

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.687 OF 2010

Baburao Dattatray Kadam.	]	
Age - 45 years, Occu. : Agriculture,	]	
R/o. Burud Manki Mala, Aitawade Budruk,	]	
Taluka - Walva, District - Sangli.	]	
(At present at Kolhapur Central Prison at	]	
Walva)	]	... Appellant
		Original Accused

Versus

The State of Maharashtra.	]	... Respondent
---------------------------	---	----------------

None for Appellant.
Mr. Ajay Patil, APP for State.

CORAM :- B. R. GAVAI &
SARANG V. KOTWAL, JJ.
DATE :- 15 JUNE, 2018

JUDGMENT (PER SARANG V. KOTWAL, J.) :-

1. The present Appeal is filed by the Appellant challenging the Judgment and Order dated 22/07/2010 passed by the learned Ad-hoc Additional Sessions Judge, Islampur, in Sessions Case No.6 of 2009. By the impugned Judgment and Oder, the Appellant was convicted for commission of offence punishable under Section 302 of

the IPC and was sentenced to suffer life imprisonment and to pay a fine of Rs.2,000/- and in default of payment of fine, to undergo rigorous imprisonment for six months. The Appellant was given set off under Section 428 of the Cr.P.C. for the period which he had already undergone in jail from 11/11/2009 till the date of conviction i.e. 22/07/2010.

2. The prosecution case, in brief, is as follows :

The present Appellant was cousin of Vilas Shamrao Kadam (the deceased in the present case). The Appellant and Vilas had agricultural lands which were situated adjacent to each other. Vilas was having 38 gunthas and the Appellant was having 18 gunthas. There was a well with an electric pump in the land of the present Appellant. The water was shared by both of them. However, 4 to 5 days prior to the incident dated 10/11/2008, the Appellant had made a water canal in his field. The said water canal was destroyed by Vilas, therefore there was a quarrel between them. Both were pacified by Vilas's brother Ananda and after that Vilas had restored the water canal. Even then the Appellant was holding a grudge against Vilas. As per the prosecution case, on 10/11/2008 at about 4.00 p.m., Vilas's

wife Sunanda heard shouts in their agricultural land. When she went there, she saw that the Appellant gave a blow of sickle on Vilas's thigh. When she tried to intervene, the Appellant pushed her and quarreled with her. The Appellant's son Sagar pressed his leg on Vilas's throat due to which Vilas got severely injured and became motionless. After that, the the Appellant and his son Sagar went away from the spot. Vilas's wife informed Ananda's son. After sometime, Vilas's brother Ananda came and removed him to the hospital but Vilas was declared dead. Vilas's wife then gave her FIR to the police. The FIR was registered vide C.R.No.66 of 2008 at Kurlap Police Station under Section 302 read with 34 of the IPC. The FIR was lodged at 7.00 p.m. on 10/11/2008.

3. The Appellant was arrested on 11/11/2008 along with his son Sagar. Since Sagar was a juvenile in conflict with law, he was produced before the Juvenile Court. As per the prosecution case, on 13/11/2008, a sickle used by the Appellant was recovered at his instance from below some leaves near a shed in the land belonging to Vilas. At the time of arrest of the Applicant, his clothes were seized by the police. All the articles were sent for chemical analysis. Different

panchanamas viz. inquest panchanama, spot panchanama, etc., were conducted. The statements of various witnesses were recorded and at the conclusion of the investigation, charge-sheet was filed. The offence being exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions, Sangli, and it was tried by the Ad-hoc Additional Sessions Judge, Islampur.

4. During trial, the prosecution examined 10 witnesses. PW 1 Dhanaji Gaikwad was a pancha for inquest panchanama. PW 2 Ashok Randive was a pancha when clothes of the deceased were taken charge of. PW 3 Narayan Gaikwad was a pancha for spot panchanama. PW 4 Shivaji Gaikwad was a pancha when the sickle was recovered at the instance of the present Appellant. PW 5 Sunanda Kadam was the widow of the deceased and was an eye witness to the incident. PW 6 Sachin Sadale was a pancha when the Appellant was arrested and his clothes were seized. PW 7 Dr. Shahaji Shelke had conducted the post-mortem examination on the dead body of the deceased and also had issued medical certificate in respect of the injuries suffered by the Appellant. PW 8 PHC Shivaji Desai had recorded the FIR given by the PW 5. The FIR is produced at Exh.17.

PW 9 Ananda Kadam was the brother of the deceased and had deposed about the past dispute between the deceased and the Appellant. PW 10 Bhimanand Nalavade was the Investigating Officer who had conducted the investigation from 11/11/2008 onwards. He handed over the investigation to PI Mr. R. G. Patil subsequently who, in turn, filed the charge-sheet.

5. The Appellant has taken a specific defence in the statement recorded under Section 313 of the Cr.P.C., that on 10/11/2008, when he was passing from near the agricultural land of the deceased, suddenly the deceased Vilas assaulted him on his head from backside with a sickle and gave further blows. At that time, his right hand thumb was cut and he suffered injuries on his stomach. It was the Appellant's case that, in the scuffle, Vilas's own sickle caused injuries to his own thigh. As Vilas fell because of this injury, the Appellant ran away from the spot and went to Kurlap Police Station for lodging his FIR. He was sent to Kurlap Primary Health Centre and then was shifted to Islampur for further treatment and thereafter he was shifted to the Government Hospital at Sangli.

6. After hearing both the parties, the learned trial Judge passed the impugned Judgment and Order as mentioned earlier.

7. We have heard Mr. Ajay Patil, learned APP for State. The Advocate for the Appellant was not present. Therefore, we have read the evidence and the Judgment with the assistance of the learned APP.

8. The prosecution case rests heavily on the evidence of PW 5 Sunanda Kadam who is the widow of the deceased. According to her, Vilas and the present Appellant had purchased 1½ acres of agricultural land before 10 years of the incident. Vilas was owing 38 gunthas and the Appellant was having 18 gunthas. There was a common well for both the lands in the land of the present Appellant on which common electric pump was fixed. The pipeline was laid by Vilas which was used by the Appellant also. She has further deposed that about 4 to 5 days prior to the incident dated 10/11/2008, the Appellant had constructed a water canal in Vilas's field which was removed by Vilas. Due to this, there was a dispute between Vilas and the present Appellant. Vilas's brother Ananda pacified both the parties because of which Vilas reconstructed the water canal in their field but

still the Appellant was angry with Vilas. On 10/11/2008 at about 4.00 p.m., Vilas was cutting grass in his field and PW 5 had gone to a water stream nearby for washing clothes. When she was returning, she saw that the Appellant gave a blow of sickle on Vilas. PW 5 rushed there and snatched away the sickle from the Appellant. That time, the Appellant pushed her and took back the sickle. The Appellant's son Sagar made Vilas to fall down on ground and pressed his leg on his throat. PW 5 was telling the Appellant not to assault her husband but the Appellant pushed her. Vilas was struggling and became unconscious. After that, the Appellant and his son went away from there. PW 5 then informed Anandrao's son Amol about the incident, who, in turn, informed Anandarao. Both of them came to the spot and removed Vilas to the hospital but he was declared dead. Thereafter, PW 5 lodged her FIR which is produced on record at Exh.17. In her cross-examination, she gave details of their land and situation of other agricultural fields surrounding those agricultural lands. About the main incident, she denied the suggestions put to her on behalf of the defence. Other than the suggestions put by the defence, there was nothing much in the cross-examination in favour of the Appellant.

9. PW 9 Ananda Kadam has supported this witness in respect of the earlier disputes between Vilas and the Appellant. We find that PW 5 is a truthful witness and she has deposed before the Court what she had seen. There is no reason to discard her evidence. She was a natural witness. She was present at the spot when part of the incident occurred. She had immediately lodged her FIR. There is nothing on record which would discredit her deposition before the Court.

10. Apart from the direct evidence of PW 5, the prosecution has relied on other corroborating circumstances. The spot panchanama and the panchanama of seizure of clothes of the deceased show that the articles were properly sealed and were sent for chemical analysis. PW 5 Sachin Sadale was a pancha when the Appellant was arrested at 3.00 p.m. on 11/11/2008. At that time, the clothes which were on the person of the accused were seized. Those clothes were also sent for chemical analysis. PW 4 Shivaji Gaikwad was a pancha when the sickle was recovered at the instance of the Appellant. He has deposed that the statement of the Appellant was recorded under Section 27 of the Evidence Act. The Appellant led them to a shed in the agricultural field of Vilas and from near that

shed, the sickle was recovered concealed below leaves. All these articles were sent for chemical analysis. The CA report is produced at Exh.34. All the articles sent to CA showed presence of human blood. However, the analysis for finding out the blood group was inconclusive.

11. Thus, the prosecution has established that the incident had taken place and the Appellant had caused bleeding injury on the leg of the deceased. This fact is mainly established through the direct evidence of PW 5 Sunanda. It is corroborated by the bloodstained clothes seized from the person of the Appellant and the bloodstained weapon recovered at his instance.

12. The next question that falls for our consideration is as to whether the Appellant had committed the offence of murder as defined under Section 300 of the IPC. For deciding this question, the background of the incident needs to be taken into account. As per the prosecution case, there was a dispute regarding construction of water canal in the field. That dispute was resolved through mediation of PW 9 Ananda though the Appellant was not fully satisfied. Thereafter

there is evidence of PW 5 regarding the main incident. When the incident started, PW 5 was not there. She was washing clothes nearby but when she was returning, she saw that the Appellant gave a blow with sickle on Vilas. Therefore, even as per the prosecution case, she has not deposed how the incident had started. Thus, the genesis of the incident is not before the Court. According to this witness PW 5, her husband was cutting grass in his field but the spot panchanama conducted subsequently did not show that there was any sickle lying at the spot. Therefore, there is no conclusive evidence to show that the sickle involved in the offence which was recovered at the instance of the present Appellant, was with Vilas or with the Appellant when the incident started. The prosecution case, through the evidence of PW 5, at the highest, mentions that the Appellant gave a blow of sickle just above the knee of the deceased. Then there was verbal exchange between the Appellant and the PW 5 and at some point she had even snatched the sickle from the Appellant. From the evidence, it is seen that by that time, the Appellant's son pressed his leg on Vilas's throat which ultimately led to his death. Thus, in the facts of this case, the role played by the present Appellant and the role played by his son are clearly separate. The prosecution has not proved that

there was any premeditation or preparation for commission of the assault. Therefore, the present Appellant cannot be held liable for the act committed by his son on the spur of the moment. The evidence does not show that they shared any common intention. The Appellant has taken a specific defence that while passing from the field of the deceased, the deceased Vilas attacked him with sickle. According to the Appellant, he himself suffered injuries and in the process, the deceased also suffered injuries on his thigh by his own weapon. The injuries suffered by the Appellant are brought on record through the evidence of PW 7 Dr. Shelke. In his cross-examination, he was asked about the medical certificate issued by him and the medical certificate is produced on record at Exh.23. These injuries are very minor and therefore, failure on the part of PW 5 to explain such injuries is not fatal to the prosecution case. At the same time, these injuries indicate that some incident had taken place before PW 5 reached on the spot to witness the incident. Therefore, the genesis of the incident is not brought forth through any other evidence by the prosecution and therefore, it is difficult to hold that the Appellant had attacked the deceased with premeditation and preparation. The Appellant is entitled for benefit of doubt to that extent.

13. In this background, it is necessary to consider the medical evidence in the form of deposition of PW 7 Dr. Shelke. Dr. Shelke had conducted the post-mortem examination on the dead body of the deceased and had noticed the following injuries.

- (1) Injury above right knee, anteriorly, 4cm in length X 1½ cm in width X 3 cm in depth. 1 cm above knee (patella) and it was fresh, caused by sharp cutting object.
- (2) Abrasion on thyroid cartilage, transversely, about 2 cm in length and 2 cm in depth.

The cause of death was given by him as 'cardio-respiratory arrest due to asphyxia due to throttling with shock due to blood loss'. The post-mortem notes are produced at Exh.21. The said witness has further deposed that the Injury No.(1) (i.e. injury attributed to the present Appellant) was sufficient in the ordinary course to cause death and according to him, the death is caused because of both the injuries. However in the cross-examination, he has admitted that he had not mentioned the type of Injury No.(1). It was an incised wound but he had not mentioned as to whether it was vertical or horizontal. More importantly, he has admitted that 'superficial branches of popliteal vein and popliteal artery were cut'. He has further admitted that when the

branches of popliteal vein and popliteal artery are cut, the blood flow is very slow. Thus, though the Medical Officer has opined that the injury was sufficient in the ordinary course of nature to cause death, at the same time, he has admitted in the cross-examination that the only superficial branches of popliteal vein and popliteal artery were cut. The injury was just above the right knee. Therefore, it cannot be said that the Appellant had given a blow on a vital part or that he had knowledge that the injury which he was causing was sufficient in the ordinary course of nature to cause death. In the facts of this case, it cannot be said that the Appellant either had intention or knowledge that his act would cause such an injury which, in the ordinary course of nature, would cause death. In our opinion, his act does not fall within the definition of Section 300 of the IPC. We are of the opinion that his act does not even fall within the conditions mentioned in Section 304 of the IPC and therefore, he cannot be held liable even for commission of culpable homicide not amounting to murder. The prosecution has not proved that the offence would be punishable under Section 326 of the IPC either. For convicting and sentencing and accused under Section 326 of the IPC, it is necessary that the accused should actually cause a grievous hurt and more importantly,

he should intend to cause or he should know that his act was likely to cause a grievous hurt, as mentioned under Section 322 of the IPC. In the present case, since a single blow was given just above the knee which was not a vital part and since the only superficial branches of popliteal vein and popliteal artery were cut, it cannot be held that the Appellant intended to cause and actually caused a grievous hurt. Therefore, the Appellant cannot be convicted for commission of offence punishable under Section 326 of the IPC. In this view of the matter, we are of the opinion that the Appellant can be convicted for commission of offence punishable under Section 324 of the IPC i.e. voluntarily causing hurt by dangerous weapon. Under the said Section, the maximum punishment provided is 3 years. Since in the instant case the victim has ultimately died in the incident, we are inclined to award the maximum punishment under this Section and therefore, the Appellant is sentenced to suffer rigorous imprisonment for three years.

14. Hence, the following order :

ORDER

The Appeal is partly allowed.

The conviction of the Appellant u/s 302 of the IPC and the sentence awarded to him thereunder is quashed and set aside.

The Accused is convicted for the offence punishable under Section 324 of the IPC and is sentenced to suffer rigorous imprisonment for a period of three years.

Since the accused has already undergone the sentence for more than three years, he is directed to be released forthwith, if not required in any other case.

(SARANG V. KOTWAL, J.)

(B. R. GAVAI, J.)