

JPP

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION**

CRIMINAL APPEAL NO. 575 OF 2012

1. Eknath Dattu Patil
Age : 58 yrs.,
Occup. : Agriculturist

2. Shivaji Eknath Patil
Age : 21 yrs.,
Occup.: Agriculturist,
Both R/o. Village Natoli,
Tal. : Shirala, Dist. Sangli.
(At present Kalamba Jail)

... Appellants.
(Orig. Accused Nos.1 & 2)

V/s.

The State of Maharashtra.
(Through Shirala Police Station
at C.R. No.37/2010).

... Respondent.

Mr. Kedar Patil for the Appellants.
Mr. H.J. Dedhia, APP for the State.

CORAM : P.V. HARDAS, J.

APRIL 13, 2015.

ORAL JUDGMENT :-

The Appellants/Original Accused Nos.1 and 2, who
stand convicted for offence punishable under Section 304(II)

r/w. 34 and 323 r/w. 34 of the Indian Penal Code and sentenced to R.I. for seven years and each accused to pay fine of Rs.3,000/- in default of which to undergo further R.I. for three months and R.I. for six months and each accused to pay fine of Rs.1,000/- in default of which to undergo further R.I. for one month, by the Additional Sessions Judge, Islampur, by Judgment dated 31.3.2012, in Sessions Case No.30 of 2010, by this Appeal question the correctness of their conviction and sentence.

2. Facts as are necessary for the decision of this Appeal may be stated thus.

PW-9 Police Constable Ashok Pawar, who on 5.6.2010 was attached to the Shirala Police Station and was on duty, recorded the report of PW-3 Ranjana at Exhibit 22. On the basis of the said report, he registered an offence vide Crime No.37 of 2010. Further investigation was thereafter entrusted to PW-10 Police Head Constable Pandurang Tate.

PW-10 Police Head Constable Pandurang Tate, who was also attached to the Shirala Police Station was entrusted with the investigation of Crime No.37 of 2010. He accordingly visited the scene of the incident and drew the scene of the incident panchnama in the presence of PW-2 Krishna at Exhibit 10. On the same day he arrested Accused No.2 Shivaji in the presence of panchas and seized the clothes on the person of Accused No.2 Shivaji in the presence of panchas under seizure memorandum at Exhibit 17. He thereafter arrested Accused No.1 Eknath and seized the clothes vide seizure memorandum at Exhibit 26. He recorded the statements of witnesses.

On 6.6.2010 during custodial interrogation, Accused No.1 Eknath expressed his willingness to point out the place where the sticks had been concealed. A memorandum was accordingly drawn in the presence of panchas at Exhibit 24. Accused No.1 Eknath led the police and the panch to his shed and produced two sticks which were seized under the panchnama at Exhibit 24. Since the condition of injured Balu was precarious, Section 307 of the

Indian Penal Code was added. Further investigation was thereafter entrusted to PW-15 P.I. Gorle.

3. PW-15 P.I Gorle, who was also attached to the Shirala Police Station was entrusted with further investigation of Crime No.37 of 2010. He recorded the supplementary statements of witnesses. Injured Balu succumbed to his injury on 6.6.2010 and accordingly, Section 302 of the Indian Penal Code was added. An accidental death was registered by the CPR Hospital Police Chowky vide A.D.No. 0/2010 at Exhibit 56. An inquest panchnama of the dead body of deceased Balu was drawn at Exhibit 14. The clothes of deceased Balu were seized under seizure memorandum at Exhibit 15. The dead body had been referred for postmortem examination. The seized articles were then forwarded to the Chemical Analyzer under requisition at Exhibit 40 through Police Constable PW-11 Sanjay Pawar. Further to the completion of investigation, a charge-sheet against the accused/appellants was submitted.

4. Injured Balu had been examined first by PW-14 Dr. Budruk, who was attached to the Rural Hospital at Shirala. On

examining injured Balu, he noticed the following external injuries :-

1. Multiple CLWs over left parieto frontal four in number, maximum of 4 cm bone deep.
2. Left racoon eye.
3. CLW at left forearm with underlying compound fracture of radius.
4. Deeply unconscious with cerebral contusion.

The nature of the injuries was found to be grievous and caused within half an hour prior to the examination. The patient was referred for further management. PW-14 Dr. Budruk issued the certificate at Exhibit 50.

Injured Balu was thereafter examined by PW-12 Dr. Joshi, who was attached to the hospital of Dr. Prabhu. PW-12 Dr. Joshi noticed the following external injuries :-

1. Head injury with left fronto temporo partietal contusion with multiple rib fracture.

2. CLW at lateral canthus of left eye 1 x 1 cm.
3. CLW over left forehead 6 x 2 cm.
4. CLW over left high parietal region 3 x 2 cm.
5. CLW over the left forearm 2 x 1 cm.
6. Left eye swelling with blackening and bleeding through it.

PW-12 Dr. Joshi issued the injury certificate at Exhibit 43. Injured Balu was discharged on 5.6.2010.

5. PW-3 Ranjana was examined by PW-12 Dr. Kishor Patki, who noticed blunt trauma to the right wrist of PW-3 Ranjana. There was swelling, pain and tenderness with restricted movements of the right wrist. There was evidence of contusion over the right wrist 2 x 1 cm. The injury certificate of Ranjana is at Exhibit 47.

6. Postmortem on the dead body of deceased Balu was conducted by PW-8 Dr. Sadolikar, who noticed the following external injuries :-

1. Sutured wound near lateral canthus of left eye 2 cm in length
2. Sutured wound on left forehead obliquely placed 5 cm in length.
3. Sutured wound on left parietal region, 5 cm. in length.
4. CLW on left forearm on palmar aspect, 2 cm x 1 cm into skin deep.

On internal examination she noticed following injuries :-

Injuries under the scalp : sub-scalp haematoma under scalp left parietal region.

Injuries of skull : 1. Fracture left squamosal bone depressed 1 cm x 1 cm.
2. Fracture left frontal bone, depressed 2 cm x 1 cm.
3. Fracture left parietal bone, depressed 2 cm x 1 cm. injuries of brain.

Injuries on the brain : 1. Generalised cerebral oedema.
2. Haemorrhagic contusions multiple on left frontal and parietal region.

He therefore opined that the probable cause of death was head injury. The postmortem report is at Exhibit 30 while the death certificate is at Exhibit 31.

7. On committal of the case to Court of Sessions, Trial Court, vide Exhibit 8 framed charge against the accused for offence punishable under Section 302 r/w. 34 of the Indian Penal Code and 323 r/w. 34 of the Indian Penal Coude. The accused denied their guilt and claimed to be tried. Prosecution in support of its case examined 15 witnesses. The defence of the accused was of denial. The Trial Court on appreciation of the evidence convicted and sentenced the Appellants as aforestated while acquitting them for offence punishable under Section 302 r/w. 34 of the Indian Penal Code. The State has chosen not to file any Appeal challenging the acquittal of the Respondents for offence punishable under Section 302 r/w. 34 of the Indian Penal Code.

8. I have heard Mr. Kedar Patil, learned Counsel for the Appellants and the learned APP. In order to effectively deal with the submissions advanced before me by the learned

Counsel for the parties, it would be useful to refer to the evidence of the prosecution witnesses.

9. The entire case against the Appellants revolves round the testimony of three eye-witnesses that is PW-3 Ranjana, PW-6 Gama and PW-7 Shankar. PW-3 Ranjana, daughter-in-law of deceased Balu, deposes that Accused No.1 Eknath was the brother of deceased Balu as well as Accused No.2 Shivaji is the son of Accused No.1 Eknath. According to her, there was some dispute between the deceased and the accused. On the day of the incident, PW-3 Ranjana was milking the buffalo in front of the house. Deceased Balu had constructed a shed in front of the house in order to protect the cattle from the heat in summer. Accused No.2 Shivaji was passing by the road carrying a pot in one hand and a stick in the other hand. Accused No.2 Shivaji was ostensibly going to his agricultural land for milking the buffalo. According to Ranjana when the accused was passing near her, the accused spat at her. Deceased Balu was annoyed by the accused spitting at Ranjana and therefore, questioned Shivaji as to why he had spat at Ranjana. While the exchange of words

was going on, Accused No.1 Eknath rushed to the scene of the incident carrying a stick and questioned deceased Balu as to why he was quarreling with Shivaji. Accused No.1 Eknath thereafter dealt blows of stick on the head of deceased Balu while Accused No.2 Shivaji assaulted Ranjana on her right wrist. Sakhubai, wife of Balu, who was sitting nearby, on seeing the incident rushed to the scene of the incident and was also assaulted by Accused No.2 Shivaji. Deceased Balu had sustained injuries and was then taken to the hospital alongwith his wife Sakhubai. Injured Balu was initially examined in the Rural Hospital and thereafter, was admitted in the private nursing hospital of Dr. Prabhu and then shifted to the CPR Hospital where he succumbed to his injuries.

10. PW-3 Ranjana in her cross-examination has admitted that as soon as Accused No.1 Eknath came to the scene of the incident, he dealt blows of stick on Balu. She has also admitted that as soon as Balu received the injuries, he fell on the ground. An omission has been elicited in the cross-examination that she had not stated in her report at Exhibit 22 that both the accused had assaulted Balu after Balu had fallen

on the ground.

11. Prosecution has also examined PW-6 Gama, who claims to be an eye-witness and who deposes that when he reached the scene of the incident, he had noticed deceased Balu lying on the ground and both the accused assaulting Balu with sticks. As pointed out by me above, this part of the evidence of assault on Balu was also deposed to PW-3 Ranjana but the same has been elicited as omission. Ranjana does not refer to the presence of PW-6 Gama at the scene of the incident. PW-7 Shankar, brother of deceased Balu also deposes that Eknath rushed to the scene of the incident and assaulted Balu with sticks on the head of Balu while accused Shivaji assaulted Ranjana with stick on her hand and also assaulted Sakhubai. Though Shankar is an eye-witness to the incident, he does not refer to the presence of PW-6 Gama nor PW-3 Ranjana refer to the presence of PW-7 Shankar. Apart from that, the statement of Gama was recorded after 3 days of the incident while the statement of Shankar was recorded after 4 days. Both these witnesses have admitted that till their statements were recorded, they had not disclosed the incident to anyone.

12. Thus, in my opinion, implicit reliance cannot be placed on the testimony of PW-6 Gama and PW-7 Shankar for the infirmities which had been adverted to above. However, there is strong evidence of PW-3 Ranjana in respect of assault on her as well as the assault on deceased Balu by the accused.

13. Accused No.2 Shivaji was proceeding to his field carrying a pot for milking the cows / buffaloes. Obviously, there was no prior meeting of minds between the accused in respect of the assault on deceased Balu. The incident occurred all of a sudden and therefore, there was no prior meeting of mind and no sharing of the same intention

14. The intention of both the accused was therefore not common to them. Accused No.1 Eknath rushed to the scene of the incident suddenly and assaulted deceased Balu while Accused No.2 Shivaji assaulted Ranjana. The attack on both Ranjana and Balu was simultaneous and therefore, the accused were not aware about the intention of each other.

Accused No.2 Shankar therefore cannot be convicted for the offence punishable under Section 304 (II) of the Indian Penal Code with the aid of Section 34 nor can Accused No.1 Eknath be convicted for offence punishable under Section 323 of the Indian Penal Code with the aid of Section 34 of the Indian Penal Code. Since there was no common intention between the accused in respect of the assault, each accused would be liable for the offence committed by him. In respect of the offence committed by Accused No.1 Eknath is concerned, in my opinion, he has been rightly convicted by the Trial Court for offence punishable under Section 304 (II) of the Indian Penal Code. Accused No.1 Eknath, however, would be entitled to be acquitted for offence punishable under Section 323 r/w. 34 of the Indian Penal Code. Accused No.2 Shivaji has been convicted for offence punishable under Section 304 (II) of the Indian Penal Code and in my opinion, the conviction of Accused No.2 Shivaji for the said offence is unsustainable and he is entitled to be acquitted. Accused No.2 Shivaji has been rightly convicted for offence punishable under Section 323 of the Indian Penal Code.

15. From the record it appears that Accused No.1 Eknath has been in Jail since 5.6.2010. The learned Single Judge of this Court had rejected the application for bail filed by Accused No.1 Eknath. Accused No.1 Eknath has thus undergone a total sentence of more than 4 years and 10 months. Accused No.2 Shivaji was also in Jail from 5.6.2010 till he was released on bail by virtue of the order of this Court dated 9.4.2013. Thus, the accused Shivaji has undergone nearly 2 years and 10 months of imprisonment. Since Accused No.1 Eknath has undergone nearly 4 years and 10 months of imprisonment, in my opinion, the said sentence would meet the ends of justice by enhancing the amount of fine.

16. Accordingly, Criminal Appeal No. 575 of 2012 is partly allowed. Accused No.1 Eknath is acquitted for offence punishable under Section 323 r/w 34 of the Indian Penal Code. Fine if paid by Accused No.1 Eknath for offence punishable under Section 323 r/w. 34 of the Indian Penal Code be refunded to him. The conviction of Accused No.1 Eknath for offence punishable under Section 304 (II) of the Indian Penal Code is hereby confirmed, however, the sentence of R.I. for

seven years and to pay fine of Rs.3,000/- in default R.I. for three months, is modified to the term of imprisonment already undergone by Accused No.1 Eknath and to pay fine of Rs.15,000/- in default of which to undergo further R.I. for two years. Accused No.2 Shivaji is acquitted for the offence punishable under Section 304 (II) of the Indian Penal Code. Fine if paid by Accused No.2 Shivaji for offence punishable under Section 304 (II) r/w. 34 of the Indian Penal Code be refunded to him His conviction and sentence for offence punishable under Section 323 of the Indian Penal Code is hereby confirmed. He has already undergone the aforesaid sentence of R.I. for six months. His bail bonds stand cancelled. Since Accused No.1 Eknath is in Jail, he be released forthwith if not required in any other case. Time of one month is granted to Accused No.1 Eknath to deposit the fine of Rs.15,000/- in the Trial Court. On the fine amount being recovered, the said amount be paid to PW-3 Ranjana.

Criminal Appeal is thus partly allowed.

(P.V. HARDAS, J.)