

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

CRIMINAL APPEAL NO. 587 OF 2014

1. Sagar s/o. Vijay Kale,
Age: 28 Years, Occ: Nil.
2. Vishal s/o. Ashok Kale,
Age: 31 Years, Occ: Nil.

R/o. : Suryanagar, Ahmednagar,
Dist. Ahmednagar.

**.. APPELLANTS
[Orig.Accused]**

VERSUS

The State of Maharashtra,
Through : Police Officer,
Tofkhana Police Station,
Ahmednagar, Dist.Ahmednagar.

.. RESPONDENTS

...

Mr.Z.H.Farooqui, Advocate holding for Mr.N.V.Gaware, Advocate for
the appellants.

Mr.G.O.Wattamwar, APP for the respondent-State.

...

**CORAM : V. K. JADHAV AND
SHRIKANT D. KULKARNI, JJ.**

DATE : 01.10.2021

ORAL JUDGMENT [Per V.K.Jadhav, J.] :

1] This appeal is directed against the judgment and order of
conviction passed by the Additional Sessions Judge, Ahmednagar
dated 23.07.2014 in Sessions Case No. 217 of 2012.

2] Brief facts of the prosecution case, are as follows:

On 06.05.2011 at about 7.00 p.m. in front of Sheelavihar Kekade Hospital at Ahmenagar, the appellants-accused nos. 1 and 3 in furtherance of their common intention had committed murder by causing death of deceased Popatrao Dalvi by assaulting him with fist and kick blows. On the day of the incident at about 7.00 p.m., the informant's parental uncle, namely, Tarachand, had gone for a walk. At that time the appellants – accused nos.1 and 3, along with accused no.2 who has been acquitted by the trial Court, were quarreling with each other when uncle - Tarachand was passing near from them. However, due to the presence of uncle -Tarachand and since he witnessed the said quarrel, the accused got annoyed. They had questioned Tarachand as to why he was looking at them. Even the accused persons had abused uncle - Tarachand. Thereupon uncle Tarachand gave a call to his son, namely, Sachin - PW-3 and disclosed him that the accused were abusing him for no reason. Afterwards, when uncle Tarachand had started proceeding towards shop, all the accused had followed him and came in front of his cycle shop. Accused had started assaulting uncle Tarachand, so also, PW-3 Sachin by fist and kick blows. Consequently, uncle Tarachand and PW-3 Sachin had raised shouts. Thus, PW-1 Abhijit i.e. the informant, his

father deceased Popatrao Dalvi and his cousin brother - Ajay went there to separate the quarrel. As per the prosecution story, the accused persons had assaulted deceased Popatrao with fist and kick blows on his chest and private parts and in consequence thereof, deceased had fallen down on the ground. He was immediately taken to Nobel Hospital, Ahmednagar. All the accused fled away from the spot. Thereafter, the Doctor referred deceased Popatrao to the Civil Hospital, Ahmednagar, where, on medical examination of deceased Popatrao, the Medical Officer declared him as dead.

3] On the basis of the complaint lodged by PW-1 Abhijit [Exh.24], Crime No.158/2011 came to be registered for the offences punishable under Sections 302, 323, 504 and 506 r.w. 34 of the IPC on 06.05.2011 at about 9.35 p.m. PW-9 API Vishal Valvi has carried out investigation into crime. He has drawn inquest panchanama (Exh.34) in presence of two panch witnesses and also drawn spot panchanama (Exh.39) in presence of two panch witnesses. He has arrested accused nos.1 and 2 and seized a motorcycle from their custody under seizure panchanama (Exh.36). He has also seized the clothes on the person of deceased Popatrao under seizure panchanama (Exh.37). On completion of the investigation, PW-9 API Valvi has submitted the charge sheet.

4] Learned Additional Sessions Judge, Ahmednagar, has framed the charge vide Exhibit-14 against all accused persons for the offence punishable under Section 302 r/w. 34 of the IPC. The contents of the charge were explained and read over to the accused in vernacular and accused pleaded not guilty to the charge and claimed to be tried. The prosecution has examined in all 9 witnesses to substantiate the charges leveled against the accused. After completion of the prosecution evidence, the statement of the accused under Section 313 of the Criminal Procedure Code came to be recorded. The defence of the accused is of denial.

5] The learned Additional Sessions Judge, Ahmednagar, by its judgment and order of conviction dated 23.07.2014, convicted appellant no.1 - Sagar Vijay Kale (accused no.1) and appellant no.2 - Vishal Ashok Kale (accused no.3), for the offence punishable under Section 302 r/w. 34 of the IPC and acquitted accused no.2 - Simran Bashir Shaikh for the offence punishable under Section 302 r/w. 34 of IPC and convicted her for the offence punishable under Section 323 of the IPC. The learned Additional Sessions Judge, Ahmednagar has sentenced them as per the operative part of the order, which is reproduced herein below:

"1. Accused No.1 Sagar Vijay Kale, age 26 years and accused No.3 Vishal Ashok Kale, age 25 years are hereby convicted under Sec. 235 (2) of the Cr.P.C. for the offences punishable under Sections 302 r.w. 34 of the Indian Penal Code and they both are sentenced to suffer life imprisonment.

2. Their bail bonds stands cancelled and they are remanded to jail custody to suffer the sentence.

3. Accused No.2 Simran Bashir Shaikh, age 29 years is hereby acquitted under Sec. 232 of the Cr.P.C. of the offence punishable under Sec.302 r.w. 34 of the Indian Penal Code.

4. However, the accused No.2 Simran Bashir Shaikh, age 29 years is hereby convicted under Sec. 235 (2) of the Cr.P.C. for the offence punishable under Sec.323 of the Indian Penal Code and she is sentenced for undergone custody period. As per record she was arrested on 7.5.2011 and was released on bail on 18.7.2011 and was re-arrested on 11.7.2012 and was released on bail on 20.7.2012 (i.e. 2 months 21 days above) which she has already undergone and a set off under Sec. 428 of the Cr.P.C. be given to her for the said period.

5. Her bail bonds stands cancelled.

6. However, the accused No.2 Simran Bashir Shaikh to furnish bail bonds of Rs.5,000/- with one surety in the like amount u/s.437 [A] of the Cr.P.C. which will remain in force as prescribed in the said section.

7. The muddemal articles i.e. white colour vest and one ash colour underwear of the deceased, being worthless may be destroyed after period of one year from today and if no orders from Superior Courts are received till then and if the orders of Superior Courts are received then it be governed as per the orders of the Superior Court.

8. The black colour motorcycle bearing registration No. MH-16-AH-8643 is already given to accused No.1

Sagar Vijay Kale as per Supurtnama bond, it be retained by him.

9. Copy of this judgment be given to the accused Nos.1 to 3 free of cost.

10. The Sessions Case No. 217/2012 stands disposed of accordingly.

Dictated and declared in open Court."

6] Learned counsel for the appellants submits that there was no previous dispute between the informant, his uncle Tarachand, deceased Popatrao and PW-3 Sachin on one side and the appellants - accused on the other side. Learned counsel submits that the incident allegedly took place all of sudden without any premeditation. Learned counsel submits that as per the prosecution story as reflected from the evidence of the eye witnesses, deceased Popatrao was subjected to beating on his chest and private part. However, the acts of the appellants - accused were not specified by the prosecution witnesses. It is not clear from the prosecution evidence as to which of the accused has extended beating to deceased Popatrao on his chest and private part and by what means. Though it is a prosecution story that the appellants - accused have extended beating to deceased Popatrao on his chest and private part by fists and kick blows, however, none of the eye witnesses deposed that the beating was extended by the accused persons to deceased Popatrao by fist and kick blows on his

chest and private part. Learned counsel submits that on the same set of allegations, the trial Court has acquitted accused no.2 - Simran for the offence punishable under Section 302 r/w. 34 of the IPC and convicted her under Section 323 of the IPC. However, the trial Court has convicted the appellants i.e. accused nos. 1 and 3 for having committed the offence punishable under Section 302 r/w. 34 of the IPC.

7] Learned counsel submits that the prosecution has examined PW-8 Dr.Sunil Pokharna. He has noted three abrasions on other parts of the body and only injury no.4 is on scrotal 15 x 6 cm. size abrasion with reddish patch seen and anterior and inferior region haemotoma seen. In his opinion, the cause of death was cardio respiratory failure due to vasovagal shock due to testicular trauma with multiple contusion. According to him, such shock can be caused due to sudden injury to vital part leading to stoppage of breathing and cardiac. Learned counsel submits that PW-8 Dr.Sunil Pokharna has not opined as to whether in the ordinary course of nature injury no.4 is sufficient to cause death. In his cross examination in para no.4, PW-8 Dr.Sunil Pokharna has also admitted that testicular haemotoma can be caused by accidental injury. In order to explain the shock in his cross-examination, PW-8 Dr.Sunil Pokharna has admitted that central nerve system may respond weak due to some

diseases. PW-1 Abhijit has admitted in his cross- examination that his father was suffering from blood pressure and sugar. He was taking treatment for the same from one Dr.Nevase. Learned counsel submits that in the given set of allegations and even if the ocular evidence is considered, the acts of the accused are not specified. PW-8 Dr.Sunil Pokharna has not even ruled out possibility of accidental injury in the form of testicular haemotoma. The prosecution has failed to prove the case against the appellants - accused beyond reasonable doubt. The appellants - accused are entitled for the benefit of doubt.

8] Learned counsel for the appellants in the alternate submits that even if the prosecution case is accepted as it is, it is clear that the incident had taken place without any premeditation in a heat of anger upon a sudden quarrel. Learned counsel submits that it has come in the evidence of the eye witnesses that the incident lasted up to 5-7 minutes. Learned counsel submits that the accused persons were not knowing deceased Popatrao. Even PW-1 Abhijit and PW-3 Sachin were not knowing the accused persons prior to the incident. PW-1 Abhijit and PW-3 Sachin have admitted in their cross-examination that there was no enmity between them. Learned counsel submits that there was no intention to commit murder. However, even if the prosecution case is accepted to the extent that deceased Popatrao was subjected to beating on his chest and private parts and

considering the nature of injuries, particularly injury no.4 as noted in column no.17 of the postmortem report, at the most it can be said that there was an intention to cause simple hurt punishable under Section 323 of the IPC or at the most, grievous hurt punishable under Section 325 of the IPC.

9] Learned APP submits that there are eye witnesses, viz. PW-1 Abhijit and PW-3 Sachin to the incident. Learned APP submits that PW-2 Vijay is the witness of post-incident, however, PW-2 Vijay has also witnessed quarrel to some extent. Learned APP submits that the prosecution has proved homicidal death. PW-8 Dr.Sunil Pokharna has given opinion that cause of death was cardio respiratory failure due to vasovagal shock due to testicular trauma with multiple contusion. Learned APP submits that even PW-8 Dr.Sunil Pokharna has also explained that such shock can be caused due to sudden injury to vital part leading to stoppage of breathing and cardiac. Learned APP submits that considering the opinion that the cause of death was cardio respiratory failure due to vasovagal shock due to testicular trauma with multiple contusion, deceased Popatrao was brutally beaten on his private part and in consequence thereof, he suffered from cardio respiratory failure due to vasovagal shock. Learned APP submits that the prosecution has proved the case beyond reasonable doubt. Learned Judge of the trial Court has rightly convicted the

appellants – accused nos.1 and 3 under Section 302 r/w. 34 of the IPC. There is no substance in this appeal. The appeal is liable to be dismissed.

10] We have perused the material exhibits tendered by the prosecution; the evidence of the prosecution witnesses, the statement of the appellants – accused nos.1 and 3 recorded under Section 313 of Criminal Procedure Code, the evidence of the appellants – accused nos.1 and 3 themselves and the impugned judgment. After giving our thoughtful reflection to the matter, we are wholly satisfied that there is some substance in this appeal and the same must be partly allowed.

11] PW-1 Abhijit and PW-3 Sachin are the eye witnesses to the incident. There is no reason for them to depose falsely against the appellants - accused persons since there is no previous enmity between them. PW-1 Abhijit and his father deceased Popatrao were even not knowing the accused persons. Even PW-1 Abhijit was not knowing that his father would go to resolve to separate the quarrel which was going on between the appellants - accused and his uncle Tarachand. PW-1 Abhijit and PW-3 Sachin had deposed that the appellants - accused assaulted deceased Popatrao on his chest and private part. Their presence on the spot cannot be doubted. PW-4 Shriram, though not eye witness to the incident, however, he had

rushed to the spot immediately after the incident. PW-4 Shriram has witnessed the quarrel to some extent. Similarly, though PW-2 Vijay Kale is not an eye witness to the incident, however, he being a Police Constable, on receipt of information about the quarrel, he immediately rushed towards the spot and noticed quarrel between two groups and also found that one old person from Dalvi family was lying on the ground near cycle shop. It is thus clear that on 06.05.2011 at about 7.00 p.m. the incident had taken place in front of the cycle repairing shop.

12] PW-1 Abhijit has admitted in para no. 11 in his cross-examination that there was no previous dispute between him and the accused persons. He could not tell as to whether accused nos.1 and 3 were knowing that his father - deceased Popatrao would come to resolve the quarrel between accused persons and his uncle Tarachand. PW-3 Sachin has also admitted in para 3 of his cross-examination that he was not knowing the appellants - accused nos.1 and 3 and the said girl [acquitted accused no.2] prior to the incident and hence there is no question of previous enmity between them. PW-3 Sachin has further stated in the same para in his cross-examination that the entire incident was over within 5-7 minutes.

13] It appears from the evidence of the prosecution

witnesses, particularly the eye witnesses, namely, PW-1 Abhijit and PW-3 Sachin that the incident had taken place without any premeditation in a heat of anger upon sudden quarrel. The appellants - accused had not used any weapons in the assault. In fact, appellants - accused nos.1 and 3 and acquitted accused no.2 – Simran were quarreling against each other and since uncle Tarachand had noticed the said quarrel, they got annoyed. In consequence of which, the appellants - accused nos.1 and 3 and accused no.2 had abused uncle Tarachand and since uncle - Tarachand had called his son PW-3 Sachin, they went towards the cycle shop along with them. It has come in the prosecution evidence that the incident of initial quarrel had taken place between accused themselves in front of the Hospital of Dr. Kekade and the main incident had taken place in front of the cycle repairing shop of PW-3 Sachin. It has come in the prosecution evidence that the distance between the Hospital of Dr.Kekade and the spot of incident is about 15 to 20 feet. It is thus clear that the appellants – accused allegedly followed uncle Tarachand and PW-3 Sachin by crossing the short distance of 15 to 20 feet. Thus, considering the said short distance, it cannot be said that there was premeditation in making the assault. The appellants – accused were not knowing deceased Popatrao and his son PW-1 Abhijit prior to the incident and there was no enmity between them. In the said quarrel,

as per the ocular evidence, deceased Popatrao was assaulted on his chest and private part. There is no evidence to make it clear as to in what manner and by what means the appellants – accused extended beating to deceased Popatrao on his chest and private part.

14] PW-8 Dr.Sunil Pokharna has noticed the following injuries on the dead body:

1. *Abrasion of size 3 x 2 cm. over left forehead.*
2. *Abrasions of size 6 x 4 cm. 2 to 3 in number on left knee and upper end of tibia.*
3. *Abrasion over left elbow of size 2 x 2 cm.*
4. *Scrotal 15 x 6 cm. size abrasion with reddish patch seen. Anterior and inferior region haemotoma seen.*

So far as injury nos. 1 to 3 are concerned, they are abrasions over left forehead, left knee and upper end of tibia and left elbow respectively. Those are minor injuries. So far as injury no.4 is concerned, the same is a serious injury. However, PW-8 Dr.Sunil Pokharna has neither deposed that the said injury is grievous in nature nor that injury no.4 is sufficient, in the ordinary course of nature, to cause death. PW-8 Dr.Sunil Pokharna, during internal examination, has merely noted testicular haemotoma 2x2 cm in size. The cause of death is also cardio respiratory failure due to vasovagal shock due to testicular trauma with multiple contusion. However, accepting the evidence of PW-8

Dr.Sunil Pokharna as it is, at the most it can be said that the deceased Popatrao was extended beating on his private part and as a result thereto, he has sustained multiple contusions on his private parts which resulted into cardio respiratory failure due t vasovagal shock. Such shock can be caused due to sudden injury to the vital part.

15] Thus, considering the entire aspect of the case, we are of the opinion that, there was no intention to commit murder. In view of the ocular evidence coupled with the Doctor's opinion, it can be said that there was intention on the part of the appellants – accused to cause grievous hurt to deceased Popatrao. There was no reason for the appellants – accused to commit murder of deceased Popatrao since he had merely intervened in the quarrel.

16] Both the appellants – accused, though, were on bail during trial, however, after their conviction in connection with the present case, since 23.07.2014, they are in jail. Maximum punishment under Section 325 is upto 7 years. In view of the same, it would meet the ends of justice if the conviction of the appellants – accused nos.1 and 3 is altered under Section 325 of the Indian Penal code and sentencing them for the imprisonment which they have already undergone.

ORDER

- [i] Criminal Appeal is hereby partly allowed.
- [ii] The impugned judgment and order of conviction passed by the Additional Sessions Judge, Ahmednagar in Sessions Case No.217 of 2012 dated 23.07.2014 thereby convicting the appellant no.1 – accused no.1 – Sagar Vijay Kale and appellant no.2 – accused no. 3 Vishal Ashok Kale for the offence punishable under Section 302 r.w. 34 of the IPC and sentencing them to suffer Life Imprisonment is hereby quashed and set aside.

Instead

The appellant no.1 – accused no.1 – Sagar Vijay Kale and appellant no.2 – accused no. 3 Vishal Ashok Kale are hereby convicted under Section 325 r.w. 34 of the Indian Penal Code and sentenced to suffer imprisonment which they have already undergone, with fine of Rs.1,000/- each, in default to suffer S.I. for one month each.

- [iii] The appellant no.1 – accused no.1 – Sagar Vijay Kale and appellant no.2 – accused no. 3 Vishal Ashok Kale shall be set at liberty forthwith if not required in connection with any other case.
- [iv] The appellant no.1 – accused no.1 – Sagar Vijay Kale and appellant no.2 – accused no. 3 Vishal Ashok Kale shall execute P.B. of Rs.15,000/- each with one surety of the like amount

each to appear before the higher court as and when the notice is issued in respect of any appeal or petition filed against the judgment of this Court. Such bail bonds shall remain in force for a period of six months from the date of its execution.

[v] Criminal Appeal is accordingly disposed.

[SHRIKANT D. KULKARNI, J.]

[V. K. JADHAV, J.]

DDC