

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

CRIMINAL APPEAL NO.642 OF 2010

1. Ismail Mahamad Petkar
Aged about 65 years
2. Faiyaj Ismail Petkar
Aged about 35 years
3. Abida Ismail Petkar
Aged about 70 years

All resident of Muslim Mohalla,
Village – Pimpaloli,
Taluka – Mandangad,
District – Ratnagiri

(presently in Ratnagiri Central Prison)

.... Appellants

versus

The State of Maharashtra
(Through Mandangad Police Station,
Ratnagiri)

... Respondent

.....

- Mr.Rajiv Patil, Senior Advocate i/b. Mr.K.T. Kanchanpurkar,
Advocate for the Appellants.
- Mrs.M.M. Deshmukh, Addl. P.P. for the State/Respondent.

**CORAM : B. R. GAVAI &
SARANG V. KOTWAL, JJ.**
DATE : 11th JUNE, 2018.

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

1. The Appellant has preferred this Appeal challenging the Judgment and Order dated 26/08/2010 passed by the Additional Sessions Judge, Khed, in Sessions Case No.3/06, whereby the Appellants were convicted u/s 302, 452 and 506 (II) r/w 34 of the Indian Penal Code. The Appellants were sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs.10,000/- and in default to suffer rigorous imprisonment for one year in respect of offence u/s 302 r/w 34 of IPC. The Appellants were sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.5,000/- and in default of payment to suffer rigorous imprisonment for six months for commission of offence punishable u/s 452 r/w 34 of IPC. The Appellants were sentenced to suffer rigorous imprisonment for 5 years and to pay a fine of Rs.5,000/- and in default of payment to suffer rigorous imprisonment for six months for the offence punishable u/s 506(II) r/w 34 of IPC. All the substantive sentences were directed to run concurrently.

2. During the pendency of the Appeal the Appellant No.3 Abida Ismail Khalpe expired and the Appeal on her behalf stood abated.
3. The Appellants were Accused Nos.1 to 3 in the Sessions Case. The prosecution case pertains to the murder of one Gulam Petkar. The Said Gulam was a distant relative of the present Appellants. Gulam's wife had given a loan of Rs.3 lakhs to the Appellants about 20 years before the incident and there was dispute between them for non-payment of the same. The incident had occurred on 16/11/2005 at about 03.00 p.m. The immediate cause of the incident was the dispute in respect of a water tap in the house of the Appellant No.1's daughter Jaibin Gulam Dastgir. The said Jaibin had gone to Mumbai and had closed the tap. On 16/11/2005 one Hasina Bala Petkar opened the water tap. Gulam had objected to that, due to which the Appellants got annoyed. It is the prosecution case that the Appellant No.2 assaulted Gulam with a wooden batten and the other accused assaulted him with fist and kick blows. One Nuruddin Khalpe who was present in a nearby house, rushed to

the Gulam's house on hearing the shouts and saw that the accused were assaulting the deceased. The Accused did not pay any heed to Nuruddin's presence and after the assault left the place. The said Nuruddin informed the Police Patil who in turn informed the officers of Mandangad Police Station. The police officers came to Gulam's house. He was lying in injured condition, but he narrated the incident which was recorded by the police officers. Based on his statement the offence vide C.R.No.43/05 was registered at Mandangad Police Station u/s 307, 452, 323, 506 r/w 34 of the Indian Penal Code. At 05.15 p.m. Gulam was removed to Government Hospital at Dapoli and thereafter he was being taken to Walawalkar Hospital at Derwan, Chiplun, for further treatment. However before reaching there, Gulam died at Khed. After his death, section 302 of IPC was added. The post-mortem was conducted. The accused were arrested. Various Panchanamas were conducted. Statements of various witnesses were recorded and at the conclusion of the investigation, the charge-sheet was filed. The case was committed to the Court of Sessions at Khed.

4. During trial, the prosecution examined P.W.1 Nuruddin Usman Khalpe and P.W.3 Amina Ibrahim Petkar as the eyewitnesses. P.W.2 Pradeep Vishnu Malusare was the Police Patil, who had informed the police officers at Mandangad Police Station. P.W.4 Jahir Abdul Rahiman Khalpe was a Pancha in whose presence the clothes of the accused were recovered at the instance of the accused No.1. P.W.5 Rajendra Vasant Mahajan had taken photographs of the spot. P.W.6 Raghunath Digambar Athavale had carried the Muddemal Articles to the office of chemical analyzer. P.W.7 PSI Shantaram Dajirao Dalvi was the Investigating Officer and P.W.8 Dr.Surendra Raghunath Pachalegaonkar had conducted the post-mortem examination. After recording of the evidence, the statements of the accused u/s 313 of Cr.P.C. were recorded. After hearing the parties, the learned Trial Judge vide his Judgment and Order dated 26/08/2010 convicted and sentenced the Appellants as mentioned earlier.

5. We have heard the learned Senior Counsel Mr.Rajiv Patil, for the Appellant and learned Addl. P.P. Mrs.M.M. Deshmukh, for the State of Maharashtra.
6. Mr.Rajiv Patil, the learned Senior Counsel for the Appellants submitted that the evidence of eyewitnesses is not reliable. The cross-examination of the witnesses shows that the P.W.1 Nuruddin Khalpe was on enimical terms with the accused as they belonged to different parties. He further submitted that there was no motive to commit the offence. The money transaction in question was allegedly in dispute since past 20 years and therefore it could not have been the cause of the incident. He further submitted that looking at the fact that the deceased had not survived till he was removed to hospital at Darwan, he might not have been in a position to give statement and therefore his FIR could not have been in his own words. In the alternative he submitted that the offence of murder as defined u/s 300 of IPC is not made out in the given facts of the case.

7. As against these submissions, the learned Addl. P.P. submitted that the prosecution has proved its case beyond reasonable doubt. There was no reason to disbelieve the evidence of eyewitnesses. There was recovery of blood stained clothes at the instance of the accused No.1 and there was motive to commit the murder. She therefore submitted that the impugned judgment should not be interfered with.

8. The evidence of P.W.8 Dr.Surendra Pachalegaonkar shows that the deceased had suffered following injuries;

- 1) Contused lacerated wound over left parietal region, horizontal to coronal suture measuring. 7 cm x 2 cm x 1 cm with irregular edges and underling parietal bone fracture.
- 2) Abrated contusion over deltoid region measuring 8 cm x 6 cm.
- 3) Abratal contusion over left deltoid region measuring 6 cm x 6 cm.

- 4) Contusion over right arm measuring 15 cm above from elbow joint posteriorly (tricep) region measuring 10 cm x 6 cm.
- 5) Contusion over left wrist joint posteriorly horizontal 6 cm x 3 cm with dislocation or wrist joint and fracture of lower end of radius.
- 6) Crush injury to left ring finger distal phalynx.
- 7) Contusion over right knee joint anteriorly measuring 6 cm x 6 cm with dislocation of knee joint.
- 8) Two sutured contused lacerated wounds over right chin measuring size of 2 cm in length and vertical situated 10 and 15 cm above ankle joint.
- 9) Sutured contused lacerated wound over left chin 15 cm below from knee joint measuring 2 cm in length and vertical.
- 10) Abrated contusion over right ankle joint anteriorly 4 cm x 4.5 cm with dislocation of right ankle joint.

9. Thus, as can be seen, there was one major injury on

the head which had caused the death. The other injuries were on the limbs.

10. The prosecution case is based mainly on the evidence of the eyewitnesses i.e. P.W.1 Nuruddin Khalpe and P.W.3 Amina Petkar. P.W.1 Nuruddin Khalpe has stated that he was knowing the deceased as well as the Appellants being residents of his locality. On 16/11/2005 he was present in the house of his Uncle Ismail Khalpe. At about 03.00 p.m. he heard shouts from the house of Gulam. He rushed there. He saw that Gulam was lying in the room and the Appellant No.2 Faiyaz Petkar was beating him with a wooden batten. The other accused were assaulting him by kicks and fist blows. He further deposed that the accused told him that they had beaten Gulam and that P.W.1 Nuruddin himself could take any action as he pleased. They then left the spot. The villagers gathered there. The P.W.1 Nuruddin Khalpe saw that Gulam had suffered injuries on his head and therefore could not get up on his own. He saw that three pieces of wooden batten were lying nearby. This witness had then visited the

house of the Police Patil and had informed him about the incident, who in turn telephonically informed the Mandangad Police Station. The police came to the spot and recorded Gulam's statement in front of this witness. P.W.1 Nuruddin Khalpe has proved the contents of the statement and identified Gulam's signature on the same. The FIR is produced at Ex.20.

11. His cross-examination shows that the police arrived at the spot at around 05.30 to 05.45 p.m. and then took Gulam to hospital at 07.00 p.m. Apart from this, there is nothing in the cross-examination which has affected the deposition of this witness adversely, insofar as the prosecution case is concerned. The FIR at Ex.20 narrates the incident in the same fashion as narrated by the P.W.1.

12. Even P.W.3 Amina Petkar has deposed on the same lines as those of P.W.1 Nuruddin. Even she has deposed that on hearing shouts she had gone to the house of Gulam. She saw that accused No.2 was beating him with wooden batten on his

head and other accused were beating him by kicks and fist blows. Her cross-examination has not yielded anything in favour of the accused. P.W.2 Police Patil Pradeep Vishnu Malusare had informed the police officers Mandangad Police Station and he was present at the spot after P.W.1 Nuruddin Khalpe informed him.

13. The clothes of the accused Nos.1 and 2 were recovered in the presence of P.W.4 Jahir Abdul Rahiman Khalpe. The C.A. reports show that these clothes showed presence of blood of 'B' group, which was blood group found at the spot and also on the clothes of the deceased. Therefore this is one more circumstance against the Appellants.

14. Considering this evidence on record in favour of the prosecution, we are of the opinion that the prosecution has established beyond reasonable doubt that the incident had taken place in the manner as narrated by P.W.1 Nuruddin Khalpe and P.W.3 Amina Petkar. The police had come on the spot and the

statement given by the deceased himself was in consonance with the evidence of P.W.1 Nuruddin Khalpe and P.W.3 Amina Petkar. The evidence in respect of assault on the deceased by the accused is consistent. Corroborative piece of evidence in the nature of recovery of clothes also supports the prosecution case. There is nothing in the evidence of P.W.1 Nuruddin Khalpe and P.W.3 Amina Petkar to throw doubt on their veracity. Both these witnesses were natural witnesses who were present in the vicinity when the incident had occurred. Both of them have deposed about the presence of each other at the spot. Therefore they have corroborated each other in respect of their presence at the spot when the incident had taken place. Therefore we are satisfied that the incident of assault on the deceased had taken place in the manner as described by these witnesses.

15. The question still remains as to whether the offence would fall within the definition of murder as provided under section 300 of IPC. Even as per the prosecution case, there was a dispute in respect of non-payment of the loan between the

deceased on one side and the accused on the other. This dispute was pending for more than 20 years. But the evidence shows that the immediate cause was a trivial matter of opening a water tap. One Hasina had opened the water tap to which the deceased had objected. The accused had got annoyed because of that and thereafter had assaulted the deceased. The sequence of events shows that there was no premeditation and the incident had occurred because of a petty quarrel.

16. Insofar as the Appellant No.1 is concerned, the allegations against him are that he assaulted Gulam with fist and kicks blows. The evidence does not show that he had come prepared with deadly weapon and had caused any major blow on the deceased. Therefore at the most he can be held liable for commission of offence u/s 323 of IPC i.e. causing hurt. There is nothing on record to suggest that he had shared any common intention with accused No.2. Therefore conviction of the accused No.1 u/s 302 r/w 34 of IPC is set aside and instead he is convicted for the offence punishable u/s 323 of IPC. The prosecution has not shown that there was premeditation and

therefore it cannot be said that all the accused shared common intention. The accused No.1 was also convicted for commission of offence punishable u/s 452 r/w 34 of IPC. However, since we have held that the accused had not shared common intention, this conviction is altered to that u/s 452 of IPC.

17. Insofar as the Appellant No.2 Faiyaz is concerned, he had used a wooden batten and had caused injuries on the deceased. There is only one major injury on the head and rest of the injuries are either on the hands or on the legs. It can be seen that the accused No.2 had ample opportunity to assault on vital parts, but except one single blow on the head no other blow was given on any vital part. The deceased had not died immediately on the spot, in fact it is the prosecution case that, he was conscious and oriented till the police arrived on the scene after about two hours. Thus, till the accused were present in his house, the deceased Gulam was not in a serious condition. Therefore, if the accused No.2 intended to cause any of the injuries envisaged u/s 300 of the IPC, nothing prevented him

from causing such injuries. We are satisfied from the evidence on record that the accused No.2 did not commit any act with the intention of causing death. Neither it was done with the intention of causing such bodily injury; which was likely to cause death or which was sufficient in the ordinary course of nature to cause death or which was so imminently dangerous that in all probabilities it would have caused death.

18. Even as per the prosecution case, though incident had occurred at 03.30 p.m., the victim Gulam was not immediately removed to the hospital. The eyewitnesses, the neighbours, the Police Patil or even the Police Officer did not consider the injuries so serious as warranting immediate removal of the victim to the hospital. The victim was ultimately removed to the hospital at around 07.30 p.m. Therefore it is clear that nobody knew that the injury caused would have ultimately led to death. In this view of the matter, we do not think that the offence committed by the accused falls within the definition of murder. However, the act committed by the accused No.2 would

certainly fall within the description mentioned in part-II of section 304 of IPC, since the act was done with the knowledge that it was likely to cause death, but without any intention to cause death. Therefore the offence committed by the accused No.2 is not the one punishable u/s 302 of IPC, but is the offence punishable under Part-II of section 304 of IPC.

19. As discussed, the prosecution has not proved that all the accused shared common intention causing head injury to the deceased. The act is solely attributed to the accused No.2. Therefore the accused No.2 Faiyaj Ismail Petkar is solely liable to be convicted under Part-II of section 304 of the Indian Penal Code. Looking at the nature of assault, we are of the opinion that sentence of rigorous imprisonment of 7 years will meet the ends of justice. The accused No.2 was convicted and sentenced for commission of offence punishable u/s 452 r/w 34 of IPC. He was sentenced to suffer rigorous imprisonment for 5 years and to pay a fine of Rs.5,000/- and in default to suffer rigorous imprisonment for six months on that count. As we have held

that there was no common intention between the accused, the conviction of accused No.2 Faiyaj Ismail Petkar u/s 452 r/w 34 of IPC, is converted to that of u/s 452 of IPC. The sentence of rigorous imprisonment of 5 years awarded to him for commission of offence punishable u/s 452 is maintained. The substantive sentences are directed to run concurrently. Accused No.2 is entitled for set off u/s 428 of the Code of Criminal Procedure, 1973, for the period of imprisonment he has already undergone.

20. The evidence of eyewitnesses does not show that any of the accused committed the offence punishable u/s 506 (II) of IPC, as there is nothing on record to show that threats were given to the deceased by any of the accused. The utterances also do not show that any threats were issued against P.W.1 by any of the accused. Therefore all the accused deserve to be acquitted from the allegations of offence punishable u/s 506(II) of IPC.

21. Looking at the nature of manner of assault, role played by the accused No.1, the ends of justice will be met if the sentence awarded to the accused No.1 is set aside and instead

the accused No.1 is sentenced to suffer imprisonment for the period which he has already undergone in jail, for the offences punishable u/s 323 and 452 of IPC.

22. Hence following order:

ORDER

1. The Appeal is partly allowed.
2. The conviction of all the Accused/Appellants u/s 302 r/w 34, u/s 452 r/w 34 and u/s 506(II) r/w 34 of the Indian Penal Code is set aside.
3. The Appellant/Accused No.1 Ismail Mahamad Petkar is convicted for the offence punishable u/s 323 and 452 of the Indian Penal Code and he is sentenced to suffer imprisonment for the period, which he has already undergone in jail.
4. The Appellant/Accused No.2 Faiyaj Ismail Petkar is convicted for the offence punishable u/s 304 Part II of the Indian Penal Code and is sentenced to suffer

rigorous imprisonment for 7 years and to pay a fine of Rs.10,000/- and in default of payment to suffer rigorous imprisonment for one year.

5. The Appellant/Accused No.2 Faiyaj Ismail Petkar is further convicted for commission of offence punishable u/s 452 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for 5 years and to pay a fine of Rs.5,000/- and in default of payment to suffer rigorous imprisonment of six months.
6. All the substantive sentences awarded to the Appellant/Accused No.2 are directed to run concurrently.
7. The Appellant/Accused No.2 is entitled for set off for the period of imprisonment undergone by him.
8. All the Appellants/Accused are acquitted of the offence punishable u/s 506 (II) of the Indian Penal Code.

(SARANG V. KOTWAL, J.)

(B. R. GAVAI, J.)