

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

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO.301 OF 2012.

[1] Raju @ Rajendar s/o Sakharam Wagar.
Age : 32 Years, Occ.: Labourer.
R/o. : Limbgaon, Taluka : Nanded,
District : Nanded.

[2] Jaidip s/o Rohidas Wagar.
Age : 19 Years, Occ.: Labourer.
R/o. : Limbgaon, Taluka : Nanded,
District : Nanded.

.. **APPELLANTS.**

VERSUS

The State of Maharashtra. .. **RESPONDENT.**

Mrs. U.T. Pathan, Advocate h/for Mr. T.W. Pathan, Advocate
for the Appellants.

Mr. M.M. Nerlikar, Additional Public Prosecutor for the State of
Maharashtra.

**CORAM : A.B.CHAUDHARI &
INDIRA K. JAIN, JJ.**

DATE : 03/09/2015.

JUDGMENT :- (Per Indira K. Jain, J.)

This Appeal is preferred by the appellants - original accused Nos. 1 and 2 against the Judgment and Order dated 26th March, 2012 passed by the learned Sessions Judge, Parbhani in Sessions Case No.123 Of 2011. By the said Judgment and Order learned Sessions Judge convicted the appellants for the offence punishable under Section 302 read with Section 34 of the Indian

Penal Code and sentenced each of them to suffer imprisonment for life and to pay fine of Rs.5000/- each in default to suffer further rigorous imprisonment for six months.

[2] For the sake of convenience, we shall refer the appellants in their original status as accused as they were referred before the trial court.

[3] Prosecution case, briefly stated, is as under :-

(i) Deceased Balaji Bhimrao Pohare was resident of village Limbgaon, Taluka & District Nanded. Complainant Sandesh is brother of Balaji. Accused No.1 Raju @ Rajendar and accused No.2 Jaidip were neighbours of Balaji.

(ii) Before 4 to 5 months of incident, quarrel had taken place between Balaji and accused. Balaji was slapped and kicked by accused alleging that he had pushed one of the accused. That time, accused threatened Balaji that they would teach him a lesson. With the intervention of villagers dispute was settled.

(iii) On 27th May, 2011 marriage ceremony of Vishwanath Wagar was to be performed at village Dabhad. At about 10.00 a.m. accused Raju and Jaidip with Mohan Pohare went to the place of Balaji and asked him to accompany them to village Dabhad for attending the marriage ceremony. Balaji joined them and they all proceeded to village Dabhad on motorcycle. At about 12.30 in the noon, Sandesh went to attend the marriage ceremony at village Dabhad. He saw accused and Balaji roaming together in the marriage pandal.

(iv) On the same day, at about 10.30 p.m. Sandesh received telephonic call from Bhagyanagar Police Station, Nanded informing him that dead body of Balaji was brought to the Government Hospital Nanded. On receiving information Sandesh with others rushed to the Hospital. They saw dead body of Balaji lying in pool of blood. They noticed injuries on the head, arm, thigh and stab injury on chest of Balaji. Sandesh made inquiry with the people who attended marriage. During inquiry, he came to know that accused assaulted Balaji with deadly weapons and caused his murder.

(v) Sandesh then lodged complaint with Police Station, Bhagya -nagar, Nanded. CR No.100/2011 was registered under Section 302 of the Indian Penal Code. Accused were arrested. Inquest panchnama was drawn. Dead body of Balaji was referred to the Government Hospital for post mortem. Spot panchnama was recorded.

(vi) During investigation statements of several witnesses including eye witnesses were recorded. Since the offence had taken place within the territorial limits of Purna Police Station, all the papers of investigation were forwarded by Bhagyanagar Police Station, Nanded to Police Station, Purna, District Nanded. On completion of investigation, charge sheet was filed before the court of learned Judicial Magistrate, First Class, Purna, District Nanded.

[4] Charge came to be framed against the accused at Exhibit 6. They pleaded not guilty to the charge and claimed to be

tried. Regarding alleged commission of offence, defence of accused was of total denial and false implication.

[5] Prosecution examined in all 13 witnesses. After going through the evidence adduced in the case, learned Sessions Judge, Parbhani convicted and sentenced the accused, as stated in paragraph 1 above. Hence, this Appeal.

[6] We have heard at length learned counsel for the appellants and the learned Additional Public Prosecutor for the State. After giving anxious consideration to the facts and circumstances of the case, arguments advanced by the learned counsel for the parties, judgment delivered by learned Sessions Judge and evidence on record, for the below mentioned reasons, we are of the opinion that there is no sufficient evidence to convict the accused for the offence punishable under Section 302 of the Indian Penal Code but prosecution succeeds in proving the charge against accused under Section 304 part I of the Indian Penal Code. Accordingly Appeal deserves to be partly allowed.

[7] Prosecution case mainly rests on ocular evidence. In this connection reliance is strongly placed on the evidence of PW 4 Chandbee Shaikh Khairu, PW 5 Shaikh Ismail Shaikh Diwan and PW 8 Hamidabee w/o Shaikh Ismail.

[8] From the evidence of PW 4 Chandbee it can be seen that she is resident of village Kawalgaon, Taluka Purna, District Nanded. One Rekha was residing in the house of Tukaram Sonawane in front of house of PW 4 Chandbee. Accused used to visit house of Rekha. It is deposed by PW 4 Chandbee that at the time of incident she and PW 8 Hamidabee were present in the house. At about 6.00 p.m. she saw accused with one new boy

coming on motorcycle. They went to house of Rekha. After some time, they came out of the house. According to PW 4 Chandbee, accused then started hurling abuses to new boy, who was with them. Rekha intervened and pacified accused not to abuse third person. Raju gave a slap to Rekha. Thereafter, Rekha went inside. Accused Raju took the third boy at some distance. Accused Jaidip held that person and Raju inflicted blows with knife on the chest and stomach of third person. PW 4 Chandbee stated that victim sustained bleeding injuries and fell down on the ground. Thereafter, Raju and his companion made him to sit on motorcycle and Raju took motorcycle towards Nanded side.

PW 8 Hamidabee fully supports the evidence of PW 4 Chandbee on the manner of occurrence of incident.

So far as PW 5 Shaikh Ismail Shaikh Diwan is concerned he reached the spot after the incident and saw that accused made injured to sit on motorcycle. PW 5 Shaikh Ismail saw that accused took injured boy towards Nanded.

[9] To establish the authorship of the accused, prosecution has relied upon strong circumstance i.e. detection of blood on clothes of the accused. Accused have not denied that their clothes were found stained with blood. They raised defence that their clothes were stained with blood when they were taking the deceased to the hospital in injured condition. The blood found on clothes of accused was of the blood group of the blood recovered by Police from the spot i.e. of the deceased. It lends strong corroboration to the evidence of eye witnesses that they saw both the accused assaulting the deceased.

[10] Besides this accused have been identified before the court by the witnesses. Nothing substantial could be elicited in the piercing cross-examination of the star witnesses to disbelieve their testimonies.

[11] If medical evidence is looked into it is evident from the evidence of PW 13 Dr. Vishwanath Limbajirao Paratwag that at the time of performing post mortem, following anti-mortem injuries were noticed on the body of Balaji.

1. Both 1st toes medially, deep lacerated.
2. Right arm deep injury CLW 5 c.m x 1.6 c.m.
3. Right medially CLW 3 c.m. x 2 c.m x 1 c.m. upto heart.
4. Left lower chest injury, stab injury 4 c.m. deep x 1 c.m. width x 1 c.m. Length.
5. Right lower lateral CLW horizontal.
6. CLW left lateral thigh 2 x 1 x 1 c.ms.
7. Left upper lumbar region 1 x ½ x 1 c.m.

On performing post mortem, Doctor opined probable cause of death due to stab injury. Medical Officer stated that except injury No.1, all other injuries were possible by sharp cutting weapon. Injury No.4 to chest was fatal injury.

[12] In the case in hand weapon used in assault is not recovered or seized. We do understand that recovery of weapon is not always essential. However, in absence of weapon and considering the nature of injuries *vis a vis* medical papers, it would be highly unsafe to jump to the conclusion that Balaji was murdered.

In the light of the evidence of prosecution witnesses, in our view, it would be a case falling under Section 304 Part I of the Indian Penal Code i.e. culpable homicide not amounting to murder.

[13] Thus, in the totality of the facts and circumstances, we are of the opinion that there is sufficient evidence to prove beyond reasonable doubt guilt of the accused under Section 304 Part I of the Indian Penal Code. We, therefore, find it appropriate to modify the Judgment and Order of conviction passed against the accused, by partly allowing the Appeal. Hence, the following order :-

ORDER

(i) Criminal Appeal is partly allowed.

(ii) Impugned Judgment and Order dated 26th March, 2012 passed by the learned Sessions Judge, Parbhani, District Parbhani in Sessions Case No.123 Of 2011, convicting the appellants for the offence punishable under Section 302 read with 34 of the Indian Penal Code and sentencing them to suffer Rigorous Imprisonment for life and to pay fine of Rs.5,000/-, in default to suffer rigorous imprisonment for six months is modified and instead both the appellants are convicted for the offence punishable under Section 304 Part I of the Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years and fine of Rs.1,000/- each, in default to suffer Rigorous Imprisonment for one month.

(iii) Benefit of set-off to the appellants is given under Section 428 of the Code of Criminal Procedure, for the imprisonment already undergone by them.

[INDIRA K. JAIN, J.]

[A. B. CHAUDHARI, J.]