

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 220 OF 2006

Amar Sing alias Angya Pita Pawara

Aged about 26 years, occupation :

R/o Fattepur Khalacha Pada,

Taluka Shirpur, District Dhule

.. Appellant /

orig. accused

versus

State of Maharashtra

.. Respondent

Shree Joydeep Chatterji, Advocate for appellant

Ms. S. S. Raut, Additional Public Prosecutor for respondent

CORAM : SUNIL P. DESHMUKH AND
SANGITRAO S. PATIL, JJ.

JUDGMENT RESERVED ON : 09-11-2017
JUDGMENT PRONOUNCED ON : 18-01-2018

JUDGMENT (PER : SUNIL P. DESHMUKH, J.)

1. This is an appeal by the accused who has been convicted by the Second Adhoc Additional Sessions Judge, Dhule in sessions case no. 39 of 2004 for commission of offence punishable under section 302 of the Indian Penal Code, 1860 ("IPC" for brevity) sentencing him to suffer life

imprisonment and to pay a fine of Rs.5,000/- and in default to suffer further rigorous imprisonment for a period of six months.

2. The law has been set in motion upon a statement recorded of Bhimsing Raja Pawara to the police head constable on 07-01-2004 in cottage hospital, Shirpur, after the endorsement by doctor on very day about patient being fully conscious, that on 06-01-2004 around 7.00 p.m. while he (Bhimsing Raja Pawara) had been returning from a marriage with residents of his village, namely, Ratan Pawara and Devising Pawara (P.Ws. 4 and 5 respectively), had seen Shrawan Pawara of their village from whom Bhimsing was to take back a gunny bag of maize which had been lent by him to said Shrawan and had thus asked Shrawan to return the same. At that time, Shrawan's brother Amshya @ Amarsing Pita Pawara had come from behind him and started beating Bhimsing with fists and kicks, abusing him and had pushed him with force making him fall over a stone and had suffered injury in the process. Immediately, Bhimsing had been moved in a jeep by aforesaid persons to Cottage hospital for treatment.

3. Based on first information report, P.N.C. came to be registered with Police Station, Shirpur.
4. Dr. Surekha Deshpande (P.W.3) had treated Bhimsing at Shirpur. Subsequently, Bhimsing had been taken to government hospital at Dhule for treatment where he died on 09-01-2004.
5. Upon receipt of injury certificate of Bhimsing, on 09-01-2004 crime no. 5 of 2004 was registered for offences punishable sections 325, 323, 504 and 506 of IPC for having voluntarily caused grievous hurt to Bhimsing and upon death of Bhimsing, offence punishable under section 302 of IPC was added.
6. Investigation was carried initially by police head constable Borse of Shirpur Police Station (P.W.2). He prepared spot panchanama, recorded statements of witnesses Ratansing Pawara (P.W. 4), Devsing Pawra (P. W. 5) and Hiranman. Upon receipt of death certificate of Bhimsing, inquest panchanama (Exhibit - 18) and post mortem report showing cause of death of Bhimsing being head injury, further investigation was carried out by Chhagan Sitaram

Devra, Police Inspector of Police Station, Shirpur (P.W. 8). A map of the spot had also been prepared by Tahsildar. Clothes of deceased Bhimsing were seized. The appellant had been arrested on 09-01-2004. His clothes were also seized. The clothes and stone were bearing blood stains.

7. After completion of investigation, charge-sheet had been filed in the court of Judicial Magistrate, First Class, Shirpur. Since appellant came to be charge-sheeted for offence punishable under section 302 of IPC and said offence being triable exclusively by Sessions Court, learned Magistrate committed the case to the Court of Session.

8. Learned 2nd Adhoc Additional Sessions Judge (hereinafter " Trial Judge") framed charge against appellant at Exhibit 3 and explained contents of the same to him in vernacular. The appellant pleaded not guilty and claimed to be tried.

9. The prosecution has examined as many as eight witnesses. Dr. Ajit R. Patil who is lecturer in Bhausahab Hire Medical College has been examined as P.W. no.1 at Exh.8. He had conducted post mortem along with one Dr. S.C. Patil.

Ratan Pawara and Devsing Bhil are examined as P. Ws. no. 4 and 5 at Exhibits - 24 and 25 respectively, Thansing Pawara is examined as witness no. 6 at Exhibit 26. Mamadabai Pawara - wife of deceased Bhimsing Pawara is examined at Exhibit 27 as witness no. 7. Chhagan Sitaram Devraj who was attached to Shirpur Police Station as Police Inspector has been examined as witness no. 8 at Exhibit 31, while police head constables Yuvraj Borse and Vinayak Kulkarni are examined as witnesses no. 2 and 3 at Exhibits 10 and 14 respectively.

10. The Trial Judge, as referred to above, on appreciation of evidence held the appellant guilty of offence punishable under section 302 of IPC and convicted and sentenced him as earlier referred to.

11. Learned counsel Mr. Joydeep Chatterji appearing on behalf of the appellants contends that appreciation of evidence by Trial Judge has not only been erroneous but is also a result of him being oblivious of lot of vital aspects. He submits, it cannot be said that appreciation of evidence corresponds to material on record. Very genesis of putting law in motion eloquently and more than sufficiently bears that no amount of evidence would lead to conviction and

punishment awarded in the present matter. He submits, Trial Judge had been in oblivion of requirements, constituting alleged improved offence punishable under section 302 of IPC, him having not considered the facts as have emerged, the context, text and exceptions in law. The evidence amply bears that witnesses were tutored and reasons therefor have also come on record during the course of evidence. Further, he submits, it has come on record that deceased had consumed liquor and the injury suffered by deceased, is not ruled out, can be caused to person of healthy stature as that of the deceased as a result of falling on a hard, craggy or blunt object. Even if it is assumed, according to him, that the appellant had caused deceased to fall, alleged improved offence cannot even be imputed. He submits that besides, there have been lot of omissions which have emerged on record in the evidence of so called eye witnesses and submits that evidence of wife of the deceased making accusations against the appellant has really ripped open the truth requiring acquittal of the appellant. He submits that appreciation of evidence by the Trial Judge tends to be perverse.

12. Learned Additional Public Prosecutor Ms. Raut supports the order impugned and contents of the judgment, submitting that learned Judge has taken into account all the relevant aspects and evidence of eye witnesses who were present on the spot and had rescued the victim. She submits, it clearly emerges that the deceased had been hit by a hard, craggy or blunt object i.e. stone by the appellant who had got enraged upon demand by the victim for return of five year old debt of one gunny bag maize. She further submits that human blood stains have been found on the seized clothes and the hard object - the stone. She submits that there is direct evidence establishing the guilt of the appellant and for cogent reasons Trial Judge has convicted and sentenced the appellant.

13. The incident had occurred in the evening of 06-01-2004. In his last statement recorded, Bhimsing has said that there had been altercation and scuffle between him and appellant over return of one gunny bag of maize lent by him to the appellant's brother. Statement of the deceased categorically refers to that the injury had been caused by fall during scuffle. The statements of eye witnesses were

recorded on 09-01-2004 and 10-01-2004 while the health condition of Bhimsing had been deteriorating. It further may have to be taken into account that the stone had been seized on 10-01-2004.

14. Blood group of stains on Bhimsing's clothes depicts to be 'A' whereas the report of the chemical analyzer does not show any blood stains on seized clothes of appellant.

15. It has come on record that there has been a scuffle and forceful push. It further appears that while two statements of the witnesses were recorded, one on 09-01-2004 and one on 10-01-2004, such recording was after considerable length of time after the statement of Bhimsing was recorded in the hospital.

16. Statements of the two eye witnesses recorded by police show that Bhimsing in their presence had told his relatives while he was taken to his house after he suffered injury in the same fashion as they did to the police yet, recorded first information does not depict the same at all.

17. There is nothing on record to show that the two witnesses had narrated the incident to the relatives as

described by them on 09-01-2004 or 10-01-2004 at any time before, save statements made by some persons on 10-01-2004. If that had been so, an FIR ought to have been and could have been filed with reference to such statements.

18. The aspect which requires consideration is that while the two eye witnesses have stated that the incident had been described by the deceased to his relatives after he was immediately taken into his house after the incident as stated by them yet, while statement of the deceased had been recorded in the hospital, the same is wide apart as far as cause of injury is concerned. If really deceased had narrated the incident as per version of the eye witnesses, yet the same was not informed to the police immediately.

19. Reading of evidence of witnesses Ratan and Devsing does not inspire confidence, for, evidence of Devsing had been absolutely dithering even in respect of schedule of marriage and ceremonies and rituals and time of event of marriage. Both the witnesses have been concurring on that Bhimsing had consumed liquor and that there had been scuffle between Bhimsing and appellant over demand of gunny bag of maize, corroborating the statement of the

deceased. There is different version by the eye witnesses in their further statements in respect of hitting of stone.

20. Evidence of Ratan and Devsing also shows that deceased Bhimsing had consumed liquor in marriage celebration according to customs prevailing in the community. The evidence on record sufficiently bears that the statements by Ratan and Devsing have been an improvement over the statement of the deceased which had been recorded while he was taken to the hospital. Subsequent statements have been made after health condition of deceased Bhimsing was deteriorating. Those are discrepant and inconsistent in narration of collection of object for hitting. Having regard to the evidence as is appearing on record those tend to be dubious and unreliable about hitting by accused - appellant to the deceased.

21. Evidence brings out lot of inconsistencies, discrepancies and omissions in the evidence of the witnesses and their statements before the police.

22. The appellant in the cross examination has sufficiently brought forth the omissions in the statements of eye

witnesses and has tore open that eye witnesses had been tutored ones. The wife of deceased Bhimsing has clearly stated in her cross examination that there had been meetings with Shivaji Pawara, her uncle who had lost elections to one Bhattu Dita who is uncle of appellant and that there had been a meeting on the date of death of her husband in their house in which her uncle Shivaji and witnesses Devsing and Ratan were present wherein it was decided to lodge a report in the Police Station against accused - appellant Amarsing Pawara and the witnesses were told to tell in the police statement that Amarsing had hit deceased by stone. In her statement, she does not refer to deceased having told her about one gunny bag maize having been lent to the appellant.

23. Though it is contended that evidence of eye witnesses which is replete with omissions, the evidence shows that deceased had fallen down on the stone albeit the same had been improved by eye witnesses with that deceased was trying to stand up after falling and he was hit by stone. The evidence of two eye witnesses does corroborate the fact that deceased had fallen down during scuffle. Rest of the story appears to be cooked up one in order to arraign and implicate

the appellant for the offence which he has not committed.

24. The statement as recorded of the deceased and the long gap between statements recorded of the two eye witnesses with deterioration of health condition deceased, their statements do not appear to be credible beyond the statement of deceased as recorded.

25. There is a corroboration to statement of the deceased, by witnesses Ratan and Devsing about him having a fall and hitting a hard and blunt object. The evidence of eye witnesses shows that deceased had been pushed and made to fall during scuffle by appellant Amarsing.

26. All these circumstances taken into account would not lead to conclusively establish case for improved offence alleged against the appellant, of murder of deceased.

27. In the instant case, it would have to be taken into account that there was no premeditation and there was scuffle and it does not appear that any undue advantage had been taken.

28. From the incident as occurred and as narrated, on either versions, it does not appear that the case is of murder

punishable under section 302 of the IPC as it can be seen that an offence of murder under section 300 of IPC is not imputable to the appellant - accused, and, the case even otherwise would be covered by exception 4 to section 300 of the IPC.

29. Having regard to aforesaid, it does not appear to be a case wherein conviction of appellant for offence punishable under section 302 of IPC is sustainable and the sentence therefor awarded to him under impugned judgment and order is liable to be set aside.

30. Though circumstances and evidence do not sustain allegation of murder, yet, evidence does with certainty establishes that Bhimsing during scuffle with appellant over a return of one gunny bag of maize had been pushed making him fall and sustain injury.

31. The evidence, since as observed with degree of certainty, does indicate that the scuffle had caused the deceased to fall and suffer an injury leading to his death, the appellant is guilty of causing fall leading to injury which would cause death and thus there is commission of offence

punishable under section 304 part II of IPC and appellant is liable for conviction on that count, since he may not have intention to cause such bodily injury which was likely to cause death of Bhimsing but, would have knowledge that fall would cause injury likely to cause his death.

32. Considering the facts and circumstances of the case and serious consequence of the offending act of the appellant, we are not inclined to extend him the benefit of probation.

33. Having regard to aforesaid, appeal is partly allowed.

34. The judgment and order rendered by 2nd Ad-hoc Additional Sessions Judge, Dhule on 24-02-2006 in Sessions case No. 39 of 2004, convicting and sentencing appellant for offence under section 302 of Indian Penal Code is set aside. Appellant - accused stands acquitted of the offence punishable under section 302 of Indian Penal Code.

35. The appellant is convicted for offence punishable under section 304 part II of Indian Penal Code and is sentenced to suffer rigorous imprisonment of five years. Appellant shall pay fine of Rs.5000/- as awarded by the Trial Judge, if not already

paid. In default of payment of fine, appellant shall undergo rigorous imprisonment of three months. He should surrender to his bail-bonds by appearing before the Trial Court within a period of two weeks from today for undergoing the sentence passed against him today. In case the appellant fails to appear before the Trial Court as aforesaid, the Trial Court shall issue coercive process to secure his presence and commit him to prison for undergoing the sentence.

36. The appeal is, accordingly, disposed of.

SANGITRAO S. PATIL
JUDGE

SUNIL P. DESHMUKH
JUDGE

pnd/-