

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.519 OF 2012

1] Bharat Ganpat Gaikwad
Age 37 yrs., Occu. Carpenter,

2] Ramhari Ganpat Gaikwad
Age 49 yrs., Occu. Carpenter,

3] Pratap Ganpat Gaikwad
Age 45 yrs., Occu. Carpenter,

All R/at :- Gandhi Nagar Zopadpatti,
Pimpri Pune.

(now in Yerwada Central Jail, Pune)

..Appellant

(Orig. Accused Nos.1 to 3)

Versus

State of Maharashtra
Pimpri Police Station, Pune

..Respondent

Mr. Daulat G. Khamkar, Advocate for Appellants/Applicant.

Mrs. S. S. Kaushik, for Respondent - State.

**ALONGWITH
CRIMINAL APPEAL NO.443 OF 2012**

Samrat Laxman Gaikwad
Age 24 yrs., Occu. Carpenter,
R/at Gandhi Nagar Zopadpatti,
Pimpri Pune.
(At present in Yerwada Central Jail)

..Appellant

(Orig. Accused No.4)

Versus

State of Maharashtra
(Through officer in-charge
Pimpri Police Station, Pune)

..Respondent

.....

Mr. Prashant M. Patil, Advocate for Appellant.

Mrs. S. S. Kaushik, for Respondent/State.

**CORAM : B. R. GAVAI &
SARANG V. KOTWAL, JJ.
DATE : 17th JULY, 2018**

ORAL JUDGMENT (Per B. R. Gavai, J)

1] Being aggrieved by the judgment and order dated 31st March 2012 passed by the learned District Judge-10 & Additional Sessions Judge, Pune in Sessions Case No.166 of 2009, thereby convicting Appellants/Accused Nos.1 to 4 for the offence punishable under Section 302 r/w 34 of the Indian Penal Code ("IPC" for short) and sentencing to suffer imprisonment for life and to pay fine of Rs.1000/- and in default to suffer rigorous imprisonment for two months, Appellants have approached this Court.

The Accused No.2 – Ramhari Gaikwad has also been convicted for the offence punishable under Section 323 of IPC and sentenced to suffer rigorous imprisonment for three months and to pay fine of Rs.1000/- and in default to suffer rigorous imprisonment for two months.

2] The prosecution story in brief as could be gathered from

the material placed on record is thus :-

The deceased - Ravi Wadmare was residing in Boudha Nagar. The brother of the deceased, Navnath Wadmare was residing in Pimpri alongwith his mother, father, wife and two sons. The accused persons were also residing near the house of PW-1 – Navnath Wadmare. It is the prosecution case that Ravi Wadmare had an affair with Alka, first wife of Accused No.1 – Bharat Gaikwad and thereafter he had taken her away and performed marriage with her. After marriage, they both were residing at Boudha Nagar. Before two days of the date of incident, Alka had delivered a female child and therefore, Ravi was distributing sweets. When he was distributing sweets near the grocery shop of Tararam Choudhari, Accused No.1 – Bharat Gaikwad and his brothers Accused No.2 – Ramhari Gaikwad, Accused No.3 – Pratap Gaikwad and one another relative i.e. Accused No.4 – Samrat Gaikwad assaulted Ravi Wadmare. They assaulted with iron pipe and sickle. One Sanjay Wadmare informed PW-1 – Navnath Wadmare about the scuffle between the deceased and the accused persons. He ran to the spot. He saw the accused Samrat Gaikwad had caught hold of deceased

BGP.

Ravi and Ramhari Gaikwad and Pratap Gaikwad were beating him with iron rod. Accused No.1 – Bharat Gaikwad was having sickle in his hand and gave blows of sickle on the head of deceased one after another. Thereafter deceased fell down in drainage and when PW-1 – Navnath Wadmare tried to save his brother, Accused No.2 - Ramhari Gaikwad gave blow of iron pipe on his face, due to which he sustained injuries on his head.

3] PW-1 – Navnath Wadmare thereafter asked his friends to take the deceased to YCM hospital and he went to the Police Station and informed about the quarrel to Police and from Police Station he went to YCM hospital. There he came to know about death of his brother. Thereafter he came to Police Station. On the basis of his oral report an offence vide Crime No.539 of 2008 came to be registered for the offence punishable under Section 302, 323 r/w 34 of IPC. Upon completion of investigation, a charge-sheet came to be filed in the Court of learned Judicial Magistrate First Class, Pimpri. Since the case was exclusively triable by the learned Sessions Judge, the same came to be committed to the learned Sessions Judge. The charge came to be framed at Exh.5 for the

offence punishable under Section 302, 323 r/w 34 of IPC. The accused pleaded not guilty and claimed to be tried. At the conclusion of trial, the learned Trial Judge passed an order of conviction and sentence as aforesaid.

4] Mr. Khamkar and Mr. Patil learned counsel for the Appellants submit that the prosecution is based solely on the testimony of interested witnesses. It is submitted that there is also enmity between family of the deceased and the accused persons in as much as the deceased had eloped with the first wife of the Accused No.1 – Bharat Gaikwad. It is therefore submitted that as such, possibility of false implication cannot be ruled out. The learned counsel therefore submitted that the order of conviction is liable to be set aside. In the alternative, it is submitted that from the evidence of prosecution witnesses as well as the defence witnesses, it is the deceased who has tried to outrage modesty of the second wife of the Accused No.1 – Bharat Gaikwad. It is submitted that the deceased had also teased the Accused No.1 - Bharat Gaikwad with regard to he being impotent. It is therefore submitted that possibility of the Accused No.1 – Bharat Gaikwad assaulting the

deceased on account of sudden and grave provocation cannot be ruled out.

5] With the assistance of the learned APP and the learned counsel for the Appellants we have scrutinized the evidence on record. From the evidence of PW-6 – Dr. Subhash Madane, who has conducted postmortem of the deceased would reveal that the deceased has suffered following external injuries :-

- “(I) Contused Lacerated Wound on parieto temporal area of skull right side directed transversely 6 cms. Above right ear 10 cms. X 1cm x 2 cm. bone deep, base shows fracture skull boner into multiple pieces with crushed brain herniating out;
- (II) Contused lacerated wound on temporal area of skull right side directed obliquely and vertically above right ear 5 cms x 3 cms x bone deep, base shows fracture skull bones and crushed brain;
- (III) CLW over temporo occipital area of skull right side directed obliquely behind injury no.2 of Column no.17; 6 cms x 2 cms x bone deep floor shows crushed brain herniating out;
- (IV) CLW over directed vertically on right side of face zygomaxillary area 2 cm behind right eye 6 cms x 2 ½ cms x floor shows fracture fascial bones and lacerated soft tissue;
- (V) CLW above right eyebrow 1 cm above directed transversely 3 cms x ½ cm in dimension bone

deep;

- (VI) CLW over right ear pinna transverse directed and 2 ½ cm in length;
- (VII) CLW over right ear above canthus 2 ½ cm x ½ cm.;
- (VIII) abrasion over right Mastoid region irregularly oval in shape about 3 cm in diameter brownish in colour;
- (IX) Contusion back right side in scapular area bluish black in colour vertically directed 6 cms x 1 cm in dimension;
- (X) Abrasion of different small dimension on right elbow, left arm, right knee.

Nature of injury – injury nos.1 to 5 were grievous, nos.6 to 10 were simple, object of injury was hard and blunt. All the injuries were ante-mortem in nature.

The deceased has suffered following internal injuries :-

Contused under scalp right side adjacent to injury nos.1, 2, 3, 5 of corresponding to column no.17;

Right fronto parieto temporal bone was fractured into multiple small pieces, many of them burrowed in brain tissue;

Right zygo maxillary bone fracture into multiple pieces with lacerated underneath soft tissue of injury no.4 of column no.17. Base of skull fractured right side of multiple levels duto teared at multiple sites. Right fronto parieto temporal lobe of brain contused, lacerated and crushed herniating; out other part of brain was pale.”

He has stated in deposition that if the forceful blows from the blunt

side of sickle were given, the injuries at Sr. Nos.1 to 5 in Column No.17 and corresponding Column No.19 are possible. He has also deposed that the same is the case if the blows are given by iron pipes. He has admitted in his cross-examination that CLW is always caused by hard and blunt object and by a sharp weapon, injury caused is incised wound. He has admitted that CLW are not possible by the sharp side of the sickle, which is said to be used in the crime. He has further admitted that injuries at Sr. Nos.1 to 5 in Column No.17 are possible due to iron rod and it is also hard and blunt object.

6] In view of the postmortem report and the evidence of PW-6 – Dr. Subhash Madane, we find that no interference is required with the finding of the learned Trial Judge that the death of the deceased is homicidal.

7] The prosecution relies on the evidence of eye witnesses namely PW-1 – Navnath Wadmare brother of the deceased, PW-2 Vaishali Pradhan and PW-5 – Gautam Dhiwar. We will first examine the evidence of PW-1 – Navnath Wadmare brother of the deceased

and the First Informant. He has stated in his evidence that Ravi Wadmare was his elder brother and residing at Boudha Nagar, Pimpri with his wife Alka since 1 to 1 ½ years. He states that Alka – wife of his brother Ravi Wadmare was the first wife of Bharat Gaikwad. He has further stated that before 1 to 1 ½ year Ravi Wadmare was residing with them and was having love affair with Alka. Thereafter they performed marriage without telling anybody and thereafter they started residing at Boudha Nagar, Pimpri. He has further stated that after marriage of Ravi Wadmare with Alka, the accused persons started abusing them. He has further stated that prior to one year from the date of incident, when his father was going to his maternal uncle's house Uttam Pradhan, at that time Accused No.2 - Ramhari Gaikwad beat his father. At that time, he had lodged complaint against him at Sant Tukaram Police Chowky.

8] He has further stated that on 26th October 2008, Alka gave birth to female child at YCM hospital, Pimpri, at that time Ravi was staying with them. On 28th October 2008, was the day of Diwali festival, he had given tiffin to Alka at about 9:00 p.m. His wife was with him, at that time, he asked his brother Ravi Wadmare to take

meal, but he told that he is not hungry and will take afterwards. Then Ravi Wadmare went out. He was in his house with his wife and at about 10:45 p.m. his cousin Sanjay Wadmare came shouting and told him that Bharat Gaikwad and his brothers were beating Dada (Ravi). He ran towards the shop of Tararam Choudhary. He saw that Accused No.4 – Samrat Gaikwad had caught hold of his brother Ravi Wadmare and Accused No.2 – Ramhari Gaikwad and Accused No.3 – Pratap Gaikwad were having iron rods in their hands and Accused No.1 – Bharat Gaikwad was having sickle in his left hand and Accused No.2 – Ramhari Gaikwad and Accused No.3 - Pratap Gaikwad were giving blows by iron rods to his brother. On seeing him, Accused No.1 – Bharat Gaikwad started assaulting with sickle on the head and face of Ravi Wadmare. Due to the said assault, his brother fell into drainage and became unconscious. Thereafter also accused beat Ravi Wadmare with fist blows. At that time, Vishal Waghmare, Sanjay Wadmare, Sunil Pradhan, Vaishali Pradhan and himself tried to rescue his brother. At that time Accused No.2 – Ramhari Gaikwad gave blow on his face with iron rod and he sustained injury near his chin. The accused persons ran away from the lane of Laxman Gaikwad. Thereafter he told Sunil

Pradhan to take his brother to hospital and he went to Police Station and lodged complaint against accused persons. Thereafter he went to the hospital and he came to know that Ravi Wadmare is expired. He has identified the clothes worn by him as well as the deceased, having blood stains. He has also identified the weapons alleged to have been used in the crime. This witness is thoroughly cross-examined. However, in so far as his evidence with regard to the accused assaulting the deceased has not been vitally affected. He has admitted in his cross-examination that in the same night same persons had destroyed the articles in the house of accused persons. He has further admitted that with regard to that incident, Police registered crime against him and arrested him. He has further admitted that crime was registered against him alleging that he had destroyed the household things like TV and door of the accused persons.

9] The evidence of PW-2 – Vaishali Pradhan is on similar lines. She has admitted in her cross-examination that her sister-in-law- is wife of PW-1 – Navnath Wadmare. She has further admitted that Police had arrested her husband on 31st October 2010 for

breaking the hospital.

10] In so far as evidence of PW-5 – Gautam Dhiwar is concerned, he states in his evidence that on the day of incident, he had returned home at around 10:15 p.m. and was taking dinner. At about 10:45 p.m., he heard noise from outside and he came out of house, he saw Accused No.2 – Ramhari Gaikwad on the spot having iron rod in his hand. Ravi Wadmare was lying there in front of shop of Tararam Choudhari. Thereafter he went to Accused No.2- Ramhari Gaikwad and asked him “why you killed him”. At that time Accused No.2 – Ramhari Gaikwad told that “for how many days he tolerate his abuses”. He also acted as Panch witness for seizure of clothes of accused persons. However, in his statement to the Police, he has stated that when he went on the spot, Accused No.2 – Ramhari Gaikwad ran away from the spot and family members of Ravi Wadmare reached there. It is thus doubtful as to whether this witness has witnessed the incident or not.

11] That leaves us with the evidence of PW-1 – Navnath Wadmare and PW-2 – Vaishali Pradhan. Undisputedly, both are

interested witnesses inasmuch as they are close relatives of the deceased. No doubt that the conviction can be based on the testimony of interested witnesses. However, evidence of such witnesses is required to be scrutinized with greater caution and circumspection. If the evidence of these witnesses is found to be trustworthy, reliable and cogent, the conviction on the basis of their evidence could be sustained.

12] Undisputedly, the family of the deceased and the family of the Accused No.1 – Bharat Gaikwad were in inimical terms, since the first wife of Accused No.1 – Bharat Gaikwad had eloped with the deceased. Undisputedly, prior to two days, on which the incident had occurred, Alka the past wife of Accused No.1 – Bharat Gaikwad and the wife of the deceased had given birth to a female child. Undisputedly, on the day of incident, the deceased was distributing sweets in the nearby locality. It is not in dispute that after marriage the deceased had shifted his residence to Boudha Nagar, whereas the Accused No.1 – Bharat Gaikwad and his family were residing in the same area at short distance, from the residence of First Informant, wherein he was residing with his parents, wife and

children. In this background, we will have to scrutinize the evidence. It is the defence of the Accused No.1 – Bharat Gaikwad as could be seen from deposition of DW-1 – Baby Gaikwad and DW-2 – Panchsheela @ Sheela Gaikwad that the deceased had tried to outrage modesty of the wife of the Accused No.1 – Bharat Gaikwad and also teased him by saying that he is impotent. It appears to be the defence of the Accused No.1 – Bharat Gaikwad that the case would come under Exception-I of Section 300 of IPC.

13] As already discussed herein-above, since PW-1 – Navnath Wadmare and PW-2 – Vaishali Pradhan are interested witnesses, an attempt will have to be made to separate the chaff from the grains.

14] In view of the law laid down by the Hon'ble Apex Court in the case of **State of Haryana Vs. Ram Singh** reported in **(2002) 2 SCC 326**, the defence witnesses are also entitled to the same treatment as that of prosecution witnesses. DW-1 – Baby Gaikwad is wife of Accused No.3 – Pratap Gaikwad. As stated in her evidence that deceased used to come to their house and abuse them. She

states that on the day of incident i.e. on 28th October 2008, the deceased came to their house under the influence of liquor. At that time she heard noise, thereafter she saw that deceased was pulling second wife of Accused No.1 – Bharat Gaikwad. The clothes on the person of the Sheela were torn. Accused No.1 – Bharat Gaikwad asked deceased Ravi to leave her, but he did not leave her and thereafter, Accused No.1 – Bharat Gaikwad gave blows of iron rod to Ravi Wadmare. After 2 - 3 blows, the deceased fell down on the tiles and at that time he left Sheela. She states that thereafter relatives of deceased came to their house and destroyed their houses. They caused damage to their house. She has also complained with regard to the said incident. An FIR is marked at Exh.85 and charge-sheet is marked at Exh.86.

15] DW-2 – Panchsheela Gaikwad is the second wife of Accused No.1 – Bharat Gaikwad. She also states that on the date of incident, her husband and she were in the house. At that time, at around 10:30 p.m. deceased Ravi Wadmare came to their house and gave sweets to his husband saying that his wife has delivered daughter from him. At that time her husband asked him to go out of

the house, but he did not go and he again abused her husband saying as 'hijada' and also gave threats that he will take his second wife forcibly. She states that at that time, deceased was under the influence of liquor. She further states that he caught hold of her hand and drove her out of the house. He drove her towards shop of Tararam Choudhari. Accused No.1 – Bharat Gaikwad asked deceased to leave her, but he did not leave her. At that time she was shouting. At that time he removed her Saree and her blouse was torn. Her husband lifted the iron rod lying in front of the shop and gave 2 - 3 blows on the face of the deceased, still he did not leave her. Again her husband gave 2 – 3 blows of iron rod to him. At that time her brother-in-law Ramhari Gaikwad and sister-in-law Baby Gaikwad came there. Due to blows of iron rod, Ravi Wadmare fell down in drainage.

16] It could thus be seen that it is the defence of Accused No.1 – Bharat Gaikwad that on account of sudden and grave provocation given by the deceased, since he had tried to outrage modesty of his wife and also teased him that he had lifted iron rod, which was lying in front of the shop and given blows of iron rod to

the deceased. The perusal of evidence of PW-6 – Dr. Subhash Madane would also reveal that the injury nos.1 to 5 are possible by iron rod. The perusal of Recovery Panchanama below Exh.62, on the basis of which, weapons alleged to have been used in the crime were recovered, would reveal that the spot of incident is around 22 ft. from the house of the accused persons. In these circumstances, the defence as raised by the accused, cannot be said to be impossible. The possibility of prosecution witnesses PW-1 – Navnath Wadmare and PW-2 – Vaishali Pradhan, who are undisputedly interested witnesses, not disclosing the true genesis of the incident, cannot be ruled out. Even according to PW-1 – Navnath Wadmare, the deceased had gone out of house to distribute sweets. In these circumstances, the version as given by the defence appears to be more probable. The possibility of PW-1 – Navnath Wadmare and PW-2 – Vaishali Pradhan exaggerating the incident and implicating the entire family of the Accused No.1 – Bharat Gaikwad, cannot be ruled out.

17] In that view of the matter, we find that the Appeal of the Accused No.1 – Bharat Gaikwad deserves to be partly allowed. He

would be entitled to the benefit of exception under Section 300 of IPC. His conviction is liable to be altered to the one under Part-I of Section 304 of IPC. We find that the sentence of ten years rigorous imprisonment for the same would meet the ends of justice. In so far as the rest of the accused are concerned, we find that the prosecution has not proved the case beyond reasonable doubt against them and as such, their conviction needs to be set aside.

18] In the result, we pass the following order :-

ORDER

- I] Criminal Appeal No.519 of 2012 is partly allowed.
- II] Criminal Appeal No.443 of 2012 is allowed.
- III] The conviction of Appellant/Original Accused No.1 Bharat Ganpat Gaikwad for the offence punishable u/s 302 of the Indian Penal Code is converted to one under Part 1 of section 304 of the Indian Penal Code. He is sentenced to suffer rigorous imprisonment for 10 years for the said offence.

IV] The conviction of Appellant/Original Accused No.2 Ramhari Ganpat Gaikwad, Appellant/Original Accused No.3 Pratap Ganpat Gaikwad and Appellant/Original Accused No.4 Samrat Laxman Gaikwad for the offence punishable u/s 302 of the Indian Penal Code and the conviction of Appellant/Original Accused No.2 Ramhari Gaikwad for the offence punishable u/s 323 is quashed and set aside.

V] The Appellant/Original Accused Nos.2, 3 and 4 are acquitted of all the charges charged with.

VI] The Appellant/Original Accused Nos.2, 3 and 4 are directed to be set at liberty forthwith, if not required in any other crime.

Balaji
Govindrao
Panchal

[SARANG V. KOTWAL, J.]

[B. R. GAVAI, J.]

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