

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

CRIMINAL APPEAL NO. 459 OF 2000

1. Anna Limbaji Keskar,
Age 35 years, Occu. Agri.,
R/o Gomalwadi, Taluka Newasa,
District Ahmednagar
 2. Vitthal alias Vithu Limbaji Keskar
Age 23 years, Occu. Agri.,
R/o Tamaswadi, Taluka Newasa,
District Ahmednagar
- .. The Appellants

Versus

1. State of maharashtra
 2. Latabai Appa Jankar,
Age 27 years, Occu. Agri.,
R/o Tamaswadi, Taluka Newasa,
District Ahmednagar
- .. The Respondents

Mr S.S. Jadhavar, Advocate for appellants
Mr V.S. Badakh, A.P.P. for respondent no.1
Mr M.G. Kolshe Patil, Advocate for respondent no.2

- WITH -

CRIMINAL APPLICATION NO.1140 OF 2002
(CRIMINAL APPEAL NO.506 OF 2017)

Kondiram s/o Balaji Jankar,
Age 30 years, Occu. Agri.,
R/o Tamaswadi, Taluka Newasa,
District Ahmednagar

.. The Applicant

Versus

1. The State of Maharashtra,
 2. Anna s/o Limbaji Keskar,
Age Major, Occu. Agri.,
R/o Gomalwadi, Taluka Newasa,
District Ahmednagar
 3. Vithal @ Vithu Limbaji Keskar,
Age Major, Occu. Agri.,
R/o Tamaswadi, Taluka Newasa,
District Ahmednagar
- .. The Respondents

Mr M.G. Kolshe Patil, Advocate for applicant
Mr V.S. Badakh, A.P.P. for respondent no.1

**CORAM : T.V. NALAWADE AND
A.M. DHAVALA, JJ**

**DATE OF RESERVING
THE JUDGMENT : 9.10.2017**

**DATE OF PRONOUNCING
THE JUDGMENT : 13.10.2017**

JUDGMENT (Per A.M. Dhavale, J.)

1. In Sessions Case No.155 of 1995 before Additional Sessions Judge, Shrirampur, the two accused were prosecuted under Section 302 read with Sec.34 of Indian Penal Code. They were acquitted of the said offence and were convicted under Section 324 read with Sec.34 of Indian Penal Code. Accused no.1 Anna was sentenced to suffer rigorous imprisonment for a period of two years and to pay fine of Rs.4,000/- in default to suffer rigorous imprisonment for a period of six months. Accused no.2 Vitthal was sentenced similarly, but he was given benefit of Probation of Offenders Act and was directed to furnish P.R. bond of Rs.5,000/- for his good behaviour for a period of three years. The aggrieved accused have filed Criminal Appeal No.459 of 2000 to challenge the said conviction and sentence, while the original informant Kondiram, brother of the deceased has filed Criminal Application No.1140 of 2002 is filed seeking leave to file appeal against acquittal under Section 302/34 of Indian Penal Code.

2. Heard learned Advocate Mr M.G. Kolshe Patil for informant, learned A.P.P. Mr Badakh for the State and learned Advocate Mr S.S.

Jadhavar for accused.

3. The leave to file appeal against acquittal is granted. The appeal against acquittal be numbered.

4. The facts relevant for deciding these appeals may be stated as follows :

5. Accused no.1 Anna and accused no.2 Vitthal are brothers inter se and they are having their agricultural land at Block No.301 situated at village Tamaswadi, Taluka Newasa. In the same block number, abutting to their land from the Eastern side, there is land of the informant, Kondiram and his deceased brother Appa. The accused and prosecution witnesses were having land disputes over the boundary. One Criminal Case bearing No.9/1992 of assault and one Civil Suit being Regular Civil Suit No.378/1992 for encroachment were filed by relatives of the deceased against the accused. On 21.12.1994 at about 9.00 p.m., deceased Appa had gone to his land for watering the wheat crop. That time, his wife Lata P.W.1 was at her residence, which is 150 ft. away from the spot. At about 9.00 a.m, P.W.2 Rahibai who is neighbour of the accused and prosecution witnesses saw both the accused assaulting Appa and she raised shouts. Then, Appa's wife P.W.1 Lata and brother's wife P.W.6 Matabai rushed to the spot. They saw that Appa was lying on the ground with injury and accused nos.1 and 2 were present there along with sticks and one wooden bar in their hands. They brought injured to their house and the matter was reported to his brother Kondiram, who was working in some other

field. While injured Appa was being taken in a bullock-cart to the hospital at Tamaswadi, he died on the way. Then, his body was brought back to his house. The Police Patil was informed and brother of the deceased, Kondiram lodged F.I.R. Exh.16. Crime was registered at C.R. No.201/1994 at Newasa Police Station under Section 302 read with Sec.34 of Indian Penal Code at 3.30 p.m. and the crime was investigated into. The post mortem conducted by P.W.8 Dr. Ashok Zarekar disclosed that there was one contusion of 7 cm x 3 cm reddish blue in colour on the auxiliary line left side over 9th and 10th rib. It was resulted into rupture of the enlarged spleen and it was the cause of death. A muffler, cap and chappals of the deceased were seized from the spot by drawing spot panchnama. Accused nos.1 and 2 were arrested. The statements of material witnesses were recorded. After completion of investigation, charge-sheet was filed at Newasa police station. In due course, case was committed to the Court of Sessions at Shrirampur. Learned Additional Sessions Judge framed charge at Exh.3-A. The accused pleaded not guilty.

6. The prosecution examined nine witnesses. Defence of the accused is of total denial. The learned Additional Sessions Judge, Shrirampur held both the accused guilty only for causing hurt by deadly weapon punishable under Section 324 read with Sec.34 of Indian Penal Code. The birth certificate of accused no.2 and report of Probation Officer was called. Accused no.2 was aged 18 ½ years at the time of incident. The accused were sentenced as referred above.

7. Learned Advocate Mr Jadhavar for the accused submitted that

there was a single injury. P.W.2 Rahibai was the first person to arrive on the spot and after hearing her shouts, P.W.1 Lata and P.W.6 Matabai had been to the spot. They could not have seen both the accused assaulting the deceased. P.W.2 Rahibai has turned hostile. She has told that accused no.2 was present there along with *Danda*. She stated that accused no.1 came there later. The evidence of P.W.1 Lata and P.W.6 Matabai will have to be discarded. P.W.4 Kondiram and P.W.7 Police Patil Sahebrao have no personal knowledge. P.W.3 Ramesh is a panch to the discovery. He has deposed about discovery regarding weapon. P.W.5 is a spot panch, P.W.8 Dr. Zarekar and P.W.9 Investigating Officer P.S.I. Budhwant cannot show the involvement of accused persons in the crime. On the point of nature of offence, Mr Jadhavar submitted that as per evidence of P.W.8 Dr. Zarekar, the spleen of the deceased was very much enlarged and it could have ruptured with a small injury. Unfortunately, it was ruptured and it resulted into death of Appa. The injury cannot be called sufficient in ordinary course to cause death. Hence, the finding of learned trial Judge that no offence under Section 302 of Indian Penal Code was disclosed and only offence under Section 324 read with sec.34 of Indian Penal Code is disclosed, is correct. However, there is no evidence against accused no.1. Accused no.2 has been already released by giving benefit of Probation of Offenders Act. Considering the facts and circumstances, the appeal be allowed and accused no.1 be acquitted and the appeal of the informant be dismissed.

8. Learned Advocate Mr M.G. Kolshe Patil for the informant has

argued that the evidence of P.W.1, P.W.2 and P.W.6 that both the accused were present in the field of the deceased armed with stick and *Danda* and they had caused injury to deceased Appa which has resulted into his death. The injury is described as sufficient in ordinary course to cause death. Hence, both the accused be held guilty under Section 302 read with sec.34 of Indian Penal Code and should be punished.

9. Learned A.P.P. Mr Badakh has supported learned Advocate Mr M.B. Kolshe Patil. Mr Kolshe Patil has relied on **Ram Tahal and ors. Vs. The State of U.P., AIR (1972) sc 254** and **Parichhat and ors., Vs. The State of Madhya Pradesh, AIR (1972) SC 535**, wherein it is held that common intention can be developed on the spot. It can be inferred from the conduct of the parties and the circumstances of the case. Even if, the injury is caused by one person, the other who was associated him will be guilty for commission of the offence in furtherance of common intention. In Parichhat's case (cited supra), it is held that when the accused is guilty of committing offence punishable for imprisonment for life, he is not entitled for the benefit under Probation of Offenders Act. In this case, the appellants' conviction under Section 304 Part II of Indian Penal Code was converted into punishment Section 304 Part I of Indian Penal Code and they were sentenced to suffer rigorous imprisonment for seven years.

10. The points for our consideration with our findings are as follows:

(I) Whether deceased Appa met with

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| homicidal death ? | .. In the affirmative |
| (II) Whether appellants no.1 and 2 (accused) in furtherance of their common intention caused injury to deceased Appa ? | .. Proved only against accused no.2 |
| (III) Whether the accused are guilty of offence under Section 302 of Indian Penal Code ? | .. In the negative
Accused no.2 held guilty only for the offence punishable under Sec.324 of I.P.C. |
| (IV) What Order ? | .. The appeal No.459 of 2000 is partly allowed. Sentence of accused no.1 is set aside. Appeal by the informant is rejected as per final order |

11. The ocular evidence shows that deceased Appa had sustained injury on his ribs. It was of the size 7 cm x 3 cm, reddish blue in colour. While he was being taken to the hospital, he has died. On next day, Dr. Zarekar conducted post mortem. He deposed that the deceased had one contusion on left side on the anterior axillary line on 9th and 10th rib having size of 7 cm x 3 cm horizontal, reddish blue in colour. It has caused internal damage in the form of rupture of spleen. His evidence shows that the normal size of spleen is 150 gms. However, the spleen of deceased was enlarged in size to 350 gms, and weight was double the normal one and it was ruptured because of external injury noticed by him. None the less, it is clear that the deceased died due to external injury, which caused the internal

damage of rupture of spleen.

12. As discussed later, the oral evidence discloses that accused no.2 had given blow of *Danda* on the chest of deceased Appa. Hence, we hold that the deceased died homicidal death.

13. With regard to complicity of the accused, it is to be noted that the accused are owners of land adjacent to the land of the deceased and they had boundary dispute. Certified copy of criminal complaint being Criminal Case No.9/1992 shows that the father of the deceased had filed complaint against accused nos.1 and 2 and their brother in respect of incident dated 18.12.1991 for offences punishable under Sections 447, 323, 504, 506 read with sec.34 of Indian Penal Code. Besides, Kondabai, mother of deceased had filed R.C.C.No.378 of 1992 for removal of encroachment to the extent of three to four feet. There is no dispute that in the past, accused were on inimical terms with deceased. The accused have taken stand that their dispute was resolved, but there is no material to support their stand.

14. As per evidence on record, P.W.2 Rahibai is neighbour of the deceased. On the day of incident at 9.00 a.m., deceased Appa had gone to his field. His house is 150 ft. away from the field. P.W.2 Rahibai aged 60 years deposed that while she was proceeding to the field of Bhausahab Khopse, she saw Appa lying in his field. That time, the accused Vitthal was standing there with a *Danda* in his hand. She had not deposed that accused nos.1 and 2 were assaulting him and, therefore, learned A.P.P. with the permission of Court, cross-examined

her. She stated that accused no.1 came there after some time. She was confronted with her previous statement showing that she had made statement that she had seen both the accused assaulting the deceased Appa, but she denied the suggestions. She stated that after she raised shouts, P.W.1 Lata, wife of deceased and P.W.6 Matabai, wife of his brother came there and the injured was brought home. She stated that accused no.1 came there later and he was not present there.

15. P.W.1 Lata and P.W.6 Matabai have deposed that at the relevant time, when they were in their house, they heard shouts of Rahibai and then they ran towards their field. They stated that they had seen both the accused beating deceased Appa with *Danda* and stick. Learned trial Judge has believed them. However, we find that there is a single injury and P.W.2 Rahibai had seen Appa lying on the ground. So, the injury was caused before arrival of P.W.2 Rahibai. P.W.1 Lata and P.W.6 Matabai arrived after hearing the shouts of Rahibai. They came from a distance of 150 feet. They could not have seen any assault on deceased Appa. Therefore, their evidence cannot be believed. P.W.2 Rahibai was declared hostile. As held in **Sat Paul Vs. Delhi Administration, AIR 1976 SC 294** and **Gura Sing Vs. State of Rajasthan, 2001 Cr.L.J. 487 (SC)**, a witness cannot be declared hostile by the prosecutor. The prosecutor has to merely seek permission for cross-examination of the witnesses, who are not supporting the prosecution and it is for the Judge who has to decide, whether they have turned hostile or not. We find nothing in the evidence of P.W.2 Rahibai to suggest that she was won over by the

accused. Her evidence is trustworthy and it can be relied upon. Her evidence shows that she saw the deceased Appa lying on the ground, his muffler, cap and chappals lying there in his own field and accused no.2 Vitthal present there in the land of Appa with a *Danda* in his hand. It is reliable. She stated that accused no.1 came there afterwards. Since there is a single injury, the evidence of Rahibai discloses that it must have been caused by accused no.2 Vitthal. Name of accused no.1 Anna must have been taken only because of enmity. If he was present along with stick in his hand, he would have given some stick blows, but there is a single injury to Appa. We, therefore, rely on the evidence of P.W.2 Rahibai. Her evidence shows that the injury was caused by accused no.2 Vitthal.

16. The evidence of P.W.8 Dr. Ashok Zarekar shows that there was contusion reddish blue in colour of size of 7 cm x 3 cm. There was no fracture of ribs. It shows that the blow was not given with tremendous force. His evidence shows that the spleen of deceased Appa was already enlarged to the size of double the normal. The blow of stick caused the rupture of spleen and it has resulted into death of Appa.

17. There is nothing on record to show that accused no.2 Vitthal was aware that the spleen of Appa was enlarged and some blow on the spleen would cause his death. In absence of such evidence, it is not a culpable homicide. We agree that the nature of act of accused no.2 Vitthal disclose offence punishable under Section 324 of Indian Penal Code only.

18. The birth certificate of the accused no.2 shows that he was born on 1.6.1976 and on the date of incident, he was aged 18 ½ years. He has given single blow of *Danda*. It has not caused fracture of ribs. Considering the facts, we find that this was a fit case for extending the benefit of Probation of Offender's Act.

19. However, the injury caused by P.W.2 Vitthal has resulted into death and, therefore, the learned trial Judge ought to have exercised the powers under Section 357 of Cr.P.C. to award compensation. The report of Probation Officer shows that accused no.2 was having share in the ancestral land and he was doing agricultural work.

20. We feel that the learned trial Judge ought to have exercised powers under Section 357 of Cr.P.C. to grant compensation to the relatives of the deceased. However, there is no appeal for enhancement of the sentence. In the light of these facts, the appeal filed by the informant deserves to be dismissed, while the Criminal Appeal No.459 of 2000 filed by the accused deserves to be allowed partly. Hence, we pass the following order :

- ORDER -

(I) Criminal Appeal No.459 of 2000 is partly allowed in respect of accused no.1 Anna Limbaji Kesar. The conviction of accused no.1 Anna under Section 324 read with Sec.34 of Indian Penal Code and the sentence passed thereunder are hereby set aside. Accused no.1 Anna Limbaji Kesar is acquitted of all the charges. Fine amount deposited

by him shall be refunded to him.

(II) The appeal by accused no.2 Vithal @ Vithu Limbaji Keskar stands dismissed.

(III) The appeal filed by the informant Kondiram Balaji Jankar is hereby dismissed.

(A.M. DHAVAL, J.)

(T.V. NALAWADE, J.)

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