

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

CRIMINAL APPEAL NO.46 OF 2006

Gaju Eknath Pawar,
Age 31 years, Occ. Labour,
R/o Nimgul, Taluka Sindkheda,
District Dhule

... APPELLANT

VERSUS

The State of Maharashtra
(Copy to be served on Assistant
Public Prosecutor, High Court,
Bench at Aurangabad)

... RESPONDENT

.....
Shri N.B. Suryawanshi, Advocate for appellant
Mrs. D.S. Jape Ansingkar, A.P.P. For respondent
.....

CORAM: T.V. NALAWADE AND
 SUNIL K. KOTWAL, JJ.

Date of reserving judgment : 18th January, 2018.

Date of pronouncing judgment : 12th February, 2018.

JUDGMENT (PER SUNIL K. KOTWAL, J.) :

1. This appeal is directed by the original accused against the judgment and order dated 7.12.2005, passed by learned 2nd Ad-hoc Additional Sessions Judge, Dhule, in Sessions Case No.43/2005, wherein the accused was convicted for the offence punishable under Section 302 of the Indian Penal Code and he was sentenced to suffer life imprisonment and to pay fine of

Rs.1000/-. The respondent is State of Maharashtra.

2. Facts leading to institution of this appeal are that, accused was prosecuted for the offence punishable under Section 302 of the Indian Penal Code. In brief the prosecution case is that, the accused was cousin nephew of informant Venubai Dhandu Padvi (P.W.2) and they were residents of village Nimgul, Taluka Sindkheda, District Dhule. On 6.4.2005, at about 5.30 p.m., when deceased sat over Varanda of his residential house with his son and cousin namely Rajesing Tukaram Pawar, that time, accused reached on the spot and while abusing the deceased, he pulled the *Uparne*, which was wrapped in the neck of the deceased. The deceased fell down on the ground and his head struck with the stone lying on that spot, resulting into fracture of the skull and brain injury to the deceased. At the time of this occurrence, Venubai Padvi (P.W.2), who is wife of deceased, was also present on the spot. Immediately, Dr. Virendra Bagal (P.W.5) was called on the spot. On examination, he declared the deceased as dead. Therefore, Police Patil Vijay Salve (P.W.4) was called and on the same day, Venubai (P.W.2) lodged F.I.R. Exh.13 at Police Station, Dondaicha. In the result, offence was registered against the accused under Section 302 of the Indian Penal Code. P.S.I. Vijay Deshmukh (P.W.7) carried out investigation and prepared inquest panchanama (Exh.7) as

well as spot panchanama (Exh.8). The dead body of the deceased was referred to Cottage Hospital, Dondaicha. Dr. Sharadsing Pardeshi (P.W.1) performed autopsy examination of that dead body, and by issuing post mortem notes (Exh.11), opined that the cause of death was due to head injury. After completion of investigation, charge sheet was filed against the accused in the Court of Judicial Magistrate, First Class, Dondaicha.

3. Offence punishable under Section 302 of the Indian Penal Code being exclusively triable by Court of Sessions, this case was committed to the Sessions Court, Dhule. The then 2nd Ad-hoc Additional Sessions Judge framed charge (Exh.3) against the accused for committing offence punishable under Section 302 of the Indian Penal Code. The accused pleaded not guilty and claimed trial.

4. Prosecution examined total 7 witnesses. Defence of the accused is of total denial.

5. After considering the evidence placed on record, learned trial Court pleased to convict the accused for the offence punishable under Section 302 of the Indian Penal Code. Therefore, this appeal arises.

6. Heard strenuous arguments advanced by Mr. N.B.

Suryawanshi, learned counsel for the appellant and learned A.P.P. for the State. Learned counsel for the appellant submitted that, Venubai (P.W.2) as well as her son Subhash Padvi (P.W.6) being closely related witnesses to the deceased, are interested witnesses and, therefore, without corroboration by the evidence of independent witnesses, accused cannot be convicted. He points out that, Rajesing Padvi, who is one of the eye witness, is not examined by the prosecution and, therefore, adverse inference is to be drawn against the prosecution.

7. The next limb of argument of the learned defence counsel is that, presence of Subhash Padvi (P.W.6) on the spot is not referred by Venubai (P.W.2) and even his name is not mentioned in the F.I.R. He prays for acquittal of the accused. In the alternative, learned counsel for the accused submits that, as the accused had no intention to kill the deceased, the accused cannot be convicted under Section 302 of the Indian Penal Code. At the most, he can be convicted under Section 325 of the Indian Penal Code. He placed reliance on **Chandrakant Narayan Kshirsagar Vs. State of Maharashtra**, reported in **(1998 Bom.C.R. (Cri.) 26)** and **Duryodhan Bhagwat Devkate & anr. Vs. The State of Maharashtra**, reported in **(1998 BCI 69)**.

8. In reply, learned A.P.P. for the State submits that,

only because Venubai (P.W.2) and Subhash (P.W.6) are close relatives of the deceased, they cannot be treated as interested witnesses. He submits that, prosecution has also examined Pandu Padvi (P.W.3), who is the immediate neighbour as well as eye witness of the occurrence.

9. The next submission of learned A.P.P. is that, the names of the eye witnesses need not be mentioned in the F.I.R. and, therefore, on the basis of truthful testimony of Venubai (P.W.2), Pandu (P.W.3) and child witnesses Subhash Padvi (P.W.6), prosecution has proved beyond reasonable doubt the charge levelled against the accused.

10. At the outset, we wish make it clear that, as ruled by the Hon'ble Apex Court in **Dalip Singh & ors. Vs. State of Punjab**, reported in **(AIR 1953 SC 364)**; **Kulesh Mondal Vs. State of West Bengal**, reported in **(AIR 2007 SC 3228)** and **State of Rajasthan Vs. Smt. Kalki & anr.**, reported in **(AIR 1981 SC 1390)**, a related witness is not equivalent to interested witness. Therefore, only because witness is related witness, testimony of such witness cannot be discarded. In **State of Jammu & Kashmir Vs. Mohan Singh & anr.** reported in **(AIR 2006 SC 1410)**, the Hon'ble Apex Court ruled that, merely because a witness is interested or inimical, his evidence cannot be discarded unless the same is otherwise found to be not

trustworthy. In view of this trite law, only because Venubai Padvi (P.W.2) and Subhash Padvi (P.W.6) are closely related witnesses with the deceased, their testimony cannot be discarded if otherwise it is free from infirmities and trustworthy.

11. From the testimony of Venubai (P.W.2), Pandu (P.W.3) and Subhash (P.W.6), who are the eye witnesses of the incident, it emerges that, at the time of occurrence, the deceased sat on the platform of his house just abutting to public road. That time, accused came on the spot and by abusing the deceased, he pulled the *Uparne* i.e. cloth wrapped around the neck of the deceased. Due to that push, deceased fell on the ground and his head struck with the stone which was lying on that ground. The deceased succumbed to his head injury on the spot. Therefore, Dr. Virendra Bagal (P.W.5) was called on the spot, who declared the deceased as dead. Pandu Padvi (P.W.3) has fully corroborated the version of Venubai (P.W.2) and Subhash (P.W.6) on every material particulars.

12. Learned counsel for appellant though points out that, at the time of occurrence, Venubai (P.W.2) went inside her house for preparation of tea, it cannot be said that she could not witness the occurrence even from the kitchen room of her house. In her cross-examination, the learned defence counsel could not bring on record that the occurrence was not visible to Venubai

(P.W.2) from her house. On the other hand, in her cross-examination, it has been brought on record that the house of Venubai (P.W.2) consists of only two rooms. Therefore, the testimony of Venubai (P.W.2) cannot be disbelieved only on the ground that just before the occurrence of incident she went inside the house for preparation of tea.

13. Even the testimony of Pandu (P.W.3) and Subhash (P.W.6) cannot be doubted only because their names are not mentioned in the F.I.R. (Exh.13). It is trite law that, F.I.R. is not an encyclopedia wherein each and every minor details of the occurrence need to be mentioned. Even otherwise, in the F.I.R. (Exh.13), it is specifically mentioned that the deceased sat on the platform of his house with his cousin and son. Therefore, even otherwise also, presence of Subhash Padvi (P.W.6), who is son of the deceased cannot be doubted. So also, Pandu (P.W.3), being immediate neighbour of the deceased, his presence on the spot is also natural and nothing could be elicited from his cross-examination to doubt his presence.

14. On the other hand, from the cross-examination of Venubai (P.W.2), the defence has brought on record that, prior to the occurrence, there was no dispute in between the deceased and accused. When deceased was also related with the accused person and when both of them had cordial relations, neither

Venubai (P.W.2) nor Subhash (P.W.6) can be branded as interested witnesses when they had no reason to falsely implicate the accused in such case. Therefore, we are fully satisfied that, on the basis of truthful version of Venubai (P.W.2) Pandu (P.W.3) and Subhash (P.W.6), the prosecution has proved beyond reasonable doubt that on 6.4.2005, when deceased was sitting on the platform of his house, that time accused pulled down him by holding *Uparne* wrapped around the neck of the deceased, which resulted into sustaining head injury by deceased due to stone lying on the spot.

15. Dr. Sharadsing Pardeshi (P.W.1), who performed autopsy examination of the deceased, has duly proved post mortem notes (Exh.11) and cause of death of the deceased due to head injury. This witness has specified that, only one contused lacerated wound of size 1 x ½ inch was found over frontal region of scalp of the deceased. This witness has also proved that, there was fracture of the frontal bone of the skull and internal injury to the brain of the deceased, which resulted into his death. In the cross-examination of Dr. Sharadsing (P.W.1), the defence has brought on record that the above head injury to the deceased is possible due to fall from the platform of the height 4 to 5 ft. The defence has admitted the spot panchanama (Exh.8), which shows that, the height of platform

was 3 ½ ft. from the ground level and one stone was lying near the platform. Thus, the evidence of eye witnesses is also corroborated by medical evidence as well as circumstantial evidence in the form of spot panchanama. In the result, we have no hesitation to hold that the prosecution has proved beyond reasonable doubt that on 6.4.2005 at about 5.30 p.m., when deceased was sitting on the platform of his house, the accused suddenly pulled the deceased by holding his *Uparne*, which resulted into fall of the deceased on the ground. Due to act of the accused, the deceased sustained fatal head injury.

16. Now question arises whether the death of the deceased is homicidal death. It must be noted that, culpable homicide under Section 299 of the Indian Penal Code is defined as under :

“S. 299. Culpable homicide :- Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.”

17. Under Section 300 of the Indian Penal Code, murder is defined as under :

“S. 300. Except in the cases hereinafter excepted,

culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or

2ndly:- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

3rdly:- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

4thly:- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

18. Thus, it is clear that, unless prosecution establishes that with requisite intention or knowledge, the accused caused bodily injury to the deceased which is sufficient in the ordinary course of nature to cause death, prosecution cannot prove that deceased died of homicidal death. In the case at hand, the accused had no motive to kill the deceased as his relations with the deceased were cordial. Even if the incident is accepted as it is, it shows that the deceased was suddenly pulled by the accused from the platform without any intention to kill him.

Therefore, only because due to fall on stone deceased sustained fatal head injury and died on the spot, it cannot be held that the accused intentionally killed the deceased. Therefore, by no stretch of imagination it can be held that the accused committed offence punishable under Section 302 of the Indian Penal Code. In fact, the death of the deceased is not homicidal death as defined under Section 299 of the Indian Penal Code for want of necessary intention or knowledge.

19. However, it cannot be ignored that, as due to the voluntary act of the accused, deceased sustained fracture of his skull bone, as proved by Dr. Pardeshi (P.W.1), the prosecution can establish guilt of the accused at the most under Section 325 of the Indian Penal Code. In the similar circumstances, even in **“Chandrakant Vs. State of Maharashtra”** (cited supra), this Court has convicted the accused only under Section 325 of the Indian Penal Code. Therefore, as observed above, prosecution cannot prove guilt of the accused under Section 302 of the Indian Penal Code, but the prosecution has proved beyond reasonable doubt that on the date of the occurrence, accused committed offence punishable under Section 325 of the Indian Penal Code. Therefore, this appeal deserves to be partly allowed to modify the conviction and sentence of the accused imposed by learned trial Court under Section 302 of the Indian Penal Code into

Section 325 of the Indian Penal Code.

20. Regarding quantum of sentence, learned counsel for the appellant prayed for showing lenient view on the ground that, at the time of trial, the accused has already undergone 7 months imprisonment. He also pointed out that, at the time of occurrence, the age of the accused was only 30 years and, therefore, considering his young age, lenient view may be taken. For the offence punishable under Section 325 of the Indian Penal Code, maximum sentence prescribed is imprisonment for seven years and fine. Considering the young age of the accused and the peculiar circumstances of the case in which the death of the deceased resulted on account of sudden pulling by the accused, lenient view deserves to be taken. Rigorous imprisonment for two years and fine of Rs.5000/- would be sufficient to meet the ends of justice.

21. Therefore, we pass the following order :

ORDER

- (I) The Criminal Appeal is partly allowed.
- (II) Conviction of the appellant – accused under Section 302 of the Indian Penal Code and his sentence for life imprisonment and fine of Rs.1000/- is quashed and set aside.

- (III) The appellant-accused is convicted for the offence punishable under Section 325 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs.5000/- (Rupees five thousand), in default to suffer rigorous imprisonment for one month.
- (IV) Set off be given under Section 428 of the Criminal Procedure Code for the period already undergone by the appellant-accused.
- (V) The appellant-accused shall surrender to his bail bonds immediately before the trial Court to undergo the sentence.

(SUNIL K. KOTWAL)
JUDGE

(T.V. NALAWADE)
JUDGE

fmp/