

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

CRIMINAL APPEAL NO.349 OF 2015

Vijay Gangadhar Kendre
Age: 25 years, Occu.: Agri.,
R/o Kendrewadi, Tq. Ambajogai,
Dist. Beed.

..APPELLANT
(Orig.Accused No.1)

VERSUS

State of Maharashtra,
Through Police Station Officer,
Police Station Dharur,
Tq. Dharur, Dist. Beed.

..RESPONDENT

Mr. N.S. Ghanekar, Advocate for the appellant
Ms. G.O. Wattamwar, A.P.P. for the respondent/State

CORAM : SANGITRAO S. PATIL, J.
RESERVED ON : 21st AUGUST, 2017
PRONOUNCED ON: 1st SEPTEMBER, 2017

JUDGMENT :

The appellant (original accused no.1) has taken exception to the judgment and order dated 26th March, 2015 passed in Sessions Case No. 71 of 2012 by the learned Additional Sessions Judge, Majalgaon whereby he has been convicted for the offence punishable under Section 304 Part II of the Indian Penal Code ("I.P.C.", for short) and sentenced to

suffer rigorous imprisonment for seven years and to pay fine of Rs.2,000/-, in default, to suffer simple imprisonment for three months.

2. It is the case of the State/prosecution that on 19th August, 2012, at about 03.00 p.m., the deceased – Angad Gangadhar Kendre was sleeping on the *Varanda* of the Zilla Parishad Primary School of village Kendrewadi. One Baliram Kendre put a small stick in the ear of the deceased – Angad, due to which he got up from the sleep. He was annoyed. He threw his shoe towards Baliram Kendre which hit on the person of one Gangadhar Kendre, due to that Gangadhar Kendre started hurling abuses against the deceased – Angad. The deceased – Angad also hurled abuses against Gangadhar Kendre. At that time, the appellant Vijay and his brother Ajay (juvenile), who are the sons of Gangadhar Kendre, came there and questioned the deceased – Angad as to why he was hurling abuses against their father. The appellant then hit the cricket bat on the head of the deceased – Angad, due to which he fell down on the ground. Ajay also inflicted cricket stump blow on the head of the deceased – Angad.

Thereafter, both of them ran away. One Navnath Kendre and Neminath Kendre came there and took the deceased – Angad for medical treatment to Ambajogai. The wife of the deceased – Angad also accompanied him while going to Ambajogai. The deceased was admitted in the S.R.T.R. Hospital, Ambajogai. The doctors advised them to shift the deceased – Angad to Aurangabad for further treatment. On the next day of the incident, the deceased succumbed to the injuries on the way to Aurangabad.

3. Sugriv (P.W.9) – son of the deceased – Angad was present at the time of the incident. He narrated about the incident to P.H.C. Manik Rathod (P.W.1), who, in turn, lodged the F.I.R. in respect of the incident in Police Station, Dharur on 20th August, 2012 at about 07.00 p.m.

4. On the basis of the report lodged by P.H.C. Rathod (P.W.1), Crime No. 114 of 2012 came to be registered against the appellant and his minor brother – Ajay for the offence punishable under Section 302 read

with Section 34 of the I.P.C. The investigation followed. The Investigating Officer prepared the inquest panchnama in respect of the body of Angad and also the spot panchnama. Postmortem of the dead body of the deceased - Angad was conducted in S.R.T.R. Hospital, Ambajogai. The medical officer opined that the deceased - Angad died due to hemorrhage and shock due to injury to the brain. The statements of witnesses were recorded. The cricket bat and stump came to be recovered at the instance of the appellant. After completion of the investigation, the appellant came to be charge-sheeted for the offence punishable under Section 302 read with Section 34 of the I.P.C. Since another accused - Ajay, brother of the appellant was juvenile, a separate charge-sheet came to be filed against him before the Juvenile Justice Board.

5. The learned Trial Judge framed the charge against the appellant for the offence punishable under Section 302 read with Section 34 of the I.P.C. vide Exh. 10 to which the appellant pleaded not guilty and claimed to be tried. His defence is of total denial and false implication on account of the previous rivalry.

6. The prosecution examined ten witnesses to establish the guilt of the appellant for the above mentioned offence. After evaluating the evidence of the prosecution, the learned Trial Judge held the appellant guilty of the offence of committing culpable homicide not amounting to murder made punishable under Section 304 Part II of the I.P.C. and accordingly convicted and sentenced him for the said offence as stated above.

7. The learned Counsel for the appellant submits that the case of the prosecution is depending on the sole eye witness viz. Sugriv (P.W.9), who is none other than the son of the deceased – Angad. Though independent witnesses were available, none has been examined by the prosecution. The evidence of Sugriv (P.W.9) suffers from omissions and improvements. It does not inspire confidence. He further submits that there has been delay of one day in lodging the F.I.R. which has not been explained by the prosecution. Sugriv – (P.W.9) did not lodge the F.I.R. There is no explanation as to why P.H.C. Rathod (P.W.1) lodged the F.I.R. He submits that one Captain Lamb had given

information about the incident to the police station on 20th August, 2012 itself, however, the said witness has not been examined by the prosecution. According to him, the source of information about the incident, as stated by P.H.C. Rathod (P.W.1), is not believable. No explanation is given as to why the statement of Sugriv (P.W.9) was not recorded on 19th August, 2012 or 20th August, 2012. The delay in recording his statement creates suspicion about his presence at the time of the alleged incident. He submits that the prosecution has failed to establish the guilt of the appellant for the offence of which he is convicted. According to him, if the nature of the injuries found on the body of the deceased – Angad and the object by which the said injuries are stated to have been caused are considered, the appellant cannot be attributed with the knowledge that the injuries caused on the head of the deceased – Angad would be sufficient to cause his death. According to him, at the most, the offence under Section 326 of the I.P.C. would be disclosed from the facts of the case and the evidence on record. He, therefore, submits that the appellant may be acquitted or in the alternate, he may be convicted for the offence punishable under

Section 326 of the I.P.C. and may be sentenced to suffer imprisonment which he has already undergone, i.e. from 20th August, 2012 till the date of disposal of this appeal.

8. The learned A.P.P., on the other hand, submits that the evidence of Sugriv (P.W.9) is quite natural, probable and dependable. He sustained mental shock due to the incident and therefore, he was required to be admitted in the hospital. Consequently there has been delay in recording his statement. He had narrated about the incident to P.H.C. Rathod (P.W.1). Since Sugriv (P.W.9) was not available, P.H.C. Rathod (P.W.1) lodged the report against the appellant after knowing that cognizable offence was committed. According to him, after the incident, the family members of the deceased – Angad were busy in extending medical treatment to him to save his life. It is only after the death of Angad, when he was being taken to Aurangabad from Ambajogai, that they approached the police to move the criminal machinery. He submits that the delay, in the circumstances of the case, cannot be said to be fatal to

the prosecution. According to the learned A.P.P., there was no reason for Sugriv (P.W.9) to state false against the appellant. The evidence of Sugriv (P.W.9) itself is sufficient to connect the appellant with the incident in question. The medical evidence supports the prosecution. The Trial Judge has rightly appreciated the facts as well as evidence on record and has rightly convicted the appellant for the above mentioned offence. He, therefore, prays that the appeal may be dismissed.

9. Dr. Amit (P.W.2) (Exh.19) states that he conducted postmortem of the body of the deceased – Angad in S.R.T.R. Hospital, Ambajogai on 20th August, 2012 between 4.50 p.m. to 5.45. p.m. and found the following external injuries :-

- 1) Three stitch wounds over left side of parieto temporal region, verticle in direction, 11 c.m. away from left mastoid process on opening 4 c.m. x 0.5 c.m. in size, sub-scapular haemorrhage present.
- 2) Contusion over right maxillary region 3 c.m. x 1.2 c.m. in size, verticle in

direction, 5 c.m. from right angle of mouth, bluish in colour.

3) Contusion over right frontal region 1 c.m. x 0.5 c.m. in size, oblique in direction, 3 c.m. from glabella, bluish in colour, on opening single lacerated wound present over right frontal region 3 c.m. x 1 c.m. in size obliquely downwards in direction, 3 c.m. from glabella bluish in colour, edges inverted, varying in direction.

4) Contusion over right toe 1 c.m. x 0.5 c.m. in size, horizontal in direction, bluish in colour.

5) Swelling and blackening around left eye.

10. Dr. Amit (P.W.2) states that the above injuries were antemortem and caused by hard, blunt and sharp objects. According to him, injury nos. 1 to 3 were sufficient to cause death of the deceased – Angad. He further states that internal examination of the body of the deceased – Angad, exhibited the following injuries :-

- 1) Subscapular haemorrhage with haematoma over left parieto – temporal region, single linear fracture over left parieto – temporal region, horizontal in direction 11 c.m. in length, 4 c.m. from left mastoid process.
- 2) Subdural haemorrhage sub arachnoid haemorrhage intracranial haemorrhage over left parieto-temporal as well as on right frontal region.
- 3) Anterior cranial fossa as well as middle cranial fossa linear fracture present.

11. Considering the above mentioned injuries, Dr. Amit (P.W.2) opined that the deceased – Angad died due to haemorrhage and shock due to injury to brain. Accordingly, he prepared memorandum (Exh. 20) of postmortem. In his cross-examination, it was suggested that the injuries found on the body of the deceased – Angad were possible by falling down from motorcycle. However, he denied that suggestion. There is nothing on record to show that the injuries sustained by the deceased – Angad were either suicidal or accidental.

Thus, the evidence of Dr. Amit (P.W.2) clearly shows that the death of Angad was homicidal.

12. The prosecution is relying on the sole testimony of Sugriv (P.W.9) (Exh.32), who is the son of the deceased – Angad, to establish involvement of the appellant in the incident in question. He deposes that on 19th August, 2012, at about 3.30 p.m., the deceased – Angad was sleeping on the *Varanda* of Zilla Parishad Primary School at Kendrewadi. At that time, he was playing alongwith some other children near the school. One Baliram Kendre inserted a small stick in the ear of the deceased – Angad. The deceased – Angad got up from sleep and got annoyed. He threw his shoe towards Baliram Kendre, which hit on the shirt of Gangadhar Kendre, who is the father of the appellant. Therefore, Gangadhar Kendre started hurling abuses against the deceased – Angad. The deceased – Angad also hurled abuses against Gangadhar and Baliram. At that time, the appellant and his younger brother – Ajay came there and questioned the deceased – Angad, as to why he was abusing their father. Then immediately, the appellant beat on the head of the deceased – Angad by means of a

cricket bat. Due to that, the deceased – Angad fell down on the ground. Then Ajay also gave cricket stump blow on the head of the deceased – Angad. Then both of them ran away from the spot. This is what is the account of the incident given by Sugriv (P.W.9).

13. The statement of Sugriv (P.W.9) was recorded by P.I. Sudke (P.W.10) on 21st August, 2012 and by the Judicial Magistrate First Class, Dharur on 27th August, 2012. There were some minor omissions brought in the cross-examination of this witness, which do not go to the root of the incident in question. So far as the role attributed by this witness against the appellant is concerned, nothing has been brought in his cross-examination to shatter his evidence.

14. The learned Counsel for the appellant submits that Sugriv (P.W.9) is stated to have narrated about the incident before P.H.C. Rathod (P.W.1), who lodged the F.I.R. (Exh. 18). However, it is not explained by the prosecution, as to why the F.I.R. was not lodged on the basis of that statement in the name of Sugriv (P.W.9) only and why it came to be lodged by P.H.C. Rathod

(P.W.1). He submits that the statement of Sugriv (P.W.9) has been recorded by P.I. Sudke (P.W.10) on 21st August, 2012. He questioned as to why the statement of Sugriv (P.W.9) was not recorded on 20th August, 2012 itself.

15. It has come in the evidences of P.H.C. Rathod (P.W.1) and P.I. Sudke (P.W.10) that after receiving a phone message from one Captain Lamb, they went to village Kendrewadi alongwith police officers having surnames Deshmukh and Chaudhary. P.H.C. Rathod (P.W.1) has given their badge numbers as 650 and 331 respectively. P.H.C. Rathod (P.W.1) states that they made enquiry about the incident with Sugriv (P.W.9), who narrated about the cause of the injuries sustained by the deceased – Angad. He states that at that time, the dead body of the deceased – Angad was brought to the village Kendrewadi. He prepared inquest panchnama (Exh.16) of that body and referred it to S.R.T.R. Hospital, Ambajogai for postmortem. P.I. Sudke (P.W.10) and panch – Dhondiram (P.W.3) state that panchnama in respect of the spot and seizure of shirt (Article 6) of the deceased – Angad and samples of plain soil and blood mixed soil from the spot of the incident was prepared on

that date between 2 p.m. and 3 p.m. It has come in the cross-examination of P.I. Sudke (P.W.10) that on 20th August, 2012, the witnesses were crying and therefore, he could not record their statements on that date. It is quite natural for Sugriv (P.W.9), who was aged about 13 to 14 years at the time of the incident, to be under a great sorrow because of the unnatural death of his father. It has come in his cross-examination that after he came to know at about 2 p.m. about the death of his father – Angad, he suffered from giddiness and was required to be shifted to Adas for medical treatment. Then, within half an hour, he came back to village Kendrewadi. Considering the age of this witness and the effect of shock because of the unnatural death of his father on his mind, the version of P.I. Sudke (P.W.10) that because the said witness was crying, he could not record his statement on that date, being natural and probable, will have to be accepted and, accordingly accepted. After coming to know about the incident, considering the fact that Sugriv (P.W.9) was not in a position to lodge the F.I.R. on that day, it seems that, in order to set the criminal machinery into motion, P.H.C. Rathod (P.W.1) lodged the F.I.R. Thus, there is

sufficient explanation coming in the cross-examination of this witness for not lodging the F.I.R. on the name of Sugriv(P.W.9) on 20th August, 2012.

16. It has come in the evidence of P.I. Sudke (P.W.10) and Dhondiram (P.W.3) that they prepared panchnama (Exh.22) in respect of the spot of the incident which was shown by Sugriv (P.W.9). Sugriv (P.W.9) also states that he showed the spot of the incident to the police. Blood mixed soil was collected from that spot. C.A. report (Exh.39) shows that the blood having group "O" was found in that sample of earth. Thus, the spot of the incident was duly proved by the prosecution.

17. The prosecution examined Navnath Kendre (P.W.7) (Exh.27) who happened to be an eye witness to the incident. However, he did not support the prosecution. It has come in his cross-examination that the appellant is the son of his cousin uncle and that he has good relations with the appellant. He could not assign any reason, as to why the police recorded the contents of portions marked as Exhs. 37 and 38 in his statement. It

is, thus, clear that he tried to save the appellant and therefore, did not support the version of Sugriv (P.W.9). Any way, his evidence is of no use to the prosecution.

18. It has come in the evidence of Sugriv (P.W.9) that at the time of the incident, about 5 to 7 persons were present there. However, he could not tell the names of those persons. The learned Counsel for the appellant submits that though the independent witnesses were available, they were not examined by the prosecution. In my view, in the facts of the present case, the said contention cannot be accepted. The prosecution has tried to examine an eye witness – Navnath Kendre (P.W.7), however, he turned hostile and did not support the prosecution. Now a days, it is a common tendency that third persons do not come forward to support the prosecution in order to save themselves from the wrath of the accused. The evidence of Sugriv (P.W.9) is quite natural and probable. Considering his age, it cannot be said that he would leave the real culprits of the deceased – Angad scot-free and falsely implicate the appellant. If he had the tendency to

speak false, he would have implicated the father of the appellant also, who was very much present at the spot of the incident and because of his quarrel with the deceased – Angad, the incident took place. This circumstance itself is sufficient to lend assurance to the fairness and truthfulness of Sugriv (P.W.9). In my view, the sole testimony of Sugriv (P.W.9) creates a great confidence. It is corroborated by the medical evidence. It cannot be said that he falsely implicated the appellant in the incident in question. In the circumstances of the case, lodging of the F.I.R. (Exh.18) by P.H.C. Rathod (P.W.1), on the basis of the cryptic information received from Sugriv (P.W.9), to set the criminal machinery in motion, cannot be viewed with suspicion.

19. It has come in the cross-examination of Sugriv (P.W.9) that the police had taken away the seized bat and stump on the very day, on which the funeral of the deceased – Angad was performed i.e. on 20th August, 2012. If that be so, the evidence of Shivaji Mundhe (P.W.8) and P.I. Sudke (P.W.10) about the discovery of cricket bat (Article 2) and cricket stump (Article 3) vide

panchnama (Exh.31) on 25th August, 2012 in pursuance of memorandum (Exh.30) of the statement of the appellant, cannot be believed.

20. There is positive and dependable evidence of Sugriv (P.W.9) that the appellant hit cricket bat on the head of the deceased – Angad due to which the deceased – Angad sustained serious head injury and fell down on the ground. The medical evidence shows that the injury on the head of the deceased – Angad was possible by hard, blunt and sharp objects. The cricket bat is certainly a hard and blunt object. It seems that in respect of the sutured injury, Dr.Amit (P.W.2) seems to have added that the injuries found on the head of the deceased – Angad were possible by sharp object also in addition to hard and blunt object. He states that injury nos. 1 to 3, which were grievous in nature, were sufficient to cause death of the deceased – Angad. It is, thus, clear that the death of the deceased – Angad was the direct result of the injury sustained on his head because of the blow of cricket bat given by the appellant.

21. The facts on record clearly show that the incident took place on a very trivial ground. There was

no predetermination to cause death of Angad. The incident took place on the spur of the moment. The contention of the learned Counsel for the appellant that the injury sustained by Angad on his head and the circumstances in which it was caused, at the most, would disclose the offence under Section 326 of the I.P.C. He submits that the appellant cannot be attributed with the knowledge that the said injury might cause death of Angad. He, in the alternate, submits that the appellant, at the most, could be convicted for the offence under Section 326 of the I.P.C. I am not inclined to accept this contention. When the appellant gave the blow of cricket bat on the head i.e. the vital part of the body with such a force that because of that blow, the deceased - Angad instantaneously fell down on the ground, the appellant certainly can be attributed with the knowledge that such forceful blow of cricket bat on the head of the deceased - Angad would cause his death. The learned Trial Judge, therefore, rightly acquitted the appellant of the offence punishable under Section 302 of the I.P.C. and convicted him for the offence punishable under Section 304 Part-II of the I.P.C. Consequently, the conviction of the appellant

cannot be altered into the offence under Section 326 of the I.P.C.

22. The learned Counsel for the appellant submits that considering the age of the appellant, the circumstances under which the incident took place and the fact that the appellant is not a previous convict, the sentence of imprisonment may be reduced to the period of imprisonment, which he has already undergone. The appellant was in jail from 20th August, 2012 till 22nd November, 2012 and from 26th March, 2015 till today i.e. 02 years, 08 months and 07 days.

23. The learned A.P.P. opposed this contention. He submits that considering the serious consequences of the act of the appellant, he may not be shown more leniency than that has been shown by the Trial Court.

24. The appellant has been convicted with rigorous imprisonment for seven years and a fine of Rs.2,000/- He has already deposited the fine amount. The appellant was aged about 22 years at the time of the incident. Considering his young age, the circumstances under which

the incident took place and the fact that he is not a previous convict, in my view, some more leniency will have to be shown to the appellant than that has been shown by the Trial Court. According to me, if the sentence of rigorous imprisonment for seven years is reduced to the period of five years, it will meet the ends of justice. The impugned judgment convicting the appellant for the offence under Section 304 Part-II of the I.P.C. call for no interference. However, the order of sentence passed by the Trial Court will have to be modified reducing the sentence of rigorous imprisonment from seven years to five years. In the result, I pass the following order:-

O R D E R

- i) Criminal Appeal is partly allowed.
- ii) The conviction of the appellant for the offence punishable under Section 304 Part-II of the I.P.C. is maintained as it is.
- iii) The impugned order, sentencing the appellant to suffer rigorous imprisonment for seven years, is

modified and he is sentenced to suffer rigorous imprisonment for five years.

iv) The order of sentence of fine passed against the appellant is maintained as it is.

v) The appellant be given benefit of set off in respect of the period of his detention in connection with this case.

vi) Criminal Appeal is accordingly disposed off.

[SANGITRAO S. PATIL]
JUDGE

SSD