

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

**CRIMINAL APPEAL NO. 470 OF 2012
WITH
CRIMINAL APPEAL NO. 3 OF 2016**

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CRIMINAL APPEAL NO. 470 OF 2012

The State of Maharashtra .. Appellant
Through Police Station,
(Rural) Nanded,
District – Nanded.

Versus

1. Rahul s/o. Limbaji Landge .. Respondents
Age. 22 years, Occ. Labour,
2. Rashtrapal s/o. Tukaram Kapale
Age. 20 years, Occ. Labour
3. Dilip s/o. Trimbakrao Bansode
Age. 23 years, Occ. Labour
4. Shankar s/o. Nivrutti Lone
Age. 25 years, Occ. Labour

All R/o. Balirampur,
Tal. & Dist. Nanded.

Mrs. A.V. Gondhalekar, A.P.P. for appellant/State.
Mr. A.R. Deokate, Advocate (appointed) for respondent
Nos.1.
Mr. A.M. Gaikwad, Advocate for respondent Nos. 2 to 4.

**WITH
CRIMINAL APPEAL NO. 3 OF 2016**

Rahul s/o. Limbaji Landge .. Appellant

Versus

The State of Maharashtra .. Respondents
Through Police Station Officer

Mr. A.R. Deokate, Advocate (appointed) for appellant.
Mrs.A.V. Gondhalekar, A.P.P. for respondent/State.

**CORAM : A.V.NIRGUDE &
INDIRA K.JAIN, JJ.
DATED : 07.01.2016**

ORAL JUDGMENT [PER : A.V. NIRGUDE,J.] :-

1. Both these appeals arise from judgment and order dated 26.07.2011 passed by the learned Additional Sessions Judge, Nanded, in Sessions Case No. 135 of 2009.

2. Facts leading to the Sessions Case in short can be narrated as under :-

3. The prosecution filed case for offence punishable under section 302 read with section 34 of the Indian Penal Code against four accused, out of which accused No.1-Rahul was convicted for offence punishable

under section 304 (Part-II) of Indian Penal Code and was sentenced to suffer rigorous imprisonment. Other three accused were acquitted. The State of Maharashtra came in appeal against the entire judgment and order. They pleaded that all the accused should have been convicted under section 302 r/w 34 of the Indian Penal Code. On the other hand accused No.1 rather belatedly filed his appeal, which was registered as Criminal Appeal No.3 of 2016, asserting that he was entitled to clean acquittal.

4. It was the case of prosecution that on 15.06.2009 the accused assaulted one Raju Gaole on public road at about 9.30 a.m. Accused No.1 Rahul was armed with a knife and he stabbed Raju 13 times. After the incident Raju was rushed to hospital and on the way he became unconscious. The doctor treated him for five days but in-vain. He died on 20.06.2009. As per the charge-sheet, all the accused assaulted the deceased with common intention of causing his death.

5. It is evidence of P.W.1-Vidya Gaole that she was married to Raju. At about 9.30 a.m. on the day of incident when she heard commotion near her house, she came out and saw that her husband was being assaulted. She rushed to the spot and saw her husband lying on the road. She saw that her husband had sustained injuries

over his head, stomach, left hand, chest and neck. She found her husband alive. She asked him as to who assaulted him. Her husband told her that it was accused Nos.2,3 and 4 who had caught him and it was accused No.1-Rahul who dealt knife blows on his person. She then took her husband to Civil Hospital, Nanded. On the way the victim became unconscious. From there, the witness went to Police Station at Cidco and lodged report. This report was treated as F.I.R.

6. Second important witness in this case is P.W.4-Vinayak, who stated that at the time of incident he was present nearby. When he noticed commotion near house of Uttam Chitte, he went there and saw Raju was shouting for help. He also said that he saw accused Nos. 2 to 4 were assaulting Raju with kicks and fists blows. He then stated that accused No.1-Rahul was delivering repeated blows of knife on Raju's body. He further stated that Rahul threatened loudly that if anyone intervened, he would harm him too. No one, therefore, intervened. Raju sustained various injuries. After the assault Raju could walk few steps, but he fell down. He stated that he then saw Raju's wife going to the spot. The cross-examiner for the accused tried to indicate that this witness could have been there on the spot. In cross-examination, this witness also admitted that he was witness in another case

in which Raju was complainant. This witness further mentioned that he had no occasion to see any injuries on the person of accused No.1-Rahul. He admitted further in the cross-examination that at the time of incident, he did not raise alarm to call for help.

7. Third important witness of this case is P.W.6-Latabai who stated that at the time of incident she was in her house and was engaged in cooking. She heard commotion near her house and therefore she came out. She rushed to the spot and saw that the Raju was being assaulted by accused No.1-Rahul, who had knife in his hand. Accused No.1-Rahul dealt blows of knife on the body of Raju over head, chest, stomach and hand. She said many people gathered there. She also added that Rahul was threatening that if anyone would intervene, he would cause harm to him. No one, therefore, intervened. She added further that there were three persons, who had caught Raju. She also stated that she saw accused Nos. 2 to 4 on the spot, but has not assigned any role to them.

8. P.W.5 is one Dhondiba Sonsale, resident of Osman Nagar, Tq. Kandhar. He said that at the time of incident, he was near the spot. He had come to Cidco, Nanded from his village to meet his uncle. He also heard commotion and went to the spot and saw the incident, but

he did not name anyone as assailant. He did not know assailants before hand. He did not get opportunity to recognize culprits in a properly arranged test identification parade.

9. P.W.8-Medical Officer, who conducted post mortem examination, stated that he found as many as 13 knife injuries on Rahul's person. More serious injuries were found on the face and head. He noticed that due to blow on head of the victim he has suffered fracture of frontal bone. He also found lacerated injuries to linear right upper lobe due to stab. He opined that the cause of death was due to head injuries with hemorrhage shock due to injury to vital organ with multiple stab injuries.

10. The defence of accused No.1 was that he acted in self defence. He stated in his statement under section 313 of Cr.P.C. that it was Raju who initiated assault using knife. He stated that he snatched away knife from Raju's hand and then caused injuries to Raju. On the other hand accused Nos.2 to 4 simply denied their presence on the spot. Learned Judge of the Lower Court accepted the case of accused No.1 and held that he acted in self defence but exceeded his right of private defense. He did not believe the witnesses when they stated that accused Nos.2 to 4 were also present and were

also seen assaulting the victim and he acquitted them.

11. Upon hearing submissions at bar, following questions arise for our consideration.

i. Whether the prosecution could prove that it was a case of murder or whether it was a case of exceeding right of private defence?

ii. Whether the prosecution could prove presence of accused Nos. 2 to 4 on the spot?

iii. Whether the prosecution could prove that accused Nos.2 to 4 were assailants in the assault?

iv. Whether the prosecution could prove that accused Nos. 2 to 4 shared intention of accused No.1?

12. The most important question in this case is whether accused could prove his case of self defence. Accused No.1 admitted that he was present on the spot and so we need not give importance to the depositions of eye witnesses who say that they saw accused No.1 on the spot. The moot question is who initiated fight; whether it was Rahul who was armed with weapon and whether he assaulted the victim? We have narrated the depositions that have

come on record. As against this no admission came on record to indicate that it was Raju who was armed with a knife and it was he who started assault. Accused No. 1 could bring on record through defence witness No.1 Dr. Pratap Durge that after the incident accused No.1 was referred to him for treatment and he found two incised wounds over right thigh of accused No.1 Rahul. In view of this all that came on record was that during the incident accused No.1 Rahul sustained two simple incised wounds on his right thigh. Unfortunately for the defence, accused No.1 did not enter witness box to explain as to how the incident occurred.

13. Learned counsel for accused No.1 tried to take advantage of the fact that the prosecution did not explain the two simple incised wounds that were found on right thigh of accused No.1. The question, therefore, is whether the circumstances would go against the prosecution. The answer is in negative. In the facts and circumstance of the case this lapse can easily be ignored. The injuries were simple in nature and judicial note can be taken of the fact that during the incident itself when accused No.1 was utilizing his weapon for assault, he could have received these simple injuries on his own person. We are of the view that this is not a case where the accused could have succeeded in proving

his defence. There is nothing on record to show that it was Raju who started assault with his own weapon. It has come on record that victim Raju was heftier as against accused No.1 Rahul. Accused No.1 was less powerful than him. In such circumstances it was not possible to accept the defence that weaker person could snatch away knife from a stronger person's hand and then managed his attack. All the circumstances narrated above would indicate that it was accused No.1 who was armed and that the victim was not. It is also indicated that Raju was not prepared for this fight and so despite his physical strength he could not resist the deadly attack. The other circumstance why we did not accept theory of self defence is that as many as thirteen knife blows were delivered on the victim's body. His head and face were the main targets. The attack was brutal, deadly and sudden. Repeated blows were given. This circumstance does not suggest that this was a case of self defence.

14. Let us now turn to the case as against accused Nos. 2 to 4. We have narrated the evidence that came against them. We are inclined to believe the deposition of prosecution witness No.1 and prosecution witness No.4. The depositions of rest of the eye witnesses deserve to be discarded. Out of these two witnesses deposition of P.W.No.1 is quite significant. She went to her husband

immediately after the assault and heard names of all accused from her husband being his assailants. In cross-examination of these witnesses this part of deposition did not get disturbed. This part of deposition is even consistent with the prosecution case which is found in the F.I.R. In addition to this P.W.No.4 stated that he saw accused Nos.2 to 4 assaulting the victim with fist and kick blows. This witness appears to be interested witness because in earlier case he was witness and victim Raju was complainant. This circumstance, however, would not deter us from believing the deposition. Even learned Judge of the Lower Court believed this witness. We, therefore, hold that the prosecution could prove that the accused Nos.2 to 4 were present on the spot and at least could prove that they assaulted the victim with kick and fist blows.

15. The next important question in this case is whether all accused shared common intention of committing murder of the victim. The circumstances do not indicate this. The circumstances narrated above indicate that it was accused No.1 who had intention to cause death of the victim. Accused Nos.2 to 4, no doubt, were partners in the assault. But, they did not use any weapon. They simply assaulted the victim with kick and fist blows. They could hardly cause any serious injury to the victim.

The theory of the prosecution that it was accused No.2 to 4 who caught the victim for facilitating knife attack is discarded by the learned Judge of the Lower Court and we too are inclined to do so. P.W.No.4 did not support this theory. These circumstances are sought to be proved only through oral dying declaration proved through deposition of P.W.No.1. Though we believe deposition of P.W.No.1, we are not inclined to give any undue importance to it. All that we conclude from her deposition is that the accused were assailants. The role attributed to them could not come through deposition of eye witnesses. We, therefore, hold that accused Nos.2 to 4 did not share intention of accused No.1 for causing death of the victim.

16. In view of this we are inclined to hold that the prosecution could prove that the accused No.1 committed murder of the victim. However, prosecution could not prove that accused Nos.2 to 4 had shared his intention to cause death of the victim. In the result the appeals are disposed of in terms of following order.

ORDER

I. Judgment and order passed by the Lower Court is set aside and substituted by following order.

II. Accused No.1-Rahul is convicted for offence punishable under section 302 of Indian penal Code and is sentenced to suffer life imprisonment and to pay fine of Rs.5000/- (Rupees Five Thousand), in default, to suffer rigorous imprisonment for six months.

III. Accused Nos.2 to 4 are convicted for offence punishable under section 323 read with section 34 of Indian Penal Code and are sentenced to suffer simple imprisonment to the period to which they have already undergone.

IV. Appeal filed by accused No.1-Rahul, stands dismissed.

[INDIRA K.JAIN,J.]

[A.V.NIRGUDE,J.]