

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.967 OF 2011

Shri Dattu Manji Pagi
Age:39 years, Occ: Agriculturist,
Indian Inhabitant, Residing at:
Sawade Pagi Pada,
Vill & Tal - Vikramgad, Dist. Thane,
(At present in Central Jail, Thane)Appellant

V/s.

The State of MaharashtraRespondent

Dr. Yug Mohit Chaudhary with Ms. Payoshi Roy , Advocates
for Appellant.
Mrs. G.P.Mulekar, APP for Respondent-State.

**CORAM : SMT. V.K. TAHILRAMANI, &
SANDEEP K. SHINDE, JJ.**

DATE : 8th June, 2017.

ORAL JUDGMENT : (Per V.K.TAHILRAMANI, J.)

The Appellant/Original Accused has preferred this appeal against the judgement and order dated 30.6.2011 passed by the District Judge-1 & Additional Sessions Judge, Thane in Sessions Case No.168 of 2010. By the said judgment and order, the learned Sessions Judge convicted the Appellant under Section 302 of the IPC and

sentenced the Appellant to undergo rigorous imprisonment for life and to pay a fine of Rs.1,000/- in default to undergo further rigorous imprisonment for three months.

2 The prosecution case briefly stated is as under:

The deceased Shidwa Pagi was the husband of P.W.8-Sita. The first informant P.W.1-Dama Nago Pagi is younger brother of the deceased Shidwa. The Appellant is nephew of the deceased Shidwa. The deceased, Appellant and witnesses were residents of Village: Sawade in District: Thane.

According to the Appellant, land on which the deceased Shidwa was residing was owned by the Appellant and, therefore, he was asking Shidwa to vacate the said land. The incident took place on 11.12.2009 at about 6 a.m. At that time, the first informant P.W.1-Dama was collecting paddy. The deceased Shidwa was also collecting paddy and he was going to load the same in a bullock-cart. At that time, the Appellant came there. He was armed with bamboo stick in his hand. The Appellant asked Shidwa to vacate the land. The Appellant then assaulted Shidwa on his back and head. Shidwa fell down. This incident was

witnessed by P.W.5-Vishnu Laxman Bhad and P.W.8-Sita Shidwa Pagi. Then P.W.1-Dama, P.W.5-Vishnu and P.W.8-Sita lifted Shidwa and took him inside the house. They were trying to make Shidwa drink water. However, within short time, Shidwa expired. P.W.1-Dama lodged FIR, thereafter, investigation commenced. Dead body of Shidwa was sent for post-mortem. The Appellant came to be arrested. After completion of investigation, charge-sheet came to be filed. In due course, the case was committed to the Court of Sessions.

3 Charge came to be framed against the Appellant under Section 302, 504 and 427 of the IPC. The Appellant pleaded not guilty to the said charge and claimed to be tried. The defence of the Appellant is that of total denial and false implication. After going through the evidence adduced in this case, the learned Additional Sessions Judge, Thane convicted and sentenced the Appellant as stated in paragraph 1 above, hence this Appeal.

4 We have heard the learned counsel for the Appellant and the learned APP for the State. We have carefully considered their submissions, judgment and order

passed by the learned Additional Sessions Judge, Thane and the evidence in this case. After carefully considering the matter, we are of the opinion for the below mentioned reasons that the Appellant assaulted Shidwa with bamboo stick which led to the death of Shidwa.

5 The conviction of the Appellant is mainly based on the evidence of three eye witnesses, i.e., P.W.1-Dama Nago Pagi, P.W.5-Vishnu Laxman Bhad and P.W.8-Sita Shidwa Pagi. P.W.1-Dama was the younger brother of deceased Shidwa. He is the first informant in the present case. P.W.5-Vishnu was residing in the same village. P.W.8-Sita was wife of the deceased Shidwa. P.W.1-Dama has stated that the Appellant was nephew of the deceased Shidwa. The Appellant was telling Shidwa that the land on which Shidwa was residing was owned by him and, therefore, Shidwa should vacate the said land. On the day of incident, at about 6 a.m., P.W.1-Dama was collecting paddy. The deceased Shidwa was also collecting paddy and he was going to load the same in a cart. At that time , the Appellant came there. He was armed with bamboo stick in his hand. The Appellant asked Shidwa to vacate the land.

The Appellant then assaulted Shidwa on his back and head. Shidwa fell down. This incident was witnessed by P.W.5-Vishnu Laxman Bhad and P.W.8-Sita Shidwa Pagi. Then P.W.1-Dama, P.W.5-Vishnu and P.W.8-Sita lifted Shidwa and took him inside the house. They were trying to make Shidwa drink water. However, within short time, Shidwa expired.

6 P.W.5-Vishnu is an independent witness. He was also residing in Village: Sawde. He has stated that on 10.12.2009, the deceased Shidwa had come to him to ask for his bullock-cart on hire basis and on the next day at about 6 a.m. P.W.5-Vishnu went to the house of Shidwa with bullock-cart. P.W.5-Vishnu found heap of paddy lying in the court-yard of Shidwa. At that time, the Appellant came there with a bamboo stick and assaulted Shidwa. Due to which Shidwa fell down. Then P.W.5-Vishnu, P.W.1-Dama and P.W.8-Sita wife of Shidwa took Shidwa inside his house and tried to make him drink water.

7 P.W.8-Sita is wife of deceased Shidwa. She has stated that the Appellant was nephew of the deceased and he was residing near their house. The Appellant was

insisting that Shidwa should leave the house and on this ground, there used to be quarrel between the Appellant and the deceased Shidwa. P.W.8-Sita has further stated that on the day of incident at about 6 a.m., her husband Shidwa had called bullock-cart of P.W.5-Vishnu for the purpose of transporting paddy to the market. At that time, the Appellant came there. He assaulted her husband Shidwa with wooden stick. Thereafter, she, P.W.1-Dama and P.W.8-Vishnu lifted her husband and took him in the house. Nothing has been elicited in the cross-examination of any of these three witnesses so as to cause us to disbelieve their testimony. Their testimony inspires implicit confidence. Hence, we have no hesitation in relying on their evidence.

8 No doubt, evidence of P.W.1-Dama, P.W.5-Vishnu and P.W.8-Sita show that the Appellant assaulted Shidwa with bamboo stick, however, the learned counsel for the Appellant submitted that looking to the injuries sustained by Shidwa, the act of the Appellant cannot fall under Section 302 of the IPC but it would fall under Section 304(II) of IPC. Mr. Chaudhari the learned counsel for the

Appellant pointed out that evidence on record, specially panchanama at Exhibit 29 shows that the weapon used by the Appellant was a bamboo stick which was just 2 ½ feet in length and 1 ½ inch in diameter. He submits that such a bamboo stick cannot be termed as deadly weapon. In addition, he drew our attention to the injuries sustained by deceased Shidwa. P.W.6-Dr. Milind Chiman Khandvi has deposed about these injuries. P.W.6-Dr. Khandvi has stated that on external examination, he found following injuries:

- "1) Abrasion near left elbow joint size 2 cm x 1 cm*
- 2) Abrasion site near right knee joint size 1 cm x 1 cm.*
- 3) **Head Injury :-** 1) contusion and abrasion site above left eyebrow size 4 cm x 3 cm*
- 4) Hematoma and swelling, site occipital region."*

On internal examination, PW.6-Dr. Khandvi found hematoma and blood accumulated at occipital region and hemorrhage in cranial and occipital region. The cause of death was neurological shock due to intra cranial hemorrhage. Mr. Chaudhari, the learned counsel for the Appellant submitted that blow given by the Appellant was not such as to cause fracture of skull. He pointed out that the act of the Appellant did not cause lacerated wound or

even contusion. Looking to the medical evidence, we find that it is indeed so. Hence, we find much merit in the submission of learned counsel for the Appellant that the Appellant did not use much force to assault Shidwa.

9 Mr. Chaudhari, the learned counsel for the Appellant submitted that in the facts of the present case, a case under Section 304 Part II of IPC is made out. In support of his contention, he has placed reliance on the decision of the Supreme Court in the case of ***Gudu Ram v. State of Himachal Pradesh*** reported in **(2013) 11 Supreme Court Cases 546**. He pointed out that in the said case also, the accused had used wooden stick and assault was on the head of the deceased. In the said case, two contusions were found on forehead of the deceased and one grazed abrasion over the root of the nose. The cause of death was due to haemorrhagic shock as a result of head injuries. In the said case, the Supreme Court observed that looking to the nature of the injuries and nature of weapon i.e., small wooden cricket bat, the offence would fall under second part of Section 304 of IPC. Thus, the facts in ***Gudu Ram (Supra)*** are similar to the

facts of the present case. Hence, the decision in ***Gudu Ram (Supra)*** would squarely apply to the present case.

10 In this view of the matter, we set aside the conviction of the Appellant under Section 302 of IPC and instead, we convict the Appellant under Section 304 Part II of IPC. In our opinion, sentence of 7 years rigorous imprisonment with fine amount of Rs.1,000/- in default of payment of fine to undergo simple imprisonment for further three months would serve ends of justice.

11 The Appeal is partly allowed in the above terms.

(SANDEEP K. SHINDE, J) (SMT. V.K. TAHILRAMANI, J)