

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 53 OF 2017

Swapnil Subhash Gurchal
age 25 years, occ. Student
r/o Renuka Nagar, Bodwad
Tq. Bodwad, Dist. Jalgaon

Appellant

Versus

State of Maharashtra

Respondent

WITH
CRIMINAL APPEAL NO. 647 OF 2016

1. Subhash Rupchand Gurchal
Age 54 years, occ. Business
2. Sushil Subhash Gurchal
Age 21 years, occ. Student

Both r/o Renuka Nagar,
Bodwad, Tq. Bodwad,
Dist. Jalgaon

Appellants

Versus

State of Maharashtra

Respondent

Mr. A. K. Bhosale, Advocate for the appellant.
Mr. R. B. Bagul, APP for the respondent/State.

**CORAM : R. G. AVACHAT &
R. M. JOSHI, JJ.**

RESERVED ON : 14th DECEMBER, 2022.
PRONOUNCED ON : 23rd DECEMBER, 2022.

JUDGMENT : (PER R. M. JOSHI, J.)

1. Appellants herein are convicted by the Additional Sessions Judge, Bhusawal in Sessions Case No. 456/2014 by judgment and order dated 7th October, 2016, for the offence punishable under Sections 302, 307 and 324 read with Section 34 of the Indian Penal Code and exception is taken to the same in this appeal under Section 374 of the Code of Criminal Procedure.

2. In short, case of the prosecution is as under :-

On 31st July, 2014, at about 10.00 am, Manohar Tayade was present at bus stand where he was abused by Swapnil Gurchal and Ashish Gurchal. Santosh Tayade, Dilip Tayade, Manohar Tayade and others (informant's side) went to question Subhash Gurchal as to why his sons abused Manohar. At that time, Subhash, Swapnil, Ashish, Sushil and Ashuthosh (accused side) assaulted Dilip and Santosh with knife, iron rod and other weapons. In the said incident, Santosh died while admitted in the hospital whereas Dilip sustained serious injuries. On the basis of said information, offence came to be registered vide Crime No. 53/2014.

3. On completion of investigation, case was committed for trial before the Sessions Court wherein charge was framed against the accused vide Exhibit 15. Since they abjured the charge, they were put on trial. In order to bring home guilt of the accused, prosecution examined in all 14 witnesses.

4. Learned advocate for the appellants submitted that considering the evidence on record, it can be inferred that the incident in question has occurred at the shop of the accused where the informant and injured came with weapons and during the course of the said assault, to save themselves, some injuries came to be inflicted on the person of the injured and deceased. According to him, sustainment of injuries by accused shows that the informant's side was aggressor who came with weapons to cause assault on accused persons. By referring to the evidence of injured witness Dilip, it is submitted that his statement is recorded belatedly i.e. after 18 days of occurrence of the incident and hence it has lost its evidentiary value. He challenged the testimony of Yuvraj (PW 10) on the ground that he is got up witness and in absence of any corroboration to show that there really exist any photo studio nearby to the place of incident, his presence for the reason of coming to the

photo studio to get photographs is not believable. It is also tried to argue that this witness is related to the injured and therefore, his testimony, being of an interested witness, should be kept out of consideration. He drew attention of this Court to the evidence of Sudhakar Tayade (PW 1), Dilip Tayade (PW 2) and Manohar Tayade (PW 3) in order to argue that there are material contradictions in the testimonies of these witnesses with regard to the actual incident of assault and specific role played by each accused. He further submitted that a complaint was made by accused Subhash regarding informant and injured coming to the spot and vandalising the mobile shop of the accused. Thus, according to him, there is evidence to show that informant's side was aggressor and therefore, conviction recorded against appellant Swapnil for the offence punishable under Section 302 of the Indian Penal Code, against appellant Subhash for offence punishable under Section 307 of the Indian Penal Code and appellant Sushil for the offence punishable under Section 324 of the Indian Penal Code cannot sustain. Without prejudice to the aforesaid submissions in respect of appellant Swapnil, it is argued that considering the right of appellant Swapnil of his private defence and the circumstances in which the incident occurred, he cannot be held guilty for committing murder of Santosh and the gravity of the

offence deserves to be scaled down to the offence punishable under Section 304 of the Indian Penal Code. In support of his submissions, he placed reliance on the following cases :-

- (i) *Jagriti Devi vs. state of Himachal Pradesh*
2009(14) SCC 771
- (ii) *Kumar vs. State*
2018 Cri.L.R.(SC) 509
- (iii) *Darshan Singh vs. State of Punjab and another*
2010(2) SCC 333
- (iv) *Chandan Singh vs. The State of Haryana*
1971 AIR (Supreme Court) 1554

5. Learned APP strongly opposed the said submissions by pointing out that the nature of injuries caused to the deceased and injured witness which according to him are sufficient to indicate as to which side is aggressor in this case. According to him, the injuries caused to the accused are superficial in nature and those injuries are very much possible to have been caused during the resistance put up by the victim in the said assault. It is submitted that there is no evidence in order to hold that informant's side is aggressor and they came to the spot with weapons. By referring to the testimony of injured witness and other witnesses, it is pointed out that their version about the incident is consistent and the role played by each

accused in the case being fully established, there is no reason for interference in the impugned judgment and order.

6. We have carefully gone through the entire evidence on record and in particular evidence of Subhash (PW 1), injured witness Dilip (PW 2), Manohar (PW 3) and Yuvraj (PW 10). These witnesses have given consistent account of the incident occurred on 31st July, 2014 at about 10.30 am. According to them, incident has occurred at Malkapur square, near shop of accused. The spot of the incident as described by these witnesses is in front of Amar hotel in village Bodwad. Spot panchanama (Exhibit 71) drawn during the course of investigation and proved by Surendra Palve (PW 4) shows that the incident has occurred near Bodwad-Malkapur road in front of mobile shop of accused Subhash. According to the testimony of this witness, weapons like knife and cutter stained with blood were seized from the spot. In fact, defence has also not raised any dispute about the incident and place of its occurrence.

7. On actual incident of assault, Subhash (PW 1) specifically states about appellant Swapnil giving knife blows on the stomach of Santosh (deceased). Similarly, he deposes about use of

iron rod for causing assault on the head of deceased. He also speaks about injuries caused to Dilip. There is support to this testimony from evidence of Dilip (PW 2) who has categorically deposed about use of knife by appellants Swapnil and Santosh so also assault on him. It is sought to be canvassed before this Court that evidence of Dilip need not be taken into consideration for delay in recording his statement. His evidence, however, indicates that he was hospitalised and was in ICU for 18 days and immediately after his discharge from the hospital, his statement was recorded. Said facts are self-explanatory and hence we do not find any reason to disbelieve his testimony. This witness has seen deceased Santosh being assaulted by accused No. 1 and 2. He also specifically states about the manner in which he was assaulted and he sustained serious injuries requiring 18 days of hospitalisation. The ocular evidence of this witness gets support from medical evidence and Medico Legal Certificate (Exhibit 116) is duly proved through Medical Officer Dr. Dhake (PW 13). He being injured witness, his presence at the spot as well as fact about he being recipient of injuries at the hands of accused cannot be discarded. We find that deceased Santosh had sustained as many as 7 stab wounds which corresponded to the

internal injuries. According to Dr. Patil (PW 12), cause of death of Santosh was hemorrhagic shock due to multiple stab injuries.

8. There is further support to the testimony of this witness from evidence of Manohar (PW 3). According to Manohar, an incident occurred at about 10 am, when he was abused by accused No. 2 and 3 and when he along with others came to spot to question about the same. Accused No. 1 and 2 gave knife blows to deceased Santosh and also assaulted Dilip. Dr. Patil (PW 7) claimed to have examined Manohar and found 4 injuries caused to him as per Medico Legal Certificate (Exhibit 86).

9. The version of injured witnesses and informant gets further corroboration by testimony of Yuvraj (PW 10). He claimed to have seen two persons with knife and one with iron rod and others assaulting with fist and kick blows. His testimony can be considered for limited purpose of lending support to the evidence of other witnesses to hold that an incident occurred in which two persons were severely assaulted with knife and iron rod and one of them succumbed to the injuries. Examination of independent witness is not *sine quo non* to prove case of prosecution. On the other hand,

due weightage must be given to the testimony of injured witness, unless his version about incident is unreliable. We do not find testimonies of injured witnesses not reliable. They are consistent and duly supported by medical evidence on record.

10. It is sought to be argued on behalf of appellant that accused Subhash gave complaint to the police against informant and others coming to his shop and vandalised the same. In this regard perusal of N.C. complaint (Exhibit 13) shows that the same was lodged on 6th August, 2014 i.e. after six days of the incident in question. Apart from the fact that it is lodged belatedly, there is no reference to the fact that informant and others came to the shop armed. Except this belated complaint, there is nothing on record to indicate that infact informant's side came to the shop of accused and vandalised the same. In view of this, we are not inclined to consider such belated complaint made by one of the accused in order to hold that informant's side was aggressor in the present case. Similarly, there is no evidence to show how weapons changed hands from informant's side to accused.

11. Though it is claimed that the accused were defending themselves and had exercised right of private defence, but perusal of the entire record before the Trial Court does not indicate that, accused at any point of time during the course of trial, came with such plea. Neither during cross examination nor in the statement of accused under Section 313 of the Code of Criminal Procedure, such stand is taken and their is plea of total denial. Accepting right of the accused to take multiple as well as contradictory defences, we gave thoughtful consideration to the submissions made on behalf of the appellants to find out any evidence on record which would indicate that the informant's side was aggressor and while exercising the right of private defence any act was done by the accused which has resulted into death of Santosh. We are, however, unable to convince ourselves to accept said contention for want of supporting material evidence on record. We, therefore, are not inclined to accept the submission made on behalf of appellant Swapnil that he acted in exercise of his private defence.

12. In order to consider submission to bring case out of mischief of Section 300 of the Indian Penal Code, and right of private defence, the intention of the accused to kill deceased is required to

be ascertained and for that purpose one has to see the nature of assault mounted on deceased by the assailants. Perusal of evidence of Dr. Patil (PW 12) who conducted autopsy on the dead body of Santosh shows that there were six stab wounds on abdominal part and he also noticed CLWs on right parital occipital region on the dead body. On the other hand, as per Medical Certificates (Exhibit 89 and 91) appellants had sustained simple injuries and appellant Swapnil, in particular, had sustained superficial injuries, on his finger tips, which indicates that there is possibility of causing of this injury while deceased/injured resisted the assailant. Medical Officer has also opined that this injury to be caused by sharp instrument and the cause of death was due to hemorrhagic shock with internal bleeding due to lever and lung injuries due to multiple stabbing. Having regard to the nature and number of injuries caused to the deceased and use of weapon, the intention to kill him is apparent.

13. Ld. Trial Court has rightly considered entire evidence on record and convicted appellants for the offences on the basis of role played by them in the assault. On the basis of evidence on record, no infirmity is found in the said finding. Considering time lapsed since incident and in view of fact that both these appellants have no

other crime registered against them, so also as Subhash has served more than 9 years imprisonment out of sentence of ten years, we are inclined to award substantive sentence of imprisonment to them for the period already undergone.

14. In view of aforesaid discussion, following order :-

ORDER

- i) Criminal Appeal No. 53/2017 stands dismissed.
- ii) Criminal Appeal No. 647/2016 is partly allowed to the extent of substantive sentence imposed against appellants Subhash Rupchand Gurchal and Sushil Subhash Gurchal.
- iii) Conviction against all the appellants is maintained.
- iv) Appellants Subhash Rupchand Gurchal and Sushil Subhash Gurchal are sentenced to suffer Imprisonment for the period already undergone in connection with Crime No. 53/2014.

v) Bail bonds of appellants Subhash Rupchand Gurchal and Sushil Subhash Gurchal stand cancelled.

(R. M. JOSHI)
Judge

(R. G. AVACHAT)
Judge

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