

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.131 OF 2011

1. Sukhdev Ganga Khaire @ Don	)	
r/o. Andheri Jai Bhawani Mata Road	)	
Ramesh Nagar, Makadpada,	)	
Andheri (W), Mumbai – 400058	)	
 2. Tulsiram Ganga Khaire @ Tulshya	)	
r/o. Andheri Jai Jai Bhawani Mata Road	)	
Ramesh Nagar, Makadpada,	)	
Andheri (W), Mumbai – 400058	)	... Appellants

Vs.

The State of Maharashtra	)	... Respondent
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**WITH
CRIMINAL APPEAL NO.106 OF 2011**

1. Gangaram Soma Kamble	)	
r/o. Andheri Jai Bhawani Mata Road	)	
Ramesh Nagar, Makadpada,	)	
Andheri (W), Mumbai – 400058	)	
 2. Tulshiram Rama Bodke @ Balya	)	
r/o. Bablipada, C.S. Road No.3,	)	
Dahisar (E), Mumbai – 68	)	
 3. Mahesh @ Manish Ganga Khaire	)	
r/o. Andheri Jai Bhawani Mata Road	)	
Ramesh Nagar, Makadpada,	)	
Andheri (W), Mumbai – 400058	)	
 4. Nagesh Jana Khaire	)	
r/o. Andheri Jai Bhawani Mata Road	)	
Ramesh Nagar, Makadpada,	)	
Andheri (W), Mumbai – 400058	)	... Appellants

Vs.

The State of Maharashtra	)	... Respondent
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Mr.Amit Munde for the Appellant Nos.1 & 2 in Apeal/131/2011 and for Appellant Nos.3 to 6 in Apeal/106/2011

Mrs.U.V. Kejriwal, APP, for Respondent – State

CORAM: **SMT. V.K. TAHILRAMANI &
MRS.MRIDULA BHATKAR, JJ.**

DATE: **JULY 15, 2016**

ORAL JUDGMENT (PER MRS.MRIDULA BHATKAR, J.):

1. These two appeals are directed against the judgment and order dated 11.1.2011 thereby convicting the accused Nos.1 and 2 i.e., the appellant in Appeal No.131 of 2011 for the offence of murder and sentencing them for life imprisonment and holding the original accused Nos.3, 4, 5 and 6 i.e., the appellants in Appeal No.106 of 2011 guilty and sentencing them for 3 years R.I.

2. The incident of assault has taken place on 3.6.2007. The complainant Ravi Bodke is the step-brother of the deceased Vinod Bodke. The family of the complainant i.e., the father, his mother, the step mother and the step brothers one Ajay and Vijay had quarrelled with the accused persons on 3.6.2007 and when the family was having lunch on 3.6.2007 at around 2pm, nearly 6 to 7 persons including all the accused, armed with the weapons, entered the house. As per the case of the prosecution, accused No.1 was holding a stick; accused No.2 was holding cricket

stumps, accused No.4 was holding wood, accused No.5 was holding bat and accused No.6 was with stump. They had quarrelled in the morning with Ajay and Vijay and the father of the complainant went to police station and lodged complaint against these accused persons. So they entered the house and questioned as to why the complaint was lodged against them with the police. They started assaulting the father i.e., PW2 Sukhdev Bodke and the complainant and other family members. Vinod Bodke had received blows on the head. The family members of the complainant in their defence, attacked them in the fight. Some accused persons also sustained injuries. Thus, cross cases were registered against each other. The complainant gave information pursuant to which the offence was registered at C.R. No.229 of 2007 with Oshiwara police station and one accused Tulshiram Ganga Khaire gave information of assault, pursuant to which the offence was registered at C.R. No.230 of 2007 of Oshiwara police station. The police arrested persons from both the groups. They initially registered offence under section 307 of the Indian Penal Code against the appellants/accused. Vinod Bodke was admitted in hospital for treatment on 3.6.2007. However, he did not respond to the treatment and succumbed to injuries on 9.6.2007 and so, section 302 of the Indian Penal Code was added and the cause of his death was head injury. The police recorded statements of the other witnesses. They drew spot panchanama and thereafter, inquest panchanama was drawn and there was discovery

of weapons at the instance of accused No.1. The Doctors i.e., PW9 Dr.Rahul Tekade, PW10 Dr.Ashfaq Ansari, PW11 Dr.Sunil Shinde, were examined on the point of injuries received by both the parties and the post-mortem was conducted by PW12 Dr.Baban Shinde. Then other three witnesses, i.e., PW13 Hiralal Jadhav, PW14 Sayaji Phadtare and PW15 Dattatraya Sankhe, who were the police personnel and arrested the accused were examined. Seizure panchanama was conducted and after completion of the investigation, chargesheet was filed before the Court of the learned Magistrate. Thereafter, the case was committed to the Court of Sessions. Charge was framed. Accused pleaded not guilty and the trial was concluded in conviction as mentioned above. Hence, these appeals.

3. In the present case, the accused are facing charges under section 302 of the Indian Penal Code for the offence of murder of Vinod Bodke and also for the offence punishable under section 326 of the Indian Penal Code of causing grievous hurt to witnesses Sukhdev Bodke and Ravi Bodke. Before dealing with the question as to whether the appellants were the assailants or not, we deal with the evidence of PW11 Dr.Sunil Shinde. As per the case of the prosecution, the incident of assault has taken place on 3.6.2007 at the residence of PW1 Ravi Bodke and PW2 Sukhdev Bodke. On the same day, they all went to Cooper hospital, Vile Parle. PW11 Dr.Shinde had attended them. The history was given of

assault by known persons with wooden cricket stump. Sukhdev was examined by Dr.Shinde and he found that there was CLW on frontal vertex and swelling with deformity over left forearm. Then, a third patient i.e., PW3 Ms.Shanta Rama Sonawane, who is the sister of accused No.2 was examined. She had two blunt injuries on elbow and forearm. Thereafter, the Doctor examined another patient Vinod Bodke, who was brought by his brother. As there was head injury, he was referred to ICU. The injury certificates of these injured persons are produced at exhibits 59, 60 and 61. PW12 Dr.Baban Shinde has stated that he had conducted post-mortem on Vinod Bodke. He found haematoma under scalp on fronto - frontol regions, fracture of left temporal bone and there was haemorrhage in the temporal parietal region. He has opined that the death was caused due to haemorrhage and shock due to head injury. He conducted post-mortem on 9.6.2007, produced post-mortem notes marked exhibit 64.

4. Mr.Munde, the learned defence Counsel, while assailing the evidence of the prosecution witnesses, has submitted that the conviction under the charges of sections 302 and 326 of the Indian Penal Code is illegal considering the injuries sustained by the witnesses and the deceased. He argued that Vinod did not succumb to the injuries on the same day i.e., on 3.6.2016 but he died six days after the date of the assault. He was admitted in ICU and he did not die instantaneously. He

further submitted that the injuries sustained by the other witnesses disclose that the attack was not very severe but, as per the admissions given by PW11 Dr.Shinde, such injuries can be caused due to fall on hard and blunt object. He argued that the benefit of this opinion is to be given to the accused.

5. In the present case, there are six eye witnesses. The incident has taken place in the house of the complainant Ravi. All the witnesses speak in the same tune that there was quarrel between Ajay and Vijay, the cousins of the complainant and the accused persons, when they were playing cards in the morning before lunch. Thus, both the eye witnesses i.e., PW1 Ravi Bodke, PW2 Sukhdev have stated that on the day of the incident Ajay and Vijay quarrelled with the accused regarding some money issue and thereafter, all the accused armed with weapons entered their house. They attacked the family members of the complainant as they were angry as the mother of Ajay and Vijay had lodged police complaint against the accused. Thus, a fresh dispute was a motive.

6. The learned Counsel has argued that either Ajay and Vijay should have been examined by the prosecution to prove the motive. He further submitted that assuming the motive was the dispute between Ajay and Vijay and the accused, the accused did not have any reason to assault

these witnesses other than Ajay and Vijay. He submitted that Ajay and Vijay were also present in the house having lunch. However, they were not assaulted. This appears that the incident might not have been happened in the manner in which the prosecution has put it before the Court.

7. Non-examination of Ajay and Vijay is not a material lacuna in the case of the prosecution when six eye-witnesses speak about the assault by taking names of the assailants. The mother of Ajay and Vijay had given complaint to the police against the accused on the same day and, therefore, the appellants armed with weapons entered the house of the complainant. The evidence of the eye witnesses gives a picture that when the assailants came inside, the eye witnesses, Sukhdev, Ravi and other family members, who tried to stop them, were assaulted. It was not a target attack but was at random and, therefore, whoever tried to stop them was injured.

8. Six eye witnesses i.e., PW1 Ravi Bodke, PW2 Sukhdev, PW3 Shanta Sonawane, PW4 Pramila Bodke, PW5 Maria Sonawane and PW6 Ganesh Sonkusare and all the eye witnesses sing in the same tune on the point of actual assault. There cannot be challenge to the identification of the accused as the witnesses know them. They have stated very

specifically that the accused No.1 was holding hockey stick. His nick name was 'don'. Accused Tulshiram was holding cricket stump. Accused No.4 was holding wood; accused No.5 was holding cricket bat and accused No.6 Nagesh was with stump. Specific roles were given to the accused in the assault. The incident has taken place in the afternoon. All the assailants, their weapons were visible. There was a proximity of cause i.e., quarrel, which led the accused to attack the family of the complainant. The submission of the learned Counsel that the true assailants are not before the Court, has no basis. The evidence of all these eye witnesses could not be demolished in the cross-examination and we find this evidence true, cogent and trustworthy.

9. The ocular evidence is fully corroborated with the medical evidence, which inspires confidence of the truthfulness of the witnesses. Therefore, we are of the view that this is a case of conviction of all the accused.

10. On the point of quantum, the learned Counsel Mr.Munde has submitted that considering the nature of the assault and the injuries suffered by the witnesses, the appellants did not have intention to kill Vinod, who died six days after the assault. Thus, the offence is of a lesser degree and not of murder under section 302 or grievous hurt under section 326 of the Indian Penal Code. After due deliberation and going through

the medical evidence and also evidence of the injured persons, we are inclined to accept the submissions of the learned defence counsel to certain extent. The evidence of PW1 Ravi Bodke and PW2 Sukhdev Bodke and PW3 Shanta Sonawane disclose that accused Nos.1 and 2 mounted assault on the head of Ravi. However, it appears that there were one or two blows on his head. However, he did not die instantaneously. He was admitted in ICU. He was treated for the same and finally, he died after six days. Thus, the manner in which the assault has taken place, it appears that they were angry and wanted to create terror in the mind of the family members of the complainant. Unfortunately Vinod suffered head injury with cricket stump and succumbed to it. Sukhdev had sustained fracture to his left hand. We agree that it is an offence of a lesser degree and therefore, it will be correct to bring down the sentence to a lesser degree i.e., from under section 302 to section 304 part I / II (??????) of the Indian Penal Code against the accused Nos.1 and 2, who caused injury to Vinod. However, Sukhdev had sustained fracture to his arm and the offence is under section 326. There is a specific mention about the attack, so, we do not want to interfere with the sentence under section 326 r/w section 34 of the Indian Penal Code. The offence has taken place in June, 2007. Accused Nos.1 and 2 are in the prison and they have undergone the sentence for a period of nearly 9 years and 42 days. So also, other accused Nos.3, 4, 5 and 6 have spent 7 months to 9

months approximately in the prison and they are on bail. Considering this position, we maintain the conviction of the accused and reduce the sentence as follows:

i) Accused No.1 Sukhdev Ganga Khaire and accused No.2 Tulshiram Ganga Khaire are sentenced to suffer imprisonment for the period undergone.

ii) Accused Nos.3 to 6 i.e., Gangaram Soma Kamble, Tulshiram Rama Bodke, Mahesh @ Manish Ganga Khaire and Nagesh Jana Khaire are sentenced to suffer imprisonment for the period of undergone.

11. Appeals are disposed of accordingly.

(MRIDULA BHATKAR, J.)

(V.K. TAHILRAMANI, J.)