

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 862 OF 2018
WITH
CRIMINAL APPLICATION NO. 191 OF 2019

Mayur Vilas Pachfule

Age : 25 Years, Occ. : Agriculture,
R/o. Yellamwadi, Taluka Mohol,
District Solapur.

Appellant
.. (Org. Accused No. 2)

Versus

1. The State of Maharashtra
2. ~~Jobi Abhiman Kole~~ (deleted as expired)
3. **Swarna Pandit Kole**
Pardhiwasti, At. Yellomwadi,
Tal. Mohol, District Solapur,
Pin 413 410.

.. Respondents

WITH
CRIMINAL APPEAL NO. 687 OF 2018

Avinash Manohar Pastapure

Age : 29 Years, Occ. : Agriculture,
R/o. Yellamwadi, Taluka Mohol,
Dist. Solapur.

Appellant
.. (Org. Accused No. 3)

Versus

The State of Maharashtra

.. Respondent

WITH
CRIMINAL APPEAL NO. 863 OF 2018

Akshay Laxman Pachfule

Age : 24 Years, Occ. : Agriculture,
R/o. Yellamwadi, Taluka Mohol,
District Solapur.

Appellant
.. (Org. Accused No. 1)

Versus

The State of Maharashtra

.. Respondent

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- Mr. Satyavrat Joshi i/by Mr. Nitesh Mohite for the Appellant / Applicant in Cri. Appeal No. 862 of 2018
 - Mr. M.V. Thorat a/w Mr. V.M. Thorat for the Appellant in Cri. Appeal no. 687 of 2018

- Mr. Daulat Khamkar for the Appellant in Cri. Appeal No. 863 of 2018
- Mr. Ritesh Thobde a/w Mr. Sagar Tambe for Respondent No. 3 in Cri. Appeal No. 862 of 2018
- Ms. M.M. Deshmukh, APP for the State

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**CORAM : SMT SADHANA S. JADHAV &
MILIND N. JADHAV, JJ.**

DATE : APRIL 21, 2022

JUDGMENT [PER MILIND N. JADHAV, J.]:

1. This is a group of three Criminal Appeals which are disposed of by this common judgment.

2. Criminal Appeal No. 863 of 2018 is filed by Akshay Laxman Pachphule - original accused No. 1; Criminal Appeal No. 862 of 2018 is filed by Mayur Vilas Pachphule - original accused No. 2 whereas Criminal Appeal No. 687 of 2018 is filed by Avinash Manohar Pastapure - original accused No. 3. Criminal Bail Application No. 191 of 2019 is filed by accused No. 3 seeking enlargement on bail.

3. The aforesaid Appeals are filed against the conviction of the Appellants by the learned Additional Sessions Judge, Solapur vide judgment and order dated 18.05.2018 in Special Case No. 71 of 2015 convicting the Appellants of the offence punishable under section 302 r/w 34 of the Indian Penal Code (for short "**IPC**") and sentencing the Appellants to undergo life imprisonment and to pay a fine of Rs. 2,00,000/- each and in case of default of payment of fine to undergo further simple imprisonment of six months. It is further stated in the

judgment that out of the said fine amount of Rs. 6,00,000/-, Rs. 1,25,000/- each be paid as compensation to the children and wife of the deceased and Rs. 75000/- be paid as compensation to the mother of the deceased.

4. For the sake of convenience, the Appellants shall be referred to as accused No. 1, accused No. 2 and accused No. 3 in the present judgment.

5. It will be apposite to refer to such of the relevant facts necessary for deciding the present Appeals.

5.1. The informant Dayanand Chandrakant Devkar (P.W.1) was working as hotel manager in Shambhuraje Dhaba / restaurant owned by Dattatray Shivaji Karande. On 29.09.2015 at about 00.45 hrs. Ram Pachphule came to the dhaba and woke up the informant and demanded a meal. The informant informed that the dhaba was closed and he could not provide any meal. At that time Pandit Kale and Manoj Kale arrived at the dhaba and started quarreling with Ram Pachphule. The informant gathered that there was some dispute between them due to the Ganpati immersion procession in the village and the altercation led to Pandit Kale assaulting Ram Pachphule with a stick. At that time the informant pacified the parties and sent them home. On the following day i.e. 30.09.2015 at about 05.00 p.m., the informant was sitting at his hotel counter as usual when Akshay

Pachphule, Mayur Pachphule and Avinash Pastapure i.e. accused Nos. 1 to 3 arrived at the dhaba and sat there. At the same time Pandit Kale arrived at the dhaba in an inebriated state and demanded meal from the informant. At that time accused No. 1 started abusing Pandit Kale and asked him as to why he had assaulted Ram Pachphule on the previous night and this altercation led to accused No. 1 severely assaulting Pandit Kale with a stick lying nearby below his waist, on his legs and buttocks. Accused No. 2 picked up a flagstone lying nearby in the dhaba and assaulted on the leg of Pandit Kale whereas accused No. 3 assaulted Pandit Kale with his fist and kick blows. The informant witnessed the incident and pacified the parties but in return sustained an injury near his left ear. After this incident accused Nos. 1 to 3 left the incident spot.

5.2. On learning about the incident that Pandit Kale was assaulted, Balu and Lankeshwar - brothers of Pandit Kale, Abhiman - father of Pandit Kale arrived at the dhaba with 10-15 persons and inquired with the informant. They called for a private vehicle which took Pandit Kale and the informant to the Government Hospital at Mohol for treatment. At the Government Hospital, Mohol Pandit Kale was directed to be taken to Solapur. The informant was treated at Mohol. During treatment, Pandit Kale passed away at 10.45 p.m. in the civil hospital. The informant lodged FIR against the accused Nos.

1 to 3 at Madha Police Station for offences punishable under sections 302, 324, 323 and 504 r/w section 34 IPC. During investigation it was revealed that the accused were also liable to be charged under sections 3(i)(10), 3(ii)(v) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short "**Atrocities Act**"). Chargesheet was filed against the accused. However as per order dated 09.06.2016 the accused were discharged in respect of the allegation of offences punishable under the Atrocities Act.

6. Charge came to be framed against the accused Nos. 1 to 3 for the offences punishable under section 302 r/w 34 IPC. It was read over to the accused and explained to them in vernacular to which they pleaded not guilty and claimed to be tried.

7. In order to establish the guilt of the accused, the prosecution examined in all eight witnesses. Dayanand Chandrakant Devkar (informant - P.W.1) is the eye witness who witnessed the incident. P.W.2, P.W.4, P.W.5 and P.W. 6 are pancha witnesses. P.W.7 is the Investigating Officer ("**I.O.**") whereas P.W.8 is the Deputy Superintendent of Police, Kolhapur. The prosecution has relied upon the FIR, spot panchnama, inquest panchnama, seizure panchnama, arrest panchnama, statements of P.W.1 (informant) and Santosh Popat Karande (P.W.3) under section 164 of the Code of Civil Procedure ("**Cr.P.C.**"), medico legal certificate of P.W.1 and reports from the

forensic laboratory. It is pleaded on behalf of the accused that there was some dispute between the parties as the accused took side of the first wife of the informant during his second marriage and the accused used to complain about the illegal activities at the dhaba; further the deceased had created a chaos at the dhaba and assaulted the informant and in retaliation the informant and other employees of the dhaba assaulted the deceased. In short the defence is that of framing the accused in a false case.

8. We have heard Mr. Satyavrat Joshi, learned counsel appearing for the Appellant i.e. accused No. 2 in Appeal No. 862 of 2018, Mr. Daulat Khakmar, learned counsel appearing for the Appellant i.e. accused No. 1 in Appeal No. 863 of 2018 and Mr. M.V. Thorat, learned counsel appearing for the Appellant i.e. accused No. 3 in Appeal No. 687 of 2018. We have also heard Mr. Ritesh Thobde, learned counsel appearing for Respondent No. 3 in Appeal No. 862 of 2018 and Ms. M.M. Deshmukh, learned APP for the State.

9. It is the Appellants' case that the impugned judgment does not prove the commission of the offence by the accused beyond reasonable doubt. It is submitted that the incident in question took place at 05.00 p.m. on 30.09.2015; the FIR however was recorded after 13 hours on the next day; that this delay is not explained by the prosecution; that there is no motive involved and / or proved by the

prosecution; that the prelude to the incident on the previous day i.e. on 29.09.2015 when the deceased and one Manoj Kale had assaulted Ram Pachphule is shown as the motive but the said Manoj Kale nor Ram Pachphule have been examined by the prosecution as witnesses to prove the prelude; rather not a single witness has been examined by the prosecution in respect of the dispute / incident that had happened during the Ganpati immersion procession which could have thrown light on the case of the prosecution. It is further submitted that after the incident the informant and the deceased were taken to Mohol and thereafter to Solapur. It is alleged that they were assaulted by the three accused with stick, flagstone and fist and kick blows, however the statement of the informant taken at Mohol has not come on record. So also the person who relayed the information for the first time about the incident to the family members of the deceased has also not been examined. It is further submitted that at the time of the incident there were two independent witnesses who were having food at the dhaba; these two independent witnesses have not been examined though their statements have been recorded. Learned counsel have vehemently submitted that there is no motive involved and there was no grudge between the parties involved in order to hold the accused guilty of the offence; that if at all the incident took place at the spur of the moment; that there was no preparation or pre-meditation of any nature to commit the crime and most importantly

the stick and the flagstone, the two weapons used by the accused Nos. 1 and 2 were lying in the dhaba premises itself which clearly show that there was no motive, preparation and intention on the part of the accused to commit the murder of the deceased. It is further submitted by the learned counsel appearing for the accused that the medical evidence is at variance with ocular evidence in as much as though the prosecution witnesses state that there was assault on the private parts of the deceased, the postmortem report and the other documentary evidence does not reveal any injury to the private parts of the deceased. Learned counsel on the basis of decisions given by this Court have submitted that at the highest the assault by accused Nos.1 and 2 by the stick and the tile could be held punishable under the provisions of section 325 IPC; that the deceased was under the influence of alcohol; that the stick and the flagstone cannot be termed as a deadly weapon or a sharp weapon and thus the prosecution has failed to prove their case beyond reasonable doubt for seeking conviction under section 300 IPC as the facts and circumstances of the present case do not fit into the definition of section 300 IPC. The Appellants therefore have prayed for consideration of their case in the present Appeal proceedings.

10. *PER CONTRA*, Ms. Deshmukh, learned APP submits that the judgment passed by the trial court is a reasoned judgment which has

proved beyond reasonable doubt the role and indictment of the three accused in the commission of the offence; that the roles of the three accused cannot be segregated and there was previous enmity with the deceased Pandit Kale; that the evidence shows that the three accused with a common intention assaulted the deceased and caused bodily injuries severe enough to cause death in the ordinary course of nature and thus the prosecution has succeeded in proving beyond reasonable doubt the severe and grievous assault by the three accused in committing the murder of the deceased Pandit Kale. The learned APP therefore submits that the impugned judgment and order deserves to be upheld.

11. We have perused the entire record with the help of the learned counsel appearing for the parties, considered the submissions and evidence on record. The prosecution has examined eight witnesses. The entire case of the prosecution is based on the evidence of PW 1 Dayanand Devkar, the principal eye witness. We shall therefore outline the evidence given by this witness to consider and see whether his evidence along with the investigation done by the prosecution as also the medical evidence is to be considered beyond reasonable doubt for indicting the three accused.

12. It is seen that PW-1 is the eye witness and on whose evidence the entire Prosecution's case rests. In his deposition PW-1

has narrated the incident as stated herein above. However in his cross-examination PW-1 has stated that no FIR was registered with the police in respect of the quarrel between Ram Pachfule and Pandit Kale. The incident of the assault by the accused persons continued for a period of 10 to 15 minutes. P.W.1 further states that though he had stated before the Magistrate, Solapur in his statement that accused No.2 had assaulted the deceased with a flagstone (piece of tile) the same is not reflected in the statement before the Magistrate. Similarly the statements related to assault by accused Nos. 1 and 3 by stick and fist and kick blows is also not reflected in the statement recorded before the Magistrate. However the evidence of P.W.3 Santosh Popat Karande, a waiter at the dhaba who is also an eye witness is material. He is completely a neutral person. In his deposition he has stated that the deceased Pandit Kale came to the dhaba in a heavily drunken state and ordered chicken from the P.W.1 and sat in the dhaba. At that time, there was an altercation between accused No.1 and the deceased Pandit Kale for the reason that Pandit Kale had assaulted Ram Pachfule - uncle of accused No.1 on the previous day i.e. on 29.09.2015. P.W.3 further deposed that due to this altercation accused No.1 picked up a stick lying nearby and started assaulting the deceased Pandit Kale below his waist and on his legs. He further deposed that accused No. 2 picked up a piece of tile (flax stone) and assaulted the deceased with the tile on his legs and accused No. 3 gave

fist and kick blows to him. It needs to be noted that the assault took place pursuant to the altercation and the prelude to the incident with respect to some dispute between the deceased and the uncle of accused No.1 at the time of Ganpati immersion procession. It is therefore clear that the assault on the deceased was not a pre-planned and orchestrated event by the accused. Because of the altercation, accused No.1 and accused No. 2 picked up the articles lying nearby in the dhaba premises and inflicted blows on the deceased. Another mitigating factor which needs to be addressed is that if there was an intention to murder and kill the deceased Pandit Kale, the assault would have been inflicted on his head and not below his waist. It has also come on record that the stick used by the accused No.1 was a bamboo stick which has been seized by the I.O.. This bamboo stick in common parlance is known as *velu* stick. This is a hollow stick which does not carry much weight. The inquest panchanama at Exhibit '64' if seen reveals that the deceased Pandit Kale sustained injuries to his head, near left eye, on both leg and toes and his back. The postmortem report at Exhibit '95' shows that there are 25 external injuries; all injuries in column Nos. 17 and 18 of the postmortem report are ante-mortem; the inquest panchanama and postmortem report show that blood was accumulated near the toes. However it is clear that since there was no premeditation for the commission of the crime, no preparation and weapon brought by the accused at the

incident spot; the fact that the accused were already seated in the dabha before the arrival of the deceased; most of the injuries were abrasions below the legs; the deceased himself was in a drunken state; that the exact time of death of the deceased has not come on record; further the death of the deceased is due to internal bleeding; that there was absolutely no intention on the part of the accused to commit the offence and therefore the prosecution has not proved beyond hilt that the commission of the offence by the accused is beyond reasonable doubt.

13. Section 300 IPC define the offences of murder and read thus:

"300. Murder.— Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

2ndly.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

3rdly.—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

4thly.—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1.—**When culpable homicide is not murder.**—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:—

First.—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.—That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2.—Culpable homicide is not murder if the offender in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3.—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

14. The trial court has convicted and sentenced the Appellants

for the offence of murder (as defined in Section 300 IPC) under Section 302 IPC. This conviction and sentence passed by the trial court calls for reconsideration in view of the following:

14.1. Exception 4 to Section 300 IPC outlines a situation where culpable homicide does not amount to murder. There are three requirements for this exception to apply: (i) the act of killing is committed without premeditation; (ii) the act of killing is committed in a sudden fight in the heat of passion upon a sudden quarrel; and, (iii) the offender should not have taken undue advantage or acted in a cruel or unusual manner.

14.2. In our considered opinion, the three requirements for Exception 4 of Section 300 IPC to be applicable have been satisfied in the present case:

- i. There cannot be the evidence rather it is matter of appreciation from the incident as a whole of intention harboured by the Appellants to commit the act of killing the deceased;
- ii. The evidence given by the eyewitnesses prove that the incident occurred because of a sudden altercation which, in turn, was caused due to the provocation by the deceased; the Appellants hit the deceased below his waist owing to the

intense altercation between the Appellants and the deceased;

- iii. Because the deceased was inebriated, the quarrel between them being sudden and heated, it cannot be reasonably said that the Appellants have acted in an unusual manner.

14.3. On the basis of the above discussion and findings and considering the evidence placed on record, we are of the firm opinion that the present case does not travel beyond the offence punishable under the provisions of section 326 IPC at the highest. We have perused and analyzed the evidence on record. Admittedly there is no intention on the part of the Appellants to cause the death of the deceased; that the assault by the Appellants is below the waist which once again signifies that there was never any intention on the part of the Appellants to murder the deceased; the weapons used i.e. stick and flagstone (tile piece) have already been commented by us herein above; lastly the entire incident has occurred in a heat of passion and the Appellants have acted in a manner as stated by the two prosecution witnesses. We are therefore convinced that the provisions of section 302 IPC shall not apply to the acts of the Appellants in the present case and at the highest the offence committed by the Appellants is punishable under the provisions of section 326 IPC.

15. In view of the above discussion and findings, we are of the

firm opinion that the Appellants, in a heat of passion, acted in a manner that they knew that their act is likely to cause the death of the deceased but without the intention to kill him. In view of the same, the conviction of the Appellants for the offence of murder is hereby altered to that of culpable homicide not amounting to murder as defined under Section 299 IPC read with Exception 4 of Section 300 IPC.

16. In view of the above discussion, we pass the following order:-

- (i) Appeals are partly allowed;
- (ii) All the Appellants i.e. accused No. 1 - Akshay Laxman Pachfule, accused No. 2 - Mayur Vilas Pachfule and accused No. 3 - Avinash Manohar Pastapure are acquitted of the offence punishable under Section 302 read with 34 of the Indian Penal Code (**IPC**);
- (iii) Accused No. 1 - Akshay Laxman Pachfule and accused No. 2 Mahur Vilas Pachfule are convicted for the offence punishable under Section 326 of the IPC and are sentenced to the period already undergone;
- (iv) Accused No. 3 - Avinash Manohar Pastapure is convicted for the offence punishable under Section 323 of the IPC and is sentenced to suffer RI for one year imprisonment which he had already undergone and to

pay fine of Rs. 50,000/- to be paid to the children of the deceased. Accused No. 3 has been granted bail on 08.08.2018. He has already undergone the said sentence. His bail bonds shall stand cancelled;

- (v) Appellants i.e. accused No. 1 - Akshay Laxman Pachfule, accused No. 2 - Mayur Vilas Pachfule have undergone almost six years and four months in custody. They be released forthwith if not required in any other offence;
- (vi) It is submitted that accused No. 1 - Akshay Laxman Pachfule, accused No. 2 - Mayur Vilas Pachfule are on COVID parole at present. They shall surrender to Yerawada Central Prison, Pune. The Superintendent of Yerawada Central Prison, Pune shall obtain their signatures and complete the formalities and release them forthwith if not required in any other offence;
- (vii) The compensation which was awarded by the trial court to the children and wife of the deceased be paid to them.
- (viii) The compensation which was awarded to the mother of the deceased will be paid to the children of the deceased as the mother has expired on 07.04.2020.

17. In view of disposal of Appeals, nothing survives in Criminal Application No. 191 of 2019. The same stands disposed of accordingly.

[MILIND N. JADHAV, J.]

[SMT. SADHANA S. JADHAV, J.]

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