

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

Criminal Appeal No.426 of 2016

Jasbirsing s/o Nirmalsingh Tak,
Age 39 years, Occupation : Nil,
R/o Ramamata Ambedkarnagar,
Nanded, Taluka & Dist. Nanded. .. **Appellant.**

Versus

The State of Maharashtra
Through Police Inspector,
Shivajinagar Police Station,
Nanded, Taluka & Dist Nanded. .. **Respondent.**

Shri. V.D. Sapkal, Advocate, for appellant.

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

With

Criminal Appeal No.910 of 2019

Nitin s/o Ambadas Nerlikar,
Age 33 years,
Occupation : Labour
R/o. Vishnunagar, Nanded,
Taluka & Dist Nanded. .. **Appellant.**

Versus

The State of Maharashtra
Through Police Station,
Shivajinagar Nanded,
Taluka & Dist Nanded. .. **Respondent.**

Shri. Dhananjay A. Mane, Advocate, for appellant.

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

**Coram: T.V. NALAWADE &
R.G. AVACHAT, JJ.**

Date: 6 SEPTEMBER 2019

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

1) Both the appeals are filed against the judgment and order of Sessions Case No.29/2012 which was pending in the court of the learned Additional Sessions Judge-2, Nanded. The trial court has convicted and sentenced the appellants for the offence punishable under section 302 of the Indian Penal Code and each of them is sentenced to suffer imprisonment for life. Charge was framed for offence punishable under section 302 read with 34 of the Indian Penal Code against four accused. Accused No.3 and 4 are acquitted of the offence punishable under section 302 read with 34 of the Indian Penal Code but they are convicted for the offence punishable under section 323 read with 34 of the Indian Penal Code. Both the sides are heard.

2) In short, the facts leading to the institution of the two appeals can be stated as under :-

3) The first information report was given by Anil Sulgekar (PW 3). Deceased Suresh was real brother of the informant. The incident in question took place on 16-10-2011. On that day Feroz Lala, employer of Suresh, came to the house of the deceased where the informant was also living and he took the widow of the deceased with him by saying that Suresh was admitted in the hospital as he had sustained injuries. The informant rushed to Lotus Hospital where Suresh was taken after taking him first to Civil Hospital Nanded. There, he learnt from the persons like Shaikh Shadul, Firoj Gadiwala and Balya that there was quarrel between Suresh and Taju Ghasletwala on one side and Balu on the other side on the count of money at Ramamata Ambedkar Nagar at about 5.00 p.m. and there all the four accused had come and had picked up quarrel with the deceased. They informed that on the instructions given by accused No.2 Jashirsing his son Taklya, other accused, had fetched a spade and by using the spade first accused No.1 had given blow on the head of Suresh and

then Jasbirsing had given the blow on the head of Suresh. They disclosed that accused Nos.3 and 4 had assaulted deceased with kicks and fist blows and this incident was witnessed by many persons of that locality. Doctors from Lotus Hospital declared that Suresh was already dead. On the same day Anil gave report mentioning the aforesaid information. The crime came to be registered for offence punishable under section 302 read with 34 of the Indian Penal Code.

4) Crime was registered after 7.00 p.m. but on the same day spot panchanama was prepared and the post mortem was conducted. There was blood on the spot of offence and earth sample containing blood was collected from the spot.

5) During the course of investigation statements of witnesses came to be recorded and all the four accused came to be arrested. Accused No.1 gave statement under section 27 of the Evidence Act on 19-10-2011 and on the basis of that statement, the spade which was thrown into a drainage channel was recovered and seized. The map of scene of offence was got prepared from revenue authority.

6) In the trial court the prosecution examined in all 9 witnesses including two eye witnesses to prove the offence. The defence did not dispute that Suresh died homicidal death. The defence did not dispute that the incident took place on the spot shown in the spot panchanama at Exhibit 54. In view of these circumstances it is not necessary to discuss the evidence of spot panchanama and the medical evidence in detail. The medical evidence can be considered to ascertain as to whether there is consistency between the medical evidence and the direct evidence.

7) Anil (PW 3), brother of the deceased, has given evidence of aforesaid nature on the basis of information he had received from others. He had given names of many persons in the first information report. Out of them Taju Ghasletwala is examined as eye witness by police. The other persons who had supplied information and whose names are mentioned in the F.I.R. were not examined. The evidence of PW 3 is of the nature that immediately after the incident he learnt the names of the assailants and the persons who were present on the spot to witness the

incident. This fact is relevant and this evidence can be considered under section 6 illustration (a) of the Evidence Act. It was submitted by the learned counsel for the appellants that this evidence is hit by section 60 of the Evidence Act and it is hearsay in nature. This submission cannot be accepted as the information was from the persons who were in the vicinity of the spot of offence and this information was spread immediately after the incident everywhere by those persons.

8) The evidence and the record show that at the relevant time deceased Suresh, Taju (PW 4) and Balu were together. The evidence of the informant (PW 3) shows that he had no reason at all to falsely implicate any of the accused. He has denied that there was long standing enmity between Suresh, Shaikh Tajoddin (PW 4) and other friend of the deceased, Balu. His evidence is important as in the F.I.R. which was given immediately after hearing about the incident his name was given as eye witness. Thus, the names of the assailants and the names of the witnesses were given immediately to police by the informant and this circumstance needs to be kept in mind

while appreciating the evidence of eye witness Shaikh Tajoddin (PW 4).

9) Shaikh Tajoddin (PW4), eye witness, is believed by the trial court. He has given evidence that at about 5.00 p.m. he, deceased and Balu were together at the spot of the offence. He has deposed that all the four accused came there and they started quarreling with them. He has deposed that during quarrel, accused No.2 Jasbirsing asked his son Taklya to bring spade from his house and Taklya fetched the spade to the spot. He has deposed that when Taklya handed over the spade to his father, accused No.2, accused No.1-Nitin snatched that spade from the hand of the accused No.2 and he gave blow of the spade on the head of Suresh. He has deposed that Suresh sustained injury due to this blow but accused No.2 took the spade from accused No.1 and assaulted Suresh by using the spade on the forehead of Suresh. He has given evidence that accused Nos.3 and 4 then assaulted Suresh with fist blows and kicks. He has deposed that when all four accused rushed at him, he ran away to save his life.

10) The evidence of Shaikh Tajoddin (PW-4) shows that he learnt about the death of Suresh at about 7.00 p.m. He identified all the four accused in the court. He identified the weapon, spade (article No.4) in the court. The statement of PW-4 was recorded by police on the next day of the incident but that circumstance is not sufficient to discard the evidence of PW-4.

11) The cross-examination of Shaikh (PW4) made by the learned counsel for accused No.1 shows that this witness admitted that the relations with accused are not good. Though this suggestion is admitted, no specific reason was suggested for strained relations between them prior to the date of the incident. Suggestion is given to him that during incident, he and Balu were pushing Suresh and due to that he fell into drainage. This suggestion is denied. However, in the cross-examination he has admitted that Suresh was demanding back amount of Rs.200/- from Balu at the spot of the incident and there were some altercations between Suresh and Balu. Balu did not make assault on Suresh and defence did not suggest that any accused had any particular relation or

contact with Balu. Due to these circumstances it cannot be said that the incident took place due to the demand of Rs.200/- by the deceased from Balu and due to the quarrel which was going on between the deceased and Balu.

12) In the cross-examination of PW-4 some omissions in relation to his previous statement were confronted to him. He had not stated before police that accused Nos.3 and 4 had assaulted him also with fist blows and kicks. Other so called omissions are not that material.

13) The evidence of Shaikh Tajoddin (PW-4) shows that defence is not seriously disputing the presence of this witness on the spot at the relevant time. All the accused were known to him. Due to all these circumstances not much can be made out due to the circumstance that he gave police statement one day late. It is true that he did not attempt to save the deceased. He has frankly admitted that he ran away to save his own life. It is not the case of the defence that these three friends had rushed at the accused persons. The accused were having some weapon

and as they had made assault on the deceased, particularly on his head, there is possibility that this witness became afraid and to save his life he ran away. Due to these circumstances, the trial court has believed him and as appellate court this Court holds that it is not possible to interfere in the finding of the trial court that this witness is trustworthy and can be believed.

14) Shaikh Feroz (PW-6) the other eye witness has deposed that he noticed the incident when he was proceeding towards his house at the relevant time. His evidence shows that he knew the deceased and the accused. He has given evidence that he noticed that some altercation was going on between the deceased and Balu over money and then accused Nitin (accused No.1) fetched the spade and gave blow of the spade on the head of the deceased. He has identified only accused No.1 in the court and he has given evidence only as against accused No.1 in the court. His police statement was also recorded late. The trial court has not believed this witness.

15) Evidence of Shaikh Feroz (PW-6) shows that though he had no dispute with both sides, he did not intervene in the matter and he did not make any attempt to shift Suresh to the hospital. Other by-passers had shifted Suresh to the hospital. His evidence shows that for reaching to home from his shop he is not required to go by that area. This witness is not declared hostile by the prosecution though he did not utter a word as against accused Nos.2 to 4. In any case he has taken the name of accused No.1 as the assailant but his evidence is not consistent with medical evidence which this court is discussing at other place. For all these reasons the trial court has disbelieved him in entirety. It can be said that he gave evidence at least as against accused No.1 and that portion of the evidence could have been considered at least as against accused No.1 and in respect of at least one blow given on the head of the deceased by accused No.1. Even if the evidence of this witness is ignored, there is the evidence of PW-4 which is consistent with the medical evidence. It is already observed that the evidence of spot panchanama is not disputed by the defence and so the discarding of the evidence of PW-6 cannot affect the

case of the prosecution.

16) Dr. Naresh (PW-7) conducted post mortem examination on the dead body of Suresh on 17-10-2011 between 9.35 a.m. and 11.00 a.m. He found following surface wounds on the dead body.

"(a) Sutured wound over right forehead on the lateral side of the eye brow obliquely measuring with length 2.5 cm, five intact sutures seen with surrounding area with contusion measuring 4.5cmx2cm.

(b) Sutured wound over right forehead 2cm above and medial to injury No.1 with two intact sutures vertically placed.

(c) contused lacerated wound over frontal area vertically placed in midline measuring 5 cm x 0.5 cm x bone deep with irregular margin.

(d) Contusion over left cheek measuring 2x1 cm

(e) Contusion over right shoulder measuring 3 x 1 cm."

17) Dr. Naresh (PW 7) found following internal injuries.

"(i) Subgalleal hemorrhage over both frontal and right temporal area.

(ii) Depressed fracture of right frontal bone size 4 x 1.5 cm with fracture line extending upwards up to coronal sutures measuring 7 cm in length with sutural separation on both sides with gaping

exposing underlined brain matter. Fractural line extending on left side upto left temporal bone.

(iii) Fracture line extends from right coronal suture backwards over right parietal bone and 4 cm downwards towards right temporal bone, 9 cm in length. Left frontal bone fractured vertically, 8 cm in length extends upto coronal sutures.

(iv) Fracture seen in anterior cranial cavity with multiple fractures of right orbital plate and fracture seen in right middle cranial cavity."

18) The evidence of Dr. Naresh (PW-7) shows that the brain had injury like contusions to frontal side like on right side the size of the contusion was 3x2 cm and on left side of size 1x1 cm. There was laceration of right frontal bone of 2x2 cm size and subarachnoid hemorrhage over both frontal and parietal lobe.

19) Dr. Nitin (PW 7) has given evidence that all the aforesaid injuries were ante mortem in nature. He has given evidence that sutured injuries found on the head can be caused by article like spade produced in the court and they are sufficient in ordinary course of nature to cause the death if they are considered along with the corresponding internal injuries. Thus, medical evidence

shows that there were 3 injuries on the head and they had caused the aforesaid internal damage. This evidence is sufficient to infer that at least three blows were given on the head by using heavy weapon. The doctor has denied that such injuries can be caused in simple fall on stone. The post mortem report at Exhibit 63 is consistent with the oral evidence of Dr. Naresh (PW-7).

20) Dr. Shivaji Wankhede (PW-9) was working in Lotus Hospital at the relevant time. His evidence, however, shows that the dead body of Suresh was brought to the hospital and there was no question of giving any treatment in Lotus hospital to Suresh. The dead body was brought at 7.00 p.m. He issued certificate at Exhibit 85.

21) The evidence in respect of post mortem examination shows that injury Nos.1 to 3 were on the head as surface wounds. Learned counsel for the appellants submitted that the prosecution ought to have examined doctor from the Civil Hospital where the deceased was shifted first and where probably suturing was done. This Court had expressed that the record from

civil hospital can be called to make this circumstance clear if the defence wants. But the defence did not express desire for that and no application was given. The evidence on the record is sufficient to show that no operation was performed on the head and only suturing was done in respect of the three injuries in the civil hospital and then for better treatment the deceased was shifted to private hospital like Lotus Hospital. The evidence of PW-7 does not show that they were operative injuries. The dead body was reached to Lotus Hospital at 7.00 p.m. Due to all these circumstances, this Court holds that the injuries No.1 to 3 shown in the post mortem report were ante mortem injuries and they were not the injuries in respect of treatment or operation.

22) The prosecution evidence shows that the incident had taken place at about 5.00 p.m., in broad day light in the month of October. There is evidence of eye witness (PW-4) to the effect that it is accused Nos.1 and 2 who gave one blow each on the head of the deceased. It can be said that the account of third blow on the head is not given by PW-4. Not much can be made out of this

circumstance as the evidence of PW-4 shows that he ran away from the spot due to fear of the accused. PW-4 in the cross-examination has deposed that accused No.2 had given blow on the left side of the head. This circumstance also cannot be considered against the prosecution. Injury No.3 mentioned in the post mortem was vertically placed in mid-line. When such incident takes place it is not practically possible to the eye witness to describe the correct side of the head when the blow was given. The evidence on the record shows that two blows were given on right side of frontal bone and the third blow caused injury No.3. Only accused No.1 and 2 had used the spade and so not much can be made out of the absence of substantive evidence in respect of blow No.3 given on the head of the deceased. This circumstance cannot be called as a discrepancy and this Court holds that the eye witness like PW-4 is not expected to give account of each and every injury. If his evidence is considered as a whole it is not consistent with the medical evidence. This Court holds that the medical evidence is consistent with the oral evidence of PW-4.

23) There was charge for the offence punishable under section 302 read with section 34 of the IPC, though section 34 is not shown in the operative part of the decision of the trial court. The learned counsel for the appellants submitted that there is the circumstance that the motive for the offence is not established against the accused and so conviction for offence punishable under section 302 read with 34 of the IPC is not possible and the conviction can be at the most for offence punishable under section 304 Part II of the Indian Penal Code. This submission is not acceptable in the present matter. When there is direct evidence, motive cannot be given that much importance. Specific evidence of the eye witness (PW 4) that accused No.2, whose residence is situated in the vicinity of the spot of offence, arranged to fetch the weapon spade from the house, needs to be kept in mind. Spade has thick handle and heavy blade. Evidence is given by the eye witness that spade was used as weapon. Accused No.1 took this weapon when it was in the hand of accused No.2 and gave blow on the head of Suresh. Due to the blow given by accused No.1, Suresh was injured and then accused No.2 took the weapon from the hand of

accused No.1 and gave another blow on the head of Suresh. These injuries caused fracture of skull bones as described above. There is medical evidence that injury Nos.1 to 3 are sufficient in ordinary course of nature to cause the death. As three injuries were inflicted on the head together by accused Nos.1 and 2 by using such weapon, it is easy to infer that there was the intention to assault on the head of the deceased by such weapon. Due to such evidence inference is possible that there was intention as mentioned in section 300 *secondly* and section 300 *thirdly* of the Indian Penal Code. So it is a murder. In view of the nature of evidence, section 34 of the IPC can be used against accused Nos.1 and 2 and the charge was framed by using section 34 of the IPC.

24) The learned Additional Public Prosecutor placed reliance on the case reported as **State of Rajasthan v. Ram Kailash (AIR 2016 SC 634)**. In view of the facts of the case the Supreme Court held that section 300 of the IPC was applicable and error was committed by the High Court in using section 304 Part I of the IPC. The facts were different. Learned counsel for the appellants placed

reliance on the cases reported as **Manke Ram v. State of Haryana (2003 Cri.L.J.2328) (SC)** and **Joseph v. State of Kerala (2003 Cri.L.J.2543) (SC)**. In the case of Manke Ram (cited supra) when accused had fired two shots by using service revolver and one had hit the neck, due to the circumstance of the case like there was the scuffle, and there was absence of motive, the Supreme Court held that the accused can be convicted under section 304 Part II of the Indian Penal Code. In the second case of Joseph (cited supra) benefit of doubt was given to the accused as the name of the eye witness was not mentioned in the F.I.R. and there was circumstance that accused was arrested very late, after 10 days of the incident even when everything about him was known. These circumstances were not explained by the prosecution in that case.

25) In criminal cases facts of each and every case are always different. One fact which is different can make all the differences in the decision. That is why for appreciation of evidence the decisions in criminal cases cannot be considered as precedent. The evidence of the case needs to be appreciated as a whole in that case. In

the present matter, relevant evidence is already quoted by this Court. The evidence is sufficient to prove that the accused No.1 and 2 together committed murder of Suresh and they are liable to be convicted and sentenced under section 302 read with section 34 of the Indian Penal Code. This Court holds that the trial court has not committed any error in deciding the matter that way.

26) In the result, both the appeals are dismissed. The fees of the learned counsel appointed in Criminal Appeal No.910 of 2019 is quantified at Rs.10,000/- and it is to be paid through the High Court Legal Services Sub Committee, Aurangabad.

Sd/-
(R.G. AVACHAT, J.)

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

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