

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

CRIMINAL APPEAL NO.147 OF 2008

The State of Maharashtra,
Through A.P.I. Shrirampur,
City Police Station

..Appellant
(Prosecution)

Vs.

1. Pinya @ Jayant Vitthal
Walke, Age : 24 years,
r/o.Saraswati Colony,
Ward No.7, Shrirampur,
Dist. Ahmednagar

2. Vasant Karbhari Pawar,
Age : 36 years,
r/o.Saraswati Colony,
Ward No.7, Shrirampur,
Dist. Ahmednagar

..Respondent
nos.1 and 2
(Orig.accused
nos.1 and 2)

3. Fukya @ Dhananjay Pandurang
Girme, Age : 27 years,
r/o.Saraswati Colony,
Ward No.7, Shrirampur,
Dist. Ahmednagar

..Leave refused
as per order
dated 22/4/2008

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Ms.S.S.Raut, APP for appellant

Mr.R.A.Tambe, Advocate for respondents

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**CORAM : SUNIL P. DESHMUKH AND
SANGITRAO S. PATIL, JJ.**

**RESERVED ON : DECEMBER 08, 2017
PRONOUNCED ON : DECEMBER 22, 2017**

JUDGMENT (PER SANGITRAO S. PATIL, J.):

Heard.

2. Respondent nos.1, 2 and one Fukya @ Dhananjay Pandurang Girme (original accused nos.1, 2 and 3 respectively) were prosecuted for the offences punishable under Sections 302 and 323 read with Section 34 of the Indian Penal Code ("I.P.C.", for short). Sessions Case No.54 of 2005 was registered against them. The learned Addl. Sessions Judge, Shrirampur convicted them for the offences punishable under Sections 324 and 323 read with Section 34 of the I.P.C. and extended them the benefit of probation by directing them to furnish bonds of good behavior in the sum of Rs.5,000/- each, for a period of two years, and to pay compensation of Rs.3,500/- each, which amount, on reaslisation, was directed to be paid to the informant Shobhabai, Kalabai and Fulabai, to the extent of Rs.3,500/- each. The learned trial Judge acquitted the accused persons

of the offence punishable under Section 302 of the I.P.C.

3. Being aggrieved by the judgment and order dated 25.10.2007 passed by the learned trial Judge, the State/Prosecution preferred this appeal with leave of this Court. While considering the application for leave to file appeal, this Court, vide order dated 22.04.2008, granted leave against respondent nos.1 and 2 (original accused nos.1 and 2) only and refused it as against respondent no.3 (original accused no.3) namely, Fukya @ Dhananjay Pandurang Girme. Thus, the appeal proceeded against respondent nos.1 and 2 (original accused nos.1 and 2) only.

4. The deceased Nausabai Nivrutti Chavan, aged about 70 years, was residing in Saraswati Colony, Ward No.7, Shrirampur. She had three daughters namely, Fulabai, Shobhabai and Kalabai. Fulabai has four daughters namely, Radha, Varsha,

Paru and Sakhu. Sakhu had got married to respondent no.1 prior to about two years of the date of incident, which took place on 01.04.2005.

5. It is the case of prosecution that on 01.04.2005 at about 5.30 p.m., Paru was coming from a grocery shop to the house of the deceased Nausabai. Respondent no.1 met her on the way and asked her to send Sakhu to him. He further started hurling abuses against Paru. Respondent no.1 followed Paru and went to the house of the deceased Nausabai along with his friend i.e. respondent no.2 and original accused no.3. All of them hurled abuses against Shobhabai, who was standing in front of the house and started beating her. Respondent no.1 was holding an iron bar, while respondent no.2 was having a tommy. Respondent no.1 gave a blow of iron bar on the nose of Shobhabai and caused her bleeding injury. When the deceased Nausabai intervened to rescue her, respondent no.1 gave blows of iron bar on her

left shoulder and forehead. Respondent no.2 also beat on her head, back, waist and both of the knees by means of a tommy. She sustained bleeding injuries on her head, shoulder and chest. Kalabai also came to intervene in that incident. At that time, original accused no.3 beat her by fists and kicks.

6. Shobhabai went to Police Station, Shrirampur and lodged report against the respondents and accused no.3. Crime No.70 of 2005 came to be registered against them for the offences punishable under Sections 324, 323, 504 and 506 read with Section 34 of the I.P.C. All the injured persons were referred to Kamgar Hospital, Shrirampur for examination and treatment. The Medical Officer examined them. The deceased Nausabai was referred to the Civil Hospital at Ahmednagar, where she was admitted for treatment for one day. She was again taken back to Kamgar Hospital, Shrirampur, where she survived for about

fifteen days. She expired on 15.04.2005 at 5.10 p.m.

7. After her demise, the offence punishable under Section 302 of the I.P.C. came to be added in the above-numbered crime. The investigation was conducted. Inquest panchanama of the body of the deceased Nausabai was prepared. Her clothes were seized. Post mortem of the deceased Nausabai was conducted. The Medical Officer opined that she died of shock due to due to cardio-respiratory failure due to hypostatic pneumatics with pulmonary embolism in association with fracture of acetabulum and fracture of left humerus. The iron bar and the tommy used by the accused came to be seized. After completion of the investigation, respondent nos.1 and 2 and original accused no.3 came to be charge-sheeted for the above-mentioned offences.

8. The learned trial Judge framed Charges against respondent nos.1 and 2 and original accused no.3 for the offences punishable under Sections 302 and 325 read with Section 34 of the I.P.C. vide Exh.-16 and explained the contents thereof to them in vernacular. They pleaded not guilty and claimed to be tried. Their defence is that of total denial and false implication. According to them, on the day of the incident, respondent no.1 had gone to the house of the deceased Nausabai in a jeep to take his wife Sakhu with him. At that time, respondent no.2 and original accused no.3 were with him in the jeep. When Sakhu boarded the jeep and started proceeding with respondent no.1, all of her maternal relations came there with sticks and snatched her out of the jeep. Respondent no.1 took the jeep to its reverse side. At that time, the deceased Nausabai accidentally got pushed and sustained injuries. Since the maternal relations of Sakhu

were against her marriage with respondent no.1, they lodged a false report against respondent no.1 and his companions. They denied that they had any weapon with them and assaulted the deceased Nausabai or other witnesses as alleged by the prosecution.

9. The prosecution examined in all thirteen witnesses. Respondent no.1 also examined his wife Sakhu in his defence. After considering the evidence on record, the learned trial Judge held the respondents and original accused no.3 guilty for the offences punishable under Sections 324 and 323 read with Section 34 of the I.P.C., but instead of sentencing them to suffer any imprisonment, extended them the benefit of probation. The learned trial Judge acquitted them of the offence punishable under Section 302 of the I.P.C., holding that the prosecution failed to establish that the death of the deceased Nausabai was homicidal.

10. Respondent nos.1 and 2 did not challenge the judgment and order passed by the learned trial Judge holding them guilty for the offences punishable under Sections 324 and 323 read with 34 of the I.P.C. for voluntarily causing hurt to the deceased Nausabai and witnesses Shobhabai and Kalabai. As such, the said findings recorded by the learned trial Judge have become final.

11. Since the findings of the learned trial Judge holding the respondents guilty of voluntarily causing hurt to the deceased Nausabai and the injured witnesses, namely, Shobhabai and Kalabai during the course of the incident narrated above have become final, the following points arise for our consideration :-

- (1) Did the prosecution prove that the death of the deceased Nausabai was homicidal ?
- (2) Did the prosecution prove that the respondents committed murder of Nausabai ?

- (3) Whether respondent nos.1 and 2 caused grievous hurt to the deceased Nausabai ?
- (4) What offences are established against the respondents ?

12. The learned APP submits that after the incident, the deceased Nausabai was taken to Kamgar Hospital, Shrirampur, from where she was referred to the Civil Hospital at Ahmednagar on 01.04.2005 in the night. She was admitted there for treatment. Dr. Sonawane (PW 7)(Exh.43), who examined her on 02.04.2005 at about 2.15 a.m., found the following injuries on her person :-

- (i) Head injury with contusion;
- (ii) Sutured contused lacerated wound over left eye brow;
- (iii) Sutured contused lacerated wound over left elbow joint;
- (iv) Abrasion over left shoulder.

The learned APP submits that Dr. Sonawane (PW 7) (Exh.43) specifically states that the head injury in the ordinary course would be sufficient to cause death. She then points out the evidence of Dr.Shinde (PW 3)(Exh.30), who conducted post-mortem of the body of the deceased Nausabai on 15.04.2005. He noticed the following internal injuries on the body of the deceased Nausabai :

- (i) C.L.W. at left frontal region, size $1\frac{1}{4}$ " x $\frac{1}{2}$ ", reddish gray;
- (ii) C.L.W. on left elbow dorsal side, size - $1\frac{1}{2}$ " x $\frac{1}{2}$ ", reddish gray;
- (iii) Fracture of a acetabulum, left side swollen (tissues around grayish).
- (iv) Fracture of neck of left humerus; swollen tissues.

He noted that the said injuries were ante-mortem. On internal examination, he found that left side pleura was having haemorrhagic patches on third region and consolidation in both lungs in lower region. Hylem of both the lungs was swollen. There was bluish blood. He deposes that the internal changes were due to complications due to injuries sustained by the deceased Nausabai. He opined that the cause of her death was shock due to cardio-respiratory failure due to hypostatic pneumatics with pulmonary embolism in association with fracture of acetabulum and fracture of left humerus. He specifically states that injury nos.1 to 4 mentioned above were possible by the blows of iron bar that was shown to him and the said injuries were sufficient in the ordinary course to cause death. On the basis of that medical evidence, the learned APP submits that the deceased Nausabai died as a direct result of the injuries sustained by her in the incident in question and the

authorship of those injuries goes to the respondents. She submits that since the judgment of the trial Court has not been challenged by the respondents, whereby they have been held guilty for causing the above-mentioned injuries to the deceased Nausabai, the respondents are liable to be convicted for committing murder of the deceased Nausabai.

13. On the other hand, the learned Counsel for the respondents points out to the evidence of Dr.Sonawane (PW 7) and Dr.Shinde (PW 3), which according to him, would make it clear that the death of Nausabai was not the direct result of the injuries sustained by her in the incident in question. He submits that the deceased Nausabai got herself discharged from the Civil Hospital, Ahmednagar on 02.04.2005 against medical advice. As seen from the evidence of Dr.Jagdhane (PW 9) (Exh.49) of Kamgar Hospital at Shrirampur, Nausabai was again admitted in that hospital on 05.04.2005

at 6.00 p.m. As such, Nausabai did not take any treatment for three days after she was discharged from the Civil Hospital, Ahmednagar. He submits that since the deceased Nausabai had no serious injury, she got herself discharged from the hospital. He submits that even if it is accepted that she was in need of medical treatment, she did not continue the medical treatment, due to which complications arose leading to her death. In the circumstances, the injuries sustained by the deceased Nausabai in the incident in question cannot be said to be the direct cause of her death.

14. It has come in the evidence of Dr.Shinde (PW 3)(Exh.30) that the injuries sustained by the deceased Nausabai were not sufficient to cause immediate death. He then states that the complications which arose subsequently caused her death. According to him, Hythetic Pneumonia is a complication leading to cause death. He further states that Hythetic Pneumonia can be caused if the

patient is bed-ridden for a long time. He admits that an injury is not always necessary for causing Hythetic Pneumonia.

15. Dr.Sonawane (PW 7) deposes that he examined the deceased Nausabai on 02.04.2005 at about 2.15 a.m. He states that she was in need of treatment, but she left the hospital on the same day against medical advice. Though he states that there was injury with contusion on left parietal region of Nausabai and it was sufficient in the ordinary course to cause death, he states that there was no fracture of skull or any injury to the frontal region of the deceased Nausabai. However, Dr. Shinde (PW 3) states that there was contused lacerated wound on left frontal region of Nausabai. The opinion given by Dr.Shinde (PW 3) about the cause of death of Nausabai does not indicate that it was the result of any head injury sustained by her.

16. The medical evidence, as stated above, is not sufficient and consistent to show that the death of Nausabai was the direct result of the injuries sustained by her in the incident in question. The medical evidence shows that the deceased Nausabai was in need of medical treatment, but she left the hospital against medical advice on 02.04.2005 and did not take any treatment until she was admitted again in Kamgar Hospital at Shrirampur on 05.04.2005 at 6.00 p.m. There is every possibility that during the period after the discharge of Nausabai from the Civil Hospital at Ahmednagar till her admission in Kamgar Hospital at Ahmednagar, she developed complications for want of medical treatment. Had she taken the medical treatment in the Civil Hospital continuously from 02.04.2005 onwards, probably she would not have succumbed to the injuries sustained by her. Thus, the prosecution has failed to establish beyond reasonable doubt that the deceased Nausabai died as

a direct result of the injuries sustained by her in the incident in question. If that be so, the learned trial Judge cannot be said to have committed any mistake in holding that the death of Nausabai was not homicidal and acquitting the respondents of the offence punishable under Section 302 of the I.P.C.

17. Dr. Satpute (PW 10)(Exh.51), who was serving as Medical Practitioner in Kamgar Hospital at Shrirampur deposes that he examined the deceased Nausabai and found that x-ray of the deceased Nausabai showed fracture of acetabulum of left side and fracture of neck of left humerus. Dr.Shinde (PW 3) also states that he found fracture of acetabulum of left side and fracture of neck of left humerus of the deceased Nausabai. This evidence has not been shattered in the cross-examination of these witnesses. The learned trial Judge also observed in paragraph 33 of the impugned judgment that respondent no.1 caused grievous hurt

to the deceased Nausabai, answered point nos.3 and 4 for determination in the affirmative holding that the appellants caused grievous hurt and committed the offence under Section 325 read with Section 34 of the I.P.C. As per the seventh Clause under Section 320 of the I.P.C., fracture of bone has to be designated as "grievous". Respondent nos.1 and 2 are stated to have used iron bar and tommy respectively for causing injuries to Nausabai. The deceased Nausabai in her dying declaration (Exh.47), which was recorded when she was in a fit state of mind to give statement, specifically states that accused no.1 gave blows of iron bar on her left shoulder and forehead, while respondent no.2 gave blows of tommy on her head, back, waist and both of the knees. Her statement is corroborated by Shobha (PW 1). Considering the nature of these weapons and the nature of injuries caused to the deceased Nausabai, it is clear that respondent nos.1 and 2, in furtherance of their

common intention, committed the offence of voluntarily causing grievous hurt to the deceased Nausabai made punishable under Section 325 of the I.P.C. The learned trial Judge wrongly held them guilty of the offence punishable under Section 324 of the I.P.C. only, ignoring his own observations and findings on point nos.3 and 4 that grievous hurt was caused to the deceased Nausabai and the offence under Section 325 read with Section 34 of the I.P.C. was committed by the respondents.

18. We, therefore, hold that respondent nos.1 and 2 committed the offence punishable under Section 325 read with Section 34 of the I.P.C. as against the deceased Nausabai. So far as the conviction of the respondents for the offence punishable under Section 323 of the I.P.C. as against the injured Shobhabai and Kalabai is concerned, it has attained finality since the respondents did not challenge it.

19. As stated above, the impugned judgment and order holding respondent nos.1 and 2 guilty for the offences punishable under Sections 324 and 323 read with Section 34 of the I.P.C. will have to be modified and they will have to be held guilty of the offences punishable under Sections 325 and 323 read with Section 34 of the I.P.C.

20. In the facts and circumstances of the case, the benefit of probation cannot be extended to the respondents. However, considering the nature of offences established against the respondents, and the fact that a period of about 12 years has been elapsed after the date of the incident, we are of the view that lenient view will have to be taken in fixing the quantum of punishment. In our view, the respondents should be convicted for the offences punishable under Sections 325 and 323 read with Section 34 of the I.P.C. and should be sentenced to suffer rigorous imprisonment for three years each and to pay a fine of Rs.6,000/- each, in

default, to suffer rigorous imprisonment for one month each in respect of the offence punishable under Section 325 of the I.P.C. and to suffer rigorous imprisonment for six months each in respect of the offence punishable under Section 323 of the I.P.C.

21. In the result, we pass the following order:-

- (1) The appeal is partly allowed;
- (2) The impugned judgment and order are modified and respondent nos.1 and 2 are convicted for the offences punishable under Sections 325 and 323 read with Section 34 of the I.P.C. instead of the offence punishable under Section 324 read with Section 34 of the I.P.C.;
- (3) The order extending benefit of probation to respondent nos.1 and 2 is quashed and

set aside and instead, each of them are sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.6,000/- (Rupees Six Thousand) each, in default, to suffer rigorous imprisonment for six months in respect of the offence punishable under Section 325 read with Section 34 of the I.P.C. and further each of them are sentenced to suffer rigorous imprisonment for six months for the offence punishable under Section 323 of the I.P.C.

- (4) The substantive sentences shall run concurrently;
- (5) If the fine amount is recovered, an amount of Rs.4,000/- each be given to Shobhabai Bhaskar Shinde, Kalabai Gawali Shinde and Fulabai Tarachand Shinde, residents of Saraswati Colony, Ward No.7,

Shrirampur, Dist. Ahmednagar, as compensation;

- (6) Respondent nos.1 and 2 shall be given set off in respect of the period of detention suffered in respect of this case vide Section 428 of the Code of Criminal Procedure;
- (7) Respondent nos.1 and 2 shall surrender to their bail bonds by appearing before the trial Court within a period of two weeks from today for suffering the sentence of imprisonment passed against them by this order;
- (8) In case respondent nos.1 and 2 fail to appear before the trial Court within two weeks from today, the trial Court shall issue coercive process against them for securing their presence;

(9) Criminal Appeal is accordingly disposed of.

[SANGITRAO S. PATIL, J.] [SUNIL P. DESHMUKH, J.]

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