

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

CRIMINAL APPEAL NO. 262 of 2017

Sagar Dhondiram Pawar	... Appellant
V/s.	
The State of Maharashtra	... Respondent

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Mr. Rushikesh Kale i/b Viresh Purwant for Appellant.
Mrs. M.H. Mhatre, APP for State.

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**CORAM : B.P. DHARMADHIKARI AND
PRAKASH D. NAIK, JJ.**

Date of reserving the Judgment : 3rd April, 2019.

Date of pronouncing the Judgment : 24th April, 2019.

JUDGMENT (PER PRAKASH D. NAIK, J.) :

This is an appeal under Section 374(2) of Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.' for short) challenging the Judgment and Order dated 29th March, 2014 passed by the Additional Sessions Judge-1, Pandharpur, Dist. Solapur in Sessions Case No. 58 of 2011.

2. The applicant-accused no. 1 was convicted alongwith accused no. 2 and 3 for the offence punishable under Section 302 read with

34 of Indian Penal Code (hereinafter referred to as 'IPC' for short) and they were sentenced to suffer life imprisonment. The accused were also convicted for the offence punishable under Section 504 read with Section 34 of IPC and sentenced to suffer Rigorous Imprisonment for two years. They were further convicted for the offence punishable under Section 506 read with Section 34 of IPC and sentenced to suffer Rigorous Imprisonment for two years.

3. The accused no.2 and 3 challenged the impugned Judgment and Order convicting them by preferring Criminal Appeal No. 885 of 2014 before this Court. The appeal of the said co-accused was admitted and subsequently, it was finally heard. Vide Judgment and Order dated 21st July, 2015, the said appeal was partly allowed. The conviction and sentence of the said appellants under Section 302 read with 34 of IPC imposed by the Trial Court was set aside and instead, they were convicted under Section 304-II of IPC and sentenced to suffer Rigorous Imprisonment for four years and pay the fine of Rs.10,000/- each. The conviction under Sections 504 and 506 read with 34 of IPC were maintained. The substantive sentences of imprisonment were directed to run concurrently.

4. While deciding the appeal no. 885 of 2014, this Court by order dated 21st July, 2015, observed that no appeal was preferred by appellant (accused no. 1). Learned APP was requested to inform the Jailor of Kolhapur Central Prison to record the statement of appellant (accused no.1), informing him to prefer the appeal. The said statement to be produced in this Court on or before 28th July, 2018. This Court in order dated 3rd August, 2015, observed that statement of the appellant (accused no.1) was recorded. The statement was produced before the Court through covering letter of Jailor of Kolhapur Central Prison, which was taken on record. Learned APP informed the Court that the appellant (accused no. 1) is suffering from mental illness and he is under treatment for the same in jail. Looking to the fact that the accused is not in a fit mental condition to file an appeal, the jail authorities were directed to ensure that proper medical treatment is given to him and as and when he is in a fit mental condition, he be informed that he may prefer an appeal against his conviction and sentence.

5. The appellant (accused no.1) preferred this appeal challenging impugned judgment and order, which was admitted by order dated 30th March, 2017.

6. The case of the prosecution is as follows:-

The son of the deceased was residing at Uplap Nagar, Bhakti Marg, Pandharpur, alongwith his family. On 12th May, 2011, he had been to hospital. His mother and brother were out of station and his father Haribhau was alone at home. After returning from the hospital, he did not find his father at home and enquired with neighbours. He was informed that due to barking of dogs, his father came out of house and flashed his battery, so as to see if anybody is there. Four persons from Wadar community were there, they arrive at the gate of the complainant's house and manhandled his father by taking him along the side of the house. On search, Haribhau was lying near Samaj Mandir situated in nearby vicinity. He was unconscious and had sustained injuries on his head and face. The injured was taken to the hospital, he was declared dead. The First Information Report (hereinafter referred to as 'FIR' for short) was lodged with the concerned Police Station on 13th May, 2011. The investigation was completed and charge-sheet was filed.

7. The prosecution examined eight witnesses. PW No.1 Timappa Hanchinmane is the pancha witness for spot panchanama. PW No.2

Anand Kulkarni is neighbour of the deceased. PW No.3 Kedar Marathe is the son of the deceased. PW No.4 Dr. Bajrang Dhotre had examined deceased at Jankalyan Hospital. PW No.5 Mahesh Dhumal is the pancha witness for inquest panchanama. PW No.6 Narendra Sharma is the eye-witness to the incident. PW No.7 Dr. Nirmalkumar Bansode had conducted the postmortem. PW No.8 Dr. Vijay Shivpuje had examined the deceased at Yashodhara Superspeciality Hospital, Solapur and PW No.9 Sanjay Gidde is the Police Inspector, who has conducted the investigation. After recording the evidence of the accused, the statements were recorded under Section 313 of Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.' for short). Subsequently, by Judgment and Order dated 29th March, 2014, the accused convicted.

8. As stated hereinabove, after appreciating the evidence of the witnesses, this Court vide Judgment and Order dated 21st July, 2015, the appeal preferred by accused no. 2 and 3 was partly allowed by convicting them for an offence punishable under Section 304-II of IPC and set aside the conviction for the offence punishable under Section 302 of IPC.

9. Learned Advocate for the appellant submitted that the role attributed to the appellant and the co-accused no.1 and 2 who had preferred Criminal Appeal No. 885 of 2014 is identical. The appeal preferred by the co-accused has been partly allowed. It is submitted that the accused were attributed role of assaulting by fist and kick blows. Assuming that this involvement of appellant is proved, there was no intention to commit murder. The offence at the most would fall within purview of Section 304-II of IPC. It is submitted that the co-ordinate bench had appreciated the evidence adduced by the prosecution and has come to the conclusion that the conviction under Section 302 of IPC is not made out and the accused can be convicted for the offence punishable under Section 304-II of IPC. It is submitted that the appellant is in custody since the date of arrest. He has undergone the actual imprisonment from 17th May, 2011 to till date.

10. We have gone through entire evidence. We have also perused the Judgment and Order dated 21st July, 2015 passed by this Court in Criminal Appeal No. 885 of 2014.

11. Learned APP fairly stated that the case of the appellant and the accused no. 2 and 3 who had preferred Criminal Appeal No. 885 of 2014, which was partly allowed vide order dated 21st July, 2015, cannot be distinguished.

12. We have perused the evidence of the witnesses, medical evidence and all the documents exhibited in evidence and we find no reason to deviate from the view taken by the co-ordinate bench while adjudicating the appeal preferred by the co-accused.

13. PW No.2 Anand Kulkarni stated he saw accused persons going towards Jankalyan Hospital hurriedly. The names of the accused were disclosed by him. He was informed by neighbour, that the said persons had assaulted father of Kedar Marathe. Both of them went near Samaj Mandir. Injured was lying in serious condition. On enquiring, the injured informed him that he was assaulted by accused as he had focussed battery on them, after hearing barking of dogs. PW No. 3 Kedar Marathe is the son of deceased. He stated that injured was lying near Samaj Mandir. In the hospital, the injured told him that the accused assaulted him by kick and fist blows. PW No.6 Narendra Sharma is the eye-witness who stated that the

accused assaulted Haribhau. The opinion as to probable cause of death reflected in the postmortem report is that postmortem findings are consistent that death due to cardiorespiratory failure, due to septisaemia, due to multi-organ failure, due to traumatic splenic pancreatic and renal tear. The Advance Cause of Death Certificate also refers to same opinion. PW No.7 Dr. Nirmalkumar Bansode has conducted postmortem. As per his evidence, on external examination, he found contusion and epigastric region which was black in colour 3 x 3 cm and internal examination found fabrotic patch whitish in colour suggesting tear of pancreas, fabrotic patch at medial on spleen suggesting tear, fabrotic patch on upper and middle pole of right kidney. In the cross-examination, he has stated that the injury mentioning in column no. 17 (1) in the postmortem notes is the only external injury and the injuries in column nos. 13, 15, 17 and 21 are dependent on the force used by the assailants.

14. Thus, there is sufficient evidence showing involvement of the appellant in the crime. However, the evidence on record indicate that there was no intention to commit murder and the case would be covered under Section 304-II of IPC as observed by this Court in the Judgment and Order dated 21st July, 2015 passed in Criminal Appeal

No. 885 of 2014. The incident had occurred on 12th May, 2011 and Haribhau had expired on 3rd June, 2011.

15. The incident had occurred at spur of movement, the victim was assaulted by kick and fist blows. Apparently, in the light of oral evidence and medical evidence it cannot be said that there was intention to commit murder. PW No.8 has stated that he is the Chief Surgeon at Yashodhara Hospital. Haribhau was admitted on 13th May, 2011 and the relatives of the patient against medical advice took away patient on 3rd June, 2011. Injuries are possible if a person is hit by fist and kick blows with high velocity. He issued certificate (Exh. 44) at the request of Police which refers to injuries at the time of admission viz. (i) Abrasion over chest and upper abdomen and (ii) Abrasion over right knee region. Certificate also refers to findings of CT abdomen. PW No.4 Dr. Dhotre attached to Jankalyan Hospital has referred to injuries in the nature of contusions and abrasions. Thus, the evidence on record would indicate that the act is done with knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death.

16. It is pointed out by prosecution through report of Kolhapur Central Prison, that the appellant is in custody from 17th May, 2011. Hence, it would be appropriate to direct his release on sentence undergone by him.

17. Hence, we pass the following order:

ORDER

- (i) Appeal is partly allowed;
- (ii) The conviction and sentence of the appellant under Section 302 read with Section 34 of IPC imposed by the learned Additional Sessions Judge-1, Pandharpur vide judgment and order dated 29th March, 2014, in Sessions Case No. 58 of 2011, is set aside, instead, the appellant is convicted under Section 304-II of IPC and directed to be released on sentence undergone with fine of Rs.10,000/-, in default, S.I. for two months, unless required in any other case;
- (iii) The conviction and sentence of the appellant under Section 504 and 506 read with 34 of IPC is maintained;

- (iv) All the substantive sentences of imprisonment shall run concurrently;
- (v) Office to communicate this order to the appellant who is in jail.
- (vi) Muddemal property be dealt with in accordance with law.

(PRAKASH D. NAIK, J.)

(B.P.DHARMADHIKARI, J.)