

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

Criminal Appeal No.98 of 2016

- 1) Vinod s/o Vishnu Nade,
Age 35 years, Occupation : Labour,
R/o Nipani Jawalka,
Taluka Georai, District Beed.
- 2) Dilip s/o Vishnu Nade,
Age 30 years, Occupation : Labour,
R/o Nipani Jawalka,
Taluka Georai, District Beed. .. **Appellants.**

Versus

- * The State of Maharashtra,
Through Police Station Officer,
Police Station, Georai,
Taluka Georai, Dist Beed. .. **Respondent.**

Shri. S.S. Thombre, Advocate, for appellants.

Smt. V.N. Patil (Jadhav), Additional Public Prosecutor, for respondent.

**Coram: T.V. NALAWADE &
K.K. SONAWANE, JJ.**

Judgment reserved on : 27th July 2019

Judgment pronounced on : 19th August 2019

JUDGMENT (Per T.V. Nalawade, J.):

- 1) The appeal is filed against the judgment and order of Sessions Case No.120/2014 which was pending in

the court of the learned Additional Sessions Judge Beed. The trial court has convicted both the appellants for offence punishable under section 324 read with 34 of the Indian Penal Code. They were charged for offence punishable under section 326, 323, 504, 506 read with 34 of the Indian Penal Code. This case was tried as counter case of Sessions Case No.112/2013 which was filed for offence punishable under sections 302, 149 etc. of the Indian Penal Code against the witnesses of the present matter. This Court is deciding Criminal Appeal No.80/2016 by separate judgment along with the present matter and in that matter some of the accused are convicted in Sessions Case No.112/2013 for offence of murder. Both the sides are heard.

2) In short, the facts leading to the institution of the appeal can be stated as follows.

3) Both the appellants are residents of Nipani Jawalka, Tahsil Georai, District Beed. Appellant Nos.1 and 2 are real brothers inter se. The incident in question took place on 4-4-2013. The informant Barku Bangar and deceased Mahadeo, who was brother of present appellants

had a quarrel in the noon time but the matter was settled in the noon time itself. After settlement the parties had returned to their respective residential places.

4) At about 7.00 p.m. when the informant Barku, his father Laxman, his wife and his mother Kalabai were present in their house, the appellants and deceased Mahadeo came to their house. Mahadeo was holding iron bar, appellant No.1 Vinod was having sickle in concealed condition and appellant No.2 Dilip was holding a stick. Immediately after coming to the house of Barku, they gave call to Barku and when Barku came out of the house they started assaulting him. Dilip gave blow of stick to the left thigh of Barku. When Barku was shouting, Mahadeo gave blow of iron bar on the head of Barku. Barku sustained bleeding injury to his head and he collapsed and fainted. Laxman, father of Barku, Datta son of Barku, Kalabai and the wife of Barku came out. In the mean time Shriram, brother of Barku reached the spot after learning about the incident. The appellants and Mahadeo then assaulted Barku, Shriram and others. In the incident Vinod gave blow of stick on back, head and chest of the mother of

Barku. Shriram, wife of Barku and other ladies saved Barku by giving cover of their body to Barku and Barku was saved.

5) In the incident, Barku, his mother Kalabai were seriously injured and they were shifted to Government Hospital Georai. In the presence of medical officer, statement of Barku came to be recorded by police on 6-4-2013. The crime at CR No.49/2013 came to be registered on the basis of this report for the aforesaid offences against the appellants and deceased Mahadeo. Mahadeo died due to the injuries sustained in the incident. Statements of the witnesses came to be recorded and the accused came to be arrested. Charge sheet came to be filed for the aforesaid offences against the appellants.

6) Before the trial court the prosecution examined in all 8 witnesses. The trial court has believed the injured witnesses. The case was tried as counter case of the other case and the accused took the defence that the prosecution witnesses had assaulted present appellants and deceased Mahadeo. Their presence on the spot by the appellants was admitted. The medical evidence is in

corroboration of the direct evidence. In view of the nature of injuries sustained by Barku, which was simple and the nature of weapon used, conviction was given for offence under section 324 read with 34 of Indian Penal Code instead of conviction for offence punishable under section 326 read with 34 of the Indian Penal Code.

7) The learned counsel for the appellants submitted that as the prosecution witnesses were aggressors, they were armed with dangerous weapons and they murdered Mahadeo, brother of the appellants, the prosecution witnesses ought not to have been believed by the trial court. He submitted that simple injuries were sustained by the persons of the side of the complainant and as the injuries sustained by the accused and the deceased are not explained by the prosecution witnesses, the appellants ought to have been acquitted.

8) There is circumstance that both sides gave reports against each other and police filed counter cases against both the sides. It is not disputed that the appellants and deceased Mahadeo had gone towards the house of Barku to question him about the incident which

had taken place in the noon time. This circumstance needs to be kept in mind while appreciating the evidence of the prosecution witnesses.

9) Barku (PW 1) has given evidence that the incident of quarrel had taken place at about 3.30 p.m. between him and Mahadeo in the house of cousin of Mahadeo but the dispute was settled then and there only. Barku has given evidence that all the three accused (including deceased Mahadeo) had come to his house and he was called outside of the house by giving him a call. He has deposed that when he came out of the house, accused No.2 gave blow of sickle on his thigh, Mahadeo gave blow of iron rod on his head and when he shouted his wife and parents came out. He has deposed that accused Vinod gave blow of stick to Kalabai. He has deposed that when the incident was going on, his brother, who was not initially present in the house, rushed to the spot and then he was also assaulted by accused with stick. He has deposed that he collapsed and fainted due to the injuries sustained by him. He has deposed that his family members and neighbours rescued him and he was shifted to Georai

Government Hospital. He has deposed that his report was recorded by police which is at Exhibit 31 in Georai Hospital.

10) The defence has brought on record the particulars of the first incident in the cross-examination of Barku (PW 1). That part shows that the incident in question took place due to the first incident which had taken place when Barku and persons from the side of the accused were playing game of cards involving money.

11) In the cross-examination of Barku (PW 1) it is suggested to him that the appellants and Mahadeo had come to Barku to make inquiry about the quarrel which had taken place between Barku and Mahadeo in the noon time. This circumstance shows that the appellants, accused admitted that they had gone to the house of Barku at the relevant time. Though it is suggested to the witness that the incident did not take place in the vicinity of the house of Barku, the admission of the defence of the aforesaid nature is sufficient to hold that the accused and Mahadeo had gone towards the house of Barku to

question him about the incident which had taken place in the noon time.

12) Barku (PW 1) has admitted that during incident, the accused (appellants) and deceased Mahadeo were injured and Mahadeo died due to the injuries sustained in the incident. Barku has admitted that accused No.1 sustained serious injury to his head in the incident. However, Barku has denied that he and the persons from his side had assaulted the accused. It is suggested to Barku during cross-examination that he had fall during the incident on the ground which was a cement surface and due to that he sustained the injury. This suggestion is denied.

13) Laxman (PW 3), father of Barku, has given evidence which is similar to the evidence of Barku. In the cross-examination, it is brought on the record that all the three accused had come together. He has deposed that by giving call to Barku he was called outside of the house and then Barku was assaulted. The tenor of the defence shows that presence of Laxman on the spot at the relevant time is not disputed by the defence.

14) Kalabai (PW 4), mother of Barku, has given evidence which is similar to the evidence of Barku and Laxman. She has deposed that Mahadeo gave blow of iron rod on the head of Barku and Vinod assaulted her in the incident. She has deposed that she was shifted to Government Hospital by Shriram and others. In the evidence she has taken names of the accused to describe the incident and the name of Mahadeo is also taken though in the evidence she has admitted that her eye sight is weak and when the evidence was recorded she was not in a position to identify two accused, who were present in the court. She is injured witness and so her evidence needs to be considered which is to the effect that she and Barku were assaulted in the incident.

15) Shriram (PW 2), brother of Barku, has given evidence that initially, when the incident started, he was not at home. He has deposed that he rushed to home after learning about the incident from his father Laxman. He has deposed that when he rushed ahead to rescue Barku and Kalabai he was assaulted with fist blows and kicks by all the three accused. The tenor of the cross examination

of this witness shows that his presence on the spot is not disputed by the defence. On the contrary it is suggested to Shriram that he was also present inside of the house when the incident started and he had come out of the house after reaching of the accused there and he had assaulted Mahadeo, the deceased by using axe. Even if it is presumed that right from the beginning Shriram was present inside of the house, that cannot make difference as it is the accused who had gone towards the house of Barku and it is them who had started the incident. Further, it is not the defence of the accused that Barku and Shriram had come together against them.

16) The F.I.R. was given on 6-4-2013. To explain the delay there is evidence of Dr. Hasmi Ahmad (PW 7). The medical officer has deposed that he was working in Georai Government Hospital at the relevant time and on 4-4-2013 he examined Barku, Kalabai and also Shriram (Shrimant). Injury certificates in respect of Kalabai, Barku and Shriram are proved as Exhibit 47, 48 and 49 respectively.

17) Kalabai, Barku and Shriram sustained following injuries :-

Kalabai :

- 1) CLW on right frontal region size 8x2x2 cm with ragged edges, caused within 24 hours, sustained by hard and blunt object.
- 2) blunt trauma, movement restricted with 2x2 cm abrasion on back, simple in nature caused by hard and blunt object.
- 3) minor cut on right ribs of 1x1x1 cm simple in nature caused by hard and blunt object.

Barku:

CLW on left parietal region, running horizontally which sharp edge 6x2x2 cm caused by hard cutting weapon within 24 hours and simple in nature.

Shrimant :

1. Contusion on face left side, caused by hard and blunt object, simple in nature within 24 hours.
2. Contusion on left abdomen, simple in nature within 24 hours.

18) In the examination-in-chief it was suggested to the medical officer (PW 7) that Barku had sustained injuries due to iron bar and Kalabai had sustained injury by sickle. The medical officer has denied this suggestion given by the learned A.P.P. However, he has given evidence that the injuries sustained by these three

persons were fresh, were sustained within 24 hours. The certificates are duly proved and they show that Kalabai, Barku and Shriram (Shrimant) were examined at 8.30 p.m. 8.45 p.m. and 8.40 p.m. respectively.

19) In the injury certificate issued in respect of examination of Barku there is mention that the injury was sustained due to hard and cutting weapon. The history of assault was given by all of them to the medical officer. The injuries sustained were however simple in nature.

20) Suresh (PW 8), Police Naik, who made investigation of the present matter has deposed that the two crimes were registered on the basis of the reports given by the two sides in respect of the same incident. Admittedly two persons from the side of the accused were injured and one of them viz. Mahadeo died due to the injuries.

21) The evidence of Santosh (PW 5) shows that one spot panchanama was prepared by police for both the crimes and that was shown to be prepared in CR No.50/2013 which was registered on the basis of report

given by the side of the appellants. Copy of the said panchanama is proved in the present matter as Exhibit 42. Though in Exhibit 42 the location of the house of Barku is not shown, in the cross-examination of Santosh it is brought on record that the house of Barku is situated at a distance of hardly 50 feet from the spot of the offence. As the panchanama was prepared on 11-4-2013 there was no sign of the incident on the spot. Unfortunately the map of scene of offence was not prepared though hand sketch map of the spot is prepared showing the location of only one or two houses situated in the vicinity of the spot. In respect of the incident dated 4-4-2013 F.I.R. was given on 6-4-2013 in the present matter. But there was the aforesaid circumstance. Kalabai was referred to Government Hospital Beed for further treatment and that can be seen from Exhibit 47. As both the sides gave reports against each other and they are admitting their presence the evidence is sufficient to infer that in the incident in question the prosecution witnesses who were present, sustained injuries, and not much can be made out due to the circumstance that F.I.R. was given late in the present matter.

22) The aforesaid discussion shows that there is sufficient evidence to infer that accused Nos.1 and 2 and deceased Mahadeo together had gone towards the house of Barku. The evidence is also sufficient to infer that the appellants and deceased Mahadeo had used some weapons including dangerous weapons and they had caused injuries to Barku and Kalabai. The evidence is sufficient to infer that there was common intention of these three accused to assault and cause injuries and they in fact caused simple injuries. As simple injuries were caused, the trial court has given conviction for offence punishable under section 324 read with 34 of Indian Penal Code. Though three persons were injured conviction is given only in respect of one offence, one injured.

23) Though the defence has tried to use the circumstance that with dangerous weapons the prosecution witnesses had assaulted Mahadeo and Vinod and also Dilip that record is not produced in the present matter. In the case reported as **Mitthulal v. State of M.P. (1975 Cri.L.J. 236)** (*equivalent - 1975 SCC (Criminal) 93*) the Apex Court has laid down that each case must be

decided on the basis of evidence recorded in it. Evidence recorded in connected case cannot be taken into account in arriving at a decision and so the admissions of the aforesaid nature that Mahadeo died due to injuries and the appellants had also sustained injuries and by using dangerous weapon the prosecution witnesses had attacked them cannot be considered as it is.

24) The trial court has given sentence of imprisonment of 3 years and fine of Rs.5000/- each is imposed. This Court holds that in view of the trifle reason for the quarrel and the circumstance that the appellants lost one man in the incident, sentence of three years will be harsh and unreasonable. This Court holds that giving sentence of imprisonment of one year and imposing of fine of Rs.5000/- in default sentence of simple imprisonment of one month would be just and sufficient in the present matter. It appears that Dilip was behind the bars for some period but appellant Vinod got anticipatory bail. In respect of the period for which the appellants were behind the bars, set off can be given. In the result, following order.

25) The appeal is partly allowed. The judgment and order of the trial court of conviction and sentence of the appellants for the offence punishable under section 324 read with 34 of the Indian Penal Code is hereby modified. In stead of sentence of 3 years' imprisonment, sentence of rigorous imprisonment of one year is given and fine of Rs.5000/-(Rupees Five Thousand only) is imposed on each of the appellants. In default, of payment of fine each of them is sentenced to undergo simple imprisonment for one month.

26) Both the appellants are entitled to set off in respect of the period for which they were behind the bars and that period is to be counted by the office on the basis of the record and it is to be informed to the jail authority in the conviction warrant. The appellants are to surrender to their bail to undergo the sentence.

Sd/-
(K.K. SONAWANE, J.)

Sd/-
(T.V. NALAWADE, J.)

rs1