

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

CRIMINAL REVISION APPLICATION NO.94 OF 2008

1. Balaji s/o Dhondu Solanke,
Aged 28 yrs.
2. Shivaji s/o Dhondu Solanke,
Aged 20 yrs.
3. Dhondu s/o Ganpat Solanke,
Aged 60 yrs. (deceased)

Revision is abated
against applicant
No.3 as per Court's
order dtd.
28.01.21.

All Agriculturist, R/o Nagthana,
PS Tq. & Dist. Washim. **APPLICANTS**

...VERSUS...

State of Maharashtra through,
Police Station, Washim,
District Washim. **RESPONDENT**

Mr. Ajay M. Ghare, Advocate for Applicants.
Mrs. K.R. Deshpande, APP for Respondent/State.

CORAM: **ROHIT B. DEO, J.**
DATE: **3rd SEPTEMBER, 2021.**

ORAL JUDGMENT:

The applicants are assailing the judgment dated 30.08.2005 rendered by the III Ad-hoc Assistant Sessions Judge, Washim in S.T. 66/2004 whereby the applicants 1 and 2 – who shall be hereinafter referred to as the accused – are convicted for offence punishable under section 326 read with section 34 of the

Indian Penal Code (IPC) and are sentenced to suffer rigorous imprisonment for three years and to payment of fine of Rs.500/- each and accused 3 is sentenced to suffer rigorous imprisonment for one year and to payment of fine of Rs.500/-, and accused 1 and 2 are further convicted for offence punishable under section 324 read with section 34 of IPC and are sentenced to suffer rigorous imprisonment for one year and to payment of fine of Rs.300/- each and accused 3 is convicted for the said offence and is sentenced to suffer rigorous imprisonment for six months and to payment of fine of Rs.200/-.

2. The accused are further questioning the judgment dated 03.05.2008 rendered by the Additional Sessions Judge, Washim in Criminal Appeal 33/2005 whereby the appeal preferred by the accused challenging the judgment of conviction, is dismissed.

3. Accused 3 – Dhondu Solanke, who is the father of accused 1 and 2, expired during the pendency of the revision. The legality of the conviction recorded against accused 1 – Balaji Solanke and accused 2 – Shivaji Solanke survives for determination.

4. I have heard the learned counsel Mr. Ajay Ghare for the accused and the learned APP Mrs. Kalyani Deshpande for the respondent/State.

5. Mr. Ajay Ghare would fairly submit that considering the limited scope of revisional jurisdiction he would not seek a re-appreciation of evidence. However, Mr. Ajay Ghare would submit that the conclusions drawn by the courts below, on the basis of the evidence on record, to the extent the conclusions are irrational or inconsistent with the settled legal position, would be highlighted.

6. Before adverting to the precise submissions canvassed, it would be necessary to briefly and broadly note the prosecution case. The incident occurred at 08:30 a.m. on 28.04.2004. Accused 1 and 2 were ploughing some portion of the field purchased from PW-5 Dashrath. This was noticed by PW-1 Raju, who is the son of PW-5 Dashrath and PW-6 Trivenabai. It is alleged that PW-1 Raju, PW-5 Dashrath and PW-6 Trivenabai objected to accused 1 and 2 ploughing the field. Accused 2 Shivaji then went home and returned along with accused 3 Dhondu. All the accused allegedly abused PW-1 Raju, PW-5 Dashrath and

PW-6 Trivenabai. Accused 2 Shivaji dealt a stick blow on the left leg of PW-1 Raju. Accused 1 Balaji bit the finger of PW-1 Raju. Balaji and Shivaji then dealt stick blows on the shoulder of PW-1 Raju and then Balaji dealt an axe blow on the person of PW-5 Dashrath and on Trivenabai's head. PW-5 Dashrath allegedly sustained fracture due to the blow, is the case of the prosecution.

7. Mr. Ajay Ghare would submit that the version of the witnesses is that accused 1 Balaji inflicted blows on PW-5 Dashrath and PW-6 Trivenabai with axe and it is not the version of the witnesses that the blunt side of the axe was used. Relying, *inter alia*, on the decision of the Hon'ble Supreme Court in *Hallu and others v. State of Madhya Pradesh (1974) 4 SCC 300*, Mr. Ajay Ghare would submit that the evidence of the witnesses that accused 1 Balaji assaulted with axe must be discarded in view of the contrary medical evidence.

8. In *Hallu and others* the postmortem report revealed four lacerated wounds and two bruises on the body and the version of the witnesses was that the assault was with lathis, spears and axes. The Hon'ble Supreme Court noted that the injuries were not possible by spear or an axe and that the High

Court refused to attach any importance to this aspect of the matter on the premise that the witnesses did not state that the axe blows were dealt from the sharp side and the blows may have been dealt from the blunt side. The Hon'ble Apex Court observes thus:

11. The post mortem report prepared by Dr. N. Jain shows that on the body of Jagdeo were found three bruises and a hematoma. On the body of Padum were found four lacerated wounds and two bruises. According to the eye-witnesses the two men were attacked with lathis, spears and axes but that clearly stands falsified by the medical evidence. Not one of the injuries found on the person of Jagdeo. and Padum could be caused by a spear or an axe. The High Court however refused to attach any importance to this aspect of the matter by saying that the witnesses had not stated that "the miscreants dealt axe blows from the sharp-side or used the spear as a High Court axes and spears may piercing weapon". According to the High Court axes and spears may have been used from the blunt side and therefore the evidence of the eye-witnesses could safely be accepted. We should have thought that normally, when the witness says that an axe or a spear is used there is no warrant for supposing that what the witness means is that the blunt side of the weapon was used. If that be the implication it is the duty of the prosecution to obtain a clarification from the witness as to whether a sharp-edged or a piercing instrument was used as blunt weapon.

9. I am inclined to accept the submission of Mr. Ajay Ghare that since the only role attributed to accused 1 Balaji is assault with axe, and the injuries suffered by PW-5 Dashrath and

PW-6 Trivenabai are not consistent with use of axe, the prosecution version, to the extent the role attributed to accused 1 Balaji which is that he caused injuries to PW-5 and PW-6 with axe is unbelievable, will have to be accepted. Notably, the submission that the injury suffered do not confirm to assault with axe, was strenuously urged before the courts below and, was brushed aside, with the observation that the witnesses have not categorically stated that the blow was dealt from the sharp edge. I am afraid, the courts below have committed the very same error, which is noticed by the Hon'ble Supreme Court in *Hallu and others*.

10. In my considered view, the role which the witnesses have attributed to accused 1 Balaji is inconsistent with the medical evidence, and the courts below committed a grave error in assuming that the blows may have been inflicted from the blunt side. It is not even the case of the prosecution that accused 1 Balaji used a stick or any other weapon to assault PW-5 Dashrath or PW-6 Trivenabai. In this view of the matter, I am inclined to set aside the conviction recorded, to the extent of accused 1 Balaji.

11. In so far as accused 2 Shivaji, the evidence on record

is that he assaulted Dashrath with stick, which caused fracture and he further assaulted PW-1 Raju on the leg and witness Ramprasad, with stick. In revisional jurisdiction, I am not inclined to disagree with the concurrent finding recorded that accused 2 Shivaji dealt stick blows on the leg of PW-1 Raju and on the back of PW-5 Dashrath, which allegedly caused fracture. However, Mr. Ajay Ghare would submit that the offence, if at all, would fall, if at all, under section 324 of the Indian Penal Code, since in the absence of the production and proof of the radio-logical x-ray plates, it cannot be inferred that Dashrath suffered a fracture. Mr. Ajay Ghare brought to my notice certain decisions including one decision rendered by me in *Waman s/o Tulshiram Ghodmare v. State of Maharashtra Criminal Appeal 45/2007*. However, what is noted in the said decision is that the opinion of the Doctor was tentative and subject to confirmation by radio-logical tests, and therefore, the prosecution case that the injured suffered fracture is not helped by the non-production of radio-logical evidence.

12. The Courts below have relied on the testimony of Dr. Nilesh Toshniwal who deposed that he examined the X-ray plates of the radio-logical examination of injured Dashrath and he personally examined the injured at Government Hospital, Washim

and found that Dashrath had suffered fracture to the lumbar vertebra (L4). It has further come on record that Dashrath was admitted at the Saikrupa Hospital where he was operated since Dashrath also suffered fracture of proximal phalanges of left ring finger. The discharge card issued by Saikrupa Hospital (Exh.88) reveals that Dashrath was treated at the said hospital from 29.04.2004 to 08.05.2004. The report of the radiologist (Exh.89) was exhibited, at the instance of the accused, is the observation of the learned Judge. The Courts below have found the evidence of Dr. Toshniwal to be reliable and in exercise of revisional jurisdiction, I would not venture to re-appreciate the evidence and to interfere with a possible view. I am, therefore, inclined to convict accused 2 Shivaji for offence punishable under section 325 of the IPC since given the material on record, it would not be possible to hold that the grievous hurt was caused by an instrument which, used as a weapon of offence, is likely to cause death. The offence will fall under section 325 of the IPC.

13. While I am convicting the accused 2 Shivaji for offence punishable under section 325 of the IPC, it would be counterproductive to send him to custody twenty years after the incident, particularly since the incident appears to have occurred

in the heat of the moment and on account of a land dispute. Accused 2 Shivaji deserves a chance to lead a reformed life. He has already undergone detention of three months. I am inclined to reduce the sentence of imprisonment to already undergone. However, the injured will have to be compensated. The fine imposed by the trial court on Shivaji deserves to be enhanced.

14. In the light of the discussion *supra*, the following order is passed.

- i. The accused 1 – Balaji Solanke is acquitted of offence punishable under section 326 read with section 34 of IPC. His bail bond stands discharged on the fine paid, if any shall be returned.
- ii. The conviction of accused 2 – Shivaji Solanke under section 326 read with section 34 of IPC is set aside and instead he is convicted for offence punishable under section 325 of IPC. However, the sentence of imprisonment is reduced to already undergone. The fine imposed by the trial court is

enhanced to Rs.50,000/- (Rupees Fifty Thousand only), which shall be deposited in the appellate Court within the next ninety days, failing which the accused 2 – Shivaji Solanke shall suffer rigorous imprisonment for one year. If the fine of Rs.50,000/- (Rupees Fifty Thousand Only) is deposited the same shall be paid to injured Dashrath.

16. The appeal is partly allowed in the aforestated terms.

JUDGE