IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.206 OF 2001

State of Maharashtra ...Appellant
v/s.
1. Mukund Trimbak Sonawane

2. Dilip Gajendra Sonawane
Both r/o. Tandulwadi, Tal. Madha,
Dist. Solapur.

3. Somnath Rama Londhe
R/o. Markad Vasti, Kurduwadi,
Tal. Madha, Dist. Solapur. ...Respondents/
Accused

ALONG WITH
CRIMINAL APPEAL NO.102 OF 2001

Dilip Gajendra Sonawane ...Appellant/
Accused No. 2
v/s.
The State of Maharashtra ...Respondent

Mr. Ujwal R. Agandsurve, for the Appellant in Appeal No. 102 of 2001 and for Respondents in Appeal No. 206 of 2001.
Ms. P.P. Shinde, A.P.P. for the State.

CORAM : **SMT SADHANA S. JADHAV &**
N.J. JAMADAR, JJ.

JUDGMENT RESERVED ON : **20th OCTOBER, 2020**
JUDGMENT PRONOUNCED ON : **3rd NOVEMBER, 2020**

JUDGMENT (Per N.J.Jamadar, J.)

. These Appeals are directed against the judgment and order dated 20th December, 2000 passed by the learned Sessions Judge, Solapur in Sessions Case No. 233 of 1999 whereby appellant/accused No. 2 Dilip Sonawane came to be convicted for the offences punishable under section 304 Part II of the Indian Penal Code, 1860 ("the Penal Code") and sentenced to suffer rigorous imprisonment for five years. The Appellant was also convicted for the offence punishable under section 324 of the Penal Code and sentenced to suffer rigorous imprisonment for one year, along with accused No. 1 Mukund Sonawane and No. 3 Somnath Londhe, who were convicted for the offences punishable under section 323 and 504 read with 34 of the Penal Code and sentenced to suffer rigorous imprisonment for six months and three months, on the respective counts.

2. The appellant/accused Dilip and the co-accused were prosecuted for the offences punishable under sections 302, 324, 323 and 504 read with 34 of the Penal Code and section 135 of Bombay Police Act, 1951 with the following indictment:-

a] Nagnath Parmeshwar Gaikwad (the first informant) is a resident of Tandulwadi. He was residing in Harijan Vasti, Tandulwadi along with his family members including father Parmeshwar and brother Navnath Gaikwad (the deceased). Accused No. 1 Mukund Sonawane and No. 2 Dilip Sonawane were also the residents of Harijan Vasti, Tandulwadi. Accused No. 3 Somnath Londhe is a relative of accused Nos. 1 and 2 and used to occasionally visit Tandulwadi.

b] On 23rd August, 1999 in connection with the recitation of Ramayana a religious procession was taken out in village Tandulwadi. At about 5.30 p.m the first informant was near the platform of Shetkari Sanghatana, adjacent to which there was a chewing betel stall(panpatti) of Siddheshwar Gurav. Accused came thereat. Accused No. 1 Mukund demanded the first informant to offer them a treat of chewing betel(leaf). When the first informant expressed his inability, the accused raked up quarrel and abused him in filthy language. The accused beat him by fists. Bhagwan Kadam and Hanumant Gavali, who were present thereat, came to the rescue of the first informant. Thereupon, accused threatened to cause harm to Navnath, the deceased, and rushed towards the informant's house.

c] The first informant followed the accused. The accused started to abuse and assault the deceased and Parmeshwar, the father of the first informant. Accused No. 2 Dilip went to his home and returned to the spot armed with a sword. The accused No. 2 Dilip gave a blow by means of sword on the head of the deceased. Due to the blow the deceased fell down. Accused No. 2 Dilip unleashed blows with the sword on Parmeshwar as well. Parmeshwar sustained injuries on right hand and waist. While the first informant was trying to rescue the deceased and Parmeshwar, he was also assaulted by the accused. After noticing that the deceased and Parmeshwar sustained injuries, the accused fled away.

d] The deceased was brought to Madha police station. The Station House Officer, after noticing that the deceased was critically injured, forwarded the deceased to Primary Health Center, Madha. The first informant lodged report. Crime was registered at C. R. No. 17 of 1999 initially for the offences punishable under section 324, 323, 504 read with 34 of the Penal Code and section 135 of Bombay Police Act, 1951. As the deceased was in a critical condition, he was shifted to Civil Hospital, Solapur, where the deceased succumbed to the

injuries on 24th August, 1999.

e] The investigation commenced. Inquest was held. The dead body was sent for postmortem examination. Clothes which the deceased wore at the time of occurrence, were seized. The investigating officer visited the scene of occurrence and drew panchanama. The accused were arrested. The accused No. 2 Dilip made discovery leading to the recovery of the weapon of assault i.e. sword. The postmortem report and C.A. report were obtained. After finding the complicity of the accused the charge sheet was lodged against the accused in the Court of jurisdictional Magistrate.

f] On committal, the learned Sessions Judge framed charge against the accused for the offences punishable under section 302, 324, 323, 504 read with 34 of the Penal Code and section 135 of the Bombay Police Act, 1951. The accused abjured their guilt and claimed for trial.

3. At the trial, the prosecution examined ten witnesses including Nagnath Gaikwad (P.W.4), the first informant, Parmeshwar Gaikwad (P.W.7), an injured eye witness, Digambar Gholap (P.W.5) and Bhagwan Kadam (P.W.6), as eye

witnesses, Dr. Ajay Kevaliya (P.W.3), the autopsy surgeon and Rajaram Survase (P.W.8), the then station house officer, Madha police station, who had recorded the first information report, and Shrikant Padole (P.W.9) who had carried substantial investigation. The accused did not lead any evidence in their defence which consists of denial and false implication on account of a scuffle in which the informant party had, in fact, assaulted the accused.

4. After apprisal of the evidence the learned Sessions Judge was persuaded to hold that the prosecution succeeded in establishing that the accused Nos. 1 and 3 had voluntarily caused hurt and intentional insult to the deceased, Parmeshwar and the first informant. However, the accused Nos. 1 and 3 did not share the common intention to cause the fatal injury to the deceased, which was inflicted by accused No. 2 Dilip with the sword. The learned Sessions Judge was of the view that the act of accused No. 2 Dilip of giving a single blow on the head of the deceased by means of sword was, however, not with the intention of causing death. According to the learned Sessions Judge, the accused No. 2 Dilip had the

requisite knowledge that the act would result in the death of the deceased and thus the learned Sessions Judge went on to convict the accused No. 2 Dilip for the offence punishable under section 304 Part II of the Penal Code and impose the sentence, as indicated above.

5. Being aggrieved by and dissatisfied with the impugned judgment of conviction and order of sentence, the appellant/accused No. 2 Dilip has preferred the appeal, being Criminal Appeal No. 102 of 2001.

6. The State is also aggrieved by the quantum of sentence imposed by the learned Sessions Judge which is stated to be grossly inadequate and disproportionately lenient. Thus the State has preferred appeal for enhancement of sentence, being Criminal Appeal No. 206 of 2001. The appeal was admitted qua Respondent No. 2- original accused No. 2 only. It was dismissed against Respondent Nos. 1 & 3 – original accused Nos. 1 & 3.

7. We have heard Mr. Ujwal Agandsurve, for the Appellant in Appeal No. 102 of 2001 and for Respondent in Appeal No. 206

of 2001 and Ms. P.P. Shinde, A.P.P. for the State at considerable length. With the assistance of the learned counsels, we have also perused the depositions of the witnesses and material on record.

8. Mr. Agandsurve assailed the legality and correctness of the impugned judgment by raising multi-fold challenge. First and foremost, the learned Sessions Judge committed a manifest error in not properly evaluating the evidence of the star witnesses Nagnath Gaikwad (P.W.4) and Parmeshwar Gaikwad (P.W.7). On a proper analysis, according to the learned counsel for the appellant, it becomes evident that the testimony of Nagnath Gaikwad (P.W.4) and Parmeshwar Gaikwad (P.W.7) is unworthy of credence as they have made improvements to suit the prosecution case. Secondly, the learned Sessions Judge did not properly appreciate the crucial aspect of the injuries, which were found on the person of the accused, and in respect of which crime was registered at Madha police station. The injuries on the person of the accused demonstrate that the prosecution has suppressed the genesis of the occurrence. This aspect was completely lost site of by the

learned Sessions Judge. Thirdly, the material on record, at best, indicates that the scuffle broke out at the spur of the moment and there was no pre-meditation. Thus, in the absence of cogent evidence, the accused No. 2 Dilip could not have been convicted for the offence punishable under section 304 Part II of the Penal Code, urged Mr. Agandsurve.

9. Per contra, Ms. P.P.Shinde, learned A.P.P. stoutly submitted that there is overwhelming evidence to establish the guilt of the accused. Not only Nagnath Gaikwad (P.W.4) and Parmeshwar Gaikwad (P.W.7), the injured witnesses, have given the vivid account of the occurrence but there are independent witnesses namely Digambar Gholap(P.W.5) and Bhagwan Kadam(P.W.6) who render unflinching corroboration to the testimony of injured witnesses, whose presence at the scene of occurrence cannot be questioned. Ms. Shinde urged with tenacity that the fact that after the scuffle broke out accused No. 2 Dilip went to his home and returned to the scene of occurrence armed with sword and gave a fatal blow on the head of the deceased, unmistakably betrays the intention of accused No. 2 Dilip to cause the death of the deceased. Thus,

according to Ms. Shinde, the learned Sessions Judge erred in recording a finding that the accused did not intend to cause the injury with the sword on the head of the deceased. The act of the accused clearly fell within the ambit of clause 'Thirdly' of Section 300 of the Penal Code. The sentence of five years imprisonment, in the aforesaid backdrop, constitutes a fleabite sentence. Resultantly, the sentence needs to be enhanced to make it proportionate to the gravity of the offence, submitted Ms. Shinde.

10. Before adverting to deal with the aforesaid submissions, it may be apposite to note few uncontroverted facts. There is not much controversy over the fact that the informant party and accused Nos. 1 and 2 were residents of Harijan Vasti, Tandulwadi, Madha. There respective houses were situated at a close distance. The fact that the second incident wherein the deceased allegedly sustained fatal injury occurred near the cattle shed of first informant is also not much in dispute. The scene of occurrence panchanama (Exhibit 23) records that there were marks of struggle near the said cattle shed and shards of electric tube, stained with blood, were found thereat.

The first incident allegedly occurred at a square near the platform of Shetkari Sanghtana and betel leaves shop, which were at a distance of one and half furlong from the house of the first informant.

11. The prosecution alleges that the first incident was the cause for the assault on Parmeshwar and the deceased. Evidently, the incident occurred in two phases. A brief resume of evidence, would shed light on the sequence of events.

12. Nagnath Gaikwad (P.W.4) unfurled the prosecution case. He informed the Court that on 23rd August, 1999 at about 5.00 p.m. in the wake of religious procession, he was standing near the chewing betel leaves shop of Siddheshwar Gurav. The accused came there at. On his refusal to give a treat of chewing betel, the accused abused and assaulted him. Bhagwan Kadam (P.W.6) and Hemant Gavli came to his rescue. At that moment, the accused threatened to see his brother and father and rushed towards the house of the first informant.

13. Nagnath Gaikwad(P.W.4) claims to have followed the

accused. When he reached his house, he found that the accused were assaulting the deceased. Accused No. 2 Dilip was armed with a sword. Accused No. 2 Dilip gave blow of sword on the back of the head of the deceased. The later fell down. Thereupon, accused No. 2 Dilip unleashed blows by means of sword on Parmeshwar Gaikwad(P.W.7), who sustained injuries on his right hand and waist. Accused No. 1 Mukund and No. 3 Somnath went to the cattle shed, took out electric tubes and assaulted the deceased and Parmeshwar Gaikwad (P.W.7).

14. Nagnath Gaikwad (P.W.4) further affirmed that the deceased was taken to Madha police station in a jeep. The police referred the deceased to Primary Health Center, Madha. Thereafter, he claimed to have lodged first information report (Exhibit 32). Nagnath Gaikwad (P.W.4) affirmed that the accused had a quarrel with one Lankeshwar Jangalbhau and Vilasbhau and in that quarrel the informant had taken the side of Lankeshwar and thus the relations between the informant party and the accused were strained since then.

15. This claim of informant Nagnath Gaikwad (P.W.4) on the

aspect of assault near the platform of Shetkari Sanghatana was sought to be corroborated by Bhagwan Kadam (P.W.6). On the day and time of the occurrence, Bhagwan Kadam (P.W.6) claimed to have heard the exchange of abuses between the accused and the informant. He had witnessed the assault mounted by the accused by fist and kick blows on the informant. Bhagwan Kadam (P.W.6) claimed to have rescued the informant from the clutches of the accused. He was in unison with the first informant on the point that the accused left the said place threatening to see the father and brother of the deceased.

16. Parmeshwar Gaikwad (P.W.7) testified to the fact that on 23rd August, 1999 at about 5.30 p.m he and the deceased were working in the cattle shed located behind their house. Accused Nos. 1 to 3 came thereat. They started to abuse them. While the accused Nos. 1 and 3 assaulted him and the deceased with the fist and kick blows, Accused No. 2 Dilip fetched a sword from his house and assaulted the deceased with the sword on the backside of the head. Thereafter, accused No. 2 Dilip aimed the blows with the sword on him, on account of which Parmeshwar

Gaikwad (P.W.7) claimed to have sustained injuries on his right hand and waist. Accused Nos. 1 and 3 thereafter took out the electric tubes and assaulted him and the deceased with those tubes.

17. This version of Parmeshwar Gaikwad (P.W.7) was sought to be corroborated by Digambar Gholap (P.W.5). He claimed that, after hearing commotion, he rushed to the cattle shed of Parmeshwar Gaikwad (P.W.7). A scuffle had ensued between the accused Nos. 1 to 3, on the one side, and Parmeshwar Gaikwad (P.W.7) and the deceased, on the other side. Accused No. 2 Dilip gave a blow with the sword on the head of the deceased. Accused No. 2 Dilip gave blows by means of sword on the right hand and waist of Parmeshwar Gaikwad (P.W.7). Digambar Gholap (P.W.5) sought to lend support to the claim of Nagnath Gaikwad (P.W.4) and Parmeshwar Gaikwad (P.W.7) on the aspect of assault by accused Nos. 1 and 3 by means of electric tubes on Parmeshwar Gaikwad (P.W.7) and the deceased.

18. At this juncture, recourse to the medical evidence would

be apposite. Dr. Ajay Kevaliya (P.W.3), autopsy surgeon claimed to have found as many as 10 injuries on the person of the deceased, on external examination. The first was a transversely situated stiched wound over back of head in occipital region measuring 4 cm linear and 2 cm vertical in opposite L shape. Stitches intact. Margins approximated. The would was associated with swelling and deformity with haemotoma under the scalp, cut wound to skull and injury to brain.

19. In the opinion of Dr. Ajay Kevaliya (P.W.3) the injuries were antemortem. The first injury, extracted above, was caused by a heavy sharp cutting object.

18. On internal examination, he claimed to have noticed the following damage associated with injury No. 1.

a] Haematoma under the scalp in occipital region 60 cms reddish brown in colour.

b] Fracture of skull cutting enrough bone, transversely detected between middle to left parietal occipital region, size 6 cm x ½ cm cavity deep.

c] Cerebral laceration in occipital parietal region 4 cm x 2 cm x 2 cm with blood in occipital region 2" x 2" x 2" brownish red in colour.

d] Subdural haematoma all over brain surface more on left side. Sub arachoid haemohrrage in right parieto occipital region 4" x 2" extending into sagital suture.

20. The testimony of Dr. Ajay Kevaliya (P.W.3) on the aspect of having noticed as many as 10 external injuries on the person of the deceased could not be impeached. There is ocular account in the nature of the testimony of Nagnath Gaikwad (P.W.4), Parmeshwar Gaikwad (P.W.7) and Digambar Gholap (P.W.5) to demonstrate that the deceased was belabored by means of fist and kick blows and electric tubes. The witnesses have consistently deposed that accused No. 2 Dilip assaulted the deceased by means of sword on the back side of the head. The situs of injury noticed by Dr. Ajay Kevaliya (P.W.3) thus corroborates the claim of above named witnesses. We are thus inclined to hold that the deceased met homicidal death.

21. This propels us to the crucial aspect of authorship of the

death. Since this Court has admitted the appeal preferred by the State qua accused No. 2 Dilip only, it has to be seen whether the finding recorded by the learned Sessions Judge that accused No. 2 Dilip was the author of the said homicidal death warrants interference. If the question is answered in the negative, the aspect of correctness and propriety of the quantum of sentence would come to the fore.

22. In the backdrop of the ocular account, adverted to above, it is imperative to note that no serious endeavor was made on behalf of the accused to contest the prosecution case that the deceased died on account of the injury sustained on the head with sword. In contrast, an effort was made to draw home the point that in the scuffle which took place between the accused, on the one side, and Parmeshwar Gaikwad (P.W.7) and the deceased, on the other side, the deceased sustained injury as the blow of the sword with which the deceased and Parmeshwar Gaikwad (P.W.7) were armed fell on the head of the deceased. Nagnath Gaikwad (P.W.4) and Parmeshwar Gaikwad (P.W.7) have stoutly denied the said suggestion.

23. In the light of the aforesaid nature of the counter version, the veracity of the claim of Nagnath Gaikwad (P.W.4) and Parmeshwar Gaikwad (P.W.7) is required to be appreciated.

24. To begin with, Parmeshwar Gaikwad (P.W.7) claimed to have suffered the injuries on account of the blows unleashed by accused No. 2 Dilip by means of sword after the deceased fell down. This claim of Parmeshwar Gaikwad (P.W.7) finds support in the injury certificate (Exhibit 26) which reveals that the following injuries were noted on the person of Parmeshwar Gaikwad (P.W.7), on his examination at Primary Health Center, Kurduwadi, on the day of occurrence at about 9.30 p.m.

i] Incised wound over left little finger 1 x 0.5 cm

ii] Incised wound over right forearm upper part 4 x 0.5 cm

iii] Contusion over back lumber region 3 x 0.5 cm.

It was opined that injury Nos. 1 and 2 might have been caused by a sharp object. Whereas the injury No. 3 might have been caused by a blunt object.

25. The situation which thus obtains is that there is medical evidence in the form of injury certificate (Exhibit 26) which

lends requisite support to the version of Parmeshwar Gaikwad (P.W.7). This factum lends credence to the evidence of Parmeshwar Gaikwad (P.W.7) that he was injured in the same occurrence. It is trite law that an injured witness stands on a higher pedestal than an eye witness, simplicitor. The testimony of an injured witness commands greater evidentiary value and it cannot be discarded lightly. There are two imperatives. One, the injuries sustained by the injured furnish an inbuilt guarantee about the presence of the injured person at the time and place of occurrence. Two, an injured is ordinarily not expected to shield a real culprit and implicate an innocent person. Thus if found trustworthy, the testimony of an injured can form a sound basis of conviction without necessity of any corroboration.

26. In the case at hand the presence of Parmeshwar Gaikwad (P.W.7) and the deceased in their cattle shed at the time of occurrence cannot be said to be unnatural. Moreover, it is rather indisputable that a scuffle broke out in front of the cattle shed of Parmeshwar Gaikwad (P.W.7). The existence of opportunity to Parmeshwar Gaikwad (P.W.7) to witness

occurrence can hardly be gainsaid. To add to this, there is evidence of the first informant Nagnath Gaikwad (P.W.4) and Digambar Gholap (P.W.5), an independent witness, which lends unwavered corroboration to the claim of Parmeshwar Gaikwad (P.W.7). Nothing material could be elicited in the cross examination of Digambar Gholap (P.W.5) so as to discard his testimony. The evidence of Nagnath Gaikwad (P.W.4), Digambar Gholap (P.W.5) and Parmeshwar Gaikwad (P.W.7) is consistent on material particulars as well.

27. Mr. Agandsurve would urge that from the own showing of Nagnath Gaikwad (P.W.4) and Parmeshwar Gaikwad (P.W.7), the quarrel between the accused and Lankeshwar Jangalbhau had occurred prior to one year of the occurrence in question. Such a stale incident could not have furnished motive for the crime. In addition to this, Parmeshwar Gaikwad (P.W.7) and Nagnath Gaikwad (P.W.4) categorically conceded in the cross examination that they did not mention the said fact while recording the first information report and the statement under section 161 of the Code of Criminal Procedure, respectively. This omission, according to Mr. Agandsurve, dismantles the

substratum of the prosecution case.

28. We are not persuaded to accede to the aforesaid submission. The omission to state the reason for the strained relations between the accused and the informant party, in the backdrop of the overwhelming evidence on record, in our view, does not detract materially from the prosecution. The testimony of Nagnath Gaikwad (P.W.4) on the aspect of having been abused and assaulted by the accused in the first phase of the incident, near the platform of Shetkari Sanghatana, finds ample corroboration in the evidence of Bhagwan Kadam (P.W.6). Despite incisive and searching cross examination nothing could be brought out to jettison away the claim of either Nagnath Gaikwad (P.W.4) or Bhagwan Kadam (P.W.6) with regard to the first occurrence. On the other hand, Bhagwan Kadam (P.W.6) supported the claim of Nagnath Gaikwad (P.W.4) that while leaving the said place, the accused threatened to see the father and brother of the first informant Nagnath Gaikwad (P.W.4).

29. In the aforesaid sequence of events, it was but natural for

the first informant Nagnath Gaikwad (P.W.4) to follow the accused who had proceeded towards house of the first informant after giving threat to cause harm to Parmeshwar Gaikwad (P.W.7) and the deceased. The said prelude to the occurrence, in the facts of the instant case, renders the presence of Nagnath Gaikwad (P.W.4) at the scene of occurrence natural.

30. The learned Sessions Judge found that, in addition to the ocular account and medical evidence, there was circumstantial evidence which was of relevance in establishing the authorship of the crime. The recovery of the weapon of assault i.e. sword, pursuant to the discovery made by accused No. 2 Dilip was arrayed against the accused. On evaluation of the evidence of Shivaji Sathe (P.W.1), the public witness to the discovery made by accused No. 2 Dilip leading to the seizure of the sword (Article 7) from his house under seizure panchanama (Exhibit 22/1), we do not find that the evidence of discovery is fraught with any infirmity. The learned Sessions Judge was thus justified in placing reliance on the evidence of discovery.

31. Moreover, C.A. report (Exhibit 39) reveals that human blood was found on the sword (Article 7) and the glass shards which were seized from the scene of occurrence. The pant which accused No. 2 Dilip wore at the time of occurrence had blood stains of “O” group. This circumstance also connects the accused No. 2 Dilip with the crime.

32. Mr. Agandsurve, the learned counsel for the appellant attempted to salvage the position by forcefully canvassing the submission that the prosecution has suppressed the genesis of the occurrence. The edifice of the submission was sought to be built on the premise that there were injuries on the persons of accused No. 1 Mukund and No. 2 Dilip when they were arrested. The prosecution has not offered any explanation regarding the injuries found on the person of the accused. On the contrary, the prosecution witnesses have steadfastly denied the suggestion that the accused sustained injuries in the very same occurrence. Thus, the evidence of the prosecution witnesses cannot be said to be trustworthy as they have not stated the truth on the most material aspect. To this end, Mr. Agandsurve invited our attention to an admission in the cross

examination of Shrikant Padole (P.W.9), the investigating officer that while arresting the accused, Mr. Walunjkar, Head Constable, had noticed injuries on the person of accused No. 1 Mukund and No.2 Dilip and a reference thereof was made in the arrest panchanama. Parmeshwar Gaikwad (P.W.7) also conceded that he and his son were prosecuted for causing injuries to accused No.1 Mukund and No. 2 Dilip.

33. The aforesaid material and the submission advanced on the strength thereof, in our view, do not advance the cause of the accused. Apart from bald suggestion that the accused had sustained injuries in the said occurrence, no effort was made to bring credible material either in the form of admissions in the cross examination or medical evidence. What is of salience is the fact that accused sustained injuries in the very same occurrence. In the absence of such material, the mere fact that some injuries were found on the accused when they were apprehended is of little assistance to the accused.

34. It is not an inviolable rule of law that the prosecution must explain the injuries on the person of the accused in all the

cases however superficial or minor the injuries may be. Non explanation of injuries on the person of the accused cannot be resorted to as a ritualistic formula to throw the prosecution overboard, in every case, irrespective of the quality of the evidence. If the oral evidence is credible and convincing and inspires confidence, non explanation of injuries on the person of the accused may not dent the prosecution. Likewise if the injuries are minor and superficial in nature, non-explanation thereof does not be impair the prosecution case.

35. A profitable reference in this context can be made to a three judge bench judgment of the Supreme Court in the case of **Takhaji Hiraji vs. Thakore Kubersing Chamansing and Ors.**[1] wherein after adverting to the previous pronouncements the legal position was expounded in the following words:

> *"17. The first question which arises for consideration is what is the effect of non-explanation of injuries sustained by the accused persons. In Rajendra Singh & Ors. v. State of Bihar, (2000) 4 SCC 298, Ram Sunder Yadav & Ors. v. State of Bihar, (1998) 7 SCC 365 and Vijayee Singh & Ors. v. State of U.P., (1990) 3 SCC 190, all three-Judge Bench decisions, the view taken consistently is that it cannot be held as a matter of law or invariably a rule that whenever the accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so*

1 (2001) 6 Supreme Court Cases 145.

the prosecution case should be disbelieved. Before non-explanation of the injuries on the person of the accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied of the existence of two conditions : (i) that the injury on the person of the accused was of a serious nature; and (ii) that such injuries must have been caused at the time of the occurrence in question. Non-explanation of injuries assumes greater significance when the evidence consists of interested or partisan witnesses or where the defence gives a version which competes in probability with that of the prosecution. Where the evidence is clear, cogent and creditworthy and where the Court can distinguish the truth from falsehood the mere fact that the injuries on the side of the accused persons are not explained by the prosecution cannot by itself be a sole basis to reject the testimony of the prosecution witnesses and consequently the whole of the prosecution case."

(emphasis supplied)

36. In the case at hand, the factum of the accused having sustained injuries in the very same occurrence cannot be said to have been fairly established. Nor there is material which indicates with certainty the nature of those injuries. Thirdly, competing version offered by the accused, if weighed on the scale of broad probabilities, does not appear nearer to the truth as the accused offered inconsistent suggestions as to the person who were allegedly armed with sword. It does not stand to reason that the deceased, who was allegedly armed with the sword, would have sustained injury on the backside of his head,

with his own sword, even accidentally. In contrast, there is reliable evidence to indicate that accused No. 2 rushed to the house and returned to the scene of occurrence armed with sword and thereafter assaulted the deceased. Thus, the ground of non explanation of injuries on the person of the accused is of no assistance to the accused.

37. For the foregoing reasons, we are persuaded to hold that the learned Sessions Judge committed no error in arriving at the finding that the accused No. 2 Dilip caused fatal injury with the sword on the head of the deceased. In the circumstances, in our view, the finding that the accused Nos. 1 to 3 could not be attributed with the common intention to cause the said injury to the deceased, also appears justifiable.

38. Ms. P.P. Shinde, learned A.P.P urged with tenacity that the learned Sessions Judge committed an error in law in recording the finding that the act attributed to accused No. 2 Dilip falls within the ambit of section 304 Part II of Penal Code. Since the accused No. 2 Dilip intentionally assaulted the deceased by means of sword on the vital part of the body, the act would

clearly fall within the tentacles of section 300 of the Penal Code. Thus, the sentence of five years imprisonment is wholly unjustifiable, urged Ms. Shinde.

39. We find that the aforesaid submission of learned A.P.P has some substance. The learned Sessions Judge did not appropriately advert to the question as to whether the proved act of the appellant/accused No. 2 Dilip would fall within the dragnet of "murder" or "culpable homicide not amounting to murder". In contrast, it seems that the learned Sessions Judge, was swayed by the nature of the occurrence. The observations of the learned Sessions Judge, in paragraph 26 of the impugned judgment, indicate the factors which weighed with the learned Sessions Judge to hold that the said act fell within the ambit of section 304 Part II of the Penal Code.

> *26. So far as regards accused No. 2 is concerned, he gave one blow with sword on the backside of head of Navnath. It is further seen that his act is definitely not calculated, premediate and requisite intention to spell offence under section 302 also cannot be gathered. . . . . .*
>
> *It is true that the doctor has further stated that the injury No. 1 referred in Col. No. 17 is sufficient in the ordinary course of nature to cause death, still I find that the act on the part of accused No. 2 cannot fall either any of the clauses of section 300. I further*

> *find that the accused No. 2 committed offence of culpable homicide not amounting to murder and the same falls under section 299 of I.P.C. I further find that the requisite knowledge to spell out offence under section 304 Part II of I.P.C. can safely be gathered. Further I find that accused No. 2 has given one blow with sword and this aspect is again clear from the postmortem report (Exhibit 25) and evidence of Dr. Kevalaya (P.W. 3) and thus I find that accused No. 2 needs to be convicted for the offence under section 304 Part II of I.P.C."*

40. The aforesaid observations unmistakably show that the learned Sessions Judge did not pose unto himself the relevant question so as to determine the complicity of the accused. In this context, a reference to the judgment of the Supreme Court in the case of **State of Andhra Pradesh vs. Rayavarapu Punnayya and Another** would be advantageous. In this case the Supreme Court instructively explained the distinction between 'murder' and 'culpable homicide' not amounting to murder. In the process, the Supreme Court illuminatingly postulated the method of determining the question as to whether, in the given facts, the offence proved is 'murder' or 'culpable homicide not amounting to murder', in three stages. Paragraph No. 21 of the said judgment reads as under:

> *21. "From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide*

> *not amounting to murder,' on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 Penal Code, is reached. This is the stage at which the Court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four Clauses of the definition of murder' contained in Section 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of Section 304, depending, respectively, Whether the second or the third Clause of Section 299 is applicable. If this question is found in the positive, but the case comes, within any of the Exceptions enumerated in Section 300, the offence would still be 'culpable homicide not amounting to murder', punishable under the First Part of Section 304, Penal Code."*
>
> *(emphasis added)*

41. In the instant case, the learned Sessions Judge has not considered the first part of the aforesaid third stage, namely, whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in section 300 of the Penal Code. We propose to examine the said aspect.

42. First and foremost, the distinction between “intention” and “knowledge” seems to have been lost site of. To put it in simple words, “intention” is the purpose or desire with which the act is done. It is well known rule of law that the man is presumed to intend the probable consequences of his act. “Knowledge”, on the other hand, means having mental cognition of a thing or the awareness or expectation of the consequences of the act. The principal difference between the knowledge and intention is that in the former the consequence is not desired whereas in the later it is desired.

43. The crucial question which thus comes to fore is whether the accused No. 2 Dilip intended to cause the injury on the head of the deceased with the sword. There is evidence to indicate that accused No. 2 Dilip, after the scuffle broke out, went to his house and returned to the scene of occurrence armed with the sword and thereafter gave a blow with the sword on the back of the head of the deceased. This evidence would justify no other inference than the one that accused No. 2 Dilip had desired that the deceased be assaulted with the sword. It would be hazardous to draw an inference that the accused No. 2 did not

intend to cause the injury by means of sword.

44. In our view, the act clearly fell within the ambit of clause "Thirdly" of section 300 of the Penal Code. The ambit of clause "Thirdly" was illuminatingly postulated by the Supreme Court in the celebrated case of **Virsa Singh vs. State of Punjab**[2] in the following words:

> *12. To put it shortly, the prosecution must prove the following facts before it can bring a case under s. 300, "thirdly" . First, it must establish, quite objectively, that a bodily injury is present; Secondly, the nature of the injury must be proved; These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further and, Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.*
>
> *13. Once these three elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under s. 300, "thirdly". It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an*

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> *act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced that injury was accidental or otherwise unintentional.*

45. The aforesaid pronouncement has been followed in a number of cases. In the case of **Abdul Waheed Khan and Others vs. State of A.P.**[3], the import of the aforesaid proposition was explained in the following words:

> *19. These observations of Vivian Bose, J. have become locus classicus. The test laid down by Virsa Singh's case (supra) for the applicability of clause "Thirdly" is now ingrained in our legal system and has become part of the rule of law. Under clause thirdly of Section 300 IPC, culpable homicide is murder, if both the following conditions are satisfied: i.e. (a) that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death, viz., that the injury found to be present was the injury that was intended to be inflicted.*

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> *20. Thus, according to the rule laid down in Virsa Singh's case, even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this point.* (emphasis supplied)

46. On the aforesaid touchstone, reverting to the facts of the case, we find that the twin conditions to bring the act of the accused within the dragnet of clause "Thirdly" of section 300 are fully satisfied. One, the accused No. 2 Dilip assaulted the deceased with sword with intention of causing the bodily injury. The weapon of assault and the part of the body selected leave no scope for any other inference. Two, there is medical evidence to indicate that the injury was sufficient in the ordinary course of nature to cause death. The fact that there was no intention to cause death is of no relevance.

47. The question as to whether the act of the accused falls within any of the exceptions enumerated in section 300 of the Penal Code was not adverted to by the learned Sessions Judge. At the most, the applicability of exception 4 of section 300 of the Penal Code may warrant consideration. Even if maximum

latitude is given to the defence version and it is assumed that the act was committed in a sudden fight in a heat of passion, yet the fact that there was prelude to the occurrence, which had taken place at a distance of about one and half furlong, and the accused No. 2, in the midst of the scuffle, went to his house and returned to the scene of occurrence armed with knife and thereafter assaulted the deceased, would take the case out of the ambit of explanation 4. At any rate, as the accused No. 2 intended to cause the fatal injury, the offence would fall within the tentacles of section 304 Part I of the Penal Code.

48. We have elaborately considered the aforesaid position in law as the determination of the complicity under appropriate section of the Penal Code bears upon the issue of sentencing as well. Correct identification of the offence committed by the accused is thus of crucial importance in determining the sentence. An incorrect finding leads to miscarriage of justice.

49. Since the State has not preferred appeal against the order of acquittal of accused No. 2 Dilip of the offence punishable under section 302 of the Penal Code, we are constrained to

consider the aspect of enhancement of sentence only.

50. We have heard the learned A.P.P and the learned counsel for accused No. 2 Dilip. The learned A.P.P prayed for a condign punishment. On the contrary, Mr. Agandsurve, having regard to the time lag of about 20 years and the fact that the parties have since moved in life, prayed for a lenient view.

51. We have given anxious consideration to the rival submissions. In the case at hand, a 18 year old boy was done to death for no fault of his. There is evidence to indicate that the accused No. 2 Dilip was not satiated by the assault upon the first informant and rushed to the house of the first informant to cause harm to the deceased. Moreover, there are no extenuating circumstances. In our considered view, a sentence of five years imprisonment does not adhere to the principle of proportionality of the punishment to the gravity of the offence. It errs on the side of leniency. Undue sympathy and unwarranted leniency impair the cause of justice. We are thus persuaded to enhance the sentence imposed upon appellant/accused No. 2 Dilip.

52. Having regard to the entire gamut of the circumstances, especially the time lag of about more than 20 years from the date of occurrence, in our view, a sentence of rigorous imprisonment for eight years would meet the ends of justice.

53. The conspectus of aforesaid consideration is that the appeal against the conviction is liable to be dismissed and appeal preferred by the State for enhancement of sentence deserves to be allowed. Hence, the following order:

ORDER

a] Criminal Appeal No. 102 of 2001 stands dismissed.

b] Criminal Appeal No. 206 of 2001 stands allowed.

c] The sentence stands enhanced as under:

The accused No. 2 Dilip Gajendra Sonawane is sentenced to suffer rigorous imprisonment for eight years and pay fine of Rs. 2,000/- and in default of payment of fine, the accused No. 2 shall suffer rigorous imprisonment for two months.

d] Rest of the impugned order stands confirmed.

e] The accused No. 2 Dilip Gajendra Sonawane shall surrender before the Court of learned Sessions Judge, Solapur within a period of four weeks, to undergo the remaining sentence as enhanced by this order.

(N.J.JAMADAR, J.) **(SMT SADHANA S. JADHAV, J.)**