to hotel and they had called both the groups from the village for the settlement, but in his substantial evidence, P.W.4 Masnaji has not stated about the same, nor it has been extracted from him in the cross-examination on behalf

of the accused as to for what purpose he had gone to the said hotel. Since the said hotel is a public place, those persons might have gone there for taking tea, which has been stated by P.W.1 Uttam and P.W.2 Bapunath also. Therefore, their presence in the said hotel at the relevant time cannot be doubted. P.W.2 Bapunath has specifically stated that he had gone along with deceased and Sakharam, whereas P.W.1 Uttam followed them by fraction of seconds. Though P.W.1 Uttam and P.W.2 Bapunath are related to the deceased, under these circumstance, it cannot be said that they are interested witnesses, especially P.W.2 Bapunath, who is the brother-in-law of the deceased. We would like to rely on the observations of the Hon'ble Supreme Court in **Raju Alias Balchandran and others Vs. State of Tamil Nadu [(2012) 12 SCC 701),** wherein taking into consideration the facts of the said case the Hon'ble Supreme Court envisaged four category of witnesses, "(i) a third-party disinterested and unrelated witness (such as a bystander or passersby); (ii) a third party interested witness (such as a trap witness); (iii) a related and therefore an interested witness (such as the wife of the victim) having an interest in seeing that the accused is punished; (iv) a related and therefore an interested witness (such as the wife or brother of the victim) having an interest in seeing the accused punished and also having some

enmity with the accused." Under the said circumstance, the Hon'ble Supreme Court further observed that "a Court should examine the evidence of a related interested witness having an interest in seeing the accused punished and also having some enmity with the accused with greater care and caution than the evidence of a third-party disinterested and unrelated witness. Therefore, the evidence of a related or interested witness should be meticulously and carefully examined. In a case where the related and interested witness may have some enmity with the assailant, the bar would need to be raised and the evidence of the witness would have to be examined by applying a standard of discerning scrutiny. However, this is only a rule of prudence and not one of law".

10. Further, reliance can be placed on the decision in **Shahbuddin and another Vs. State of Assam, [(2012) 13 SCC 213],** it has been observed that :-

> "17. An interested witness is the one who is desirous of falsely implicating the accused with an intention of ensuring their conviction. Merely being a relative would not make the statement of such witness equivalent to that of an interested witness. The statement of a related witness can safely be relied upon by the Court, as long as it is trustworthy, truthful and

duly corroborated by other prosecution evidence.

18. At this stage, we may refer to the judgment of this Court in the case of **Gajoo v. State of Uttarakhand [(2012) 9 SCC 532 : (2012) 3 SCC (Cri.) 1200]**, where the Court while referring to various previous judgments of this Court, held as under :-

> "12. We are not impressed with this argument. The appreciation of evidence of such related witnesses has been discussed by this Court in its various judgments. In **Dalip Singh v. State of Punjab [AIR 1953 SC 364],** while rejecting the argument that witnesses who are close relatives of the victim should not be relied upon, the Court held as under:-
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> > "26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close [relative] would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far

> from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.'

13. Similar view was taken by this Court in the case of **State of A.P. v. S. Rayappa and Others [(2006) 4 SCC 512].** The court observed that it is now almost a fashion that public is reluctant to appear and depose before the court especially in criminal cases and the cases for that reason itself are dragged for years and years. The Court also stated the principle that :

> '6. … By now, it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being

> convicted somehow or the other either because of animosity or some other reasons.'

14. This Court has also taken the view that related witness does not necessarily mean or is equivalent to an interested witness. A witness may be called 'interested' only when he or she derives some benefit from the result of litigation; in the decree in a civil case, or in seeing an accused person punished. *(Ref. State of U. P. v. Kishanpal and Others [(2008) 16 SCC 73]).* In *Darya Singh & Ors. v. State of Punjab [AIR 1965 SC 328]*, the Court held as under:-

> '6. … On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars.'

15. Once, the presence of PW2 and PW3 is shown to be natural, then to doubt their statement would not be a correct approach in law. It has unequivocally come on record through various witnesses including PW4 that there was a 'Satyanarayan Katha' at the house of Chetu Ram which was attended by various villagers. It was on their way back at midnight when PW2 and PW3 had seen the occurrence in dark with the help of the torches

> that they were carrying. The mere fact that PW2 happens to be related to PW1 and to the deceased, would not result in doubting the statement of these witnesses which otherwise have credence, are reliable and are duly corroborated by other evidence. In such cases, it is only the members of the family who come forward to depose. Once it is established that their depositions do not suffer from material contradictions, are trustworthy and in consonance with the above-stated principles, the Court would not be justified in overlooking such valuable piece of evidence."

11. Further, reliance can be placed on the decision in **Shio Shankar Dubey and others Vs. State of Bihar, [AIR 2019 SC 2275],** it has been observed that when similar type of submissions were made, i.e. the witness, who is the brother of the deceased, is an interested witness, after taking into consideration the law on the same point from the various decisions in past it has been observed that the submission of the appellant, that witnesses P.W.11 and P.W.13 (in that case) being related to the deceased their evidence cannot be relied, was rejected. Reliance was placed on the decisions in **Kartik Malhar Vs. State of Bihar, [(1996) 1 SCC 614], Dalip Singh Vs. State of Punjab, [AIR 1953 SC 364], Namdeo Vs. State of Maharashtra, [(2007) 14 SCC 150].** Out of these, we would like to refer to **Dalip Singh (Supra),**

wherein referring to earlier decision in **Rameshvar Kalyan Singh Vs. State of Rajasthan, [AIR 1952 SC 54],** it was observed that "it was a fallacy common to many criminal cases and in spite of endeavours to dispel, it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel." It was further observed that "close relationship of witness with the deceased or victim is no ground to reject his evidence."

12. Definitely, it has come on record through the cross-examination of P.W.1 Uttam and P.W.2 Bapunath that there are two groups of their community in the village. It has also come on record that some persons from their community having similar surnames have come from different places and now they have settled in Betmogra since last about more than 25 years (prior to the deposition). The marriages *inter se* takes place and thereby the community is growing. Even if we consider that there is groupism, yet we want to differentiate between groupism and enmity. Groupism need not always would take inimical terms and vice versa. Enmity raises bitter feelings and would require some extreme acts. Therefore, unless the reason for the groupism turning into enmity would have been suggested, there is no point in considering that these two witnesses are from the category of

witnesses, who were interested in punishing the accused having element of enmity. These two witnesses were present at the said spot and their presence is acknowledged by the third independent unrelated and disinterested witness P.W.4 Masnaji. Though other witnesses were also present, yet prosecution is not supposed to unnecessarily multiply those witnesses and examine each and every witness, who was present at the said spot.

13. The testimony of these two witnesses were supported by P.W.9 Dr. Dake, who is the medical officer, who has conducted the autopsy. It is also to be noted that incident took place on 08.02.2014. Bhaurao was given treatment at two places one was preliminary treatment and, thereafter he was shifted to Civil Hospital, Nanded. He expired on 11.02.2014. There were four external injuries and four internal injuries. There was fracture to the skull. It has been stated that base of the cranium was fractured horizontally at mid cranial fossa, meninges cut corresponding to craniotomy. Extra durel hematoma of 100 gram, dark red colour was present on both frontal, temporal and left parietal area. Sub arachnoid hemorrhage were present all over brain, red in color, brain was markedly edematous, congested, contusion necrosis of brain was present at right parietal and temporal

lobes laterally, superior and lateral part of left frontal lobe and basal part of right temporal lobe.

14. He further says that injury No.1 in column No.17 along with its corresponding internal injuries in Column No.19 were sufficient in ordinary course of nature to cause death. In his cross-examination, he has specifically stated that according to him injury Nos.1 to 3 at column No.17 had occurred first and afterwards injury No.4 has occurred. Age of injury Nos.1 to 3 is 3-5 days before the death and age of injury No.4 is 2-4 days before death. He has categorically stated that injury Nos.1 to 3 are not possible if a branch of tree falls on the head of a person who is sitting below the tree. Those injuries will not occur even when the branch is having width of 3-4 inches, but then he admitted that injury Nos.1 to 3 are possible by hard and blunt object. Branch of a tree is hard and blunt object. It was not asked as to from which height if the branch fells on the head of a person sitting under tree, then such injuries are possible. There was no corresponding suggestion to P.W.1 Uttam, P.W.2 Bapunath and P.W.4 Masnaji that Bhaurao was sitting below a tree when a branch of that tree fell on his head. Therefore, taking into consideration the ocular evidence with the medical evidence, we hold that the

prosecution has proved that the death of Bhaurao was homicidal in nature.

15. In the normal course, an eye witness should not have been taken as panch witness, but the law does not prohibit it in specific words. It is a rule of caution that when a person is an eye witness to the incident, then the panchanama should be by a third person, but here in this case P.W.4 Masnaji, who is the eye witness, was also the panch to the memorandum panchanama. He has specifically stated that after the incident, 4-5 days thereafter, he was called by police in the police station. He was along with one Hanmant Mudhale. Accused, who was present in the police station, told them that he would produce firewood stick. Accordingly, all of them went to the house of accused as directed by him. He has stated that accused had produced the firewood stick and clothes from his house in their presence. In the cross-examination he has stated on how many panchanams he had put his signatures and whether he had signed on the panchanama in respect of case which was filed by Tanaji i.e. the earlier days complaint. He admitted that the wall from which firewood stick was seized was having Tarpaulin. He has admitted that anyone can go inside the house by removing tagged rope for the

Tarpaulin. Here, it is to be noted that as regards the way and the place which was shown by the accused is concerned, except denial there is nothing. If anyone else had kept the said firewood at that place, then how the accused would have come to know about the said place, is a question. In fact, it can be safely inferred that as the accused had kept the wooden stick at the said place, he had the knowledge about the same. No question has been put to this witness as to why he has not refused to act as panch to the said panchanama and as to whether prior to the said discovery, his statement under Section 161 of the Code of Criminal Procedure was recorded or not. Therefore, when the witness was available and no questions have been put, now accused cannot raise the objection for his role as the panch to the memorandum panchanama. The said memorandum panchanama has also been proved by the prosecution beyond reasonable doubt. The said article i.e. firewood which was marked as article No.1 was shown to P.W.9 Dr. Dake and he has opined that the injuries mentioned in column No.17 i.e. injury Nos.1 to 3 are possible by article No.1. As regards the discovery is concerned, it is also proved through the testimony of P.W.11 API Chavan the investigating officer. Therefore, the connection has been established and the said weapon has also been identified by P.W.1 Uttam, P.W.2 Bapunath

and P.W.4 Masnaji. The said wooden log had blood stains. It appears that the CA reports have been produced at Exhibit-59. The investigating officer appears to have sent the shirt of the deceased, Uparna being handkerchief, full pant of deceased, Baniyan of the accused and the wooden log i.e. firewood. Human blood was detected on full shirt, Uparna and full pant as well as the Baniyan. The blood group on the Baniyan and the wooden log could not be identified or the test was inconclusive, but it was human blood. How the human blood was found on the baniyan of the accused has not been explained by him. The said Baniyan has been discovered by him as per the memorandum panchanama proved through P.W.4 Masnaji.

16. Here, in this case, the suggestion was given that as regards the earlier incident is concerned i.e. 07.02.2014, at that time, mother, son, brother Tanaji and wife of Tanaji, who had quarreled with Dharmanna had sustained injuries and they were in hospital till afternoon of 08.02.2014. It is then stated that offence vide Crime No.12 of 2014 for the offence punishable under Sections 326, 323, 504, 506, 143, 147, 148, 149 of Indian Penal Code was registered against Dharmanna Laxman Chavan, Bapunath Shinde, Khandu Shinde, Sakharam Chavan, Dnyaneshwar Chavan and Tukaram

Chavan in respect of that incident dated 07.02.2014 and the charge-sheet vide RCC No.78 of 2014 is pending with Judicial Magistrate First Class, Mukhed. Important point to be noted is that it is not suggested to the witness that the said offence was against P.W.1 Uttam as well as deceased. Thereafter there is suggestion in respect of another offence i.e. Crime No.111 of 2013 against the informant, his father and brother, but then it appears that it is in respect of earlier incident that had allegedly taken place on 25.08.2013, however, that cannot be the ground to discard the testimony of P.W.1 Uttam, because that offence came to be registered on the basis of FIR lodged by one Dharmanna Babar, who has no connection with the present incident. It does not show any kind of enmity between the accused and the deceased or the witnesses.

17. At Exhibit-21 a private complaint lodged by P.W.1 Uttam has been produced, which is in respect of the incident in question and it appears that two more accused persons were made in that case. One is Subhash Dadarao Shegar and Digambar Bapunath Shegar, however, the said private complaint came to be disposed of by order dated 15.04.2014 passed by learned Judicial Magistrate First Class, Mukhed by giving a direction to the investigating officer, as already

the FIR vide Crime No.14 of 2014 was pending for investigation. Investigating Officer was directed to investigate the roles of the persons named in the complaint. Now, the appellant cannot say that as the other two accused persons have not been arrayed as accused in this case, he should be acquitted. It can be certainly said that the accused has not made use of the said private complaint Exhibit-21 and it has not been pointed out that some different picture was painted in the said direct complaint. After the investigation, the Investigating Officer might have come to the conclusion that these other two persons have no role to play. Question was asked to the investigating officer as to whether he has followed the order passed by the learned Magistrate or not and after going through the case diary, he has stated that he was unable to told whether he had carried out the investigation in view of the said directions. There was no direct question to the investigating officer as to whether he had found any role by the other two persons in the crime or not. As regards the present accused is concerned, the case is consistent and the investigation shows that there are eye witnesses to the incident. There is medical evidence as well as the evidence in the form of discovery of murder weapon. The testimony of other witnesses in this case is in the nature of supporting the prosecution story.

18. Taking into consideration these aspects, the prosecution has proved that the accused had given blow of the firewood on the head of deceased Bhaurao around 10.00 a.m. on 08.02.2014 in the hotel. The motive was the earlier dispute/quarrel, wherein deceased had taken side of one Dharmanna. Now, it is the submission on behalf of the appellant that the case would fall under Section 304 (II) of Indian Penal Code and not under Section 302 of Indian Penal Code. The learned Trial Court has dealt with this point. Here, certain factors will have to be considered (i) the earlier incident; (ii) accused coming armed with weapon; (iii) by uttering that he would kill Bhaurao the blow was given; (iv) the blow was on the head and (v) the force of the blow was such that it had caused fracture. Therefore, taking into consideration these five factors, it cannot be said that the incident took place at the spur of the moment. It is rather a premeditated act/ attack, therefore, the case would definitely fall under the category of homicidal death amounting to murder punishable under Section 302 of Indian Penal Code.

19. From the re-appreciation and re-assessment of evidence, we conclude that there is no illegality or error committed by the learned Trial Judge while convicting the appellant. There is no question of

showing any leniency, as the minimum sentence has been imposed. The appeal therefore stands dismissed.

[ABHAY S. WAGHWASE, J.] [SMT. VIBHA KANKANWADI, J.]

scm