

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.231 OF 2001

1. Ramesh Genu Kusalkar

2. Kiran Dnyanoba Salunke
 Both R/o. Vadarvasti Karvenagar,
 Pune.

3. Anil Laxman Bhondekar,
 R/o. Ramnagar, Warje, Pune.

... Appellants
 (Orig. Accused Nos.1 to 3)

Versus

The State of Maharashtra

... Respondents

ALONG WITH
CRIMINAL APPEAL NO.233 OF 2001

The State of Maharashtra

... Appellants
 (Orig. Complainants)

Versus

1. Ramesh Genu Kusalkar
 20 years, Karvenagar,
 Vadar-Vasti, Pune

2. Kiran Dnyanoba Salunke
 Karvenagar, Vadar-Vasti,
 Pune.

3. Anil Laxman Bhondekar,
 Warje Ramnagar, Pune.

... Respondents
 (Orig. Accused Nos.2 & 3)

...

Mr. J.P. Yagnik, A.P.P. for the State.

Mr. Kiran D. Salunke, Accused No.2 is present in the Court.

**CORAM: PRADEEP NANDRAJOG, C.J. &
SMT. BHARATI DANGRE, J.**

DATED : 20th AUGUST, 2019.

JUDGMENT:- [Per: Smt. Bharati Dangre, J.]

1. Criminal Appeal No.233 of 2001 is filed by the State seeking enhancement of sentence imposed on the three Accused persons whereas Criminal Appeal No.231 of 2001 is filed jointly by the three Accused persons assailing their conviction under Section 304 Part II of the IPC and the sentence imposed vide judgment dated 05/02/2001 by the Additional Sessions Judge, Pune in Sessions Case No.253 of 1999.

2. We have heard Mr. Yagnik, learned A.P.P. representing the State and Accused No.2 - Kiran Salunke, who is personally present in the Court. At the outset, it was informed by the A.P.P. that A-1 Ramesh has died during the pendency of the appeal and the State, therefore, intends to prosecute its appeal only against Accused Nos.2 and 3.

3. Both the appeals revolve around an incident which took place on 16/04/1999 and which was reported by the Complainant – Santosh (PW-4) based on whose statement, the investigating machinery was set into

motion. Complainant - PW-4 Santosh stated that on 15/04/1999, when he was strolling on the road, he saw a crowd in front of New Fashion Tailor on Kopre Road and he gained knowledge that a fight had ensued between Ganesh Pawar, resident of Kopergaon and one Aatish Dawde in which Aatish was injured and he was admitted in Sanjeevani Hospital, Uttamnagar, Pune. The Complainant then stated in his complaint that on 16/04/1999, he along with his four friends – Sushil, Hiralal (deceased), Deepak and Pappu had gone to Manisha Theatre to watch a matinee show since the vehicle in which they were travelling was punctured and they had to take the said vehicle into a garage. At the relevant time, a person who normally accompanied Aatish and whom the Complainant did not know personally but only by face but he was not aware of his name and address, went inside Manisha Theatre and, after sometime, he came out of the theatre along with three other persons. It is further stated that one of the persons amongst them slapped PW-6 Sushil and thereafter all the four persons took out the knives from their pockets and assaulted the Complainant and his friends. As per the Complainant, he was assaulted in his head and the other three assailants assaulted PW-6 Sushil, PW-7 Deepak and the deceased-Hiralal and injured them. The Complainant ran away from the spot apprehending threat to his life and after sometime when he came out, he saw deceased-Hiralal and PW-6 Sushil in an injured condition and they were bleeding. The Complainant along with his friends approached the Uttamnagar Police Station and informed about the incident and all the injured persons were referred to the hospital. At the relevant time, when the complaint was lodged, PW-6

Sushil and the deceased-Hiralal were under treatment. Based on the said complaint, a FIR was registered under Sections 326 and 307 of the IPC. Deceased-Hiralal, who has suffered injuries on the chest, stomach and neck succumbed to his injuries on 19/04/1999 and, therefore, offence under Section 302 came to be added. The Accused persons came to be arrested on 20/04/1999. Statements of all the injured persons were recorded and they confirmed that the Accused persons were the assailants who had mounted assault on them and injured them and they were the one who assaulted deceased-Hiralal, who succumbed to the said assault.

During the course of investigation, the investigating machinery recovered one knife and one large knife at the instance of Accused Nos.1 and 2 viz. Ramesh and Kiran. Deceased-Hiralal suffered 18 external injuries and six internal injuries as per the postmortem report. The postmortem was carried out by PW-13 who opined that the external injury No.3 and corresponding internal injuries were sufficient to cause death in the ordinary course of nature. PW-5 Pappu, PW-6 Sushil and PW-7 Deepak, who had suffered injuries also underwent medical examination. The incident, which took place on 16/04/1999, was thus witnessed by PW-4 Satish, PW-5 Pappu, PW-6 Sushil, PW-7 Deepak, who were also the injured persons and, PW-10 Narwade, who is also examined as eye-witness to the said incident.

4. On being put to trial, all the Accused persons pleaded to be tried. The prosecution relied upon ocular evidence of PW-4, PW-5, PW-6, PW-7 and PW-10 one Vijay Narwade. The testimony of the eye-witnesses

being found to be trustworthy having ring of truth, the learned Sessions Judge relied upon the version of the eye-witnesses though an attempt was made on the part of the Accused persons to rely on certain contradictions and omissions but the learned Sessions Court did not find any omissions or inconsistencies affecting the case of prosecution materially. The learned Judge also relied on the report of the Chemical Analyzer in respect of the Muddemal articles recovered from the place of offence and the report of the grouping of blood on the articles seized from the place of offence and found the same to be corroborative with the testimony of the eye-witnesses. The contention that no identification parade was held and that this lacunae to the root of the case since as per the prosecution, the Complainant as well as the injured witnesses were not known to the Accused persons was dealt by the Sessions Court and the said submission did not find favour with the Court and it was held that non conduct of the test identification parade is not fatal to the case of the prosecution since the eye-witnesses have identified the Accused persons before the Court and that has been accepted as substantive evidence.

The Sessions Court held that the prosecution has successfully established its case to the effect that Accused Nos.1 to 3 had assaulted PW-4 Satish, PW-6 Sushil, PW-7 Deepak and the deceased through cogent and reliable evidence. The circumstance that neither the injured nor the Accused persons were known to each other and, therefore, there was no case of any previous enmity between them was also accepted to record a finding that the motive was found to be lacking. This factor

weighed with the Sessions Court in recording a finding that Accused Nos.1 to 3, in furtherance of their common intention, had assaulted the deceased with sharp weapon and while doing so, they had full knowledge that it may cause his death and resultantly it was held that the Accused are guilty of offence punishable under Section 304 Part II of the IPC. At the same time, Accused had caused injuries to PW-4 Satish, PW-6 Sushil and PW-7 Deepak with the sharp and cutting object and, therefore, they were convicted for offences punishable under Section 324 read with Section 34 of the IPC. Since the presence of the Accused No.4 on the spot of the incident was doubtful, benefit of doubt was granted to him and, therefore, Accused No.4 came to be acquitted.

5. On hearing Accused Nos.1 to 3 on sentence, the Additional Sessions Judge took note of the fact that the Accused were adolescent at the time of commission of offence being of 19 to 20 years of age and they were not habitual offenders. The Sessions Court took into consideration, the aforementioned two circumstances, coupled with the fact that there was no previous enmity between the Accused and deceased and what had happened was at the spur of the moment and in the backdrop of the fact that the person, who brought Accused Nos.1 to 3 from the theatre is not traced by the police and it is he, who had shown the Complainant to the Accused persons and resulted into the unfortunate incident. Considering the nature of assault suffered by the deceased in the form of 12 incised wounds on the vital part of the body like chest and abdomen and the injuries suffered by PW-6 Sushil and PW-7 Deepak, Accused Nos.1 to 3

were sentenced to suffer imprisonment for five years and to pay fine of ₹1000/- each and, in default, to suffer rigorous imprisonment for six months. Accused Nos.1 to 3 were also sentenced to suffer imprisonment for one year and to pay fine of ₹500/- for being convicted under Section 324 of the IPC. They were also held to be entitled for a set off under Section 428 of the Cr.P.C.

6. On perusal of the prosecution case and evidence brought on record, we are of the view that the incident which resulted into the death of deceased-Hiralal was not premeditated and rather it occurred at the spur of the moment since as per the case of the prosecution, the injured persons and the deceased were outside the theatre and on being informed by some unknown person that they were outside the theatre, the Accused persons, who were watching the movie came out and assaulted the deceased and the injured. It is also established by the prosecution that Accused Nos.1 and 2 used knives to cause the assault and, therefore, the Sessions Court has rightly convicted them for offence punishable under Section 304 Part II of the IPC having knowledge that the injury caused by the weapon used by them is likely to cause death, the Accused have been sentenced to suffer imprisonment for five years but there was no intention to cause death. A2-Kiran on the relevant date was aged 19 years whereas A3-Anil at the relevant time of incident was aged 22 years.

7. We have heard the State through the A.P.P. Mr. Yagnik, who has attempted to canvass before us that the conviction under Section 304 Part

II of the IPC is erroneous and the punishment awarded is inadequate looking to its grievous nature of offence committed by the Accused persons. We have considered the submission and we are of the view that the Sessions Judge has rightly recorded that the act of the Accused was not premeditated or pre-planned and the Accused persons had no intention to cause the death though they had the knowledge that the assault is likely to cause death and, therefore, we do not find that there is any infirmity in the view taken by the Sessions Judge.

As far as the imposition of sentence is concerned, it is to be noted that on the relevant date of arraignment, Accused No.2 - Kiran was aged 19 years whereas Accused No.3 – Anil was aged 22 years. Considering the age of the Accused persons, the learned Sessions Judge ought to have invoked the provisions of the Probation of Offenders Act. The benefit of probation ought to have extended to the Accused considering that they are not habitual offenders and are in their adolescent age. The learned Sessions Judge, however, failed to extent any benefit to them. It is informed by Accused No.2 who is present before the Court that he as well as Accused No.3 had undergone 2½ years of sentence. In the decision reported in Ved Prakash v. State of Haryana, (1981) 1 SCC 447, the Apex Court observed thus:

“..... It is the duty of the sentencing Court to be activist enough to collect such facts as have a bearing on punishment with a rehabilitation slant.

A little later in the judgment, it was held that :

“.....Even if the Bar does not help, the Bench must fulfil the humanizing mission of sentencing implicit in such enactments as the Probation of Offenders Act.”

The approach of the Court while sentencing the offender should be rehabilitistic and the possibility of reformation of a young offender should be given due importance. In the decision reported in *Hari Singh v. Sukhbir Singh (1988) 4 SCC 551*, the Apex Court has held that extending the benefit of probation to first time offenders is generally not inappropriate and the humanizing principle was extended even to a conviction under Part II of Section 304 of the IPC in the decision reported in *State of Karnataka v. Muddappa, (1999) 5 SCC 732*.

8. Considering the aforesaid authoritative pronouncements, we are of the view that the Accused persons also deserve to be extended the benefit of Sections 360 and 361 of the Code of Criminal Procedure and the Sessions Court ought to have recorded the reasons for denial of such benefit. However, that does not constrict the power of the High Court to release the offenders on probation of good conduct in case we are satisfied that the circumstances enumerated under Section 360 of the Code of Criminal Procedure making a convict entitled to be released on probation do exist.

We, therefore, maintain the conviction and sentence imposed on Accused Nos.2 and 3 and dismiss the appeal filed by the State seeking

enhancement of sentence. We grant Accused Nos.2 and 3 probation requiring both to submit good conduct bonds in the sum of ₹ 10,000/- each in the Court of Sessions. The bonds are directed to be furnished within a period of one month and would continue to remain in force for two years. The Accused persons are also directed to submit their respective address of permanent residence to the learned Sessions Court. Subject to execution of these bonds, the appeal filed by the Accused persons is partly allowed whereas the appeal filed by the State seeking enhancement is rejected.

(SMT. BHARATI DANGRE, J.)

(CHIEF JUSTICE)