

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

CRIMINAL APPLICATION (ABA) NO.708 OF 2020

(Shankar Maruti Sawant and another Vs. The State of Maharashtra thr. PSO PS
Karanja Rural Police Station, Washim)

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.*

Court's or Judge's orders.

Mr. Aniket Nikam, Advocate for Applicants.
Mr. M.K. Pathan, APP for Non-Applicant/State.
Mr. Mir Nagman Ali, Advocate to assist the prosecution.

CORAM: ROHIT B. DEO, J.

DATE: 21st DECEMBER, 2020.

The applicants are apprehending arrest in Crime 387/2020 registered with the Karanja (Rural) Police Station, Washim for offence punishable under sections 302, 120-B, 323, 506 read with section 34 of the Indian Penal Code.

2. The crime is registered on the basis of report dated 01.10.2020 lodged by Mr. Ramesh Maroti Hatkar, who is the elder brother of the deceased – Suresh.

3. The gist of the report dated 01.10.2020 is thus:-

Dinesh Yashwant Wadekar – applicant 2 herein contested and lost the election to the Zilla Parishad. He assumed that the voters belonging to the “Gopal” community did not support him. At 08:10 p.m. the

informant received call from his nephew Nitesh asking him to immediately come at the Inzori square since there was a quarrel ongoing between his brother Suresh and Shankar Sawant and Sunil Sawant. The informant told Nitesh that he would come after finishing his prayer. The next call was from Sanjay Dhangar who conveyed to the informant that his brother was being severely assaulted. The informant reached the Inzori square on motorcycle, at 08:20 p.m. Shankar Sawant, Sunil Sawant, Maroti Sawant and Omkar Sawant were assaulting Suresh with kick and fist blows. Suresh was lying on the ground. When the informant confronted the assailants, the response was that their group lost the election since the Gopal community did not support their group and therefore, they have done away with Suresh. The informant was also threatened. The informant tried to telephonically contact the police, however, no contact was established. The informant sought to take Suresh to the hospital. The assailants approached the informant and assaulted him with fists. The informant was rescued by Nitesh Shimpi, Sanjay Dhangar and Omkar Hatkar. The informant requested Sahebrao Shimpi to come to the spot with rickshaw. In the interregnum, the mother and sister-in-law of the informant reached the spot and they too were pushed around and assaulted. Ultimately, the informant managed to take the rickshaw to the police station. The police admitted Suresh to the hospital where he was pronounced dead.

4. The learned counsel for the applicant Mr. Aniket Nikam submits that qua applicant 2 Dinesh Yashwant Wadekar, there is no material whatsoever to suggest that he hatched a criminal conspiracy and Suresh was assaulted pursuant thereto. *Prima facie*, the submission is well founded. Dinesh Wadekar is not named in the report. Perusal of the case diary would reveal that there is no material to indicate that there was a criminal conspiracy to assault Suresh, of which Dinesh Wadekar was a part. What is attributed to the assailants are certain statements which suggest that the loss in the Zilla Parishad election was attributed to lack or absence of support from the “Gopal” community. While it would be ultimately for the trial court to come to an appropriate conclusion, *prima facie*, it is difficult to hold that applicant 2 Dinesh Wadekar conspired with the assailants and the assault was the outcome. Applicant 2 Dinesh Yashwant Wadekar has made out a case for grant of pre-arrest protection.

5. Mr. Aniket Nikam would submit that even if the report is taken at face value, offence punishable under section 302 IPC is not made out and that at the most, the offence which is made out is of causing simple hurt. Several decisions are pressed in service to buttress the said submission.

6. The substratum of the submission that offence punishable under section 302 IPC is not made out is

predicated on the premise that the assault was by kick and fist and that there was no intention of causing death, or causing such bodily injury as is likely to cause death, or with the knowledge that the assailants are likely, by such act, to cause death. In essence, the submission is that the assailants cannot be said to have committed culpable homicide as defined in section 299 of IPC. Extending the said submission, Mr. Aniket Nikam would argue that the assault is not covered by the situations contemplated by section 300 of IPC. Mr. Aniket Nikam submits that the act was not done with the intention of causing death nor was done with the intention of causing such bodily injury as the offender knows to be likely to cause death. Adverting to clause 3rdly in section 300 IPC it is submitted that there was no intention to cause such bodily injury to Suresh as would be sufficient in the ordinary course of nature to cause death. Clause 4thly of section 300 IPC would not apply since it cannot be said that the assault by fists and kick was so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death.

7. The medical opinion is that Suresh died due to injury to the scrotum. A large contusion is noticed on the scrotum. Notably, while statements of several eye witnesses are recorded, *albeit* belatedly, only one witness ventures to state that applicant 1 Shankar kicked Suresh on the testicles. Neither the report nor the consistent statements of the other eye witnesses suggest that applicant 1 Shankar

deliberately directed or aimed kick at the testicles of the deceased. Considering the material in the case diary, at least *prima facie*, it appears that in the live situation of three persons assaulting Suresh with kick and fists, unfortunately the deceased suffered a blow on the testicles which proved fatal.

8. A blow to the testicles/scrotum may indeed cause such bodily injury as would be sufficient in the ordinary course of nature to cause death. However, the seminal question is whether the applicant 1 intended to cause the injury on the scrotum. If it is held that the applicant did intend to cause injury on the scrotum, the fact that he did not intend to cause death may be immaterial. In view of the material in the case diary, to which a reference is made *supra*, it is difficult to hold that applicant 1 Shankar did intend to cause the injury to the testicles/scrotum .

9. It would be apposite to refer to the enunciation of the Apex Court in *Gokul Parashram Patil v. State of Maharashtra (1981) 3 SCC 331* and in particular to paragraphs 4, 5, 6 and 7 which read thus:-

4. The learned counsel for the appellant has contended that the case does not fall within the ambit of Section 302 of the Code and that the two courts below erred in relying on Virsa Singh v. State of Punjab. The gist of the dictum of this Court in that case is that if an injury is held to have been

intended by the assailant and is further found to be sufficient in the ordinary course of nature to cause death, it would attract clause thirdly of Section 300 of the Code and that, therefore, its author would be liable to punishment under Section 302 thereof. The question thus is whether the particular injury which was found to be sufficient in the ordinary course of nature to cause death in the present case was an injury intended by the appellant. Our answer to the question is an emphatic no. The solitary blow given by the appellant to the deceased was on the left clavicle - a non-vital part - and it would be too much to say that the appellant knew that the superior venacava would be cut as a result of that wound. Even a medical man perhaps may not have been able to judge the location of the superior venacava with any precision of that type. The fact that the venacava was cut must, therefore, be ascribed to a non-intentional or accidental circumstance. This was precisely the view taken in Harjinder Singh v. Delhi Administration, by Sikri, J., and in Laxman Kalu Nikalje v. The State of Maharashtra, by Hidayatullah, C.J. In the former of these cases, the injury in question was a stab wound on the left thigh which had cut the femoral artery and vessels. In the latter, the damage caused consisted of a cut in the auxiliary (sic axillary) artery and veins. In each of the two cases it was held that although the injury which was found to be sufficient in the ordinary course of nature to cause death had resulted from a blow with a sharp-edged weapon, the same could not be said to have been intended, that the only injury which could be regarded as intentional was the superficial wound resulting directly from the blow, that the assailant could not be held guilty of an offence under Section 302 of

the Code and that he was, on the other hand, guilty of a lesser offence falling under Part II of Section 304 thereof.

5. Mr. Rana, learned counsel for the State has drawn our attention to illustration (c) appended to Section 300 of the Code and has contended on the basis thereof that the culpable act attributed to the appellant is covered thereby. The illustration may be extracted :

“(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.

6. The proposition propounded by Mr. Rana is that the illustration, which is obviously relatable to clause thirdly of the section, postulates that the injury in question need satisfy only two tests to attract the provisions of that clause and that those tests are:

- (i) The injury must be sufficient in the ordinary course of nature to cause death.*
- (ii) Such injury must have been intended to have been caused by the culprit.*

7. There is no quarrel with this proposition but then the injury which was found to be sufficient in the ordinary course of nature to cause death in the present case does not satisfy test (ii) because, as already pointed out, it cannot be said to have been intended by the appellant. The illustration, therefore, does not advance the cause of the State.

10. Mr. Aniket Nikam relies on the decision of the Apex Court in *State of Karnataka v. Shivalingaiah alias Handigidda 1988 (Supp) SCC 533*, which decision is rendered on facts which are to a certain extent close to the facts of the present case. In an altercation the accused squeezed the testicles of the deceased, who suffered a cardiac arrest and died instantaneously. The Apex Court held, in the facts of the case, that there was no intention of causing death nor could knowledge be attributed to the accused that such act was likely to cause the cardiac arrest resulting in death.

11. Several other decisions are cited by Mr. Aniket Nikam which explain the scope and ambit of section 438 of Criminal Procedure Code and deal with the considerations which ought to weigh with the court while granting or refusing pre-arrest protection. In view of the settled position of law, I do not consider it necessary to deal with the said decisions.

12. The learned APP Mr. Pathan and the learned counsel for the complainant Mr. Mir Nagman Ali have opposed the pre-arrest bail vehemently. However, since in my considered view, *prima facie* it does not appear that the applicant 1 intended to cause death or intended to cause such bodily injury as would result in death in the ordinary course of nature nor can knowledge be attributed to applicant 1 that by his act death will be caused, I am

inclined to protect the applicant 1, too.

13. The application is allowed.

14. In the event of arrest in Crime 387/2020 registered with the Police Station Karanja (Rural), District Washim for offence punishable under sections 302, 120-B, 323, 506 read with section 34 of the Indian Penal Code, the applicants shall be released on furnishing personal bond of Rs.25,000/- each with a solvent surety of like amount, which surety may be furnished within four weeks from the arrest, if any.

15. The applicants shall attend Police Station Karanja (Rural), District Washim as and when required by the Investigating Officer and shall co-operate with the Investigating Officer.

16. The applicants shall not make any attempt to influence the witnesses.

17. The applicants shall not enter the territorial limits of village Dhamni Khadi till the conclusion of the trial, unless specifically permitted by the trial court.

JUDGE