



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 168 OF 2021

1. Rayakya Vaharya Padvi
Age: 41 years, Occu.: Nil,

2. Datkya Vaharya Padvi
Age: 36 years, Occu.: Nil,
Both R/o Khai, Tq. Akkalkuwa,
Dist. Nandurbar

..APPELLANTS

VERSUS

State of Maharashtra
Through Police Inspector,
Police Station Molgi,
Tq. Akkalkuwa, Dist. Nandurbar

..RESPONDENT

....
Mr. A.R. Borulkar, Advocate for appellant (appointed through Legal Aid)
Mr. S.D. Ghayal, Addl.P.P. for respondent - State
....

**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ**
RESERVED ON : 21st AUGUST, 2024
PRONOUNCED ON : 19th SEPTEMBER, 2024

JUDGMENT (PER : R.G. AVACHAT, J.) :

1. The challenge in this appeal is to a judgment and order of conviction and consequential sentence dated 14th March, 2018 passed by Additional Sessions Judge, Shahada ('trial Court') in Sessions Case, No. 69 of 2014. Vide the impugned judgment and order the appellants have been convicted for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code ('I.P.C.'), and therefore, sentenced to suffer imprisonment for life and pay fine of Rs.5,000/- each. In default in payment

of fine, they were further directed to undergo rigorous imprisonment for six months.

2. The facts giving rise to the present appeal are as follows :-

The appellants are the real brothers. Jaysing and Pratap (both deceased) were the real brothers. Urmila (widow of deceased Jaysing) learnt that both the appellants were cultivating their (victim) land on the morning of 16th July, 2014. She, therefore, alongwith her husband - Jaysing, brother-in-law – Pratap, Pratap's widow – Kalubai went to the field. They questioned the appellants as to why did they cultivate their land. The appellants thereupon manhandled them. Appellant - Rayakya assaulted Jaysing on his head and neck with an iron bar (crowbar), while appellant - Datkya assaulted him with a big stick. Pratap intervened in the quarrel. Both the appellants assaulted him as well with the articles in their hands viz. Iron bar and big stick. On hearing hue and cry, neighbouring field owners arrived. The appellants thereupon fled away.

3. Both the injured viz. Jaysing and Pratap were first rushed to Government Hospital, Molgi. The Medical Officer there provided them first aid. Then both of them were shifted to a hospital at Nandurbar. They were further taken to a hospital at Dhule and ultimately shifted to a hospital in Surat. On the day of the incident itself Urmila lodged the F.I.R. (Exh.22) with Molgi Police Station.

4. Crime vide C.R. No. 39 of 2014 was registered. On the next day i.e. on 17th July, 2014 Pratap passed away and on the following day i.e. on 18th July, 2014 Jaysing breath his last in the hospital at Surat. Section 302 of the I.P.C., therefore, came to be invoked in place of Section 307 of the I.P.C.

5. Crime was investigated. The appellants were arrested. Both of them made disclosure statements pursuant to which an iron bar and wooden stick came to be seized under the panchanamas (Exh.28 & 30). Crime scene panchanama (Exh.26) was drawn. Inquest was conducted on the mortal remains of both Jaysing and Pratap. Autopsy too was conducted at the hospital in Surat itself. Statements of the persons acquainted with the facts and circumstances of the case were recorded. Seized articles were sent to R.F.S.L., Nashik for analysis and report. Upon completion of investigation investigation, charge-sheet was filed against both the appellants.

6. The trial Court framed charge (Exh.12) for the offences punishable under Sections 302, 447, 504 and 506 read with Section 34 of the I.P.C. The appellants pleaded not guilty. Their defence was of false implication.

7. To bring home the charge, prosecution examined eight witnesses and produced in evidence certain documents. The trial Court, on appreciation of the same, convicted the appellants and consequentially sentenced as stated above.

8. Learned counsel for the appellants would submit that there was quite difference between ploughing and sowing operation. The witnesses examined by the prosecution were all related to the deceased. The seized articles viz. Iron bar and stick did not bear blood stains. Our attention was adverted to the C.A. reports (Exh.52) in that regard. According to learned counsel, PW 2 - Kalusing did not witness the incident. Whatever he had deposed to was hearsay. He gave admission to that effect in his cross-examination. Then turning to the evidence of PW 6 - Kalubai (widow of Pratap), he would submit that she too was not an eye witness. Other witnesses, except PW 1 - Urmila, did not speak of her presence. She did not accompany her injured husband to the hospital. The said conduct is unnatural. He would further submit that the investigating officer did not make enquiry as to whether there was a civil dispute between the appellants on the one hand and the deceased on the other. The medical officers, who treated the deceased, have not been examined. Nor the medical papers of the treatment extended to both of them have been placed on record. According to him there is inconsistency *inter se* evidence of the prosecution witnesses. The witnesses were not consistent with the appellants to have been armed with particular articles. He would further submit that the articles allegedly used in the commission of the crime were of day-to-day agricultural implements. He, therefore, ultimately urged for allowing the appeal.

9. Learned A.P.P. would, on the other hand, submit that the case is based on eye witness account. The deceased suffered injuries on their vital

parts viz. head. Although the C.A. report do not support the prosecution case, evidence of the eye witness go a long way to conclude the appellant to have committed murders of their cousins on account of land dispute. According to learned A.P.P., there is no reason to interfere with the impugned order of conviction and consequential sentence.

10. Considered the submissions advanced. Perused the evidence on record. Also perused the judgment impugned herein. Let us advert thereto and appreciate the same.

11. It has been brought on record during cross-examination of PW 1 – Urmila that one Mithya was the common ancestor. He had three sons, viz. Bhanga, Vaharya and Motya. Mithya partitioned the agricultural land amongst his three sons. The trio were cultivating their respective lands. Damja and Jonda were the real brothers of the appellants. They were the sons of Vaharya.

12. PW 1 – Urmila was the widow of Jaysing. Her oral evidence indicates that on the given day i.e. on 16th July, 2014 she learnt the appellants to have been cultivating their (victim) field. She, therefore, alongwith her husband – Jaysing, brother-in-law – Pratap, his wife – Kalubai (PW-6) went to the field to enquire the appellants as to why did they cultivate their field. Thereupon the appellants manhandled them. Appellant – Datkya assaulted on the neck and head of Jaysing with iron bar (crowbar), while appellant - Rayakya assaulted with a big stick (dengara). He assaulted on

his entire body. He (Jaysing) thereby became unconscious. Her brother-in-law – Pratap intervened. He too was not spared. Both the appellants assaulted him with the very articles. She and Kalubai, therefore, raised hue and cry. Villagers Damjya, Dursing and Kalya rushed to the spot. The appellants thereupon fled away.

13. It is further in her evidence that both, Jaysing and Pratap were lying in the field for about 4-5 hours before they were shifted to Government Hospital at Molgi. Then they were shifted to Civil Hospital Nandurbar from Molgi. Again they were taken to Dhule Civil Hospital and ultimately admitted to the Civil Hospital at Surat. According to her, she lodged the report of the incident on the same day. She referred thereto. It is at Exhibit 22.

14. She was subjected to a searching cross-examination. Relationship between the parties and their predecessors has been brought on record. The same has been referred to hereinabove (Paragraph no.11). She admitted that no suit was pending in any Court of law on account of dispute over the land. The field in which the incident taken place was 300 feet away from her house. She could not state gut number or survey number of the field in which the incident took place. She admitted that ploughing and sowing operations are two different things. She admitted that the appellants had not come to their residence or picked up quarrel any time prior to coming to their field. She denied to have had picked up the quarrel with the appellants. According to her, scuffle had taken place between the deceased

and the appellants for about 2-3 minutes. The suggestions put to her in cross-examination indicate the appellants to have appeared at the crime scene. It is further in her evidence that scuffle took place for about 2-3 minutes. The incident lasted for about 5-6 minutes. Both the injured were lying in the field unattended for about 5-6 hours before they were shifted to the hospital. Before they were taken to the hospital, no villager had informed the police about the incident. She denied to have had approached Molgi Police Station post demise of her husband and brother-in-law. She was confronted with the F.I.R. which is silent to state that it was a big stick (dengara) with which one of the appellants had assaulted. Rest of the questions put to her were in the nature of denying her evidence in examination-in-chief.

15. PW 2 - Kalusing's evidence indicates that he was present in his field by 10:00 in the morning on 16th July, 2014. A fight took place between the appellants on one hand and deceased on the other. Wives of Jaysing and Pratap raised hue and cry. He, therefore, alongwith Dursing and Damjya rushed to the spot. Both the appellants thereupon fled away. According to him, the quarrel took place on account of a dispute over the field. The injured were shifted first to the Government Hospital at Molgi and then to different hospitals.

16. In his cross-examination, it was suggested to him that Jaysing and Pratap had allotted big portion of land in partition. It was further suggested

that all the four lands were at four different places. Each one was cultivating the land of his share. He could not tell the number of his own land and the land in which the incident took place. According to him, the incident lasted for half an hour. Before he reached the spot, the appellants fled away. Learned counsel, therefore, meant to say that he was not an eye witness to the incident. We are not in agreement with him, since his evidence indicates that he was present in the neighbouring land wherefrom he could witness the incident. His admission only suggests that the appellants had fled before he reached the crime scene. He was confronted with his police statement which is silent to state appellant - Rayakya was armed with a big stick (dengara). He, however, admitted that Urmila and Kalubai (widows of the deceased) related him about the incident. He was present with Urmila while the report was lodged at the concerned police station.

17. Evidence of this witness indicates that it was he, who had accompanied Urmila to lodge the report the same day. It was he, who helped to take the injured to the hospital. There is nothing to indicate that there is any animosity between him and the appellants, for him to give false evidence against them.

18. PW 3 – Daulatsing is the witness to the crime scene panchanama (Exh.26), disclosure statements (Exh.27 and 29) made by the appellants – Rayakya and Datkya respectively, pursuant to which wooden stick and iron bar came to be recovered under seizure memo (Exh.28 and 30) respectively.

We do not propose to rely on his evidence in *extenso*, since seized articles did not bear blood stains. The so called disclosure statements made by the appellants, therefore, could not be said to be relevant under Section 27 of the Evidence Act. The crime scene panchanama (Exh.26) also does not indicate marks of footprint or anything. It was rainy season. Nothing was seized from the crime scene.

19. PW 4 – Dhursing's evidence is on the lines of the evidence of PW 2 – Kalusing. According to him, he was ploughing his field. On hearing shouts he rushed where the incident took place. On having seen them, the appellants fled. On his enquiry, Urmila told him as to how the incident took place. It was he, who assisted to take the injured to the hospital at Molgi in a jeep and then the injured were shifted to a hospital at Nandurbar. He admitted in his cross-examination to have had not witnessed the dispute between the appellants and the deceased. He denied to have not seen the appellants fled away from the spot.

20. Close appreciation of the evidence of this witness may indicate him to have not witnessed the incident. His evidence, however indicates that he reached the crime scene immediately after the incident took place and learnt about the same from the informant – Urmila.

21. PW 6 – Kalubai is the widow of Pratap. Her evidence is consistent with the evidence of PW 1 – Urmila. It is in her evidence that she

had accompanied Urmila, Jaysing and Pratap to their field on having learnt the appellants cultivating the same. Her evidence further indicates that both the appellants scuffled with Jaysing and Pratap. Appellant – Datkya assaulted Jaysing with an iron rod, while appellant – Raykya assaulted with a wooden stick. Her evidence further indicates that on hearing hue and cry, Kalusing, Dursing and Damjya arrived. Her cross-examination further indicates that Jaysing sustained injury to his leg. The leg was fractured. The postmortem report (Exh.34), however indicates Jaysing to have not suffered injury to his leg. He could not state the gut number of the land wherein the incident took place. She did not accompany her husband (Pratap) to the hospital.

22. PW 7 – Goraksh was the Assistant Police Inspector with Molgi Police Station. He did investigation of the crime. He drew crime scene panchanama (Exh.26). He also recorded disclosure statements made by both the appellants and seized the articles accordingly. He admitted to have not collected medical papers from the hospital at Molgi, Nandurbar or Dhule. There were no injuries on the person of the appellants. He denied that appellant – Raykya was unable to talk in Marathi. While PW 3 – Daulatsing, panch witness testified that Raykya did not understand Marathi.

23. Appreciation of the evidence of the aforesaid witness indicates that the appellants and the deceased were relatives of each other. A dispute over an agricultural land was there amongst them. None of the prosecution

witnesses, however could give the gut number of the land wherein the incident took place. The appellants claimed that they were cultivating their own land, while according to the informant, the appellants encroached on their land, and therefore, on questioning them the incident took place. Admittedly, the investigating officer did not collect any documentary evidence in the nature of revenue record to indicate the land on which the incident took place really belong to the deceased. It, therefore, appears that the trial Court has acquitted the accused of Section 447 of the I.P.C. The F.I.R. (Exh.22) has been lodged within hours of the incident. The same gets reinforced from the evidence of PW 1 – Urmila. Other witnesses viz. PW 2, 4 and 6 have also no reason to speak against the appellants, who were their close relatives. As such, evidence of these witnesses lead us to undoubtedly conclude that it were the appellants, who assaulted Jaysing and Pratap with a wooden stick and an iron rod.

24. PW 5 – Dr.Patel was serving with New Hospital at Surat as a resident doctor. His evidence indicates that he conducted postmortem examination of the mortal remains of both the deceased. On external examination of the body of Pratap, he noticed following injuries :-

- “1) *A surgically stitched wound of size 8 c.m., stitched with 6 black coloured stitches, present over left parieto temporal region of scalp. Anterior inner end lies 7.5 c.m. above left supraorbital ridge and 7 c.m. left to midline. On removing stitches margins of wound are non adherent with red clotted blood present over it.*
- 2) *A surgically stitched wound of size 3 c.m., stitched with 3 black coloured suture present obliquely over lateral aspect of 1/3rd of right eyebrow, inner end lies 4 cm. right to midline.*

- 3) *A surgically stitched wound of size 1 c.m., stitched with 1 black coloured suture present obliquely over right side of forehead, 6 cm right to midline and 3 c.m above right supraorbital ridge. On removing stitch wound is bone deep and underlying bone fracture found. On removing of all above stitched wound, all wounds are bone deep and margins of all wound are irregular and contused with red clotted blood over it.*
- 4) *A palpable depressed communicated fracture of size 7 c.m. X 4 c.m. present over right fronto-parieto-temporal region.”*

25. While he conducted autopsy on the mortal remains of Jaysing on 18th July, 2014, he noticed following external injuries on his person :-

- “(1) *A surgically stitched wound of size 3 c.m., stitched with two black coloured stitches, present obliquely over left side of head, upper medial end is 8 cm. above left mastoid process and 13.5 c.m. left to mid line.*
- 2) *A surgically stitched wound of size 2.5 c.m., stitched with two black coloured stitches, present obliquely over left side of head. Upper medial end is 9 c.m. above left mastoid process and 12.5 c.m. left to midline.*
- 3) *A surgically stitched wound of size 3.5. cm. stitched with 3 black coloured stitches, present obliquely over left side of head, upper medial end is 16 c.m. above left supra orbital ridge and 7 c.m. left to mid line.*
- 4) *A surgically stitched wound of size 4 cm. stitched with 4 black coloured stitches, present obliquely over area behind left ear, upper posterior end is 0.5 c.m. above and 0.5 c.m. anterior to left mastoid process.*
- 5) *Bluish contusion of size 5 x 4 c.m. present over left side of neck, 3 c.m. below and 0.5 c.m. behind left mastoid process. On removing of stitches of all surgically stitched wounds margins are non adherent, irregular and contused with red clotted blood present over it.”*

Postmortem reports of both the deceased find place at Exhibits 34 and 35 respectively.

26. His cross-examination indicates that it was Dr.Bharat Patel, who had treated the deceased. He could not state whether the injuries suffered by the deceased were result of a single blow or multiple blows. He even could not state the age of the injuries. The cause of death of both, Jaysing and Pratap was 'shock due to head injury'.

27. Now the question is whether this is an offence of murder or culpable homicide not amounting to murder. True, learned counsel for the appellants made no submissions in this regard. It is, however for the prosecution to make out a case for sustaining conviction for the offence punishable under Section 302 of the I.P.C.

28. In paragraph no. 59 of the Apex Court's judgment in case of **Anbazhagan Vs. State represented by the Inspector of Police, AIR 2023 SC 3660** it has been observed as under :-

"59. We may lastly refer to the decision of this Court in Pulicherla Nagaraju v. State of A.P., (2007) 1 SCC (Cri) 500, wherein this Court enumerated some of the circumstances relevant to finding out whether there was any intention to cause death on the part of the Accused. This Court observed: (SCC pp. 457-58, para 29)

29. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls Under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the Accused attempts to avoid the

penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable Under Section 302, are not converted into offences punishable Under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable Under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the Accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the Accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention.”

It is further observed in sub-paragraph no.7 of paragraph no.60 thereof as follows :-

“60. Few important principles of law discernible from the aforesaid discussion may be summed up thus:

(7) The distinction between culpable homicide (Section 299 of the Indian Penal Code) and murder (Section 300 of the Indian Penal Code) has always to be carefully borne in mind while dealing with a charge Under Section 302 of the Indian Penal Code. Under the category of unlawful homicides, both, the cases of culpable homicide amounting to murder and those not amounting to murder would fall. Culpable homicide is not murder when the case is brought within the five exceptions to Section 300 of the Indian Penal Code. But, even though none of the said five exceptions are

pleaded or prima facie established on the evidence on record, the prosecution must still be required under the law to bring the case under any of the four clauses of Section 300 of the Indian Penal Code to sustain the charge of murder. If the prosecution fails to discharge this onus in establishing any one of the four clauses of Section 300 of the Indian Penal Code, namely, 1stly to 4thly, the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described Under Section 299 of the Indian Penal Code.”

29. Section 300 of the I.P.C. reads thus :-

“Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

2ndly.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

3rdly.—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

4thly.—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.”

Exception 4 thereof reads thus :-

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

30. Admittedly, the appellants had not been to the house or place of the deceased with deadly weapons to assault them. It is the deceased alongwith their wives had been to the field on having learnt the appellants to have been cultivating their (victim) land. The Investigating Officer made no investigation to find the land which was allegedly cultivated by the appellants

really belongs to the deceased. As such, the quarrel preceded between the appellants on one hand and the deceased on the other. Even the witnesses testified that a scuffle took place between both the sides. The weapons of assault seized may not be the same which have been used by the appellants, since the C.A. report (Exh.52) does not corroborate the same. No sharp edged weapon was used. It is not the case of prosecution that the appellants during quarrel left the place and fetched the articles to assault the deceased therewith. It means the wooden stick and the iron rod were very much there where they were working. It is not a case of premeditation. A sudden fight ensued in a hit of passion upon sudden quarrel. True, the nature of injuries indicates the same to have been caused on the vital part of the body, head. The medical officer testified those were sufficient in ordinary course of nature to cause death. In our view, therefore, it would be a case of culpable homicide not amounting to murder, punishable under Section 304 Part I of the I.P.C. In the facts and circumstances of the case, we find that ends of justice would be met if the appellants are sentenced to imprisonment for eleven years. They have already undergone a little over ten years of sentence.

31. For all the aforesaid reasons, we pass the following order :-

ORDER

- (I) Criminal appeal is partly allowed.
- (II) Impugned judgment and order dated 14th March, 2018 passed by Additional Sessions Judge, Shahada in Sessions Case No.

69 of 2014, thereby convicting and sentencing the appellants for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, is hereby set aside.

- (III) The appellants are convicted for the offence punishable under Section 304 Part I read with Section 34 of the Indian Penal Code, and therefore, sentenced to undergo rigorous imprisonment for eleven years and to pay fine of Rs.1,000/- (Rupees One Thousand) each, in default to suffer rigorous imprisonment for one month.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

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