

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

APPELLATE SIDE JURISDICTION

CRIMINAL APPEAL NO. 254 OF 2002

- 1] Dhanraj s/o Laxman Thombare,
age 32 years, occ. Labourer,
R/o Phulenagar, Kaij,
Tq. Kaij, Dist. : Beed,
- 2] Laxman s/o Kondiba Thombare,
age 60 years, occ. Labourer,
R/o as above
- ...Appellants
[Original Accused]

VERSUS

The State of Maharashtra

...Respondent

Mr. U.B.Bondar, Advocate for the Appellants
Mrs. R.K.Ladda, APP for Respondent

CORAM : INDIRA K. JAIN, J.
DATED : 15th APRIL, 2016

ORAL JUDGMENT :

This appeal is directed against the judgment and order dated 23.4.2002 passed by the learned Additional Sessions Judge, Ambajogai in Sessions Case No. 32 of 1999 convicting the appellants of the offence punishable under Section 304 Part II r/w

Section 34 of the Indian Penal Code and sentencing each of them to suffer rigorous imprisonment for five years with fine of Rs.1,000/- and in case of default to undergo rigorous imprisonment for three months.

2] Prosecution case, in brief, is as under :-

(i) On 22.9.1998 at around 10.00 a.m. Mahesh Deshmukh along with complainant Appasaheb More resident of Massajog had come to Kaij. Since Mahesh had to polish his foot wear they went to cobbler. Accused no.2 Laxman was running a petty shop in front of Vaishali General Stores near S.T. Stand Kaij. Mahesh and Appasaheb went to accused no.2 Laxman. After polishing foot wear Mahesh was to pay Rs.2/- to accused no.2. He had no change, so he gave him a currency note of Rs.ten denomination. There was altercation between Laxman and Mahesh on the point of change. During altercation accused no.1 Dhanraj intervened. It is alleged that accused no.2 caught hold Mahesh and accused no.1 Dhanraj delivered fist and kick blows on the abdomen of Mahesh. Complainant Appasaheb tried to rescue

Mahesh. That time police constables PW 2-Mohan Andhale, PW 5-Vishnu Dongare and PW 6-Babasaheb Kadam came there. They rescued Mahesh. Mahesh and accused were taken to police station. Since Mahesh fell unconscious he was taken to Rural Hospital, Kaij where he succumbed to injuries at around 11.45 a.m.

(ii) PW 7-Appasaheb lodged report. Crime was registered against the accused. Head Constable Wagh visited hospital and recorded inquest panchanama. The dead body was sent for postmortem. PW 9-Dr.Ashok Thorat conducted postmortem. PSI Dinkar Jayebhaye took over investigation. He recorded statements of witnesses. Accused were arrested. In view of transfer of P.S.I. further investigation was taken over by P.S.I. Munde. On completion of investigation charge sheet was submitted to the Court of Judicial Magistrate, First Class, Kaij, who in turn committed the case for trial to the Court of Sessions.

3] Charge of the alleged offence was explained to the accused. They pleaded not guilty and claimed to be tried. Their defence was of total denial and false implication at the instance of police constables who were on cross terms with them.

4] Prosecution examined in all 11 witnesses in support of its case. Considering the evidence of prosecution witnesses and the defence raised by accused, Trial Court came to the conclusion that offence under Section 302 of the Indian Penal Code was not made out against the accused but the offence under Section 304 Part II of the Indian Penal Code was proved. In consequence thereof both the accused were convicted and sentenced as indicated in paragraph 1 above. Hence this appeal by both the original accused.

5] Heard Shri U.B.Bondar, learned counsel for appellants and Smt. R.K.Ladda, learned Additional Public Prosecutor for the respondent/State. Perused record. Upon considering the evidence of complainant, eye witnesses and medical officer, this Court is of the view that prosecution succeeded in proving the offence under Section 304 Part II r/w Section 34 of the Indian Penal Code against the accused and for the below mentioned reasons the judgment and order of conviction and sentence recorded by Trial Court needs no

interference in this appeal.

6] PW 7-Appasaheb, PW 2-Police Constable Andhale, PW 5-Police Constable Dongre, PW 6-Babasaheb Kadam are the star witnesses in this case. It is stated by complainant Appasaheb that on the day of incident in the morning he and Mahesh came to Kaij. Mahesh was to get his foot wear polished, so they went to accused no.2. After Mahesh had given a note to accused no.2 altercation took place between the duo. That time accused no.1 Dhanraj came there. He assaulted Mahesh by kicks and fists on his abdomen. Complainant further states that he intervened and rescued Mahesh. By that time Police Constable Andhale, Police Constable Dongare, Babasaheb Kadam also came there. Exh.22 is the first information report proved by PW 7-Appasaheb.

7] The evidence of the complainant is fully corroborated by eye witnesses PW 2-Police Constable Andhale, PW 5-Police Constable Dongare, PW 6-Kadam and to some extent by PW 3-Ram Patakar. So far as PW 4-Nandkishor Mete is concerned, he did not support the prosecution. Nothing substantial could be elicited in the evidence of complainant and eye witnesses to show that they had a reason to falsely implicate the accused. Relying upon the

testimonies of complainant and eye witnesses it could be concluded that accused no.1 Dhanraj at the relevant time assaulted Mahesh with kicks and fists on his abdomen and accused no.2 caught hold the victim.

8] The next question that crops up here is whether death of Mahesh was homicidal and injuries inflicted were sufficient to cause the death. In this connection, evidence of PW 9-Dr. Ashok Thorat is important. Dr. Thorat was attached to Rural Hospital, Kaij on 22.9.1998. He received the dead body of Mahesh Manohar Deshmukh for postmortem. On the same day he conducted postmortem. On internal examination doctor noticed :-

" Rupture of right lobe of liver posteriorly around 3 x 4 cm. 2 to 3 cm. deep. Rupture of spleen, anteriorly 3 x 4 cm. and 2 cm. deep. "

It is opined by the Medical Officer that death was caused due to hemorrhagic shock due to injury to liver and spleen with cardio respiratory arrest.

9] On the cause of death of victim accused has raised three fold defence. According to them, cause of death could be :-

- (i) Due to disease suffered by Mahesh.
- (ii) Rupture of liver by fall, and

- (iii) Possibility of receiving such injury while playing Kabaddi.

10] PW 9-Ashok Thorat denied all the suggestions given by accused on cause of death. There is nothing on record to show that Mahesh was suffering from any ailment. Evidence of Dr. Ashok Thorat clearly indicates that injuries noticed on internal examination were sufficient to cause death. Relying upon the evidence of PW 9- Dr. Thorat, postmortem report (Exh.29) and provisional cause of death certificate (Exh.30) it could be safely concluded that the death in question was homicidal death and prosecution has overruled the possibility of natural, suicidal and accidental death.

11] It is not in dispute that weapon was not used for assault. The assault was by fist and kick blows. The part of body chosen was abdomen. These circumstances would indicate that act of accused was squarely within the frame work of Section 304 Part II of the Indian Penal Code and they were rightly convicted for the same.

12] Now the question remains to be answered is regarding the quantum of sentence. The learned counsel for appellants submitted that appellant no.2 is on death bed. Appellant no.1 is the

sole bread winner of his family. Learned counsel submits that there was no intention to commit such act but in the spur of moment incident took place. Learned counsel prays that both the appellants be released on the sentence already undergone.

13] It is apparent from the evidence that altercation took place on trifle ground. The punishment prescribed for the offence under Section 304 Part II is imprisonment for ten years or fine or both.

14] As can be seen from the judgment of the Trial Court both the accused were in jail from 22.9.1998 to 23.11.1998. Record shows that judgment was delivered on 23.4.2002. Appellant no.1 was released on bail by this Court on 17.10.2002 and appellant no.2 was released on bail on 27.6.2002. It means, appellant no.1 was in custody for about eight months and appellant no.2 was in custody for about four months. Besides they have also suffered mental incarceration since last around 18 years and present appeal is being decided after 14 years.

15] In the above premise this Court is inclined to reduce the substantive sentence to the sentence undergone and proceed to

pass the following order.

ORDER

- (i) Criminal Appeal No. 254 of 2002 is partly allowed.
- (ii) The impugned judgment and order of conviction passed on 23.4.2002 by the learned Additional Sessions Judge, Ambajogai, District Beed, in Sessions Case No. 32 of 1999 is maintained.
- (iii) The order of sentence is modified and both the appellants are released on the sentence already undergone.
- (iv) Bail bonds of both the appellants stand cancelled.

[INDIRA K. JAIN, J.]

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