

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

CRIMINAL APPEAL NO. 747 OF 2016

The Sate of Maharashtra,
Through - Assistant Police Inspector,
Police Station Ambad, Taluka Ambad,
District Jalna.

... Appellant
(Ori. Complainant)

Versus

Sandip Sarjerao Vaidya,
Age: 22 years, R/o Rohilagad,
Taluka Ambad, District Jalna.

...Respondent
(Ori. Accused)

...

Smt. V. S. Chaudhary, APP for appellant – State
Mr. Joydeep Chatterji, Advocate for respondent-Accused.

...

WITH

CRIMINAL APPEAL NO. 671 OF 2016

Sandip Sarjerao Vaidya,
Age : 29 years, Occupation Agriculture,
R/o : Rohilagad, Taluka Ambad,
District Jalna.

... Appellant
(Ori. Accused)

Versus

1. The Sate of Maharashtra.

2. Harising Bhaulal Sisode,
Age : 50 years, Occupation Agriculture,
R/o : Nihalsing Wadi, Taluka Ambad,
District Jalna.

...Respondent
(Respondent No. 2 is
father of deceased Lakhan)

...

Mr. Joydeep Chatterji, Advocate for appellant-Accused.
Smt. V. S. Chaudhary, APP for respondent – State

...

WITH
CRIMINAL APPLICATION NO. 922 OF 2018
IN
CRIMINAL APPEAL NO. 671 OF 2016

Sandip Sarjerao Vaidya,
 Age : 31 years, Occupation Agriculture,
 R/o : Rohilagad, Taluka Ambad,
 District Jalna.

... Applicant
 (Ori. Accused)

Versus

The State of Maharashtra.

...Respondent

...

Mr. Joydeep Chatterji, Advocate for applicant-Accused.
 Smt. V. S. Chaudhary, APP for respondent – State

...

**CORAM : T.V. NALAWADE &
 SMT. VIBHA KANKANWADI, JJ.**

DATED : 10th SEPTEMBER, 2018.

ORAL JUDGMENT :- (Per: SMT. VIBHA KANKANWADI, J.)

All these matters are arising out of the same proceedings, therefore, proposed to dispose of by this common judgment.

2. At the outset, it is stated that Criminal Application No. 922 of 2018 is filed by the original accused for suspension of sentence and releasing him on bail. However, since we have decided to hear both the parties finally, there is no reason to deal with the bail application. Therefore, it is disposed of.

3. Criminal Appeal No. 747 of 2016 has been filed by the prosecution - State for enhancement of punishment contending

that inadequate sentence has been awarded to the respondent-accused by the learned Sessions Judge, Jalna, in Sessions case No. 159 of 2012 dated 21-10-2016 by holding accused guilty of committing offence punishable under Section 304 Part II of the Indian Penal Code, 1860 (for short "IPC").

4. Criminal Appeal No. 671 of 2016 is filed by original accused challenging his conviction in the aforesaid case by the learned Sessions Judge, Jalna holding him guilty of committing offence punishable under section 304 Part II of the IPC and sentencing him to suffer Rigorous Imprisonment for Seven years and to pay fine of Rs. 10,000/- in default of payment of fine to suffer Simple Imprisonment for Three months. He is also challenging the order of amount of fine to be given as compensation to the wife and parents of the deceased.

5. Prosecution had come with a case that one Sachin Suresh Bamnawat, resident of Nihalsing wadi, Taluka Ambad, District Jalna lodged First Information Report (FIR) with Police Station Ambad on 07-07-2012. He has stated that he is owner of agricultural land bearing Gat No. 122 admeasuring 8 Acres situated in Rohilagad shivar. One Sandip Sarjerao Vaidya is having his agricultural land adjacent to the land of Sachin Bamnawat. Sachin was present in his land and the work of construction of well was going on. On 07-07-2012 around 1.00 p.m., one Lakhan Harising Sisode, who was owner of vehicle i.e.

Jeep/Pick-up bearing No MH-21-AC-1760 had brought cement for the well under construction in the land of Sachin. One Poonam Chainsing Bamnawat was along with Lakhan. The cement bags were unloaded around 1.30 p.m. and present accused i.e. Sandip Vaidya obstructed jeep by saying that vehicle should not be taken from his land. He started abusing them. He also started to release the air from tyre of the Jeep. Sachin, Lakhan and Poonam alighted from the jeep in order to pursue Sandip. At that time, Sandip suddenly took knife from his waist and gave a blow towards left side of chest of Lakhan. Lakhan sustained severe injury, at that time Sandip fled away on the motor-cycle. The blood was oozing from the injury of Lakhan. As a result of which, he became unconscious and fell on the spot. Sachin had informed said fact to Sarpanch - Kachrusing Hiralal Bahure. On information, Sarpanch and others came to the spot immediately. They all picked up Lakhan and put him in Pick-up Van. As Lakhan was injured, Poonam drove the Jeep and Lakhan was brought to the Government Hospital at Ambad. He was examined by Doctor and it was opined that he is serious, therefore, he was referred for further treatment in Ambulance. Sachin went to the Police Station and lodged FIR.

6. On the basis of FIR, offence vide Crime No. 158 of 2012 came to be registered under Sections 307, 341 and 504 of the IPC against the accused and investigation was undertaken.

7. The panchnama of spot was effected with the help of two panchas. Statements of witnesses were recorded. Lakhan was taking treatment at Aurangabad. Investigating Officer (PW-13) the then P.I. Jaybhaye came to know that Lakhan expired, therefore, he had sent one PSI to GHATI, Aurangabad. Inquest panchnama came to be drawn on 08-07-2012 and dead body of the deceased was referred for post mortem. After receipt of provisional report of post-mortem, offence under Section 302 of the IPC came to be added and it was informed on 09-07-2012 to the Judicial Magistrate, First Class by letter. Statements of the witnesses were recorded. The accused came to be arrested. The clothes of the accused came to be seized under *panchnama*. The clothes of deceased were also seized by executing panchnama. The statements of witnesses were got recorded under Section 164 of the Code of Criminal Procedure (Cr.P.C.) through Judicial Magistrate, First Class. The blood samples of the accused were collected. Accused was in police custody on 12-07-2012, when he gave memorandum and discovered knife used for commission of offence. The said article was seized by drawing *panchnama*. The motor-cycle used by the accused was also seized. Seized muddemal was sent for analysis to the Forensic Laboratory, Aurangabad. The 7/12 extracts of the lands of the accused and informant were collected. The C.A. reports were also collected. After conclusion of the investigation, the charge-sheet was filed.

8. After committal of the case, accused appeared before the learned Sessions Judge, Jalna. The charge was framed against him. He pleaded not guilty. The trial has been conducted. The prosecution examined in all (13) witnesses in order to bring home the guilt of accused. Accused has examined defence witness namely Bharat Sarjerao Vaidya, his brother.

9. After taking into consideration the evidence of prosecution and hearing both sides, learned Sessions Judge has come to the conclusion that prosecution has proved that the death of Lakhan was homicidal, but it has been held that it is culpable homicidal not amounting to murder, therefore, accused has been acquitted for the offence punishable under Section 302 of the IPC, but accused has been held guilty for committing offence under Section 304 Part II of the IPC and has been sentenced as stated above. Hence, both appeals.

10. Heard learned Advocate Mr. Joydeep Chatterji for the appellant-original accused and learned APP Smt. V.S. Chaudhary for the State. Perused the record and proceedings.

11. It has been submitted on behalf of accused that the learned Sessions Judge has failed to consider the evidence on record in proper perspective. The defence evidence has not been taken into consideration. D.W. 1 Bharat was present at the spot. Even spot panchnama would clearly show that informant and others

had taken Jeep from middle of the land of accused. At that time, accused had sown Bajara seeds. All the accused were under influence of liquor. In order to stop them from going to their field, accused had released the air of the tyre of jeep, at that time, Lakhan had caught Sandip. There was scuffle between them. Victim Lakhan was holding knife, which he had kept beneath seat of the Jeep. Sandip had saved himself from the blow by Lakhan, but in that process Lakhan himself sustained injuries. Presence of Bharat has been stated by P.W.4 Poonam in the cross examination. P.W.3 Nihalsing Bamanawat has stated that spot of incident was in Gut No. 122, which is land belonging to the accused. The informant himself i.e. P.W. 2 has admitted in the cross examination that accused was resisting them from taking Jeep from his land. Though he has denied the fact that accused had informed that he has sown Bajara seeds and they should not cause damage to his land; the said fact has come on record. The conduct of P.W. 2 is also required to be considered. He has admitted that he is facing trial regarding murder of his wife. Therefore, question that ought to have been addressed by learned Sessions Judge was, whether accused had right to protect his property. He relied on the decision in the case of **Wasan Singh Vs. State of Punjab** reported in **1996 Cri.L.J 878**. It is stated that though the facts are slightly different, the observations are important. He, therefore, relied on the

observations in paragraph No. 10, relevant part from said paragraph is reproduced below:

"10. While judging the nature of apprehension which an accused can reasonably entertain in such circumstances requiring him to act on the spur of the moment when he finds himself assaulted, by number of persons, it is difficult to judge the action of the accused from the cool atmosphere of the courtroom. Such situations have to be judged in the light of what happens on the spur of the moment on spot and keeping in view the normal course of human conduct as to how a person would react under such circumstances in a sudden manner with an instinct of self-preservation."

12. *Per contra*, learned APP has supported the reasons given by learned Sessions Judge while arriving at the conclusion that death of Lakhan was homicidal in nature. It was submitted that testimony of three eye witnesses was consistent to each other. The discovery was at the instance of present appellant-accused. The C.A. report was also supporting the prosecution case. The probable cause of death was '*shock and Hemorrhage due to stab injury to left lung*'. It has been proved through P.W. 12 Dr. Nitin. It was submitted that learned Sessions Judge erred in holding that there was no intention on the part of accused to commit murder. Though dispute had cropped up after accused was obstructed the

Jeep of the informant, which was passing through his land, yet he had prepared himself to cause injuries. Because, in normal course, farmer will not keep the knife with him. There is no question of sudden provocation to the accused. The learned Sessions Judge ought to have held the accused guilty for committing murder of deceased and ought to have imposed punishment under section 302 of the IPC. Therefore, she prayed for allowing the appeal filed by the State.

13. In this case the inquest panchnama (Exhibit -33) has been admitted by the defence. In order to prove the post mortem report, prosecution has examined P.W.12 Dr. Nintin Subhash Nihal. He had noted only one injury i.e. stab injury over left side chest admeasuring 4.5 cm X 2 cm X cavity deep. He has given further details of the injury as how it was placed. Internal examination showed that fracture of forth rib of left side of level of costal cartilage, fracture margin irregular and blood infiltrated. Left pleura was punctured and there was collection of blood in the left pleura cavity. In the heart, he found injury of stab extending over and anterior interventricular septum at uppermost part. After considering all these injuries, he has given opinion regarding cause of death "*shock and haemorrhage due to stab injury to left lung.*" Post mortem report is at Exhibit - 71. Provisional Certificate was issued by preserving *Viscera*. Even after perusal of CA report, he has maintained the same cause of

death as final opinion. In clear words he opined the death was homicidal, which is possible by knife *Article - A*. The important point to be noted is that cross examination of P.W. 12 Dr. Nitin was technical in nature, which does not shake his examination-in-chief.

14. A nother factor required to be noted is that there are eye witnesses to the incident, which have been examined in this case. Taking into consideration this quality of evidence, it is sufficient to hold that death of Lakhan was homicidal in nature. The learned Sessions Judge has come to the conclusion that same is not amounting to murder, and therefore, punishment is awarded under Section 304 Part II of the IPC instead of Section 302 of the IPC, and, now the prosecution has filed appeal stating that learned Sessions Judge ought to have convicted the accused under Section 302 of the IPC. Therefore, it is required to be seen from the other evidence also as to whether case is covered under Section 304 Part II of the IPC or Section 302 of the IPC. Both of them required basic ingredient that death should be homicidal in nature, which has been proved by the prosecution beyond reasonable doubt.

15. What is not disputed in this case on behalf of the accused is that informant Suresh Bamnawat was adjacent land holder of the accused. In clear words this fact has come on record by way of

testimony of P.W. 1 Rahul Eknath Jadhav, P.W. 3 Nihalsing Jenhu Bamnawat, who was panch witness and P.W.4 Poonam Chainsing Bamnawat, who is another eye witness, the spot panchnama (Exhibit-42) as well as from testimony of defence witness i.e. D.W. 1 Bharat Sarjerao Vaidya. According to P.W. 2 Sachin Suresh Bamnawat and P.W. 4 Poonam, on the day of incident, they had taken cement bags to the land of Sachin, where a construction of the well was going on. These cement bags were taken in the jeep. The deceased Lakhan was with them. After unloading the cement bags, they were again proceeded in the same jeep from the land belonging to accused, where they were asked "to stop". According to P.W. 2 Sachin and P.W. 4 Poonam, after accused had obstructed them, he started abusing. They have not stated what were the abuses given to them and also on what count, but they both said that, all of them three in number, got down from the jeep and tried to convince the accused, however, accused took out knife from his waist and assaulted Lakhan in his chest by the knife. P.W. 4 – Poonam had stated, accused had removed air from the tyre of the jeep. Lakhan had sustained bleeding injury to his chest. He fell unconscious.

16. It is to be noted from the testimony of the defence witness D.W. 1 Bharat, he is accepting the fact that jeep was taken from his land and jeep was stopped. According to him, he had stopped the jeep, thereafter, called his brother Sandip. That

means, when part of the fact is accepted, whatever prosecution witnesses were saying till that point, will have to be accepted as proved. At the same time, if we peruse the spot panchnama, we can see that the tyre marks on the road, from which the jeep had gone, are almost from the middle of the field. Now it has been argued on behalf of the appellant that appellant being owner of the land had right to protect the property. It was his right to private defence, to stop anybody from causing damage to his property. According to accused, he had sown bajara seeds in the land. There is no evidence to that effect except bare statement of the defence witness D.W 1 Bharat. The question is, though jeep was being taken from the land of the accused whether he had right to cause any injury to the person and property. The basic principle of right of private defence is that there cannot be exclusive right of private defence. It is limited to the extent to protect property, so that, it is not being wasted or as regards right to person is concerned, it should be proportionate. There is no denial of fact which has been told by P.W. 4 Poonam that accused had tried to remove the air from the tyre. If that would have been done, it would have been sufficient to take into consideration the right to protect property.

17. Further, defence witness as well as accused in his statement under Section 313 of the Cr.P.C. do not say that when Jeep was being taken towards the field of P.W. 2 Sachin, at that time itself

there was an attempt on the part of accused or by his brother to stop Sachin, Lakhan and Poonam from taking that Jeep from their land. That means, they had allowed the vehicle to be taken from their field, but then, while coming out of the land of Sachin, they were obstructed. At that time, there was assault of stab on the person, who was driving the jeep. Further, if at all accused was very much concerned with his right to protect the property, he ought to have entered the witness box. When he has not entered the witness box and did not say anything, it cannot be proved through his brother. No doubt, cardinal principle to prove the private defence is that accused need not enter witness box, but he can rely upon the evidence of prosecution itself that may come in their cross-examination. In clear words, there is no suggestion to eye witness that certain acts were done by accused in order to protect his property. There is no reason to disbelieve P.W. 4 Poonam, even if we accept for the sake of argument that P.W. 2 Sachin being adjacent land holder was not on good terms with accused. The testimony of P.W. 4 - Poonam cannot be discarded only on the ground that he is friend of P.W.2 - Sachin.

18. D.W.1 Bharat has also stated about Sandip started releasing air from the tyre of the Jeep, as aforesaid that act only would have been sufficient to protect his property as right of private defence. However, D.W. 1 Bharat further deposed that Lakhan had pushed Sandip. Sandip fell down on the ground.

He got up. Thereafter, there was scuffle between Sandip and Lakhan. According to him, Sachin and Poonam assaulted to Sandip. Lakhan brought the knife, which was kept beneath the seat of Jeep, tried to give blow of knife to Sandip, however, Sandip avoided that blow, but, he had received scratch injuries on his hand. According to him, sleeve of his shirt got torn. Sandip pushed Lakhan heavily. Due to push, Lakhan dashed against the Jeep and his chest part came in contact with Jeep. Thus, even if, it is accepted for a moment, without admitting it, it does not give any explanation to stab injury, which was found on the person of Lakhan as per the post mortem report. There is no clear suggestion that any part of the jeep which had come out, got inserted in the chest of Lakhan, when he dashed against the jeep. Another fact is that, absolutely there is no explanation by D.W. 1 Bharat as well as in the statement of accused under Section 313 of Cr.P.C. as to why there was no attempt on the part of accused to lodge complaint against Sandip, Poonam and Lakhan. Therefore, it can be stated that whatever defence has been raised through D.W. 1 Bharat appears to be after thought defence.

19. Further evidence, which is against the accused is, discovery of knife at the hands of accused. P.W.8 Vitthalsing Kisansing Bamnawat is panch to memorandum panchnama (Exhibit- 54). He has proved the same. He has stated that Lakhan was his

distant relative i.e. nephew. Only on that count, it cannot be said that he was interested witness as statement was made in presence of panch by the accused, when he was in police custody to discover the knife. Thereafter, the accused had led discovery. The knife was recovered from the place, which is on Wakulni road, and thereafter, by going on Kaccha road, there was a dilapidated house, and thereafter, he was taken to field, where there was a big stone and knife was taken out from beneath the stone. Definitely, said place was known to the accused, therefore, he has discovered the knife. Said discovery is also proved by Investigating Officer, therefore, it is concluded that discovery is definitely admissible under Section 27 of the Indian Evidence Act, 1872.

20. Thus, taking into consideration all these facts, it can be seen that evidence of eye witnesses as well as medical evidence show that there was only one injury, which could have been given only by one blow. The eye witnesses have also stated as to how incident happened. That means, there was no premeditated mind, though the accused was holding knife in his hand. The prosecution has not come with the case that when Jeep was taken to the field of Sachin, at that time itself, it was noticed by the accused and that he had cautioned P.W. 2 Sachin that he should not again go through his field; thereafter, when Jeep started going, accused had stopped and then stabbed. So,

whatever happened was at spur of moment, and therefore, it cannot be said that there was an intention to commit murder of Lakhan. There was no enmity between Lakhan and accused prior to the incident. Therefore, there was no motive to commit his murder for the accused. Hence, we agree with the discussion made by the learned Sessions Judge that there was sudden grave provocation given by the informant and deceased by going from the field of accused. Therefore, Exception 1 provided to Section 300 of the IPC would be attracted. Therefore, case falls under Section 304 Part II of the IPC.

21. Another fact also to be taken into consideration when right of private defence is raised by the accused that as per D.W. 1 Bharat, accused had also sustained injury in the incident in question, which took place on 07-07-2012. The accused came to be arrested on 08-07-2012. Arrest panchnama does not show anything about injuries on the person of accused. So, on that count also, defence of right to private defence cannot be considered.

22. Learned Sessions Judge had sentenced the accused to suffer R.I. for seven years, which we consider to be on higher side. Taking into consideration the fact that only one blow was given with knife by accused that too on the fact that the deceased and the informant were passing through land of the

accused i.e. on the count of grave sudden provocation. The said sentence is required to be reduced. Under the fact and circumstances, we are of the opinion that R.I. for five years would be an appropriate sentence in said circumstances. Therefore, appeal filed by the accused deserves to be partly allowed. The appeal preferred by the prosecution deserves to be dismissed. Therefore, for aforesaid reasons, we proceed to pass the following order :-

O R D E R

- 1] Criminal Appeal No. 747 of 2016 stands dismissed.
- 2] Criminal Appeal No. 671 of 2016 is partly allowed.
- 3] Conviction of accused - Sandip Sarjerao Vaidya for the offence punishable under Section 304 Part II of I.P.C. is maintained. But, the sentence is modified and made it R.I. for five years and to pay a fine of Rs.10,000/-.
- 4] As per the order of trial Court, the amount is to be given as compensation to the widow of deceased Lakhan Harising Sisode.
- 5] Other part of the decision to remain there including entitlement of set in respect of sentence which accused had undergone.
- 6] Application for bail bearing Criminal Application No. 922 of 2018 stands disposed of.

(SMT. VIBHA KANKANWADI, J.)

(T.V. NALAWADE, J.)