

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

**CRIMINAL APPEAL NO. 106/2018**

Gopal s/o Janrao Sarap,  
aged about 30 years,  
r/o Gram Chikhalgaon, Tq. Dist. Akola. ....**APPELLANT**

**...V E R S U S...**

The State of Maharashtra,  
through Police Station Officer,  
Police Station, Patur, Dist. Akola. ....**RESPONDENT**

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Mr. R. M. Daga, Advocate for appellant.  
Mr. T. A. Mirza, A.P.P. for respondent-State.  
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**CORAM:- V. M. DESHPANDE AND**  
**AMIT B. BORKAR, JJ.**  
**DATE:- AUGUST 17, 2021**

**JUDGMENT (Per: V. M. Deshpande, J.)**

1. The appellant was charged in Sessions Trial No. 108/2014 by learned Sessions Judge, Akola that on 23.12.2013 at about 04.00 to 04.30 p.m., the appellant has committed murder of Mukesh Madhukar Pendharkar by stabbing ken-sword (gupti) thereby committing an offence punishable under Section 302 of the Indian Penal Code. He was also charged that he had assaulted on his mother Sunanda by ken-sword causing injury to her person with such intention or knowledge and under such circumstances that if by that act he had caused death of his mother and he would

have been guilty of committing an offence punishable under Section 307 of the IPC. He was also charged for causing hurt to one Vilas Wankhade on his right hand by ken-sword and thereby committed an offence punishable under Section 324 of the IPC.

Appellant denied charge and claimed for his trial. The prosecution, to prove charge has examined 19 witnesses and also relied upon various documents duly proved during the trial.

2. After a full fledged trial, learned 4<sup>th</sup> Additional Sessions Judge, Akola found that the prosecution has proved the charge against the appellant and convicted him for the offence punishable under Section 302 of the IPC, directing him to suffer imprisonment for life, convicting him for the offence under Section 307 of the IPC with a direction to suffer rigorous imprisonment for seven years and also convicting him for the offence punishable under Section 324 of the IPC and directing him to suffer rigorous imprisonment for one year. He was also convicted for the offence punishable under Sections 4 and 25 of the Arms Act and was directed to suffer rigorous imprisonment for three years.

3. Manoj (PW1) and Satish (PW2) are real brothers of deceased Mukesh. Manoj (PW1) has lodged oral report Exh.-21. The printed FIR is at Exh.-22.

Both these witnesses have deposed on the line of FIR. From the FIR as well as from their substantive evidence, it is clear that they are not eye witnesses any of the incident for which the appellant was charged.

According to their evidence, on 23.12.2013 information was received by them from one Santosh that somebody has assaulted their brother Mukesh at village Chikhalgaon. Immediately, they reached there and found minidoor vehicle of their brother Mukesh standing on Akola-Patur road at Chikhalgaon bus stand and their brother Mukesh was lying in the injured condition. According to them, when they asked him about incident upon their inquiry, he replied that he was proceeding from Patur with some equipment of M.S.E.B. He also told that when he reached at Chikhalgaon bus stand, one Gopal Sarap-appellant signaled him by showing his hands to stop the vehicle and asked to take his mother to hospital in minodoor vehicle. Mukesh also told him that he informed Gopal that his vehicle is fully loaded with equipment of M.S.E.B. Therefore he should see another

vehicle. On this reply being given by him, Gopal took out Gupti and assaulted him. Deceased Mukesh also told him that when he shouted for help as, “Wachwa, Wachwa”, accused Gopal ran away.

4. After the crime was registered, investigation started. Sanjay Khandekar (PW17) has done investigation of Crime No.185/2013, which was registered on the basis of report lodged by Manoj. Accused was arrested by PSI Sathawane under arrest panchanama Exh.-93. When the accused was in custody, Sanjay Khandekar (PW17) seized his clothes under seizure panchanama Exh.-43. During his PCR, he also shown his readiness to give discovery statement and accordingly, it was reported in presence of pancha witness Gajanan (PW4). Admissible portion of memorandum panchanama is at Exhs.93 and 94 and accordingly, he took out the ken-sword. Investigating Officer also recorded statement of various witnesses. All the pancha witnesses examined to prove various seizures have supported the prosecution and those are duly proved.

5. The autopsy was performed by Dr. Chaitanya Kulkarni (PW11). He found following two injuries:

*“Injury no.1 – Incised penetrating stab wound over chest 3.5 cm below supra sternal notch, horizontal place, gaping of edges and margin giving wound spindle shape of size 2 cm X 1 cm X cavity deep wound situated 9 cm above and medial to left nipple, reddish.*

*Injury no.2- Incised penetrating stab wound over left hypocondrium region of abdomen 21 cm below left nipple, 10 cm lateral to midline and 12 cm above and lateral to umblicus, muscle deep, 1 cm X 05 cm gaping reddish. Above mentioned injuries are ante-mortem.”*

Post mortem report is at Exh.-64. Cause of death in the opinion of the autopsy surgeon was as under:

*“Cardiac temponade due to hemopenicardium due to stab injuries over left ventricle as result of stab injury over chest. (unnatural)”*

Dr. Kulkarni also examined gupti, which was sent to him for giving opinion as to whether the injuries found during post mortem are possible by that weapon. He gave his report Exh.-65 in affirmative.

6. We have seen that one of the charges framed against the appellant was that he has assaulted on his mother Sunanda as

well as one Vilas. They were examined by Dr. Deepa Wase (PW12). Her evidence would show that on examining Sunanda, she found cut lacerated wound of 1.5 cm X 05. cm with cavity deep on abdomen. She issued certificate Exh.-72 and referred her for surgery. Dr. Deepa's evidence also shows that she examined Vilas Wankhade, who was brought to her by police and she found cut lacerated wound of 0.5 cm X 0.1 cm on anterior middle aspect of right arm on middle area. She accordingly issued certificate, Exh.-71.

There is an evidence of Dr. Avinash Telgote (PW10), who has performed surgery on Sunanda.

7. It would be useful to first examine about the assault made by the appellant on Vilas. The prosecution has examined Vinod Nikhade (PW15), a police personnel, who was at Police Station, Patur and was discharging duty as Station Diary Incharge on 23.12.2013. As per his evidence, on that day, between 03.00 to 3.30 p.m. Vilas came to Police Station in the injured condition. He was having bleeding injuries. According to Vinod (PW15), he took station diary entry and referred Vilas (PW7) to the hospital.

8. Surprisingly, no report of Vilas was taken by Police Officer Vinod (PW15). It would be useful to refer to his evidence as appearing in his cross-examination, which is as under:

*“I did not obtain the report of (PW7) Vilas. It is true to say that, it is cognizable offence. There are no reason as to why I have not registered the crime in that regard. It is true to say that at Ex.70, there is no mention of station diary entry number and time. It is true to say that there is also not mentioned, name of non applicant. It is true to say that today I have not brought the station diary entry with me....”*

It is really hard to believe that police officer, before whom a person is coming injured condition, is not making inquiry and no offence is registered.

9. Vilas was examined as Prosecution Witness No.7. He has not supported the prosecution case at all that he was assaulted by the present appellant. As per his evidence, scuffle was going on the spot of the incident in between animals and one goat had given dash to him, resulting into he falling on the ground and having injuries on his person.

It is not the prosecution case that the place of the assault on Vilas and place of the assault on deceased is one and

the same. Still for the reasons best known to the prosecution, the prosecution has not brought on record spot panchanama of the alleged assault made by appellant on Vilas. Further, Dr. Deepa (PW12), who had examined Vilas and Sunanda did state that police did not send any weapon to her by seeking her opinion as to whether the injury is possible by the weapon. Further, she has candidly admitted in her evidence that the injury suffered by Vilas was simple injury.

10. In absence of spot panchanama on record and looking to the fact that the injured person himself is not supporting the prosecution, we are of the view that the prosecution has not proved its charge positively qua assault made on Vilas. Therefore, we have no hesitation in our minds to record a finding that the learned Judge has committed an error in convicting the appellant for the offence punishable under Section 324 of the IPC.

11. We have already seen the injuries as stated by Dr. Deepa (PW12) on the person of Sunanda, mother of the appellant. Sunanda was also examined by the prosecution as Prosecution Witness No.8. She has also not supported the

prosecution in respect of the alleged assault made on her by her son, the appellant. According to her evidence, on 23.12.2013, she fell down from the ladder and received injuries. Dr. Deepa (PW12) in her evidence did state that the injury no.1 as shown in certificate Exh.-72 was not on vital part of Sunanda. She also states that it could happen if any person falls on objects such as nails, broken pieces of glass or piece of tin.

12. Dr. Avniash (PW10) performed operation on Sunanda. He stated as under:

*“It is correct to say that, CLW can be possible by hard and blunt object as well as by falling on the hard and rough surface. It is correct to say that in case when any person fall on sharp pointed object like broken piece of glass, metal piece, long iron nail, etc., he may sustain stab injury...”*

13. According to prosecution case, the incident of allegedly stabbing to Sunanda occurred somewhere else than the place where deceased was assaulted. From the tenor, it is clear that the assault was made on Sunanda at her house. However, for the reasons best known to prosecution, spot panchanama of alleged incident was not recorded. Therefore, everyone is in dark

whether on the spot there were articles which could cause injuries as stated by the doctor.

14. In this background, merely because Sunanda was not supporting the prosecution, she cannot be said to be a witness to the truth. In that view of the matter, in our considered view, the learned Judge of the Court below erred in recording a finding that the appellant is found to be guilty for the offence under Section 307 of the IPC.

15. Now, lastly, we have to deal with the prosecution case in respect of the assault made on the deceased Mukesh.

We have seen the injuries as stated in the post mortem report Exh.-64. From the said, it is clear that the deceased died unnatural death.

16. In this case, we have the evidence of Manoj Pendharkar (PW1) and his brother Satish Pendharkar (PW2). They are real brothers of deceased Mukesh. Merely because they are brothers of deceased their evidence need not be viewed from the tainted glasses. Merely because they are brothers, their evidence need

not be discarded as evidence of interested witnesses as argued by the learned counsel for the appellant. If the Court could reach to the conclusion, after appreciating their evidence, that their evidence is found to be trustworthy and free from embellishment, their evidence could be considered for recording conviction.

17. In the earlier part of this judgment, we have already reproduced what was stated to them by the deceased when they reached to the spot. Statement made by the deceased to these two brothers is an oral dying declaration. There has nothing emerged during the cross-examination of these two witnesses to raise any suspicion that the deceased was not able to give his oral dying declaration to them.

18. Further, in this case, the prosecution has examined one Ravindra Mesare (PW3). He is not connected either with the deceased or with the appellant. Thus he is an independent witness. His evidence would show that he has engaged in the business of selling fish and he used to sell fish at Akola. According to him on 23.12.2013, he had been to Akola on his motorcycle for collecting the amount of his business and then he proceeded

towards Patur. His evidence would show that he reached to Chikhalgaon between 03.00 to 04.00 p.m. where people were gathered. It was his thought that some quarrel was going on. Therefore, he stopped the vehicle and noticed one minidoor was stopped there and Mukesh, the deceased was sitting on the driver's seat. Appellant-Gopal resident of Chikhalgaon was quarreling with Mukesh. He was asking the deceased to take his mother to Akola hospital as she was injured. Deceased Mukesh told him that there were articles from M.S.E.B. in his vehicle and hence he should arrange another vehicle. People from the crowd told Gopal to go home, they will admit his mother to hospital. According to Ravindra's version, Gopal asked as to how the deceased was not taking his mother to hospital and thereafter he took out gupti and assaulted on the deceased.

The corroborative piece of evidence in the nature of Chemical Analyser's report Exh.-114 is also supportive of the prosecution case.

19. Evidence of Ravindra (PW3), the person who alone was examined as eye witness, is found to be trustworthy coupled with the oral dying declaration made by deceased to his two brothers

Manoj (PW1) and Satish (PW2) allows us to reach to the conclusion that it is the appellant, who has assaulted upon the deceased by means of Gupti.

20. Now, we have to reach to the conclusion whether the appellant can be punished for the offence under Section 302 of the IPC or any other lesser offence, as argued by the learned counsel for the appellant.

21. Admittedly, there was no previous enmity between the appellant and the deceased. Admittedly, mother of the appellant was having some injuries on her person. Admittedly, as per the oral dying declaration as well as eye witness account, appellant Gopal was asking and requesting the deceased driver to allow him to take his mother in the vehicle, which was not permitted as there were some articles in the vehicle belonging to the M.S.E.B. Be that as it may, there was no predetermination of the appellant to cause death. It appears that the appellant got flared up because of refusal by the deceased in respect of taking his mother to the hospital and therefore in the spur of moment, the appellant has assaulted on him. Therefore, in our view, this particular case falls

in exception-IV of Section 300 of the IPC. Further, according to the autopsy surgeon, injury no.2 is a simple injury.

22. Since the incident has occurred at the spur of the moment without there being any intention on the part of the appellant to commit murder of the deceased, we are of the view that though the appellant has assaulted upon the deceased attracting lesser punishment instead of offence punishable under Section 302 of the IPC. According to us, the case will fall under Section 304-II of the IPC. From the impugned order, it is clear that the appellant is in jail from 28.12.2013 till the decision of the trial. Even during the pendency of the appeal, the appellant was not released on bail. Consequently, we pass the following order.

### **ORDER**

(i) The appeal is partly allowed.

(ii) The judgment and order of conviction passed by the learned 4<sup>th</sup> Additional Sessions Judge, Akola, on 25.01.2018 in Sessions Judge, Akola on 25.01.2018 in Sessions Trial No.108/2014, convicting the appellant for the offence punishable under Sections 302, 307 and 324 of the Indian Penal Code is hereby quashed and set aside.

(iii) Instead, appellant-Gopal s/o Janrao Sarap is convicted for the offence punishable under Section 304 Part II of the Indian Penal Code.

(iv) The appellant is in jail from 28.12.2013. In our considered view the punishment for the offence under Section 304 Part II will be the jail period for which the appellant has already undergone from 28.12.2013.

(v) The appellant, who is in jail, shall be released forthwith, if not required in any other offence.

**JUDGE**

**JUDGE**

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