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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 660 OF 2016

1. Vinod Suresh Kharvi
2. **Suresh Shankar Kharvi (Abated)**
3. Manoj Shankar Kharvi **..Appellants**
VS.

The State of Maharashtra
(through Mankhurd
Police Station in C.R. No.72 of 2014) **..Respondent**

Mr. Murtuza Najmi a/w. Aqsa Tajuddin for the Appellant No.1.
Ms Ashwini B. Jadhav, Appointed Advocate for Appellant No.3.
Mr. Ajay Patil, APP for the Respondent - State .

**CORAM : SMT. ANUJA PRABHUDESSAI &
N.R.BORKAR, JJ.**

DATE : 25.09.2023.

JUDGMENT (PER: N.R. BORKAR, J.)

1. This appeal is filed against the judgment and order dated 20.08.2016 passed by the Additional Sessions Judge, Gr. Bombay in Sessions Case No. 727 of 2014.

2. By the impugned judgment and order, the trial Court convicted the appellants for the offence punishable under section 302 read with 34 of the Indian Penal Code, 1860 (for short "IPC") and sentenced to suffer life imprisonment and to

pay fine of Rs.2000/- each, in default to suffer simple imprisonment for three months.

3. The appellant No.2 - Suresh Kharvi, who was accused No.2 before the trial Court, died during pendency of the present appeal. The appeal thus stands abated against him.

4. The appellant No.1- Vinod Kharvi and appellant No.3- Manoj Kharvi were accused Nos.1 and 3 respectively before the trial Court.

5. The deceased Ashok Kharvi was the brother of accused Nos.2 and 3. The accused No.1 is the son of accused No.2.

6. It is the case of the prosecution that there was a dispute between the deceased on one hand and the accused Nos.2 and 3 on the other hand in relation to apportionment of pension and other benefits of their father who was working as Gardner with B.M.C.

7. According to the prosecution, on the date of incident which took place on 2.3.2014, at about 9:30 p.m., the accused Nos.1 to 3 came to the house of deceased and started quarreling with him. It is alleged that during the said quarrel, the accused No.1 picked up a Scissor, which was there on T.V. set and stabbed the deceased on his chest. The deceased was injured and taken to the hospital where he succumbed to his injuries.

8. The trial Court to convict the accused Nos.1 to 3 has primarily relied upon the evidence of eye-witnesses PW-3 Chandrabhan Upadhyay, PW-4 Narendra Dubey and PW-5 Vishnu Murlapille.

9. We have heard the learned counsel for the appellant No.1/accused No.1, learned appointed counsel for appellant No.3/accused No.3 and learned APP for the respondent -State.

10. The learned counsel for the appellants submit that the trial Court erred in relying upon the evidence of PW-3 to PW-5 to convict the appellants/accused. It is submitted that perusal of their evidence will show that infact they are not the eye-witnesses to the incident. It is submitted that there is no evidence on record in relation to alleged motive. It is submitted that the appellants/accused thus need to be acquitted.

11. In the alternative, the learned counsel for the appellant No.1/accused No.1 submits that considering the facts and circumstance of the case, benefit of Exception 4 to Section 300 of the IPC needs to be extended to the appellant No.1 and conviction of the appellant No.1/accused No.1 needs to be altered to the offence punishable under section 304 - Part (II) of the IPC.

12. On the other hand, learned APP for the respondent/ State supported the impugned judgment and order.

13. We have perused the evidence of PW-3, PW-4 and PW5. According to PW-3 Chandrabhan Upadhyay, he and deceased were residing on the same floor. On the date of incident, he heard a noise of quarrel and came out of his house. According to him, accused No.1 - Vinod assaulted the deceased. He has, however, not attributed any *overt-act* to the accused Nos.2 and 3. According to him, he had seen them running away from the house of deceased.

14. According to PW-4 Narendra Dubey, the deceased was his neighbour. On the date of incident, on hearing a noise of quarrel, he rushed to the house of deceased and saw that accused Nos.2 and 3 were beating the deceased. According to him, the accused No.1 who was also beating the deceased, picked up the scissor which was there and assaulted the deceased on his chest and head. According to him, after assault, accused Nos.1 to 3 ran away from the place of incident.

15. The evidence of PW-4, however, with regard to the fact that he had seen the accused Nos.2 and 3 beating the deceased is nothing but an omission as he has admitted in his cross-examination that he has not stated so in his statement under Section 161 of the Cr.P.C.

16. According to PW-5, he was residing in the same building where the deceased was residing. According to him, on the date of incident, at about 10:15 p.m., he had seen the

deceased and accused quarreling with each other. The evidence of PW-5 is, however, silent in relation to actual assault.

17. It is apparent from the evidence of PW-3 to PW-5 and more particularly, PW-4 that on the date of incident, accused No.1 during quarrel between them and the deceased, picked up the scissor, which was there at the spot of incident and assaulted the deceased. There is nothing in the cross-examination of PW-3 to PW-5 to disbelieve them. After perusing the evidence of PW-3 to PW-5, we are not inclined to accept the submission of the learned counsel for the appellants/accused that they did not witness the actual assault.

18. We are, however, of the view that considering the facts and circumstances of the case, the trial Court was not justified in convicting the accused No.2 and 3 for the offence punishable under section 302 of the IPC with the aid of section 34 of the IPC.

19. It is well settled that to convict the accused with aid of section 34 of the IPC, there has to be simultaneous consensus of mind of the persons participating in the criminal action to bring about particular result. However, in the present case there is no such evidence. From the evidence on record, it is difficult to infer that the accused Nos.2 and 3 had idea or were aware about the intention of the accused No.1 that he would

pick up the scissor and assault the deceased. We, also find merit in the alternative submission of learned counsel for appellant No.1/accused No.1 considering the facts and circumstances of the case, the benefit of Exception 4 to Section 300 of the IPC need to be extended to accused No.1.

20. The Hon'ble Supreme Court in ***Surinder Kumar v. Union Territory, Chandigarh***¹

"To invoke Exception 4 to Section 300 I.P.C. four requirements must be satisfied, namely (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion, and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger.

Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this Exception provided he has not acted cruelly."

21. In the present case, it is apparent from the evidence on record that there was no premeditation and in a sudden quarrel, accused No.1 assaulted the deceased. There is also no evidence that the accused No.1 acted in cruel manner. In our view, the requirements of Exception 4 to Section 300 of the IPC are, therefore, satisfied in the present case.

22. As regards the submission that the accused No.1, at the most, can be said to have committed offence punishable under

1 AIR 1989 SC 1094

section 304 - Part (II) of the IPC, the prosecution has proved that the accused No.1 assaulted the deceased by scissor on the chest. It is well settled that if death is caused either with intention to cause death or with the intention of causing such bodily injury as was likely to cause death, the accused would be guilty of Part (I). Whereas if the act was done with the knowledge that it was likely to cause death but without any intention to cause it or without any intention to cause such bodily injuries as likely to cause death the accused would be guilty of Part-II. The Hon'ble Supreme Court in **Aradadi Ramudu @ Aggiramudu v. State**² has held that for modification of conviction from section 302 of the IPC to Part-II of section 304 of the IPC not only should there be an absence of intention to cause death but also an absence of intention to cause such bodily injury that in the ordinary course of things is likely to cause death.

23. According to PW-7 Dr. Narendra Shinde, who conducted the postmortem, the injuries were life threatening. The heart of deceased was ruptured. Considering the evidence of PW-7, we are not inclined to accept the submission of the learned counsel for the accused No.1 that it was a case of simplicitor knowledge and not that of intention. Considering the overall facts and circumstances, conviction of the accused No.1 is altered to the offence punishable under Section 304 - Part (I) of the IPC.

² (2012) 5 SCC 134

24. In the result, the following order is passed:

(a) The Appeal is partly allowed.

(b) The conviction of appellant No.1/accused No.1 under section 302 of the IPC is altered to conviction under section 304 - Part(I) of the IPC and is sentenced to suffer Rigorous Imprisonment for 10 years. Needless to mention that the sentence of life imprisonment stands quashed.

(c) The sentence of fine is, however, maintained.

(d) The impugned judgment and order convicting accused No.3 for the offence punishable under section 302 read with 34 of the IPC is hereby set aside and he is acquitted of the said offence.

(e) The bail bonds of appellant No.3/accused No.3 shall stands cancelled.

(f) The Appeal is disposed of in the aforesaid terms.

25. Pending application (s), if any, are disposed of.

[N.R.BORKAR, J.]

[SMT. ANUJA PRABHUDESSAI, J.]