

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO. 421/2020.

Gajanan Wasudeorao Gomkale,
Aged 40 years, Occupation
Labour, resident of Wadegaon Punrvasan,
Taluq Warud, District Amravati.

... **APPELLANT.**

VERSUS

The State of Maharashtra,
through Police Station Officer,
Police Station Warud,
District Amravati.

... **RESPONDENT.**

Shri U.P. Dable, Advocate for the Appellant.
Ms. H.N. Jaipurkar, A.P.P. for Respondent State.

CORAM : VINAY JOSHI, J.

CLOSED FOR JUDGMENT : 18.12.2020.
JUDGMENT PRONOUNCED ON : 21.12.2020.

JUDGMENT :

Heard learned Counsel for the parties.

2. Conviction of sole accused in Sessions Case No.53/2017
by the Sessions Judge, Amravati on 23.09.2020 for the offence

punishable under Section 304-II of the Indian Penal Code led to this appeal. The Sessions Court has convicted the accused for the aforesaid offence and sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs.5000/- with default clause. Being dissatisfied by the said pronouncement, challenge has been raised by way of this appeal.

3. The prosecution case in nutshell is that the accused [Gajanan] and deceased [Sudhakar] were real brothers. Accused – Gajanan was residing at village Wadgaon, Taluq Warud, District Amravati along with his age old parents, whilst deceased Sudhakar was residing separately at village Rajura Bazar. On the date of occurrence i.e. on 04.04.2017 around 8 to 9 p.m., the deceased came to the house of accused at Wadgaon under influence of liquor. He started demanding sum of Rs.5000/- to his mother, who expressed her inability to pay, on which the deceased started beating his mother. At that time accused Gajanan intervened and beat deceased by means of fist blows and stick, which resulted into death of Sudhakar.

4. PW.3 – Sanjay Sable, was residing opposite to the house of accused at village Wadgaon. At the relevant time he heard hot exchange or words in between two brothers i.e. accused and

deceased. Since it was an usual affair, he had closed his doors and gone for sleep. In the midnight he woke up for urinal and saw that the deceased Sudhakar was lying on the road at some distance from the house of Gajanan. He telephonically informed the matter to PW.2 – Sangita Gohatre, who was Police Patil. Immediately the Police Patil came to the place and saw that Sudhakar was lying motionless on the road, therefore, she went to the police station and lodged report [Exh.24]. On the basis of report, police registered crime vide Crime No. 9/2017, and investigation was entrusted to PW.5 – Vijay Shingade.

5. During the course of investigation, panchnama of scene of offence was drawn, blood mixed earth from the courtyard of the house of accused, stick used in the commission of offence and clothes of deceased were seized. Inquest panchnama was drawn on the dead body and it was sent for autopsy. The accused was immediately arrested and his clothes having blood stains were seized. On completion of other formalities of investigation, final report came to be submitted in the Court of concerned Judicial Magistrate. On committal of case, the Sessions Court has framed charge against the accused for commission of offence punishable under Section 302 of the Indian Penal Code, to which the accused

denied and claimed for trial.

7. The prosecution led evidence of in all six witnesses. The prosecution evidence consists of PW.1 Rajesh Bhadange [Panch on seizure], PW.2 Sangeeta Gohatre [Informant], P.QW.3 – Sanjay Sable [Neighbour], PW.4 – Taibai Gomkale [Mother of deceased and accused], PW.5 – A.P.I. Vinay Shingade [Investigating Officer] and PW.6 – Dr. Praveen Thakare [Medical Officer]. Besides that prosecution also banks upon certain documents to establish the guilt with requisite standard of proof.

8. The trial Court on appreciation held that the prosecution has proved beyond reasonable doubt that the accused has assaulted deceased Sudhakar by means of stick, which resulted into his death. However, the trial Court held that the act of accused was a result of grave and sudden provocation falling under exception 1 to Section 300 of the Indian Penal Code. Moreover, it is held that the accused did not intend to cause death of deceased, however, he had adequate knowledge that his act would result into death and accordingly held him guilty for the offence punishable under Section 304-II of the Indian Penal Code. Concededly, the State has not challenged the conviction under Section 304-II of the Indian Penal Code instead of Section 302 of the Indian Penal Code.

8. The learned defence counsel would submit that the trial Court failed to consider the well known principles of appreciation of evidence in cases based on circumstantial evidence. He would submit that the chain of circumstances was not complete to fasten the guilt. There was no evidence to establish that the accused was last seen in the company of the deceased. Though blood stains were found on the clothes of the accused, however, result was inconclusive. According to him, there was every possibility of accidental death of Sudhakar by fall on rough surface. He would submit that merely on the basis of possibility and probability the trial Court has recorded the order of conviction.

9. Per contra, the learned A.P.P. submitted that there are sufficient circumstances against the accused which excludes the possibility of his innocence. It was a case of custodial death, therefore, the accused ought to have offered plausible explanation. She has pointed towards the evidence of mother of accused to show that presence of accused on the spot was not denied. According to her the accused had not offered explanation about the finding human blood on his clothes. She has also referred to the evidence of neighbouring witness to state that there had been fight between two brothers. With these contention, it is submitted that the judgment of

trial Court of finding accused guilty is wholly justifiable, hence, urged to dismiss the appeal.

10. Undoubtedly the prosecution case is based on the circumstantial evidence since there is no direct eye witness to the occurrence. Needless to say that a fact can be proved by circumstantial evidence in absence of direct one. However, when a case is based on circumstantial evidence, the prosecution owes a duty to establish all the circumstances firmly and tightly so as to exclude every hypothesis regarding the innocence of the accused. The prosecution has relied on the circumstances namely, presence of accused on the spot, quarrel in between accused and deceased at relevant time, finding blood stains in the house of the accused, deceased found lying near the house of the accused and finding of human blood on the clothes of accused.

11. So far as the homicidal death of Sudhakar is concerned, the prosecution has relied on inquest panchnama, medical evidence and evidence of assault. PW.6 Doctor Thakare found several internal injuries on the person of the deceased as set out in the post mortem notes [Exh.53]. On internal examination he found fracture of several ribs. He found that right lung had lacerated wound over liver. The Doctor has opined cause of death as due to hemorrhagic

shock due to injuries to vital organs. It is stated that the injuries sustained by the deceased are sufficient to cause death in ordinary course of nature. Moreover, he deposed that all injuries were of antemortem in nature.

12. Though the medical officer admits that ribs are of soft bones and they can be cracked by force. He admits that if part of ribs comes into contact with hard and rough surface, then also it can be cracked. Moreover, he admits that the ribs can be fractured if somebody falls on stony surface. Infact the same is one of the possibility. These admissions are to be appreciated in context with the entire evidence. Pertinent to note that the medical officer has stated in his evidence that such type of injuries are possible in scuffle as well as in assault by fist blows or by stick.

13. Pertinent to note that in case of fall, generally there may be one or two injuries or fracture to some of the ribs, however, medical evidence discloses that there were several abrasions and in all 9 ribs were fractured with extensive internal injuries, therefore, the possibility of causing injuries by simple fall is improbable. The nature of extensive abrasions over the body prominently shows the signs of struggle. The said material is to be appreciated in context with rest of the circumstances.

14. In order to establish presence of accused on the spot and the quarrel in between the accused and deceased, the prosecution relied on the evidence of P.W.4 Taibai, who was mother of both. It is her evidence that deceased Sudhakar was staying away at Rajura. He was addicted to bad vices, like drinking liquor and consuming ganja. He was in the habit of quarreling and used to assault family members. She deposed that on the date of occurrence, Sudhakar came to her house around 9.30 p.m. under influence of liquor. He demanded Rs.5000/- and on refusal started to beat her. She stated that accused Gajanan intervened to prevent the assault. Pertinent to note that defence has not cross examined this witness at all, meaning thereby her entire testimony has gone unchallenged. Therefore, it is evidence that at the time of occurrence accused was very much present in the house and he intervened the dispute between the deceased and witness. This evidence largely corroborates the prosecution case about quarrel in between two brothers.

15. Neighbouring witness P.W.3 – Sanjay Sable also corroborates the evidence regarding quarrel in between both brothers. It has come in his evidence that at the relevant time, he heard noise of hot exchange of words in between accused and

deceased Sudhakar. Since it was an usual affair, he had neglected the same. There was no reason to discard his version which corroborates the evidence of P.W.4 Taibai.

16. During the course of investigation blood stained earth was seized from the house of the accused. Moreover, on his arrest his clothes were seized on which human blood was detected. It emerges from the evidence that the deceased was habituated to consuming alcohol and picks up quarrel with his family members. On the date of occurrence, the deceased who was staying at Rajura, came to the house of accused at Wadgaon and picked up quarrel under influence of liquor. Accused Gajanan who was present at the house had intervened the quarrel, which supports the prosecution case about assault. The panchnama of the scene of offence largely supports the prosecution case since blood stained earth was seized from the courtyard and there were signs of struggle in the house. As regards to seizure of blood stained clothes from the person of accused is concerned, on detection it was found to be human blood. Accused has not offered any explanation about finding of blood stains at the courtyard of his house or on his clothes. The learned trial Judge by placing reliance on the decision of Hon'ble Supreme Court in case of **Trimukh Maruti Kikran .vrs. State of Maharashtra –**

2006 All MR (Cri) 3510, has rightly appreciated the said fact and held it as a strong circumstance against the accused. The totality of circumstances discloses that the deceased became a headache for the family of accused. He was addicted with bad vices and used to quarrel with everyone. On the date of occurrence also he started to quarrel under influence of liquor and this was the reason for occurrence.

17. It is the prosecution case that the accused used stick in commission of offence. During the course of investigation a stick was seized from the house of the accused as well as small pieces of wood were also seized from the places where the deceased was lying. The injuries sustained by the deceased were quite possible by stick. The trial Court has correctly come to the conclusion from various circumstances as set out in paragraph no.28 of the judgment that as a result of assault by means of stick, Sudhakar sustained injuries to which he succumbed.

18. The trial Court has observed that on the date of incident the deceased came to the house under drunken condition, demanded money and on denial started abusing, therefore, the incident occurred. The trial Court took note that the incident happened as of sudden in absence of any premeditation. The

accused had not used any sharp edge weapon in the commission of offence. In view of these facts the trial Court held that there was total absence of intention and the incident was an outcome of the grave and sudden provocation given by the deceased. However, the trial Court held that the act of accused of assaulting by means of stick was with the knowledge that it can cause death and therefore, convicted the accused under Section 304-II of the Indian Penal Code.

19. In order to appreciate as to what sort of offence has been committed, the entire incident is to be looked upon. The prosecution has duly established that the deceased was addicted to bad vices and on the date of occurrence he came to the house of accused. The deceased demanded money and on denial, started abusing. Pertinent to note that it is not a case that accused was armed or he at his own went to the deceased with a specific intention. Apparently there was total absence of premeditation and incident happened on a spur of moment.

20. The core question is whether the trial Court was correct in holding that the accused was having adequate knowledge that his act was likely to cause death. All relevant factor requires reconsideration for said purpose. There were internal fracture injuries at the ribs of the deceased which shows that he was

assaulted by fist blows or a stick blow was dealt at his chest. Neither a sharp edged weapon was used, nor stick blow was dealt on the head by the accused. Since it is a case of circumstantial evidence, one cannot assume that there were repeated blows on the chest of the deceased. Even a single or couple of blows can cause internal damage to the ribs which are having soft bones. Therefore, it cannot be said that the accused had adequate knowledge that stick blow would result into death. The very intention of the accused was to prevent the assault on his mother and in a bid of such effort, he dealt a stick blow his chest. All these circumstances shows that the act was neither intentional nor the accused had knowledge about the consequence of his act. Therefore, the conviction under Section 304-II of the Indian Penal Code is wholly unjustified.

21. The prosecution has proved that the accused by means of stick assaulted the deceased which resulted into various internal injuries, particularly rib fracture. Certainly ribs fracture amounts to grievous hurt. The stick which was seized by the prosecution was having sufficient length of 29 inches, which can be certainly used as a weapon of offence, therefore, it is a cause of voluntarily causing grievous hurt by dangerous weapon attracting the provisions of Section 326 of the Indian Penal Code.

22. So far as the aspect of sentence is concerned, the entire incident requires reconsideration. The accused was peacefully living with his old aged parents at village Wadgaon. The deceased, a liquor addict, was living separately and had been to the house of accused to demand money. Not only that the deceased assaulted his mother, an old aged lady, on which the incident occurred. It reveals from the judgment of trial Court that the accused on the point of sentence has stated that he is shouldering family responsibility of old aged parents, small children and wife. Having regard to the circumstances in which the offence was committed, and the family responsibility, a term of imprisonment for three years would meet the ends of justice. In view of that, following order is passed.

- (i) Criminal Appeal is partly allowed.
- (ii) The conviction and sentence for the offence punishable under Section 304-II of the Indian Penal Code is converted into punishment under Section 326 of the Indian Penal Code. The accused is sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.5000/-, in default to suffer further rigorous imprisonment for six months. The impugned judgment

passed by the Sessions Court, Amravti in Sessions Trial No. 53/2017 on 23.09.2020, is modified to the above extent only.

- (iii) The accused is entitled for set off in terms of Section 428 of the Code of Criminal Procedure.
- (iv) Muddemal property be dealt with as per rules.

JUDGE

Rgd.