

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 222 OF 2015

Shivaji @ Bhau Eknath Jadhav }
Age-58 years, Occ: Agriculturist }
R/o. "Piracha Mal", Jadhav-Vasti, Sokasan, }
Tal-Man, District-Satara. }
(At present lodged in Kolhapur Central }
Jail, Kalamb. } Appellant

Versus

The State of Maharashtra }
(At the instance of Dahiwadi Police }
Station in connection of C.R. No. }
83/2010) } Respondent

Mr. Rahul S. Kate for the Appellant.

Ms. P.P. Shinde-APP for the State.

CORAM : SMT. SADHANA S. JADHAV &
N.J. JAMADAR, JJ.

RESERVED ON : 24th November 2020.

PRONOUNCED ON : 8th December 2020.

JUDGMENT :- (PER SADHANA S. JADHAV, J.)

1. The appellant herein is convicted for the offence punishable under Section 302 of Indian Penal Code and is sentenced to suffer imprisonment for life and to pay fine of Rs.500/- (Rupees Five Hundred only), in default further Rigorous Imprisonment for three

months by Additional Sessions Judge, Vaduj in Sessions Case No. 46 of 2010 vide Judgment and Order dated 14th January 2015. Being aggrieved by the said judgment and order, the appellant herein has filed the present appeal.

2. The case of the prosecution in a nutshell is as follows:-

a) The appellant herein happens to be the nephew of Dhondiram Jadhav (the deceased). They were residing in their ancestral houses situated on the land known as "Piracha Mal". They reside in their respective portions allotted to them. There used to be intermittent quarrels between both the families, on the ground that the ancestral lands have not been partitioned by metes and bounds and therefore, they were not on cordial terms with each other. On 22nd September 2009, PW.1 Vitthal, the son of Dhondiram had received a phone call from his wife Sindhu that his father Dhondiram has sustained grievous injuries at the hands of the accused. At that time Vitthal was at Vaduj and therefore he had directed the family members to bring the injured to Pusegaon. Dr. Anil Patil upon examining the injured, apprised Vitthal of the grievous nature of injuries, he therefore reported the incident to the police station on the basis of which Crime No. 83 of 2009 was registered at Dahiwadi Police Station against the accused for an

offence punishable under Section 326 of Indian Penal Code. Dhondiram succumbed to the injuries on the next day and therefore section 326 of Indian Penal Code was substituted by Section 302 of Indian Penal Code.

3. The prosecution has examined as many as 16 witnesses to bring home the guilt of the accused. However, the prosecution relies upon the evidence of PW.1-Vitthal Jadhav son of the deceased Dhondiram, PW.3-Kamini Jadhav who was collecting grass in the adjacent land. PW.4-Sindhu Jadhav the daughter-in-law of deceased Dhondiram, PW. 5-Rajesh Pawar the grandson of deceased Dhondiram and PW.6- Popat Shirkule.

4. PW.1-Vitthal Jadhav has given the family history stating therein that the accused happens to be the son of his uncle Eknath. The deceased and Eknath had inherited the agricultural land admeasuring about 59 acres. There was a partition 30 years ago. The lands were partitioned by the deceased equally. There were no disputes between Eknath and Dhondiram. No court cases either Civil or Criminal were pending between the parties in any Court of law.

5. PW.1- Vitthal Jadhav happens to be the son of the deceased. PW.1 is the first informant, he has deposed before the Court in consonance with the recitals of the First Information Report. As far as the information received by him is concerned, he has stated that PW.4-Sindhu, his wife had informed him about the said incident.

6. According to him on 22nd September 2009 at about 4.30 p.m. he had received a phone call from his wife informing him that the accused Shivaji had assaulted his father with stick and stones on account of his father asking the accused to remove his cattle from “Mhasobacha Mal”. He was also informed that Kamini Jadhav, PW-3 has witnessed the incident, wherein the accused assaulted the deceased with a stick and thereafter, Rajesh Pawar, nephew of PW-1 with the help of Popat Shirkule had brought his father home.

7. PW.3-Kamini is an eye-witness and has deposed before the Court that her agricultural land is adjacent to the land of deceased Dhondiram Jadhav. That, on 29th September 2009 she was cutting grass in her field which is known as Dahiwad Kada. She heard the cries of Dhondiram which attracted her attention and then she saw that Dhondiram was lying on the ground whereas, accused Shivaji was assaulting him. She rushed to the spot and noticed that Dhondiram had sustained bleeding injury on his head. Upon seeing blood, she felt giddy. In the meanwhile, daughter-in-law and grandson of Dhondiram had rushed to the spot. She had seen spectacles, turban and the stick of deceased lying nearby, therefore, she inferred that there must have been a scuffle between the accused and the deceased. She was unaware of the prelude to the incident or the genesis of the offence. That, when she was helping Dhondiram to sit, he disclosed that he was assaulted by the accused. That, the accused had fled after she saw him. She has also admitted that the accused had suffered a paralytic attack.

8. PW.4-Sindhu Jadhav happens to be the daughter-in-law of deceased and wife of PW.1, the complainant. According to her, there were intermittent quarrels between the accused and the deceased on account of partition and unequal distribution of land and that the accused was often letting his cattle to graze in the land.

9. PW.4 has stated in her testimony about the incident which she had narrated to her husband. She admits that she is not a witness to the actual incident of assault. When she rushed to the spot of incident she saw PW-3, Kamini Jadhav and her nephew supporting the injured. That, her father-in-law had sustained head injuries and blood was oozing. Upon enquiry, her father-in-law had disclosed to her that he had questioned Shivaji as to why he had tethered his cattle near their land and in response Shivaji had snatched the stick from his hand and assaulted him by the said stick. She informed about it to her husband.

10. According to her, her father-in-law was aged about 85 years and a stick was part of his attire, which he always carried for his support. She had seen the cattle of the accused at the spot of incident. She is not an eye-witness. Her testimony is consistent with the testimony of PW-3.

11. PW.5-Rajesh Pawar is the grandson of deceased Dhondiram. According to him, on the day of incident, he had heard Kamal Jadhav, wife of accused abusing his grandfather as well as the accused. He, therefore, proceeded in that direction and was near the

drinking water tank when he saw his grandfather lying in “Mhasobacha Mal” without turban on his head. He also saw the cattle of accused and therefore ran towards his grandfather who was injured and he saw that Kamini Jadhav supporting his grandfather to walk. The deceased had made an oral dying declaration before PW.3, PW.4 and PW.5.

12. PW.6 -Popat has reiterated the testimony of PW.3, PW.4 and PW.5 in all material particulars. The evidence of all the witnesses on this aspect is consistent.

13. PW.14-Dr. Sandip Pol, was attached to the Rural Hospital Dahiwadi. On 22nd September 2009 he had examined Dhondiram, who was referred along with a police memo. He had seen the following injuries :-

- i. One CLW on left parietal region size about 2 x 4 x 1 cm and bleeding was present.
- ii. One CLW right post auricular region (behind ear) size 1 x 3 x 1 cm. Swelling was present.
- iii. CLW right occipital region size 2 x 3 x 1 cm bleeding was present.
- iv. CLW at right occipital parietal region size 2 x 2 x 1 cm.
- v. Bleeding through left ear.

The case history was given by patient and relatives.

On 23rd September 2009, PW-14 had examined the accused Shivaji Jadhav and found following injury on his person:-

- i) Abrasion on left parietal region size 4 Cm in diameter.

14. PW.10-Dr. Suhas Mane had performed autopsy of dead body of Dhondiram, aged about 85 years on 23rd September 2009. He had observed the following injuries :-

1. Sutured C.L.W. over left parietal occipital region of size 3 Cm. X 1 Cm.
2. Abrasion over right middle aspect of leg.
3. Abrasion over left scapular region 1 Cm. Diameter.
4. Sutured C.L.W. over infra scapular region 2 Cm. Length.
5. Abrasion over right elbow 1 Cm. Diameter.
6. Bleeding through left ear.

There was fracture of right 5th rib on palpation.

On internal examination, he found following injuries.

1. There was hemorrhagic contusion over left parietal occipital region of size 10 x 5 Cm.
2. Fracture of left parieto occipital bone 2 Cm. In length.

Examination of Brain revealed.

3. Large subdural haematoma over left temporo parietal region Blood about 300 ml.

Brain matter shrunken and normally appearance.

Examination of Thorax it revealed:

4. Fracture of right 5th rib.

Right and left lungs were pale.

PW.10-Dr. Mane has categorically opined that the injuries sustained by Dhondiram were sufficient in the ordinary course of nature to cause death. Postmortem notes are at **'Exhibit-49'**.

15. The learned counsel for the appellant submits that the accused who had already suffered a paralytic attack and he is disabled to the extent of more than 40%. That he was apprehended and assaulted by the deceased who was holding the stick. The incident had occurred on the spur of the moment and it was not premeditated and therefore, according to the learned counsel, initially the offence was registered under section 326 of Indian Penal Code and only when the deceased had succumbed to the injuries, it was converted to an offence under section 302 of Indian Penal Code.

16. The learned counsel has submitted that the deceased had not died an instantaneous death. Even according to the witnesses the deceased had disclosed to them that he had questioned the accused about tethering his cattle so close to the land of the deceased and in response, the accused had snatched his stick and assaulted him with the same. It is submitted that the accused-appellant has undergone almost 7 years of imprisonment and deserves to be set at large.

17. Per contra, the learned APP has submitted that although there is a dying declaration to the effect that the incident of assault was preceded with a verbal altercation, the accused had taken undue advantage of the situation and caused grievous injury to the deceased who was more than 80 years old and therefore, according to the learned APP, the verdict of the Sessions Court calls for no interference.

18. Upon considering the evidence adduced by the prosecution and evaluation of the substantive evidence of all the witnesses and the submissions of the respective parties, the only inference that can be drawn is that at the spot there was an altercation between the accused and the deceased and in a sudden fight, after the deceased objected to the tethering of the cattle by the accused near his land. Moreover, according to the PW-4, Rajesh the wife of the accused was abusing the deceased and the accused, the appellant must have assaulted the deceased without any premeditation. The defence of the accused, by way of suggestions given on his behalf to the prosecution witnesses is sufficient to show that the incident of assault was a result of grave and sudden provocation and the same does not appear to be improbable. The incident had occurred in a heat of passion.

19. On the basis of the oral dying declaration it can be said that it was the deceased who had questioned and objected to the teetering of the cattle by the accused near his land. The accused had also sustained injury, the accused got provoked and hence he had assaulted the deceased without any intention to cause death.

20. The deceased may have raised his stick to cause hurt to the accused. However, he was overpowered by the accused who in turn assaulted him and the injury turned out to be fatal. Moreover, the deceased was an octogenarian. According to PW-2, he was 85 years old at the time of incident and therefore, what falls for consideration is whether the accused-appellant had intended to cause the death of the deceased or whether the incident had occurred on the spur of the moment. The fact that the stick belonged to the deceased would be a clear indication that it was snatched by the accused who then mounted assault upon the deceased.

21. Although, the evidence further shows that, although PW. 2,3 and 4 had reached the spot to rescue Dhondiram, the accused had not caused any harm to them nor restrained them from rescuing or helping the deceased. He did not cause any other injury to the deceased and therefore it can be said that he had not acted in cruel or unusual manner or had taken undue advantage of the situation. Admittedly, he did not assault PW. 2,3 and 4. This fortifies our belief that the assault on the deceased was made during the sudden quarrel without any pre-meditation. The statement of the witnesses and suggestions given on his behalf to the prosecution witnesses makes it amply clear that the accused had assaulted the deceased with the stick which was a part of his attire, does not appear to be improbable and therefore, Exception 4 of Section 300 is clearly attracted. Exception 4 of Section 300 reads as follows:-

“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”

22. In a similar case i.e. in the case of ***Satish Narayan Sawant v/s. State of Goa reported in (2009) (17) SCC 724***, the Hon’ble Apex Court has held as follows:-

“24..... Section 300 Indian Penal Code further provides for the Exceptions which will constitute culpable homicide not amounting to murder and punishable Under Section 304. When and if there is intent and knowledge then the same would be a case of Section 304 Part I and if it only a case of knowledge and not the intention to cause murder and bodily injury, then the same would be a case of Section 304 Part II.

“28..... Records clearly establish that there was indeed a scuffle between the parties with regard to the availability of electricity in a particular room and during the course of scuffle the Appellant also received an injury which was simple in nature and that there was heated exchange of words and scuffle between the parties before the actual incident of stabbing took place. There is, therefore, provocation and the incident happened at the spur of the moment. That being the factual position, we are of the considered view that the present case cannot be said to be a case Under Section 302 Indian Penal Code but it is a case falling Under Section 304 Part II Indian Penal Code. It is trite law that Section 304 Part II comes into play when the death is caused by doing an act with knowledge that it is likely to cause death but there is no intention on the part of the accused either to cause death or to cause such bodily injury as is likely to cause death”.

23. The Court also cannot be oblivious of the fact that the accused had also sustained injury in the said transaction. The injury may be superficial or cosmetic but an apprehension by the accused that

he is likely to be assaulted is sufficient for him to react. Hence, the element of intention is ruled out.

24. In view of the evidence adduced by the prosecution, the circumstances in which the accused had assaulted the deceased and the oral dying declaration, the conviction of the appellant for an offence punishable under section 302 of Indian Penal Code deserves to be set aside and the appellant would be liable for an offence punishable under section 304 Part II of Indian Penal Code. Hence, the following order:-

ORDER

- i) The appeal is partly allowed.
- ii) The order of conviction of the appellant for the offence punishable under section 302 of Indian Penal Code vide judgment and order dated 14th January 2015 passed by the Additional Sessions Judge, Vaduj in Sessions Case No. 46 of 2010 is hereby quashed and set aside.
- iii) The appellant instead is convicted of the offence punishable under section 304 Part II of Indian Penal Code and is sentenced to suffer rigorous imprisonment for 8 years. The sentence of fine is maintained.
- iv) The appellant is entitled to set off for the period already undergone.

25. The appeal is accordingly disposed of.

26. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on a digitally signed copy of this order.

(N.J. JAMADAR, J)

(SMT. SADHANA S. JADHAV, J)