

VPH

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. 150 OF 2015

Marvat Bhiva Mukane)

Age 53 years, R/at Gandhre,)

Thakrepada, Taluka Wada ... Appellant

Vs.

The State of Maharashtra)

(Through Wada Police Station)... Respondent

Ms. Rohini M. Dandekar, (appointed) for the Appellant.

Mrs. G. P. Mulekar, APP for the Respondent – State.

CORAM : Smt. V. K. TAHILRAMANI,
ACTING CHIEF JUSTICE, &
P. N. DESHMUKH, J.
(SPECIAL VACATION BENCH)

DATE : MAY 9, 2018

JUDGMENT [Per : P. N. DESHMUKH, J.]

1. Original accused No. 1 has challenged judgment of
learned Additional Sessions Judge, Thane passed in Sessions

Case No. 56 of 2010 dated 27th August, 2014 whereby abovenamed Appellant alongwith original accused No. 2 Sachin Mukane (not before the Court) are convicted for the offence punishable under Section 302 read with 34 of Indian Penal Code and are imposed with sentence of rigorous imprisonment for life and to pay fine of Rs.1,000/-, in default to suffer R.I. for three months. Since 25.8.2009 Appellant is in custody.

2. In brief, it is case of prosecution that:

(i) Deceased Rupesh Thakare was son of PW 1 Ashok Thakare and was assisting his father in agriculture operations and in running poultry farm business since 2009. Prior to incident, one fighter cock owned by deceased was killed by original accused No. 2, which was worth Rs. 1,500/-, and therefore, deceased Rupesh was demanding such price to accused No. 2, which remained unpaid till the incident which has occurred on 23.8.2009.

(ii) In the background of above facts, it is case of

prosecution that on 23.8.2009 during Ganpati festival, there was some entertainment programme in the village. At about 11.20 p.m. when deceased alongwith PW 1 Ashok his father, PW 2 Ram Thkare, his uncle, PW 3 Kapil were present in the house, absconding accused Ankush Mukane visited and informed that accused No. 2 Sachin has called him as he has to pay price of fighter cock. Deceased accordingly accompanied Ankush and was followed by PW 2 Ram, PW 3 Kapil. When deceased reached near the house of original accused No. 2 Sachin, accused No. 2 having armed with sickle asked deceased if he want to recover price of Rs.1,500/- of the fighter cock and at the same time absconding accused Gangaram and Ankush committed assault by sticks on head of deceased. Therefore, to save himself, deceased ran towards the house of one Nakhava where he was assaulted by Appellant by stick and original accused No. 2 Sachin by sickle, due to which, he fell unconscious. Fact of assault was brought to the notice of the PW1 Ashok father of deceased by PW 3 Kapil who immediately

rushed to the spot and injured Rupesh was shifted to Rural Hospital of Wada, and from there to Civil Hospital Kalwa, Thane and further to Sion Hospital where he succumbed to injuries on 24.8.2009 at 11.45 p.m.

(iii) On the basis of report dated 25.8.2009 lodged by PW 2 Ram, uncle of deceased vide Exhibit 29, offence came to be registered vide C. R. No. 160/2009 under Section 302 read with 34 of I.P.C., and was investigated by PW 11 Rajiv Chavan, during the course of which he visited scene of offence and seized articles from the spot at Exhibit 61 and drew sketch of spot at Exhibit 62. Blood stained clothes of deceased came to be seized in presence of panch witness PW 6 Baban Patil at Exhibit 47 and Appellant came to be arrested on 25.8.2009 under arrest panchanama Exhibit 56. On interrogation, Appellant on 28.8.2009 voluntarily made statement, which came to be recorded vide Exhibit 49, to discover stick used in the crime, in presence of panch witnesses PW 7 Arvind and Bhalchandra, and pursuance to the same, one bamboo stick came to be seized at

the instance of Appellant vide panchanama Exhibit 50. On arrest of accused No. 2 Sachin, one sickle came to be seized at his instance. After recording statement off witnesses, all muddemal articles came to be forwarded to Chemical Analyser, of which C.A. reports are on record at Exhibits 78 to 81. On completion of investigation and receipt of post mortem report, charge-sheet is filed in the court of learned J.M.F.C. Wada. In the course of time, case came to be committed for trial to the Sessions Court, Thane. Charge is framed against accused at Exhibit 2 for the offences punishable under Section 302 read with 34 of I.P.C. to which he denied and claimed to be tried. His defence is of total denial. No defence evidence is led by Appellant.

3. To establish charge levelled against accused, prosecution in all examined 13 witnesses, and commenced its evidence by examining PW 1 Ashok father of deceased, PW 2 Ram, and; PW 3 Kapil, both eye witnesses and uncle and cousin of deceased; PW 4, Jaywant Dattatray Thakare, third eye witness; PW 5 Jaywant Ganpat Thakare, a panch witness on

arrest panchanama of original accused No. 2 Sachin; PW 6 Baban Patil, panch witness on seizure of clothes of deceased; PW 7 Arvind Thakare, panch witness on memorandum statement of Appellant and seizure of bamboo stick; PW 8 Madan Thakare, panch witness on memorandum statement of original accused No. 2 and recovery of sickle; PW 9 Manohar Patil, independent eye witness, who has also acted as spot panch; PW 10 Damodar, panch witness on memorandum statement of original accused No. 2 and on seizure of blood stained clothes of said accused; PW 11 Rajiv Chavan, Investigating Officer; PW 12 Medical Officer, Dr. Rajesh Dere, who has performed post mortem and issued P. M. report (Exhibit 85), and concluded evidence on examining PW 13 Dr. Vasantrao More, attached to Rural Hospital Wada, who has examined deceased Rupesh on 24.8.2009 and issued injury certificate (Exhibit 88). Considering evidence of above witnesses, learned Additional Sessions Judge convicted Appellant as aforesaid. Hence, this appeal.

4. Learned advocate Mr. Rohini Dandekar, appointed for

Appellant by referring to the evidence of eye witnesses submitted that from their evidence, it cannot be said that Appellant had intention to commit murder of deceased, as according to their evidence, Appellant was armed with bamboo stick and none of the eye witnesses had deposed of Appellant committing assault on the vital part of the body and has thus, contended that since, according to medical evidence, death is caused due to the injury sustained by sickle, which according to the eye witnesses is attributed to original accused No. 2 Sachin, prayed that Appellant's case falls for punishment for lesser offence.

5. Learned Additional Public Prosecutor Mrs. G. P. Mule has opposed the submissions and supported the impugned judgment and submitted that as there is direct evidence, showing involvement of Appellant alongwith co-accused and therefore prayed that appeal be dismissed.

6. In the background of the case of prosecution and

submissions advanced as aforesaid, perusal of relevant evidence would reveal that PW 1 Ashok, father of deceased on 23.8.2009 learnt of assault on his son Rupesh from PW 3 Kapil, who prior to that had left with absconding accused Ankush. Therefore, he rushed to the spot and took injured Rupesh initially to hospital at Wada, and then to Civil Hospital at Thane and then to the hospital at Sion. In cross-examination, he has admitted that Appellant had no concern with the financial transaction between deceased and original accused No. 2 Sachin with regard to price of chicken.

7. From the evidence of PW 2 Ram, complainant, evidence of PW 1 Ashok is found corroborated when he has stated that when he was present in the house of Rupesh on 23.8.2009, absconding accused came and informed him that as original accused No. 2 Sachin was to pay him price of fighter cock, he had called him and thus, deceased accompanied Ankush. PW 3 Kapil further stated that he alongwith PW 2 Ram followed them and has stated that when they were near the

house of absconding accused Ankush, original accused No. 2 Sachin was present there having armed with sickle and asked deceased if he want price of fighter cock? and immediately committed assault by sickle on deceased. He further stated that at the same time, Appellant alongwith absconding accused Gangaram, Ankush assaulted by sticks. On witnessing said incident, he went to house of deceased Rupesh and informed his father. In the cross-examination, though attempt is made to bring on record that there was no source of light and thus, he could not identify the assailants, PW 3 Kapil denied such suggestion and had volunteered that there was no dark, as there was electricity supply. He also denied that there was load shading. Nothing has come on record to doubt his version. Evidence of PW 2 Ram fully corroborates version of PW 3 Kapil of absconding accused coming to the house of deceased and saying that as original accused No. 2 Sachin was to pay him price of chicken, Rupesh should accompany him and when they left, he alongwith PW 3 Kapil followed them, when they noticed

that after going for some distance, original accused No. 2 Sachin committed assault by sickle while absconding accused Gangaram, Ankush assaulted Rupesh by stick, due to which he fell unconscious.

.. Both these witnesses deposed about referring Rupesh in injured condition to Wada hospital, and then to Government Hospital at Thane, and then to hospital at Sion where he succumbed to the injuries, upon which he lodged report as per Exhibit 29.

.. In the cross-examination, similar suggestion was put to PW 2 Ram about no source of light on the spot, which is denied. Though he admits that there is no mention of PW 3 Kapil to have accompanied him at the time of incident, such omission is pointed to be from the report lodged by PW 2 Ram is insignificant, more particularly, when PW 3 Kapil is examined and in clear terms he has deposed to have witnessed the incident of assault by Appellant alongwith original accused No. 2 Sachin and absconding accused on Rupesh.

8. Apart from above witnesses, evidence of PW 9 Manohar Patil, who appears to be a chance witness further corroborates the above evidence who has deposed that on the day of incident while he was in the dance programme arranged during the Ganpati festival, and when he went to answer nature's call behind the house of one Darpa, he found quarrel between deceased and original accused No. 2 Sachin in progress, and said second accused armed with sickle, and deposed that said accused with absconding accused Ankush, Gangaram assaulted Rupesh by sticks. Presence of this witness on the spot is natural, who appears to be present for the entertainment programme arranged during Ganpati festival and when he happens to go behind the house of one Darpa to answer nature's call, he happens to witness the incident by chance. Moreover, there is no reason for this witness to falsely implicate Appellant as in the cross-examination he has admitted that deceased was not related to him in any manner but he was knowing him. When above evidence is thus, considered, it is necessary to note

that none of these eye witnesses have attributed Appellant with specific assault by stick on any vital part of body of the deceased. In fact, it has come in the evidence of PW 1 Ashok, father of deceased that Appellant was in no way concerned with payment of price of chicken. Similarly, PW 2 Ram has stated that he is unable to state which accused was holding which stick.

9. In the background of above evidence, evidence of PW 7 Arvind though establish recovery and seizure of one bamboo stick which came to be seized under panchanama (exhibit 50) in pursuance of memorandum statement of Appellant (exhibit 49), that by itself is not sufficient to establish role of Appellant in the present crime as assailant of Rupesh committing assault with intention to cause his death.

10. From the evidence of PW 12 Dr. Rajesh Dere, who has performed autopsy, deceased Rupesh was found to have sustained five external injuries, out of which injury No. 1 was sutured contused incised wound 3 cm above left eyebrow,

admeasuring 2 cm x 2 cm x 5 cm, and was sufficient to cause death in the ordinary course of nature. The medical officer in clear terms opined that out of 5 injuries, injury Nos. 1 to 4 found on the person of deceased are incised wounds, possible by sickle and injury No. 5 is in the form of contusion, which is possible by stick. According to the case of prosecution, apart from Appellant, two absconding accused also assaulted deceased by sticks. However, as per P. M. Notes as deceased is found to have sustained only one injury by stick, it cannot be said who is the author of said injury caused by stick. In fact, from the evidence of eye witnesses and even according to the case of prosecution, injury which is stated to be fatal is caused by sickle on the head of deceased by original accused No. 2 Sachin. Apart from that, injury Nos. 2, 3 and 4 are attributed to original accused No. 2 Sachin being incise wounds and are possible by sickle.

11. In the background of above facts, while considering case of Appellant which falls for imposing any lesser punishment, we find it useful to refer the judgment in the case

of *Surajit Sarkar ..vs.. State of West Bengal*, reported in *(2013)2 SCC 146*, wherein from the evidence led on behalf of the prosecution, it was found that the deceased was assaulted by the accused with iron rod. The injuries sustained by the deceased could be seen from paragraph no.14 of the said judgment which reads thus :

“14. PW 9 Dr. Partha Sarathi Saha confirmed the injuries on Gour Chandra Sarkar and stated that a hard, blunt weapon could have caused them. The injuries were :

- (1) 1½ “ cut mark over the right front parietal region.
- (2) ½: cut mark over the back of right parietal region.

There were some abrasion marks over the right ear and right knee. He also found that the right parietal bone was fractured. The membrane and brain matter were ruptured. There was a fracture of the right 6th and 7th ribs and a fracture of the lower end of right radius and dislocation of the right elbow joint. In his cross-examination this witness stated that injuries (1) and (2) above may be caused by contact with a

hard and blunt weapon and even by a fall.”

12. Though the Apex Court found that there was shoddy and defective investigation, the court found that the accused was not entitled to acquittal. However, the Apex Court discussed as to whether offence under Section 302 of IPC was made out or not. It would be relevant to refer to paragraph No. 64 of the said Judgment which reads thus :

“64. Given the nature of injuries, it is difficult to accept the view that Surajit Sarkar intended to cause the death of Gour Chandra Sarkar or that the injuries were so imminently dangerous that they would, in all probability, cause death. The murder of Gour Chandra Sarkar would, therefore, be ruled out. Nevertheless, the injuries were quite serious and inflicted by Surajit Sarkar on Gour Chandra Sarkar’s head with an iron rod, as stated by PW 8 Achintya Sarkar. We can surely credit Surajit Sarkar with the knowledge and if a person is hit with an iron rod on the head, then the act is likely to cause the death of the victim. That being so, in our opinion, it would be more appropriate to hold Surjit Sarkar guilty of an offence of culpable homicide not amounting to murder. Since we attribute to him the knowledge of his actions, he should be punished under the second part of Section 304 IPC.”

13. In view of above pronouncement, thus, when evidence of witnesses referred above is considered, it is noted that their evidence is short to establish Appellant's involvement as author of fatal blow by sickle on the head of deceased resulting into death of deceased which is inflicted by original accused No. 2. Moreover, only one injury is found on the person of deceased, which is possible by stick, while according to the case of prosecution, apart from Appellant, two absconding accused are attributed assault by sticks on the deceased thus, it cannot be said that injuries sustained by stick is caused by Appellant, which even otherwise is not fatal. Moreover, and as already stated, Appellant had no concern with payment of price of chicken, which was due from original accused No. 2 Sachin to deceased. As such, no motive even can be attributed to Appellant to cause death of Rupesh.

14. For the above stated reason, we are of the view that case of Appellant would not fall under Section 302 I.P.C., but would fall under Section 304, Part-II of I.P.C.

15. In that view of the matter, we find that conviction under Section 302 of I.P.C. is not maintainable, as the case would fall under Part-II of Section 304 of I.P.C. In the result, appeal is partly allowed as under:

(i) Order of conviction of Appellant / original accused No. 1 Marvat Bhiva Mukane under Section 302 of I.P.C. imposed vide judgment dated 27th August, 2014 passed in Sessions Case No. 56 of 2010 is altered to Section 304 Part-II of I.P.C. and his sentence is reduced from life imprisonment to ten years rigorous imprisonment;

(ii) Rest of the order regarding fine is maintained.

Sd/-

[P. N. DESHMUKH, J.]

Sd/-

[ACTING CHIEF JUSTICE]

Vinayak Halemath