

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

Criminal Appeal No.360 Of 2000.

1. Kadubal Bhoniba Rodge.
Age : 60 Years., Occ.: Agriculturist.

2. Manju Bhoniba Rodge.
Age : 60 Years., Occ.: Agriculturist.

3. Haribhau Kadubal Rodge.
Age : 28 Years., Occ.: Agriculturist.

All R/o.: Gondegaon, Tal. Newasa,
District – Ahmednagar.



Appellants.

Versus

The State of Maharashtra. ::



Respondent.

Appearance =>

Mr. A.S. Barlota, Advocate h/for Mr. S.K. Barlota, Advocate for the Appellants.

Mrs. V.A. Shinde, Additional Public Prosecutor for the State of Maharashtra.

CORAM : V.M. DESHPANDE, J.

DATE : 13th APRIL, 2015.

ORAL JUDGMENT :-

The present Appeal is directed against the Judgment and Order of conviction dated 14th August, 2000 passed by the learned 2nd Additional Sessions Judge, Shrirampur, District – Ahmednagar in Sessions Case No.101 Of 1995 whereby, the Appellants are convicted for the offence punishable under Section 304(II) read with 34 of the Indian Penal Code and on that count they are directed

to suffer Rigorous Imprisonment for seven years and to pay fine of Rs.5000/- and in default of payment of fine, directed to to suffer further Rigorous Imprisonment for one year.

The Appellants are also convicted for the offence punishable under Section 307 read with 34 of the Indian Penal Code and are directed to suffer Rigorous Imprisonment for five years and to pay fine of Rs.5000/- and in default of payment of fine, to suffer further Rigorous Imprisonment for one year.

[2] The Appellants alongwith Geetaram Kadubal Rodge were charged in Sessions Case No.101/1995 that on 29th July, 1994 at Mauje Gondegaon, Tal. Newasa, District – Ahmednagar, they either individually or in furtherance of their common intention, committed murder of Bhimraj Bhoju Pathak, brother of the complainant - Mohan. They were also charged that, they either individually or in furtherance of their common intention assaulted complainant – Mohan by sticks and axe with such an intention and knowledge that by their act, they are likely to cause the death of complainant. They were also charged that they intentionally insulted the complainant and, thereby, gave provocation to him.

Thus they were charged by the learned 2nd Additional Sessions Judge, Shrirampur that, the Appellants with other co-accused Geetaram committed offences punishable under Section/s 302, 307, 504 read with 34 of the Indian Penal Code. The Appellants denied the charge and claimed for their trial.

[3] In order to bring home the guilt of the accused persons, prosecution has examined in all 18 witnesses and also relied upon various documents.

According to the prosecution, due to assault made on deceased Bhimraj on 29th July, 1994, he died on 9th August, 1994.

[4] Shankar Bhagwantrao Wagh (PW No.13) on 29th July, 1994 was Police Station Officer, Newasa Police Station. On the said day, Mohan Bhoju and Bhimraj came to the Police Station. Mohan filed complaint against the accused persons. Thereafter they were referred to the Rural Hospital, Newasa, District – Ahmednagar. He registered Crime for the offences punishable under Section/s/ 323, 324, 504, 506 read with 34 of the Indian Penal Code. Further investigation was carried by Police Head Constable – Barawkar. On 9th August, 1994 Bhimraj died.

[5] PW No.18 – Babaji Sonaji Budhwant, Asstt.Police Inspector received advanced death certificate from Dr. Shirsath of Shrirampur. Thereafter offence was registered under Section/s 302, 307 of the Indian Penal Code and he carried further investigation.

On 11th August, 1994 he arrested the accused. Dr. Anil Mahadev Shinde (PW No.11) conducted the post mortem. Asstt.Police Inspector – B.S. Budhwant recorded the supplementary statements.

[6] After full dress trial, the learned trial court did not convict the Appellants for the offence punishable under Section 302 of the Indian Penal Code however, they were convicted for the offence punishable under Section 304(II) of the Indian Penal Code, in so far as death of Bhimraj is concerned and under Section 307 of the Indian Penal Code for attempting to commit murder and thereby, causing injuries to Mohan.

[7] I have heard Mr. A.S. Barlota, learned counsel for the Appellants and Mrs. V.A. Shinde, learned Additional Public Prosecutor for the State. I have gone through the entire Record & Proceedings.

[8] First question, the court would like to consider as to whether the prosecution has proved the guilt of the Appellants for the offence punishable under Section 304(II) of the Indian Penal Code.

In the present case, the prosecution has examined before the court following six Doctors, namely :-

- PW No.10 :** Dr. Ashok Shankar Zarekar.
He examined Bhimraj and Mohan on 29/07/94.
- PW No.11 :** Dr. Anil Mahadeo Shinde.
He conducted post mortem of Bhimraj.
- PW No.12 :** Dr. Dilip Bhausahab Shirsath.
Bhimraj was admitted at his Hospital on 08/08/94 where-in Bhimraj died on 09/08/94.
- PW No.15 :** Dr. Chandravadan Devkate Mishra.
Civil Surgeon of Civil Hospital, Ahmednagar.
- PW No.16 :** Dr. Pravin Madanlal Munot.
He attended Mohan on 30/07/94.
- PW No.17 :** Dr. Popat Ananda Sonawane.
He attended Bhimraj from 30/07/94 till his discharge from Civil Hospital, Ahmednagar.

[9] PW No.10 Dr. Ashok Zarekar has examined deceased Bhimraj and Mohan on 29th July, 1994. On 29th July, 1994 at 8.45 p.m. Dr. Ashok examined Bhimraj as he was produced before him by P.H.C. - Lolage. When he examined Bhimraj he was conscious. He gave history to him of assault at 6.00 p.m. by wooden stick. He found following injuries on his person :-

- (i) Contusion below Lt. Scapula region 4 x 2 cm.
- (ii) Contusion over Rt. Mid axillary at 8th and 9th rib, red colour, 2x3 c.m.
- (iii) Swelling and tenderness at lower 1/3rd Lt. forearm. Clinically fracture radish radish colour. 4 x 3 c.m.

(iv) Contused lacerated wound over Lower Lt. Leg near Lt. Knee joint, anteroay, red colour.

Thereafter Bhimraj was sent to Civil Hospital for X Ray. According to Dr. Ashok Zharekar, except injury No.3 other injuries were simple. He proved medical certificate of Bhimraj and it is at Exhibit – 24.

[10] PW No.11 is Dr. Anil Shinde. He was serving as Medical Officer at Nagar-Parishad, Shrirampur. Dead body of Bhimraj was brought to him for post mortem on 10th August, 1994. He conducted the autopsy over dead body, at Municipal Dispensary, Shrirampur. Dead body of Bhimraj was brought from the hospital of Dr. Shirsath for post mortem. During the post mortem he found following injuries which are mentioned in post mortem report (Exhibit – 29)

1. Fracture radius ulna on left side of shaft. Odema was there.
2. Fracture left 9th rib, odema was there, lower end of left rib was fractured and has penetrated into inside.
3. Abrasion on right shin middle one-third 1" x ½ ".
4. Abrasion on left side of back lower aspect 1" x ½ " near mid-axillary region.

Above injuries 1 to 4 are ante mortem one.

According to the Doctor, he noticed following internal injuries :-

1. Left side on pleura in mid-axillary region, lower aspect shows Haematoma.
2. Left lung shows abrasion on lateral aspect, reddish in colour, 2" x 1 ".
3. Cavity of abdomen was full of blood and blood cots.
4. Spleen shows rupture on anterior aspect, 1 x ½ x 2 inch, which was reddish in colour.

5. Capsule of the speed was stretched with haematoma. It was with Haematoma and blood clots.

According to Dr. Anil Shinde, cause of death was “shock due to intra abdominal hemorrhage due to formalic splenic rupture.”

As per evidence of Dr. Zarekar (P.W.No.10) after examining Bhimraj on 29th July, 1994 he was referred to the Civil Hospital, Ahmednagar.

[11] On 30th July, 1994 Dr. Chandvadan Mishra (PW No.15) Civil Surgeon, examined Bhimraj. His evidence would reveal that Bhimraj was treated further by Dr. Popat Sonawane (PW No.17),.

[12] Evidence of PW No.17 – Dr. Popat Ananda Sonawane would reveals that Bhimraj was referred to him for treatment on 30th July, 1994. He examined him in Orthopedic ward. He found that he was having fracture to ulna on left side. He was discharged from the hospital on 4th August, 1994.

[13] PW No.12 is Dr. Dilip Bhausahab Shirsath. He runs a hospital since 1985 at Shrirampur, District - Ahmednagar. Said hospital is named as “ Dr. Shirsath Accident Hospital”.

Bhimraj was discharged on 4th August, 1994 from the Civil Hospital, Ahmednagar and he was admitted in the hospital of PW No.12 – Dr. Dilip Shirsath on 8th August, 1994.

His evidence would reveal that patient by name Bhimraj was admitted in his hospital for treatment on 8th August, 1994. He examined him, treated him. He noticed that he was formerly treated at Ahmednagar. He took X ray of his chest to notice injury to his chest and fracture to forearm. Bhimraj died on 9th August, 1994 at his hospital.

According to PW No.12 – Dr. Dilip Shirsath he found deceased Bhimraj was a chronic smoker. He gave treatment only in respect of chest injury. According to PW No.12 Dr. Dilip Shirsath patient died on account of cardio respiratory arrest on 8/30 p.m. on 9th August, 1994. According to the post mortem report, the cause of death of “rupture of spleen due to hemorrhagic shock led to his cardio respiratory arrest.

[14] Evidence of PW No.12 Dr. Dilip Shirsath reveals on clinical examination of Bhimraj that he did not suspect rupture of spleen. Evidence of PW No.12 Dr. Dilip Shirsath further reveals that, it was told to him by the patient that he did not get X ray from the Civil Hospital. PW No.12 Dr. Dilip Shirsath carried blood and urine test of Bhimraj and his X ray was also taken. His evidence further shows that, he did not find fracture to his rib and he did not suspect rupture of spleen in view of the blood report. However, since the patient was having difficulty in breathing, he called Physician - Dr. D.S. Shirsath. Cardiogram was taken. Dr. D.S. Shirsath, opined that patient died due to heart failure.

[15] PW No.12 Dr. Dilip Shirsath disclosed in his evidence that Physician – Dr. D.S. Shirsath has opined that, patient died due to heart failure.

[16] PW No.12 Dr. Dilip Shirsath is very specific in his evidence that even though opinion is given in post mortem report regarding cause of death, he did not find any symptom regarding rupture of spleen.

In respect of authorship of appellants in respect of rupture of spleen, the Doctors who are examined by prosecution states as under in their respective evidence.

[17] Relevant portion from the evidence of PW No.12 Dr. Dilip Shirsath is as under :-

" On account of heart failure, the cardiac massage was done on 9/8/94."

" Injections were administered to him."

" The E.C.C was taken i.e. recording. His heart continued functioning till 10.38 p.m and it failed at 10.40 p.m. "

" It is true to suggest that in case the cavity of abdomen is full with blood, a patient is likely to die within 24 hours, unless treatment is not given.

"Generally spleen is removed in order to save a patient."

Evidence of PW No.10 – Dr. Ashok Zarekar shows that, Bhimraj did not disclose to him that he was assaulted with axe.

[18] PW No.15 - Dr. Chandravadan Devkate Mishra, Civil Surgeon would reveal in his evidence as under :-

" I informed the police that at the time of discharge of Bhimraj, he was fit."

" There were no signs of rupture to spleen in respect of Bhimraj at the time of admission. "

" At the time of discharge, I did not examine Bhimraj Pathak on the basis of papers, I say that there was no rupture to his spleen. "

" In case there is rupture to spleen and abdominal cavity is full of blood, the patient is not treated, and he will not survive for 48 hours."

Prior to discharge from the Civil Hospital, Ahmednagar as discussed in the preceding paragraphs, Bhimraj was treated by PW No.17 – Dr. Popat Ananda Sonawane. His evidence reads as under :-

" The patient did not complain regarding pains in the abdomen."

" There were no symptoms of spleen rupture."

" In case, cavity of abdomen is full of blood, the patient will not survive for 24 hours, if not treated."

" The patient did not complaint regarding pains to ribs."

[19] PW No.11 - Dr. Anil Shinde, who conducted post mortem has stated in his evidence that on account of cancer, leukemia, typhoid, malaria, spleen can be enlarged. His evidence would further reveals that during post mortem he found no injury to the right side of the chest and there were no injury to right side of the ribs. According to him, malaria is an epidemic. However, his evidence would reveals that, malaria cannot be detected in post mortem. His evidence discloses as under :-

" In case, the treatment is not given well within time, to a patient who is suffering from chronic malaria, the spleen can enlarge."

"I am unable to say exact period of rupture regarding spleen."

" It may rupture within a period of 4/5 days."

" There are immediate symptoms in case there is rupture to a spleen."

In his cross-examination, he deposed as under :-

“ In case cavity of abdomen is full of blood on account of rupture of spleen, a patient would not survive for 8/10 days.

[20] According to the prosecution, date of incident of assault on 29th July, 1994. Bhimraj died on 9th August, 1994. It is established on record that Bhimraj was discharged from the Civil Hospital, Ahmednagar on 4th August, 1994 and he was admitted to the hospital of Dr. Dilip (PW No.12) on 8th August, 1994.

[21] From the aforesaid survey of evidence of prosecution through various Doctors, it is clear that at the time of discharge, neither Civil Surgeon nor Dr. Popat Sonawane found that, there was rupture of spleen.

Evidence of all Doctors would reveal that, in case of rupture of spleen and abdominal cavity is full of blood, patient cannot survive for more than 24 to 48 hours.

[22] It is not prosecution case that after discharge from Civil Hospital, Ahmednagar and his re-admission to the hospital of Dr. Shirsath on 8th august, 1994 at any point of time, deceased Bhimraj was assaulted by any of the Appellants.

[23] Evidence of PW No.1 Kesharbai widow of Bhimraj would reveal that her husband was discharged from the Civil Hospital on 4th August, 1994 and then he was brought to Gondegaon i.e. his village and thereafter he was taken to the Hospital on 8th August, 1994 for treatment at Shrirampur at the hospital of Dr. Shirsath.

[24] Looking to the medical evidence, it is thus clear that rupture of the spleen of Bhimraj cannot be attributed to the assault of 29th July, 1994 by the Appellants, as alleged by the prosecution.

[25] For four days i.e. 4th August, 1994 to 8th August, 1994 Bhimraj was in his home alone. If really his spleen was ruptured due to assault, as suggested by the prosecution then in the light of the medical evidence it would not have been possible that Bhimraj would survive till 9th August, 1994; since according to Doctor/s in case of rupture of spleen, if not treated, patient cannot survive for more than 24 hrs to 48 hrs.

The Doctor who has conducted post mortem found that cavity of abdomen was full of blood and blood clots. According to evidence of all Doctors if the cavity of abdomen is full of blood, patient can survive for 24 hrs to 48 hrs. In fact, as per evidence of Dr. Shinde (PW No.11) if cavity of abdomen is full of blood due to rupture of spleen then patient cannot survive for 8-10 days.

[26] It is crystal clear from the medical evidence that at no point of time, prior to his discharge from the Civil Hospital, Bhimraj was treated for rupture of spleen. In that view of the matter, it is really doubtful that the nature of death of Bhimraj was homicidal due to rupture of spleen and, therefore, the Appellants cannot be held responsible for his death and in that view of the matter, conviction for the offence punishable under Section 304(II) of the Indian Penal Code is unsustainable and is required to be set aside and accordingly it is set aside.

[27] The another question as to whether the conviction of the Appellants for the offence punishable under Section 307 of the Indian Penal Code can be upheld.?

The Appellants are convicted for the offence punishable under Section 307 of the Indian Penal Code for having made murderous assault on Mohan. Mohan was not examined before the court because of his demise. He died in the year 1995. Date of occurrence is 29th July, 1994. According to the evidence of PW No.1 Kesharbai, Mohan died after a period of one year from the date of incident.

[28] Mohan was also examined by PW No.10 Dr. Ashok Zharekar on 29th July, 1994. His medical certificate is at Exhibit – 25. According to Dr. Zharekar, he found following injuries on the person of Mohan :-

1. C.L.W. on Lt. parietal region, anterior to posterior fresh wound. 5X5x1 cm.
2. C.L.W. on occipital region horizontal fresh wound. 3 x 2 ½ x 1 c.m.
3. Contusion on Lt. Upper arm, red colour 3 x 2 c.m.
4. Contusion on Lt. Scapula vertical, red colour, 2 x 2 c.m.

According to PW No.10 Dr. Ashok Zharekar, injury Nos. 1 and 2 were grievous; where-as injury Nos.3 & 4 were simple in nature. However, the Doctor is very specific that those injuries are not sufficient to cause the death in ordinary course of nature. Further as per evidence of PW No.10 Dr. Ashok Zharekar, he could not locate any incised wound on Mohan.

[29] PW No.16 - Dr. Pravin Madanlal Munot, examined Mohan on 30th July, 1994. His evidence would reveals that on examination, he found no injury on his brain. According to Dr. Pravin Munot the injury found on the person of Mohan was possible due to stick and axe. However, in the cross-examination PW No.16 - Dr. Pravin admitted suggestion that injuries are also possible in case bull gave dash to the person and he fell down.

[30] In the present case, the prosecution has examined four panch witnesses. PW No.4 - Bhausahab Gawit Salve and PW No.5 – Bapu Raibhan Waghole are the panchas to the panchnama for spot of occurrence and they proved it and it is at Exhibit – 14.

[31] In so far as seizure of weapons, prosecution has examined PW No.2 – Devidas Yohan Chavan and PW No.3 – Shashikant Chotu Chakranarayan.

They did not support the prosecution that accused No.2 Manju produced the axe and three sticks before the Police in their presence and they were seized under the panchnamas. Thus, they were declared hostile and cross examined by the learned Additional Public Prosecutor, however, nothing could be brought on record by the learned Additional Public Prosecutor in their cross-examination.

[32] The prosecution has examined PW No.14 Bhau Tukaram Barawkar (Police Head Constable), who took the investigation on 30th July, 1994 and he arrested the accused on 31st July, 1994. Though he made statement from witness -box that he attached/seized axe and sticks which are before the court, the prosecution for the reasons best known to it, did not get proved the seizure panchnama. The seizure panchnama of seizure in respect of weapons remained to be proved in present prosecution case.

[33] As discussed above, the independent panch witnesses did not support the prosecution in respect of seizure of the weapons and, therefore, through them seizure panchnaam was not proved.

[34] Merely because the seizure panchnama is not exhibited that does not mean that seizure is not proved. However, for that it was open for the prosecution to get the necessary requirements for proof of the seizure of the weapons through PW No.14 – P.H.C. Bhau Barawkar, who claims, he attached axe and sticks. His entire evidence is completely silent in respect of the fact that he has proved the seizure panchnama. Thus, in the present case, the seizure of the weapons namely axe and sticks are not at all proved by the prosecution.

[35] Admittedly, Mohan did not die due to injuries suffered in the assault as alleged by the prosecution. Further his death has occurred about one year after the incident. Further the Doctors, who examined Mohan has specifically disclosed before the Court that the injuries were not sufficient to cause the death in ordinary course of nature. Further as per the evidence of prosecution, through

PW No.1 Kesharbai Bhimrak Pathak and PW No.8 Shantabai Narayan Pathak motive for assault was that, Mohan had cut down the branches of 'neem' tree for fuel, which was standing on the common boundary of agricultural field of the accused and the agricultural field of the Bhimraj and Mohan. Thus, it is clear that Bhimraj and Mohan were assaulted on trifle issue. It was never the intention on the part of the Appellants to commit murder of Mohan coupled with fact that Mohan did not die due to any of the injuries which he suffered in the said assault. Therefore, in my view, conviction of the Appellants for the offence punishable under Section 307 of the Indian Penal Code is not warranted.

[36] However, it is clear from the eye witness account that Mohan was assaulted and he also suffered injuries. Therefore, instead of convicting the Appellants for the offence punishable under Section 307 of the Indian Penal Code, conviction can be converted to section 323 of the Indian Penal Code.

[37] The Appellants were in jail for a period 11th August, 1994 to 29th August, 1994. After their conviction on 14th August, 2000, they were taken into custody. They were released on bail by this court on 14th September, 2000. That leads me to pass the following order :-

ORDER

- (i) Criminal Appeal is partly allowed.
- (ii) Judgment and Order dated 14th August, 2000 passed by the the learned 2nd Additional Sessions Judge, Shrirampur, District – Ahmednagar in Sessions Case No.101 Of 1995 thereby, convicting the Appellants for the offence punishable under Section 304(II) of the Indian Penal Code is hereby quashed and set aside.
- (iii) The Appellants are also acquitted for the offence punishable under Section 307 of the Indian Penal Code and instead, they are

convicted for the offence punishable under Section 323 read with 34 of the Indian Penal Code and they are sentenced for the period, which they have already undergone, in jail.

(iv) With this Criminal Appeal is partly allowed and same is disposed of accordingly.

(V.M. DESHPANDE, J.)