

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

CRIMINAL APPEAL NO. 512 OF 2014

1. Dnyaneshwar Arjun Bhagwat

Age- 38, Occu: Agri.

2. Arjun Sakhahari Bhagwat

Age-57, Occ. Agriculturists,
Both R/o. Jategaon, Tal. Nandgaon,
Dist. Nashik

... Appellants.

V/s

The State of Maharashtra

Through P.S.O. Nandgaon Police
Station, Tal. Nandgaon, Dist. Nashik.

... Respondent.

Mrs. Ayesha Ansari a/w Mrs. Nasreen Ayubi, for the Appellants.
Mr. A.R. Patil, APP for the State.

**CORAM : PRASANNA.B.VARALE &
V. G. BISHT, JJ.**

DATE : 6th October, 2020.

JUDGMENT (PER : V. G. BISHT, J.)

The present Appeal has been instituted by the appellants-accused, against the judgment and order of conviction dated 16th May, 2014 passed by learned Ad-hoc District Judge-1 and Additional Sessions Judge, Malegaon, Dist. Nashik in Sessions Case No. 67 of 2011. They

were convicted and sentenced under Section 302 r/w 34 of the Indian Penal Code (for short “IPC”) to undergo rigorous imprisonment of life and to pay fine of Rs.10,000/-each and in default of payment to undergo simple imprisonment for a period of one year.

2 Briefly, the case of the prosecution against the appellants-accused is as follows:

On 20/04/2011 at about 10.00 a.m., informant was proceeding towards his house through Maruti Galli from Jategaon S.T. Stand. When he reached near Maruti Temple, a motorcycle dashed him from behind as a result of which he fell down. According to prosecution, informant’s nephew Dyaneshwar (A-1) and informant’s brother Arjun Sakhahari Bhagwat (A-2) were riding the said motorcycle. The prosecution alleges that when the informant confronted A-1 as to why he was dashed, both the accused got down from the motorcycle, started abusing and told the informant why he was not walking down properly. Meanwhile, younger brother Balu Sakhahari Bhagwat came for intervention but both the accused abused him and A-2 caught hold of said Balu Sakhahari Bhagwat and A-1 gave a blow of tommy on his head and thereby caused bleeding injury.

3 The prosecution then contends that the villagers, namely, Nana Pandurang Wagh (PW 7) and Dyaneshwar Vishwanath Pawar separated the quarrel and the injured was rushed to Government Hospital, Nandgaon where the Medical Officer after giving the first aid sent him to Malegaon for further treatment. In the said incident, according to prosecution, the informant also sustained injury on his back and right elbow. The informant accordingly lodged the report with Nandgaon Police Station on the basis of which Crime No. 55 of 2011 for the offences punishable under Sections 302, 323, 504, 506 r/w 34 of the Indian Penal Code came to be registered against the appellants-accused.

4 It appears from the record that PW 17 Police Constable visited the place of occurrence and prepared spot panchanama and seized sand and blood stained stand from the spot under the panchanama. PW 18 Police Constable seized blood stained shirt of A-1 (Exh. 35). PW-22 PSI prepared the inquest panchanama (Exh. 17) of the dead body and sent the body for postmortem and collected the postmortem report. PW 23 API during the course of investigation recorded the statements of witnesses. He also recorded the disclosure statement of A-1 given under Section 27 of the Evidence Act, collected the CA report and after completion of investigation forwarded the charge-sheet against the

appellants-accused.

5 To substantiate the Charge against the appellants-accused, the prosecution has examined as many as 23 witnesses and exhibited number of documents. The appellants-accused were questioned under Section 313 of the Code of Criminal Procedure ('Cr.PC.' for short) about the incriminating evidence and circumstances and they expressed ignorance and denied all of them as false and that a false case has been filed against them.

6 Ms. Ansari, learned counsel for the appellants-accused, submitted that the whole incident took place in a spur of moment and that the accused had not come with a preconceived plan to assault the deceased. According to learned counsel, even if the accusations of the prosecution are accepted in toto, a case under Section 302 of IPC is not made out and since the assault made in course of quarrel, the learned trial Court committed an error in law by awarding conviction under Section 302 of IPC. According to learned counsel, Exception 4 to Section 300 of IPC is applicable in the facts and circumstances of the present case. The learned counsel also placed reliance in the cases of **Induben Arjun Wagh V/s State of Maharashtra**¹, **Pularu V/s State of M.P.**² and **Sandhya Jadhav**

1 2011 CJ (Bom) 1312

2 1993 CJ(SC) 630

(SMT) V/s State of Maharashtra³

7 Per contra, Mr. Patil learned APP, on the other hand, vehemently and vociferously opposed the submissions advanced by the learned counsel for the appellants-accused. The learned APP took us to the evidence of material witnesses and as also the medical evidence and pointed out that since the life threatening injury was inflicted on the prominent part of the body, the intention was clear on the part of the appellants-accused to commit the murder of the deceased. According to learned APP, the learned trial court has not committed any error while appreciating the prosecution evidence on record and has correctly applied the law. There being no merit in the appeal, the same is liable to be dismissed, argued learned APP.

8 In order to establish that death of deceased was homicidal, the prosecution has examined Medical Officers viz. PW 15 and PW 16.

9 PW 16- Dr. Vilas Aasaram Chordiya states in his evidence (Exh. 62) that on 20/05/2011 he was attached to Jivan Hospital, Malegaon. The patient, namely, Balu Sakhahari Bhagwat ('deceased' for short) was admitted in his hospital at 2.00 p.m. with history of assault.

³ (2006) 4 Supreme Court Cases 653

There was bleeding from right ear. He found brain stem injury and bleeding and swelling on parietal region. Though he treated the deceased but he succumbed to the injury at about 3.45 p.m.

10 Then there is evidence of PW 15- Dr. Mohammad Wasi Iqbal Ahmed who states in his evidence (Exh. 56) that he conducted the postmortem on the dead body of deceased. According to him, there was haematoma on right parietal region of scalp admeasuring 10 x 5 x 2 cm. He also found fracture on scalp of right parietal region and intracranial bleeding in brain. According to him, the cause of death was cardio respiratory arrest due to intracranial bleeds due to head injury. He then proved the contents of postmortem at Exh. 57.

11 From the evidence of both the above-noted Medical Officers, it is quite clear that the deceased had sustained brain injury. More particularly, the evidence of PW 15-Autopsy Surgeon reflects that the cause of death was cardio respiratory arrest due to intracranial bleeds due to head injury. However, in the cross-examination PW 15-Medical Officer admits that if a person falls on hard and blunt substance, the injury noted by him was possible. So also, if a stone weighing one or two kg. is thrown from a short distance, the alleged injury was possible.

In view of this, we will have to find out whether deceased died a homicidal death or otherwise.

12 At the very outset, we would like to make it clear that the present appeal is argued by the learned counsel for the appellant-accused only on the point of sentence. The conviction is not disputed in any manner. Learned counsel for the appellant-accused submitted that if the accusations of the prosecution are accepted in toto, the case under Section 302 of the IPC is not made out. The conviction should not have been done in terms of Section 302 of IPC. According to her, Exception 4 to Section 300 of IPC is applicable.

13 Section 299 of the IPC explains culpable homicide as causing death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that the act complained of is likely to cause death. The first two categories require the intention to cause death or the likelihood of causing death while the third category confines itself to the knowledge that the act complained of is likely to cause death.

14 Section 300 of the IPC declares that except in those cases which are specifically excepted culpable homicide is murder in situations which

have been specifically laid down. These are commonly referred to as firstly, secondly, thirdly and fourthly under Section 300 of the IPC. The Hon'ble Apex Court in the judgment in ***State of Andhra Pradesh v. Rayavarapu Punnayya and Another***⁴ inter alia held as follows :

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder', on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such casual connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of 'murder' contained in Section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304, of the Penal Code".

15 It is also relevant to note that Exception 4 to Section 300 of the IPC which reads as under :

⁴ 1976 (4) SCC 382 : (AIR 1977 SC 45)

“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”.

16 In ***Surinder Kumar*** (*supra*), the Hon’ble Apex Court held that to invoke Exception 4 to Section 300 of the IPC, four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion ; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner.

17 The aforesaid aspects have been high lighted in the case of **Sandhya Jadhav (Supra)**.

18 Further, in ***Arumugam v. State***⁵, in support of the proposition of law that under what circumstances Exception 4 to Section 300 IPC can be invoked if death is caused, it has been explained as under : (SCC p. 596, para 9)

“9..... ’18. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight ; (c) without the offender’s having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients

⁵ (2008) 15 SCC 590

mentioned in it must be found. It is to be noted that the “fight” occurring in Exception 4 to Section 300 IPC is not defined in the Penal Code, 1860. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression “undue advantage” as used in the provision means “unfair advantage”.

19 The question before us, in the light of submissions advanced by either side, is whether in facts and circumstances of the case the appellant- original accused has been rightly convicted for the capital offence and if not whether the act attributed to him would constitute a lesser offence like culpable homicide not amounting to murder punishable under Section 304, Part I or II of the IPC.

20 Before advertng to the ingredients of the offence with which the accused is charged, we would like to go through the evidence of prosecution witnesses in order to ascertain the relations shared by accused and the informant at the time of incident. Because this is one of

the factor which will have to be borne in mind while assessing the nature of the offence.

21 It is also noteworthy that the informant is a real brother of A-2 and A-1 is his nephew. The deceased was also his younger brother that is to say the deceased was real brother of informant and A-2.

22 PW-1 candidly admits in his cross-examination that all brothers are having good relations, including A-2. Even he was having good relation with the deceased. He further admits that he was not having any conflicting relations with A-2.

23 The above clear and categorical admissions go to show the nature of relationship between the parties. They had no animosity between them at the time of alleged incident. This is a very crucial factor which we will definitely go a long way while determining the fate of appellant-accused.

24 We now propose to go through the examination-in-chief of PW-1 informant. It is his very specific evidence that on the day of incident he was proceeding from the bus stand by walking when a motorcycle came from behind and gave a cut to him, he fell down. When he got up he

saw nephew Dyaneshwar Arjun Bhagwat (A-1) and his brother Arjun Sakhahari Bhagwat (A-2) on motorcycle. He asked Dyaneshwar, why he had given a cut to him to which A-1 replied that he should have walked properly. It is his further evidence that A-1 abused, assaulted and pushed him. His younger brother Balu Sakhahari (deceased), who was present there, separated the quarrel. It is then A-2 caught hold of deceased while A-1 gave a blow with iron rod (tommy) on the head of the deceased. The bleeding started from ear and head. The deceased was rushed to the hospital where he succumbed to the injuries.

25 Similar is the evidence of PW 9- Kishor Balu Bhagwat (Exh.42), and that of PW 10-Jijabai Balu Bhagwat (Exh. 43), son and wife of the deceased, respectively as they had also witnessed the incident. Although, some material portion of their examination-in-chief have come on record by way of major omissions but despite prosecution having examined PW-23, the investigating officer, the defence failed to prove those omissions from the mouth of the said investigating officer. Even if we exclude the evidence of son and wife of the deceased still the evidence of PW-1 informant remain intact and as already noted that the conviction is not disputed, we are here only to find out the nature of offence and consequent punishment which it entails.

26 The oral testimony of PW-1 informant also gets support from the testimony of PW-12, PW-13 and PW-15, Medical Officers.

27 That takes us to the nature of the offence. It is apparent from the evidence of the informant that the incident in question took place because of the dash given from behind to the deceased by motorcycle being driven by the accused. This led to verbal duel between the deceased and the appellants-accused. They happened to be involved because of altercation on account of alleged dash given from behind to the deceased. It is also very much clear that thereafter A-1 dealt only one blow with the tommy on the head of the deceased. There is no evidence on record to show that the accused had requisite intention or even knowledge that were going to cause death of the deceased. Having regard to the relations between the parties and as also the surrounding circumstances in which the incident in question took place, it is difficult to hold that the appellants-accused intended to cause the death of the deceased, particularly when the deceased was not armed with deadly weapon as such. In our considered opinion, the learned trial Court lost sight of this material aspect of the case. Hence, invocation of Clause (1) or (3) of Section 300 of IPC was not justified.

28 After careful examining the evidence on record, we conclude that the appellants-accused had delivered a solitary tommy blow on the head of the deceased. They could be safely credited with knowledge that such injury was likely to cause death of the deceased attracting IIIrd part of Section 299 thereby making the act by appellants-accused punishable under Section 304, Part II of IPC.

29 The offence, at the most, committed by appellants-accused would be one amounting to culpable homicide punishable under Section 304 Part-II of IPC. We accordingly set aside the conviction of appellants-accused, under Section 302 r/w 34 of the IPC and sentenced of imprisonment of life awarded thereunder. Instead, we convict them under Section 304 Part-II of IPC and pass the following order:

ORDER

- i) Appeal is partly allowed.
- ii) Appellants-accused are convicted for the offence punishable under Section 304, Part-II r/w 34 of IPC and sentenced to suffer rigorous imprisonment for 10 years.
- iii) Appellants-accused are entitled to set-off as available under Provision of Section 428 of the Code of Criminal Procedure.

(V. G. BISHT,J.)

(PRASANNA.B.VARALE, J.)