

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

CRIMINAL APPEAL NO. 40 OF 2003

1. Prakash S/o Maroti Gaikwad
Age : 38 Yrs., Occ.
R/o : Muje Chandola,
Taluka : Mukhed, Dist. Nanded.
 2. Atmaram S/o Maroti Gaikwad
Age : 27 Yrs., Occ.
R/o : Muje Chandola,
Taluka : Mukhed, Dist. Nanded.
 3. Bhaurao s/o Sadba Gakwad
Age : 53 Yrs., Occ.
R/o : Muje Chandola,
Taluka : Mukhed, Dist. Nanded.
[Deleted as per Court's Order dated 22/01/2003].
- APPELLANTS/
[ORI.ACCUSED NOS. 1 TO 3]

V E R S U S

The State of Maharashtra
Through Police Station Mukhed
at the instance of
Ganpati s/o Jalsinga Gaikwad
R/o : Chandola, Tq. : Mukhed,
Dist.: Nanded.

.... RESPONDENT/
[ORI.COMPLAINANT]

.....

Shri. P.P.Mandlik, Advocate for Appellants.

Mrs. V.S.Choudhary, A.P.P. for Resp. - State.

.....

**CORAM : SUNIL P. DESHMUKH &
P.R.BORA, JJ.**

JUDGMENT RESERVED ON : 12th JANUARY, 2018

JUDGMENT PRONOUNCED ON : 19th JANUARY, 2018

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JUDGMENT : [PER – P.R.BORA, J.]

1. The appellants have filed present Appeal against the Judgment and Order dated 06/01/2003 passed by the Additional Sessions Judge, Biloli, District Nanded in Sessions Case No. 33/1993, whereby the appellants have been convicted for the offence punishable u/s 302 r/w 34 of I.P.C. as well as u/s 324 r/w 34 of I.P.C. and have been awarded sentence of life imprisonment with fine of Rs. 500/- each and Rigorous Imprisonment for six months with fine of Rs. 500/- each for the respective offences.

2. The facts in brief as are necessary for the decision of this Appeal may briefly be stated thus :

The appellants [hereinafter referred to as 'the accused'] are residents of village Chandola, Taluka Mukhed,

District Nanded. The aggrieved persons, at whose instance the accused were prosecuted, are also from the same village. There was a dispute between accused and the aggrieved persons in respect of one agricultural land which was admittedly belonging to one Krishnabai. Some civil dispute had taken place pertaining to the said land, which was ultimately compromised and the said land was equally allotted to Nilkanth and Dadarao. The present accused were claiming through Nilkanth while the aggrieved persons were claiming through Dadarao. On 26/06/1991, the accused had sown the said land to the extent of 2 ½ Acres i.e. half of the said land. On the next day viz. on 27/06/1991, deceased Dadarao, his brother Ganpati and his nephews viz. Ganpati and Venkat had been to the said land for sowing the remaining half portion of the said land. The accused prevented Dadarao and Ganpati, etc. from carrying out the sowing operation. At that time, the scuffle had taken place between Dadarao, Ganpati, etc. on one side and accused persons and one Bhaurao on other side. In the clash so occurred, both the groups made assaults on the members of each other's group. It was the allegation against the accused that because of the assaults made by them on Dadarao, he ultimately suffered the death. According to the case of prosecution, the accused have knowingly and intentionally caused the death of Dadarao by making assaults on his head by means of sticks. The accused were also alleged to have seriously injured

Gunwant s/o Ganpati Gaikwad and Venkat s/o Ganpati Gaikwad. The complaint in that regard was lodged by Ganpati Gaikwad at police station Mukhed, whereupon the offence was registered against the accused u/s 307 and 324 of I.P.C. and the investigation was set in motion. Since Dadarao died after lodging of the complaint, the offence registered against the accused u/s 307 r/w 34 of I.P.C. was converted into the offence punishable u/s 302 r/w 34 of I.P.C. One Bhaurao Sadaba Gaikwad was also an accused with present two accused. The police after completing the investigation in the matter, filed charge sheet against the accused for the offence punishable u/s 302 r/w 34 of I.P.C. After the said case was committed to the Court of Sessions, the charge was framed against the accused persons for the offence punishable u/s 302 r/w 34 of I.P.C. and u/s 324 r/w 34 of I.P.C. In order to prove the guilt of the accused, as many as six witnesses were examined by the prosecution and certain documents were placed on record. The accused denied the charges levelled against them. According to the accused, they were falsely implicated in the alleged crime. The learned Additional Sessions Judge after having assessed the oral as well as documentary evidence on record, held the present appellants guilty for the offence punishable u/s 302 r/w 34 of I.P.C. as well as u/s 324 r/w 34 of I.P.C. Accused No. 3 Bhaurao Gaikwad was acquitted of all the charges levelled against him. Aggrieved by, the accused have preferred the present Appeal.

3. Shri. Pratap Mandlik, the learned counsel appearing for the accused criticized the impugned Judgment on several grounds. According to Shri. Mandlik, the learned Additional Sessions Judge has erroneously held the accused guilty for the offence punishable u/s 302 r/w 34 of I.P.C., though no evidence has come on record against them. The learned counsel further submitted that the prosecution has examined only the interested witnesses and though the independent witness was available, has omitted to record his evidence. The learned counsel further submitted that there are variations in the evidence of prosecution witnesses even in respect of the core incident. The learned counsel further submitted that the prosecution has utterly failed in providing any explanation as about the injuries sustained by the accused persons. The learned counsel further submitted that the evidence of recovery is shrouded with doubts and no reliance could have been placed by the learned Additional Sessions Judge on such evidence. The learned counsel further submitted that the medical evidence also has not been properly appreciated by the learned Additional Sessions Judge. The learned counsel further submitted that the trial Court has also failed in appreciating that the prosecution has utterly failed in bringing on record any cogent and sufficient evidence to prove the intention of the accused in making such assault on deceased Dadarao as well as other two injured witnesses. The learned counsel submitted that in absence

of any cogent and sufficient evidence showing complicity of the accused in commission of the alleged crime, none of the accused was liable to be held guilty for the offence punishable u/s 302 r/w 34 of I.P.C. and u/s 324 r/w 34 of I.P.C. The learned counsel, therefore, prayed for setting aside the impugned Judgment and order and consequently to acquit the accused of all the charges levelled against them. In the alternative, the learned counsel submitted that even if the entire evidence is accepted as it is, none of the accused could have been held guilty for the offence u/s 302 of I.P.C. The learned counsel submitted that from the evidence on record, it is difficult to hold that the accused were intending to cause death of Dadarao or were knowing that because of the assault allegedly made by them, death of Dadarao was likely to be caused and in the circumstances the accused can be at the most held guilty for causing hurt to Dadarao.

4. Mrs. V.S.Choudhari, the learned A.P.P. supported the impugned Judgment and Order.

5. We have carefully considered the submissions made on behalf of learned counsel appearing for the accused and the learned A.P.P. representing the State. We have also perused the impugned Judgment and entire evidence on record. After having gone through the oral and documentary evidence on record, there

remains no doubt that on 27/06/1991 there was free fight between the accused and one Bhaurao on one side and deceased Dadarao, etc. on the other side. Though it was sought to be canvassed by Shri. Mandlik, the learned counsel for the accused that the evidence of the prosecution witnesses is too vague to record any definite conclusion as to which assault was made by which accused on deceased Dadarao as well as on Gunwant s/o Ganpati Gaikwad [P.W.1] and Venkat s/o Ganpati Gaikwad [P.W.2] which resulted in causing death of Dadarao and making injured P.W. 1 and P.W.2 and as such none of the accused could have been convicted, we are not impressed with the submissions so made by Shri. Mandlik.

6. The prosecution has examined two injured eye witnesses viz. Gunwant s/o Ganpati Gaikwad [P.W.1] and Venkat s/o Ganpati Gaikwad [P.W.2]. The evidence of these witnesses assumes vital importance. P.W. 1 Gunwant has specifically deposed that accused No. 2 Atmaram made assault on the head of deceased Dadarao with the stick. P.W. 1 Gunwant has further deposed that accused No. 1 Prakash did also hit a stick blow on the head of deceased Dadarao. P.W. 1 Gunwant has also deposed that he received stick blows at the hands of accused No. 1 Prakash on his knees, legs, thighs as well as on the head.

7. Perusal of the evidence of P.W. 2 Venkat reveals that he has sufficiently corroborated the facts as were deposed by P.W. 1 Gunwant. P.W. 2 Venkat has testified that accused No. 1 Prakash and accused No. 2 Atmaram had assaulted deceased Dadarao on his head with the sticks in their hands, because of which Dadarao fell down. P.W. 2 Venkat has also deposed that accused No. 1 Prakash gave two blows of stick on his chest. P.W. 2 has also deposed about assaults made by accused Nos. 1 and 2 on person of P.W. 1 Gunwant. In the cross examination of both these witnesses, no such material or circumstance has been brought on record so as to discard or disbelieve the facts stated by these two witnesses and more particularly as about the assaults made by accused Nos. 1 and 2 on deceased Dadarao.

8. From the evidence of the aforesaid two injured witnesses, the prosecution has sufficiently proved that both the accused had assaulted deceased Dadarao with sticks on his head. The medical evidence corroborates the facts stated by P.W. 1 and 2 that deceased Dadarao was assaulted by accused Nos. 1 and 2 on his head. In the postmortem examination report of deceased Dadarao, the following injuries were noticed on his person :

[i] CLW on right parieto Frontal region 6" x 2"
horizontal.

[ii] CLW oblique on left parieto area of head 1 ½ “ x ½ “.

[iii] CLW on left wrist joint Dorsel 2” x 1” size. All injuries ante mortem.

Internal Examination, following injuries :

[i] A big wound bone deep

[ii] Fracture on right parietal bone horizontal 4” x ¼ “

[iii] Bleeding on right side of injury.

9. The probable cause of death, as has been suggested in the postmortem examination report, is shock due to Cardio Respiratory Arrest due to head injury trauma over right parietal. It is thus evident that the prosecution has, beyond reasonable doubt, proved that accused Nos. 1 and 2 had made assaults on the head of deceased Dadarao causing the head injury, as reflected in the postmortem examination report.

10. Shri. Mandlik, the learned counsel for the accused submitted that admittedly there was a fight between two groups and assaults were made by both the groups on the members of each other's group. Shri. Mandlik further submitted that the evidence which has come on record points out that deceased

Dadarao also entered into the said scuffle and in an attempt by him of making assaults on the accused, he fell down on the ground. The learned counsel submitted that the possibility of Dadarao receiving injuries because of such fall on ground can not be ruled out in absence of any specific evidence as to which of the injury was caused to deceased Dadarao because of the alleged assaults made by the accused persons on his head. Shri. Mandlik further submitted that the another fact which has come on record that deceased Dadarao was under the influence of liquor at the relevant time, also can not be ignored. The learned counsel submitted that since deceased Dadarao had heavily consumed liquor, was unable to keep his balance and as such he, at his own, fell down on the ground and received injuries.

11. The submissions so made by Shri. Mandlik are difficult to be accepted in view of the evidence on record which we have discussed herein above. Whether the assaults made on deceased Dadarao ultimately resulted in causing his death and whether such assaults were made by the accused with intention and knowledge of causing death of deceased Dadarao, are the questions which need to be considered independently, however, from the evidence on record we have no doubt that the prosecution has sufficiently proved that accused No. 1 Prakash and accused No. 2 Atmaram made one assault each with the stick on

the head of deceased Dadarao.

12. As noted above, the next question now arises, whether can it be held on the basis of the evidence on record that accused Nos. 1 and 2 were commonly intending to cause death of deceased Dadarao by making such assault and whether they were having knowledge that by such assaults death of Dadarao was likely to be caused. The conclusion recorded by the learned trial Court that accused Nos. 1 and 2 knowingly and intentionally caused the death of Dadarao is based on the fact that accused Nos. 1 and 2 both made an assault on deceased Dadarao with stick on his head, which is vital part of the body. The trial Court has further observed that looking to the nature of injuries caused to deceased Dadarao, an inference can be drawn that sufficient force was applied by both the accused while making assault on deceased Dadarao. It is further observed by the learned trial Court that both the accused were quite aware of the fact that Dadarao was an old aged person and was at the relevant time in drunken condition. According to the learned trial Judge, in spite of having knowledge of both the aforesaid facts when the accused made assault on the head of deceased Dadarao, the intention as well as knowledge both are to be attributed on the part of the accused. In the circumstances, the learned trial Court has held both the accused guilty for the offence punishable u/s 302 r/w 34 of I.P.C.

13. We are, however, unable to agree with the finding so recorded by the learned trial Judge. Firstly, the learned trial Court has nowhere recorded and discussed that the accused were having any common intention to cause the death of Dadarao. No such inference can be drawn even from the testimonies of the prosecution witnesses and more particularly P.W. 1 Gunwant and P.W. 2 Venkat that accused Nos. 1 and 2 were having a common intention to cause death of Dadarao while they entered on the spot of occurrence. What apparently reveals from the entire prosecution case and the evidence brought on record during the course of the trial is the fact that the accused were intending to restrain Dadarao and his team from sowing the field, which allegedly was owned by them. The evidence on record further shows that when the accused started preventing Dadarao and his colleagues from sowing the field, the scuffle started between two groups and in-fact there was a free fight between both the groups. The evidence of P.W. 3 Dr. Prakash Patil demonstrates that accused Prakash as well as accused Atmaram were also injured in the said fight because of the assaults allegedly made on them by the persons in the group of deceased Dadarao.

14. It is true that accused Nos. 1 and 2 made one assault each on the head of deceased Dadarao, however from the evidence on record no such inference can be drawn that it was the

premeditated act of the accused or it was a preplanned attack. Evidence of P.W. 2 Venkat shows that accused No. 1 Prakash first made an assault on him, then on P.W. 1 Gunwant and thereafter on deceased Dadarao. Had it been the common intention of accused to cause the death of Dadarao, the assaults would have been targeted first on deceased Dadarao. It has also to be considered that had the accused be intending to cause the death of Dadarao, they would have made repeated assaults. Making of the assaults by both the accused on the head of deceased Dadarao, also does not appear to be a predetermined act of the accused; rather it appears to be a coincidence.

15. After having considered the entire evidence on record, it cannot be said that the accused were intending to cause death of Dadarao. As said earlier, the only intention of the accused was to prevent deceased Dadarao and his team from sowing the field. It was only in the heat of fight that the fatal injury was caused to deceased Dadarao. In the circumstances, the finding recorded by the trial Court that the accused were intending to cause death of Dadarao cannot be sustained. The fact that the injury inflicted on head did in-fact resulted in death of Dadarao, would not justify the Court in reasoning backward from the said result to an intention to cause death. We reiterate that from the evidence on record, no such inference can be drawn that

the accused were intending to cause death of Dadarao. However, we have no hesitation in holding that the knowledge of the consequences of their act in making assault on the head of deceased Dadarao, has to be attributed on the part of the accused. The contention raised on behalf of accused that they were not aware about the consequences of the assault made by them on deceased Dadarao, has to be rejected. In the foregoing circumstances, though the conviction of the accused by the trial Court for the offence punishable u/s 302 r/w 34 of I.P.C. can not be sustained, the accused are liable to be held guilty for the offence punishable u/s 304 part II of I.P.C.

16. Shri. Mandlik has relied upon the Judgment of the Division Bench of this Court in the case of *Narayan Aba Pawar V/s The State of Maharashtra* reported in **2014 (3) Bom.C.R. (Cri.) 42** to buttress his alternate submission that the conviction of the appellants – accused u/s 302 r/w 34 of I.P.C. cannot be sustained and the accused, at the most, can be held guilty for the offence u/s 304-II of I.P.C. In the cited Judgment also, it was the case of the prosecution that the assaults made by the accused therein with the stick were with knowledge and intention to cause death of the victim in the said matter. The trial Court had accordingly held guilty the accused therein for the offence u/s 302 r/w 34 of I.P.C. In the Appeal, the Division Bench of this Court,

however, held that from the evidence on record it was difficult to record any conclusion as to which of the accused had actually delivered the fatal blow and further that the intention of the accused was not appearing to commit murder of the deceased therein and it was only in the heat of quarrel or fight that one of the accused had hit fatal blow of stick. In the circumstances, the Division Bench set aside conviction of the accused for the offence punishable u/s 302 r/w 34 of I.P.C. and held the accused guilty for the offence of culpable homicide not amounting to murder punishable u/s 304-II of I.P.C.

17. We have carefully perused the cited Judgment. The facts involved in the present Appeal are akin to the facts which were involved in the said Judgment. In the instant matter also, from the evidence on record, it is difficult to record any definite conclusion as to which of the accused had given the fatal blow and that is the reason both the accused have been convicted with the aid of section 34 of I.P.C. Alike in the cited Judgment, in the instant matter also, there was a sudden fight and in the heat of quarrel, one of the accused had dealt the fatal blow of the stick. As noted earlier, the injuries also were caused to the accused in the quarrel so occurred between the aggrieved persons and the accused. In the circumstances, according to us, the accused could not have been convicted for the offence punishable u/s 302 r/w 34

of I.P.C. In view of the conclusion recorded by us that intention of the accused was not to commit murder of Dadarao, the accused are liable to be convicted for the offence of culpable homicide not amounting to murder punishable u/s 304-II r/w 34 of I.P.C.

18. In so far as the conviction of the accused u/s 324 r/w 34 of I.P.C. is concerned, it does not appear to us that any case is made out by the accused so as to cause interference in the order so passed. Ample evidence has come on record showing that the accused caused hurt to P.W. 1 Gunwant and P.W. 2 Venkat by making assaults on both of them with stick. As such, we maintain the conviction of the accused for the said offence.

19. The next question which now falls for our consideration is the punishment to be awarded to the accused. Shri. Mandlik, the learned counsel for the accused has relied upon the same Judgment of the Division Bench of this Court referred to herein above in the case of **Narayan Aba Pawar** to urge that the accused are liable to be sentenced with the imprisonment already undergone by appropriately increasing the amount of fine. The learned counsel submitted that the alleged incident had occurred in the year 1991 i.e. prior to about 27 years and as such, it may not be proper now to impose any punishment of imprisonment more than the period already undergone by the accused. The

learned counsel submitted that both the accused have approximately undergone the imprisonment for the period of 2 ½ months. The learned counsel submitted that the accused be released on the sentence already undergone by appropriately increasing the fine amount.

20. We find substance in the submission so made by Shri. Mandlik. Having regard to the fact that the alleged incident had occurred in the year 1991 i.e. prior to about 27 years, we see no propriety now in imposing upon the accused any higher sentence of imprisonment than already undergone by the accused. The record shows that after the Judgment was pronounced by the Sessions Court, the accused were taken in custody on 06/01/2003 and were released on bail by this Court on 17/02/2003. The record further shows that accused No. 1 was initially arrested on 29/06/1991, whereas accused No. 2 was arrested on 27/06/1991 and both the accused were released on bail by the order passed by J.M.F.C., Mukhed on 18/07/1991. From the record it is thus evident appears that both the accused have undergone the imprisonment of the period of more than 2 months. We are of the opinion that the prayer so made on behalf of the accused to release them on the sentence of imprisonment already undergone deserves to be favourably considered. We may, of-course strike the balance by proportionately increasing the amount of fine.

21. In so far as the offence punishable u/s 324 r/w 34 of I.P.C. is concerned, there may not be any impediment to sentence the accused with the punishment of fine only.

22. For the reasons stated above, the following order is passed.

ORDER

[i] The conviction of appellant No. 1 Prakash s/o Maroti Gaikwad and appellant No. 2 Atmaram s/o Maroti Gaikwad u/s 302 r/w 34 of I.P.C. is quashed and set aside and in stead the appellants are convicted for the offence punishable u/s 304-II r/w 34 of I.P.C. and are sentenced to the period of imprisonment already undergone by each of them and each of the accused is sentenced to pay a fine of Rs. 25, 000/- [Rupees Twenty Five Thousand], in default of which, each of the accused to undergo further R.I. for 1 ½ years.

[ii] Conviction of the appellants for the offence punishable u/s 324 r/w 34 of I.P.C. is maintained, but the sentence awarded to them is set aside and in stead each of the accused is sentenced to

pay fine of Rs. 10,000/- [Rupees Ten Thousand] in default of which, each of the accused to undergo R.I. for six months.

[iii] Fine amount if paid by the appellants, Rs. 50,000/- [Rupees Fifty Thousand] out of the same be paid to the legal heirs of deceased Dadarao and Rs. 10,000/- [Rupees Ten Thousand] each to P.W. 1 Gunwant s/o Ganpati Gaikwad and P.W. 2 Venkat s/o Ganpati Gaikwad.

[iv] The Criminal Appeal thus stands partly allowed.

[P.R.BORA]
JUDGE

[SUNIL P. DESHMUKH]
JUDGE