

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

CRIMINAL APPEAL NO.425 OF 2001

The State of Maharashtra

.. Appellant

Versus

1. Sandipan Dadarao Sable,
Age-52 years,

.. Respondents

2. Satyawar Dadarao Sable,
Age-40 years,

3. Rajendra Sandipoan Sable,
Age-20 years,

4. Devidas Dadarao Sable,
Age-30 years,

All R/o. Sawargaon, Tq. Tuljapur,
Dist. Osmanabad

Mr.S.D.Ghayal, APP for the respondent/State

Mr.S.S.Choudhary, Advocate for the respondent Nos. 1 to 4

**CORAM : T.V.NALAWADE &
S.M. GAVHANE, JJ.**

DATED : 15.09.2017

J U D G M E N T [PER: S.M. GAVHANE, J.]

. This appeal is directed against acquittal of the respondents accused Nos. 1 to 4 of the offence punishable under Section 302 read with Section 34 of the Indian Penal Code (for short the IPC) by the judgment and order

dated 02.08.2001 in Sessions Case No.105/1995 passed by Additional Sessions Judge, Osmanabad.

2. Facts of the prosecution case, are thus;

A. One Shahaji Gaikwad (PW-2) the informant, Mithu Gaikwad (deceased), Kerba, Jalindar, Baima and Tanubai are residents of village Dahewadi, Tq. Tuljapur, Dist. Osmanabad. These persons had gone to Sawargaon, village of the accused for performing the program of singing religious songs and they had performed that program at the house of Prakash Ranghnath Dolare and halted in the village. On the next day morning i.e. on 12.11.1994 all of them were to return to their village but they were invited by Kondiba Sable of village Sawargaon for performing the program at his house and therefore, they stayed in village Sawargaon.

B. On 12.11.1994 at about 05.00 pm Shahaji Gaikwad (PW-2), Mithu (deceased) and Jalindar went in the Jawar crop standing in the land of one Shepahard of village Kemwadi for latrine and sat for latrine. The said land was being cultivated by Sandipan Sable-accused No.1 on Batai basis. Accused No.1-Sandipan Sable came shouting in the said land towards above mentioned persons and on hearing the shouts Jalindar got up, but accused No.1-

Sandipan Sable did not say anything to Jalindar (PW-3), but pelted stone towards Mithu the deceased and that stone hit Mithu on his back and deceased Mithu started running towards Government Hospital. Accused No.1-Sandipan Sable started chasing the deceased and accused No.1 pelted five or six stones which hit Mithu the deceased on his back. When the deceased was running towards the Hospital three other persons namely Rajendra, Satyawar and Devidas other accused also joined accused No.1-Sandipan Sable and started chasing Mithu the deceased and all of them pelted stones towards Mithu and hit him on his private part. As a result of such beating Mithu fell down near the hospital. One Gajendra Dolare (PW-10) lifted him and took him in front of the hospital and Mithu died in front of hospital. Shahaji Gaikwad (PW-2) informant went to Tamalwadi Police Station on 13.11.1994 and narrated the incident. His statement was accordingly recorded at about 02.00 pm and on treating the said statement as FIR Crime No.85/1994 came to be registered in said Police Station for the offence punishable under Section 302 of the IPC against the accused and the investigation was started.

C. During the investigation the Investigating Officer PSI Shingare (PW-8) prepared inquest panchanama. Postmortem examination was conducted by the Medical

Officer Dr. Vilas Alure (PW-1) in Rural Hospital, Tuljapur and he issued postmortem report (Exh.26). He opined that probable cause of death is, due to cardio respiratory arrest secondary to vasculatory collapse (profused bleeding, from injury to spleen and kidneys) hemorrhagic shock. The Investigating Officer prepared panchanama of spot of incident and recorded statements of witnesses including those who have seen accused No.1 in Jawar crop. It was transpired during investigation that the deceased was having illicit relation with wife of accused No.1

D. After completion of the investigation the Investigating Officer submitted the charge-sheet in the Court of JMFC, Tuljapur, who then committed the case to the Sessions Court, Osmanabad as the offence under Section 302 of the IPC was exclusively triable by the Sessions Court and case came to be allotted to the Additional Sessions Judge, Osmanabad.

3. The charge was framed against accused for the offence under Section 302 r/w Section 34 of the IPC. They pleaded not guilty to the charge and claimed to be tried. Their defence is denial and that there was quarrel between informant (PW-2) and accused No.1 Sandipan on account of cultivating the land of Shepherd of the

village Kenwadi, which Sandipan was cultivating. They have been falsely involved in the case. They have not examined any witness in defence.

4. The prosecution has examined in all ten witnesses and relied upon the aforesaid panchanamas and postmortem report. Considering the evidence adduced by the prosecution, the trial Court has held that the prosecution has failed to prove the offence under Section 302 r/w Section 34 of the IPC against all the four accused and acquitted them of the said offence, however, convicted the accused No.1-Sandipan Sable for the offence punishable under Section 323 of the IPC and released him upon executing the bond for Rs.5,000/- without surety for a period of three years for maintaining good behavior and piece. Therefore, this appeal by the appellant/State against acquittal of the accused of the offence under Section 302 r/w Section 34 of the IPC on several grounds mentioned in the memorandum of appeal.

5. We have heard learned APP appearing for the appellant/State and learned counsel appearing for the respondent/accused. So also, with their able assistance we have perused the evidence adduced by the prosecution. Moreover, we have perused the impugned judgment and order.

6. It is alleged that all the accused in furtherance of their common intention pelted stones at the deceased and as a result caused him injuries and he died. Therefore, death of the deceased is homicidal and the accused are responsible for his death. To prove these facts, the prosecution has mainly relied upon the evidence of Dr. Vilas Alure (PW-1), postmortem report (Exh.26) and evidence of eye witnesses Shahaji Gaikwad (PW-2), Jalindar (PW-3), Hanmant Dolare (PW-4) and Sheku Sagat (PW-5).

7. As regards homicidal death of the deceased the evidence of Dr. Vilas Alure (PW-1) is that he performed postmortem examination on the dead body on 13.11.1994 at about 01.10 pm. He deposed that he noticed following external injuries on the person of the deceased.

1. Depressed abrasion, 3 in number on left side of forehead, above eyebrow left in area of 2.5 inch x 2 inch. Black crust present. No fracture was found.

2. Leniar abrasion at iliac crest right side of size 1.5 inch x 2 cms. Black crust present.

3. Swollen lower part of abdomen, without any skin injury.

4. Swollen part at renal angle both sides on back.

. Dr.Alure also deposed that following internal injuries were found on abdomen and Lower part of abdomen was swollen:

1. Huge oozing of blood as soon as peritoneum was open at umbilicus. Ruptured spleen at lower part was seen. Both kidneys are ruptured. Stomach was totally empty.

. According to Dr. Vilas Alure (PW-1) all the above injuries were ante-mortem and death was occurred after six hours of the last meal. Stomach was found totally empty. He stated that cause of death of the deceased was due to cardio respiratory arrest secondary to vasculatory collapse due to profused bleeding from injury to spleen and kidneys (hemorrhagic shock). He stated that external and internal injuries found on the dead body were possible due to assault with the help of the stone. So also, he stated that injuries in question may be caused with the help of stones which are before the Court i.e. article No.7. He stated that accordingly he issued postmortem report/notes (Exh.26). In the cross-examination he stated that injuries in question are possible if a person falls down while running. He stated that external injury Nos. 1 and 2 referred to above are

simple in nature and external injury Nos. 3 and 4 are also simple in nature. Therefore, when external injuries sustained by the deceased were simple in nature, cause of death was due to cardio respiratory arrest secondary to vasculatory collapse due to profused bleeding from injury to spleen and kidneys (hemorrhagic shock), when as per the evidence of Dr.Vilas Alure external injuries in question (which includes injury to spleen and kidney) are possible if a person falls down while running and as it has come on record that the deceased was running at the relevant time towards the hospital it cannot be said that death of the deceased is homicidal. Therefore, we hold that the prosecution has failed to prove that death of the deceased is homicidal and the trial Court has rightly held so.

8. Once it is held that death of the deceased is not homicidal, it cannot be said that accused are responsible for death of the deceased. However, assuming for the sake of argument that the prosecution has proved that death of the deceased is homicidal, let us, consider whether the prosecution has proved that accused are responsible for death of the deceased. To establish the same, as stated above, the prosecution has mainly relied upon the evidence of eye witnesses, Pws. 2,3,4 & 5 on actual happening of the incident and on the evidence

of Pws. 7 and 10 on the point of motive to the accused to commit murder of the deceased.

9. PW-2 Shahaji's evidence is that on 12.11.1994 he and PW-3 were sitting for latrine in Jawar crop. At that time accused No.1 Sandipan Sable came abusing at that place where the deceased, he and PW-3 were sitting for latrine. Accused No.1 lifted stone and hit the deceased. A blow was received on the back of the deceased. The deceased started running. Accused No.1 started running after the deceased and accused No.1 started pelting stones towards the deceased. The deceased went towards hospital. Accused Nos.2,3, and 4 namely Satyawar, Rajendra and Devidads came from their houses and started following the deceased. All the accused assaulted the deceased by means of fist-blows and kicks. They also hit the deceased with the help of stones on his back, stomach, ribs and all over the body.

10. In the cross-examination PW-2 has stated that he stated to Police that the accused assaulted the deceased Mithu by stone and fist and kicks blows all over the body. He could not assign reason why it is not specifically mentioned in the FIR. It is material omission in the FIR and improvement while deposing before the Court. Therefore, that the evidence of PW-2 about

assaulting the deceased by all the accused as claimed by him is not believable. He has denied that he is deposing false about the incident of assaulting the deceased when he along with others had gone to field for attending nature call and that false case has been filed on account of dispute between him and accused No.1 Sandipan on the ground of cultivating the land of one Shepherd.

11. Jalindar Rokde (PW-3)'s evidence is that on Saturday at 05.00 pm he, the deceased and Shahaji (PW-2) went for latrine in Jawar Crop. Accused No.1 abused them and asked why they sat for latrine in Jawar Crop. Accused No.1 hit a stone to the deceased. Deceased ran ahead and accused No.1 went behind him beating the deceased. He ran away from that place. The deceased went towards hospital. Accused No.1 went behind the deceased beating the deceased. Further he has stated that he does not know why accused No.1 beat the deceased. In the cross-examination he denied that he did not go for latrine in the Jawar crop. He stated that he does not know how exactly the deceased died. He has not stated as to which part of the body of the deceased was hit by the stone which was allegedly thrown by accused No.1. He has not stated that said stone hit kidneys and spleen of the deceased to which injuries were caused and the deceased was immediately scummed to said injuries as per medical

evidence. Moreover, he has not stated why accused No.1 hit stone to the deceased. Thus, on the basis of his evidence at the most it can be inferred that accused No.1 hit one stone to the deceased but his evidence is of no help to state that either accused No.1 or all the accused caused injury to the deceased which resulted into his death.

12. Hanumant Dolare (PW-4) who is third eye witness to the incident as per the prosecution case who had seen accused No.1 beating the deceased in the land has not supported the prosecution as he has denied that he saw accused No.1 beating the deceased in the land of Dohiphode and he prevented the accused No.1 and sent him back. Similarly forth eye witness PW-5 Sheku Sagat who had seen the accused persons running behind the deceased and one of the accused pelting stones towards the deceased has not supported the prosecution case as he has denied suggestions in this respect on behalf of learned APP.

13. As per the prosecution case accused No.1 had motive to commit the murder of the deceased, as the deceased was having illicit relation with Dhondabai wife of accused No.1. On the point of motive prosecution has adduced evidence of PW-7 Narayan father of the deceased

and PW-10 Gajendra Dolare. Father of the deceased deposed that one female worker Dhondabai started keeping illicit relation with the deceased and therefore accused No.1 was in cross terms with the deceased. However, in the cross-examination PW-7 has stated that said Dhondabai might be 80 years and she is still alive. Considering the said evidence of PW-7 it is not possible to believe that the deceased Mithu who was young person was having illicit relation with such an old lady, so as to say that accused No.1 had motive to kill the deceased. The evidence of PW-10 Gajendra Dolare shows that the deceased was having illicit relation with Dhondabai and therefore Devidas and accused No.1 Sandipan had beaten to Mithu. He deposed that accused No.4 had told the same to him. Thus, it is clear that PW-10 had no direct knowledge of alleged illicit relation between wife of accused No.1 and the deceased. Therefore, for the above reasons evidence of both Pws. 7 and 10 is not sufficient to say that the accused had motive to cause death of the deceased.

14. Considering the medical and other evidence adduced by the prosecution, the trial Court had concluded that accused No.1-Sandipan Sable voluntarily caused heart to the deceased and accordingly held him guilty for the offence under Section 323 of the IPC and released him on

executing bond of good behavior as said earlier. But, as there is no appeal by the said accused, we need not consider the aspect whether conviction of accused No.1 for the said offence is correct or otherwise.

15. For all the reasons discussed above evidence of Pws. 2,3,4,5,7 and 10 is not sufficient to infer that the accused are responsible for death of the deceased, even if it is assumed that death of the deceased was homicidal, to attract offence under Section 302 r/w Section 34 of the IPC. Thus, we hold that the prosecution has failed to prove beyond doubt the offence under Section 302 r/w Section 34 of the IPC against the accused. The trial Court has rightly held so and rightly acquitted all the accused of the said offence by the impugned judgment and order. The view taken by the trial Court to acquit the respondents/accused of the said offence is reasonably possible view and it is not the case that there is an error in appreciating the evidence by the trial Court to arrive at the above conclusion. As

such, there is no justifiable ground to interfere with the impugned judgment and order. Therefore, appeal being devoid of merits the same is liable to be dismissed. Accordingly we dismiss the the same. Bails bonds of the accused /respondents stand cancelled.

[S.M. GAVHANE, J.]

[T.V. NALAWADE, J.]