

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

908. CRIMINAL APPEAL No. 60 of 2016
WITH
CRIMINAL APPLICATION No. 1211 of 2020
IN
CRIMINAL APPEAL No. 60 of 2016

1. Deepak S/o Pundalik Ingale
age 25 years occupation agriculture
R/o Kelgaon Murdeshwar Taluka Sillod District Aurangabad
2. Chhayabai W/o Pundalik Ingale,
age 45 years occupation household
R/o Kelgaon Murdeshwar Tal. Sillod Dist. Aurangabad

...Appellants

VERSUS

The State of Maharashtra

...Respondent

Mr. Nilesh S. Ghanekar, Advocate for appellants.

Mr. A.V. Deshmukh, Addl. Public Prosecutor for respondent/State

CORAM : T.V. NALAWADE &

MANGESH S. PATIL, JJ.

DATE : 18th August, 2020

J U D G M E N T (Per : T.V. NALAWADE , J.)

1. The appeal is filed against the judgment and order dated 19/01/2016 passed in Sessions Case No. 184 of 2010, which was

pending in the Court of the learned Additional Sessions Judge, Aurangabad. The Trial Court has convicted both the appellants, who were accused Nos. 1 & 2, for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and sentenced to suffer imprisonment for life and fine is imposed. Both the sides are heard.

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

First informant Harshal is son of deceased Pundalik. The deceased had married two wives viz. Kantabai and Chhayabai. Kantabai is mother of the informant and she is the first wife of the deceased. In addition to the informant, Kantabai has one son by name Sunil and one daughter by name Ashabai. Ashabai is married and at the relevant time only Kantabai and the informant were at home and they were living with the deceased. Chhayabai (accused No.2) has two sons viz. Dipak (accused No.1) and Anil. They were living in the field situated within the limits of village Kelgaon (Murdeswar) Taluka Sillod and these two wives of Pundalik had separate houses in their field where they were living with their issues. There was not much distance between these two houses.

3. There was dispute between these two families over

agricultural land admeasuring five acres and the land was standing in the name of Pundalik. Chhayabai and her two sons were asking Pundalik to partition this land and give separate share to them but Pundalik was avoiding to do so. On the occasion of previous Ganpati Festival, accused No.1 Dipak had picked up quarrel with the family of Kantabai and he had assaulted Kantabai. The dispute was not taken to police due to aforesaid close relationship.

4. Incident in question took place on 28/03/2010. At about 10.00 to 10.30 pm, informant, Pundalik and Kantabai were at home. Informant had gone to bed. At about 10.00 to 10.30 pm, there was noise of barking of dogs and it was coming from the side of their agricultural land. As the deceased went towards the field to see as to what had happened, Kantabai made informant to wake up and proceed to that side. They both rushed towards that side. There was light of stars in the field and the incident took place in the standing crop of Cotton. Accused Nos. 1 & 2 were plucking cotton and the deceased was asking them not to do so. As the deceased was preventing accused persons from plucking Cotton, they started giving abuses to him. They started saying that he was avoiding to partition the land and so they would finish him. Date of marriage of informant was fixed and it was to take place within a few days and

the accused said that they would see that no marriage of informant takes place. Informant tried to convince Dipak to behave well by saying that he was quarreling with the father. He advised to call mediators for partitioning the land but Dipak was not convinced.

5. During quarrel, Dipak took out pointed weapon like knife from his waist and gave a blow at informant. To avoid the hit of blow on the body, informant raised his hand and the blow hit on his left hand. Informant sustained bleeding injury due to the blow. The father of the informant then rushed forward to intervene. Accused No.1 Dipak then gave a blow of this weapon on the left side of chest of the father. The weapon stuck into the chest but accused Dipak pulled it out and then accused Nos. 1 & 2 went away with the weapon.

6. Informant, his mother Kantabai and others made an attempt to save the life of Pundalik by shifting him to the Government Hospital, Aurangabad, but he succumbed to the injury at about 3.15 am of 29/03/2010. This incident took place on the night between 28/03/2010 and 29/03/2010. The first information report in respect of the incident came to be given on 29/03/2010 and the crime at C.R. No. 40 of 2010 came to be registered for offences under Sections 302, 307 read with Section 34, etc. of the

Indian Penal Code at about 13.05 hours of 29/03/2010.

7. The investigation was made by Sillod (Rural) Police. During investigation, statements of witnesses including Kantabai came to be recorded and accused came to be arrested. Inquest was prepared on the dead body and the post mortem examination was conducted. As treatment was given to Pundlik, treatment injuries were also found on the dead body. There was one injury on the left side of chest and it had caused damage to lung and death had taken place due to that injury.

8. Accused No.1 had also sustained injury in the incident and after his arrest, police got accused No.1 examined through the Medical Officer. During investigation, accused No.1 gave statement under Section 27 of the Evidence Act and that statement led to the discovery of the weapon, which is described as *Barchi*. Accused No.2 also gave statement and that statement led to the discovery of one axe and the clothes of the two accused. These articles were sent to the C.A. Office. Blood was found on the *Barchi* and the clothes of the accused. After completion of the investigation, chargesheet came to be filed for aforesaid offences. The charge was framed for aforesaid offences and the plea was recorded. Accused pleaded not guilty.

9. The prosecution examined in all nine witnesses to prove the offences. Defence examined accused No.1. The record shows that the defence admitted that there was some incident on that night and the injury, which caused the death, was sustained by Pundlik in that incident. However, defence is taken that the deceased had come with weapon spear and when accused No.1 tried to snatch the spear from Pundlik, that weapon caused injury to Pundlik. Defence is taken that there was scuffle during the incident and there was no intention of murder.

10. The Trial Court has believed informant and his mother. Though there was charge of attempt of murder of informant punishable U/S. 307 of I.P.C., the Trial Court has not made specific mention about this offence in operative part of the order. On the basis of reasoning given by the Trial Court, it can be said that the Trial Court did not believe the case of the prosecution in respect of offence punishable U/S. 307 of I.P.C.

11. This Court is discussing hereinafter the admitted facts and other evidence of the case.

12. The post mortem report at Exh. 53 is proved by the prosecution in the evidence of Dr. Zine (P.W.6). In post mortem

report, as many as four injuries are shown in column No. 17 but these injuries show that additional injuries were there as treatment injuries. Admittedly, injury No.1 was sustained in that incident. This injury was on left side of chest and it was lateral to left mammary gland. Length of this injury is given as nine inches. Though the doctor has deposed that said injury can be caused by weapon like *Barchi* produced in the Court, in view of the circumstance that this spear injury was noted after the treatment and the treatment was given in respect of this injury also, it is not possible to discuss the injury in relation to the size and the nature of the weapon. However, the circumstance like admission of accused needs to be kept in mind.

13. Aforesaid injury No.1 had caused damage to ribs No. 4-5, pleura and upper & lower lobes of left lung. The injury was directed inward and downward. The doctor has given opinion that this injury was sufficient to cause death in ordinary course of nature. The aforesaid circumstances and particularly the defence of the accused show that it is not in dispute that Pundalik died homicidal death.

14. In the evidence, informant Harshal (P.W.1) has deposed that he was assaulted with aforesaid weapon and sustained injury

to his left hand. Said contention was made in the F.I.R. also, which is duly proved but no injury certificate in respect of the informant was produced before the Trial Court. On the other hand, the injury certificate in respect of accused No.1 is on the record and it is admitted document. This document shows that on 01/04/2020 accused No.1 was examined at 8.45 pm. Two contusions were found on buttock and sacral region. Multiple abrasions were found at right iliac crest and C.L.W. was found over forearm. These injuries were caused by hard and blunt object. They were simple and age of these injuries was within one week. Though no F.I.R. was given by the side of the accused in respect of the incident, evidence is given by accused No.1 that he sustained these injuries in the same incident. This circumstance also needs to be kept in mind while appreciating the evidence given by the prosecution.

15. Prosecution case rests on direct evidence of Harshal (P.W.1) and Kantabai (P.W.2). There is some circumstantial evidence also and that is being discussed after discussing the direct evidence. Harshal (PW 1) has given evidence that his marriage was settled and the marriage invitation cards were printed. He has deposed that names of family members of Chhayabai, the accused, were not shown on the marriage invitation cards though they were close

relatives and due to that circumstance, there was quarrel between the two families. Copy of the marriage invitation card is produced at Exh. 10 and this document is in accordance with the substantive evidence. However, in the cross-examination, Harshal (P.W.1) has admitted that there was no quarrel on this count.

16. The evidence of Harshal (P.W.1) in the cross-examination and the evidence of Kantabai (P.W.2) and also the evidence of accused No.1 shows that there was dispute between the two families and there used to be quarrels on the count of land dispute. The evidence shows that family of accused Chhayabai was demanding partition from Pundalik but Pundalik was avoiding to give separate share to the family of accused Chhayabai. It is not disputed that the houses of these two families were present in that land and the distance between the two houses was few feet.

17. Harshal (P.W.1) has deposed that at about 10.00 pm of the day of incident, there was noise of barking of dogs and due to that the deceased first went towards that side. There was standing crop of Cotton on that side. He has deposed that he was sleeping and he woke up due to his mother and after that both of them followed the father and went towards the field. He has deposed that they noticed that deceased was asking accused persons not to pluck

Cotton in the night time. He has deposed that quarrel started and during quarrel accused No.1 Dipak said to the deceased that deceased was not effecting partition of the land. He has given evidence that they said that the land can be partitioned after the marriage of Harshal but the accused persons were not convinced. He has given evidence that accused No.2 then instigated accused No.1 that he should kill his father. He has deposed that at that time accused No.2 was holding an axe.

18. Harshal (P.W.1) has deposed that accused No.1 removed knife from his waist portion and he attempted to give blow to him. He has deposed that he raised his left hand to avoid the blow on body and the blow hit on his left hand and caused bleeding injury. Harshal (P.W.1) has deposed that accused No.1 Dipak assaulted deceased with the knife on the left ribs. He has deposed that accused No.1 then removed the knife from the body of father. He has deposed that during incident, accused no.2 Chhayabai had rushed at his mother with axe but accused Nos. 1 & 2 after the assault ran away. He has deposed that there was Moon light and in that light he witnessed the incident. He has given evidence on admission of deceased in Civil Hospital, Aurangabad. He has deposed that his father succumbed to the injury at 3.15 am. The

F.I.R. at Exh. 11 given by him is proved in his evidence. He has identified the weapons used in the incident by accused No.1 which is Article 9 and which is described as *Barchi* in the Court. He has identified Article 8 – axe, which was said to be carried by accused No.2.

19. Kantabai (P.W.2) has given evidence, which is similar to the evidence of Harshal (P.W.1) on main incident. She has deposed that when she and Harshal (P.W.1) reached to the spot, quarrel was going on. She has deposed that during incident, accused No.1 first assaulted Harshal on his left hand with *Barchi* and when deceased intervened, accused No.1 gave blow of *Barchi* on left side of ribs of the deceased. She has deposed that due to the blow, her husband collapsed. She has given evidence against accused No.2 that she had rushed at her by pointing an axe to her at that time.

20. The aforesaid evidence shows that as per the two witnesses, accused No.1 had assaulted first informant Harshal (P.W.1) and when deceased intervened, a blow was given to him. In F.I.R., the weapon used against deceased was described as knife by Harshal (P.W.1). Kantabai (P.W.2) has described the weapon as *Barchi*. According to Kantabai (P.W.2), there was wooden handle to the weapon but there is no such wooden handle to the weapon

produced in the Court and Harshal (P.W.1) has also not described the weapon that way. Harshal (P.W.1) has deposed that the weapon got stuck in the body of the deceased but such evidence is not given by Kantabai (P.W.2). Thus, there are few discrepancies in the evidence of P.W.1 and P.W.2 on the main incident but due to the fact that accused No.1 has given substantive evidence and he has admitted that the incident took place and pointed weapon caused injury to the deceased, these inconsistencies can be ignored. In such case these discrepancies cannot go to root of prosecution case.

21. Accused No.1 has admitted that in the incident, pointed weapon like spear was used, though he has tried to say that the weapon was brought by the deceased. The article produced in the Court is only a blade and there is no handle to make it a spear. It was night time and it is the case of the prosecution that only due to Moon or star light the incident could be witnessed. Both panch witnesses on memorandum of statement given by accused No.1 to police turned hostile. The Police Officer, to whom allegedly statement was given by accused No.1, was dead when the evidence was recorded and the preparation of these documents by the said deceased Officer is not proved in the evidence of other Police Officer examined by the prosecution.

22. The spot panchnama of offence is also not on record. It is in the evidence that the incident took place in the field where there was standing crop of Cotton. Though the Trial Court has held that the accused was prepared and ready with the weapon having intention to assault deceased, there are aforesaid circumstances which do not support this inference. The evidence on the record shows that only due to barking of dogs, the deceased had gone to that side on that night. Admittedly, the houses of the two families are situated in the same field and Kantabai (P.W.2) has admitted in her cross-examination that the family of the accused had joined in sowing operation in that year. Thus, the inference is not possible that they had gone there to commit theft of cotton. Further, there is no such panchnama on the record showing that some Cotton was plucked already and it was lying there. Thus, it can be said that the genesis of the incident is probably suppressed by the prosecution.

23. There is no corroboration of F.I.R. to the version of Harshal (P.W.1) that accused No.2 Chhayabai was holding an axe at the relevant time and she had rushed with the axe at Kantabai (P.W.2). Though the axe is shown to be recovered on the basis of the statement given U/S. 27 of the Evidence Act by accused No.2, this weapon was not used in the incident and no blood was found on this weapon. Such weapon is available in almost every house of

agriculturists. This circumstance is also not considered by the Trial Court in favour of accused No.2 and due to that conviction is given to accused No.2.

24. As already observed, four injuries were sustained by accused No.1 in the incident. This circumstance supports the version of accused No.1 that on that night there was scuffle. Further, in the cross-examination of accused No.1, the learned Addl. Public Prosecutor had suggested to accused No.1 that accused No.1 had given blow of weapon in the heat of anger.

25. The evidence on the record shows that only one blow of dangerous weapon was given to the deceased by accused No.1. This blow was given probably during scuffle. The blow hit the deceased on lateral part of left side of chest in the agricultural land, which has no even surface. Two male persons were involved in the incident from the side of complainant and one accused, only one male person, was involved in the incident from the side of the accused. Admittedly, there was land dispute and this Court holds that genesis of the incident is not brought on record. But there was reason for the quarrel and also to get angry. The prosecution has not explained the injuries, which were found on the person of accused No.1 and he has given specific substantive evidence that there was scuffle. All

the circumstances have created probability that there was sudden quarrel on that night between the two families. Only one injury was found on the dead body of Pundalik and, thus, no undue advantage was taken by accused No.1 on that night. Due to all these circumstances, this Court holds that the offence, as defined in Section 300 - Exception No. 4 of I.P.C., is committed. Exception No. 4 is as under :

"Exception 4. - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation. - It is immaterial in such cases which party offers the provocation or commits the first assault."

26. There is medical evidence that the injury sustained by the deceased is sufficient in ordinary course of nature to cause the death. However, in view of the aforesaid circumstances, which favour accused No.1 at least to some extent, it can be said that there was intention of causing such bodily injury as is likely to cause death and as Exception 4 to Section 300 of I.P.C. is applicable, this offence can be punished U/S. 304, Part I of I.P.C. For this offence imprisonment for life or imprisonment for a term which may extend

to ten years can be given. Submissions made show that accused No.1 has been behind the bars for a period of 10 years and 5 months. It appears that the fine is imposed but sentence in-default of payment of fine is not imposed. Due to this circumstance, this Court holds that by giving conviction for offence punishable U/S. 304, Part I of I.P.C., fine can be adjusted and some benefit can be given to the accused.

27. The learned Counsel for the appellants has placed reliance on some observations made by the Apex Court. The cases are as under :

- (I) ***Criminal Appeal No. 729 of 1991 (V. Sreedharan Vs. State of Kerala)***. In this case, the Apex Court held that the conviction of offence punishable U/S. 304, Part I was proper as there was single blow of weapon dagger. There was also evidence of provocation given to the accused.
- (II) ***In Criminal Appeal No. 571 of 1976 [(Hem Raj Vs. The State (Delhi Administration))]***, there was single stab injury on chest and incident had taken place most unexpectedly in sudden quarrel and without premeditation, the Supreme Court held that there was no intention to cause death and conviction for

offence punishable U/S. 304, Part II of I.P.C. was proper.

(III) In *Criminal Appeal No. 444 of 1982 (Gurmail Singh and others Vs. State of Punjab)*, accused had given spear blow to victim who had tried to intervene the incident. In that case also, the Supreme Court held that conviction for the offence punishable U/S. 304, Part II of I.P.C. was proper.

28. In the present matter also, this Court has come to the conclusion that there is clear probability that the incident took place in sudden quarrel and without premeditation and the accused did not take undue advantage of the circumstances. Only due to the motive, this Court has come to a conclusion that there was intention to cause the injury that resulted into the death. On the whole, the decision of acquittal needs to be given in favour of accused No.2 as she had not played any part in the incident and there is nothing to infer that she had shared common intention with accused No.1. The deceased was her husband and the evidence given that instigation was given by her to accused No.1 is not that convincing and satisfactory. In the result, the following order.

ORDER

I. Appeal of appellant No.2 Chhayabai W/o Pundalik Ingale

is hereby allowed. The judgment and order of the learned Additional Sessions Judge, Aurangabad, dated 19th January 2016, delivered in Sessions Case No. 184 of 2010 against her to convict her for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, is hereby quashed and set aside. She stands acquitted of the offences for which the charge was framed and she was tried. She is already on bail. Her bail bonds are continued for the period of six months in view of provision of Section 437-A of the Criminal Procedure Code.

II. The appeal of appellant No.1 Deepak S/o Pundalik Ingale is partly allowed. The judgment and order of the Trial Court convicting him for the offence punishable U/S. 302 read with S. 34 of I.P.C. is hereby quashed and set aside. Instead, he stands convicted for the offence punishable U/S. 304 Part I of I.P.C. He is sentenced to suffer imprisonment for the period of 10 (ten) years and the remaining period undergone is treated as imprisonment in lieu of fine. He is to be released forthwith as he has already undergone the sentence.

III. Bail bonds of Rs. 15000/- (Rs. Fifteen thousand only) are to be obtained from him under Section 437-A of Cr.P.C. before his release.

IV. Fine amount, if any deposited by appellant/accused No.2
be refunded to her.

V. Application filed for bail stands disposed of.

(MANGESH S. PATIL)
JUDGE

(T.V. NALAWADE)
JUDGE

Madkar