

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.864 OF 2009

- | | | |
|-----------------------------|---|-----------------|
| 1. Vitthal Tukaram Kadam |] | |
| Age about 62 years, |] | |
| Occupation – Agriculturist, |] | |
| R/of Ambawade, Tal. Karad, |] | |
| Dist. Satara. |] | |
| |] | |
| 2. Somnath Vitthal Kadam |] | |
| Age about 19 years, |] | |
| Occupation – Agriculturist, |] | |
| R/of Ambawade, Tal. Karad, |] | |
| Dist. Satara. |] | Appellants |

Versus

- | | | |
|--------------------------------------|---|-----------------|
| The State of Maharashtra |] | |
| [At the instance of Karad Taluka |] | |
| Police Station, Karad, Dist. Satara. |] | Respondent |

Mr. Sharad Bhosale, i/by Mr. Dilip Bodake, for
the Appellants.

Mrs. A.S. Pai, A.P.P., for the Respondent-
State.

CORAM : SMT. V.K. TAHILRAMANI, ACTING C.J. &
DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 12TH FEBRUARY 2016.

ORAL JUDGMENT : [Per Dr. Shalini Phansalkar-Joshi, J.]

1. The Appellants, who stand convicted by the Judgment and Order dated 31st December 2008 in Sessions Case No.7 of 2008 of Additional

Sessions Judge, Karad, for the offence punishable under Section 302 r/w. 34 of IPC and sentenced to suffer life imprisonment and fine of Rs.1,000/- each, in default to suffer R.I. for one month and for the offence punishable under Section 323 r/w. 34 of IPC and sentenced to suffer S.I. for one month, by this Appeal challenge their conviction and sentence.

2. Brief facts of the Appeal can be stated as follows :-

Appellant No.2 is the son of Appellant No.1. Deceased Lalasaheb was the brother of Appellant No.1. They had two other brothers by name Dattatraya and PW-4 Kundalik. Deceased Lalasaheb was given in adoption to one Yeshoda Kadam and his name was entered into the property of Yeshoda's husband Ramchandra Kadam. Appellant No.1 wanted to sell the ancestral property – the agricultural land. His brothers Dattatraya and Lalasaheb told him not to sell the land. Dattatraya even offered to purchase the said land from Appellant No.1 and requested him not to sell it to any other person. Appellant No.1 was not ready for the same. On that count, the relations between Appellant Nos.1 and 2 on one hand and his brothers Dattatraya and deceased Lalasaheb, on the other hand, were strained.

3. The incident that took place on 18th April, 2007 was the outcome of these strained relations. On that day, while deceased Lalasaheb was sitting on the terrace of the house, at about 7:30 pm, Appellant No.1 came in front of his house and started giving abuses in indecent language as to how Lalasaheb can oppose him in respect of selling of the agricultural land. Lalasaheb, therefore, came down from the terrace. The fighting ensued between Appellant No.1 and Lalasaheb. Meanwhile, Appellant No.2 Somnath also came there with wooden stump. Both the Appellants then gave fist blows and kicks to Lalasaheb. Appellant No.2 also gave the blows of wooden stump. By that time, PW-3 Kantabai, Dattraya's wife, came there and snatched wooden stump from the hands of Appellant No.2 Somnath. PW-2 Laxmi, wife of Lalasaheb, also tried to intervene in the fight, but she could not succeed. Appellant No.1-Vitthal then took out knife and inflicted several blows of knife on the stomach, chest and head of Lalasaheb. As a result, Lalasaheb fell down. PW-4 Kundalik, who had also reached there, then took Lalasaheb to Krishna Charitable Hospital. There Doctor declared Lalasaheb to be dead before admission. In the hospital itself, the complaint of PW-2 Laxmi came to be recorded vide Exhibit-16.

4. On her complaint, C.R. No.72 of 2007 came to be registered at

Karad Taluka Police Station. PW-10 API Sambhaji Patil took over investigation of the case and sent dead body of Lalasaheb for postmortem examination, after conducting Inquest Panchanama (Exhibit-5). He took the search of the Appellants and arrested them on the same day. Both the Appellants were also referred for medical examination in view of the presence of some injuries on their person. Their blood stained clothes were also seized. The Spot Panchanama was made on the same night and from the spot, the blood stained knife was seized under Panchanama (Exhibit-13). During the course of investigation, Appellant No.2-Somnath gave a disclosure statement vide Memorandum Panchanama (Exhibit-33). Thereafter he guided Police and Panchas to his house and produced the blood stained shirts and wooden stump. They were seized under Panchanama (Exhibit-34). All the seized muddemal articles were sent to Chemical Analyzer on 4th May, 2007. Further to completion of investigation, Charge-Sheet came to be filed in the Court against the Appellants.

5. On committal of the case to the Sessions Court, the Trial Court framed charge against the Appellants vide Exhibit-2. The Appellants pleaded not guilty and claimed trial, raising the defence of denial and false implication on account of the enmity and strained relations.

6. In support of its case, prosecution examined in all 11 witnesses and on appreciation of their evidence, the Trial Court was pleased to hold the guilt of both the Appellants to be proved beyond reasonable doubt and convicted and sentenced them as aforesaid.

7. This Judgment of the Trial Court is challenged in this Appeal by learned counsel for the Appellants, whereas, supported by learned A.P.P. for Respondent-State. In our considered opinion, before adverting to the rival submissions advanced by them, it would be useful to refer to the evidence on record.

8. To prove homicidal death of deceased Lalasaheb, prosecution has examined PW-6 Dr. Dhondiram Jadhav, who was attached to Rural Hospital, Karad and has conducted postmortem examination after the dead body of Lalasaheb was brought from Krishna Hospital, Karad. On examination, he found following external injuries :-

(1) Incised wound, vertically placed with dried blood at margins, of size of 10 cm x 2 cm x bone deep, situated on left temporal region, just lateral to the outer canthus of left eye. Its mid portion situated. It was caused by sharp cutting weapon and it was antemortem injury.

- (2) *Punctured incised wound, elliptical in shape with both angles acutely cut vertically placed. No abrasion or bruise at wound margins. It is directed from right to left, above downwards. The track perforates the chest wall through fourth inter coastal space making vertical cut in fourth rib – lower portion, placed 1 cm. medial to costo condole junction, perforating middle lobe of right lung from 3 cm above its lower border, through and through and of size of 2 cm x 1 cm x through and through. The entire track is filled with blood and 22 ml of fluid blood found in right chest cavity. No exit wound was seen. Size of the wound was 3 cm x 3.2 cm when edges opposed by 1 cm x 7 cm deep situated in right primary region, 1 cm above and 3 cm medial to right nipple. The injury was caused by double edged sharp pointed weapon and it was antemortem injury.*
- (3) *There was punctured incised wound, el-pit elliptical in shape vertically placed, both angles acutely cut. There was no abrasion or bruising at the wound margins – the track – 7 cm deep, directed above downwards, medially and backwards. The track perforating the chest wall through 5th inter coastal space with vertical cut in 5th rib lower margins. 2 cm medial to costo condole junction, the perforating pericardium and perforating the heart, perforating right ventricular wall of size of 2 cm x 0.5 cm x cavity deep. The entire track is infiltrated with blood*

and 2 ml of fluid blood in pericardial sack and 91 ml. In left chest cavity. No exit wound seen. Size of wound was 2/2 cm x 1/2 cm x 7 cm x cavity deep. It was situated left memory region, 3 cm below and 6 cm medial to left nipple. It was caused by double edged sharp weapon.

- (4) *Loops of intestine are seen coming out at right of umbilicus, some digested material seen at intestinal loop, when loops were pushed in side, abdomen, punctured incised wound elliptical in shape, transversely placed with both angles acutely cut. The trachea is 5 cm deep, directed from front to back. The track perforates the abdominal ward and punctures jejuna, 28 cm from deodede jejuna junction at two places on anterior side surface of jejuna and measuring puncture measuring 2 cm x 1/2 cm and 2 cm x 1 cm and separated from one another by 5 cm distance above, there is mesentrice cut of size 2 cm x 0.5 cm just above in between the punctures and jejuna. Clear its attachment to bowel. No exit wound seen. Size of wound was 9 cm (9.2 cm when edges opposed) by 3 cm wide at skin surface x cavity deep. Situated in umbilical region on just right of umbilicus. It was caused by double edged sharp object and it was antemortem injury.*

- (5) *Crescent shaped stab wound placed horizontally of size 1 1/2 cm x 1/2 cm x 3 cm subcutaneous big surface only*

(sliding). Situated 3 cm below wound No.4 and 4 cm to right of mid-line. It was caused by sharp weapon and it was antemortem injury.

9. According to him, all the injuries were fresh and caused within six hours of the death. There were corresponding internal injuries noted by PW-6 Dr. Dhondiram Jadhav in Column No.18 of the Postmortem Notes (Exhibit-36) as follows :-

- (1) There was infiltration of blood in subcutaneous tissues under wound No.1 mentioned in Column No.17.*
- (2) As mentioned in Column No.20 of the Postmortem Notes, 4th right rib cut corresponding to stated injury mentioned in Column No.17.*
- (3) 6th left rib cut corresponding to 3rd injury. Third injury mentioned in Column No.17.*
- (4) Pleura cut on right side middle lobe as described in wound No.2, Column No.2.*
- (5) Right lung punctured wound of size of 2 cm x 1 cm x through and through as described in wound No.3 in Column No.2.*
- (6) Pericardium – cut anteriorly and blood with some clots 220 ml seen as described in wound No.3 in Column No.2.*
- (7) Heart – with weight – stab on right ventricle near right margin of size of 2 cm x 0.5 cm x cavity deep as described in wound No.3, Column No.2.*

10. PW-6 Dr. Dhondiram Jadhav has specifically opined that external injury Nos.2, 3 and 4 were fatal in nature and were sufficient in the ordinary course of nature to cause the death. In his opinion, the cause of death was *“stab injuries leading to injury to vital organs”*. Thus, his evidence sufficiently proves the homicidal nature of the death of Lalasaheb.

11. Prosecution case against the Appellants stands on the ocular account of the incident, as given by the three eye-witnesses, whose presence at the spot was natural one. PW-2 Laxmi is the wife of the Deceased. As the incident had taken place at about 7:30 pm, in front of her house, her presence at the time of the incident cannot be disputed at all. Her evidence goes to prove that, on the date of the incident, at about 7:30 pm, her husband Lalasaheb was sitting on the terrace of the house. At that time, Appellant No.1 Vitthal came there and started giving him abuses and confronting him as to why Lalasaheb was opposing Appellant No.1 from selling the agricultural land. Lalasaheb, therefore, came down from the terrace and went outside the house. As per evidence of PW-2 Laxmi, the fighting ensued between Appellant No.1-Vitthal and her husband Lalasaheb. During that time, Appellant No.2-Somnath also came

there with wooden stump. Both the Appellants gave fist blows and kick blows to Lalasaheb. Appellant No.2 also assaulted Lalasaheb with wooden stump. By that time, PW-3 Kantabai, Dattatraya's wife, came there. She snatched wooden stump from the hands of Appellant No.2- Somnath. PW-2 Laxmi also tried to intervene in the scuffle to rescue her husband. Appellant No.1, therefore, took out chaku (knife) and gave several blows of knife on the stomach, chest and head of Lalasaheb. PW-4 Kundalik also rushed there and then Lalasaheb was taken to Krishna Hospital, where he was declared dead.

12. In her cross-examination, it is further brought on record that PW-3 Kantabai was present at the spot till the end of the incident and after Lalasaheb fell down with injuries on her person, the Appellants fled away from the spot. In her cross-examination it is further brought on record that even when PW-4 Kundalik came there, the incident was going on.

13. This evidence of PW-2 Laxmi is completely supported and corroborated from the evidence of PW-3 Kantabai, wife of Dattatraya. According to her evidence also, while she was cooking food in the house at about 7 pm., she heard the noise of giving abuses from outside. Hence, she came out of the house and saw that Appellant Nos.1 and 2 were

giving abuses to Lalasaheb. She further noticed that Appellant Nos.1 and 2 were also beating Lalasaheb with fist blows and kicks. She herself and PW-2 Laxmi tried to intervene in the fight. However, Appellant No.1 stabbed Lalasaheb with chaku (knife) in his stomach and chest. As a result, Lalasaheb fell down in injured condition. Meanwhile, PW-4 Kundalik has also arrived there. He took Lalasaheb to Krishna Hospital. She herself and PW-2 Laxmi also went to the Krishna Hospital, where complaint of PW-2 Laxmi was also recorded by the Police. Except for some minor inconsistencies to the effect that it was PW-2 Laxmi, who snatched the wooden stump from the hands of Appellant No.2-Somnath and not she herself, her evidence is otherwise completely consistent with the evidence of PW-2 Laxmi. She has also clearly attributed the role of assault by knife to Appellant No.1.

14. Lastly, there is evidence of PW-4 Kundalik, the real brother of Appellant No.1-Vitthal and deceased Lalasaheb also. According to his evidence, on the date of incident, at about 7:15 pm, when he returned to his home from duty, he saw that many persons had gathered in front of the house; Lalasaheb had fallen down; PW-2 Laxmi and PW-3 Kantabi were pushing Appellants aside, he also helped them to push away the Appellants. As Lalasaheb was injured, he took him in rickshaw to Krishna

Hospital. PW-2 Laxmi and PW-3 Kantabai also came to the hospital. In the hospital itself, the complaint of PW-2 Laxmi was recorded.

15. If at all any further corroboration is required to this ocular account of the incident, as given by these three eye-witnesses, who are close relatives of not only the deceased but also the Appellants, it is coming from the contents of F.I.R., which is lodged immediately after the incident and gives all the details of the occurrence. It is pertinent to note that the offence is registered on the same night on the complaint (Exhibit-16).

16. Further corroboration to this evidence is also coming from the evidence of PW-1 Narayan Patil, Panch to the Spot Panchanama (Exhibit-13). The Spot Panchanama was conducted on the next day in the early morning and from the spot, the blade and handle of the knife came to be seized along with the blood stained soil. The prosecution has then led the evidence of PW-8 Dipak More, Panch to the Arrest Panchanama of the Appellants, to prove that, at the time of their arrest on that night, some injuries were found on the person of both the Appellants.

17. The evidence of PW-9 Dr. Mohan Patil, attached to the Cottage Hospital, Karad, reveals that on the requisition of Police, he has examined

both the Appellants on that night at about 1 am and found contused lacerated wound over the left eye of Appellant No.1-Vitthal with bleeding and oblique in nature of the size of 4 cm x 2 cm x 1 cm deep. The age of the injury was within twelve hours. He also noticed slight abrasion over left forearm near wrist joint of Appellant No.2-Somnath. Injury Certificates of both the Appellants are produced on record at Exhibits 45 and 46, which sufficiently prove the occurrence of the fight that has ensued between the Appellants and the deceased and further the presence and involvement of the Appellants in the said incident.

18. The evidence of PW-2 Laxmi, PW-3 Kantabai and PW-4 Kundalik also proves the motive on the part of the Appellants in picking up the quarrel and fight with deceased Lalasaheb. According to their evidence, Appellant No.1 wanted to sell the ancestral agricultural land. His brothers Dattatraya and deceased Lalasaheb were opposing the same. Dattatraya was even ready to purchase the said land from Appellant No.1. However, Appellant No.1 was not ready for the same. Appellant No.1 had a particular grudge against Lalasaheb as he was already given in adoption to Yeshoda and had got property of his adopted parents. Therefore, as per Appellant No.1-Vitthal, Lalasaheb had no right to say anything in the property of his real brothers Vitthal, Dattatraya and Kundalik. Hence, on

that count, on the day of incident, he had gone to the house of Lalasaheb, gave abuses to him and initiated the quarrel, which resulted into the death of Lalasaheb.

19. The learned counsel for Appellants has challenged the prosecution case on two counts. In the first place, it is submitted that the prosecution has examined only interested witnesses, though the incident had taken place outside the house and several other persons had also gathered there. As per learned counsel for the Appellants, non-examination of independent witnesses creates doubt about the credibility of prosecution case. However, we are not inclined to accept this submission for the simple reason that, law nowhere states that the evidence of interested witnesses should be discarded or disbelieved altogether. The law merely strikes a note of caution to appreciate the evidence of interested witnesses with care and caution. If after careful scrutiny, their evidence is found to be trustworthy and inspiring confidence in the judicial mind, then there is no reason at all to disbelieve the prosecution case for mere non-examination of independent witnesses.

20. Here in the case, the presence of PW-2 Laxmi, PW-3 Kantabai and PW-4 Kundalik at the time of incident, as stated above, is natural one.

They are the in-mates of the house and the first persons to witness the incident. Moreover, they are not only related to Deceased, but they are equally related to the Appellants also. PW-3 Kantabai is the wife of Dattatraya, the real brother of Appellant No.1 and deceased Lalasaheb. Similarly, PW-4 Kundalik is the real brother of both, the deceased and Appellant No.1. Hence, it cannot be accepted that they will implicate the Appellants falsely. Needless to say that, enmity or strained relationship is a double edged weapon; just as it can be a cause for false implication, similarly, it can also be a cause for the assault by the Appellants. Here in the case, the evidence on record clearly proves that it was Appellant No.1 who had come to the house of the deceased and started giving him abuses. Not only that, he has also carried knife with him, with which he has been aggressive in assaulting the deceased.

21. The second ground on which the prosecution case is challenged pertains to the fact that the incident had taken place at about 7:30 pm in the evening and, according to learned counsel for the Appellants, there is no evidence to show that at the spot of the incident, there was sufficient light available. Though the witnesses have stated that they saw the incident in the light but they have not disclosed the source of light. Moreover, though the Spot Panchanama proves the presence of pole

light, evidence of the Investigating Officer PW-10 API Patil reveals that, as per the report submitted by the Junior Engineer of M.S.E.B. vide Exhibit-52, on the day of the incident, during the period from 9:30 am till 12^oclock in the mid-night, due to load-shading, supply of electric energy was not available. Hence, according to learned counsel for Appellants, the evidence of the eye-witnesses implicating the Appellants in the assault on the deceased is required to be disbelieved, as they could not have been in a position to identify the assailants.

22. However, we are not inclined to accept this submission also, as, admittedly, the Appellants were close relatives of the eye-witnesses and the deceased. The eye-witnesses were hence very well conversant with their voice and body language. The incident had also taken place for about 8 to 10 minutes. Therefore, there was no difficulty at all for the eye-witnesses to identify the Appellants. Especially, when Appellant No.1 was giving abuses, hence from his voice, he could be very much identified. Moreover, these witnesses have intervened in the fight to rescue the deceased; therefore, they had opportunity to see the Appellants from close quarters.

23. As held by the Apex Court in the case of ***Dalbir Singh Vs. State of***

Haryana, 2008 ALL M.R. (Cri.) 3278, if the incident has taken place during dark night, ocular identification may be difficult in some cases. But, if a person is acquainted and closely related, then from the manner of speech, gait and voice, the identification is quite possible. In the instant case, it was not a dark or mid-night at all. The incident had taken place, more or less, in the late hours of evening. There must be light illuminating from the house also. Witnesses were also closely related. Therefore, there was no difficulty at all for the witnesses to identify the assailants and there was no reason for them to implicate the Appellants falsely in the assault. The presence of the Appellants, as aforesaid, is also proved through the injuries on their persons also.

24. The last submission advanced by learned counsel for the Appellants is that, as per the evidence of PW-6 Dr. Dhondiram Jadhav, who has conducted the postmortem examination, injury Nos.2 to 4 have been caused by double edged sharp object. According to learned counsel for the Appellants, the knife seized in the case is not a double edged sharp object and, therefore, the evidence of these witnesses that deceased was assaulted with the knife needs to be disbelieved. In our considered opinion, as the injuries found on the dead body of Lalasaheb were incised stab wounds, hence they are very much possible by sharp edged weapon.

Whether it was knife or chaku, which, as deposed by PW-6 Dr. Jadhav, is different from knife or it was a botcher's knife, as suggested to the witnesses, the fact remains that the injuries were such that they can be caused only by sharp edged weapon. The evidence of the eye-witnesses is categorical and consistent to the effect that the assault was made with the sharp edged weapon like chaku or knife. The ocular account of the eye-witnesses will always prevail over the medical evidence, especially, when the medical evidence is not totally demolishing the same. Therefore, this line of argument advanced by learned counsel for the Appellants also fails.

25. Now coming to the nature of the offence, according to learned counsel for the Appellants, as, admittedly, the assault took place in the fight that ensued between the deceased and the Appellants and as in the same incident, the Appellants had also sustained some injuries, the case of the Appellants can, at the most, fall under Part I or II of Section 304 of IPC, as it is covered by Exception 4 to Section 300 of IPC. However, in order to get benefit of Exception 4 to Section 300 of IPC, following four essential ingredients are required to be satisfied that assault is made,

- 1) In a sudden fight;
- 2) In the heat of passion;

- 3) Upon a sudden quarrel without premeditation; and
- 4) Without the offender having taken undue advantage or acted in a cruel or unusual manner.

26. Unless all these ingredients of Exception 4 to Section 300 of IPC are satisfied, the case will not fall under Section 304 Part I or II of IPC. Here in the case, it was not a sudden fight. Appellant No.1 had come to the house of the deceased with premeditation, carrying knife with him. Moreover, it was not a sudden quarrel. The evidence on record further proves that it was not a case of one or two blows of knife, but, as can be seen from the medical evidence, there were five incised wounds and that too on the vital parts of the body, resulting into the cutting of ribs and intestine coming out of the abdomen, thereby sufficiently ruling out the case of Appellant No.1 that he has not taken undue advantage or not acted in a cruel or unusual manner. As regards the injuries sustained by the Appellants in the incident, they are of too minor and insignificant nature so as to extend any benefit of those injuries to the Appellants.

27. Thus, the evidence on record in this case more than sufficiently proves the involvement and incriminating role of Appellant No.1 in causing fatal injuries to the deceased, which resulted into his death. Therefore, as

regards Appellant No.1, we have no hesitation in confirming his conviction for the offence punishable under Section 302 of IPC.

28. However, as regards Appellant No.2, we find that the only role attributed to him is that of giving blows of wooden stump to deceased Lalasaheb. The medical evidence of PW-8 Dr. Dipak More does not show that any contusions were found on the dead body. Moreover, as per evidence of the eye-witnesses, he had come to the spot afterwards and not along with Appellant No.1. Further, the evidence on record also proves that it was Appellant No.1 who took out a knife and had started giving blows to the deceased. Hence, we accept the submission of learned counsel for the Appellants that the evidence on record does not prove beyond reasonable doubt that Appellant No.2-Somnath also shared any common intention with Appellant No.1 to cause death of Lalasaheb. Hence, Appellant No.2-Somnath deserves to be acquitted of both the offences punishable under Sections 302 and 323 of IPC, extending him the benefit of doubt.

29. To sum up, therefore, the Appeal is allowed partly.

30. The conviction and sentence of Appellant No.1-Vitthal, as recorded

by the Trial Court, for the offences punishable under Sections 302 and 323 r/w. 34 of IPC is confirmed.

31. The conviction and sentence of Appellant No.2-Somnath for the offences punishable under Sections 302 and 323 r/w. 34 of IPC is quashed and set aside. He is acquitted for the said offences. His Bail Bonds stand cancelled.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [ACTING CHIEF JUSTICE]