

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 931 OF 2018

Dipakkumar Nankuprasad Dube,)
Age : 25 year, Occ: Labour,)
R/o. Sitkhana, Jotkeshav,) ...Appellant
Tq. and Dist. Bahraich)

Versus

State of Maharashtra) ...Respondent

Mr. Anilkumar P. Basarkar, Advocate (Appointed) for the
Appellant.

Mr. R.V. Dasalkar, APP for Respondent – State.

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

RESERVED ON : NOVEMBER 24, 2022
PRONOUNCED ON : NOVEMBER 29, 2022

JUDGMENT (PER R.M. JOSHI, J)

1. Appellant - accused is challenging the judgment and order dated 01st June, 2018 passed in Sessions Case No. 52 of 2016 convicting him for the offences punishable under Section 302 of the Indian Penal Code, 1860, by filing present Appeal under Section 374 of Code of Criminal Procedure, 1973.

2. Short case of the prosecution, as it appears from the material on record, is as under:

On 08.02.2016 at the place below railway

bridge a painting work was going on and workers were engaged by the contractors for performing the said work. At about 02.00 pm workers came back after purchasing grocery and liquor. Meal was being prepared. At that time, Pannelal Sonkar (deceased) and Dipak were consuming liquor. Thereafter, there occurred a quarrel between them on account of voting during election. Thereafter, Dipak started beating Pannelal with bamboo and the said attack was prevented by Vijay by snatching bamboo from the hands of Dipak. Thereafter, Dipak took fry pan and inflicted blow on the head of Pannelal. Ambulance was called and initially injured was taken to Civil Hospital by Vijay and Anilkumar Gautam. It seems that thereafter injured was shifted to Seva Hospital where he succumbed to the injuries on 17.02.2016. FIR came to be recorded on 10.02.2016.

3. During the course of investigation medical certificate and postmortem notes were obtained. Accused made statement in custody of the police and pursuant to the said statement his clothes, stained with blood, were seized under panchnama. Spot of the incident was inspected from where bamboo stick and fry pan were

recovered. Statement of witnesses were recorded. On conclusion of investigation, charge-sheet came to be filed and matter was committed before the Court of Sessions for trial.

4. Charge was framed at Exhibit 4 and since accused abjured the charge he was tried. Prosecution in order to prove the guilt of the accused examined Vijay Vishwakarma (PW 6) and Anilkumar Gautam (PW 10), who have witnessed the incident of assault caused by the accused on the deceased. Both these witnesses gave account of the incident. Spot of the incident is sought proved through Narendra (PW 1) who noticed blood stains at the spot and deposed about the seizure of one bamboo and fry pan. Prosecution also examined Dr. Bramhe of Seva Hospital who had issued injury certificate Exhibit 42. Cause of death is proved through testimony of Dr. Deoraj (PW 8) who had conducted autopsy on the dead body of Pannelal.

5. Learned Advocate for the Appellant submitted that there is delay in lodging FIR as the same has been lodged after 2 days of the alleged incident. He also submitted that no explanation is forthcoming from the

investigating officer as to why statement of injured was not recorded when the incident has occurred on 08.02.2016 and injured died on 17.02.2016. He also drew attention of this Court to the inconsistencies in the testimonies of alleged eye witnesses and it is submitted that since their version is altogether different about the weapon of assault same cannot be relied upon for the purpose of conviction. It is also argued that there is no motive established for the accused to kill deceased. By referring to the relevant dates, it is submitted that there is delay in sending muddemal articles to FSL and there is no evidence to show as to where muddemal articles were kept before sending them for chemical examination. In support of his submissions, learned Advocate for Appellant placed reliance on judgment of the Apex Court in the matter of Lavghanbhai Devjibhai Vasava Vs. State of Gujarat¹.

6. Learned APP supported the impugned judgment and order by contending that the same is passed upon testimonies of eye witnesses who had no inimical terms with the accused in order to falsely depose against him. It is submitted that the recovery of clothes of

¹ (2018) 4 SCC 329

accused stained with blood corroborates with version of eye witnesses. According to him, there is no reason for causing interference in the impugned judgment and order of conviction.

7. Dr. Nilesh Deoraj (PW 8), medical officer attached to Shri. Bhausahab Hire Medical College and General Hospital, Dhule along with Dr. Vijay Jadhav conducted postmortem on the dead body of the deceased and they found partially healed sutured wound present over right temporo-parietal region, horizontally placed of length 15 cm. They also noticed 8 injuries on the dead body and those injuries were antemortem in nature. According to medical officer, cause of death of the deceased is head injury. During the cross-examination, it is admitted by the medical officer that the injuries caused to the deceased are possible by fall on hard and blunt object. However, this admission cannot be considered in isolation by ignoring other circumstances appearing on record.

8. Here in this case there are two eye witnesses to the incident in which deceased sustained injuries. Vijay (PW 6) narrated occurrences of 08.02.2016. He

specifically deposed that accused and deceased consumed liquor together and thereafter, there was quarrel between them over the issue of voting during election. He specifically stated about accused beating deceased with bamboo, which was snatched by witness from the hands of accused. This witness thereafter went to call other persons and when he came back he saw accused holding a fry pan and there was bleeding injury on the head of deceased. Anilkumar (PW 10) testifies about accused abusing wife of deceased and there was quarrel between them. He also claim that accused pelted stones and thereby caused injury to the head of deceased. After occurrence of this incident, they all went for work and came back at around 08.00 pm. This witness along with Vijay prepared food. At that time, there was quarrel between accused and deceased for not voting him during election. This witness claims that accused assaulted deceased with fry pan on his head.

9. Though medical officer during his cross-examination admitted about possibility of causing of injury to the deceased by fall, but, there is no suggestion made to the eye witnesses to the effect that

deceased fell down of multiple occasions to sustain these number of injuries. In absence of any such suggestion made to the eye witnesses, it is not possible to accept general opinion of medical officer that such injuries are possible by fall on hard and blunt object, to rule out homicidal death.

10. From the cross-examination of eye witnesses it does not appear that they have any inimical terms with the accused in order to falsely depose against him. Defence was unable to elicit anything on record to create doubt about presence of these witnesses at the time of occurrence of the incident. On the contrary, suggestions made to these witnesses indicate that they all were working together and certainly some incident has occurred at relevant time resulting into causing of injuries to deceased. As far as case of the defence about discrepancies in their testimony is concerned, it is pertinent to note that Anilkumar (PW 10) has narrated the incident occurred prior to the incident in question though on the same day and has stated having seen assault by fry pan on deceased. Pertinently according to Vijay after he snatched bamboo from hands

of accused he went away to call others and coming back to the scene, noticed fry pan in hand of accused and injury to head of deceased. Needless to mention that it is practically impossible that two witnesses to the incident will speak in one tone and make stereotype statement. Both eye witnesses, withstood searching cross-examination and we find no reason to discard their testimony. Consideration of ocular evidence supported by medical evidence, leaves no room for doubt that deceased Pannelal met homicidal death and accused is author of injuries which led to his death.

11. As far as the contention of the defence about delay in lodging FIR is concerned, evidence of Vijay (PW 6) shows that after occurrence of the incident ambulance was called and injured was taken to the Civil Hospital by this witness along with Anilkumar Gautam and they were with the injured throughout night. It seems that preference was given to the treatment of the injured over approaching to the police. In absence of any material on record to show the reason for false implication of the accused, non-lodgment of FIR immediately *per se* will not become a ground for

acquittal of the accused.

12. Now question arises as to what offence is committed by accused. Evidence on record shows that except for the quarrel on fatal day just before incident of assault on account of elections and hurling of abuses, there was no serious dispute between accused and deceased. On the contrary, testimony of Vijay (PW 6) shows that even after the quarrel between them when he told accused to take meal he refused to take the same unless deceased eats. From this evidence it can be definitely concluded that both were having cordial relations and certainly not in inimical terms. Both accused as well as deceased consumed liquor which was followed by the incident and hurling of abuses and quarrel between them. Record also indicates that initially blows were inflicted with bamboo on deceased and postmortem notes (Exhibit 37) indicate one injury to the head which is caused by fry pan. There is nothing on record to show that accused was prevented by others from inflicting further injuries to the deceased with fry pan. No attempt is seen to cause any other fatal injury. Incident has occurred on 08.02.2016

whereas deceased died on 17.02.2016. All these circumstances do not show that accused had any intention to kill deceased and hence present case is not covered by mischief of Section 300 of the Indian Penal Code.

13. As observed above, there was no motive for the accused to kill deceased. Incident in question has occurred during quarrel and abuses between accused and deceased. There was no preparation and frying pan available at the spot came to be used to give single blow on the head of the deceased which proved to be fatal. In such circumstances, evidence on record falls short for convicting the accused for the offence punishable under Section 302 of the Indian Penal Code.

14. Accused, however, had knowledge that causing of injury to the head of the deceased with frying pan is likely to cause death and therefore, he is held guilty for the culpable homicide not amounting to murder as contemplated under Part I of Section 304 of the Indian Penal Code.

15. Accused is in jail since 11.02.2016. Accused

has no criminal antecedents. The incident in question was not pre-meditated and has occurred in spur of moment. In the circumstances, it is not the fit case to award maximum sentence to the accused. He has already undergone 6 years 9 months and 13 days incarceration, which in view of this Court, would be sufficient punishment for offence in question.

16. In view of above discussions, we proceed to pass following order:

O R D E R

1. Criminal Appeal is partly allowed.
2. The sentence recorded by learned Sessions Judge, Dhule in his judgment and order dated 01st June, 2018 in Sessions Case No. 52 of 2016 is altered from Section 302 of IPC, 1860 to Section 304(I) of the IPC, 1860.
3. The appellant is held guilty for the offence punishable under Section 304(I) of IPC, 1860 and sentenced to suffer imprisonment already undergone. The order of the learned Sessions Judge in respect of fine is confirmed and in default of payment of fine amount Appellant to suffer RI for 2 days.

4. Mr. Anil P. Basarkar, learned Advocate was appointed through Legal Aid to represent Appellant and we quantified his fees at Rs. 10,000/- to be paid by Legal Aid Services Authority.

(R.M. JOSHI, J.)

(R.G. AVACHAT, J.)

Malani