

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.329 OF 2020

Santosh Shashikant Suryavanshi Appellant
Versus
The State of Maharashtra Respondent

Mr. Salimuddin A. Shaikh, Advocate for the Appellant.
Smt. M.R. Tidke, APP for the Respondent-State.

CORAM :SARANG V. KOTWAL, J.

DATE : 22th AUGUST, 2022

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 13.2.2020 passed by the Additional Sessions Judge, Thane in Sessions Case No.42/2011. By the impugned judgment and order, the appellant was convicted for the offence punishable under Section 304 (Part-I) of IPC and was sentenced to suffer RI for five years and to pay fine of Rs.20,000/- and in default to suffer SI for six months. Out of the fine amount, Rs.15,000/- were directed to be paid to the father of the deceased. The appellant was granted set-off under Section 428 of Cr.P.C. The appellant was originally charged for commission of offence punishable under Section 302

read with 34 of IPC. He was acquitted of that charge. Along with the appellant, two other accused namely Bhingu and Vikas had faced the trial. Vikas had died during pendency of the trial. Accused No.2 Bhingu was acquitted of all the charges.

2. The prosecution case is that the deceased Ramdhiraj Gaund was seen talking with the appellant's sisters. The appellant got angry. On 3.10.2010 at about 6.00 p.m. the accused called the deceased near their house. He was assaulted with wooden logs. He was lying on the road. Somebody informed his father. He was taken to Gurukrupa hospital. There his statement was recorded. It was treated as the FIR. It was registered vide C.R. No.I-289/2010 under Section 323 read with 34 of IPC at Narpoli police station, District-Thane. The injured Ramdhiraj was subsequently shifted to a hospital in Kalwa. He died on 17.10.2010. Therefore, Section 302 of IPC was added. The investigation was carried out. The appellant was arrested on 28.10.2010. The clothes on his person were seized. The statements of the witnesses were recorded. The investigation was completed and the charge-sheet was filed. The case was committed to the Court of Sessions. The defence of the appellant was of total denial. At the conclusion of the trial, the

appellant was convicted and sentenced as mentioned earlier.

3. Heard Shri Salimuddin Shaikh, learned Advocate for the appellant and Smt. M.R. Tidke, learned APP for the State.

4. During trial, the prosecution examined six witnesses, including Medical Officer who had conducted the postmortem examination, another Medical Officer who had given endorsement on the dying declaration, PSI Jagtap who had recorded that dying declaration, father of the deceased and the pancha for recovery of clothes.

5. The evidence of the prosecution is as follows:

i. PW-1 Ramjanak Hariram Gaund was the father of the deceased Ramdhiraj. He has deposed that the deceased was working as a labourer. The incident occurred on 3.10.2010. PW-1 had gone to purchase groceries. He came back at around 6.30 p.m. While he was returning from market, he saw his son lying on the ground near the appellant's house in injured condition. He had sustained injuries all over his body. PW-1's wife told him that four persons, including the appellant and other accused, had assaulted their son by taking him in their house. PW-1 then informed others.

They took his son to Gurukrupa hospital where he was admitted. PW-1 asked his son as to how he sustained the injuries. He told him that the appellant and others assaulted him. He did not tell him the reason for the assault. After that the police came to the hospital. Statement of the injured was recorded and the FIR was lodged against the appellant and others. PW-1 did not have money for further treatment and, therefore, the deceased was taken to Chhatrapati Shivaji Hospital, Kalwa which was a Government Hospital. He was admitted in ICU. He succumbed to the injuries on 17.10.2010.

In the cross-examination, he was asked about the deceased's addiction to liquor. He denied the suggestion that the deceased used to cause nuisance after consuming alcohol. He admitted that there was no enmity between the deceased and the accused. The appellant was staying beyond six to seven houses from his house. He had not named other assailants besides the appellant in his police statement.

ii. PW-2 Ramprasad Soni was a pancha in whose presence clothes of the co-accused Vikas were recovered from his house at his instance. His evidence is not material as far as the appellant is

concerned.

iii. PW-3 Gautam Kamble was knowing PW-1. PW-3 was running a small food-stall at Anjurphata. On 3.10.2010 at about 6.30 p.m. PW-1 came to his stall and sought his help. He told PW-3 that his son Dhiraj was assaulted by the appellant and his three associates. PW-3 along with others went to the spot of incident. The injured was still lying on the ground. PW-3 then went to the police station. This witness then took the injured Dhiraj to a hospital. He has deposed that the police enquired with the injured. The injured told the police that he was assaulted by his friends by means of bamboo. After some days he was discharged from the hospital. He was again admitted to a hospital in Kalwa. On 17.10.2010, he succumbed to his injuries.

In the cross-examination, he deposed that PW-1 told about the incident of assault to PW-3's brother and PW-3 overheard their conversation. When the injured was taken to the hospital, the police were with them. PW-3 travelled in a separate rickshaw. He accompanied the injured in the rickshaw.

iv. PW-5 Dr. Arun Patil was the first doctor who treated the injured. He deposed that he was running Gurukrupa hospital. On

3.10.2010 Ramdhiraj, the injured, was brought to his hospital. He had sustained injuries on head and left hand. His left hand was fractured. He gave history of assault. PW-5 then informed the police through a letter. That letter was produced on record at Exhibit-50. On 4.10.2010 the police came to his hospital. The statement of the injured was recorded in his presence. Before recording the statement, PW-5 examined the injured. He was conscious and in fit state of mind. He gave his endorsement on the statement. The endorsement is marked as Exhibit-51. PW-5 has deposed that the patient had suffered blunt injury on head and fracture of left hand at elbow.

v. PW-6 PSI Gulab Jagtap has recorded the statement of the injured. He carried out the investigation. He deposed that on 4.10.2010 he went to the police station. He obtained consent of the doctor before recording the statement. Doctor gave endorsement that the patient was conscious and fit to give statement. After that, statement was recorded in presence of the doctor. The injured told him that there was some quarrel between him and the accused regarding some conversation with the sister of the appellant. The statement which is treated as FIR is taken on record and marked as

Exhibit-58. This witness then visited the spot of incident and carried out spot panchnama. He seized wooden logs and sticks from the spot. The spot panchnama is produced on record at Exhibit-59. The statements of the witnesses were recorded by him.

In the cross-examination, he admitted that when the statement of the injured was recorded his relatives were also present. He admitted that there was no specific role attributed to any of the accused in the FIR–dying declaration. After the death of the injured on 17.10.2010, he carried further investigation. The clothes of the deceased were seized by PSI Dhamal.

The FIR which is produced on record at Exhibit-58 is treated as a dying declaration because the injured Dhiraj had subsequently died. It is mentioned in the FIR that on 3.10.2010 at about 12.00 p.m. he was talking with two sisters of the appellant. He got angry. In the evening at about 6.00 p.m. the appellant came to his house along with other accused Vikas, Bhigu and Mistry. He was called behind the house of the appellant and all four of them assaulted him with wooden sticks on his head, left hand and legs. After that all those four ran away. Somebody informed his father and then he was taken to Gurukrupa hospital.

vi. PW-4 Dr.Mangesh Ghadge had conducted the postmortem examination. He was attached to the Medical College at Kalwa. He has deposed that on 11.10.2010, Ramdhiraj was admitted to their hospital. He had sustained injuries on abdomen and other parts of body. There were abrasions and contusions. During treatment he succumbed to his injuries on 17.10.2010. During postmortem examination, following injuries were noticed by this witness :

- “(1) contusion over right upper limb entirely,
- (2) contusion over entire left upper limb,
- (3) contusion all over left lower limb with buttock,
- (4) contusion over right lower limb buttock posteolateral aspect,
- (5) contusion over left side trunk upto flanks anteriorly laterally,
- (6) contusion over right side trunk anteriorly upto flanks,
- (7) stitched wound over right frontoparietal region 6.0 with 6 stitches intact,
- (8) multiple abrasions with scab formation over back size ranging from 8. cm x 2 cm to 2.00 to 2.0 cm.
- (9) multiple abrasions over bilateral leg and thigh size ranging from 4 x 1 cm to 1 x 1 cm.”

On internal examination, he found contusion of chest wall. There was evidence of fracture of second rib on right side.

The probable cause of death was death due to “hemorrhage shock, due to multiple contusions due to hard and blunt object’.

In the cross-examination, he denied the suggestion that the injuries were possible due to fall on hard and rough surface. The postmortem notes were produced on record at Exhibit-48. Though there was one such wound on the frontal parietal region, internal examination did not show any injury to skull or brain or hemorrhage. Both lungs however had collapsed. There were no injuries to the internal organs in the abdomen including kidney, pancreas, spleen, liver etc.

. This in short is the prosecution evidence.

6. Learned counsel for the appellant submitted that it is not possible to believe that there could not have been any other witness because the incident had taken place in a crowded locality and somebody had informed PW-1 about the incident. But no such person was examined who had seen the incident. There was no motive to cause assault resulting in death of the injured. The dying declaration was recorded in presence of the relatives and, therefore, there was every possibility of tutoring. No specific role is

ascribed to the appellant. Based on the same dying declaration, the other accused are acquitted. Therefore, on the same grounds even the appellant deserves to be acquitted. There was no recovery of any weapon at the instance of the appellant. There is no other connecting material in the form of C.A. certificates etc..

7. Learned APP opposed these submissions. She submitted that there is no reason to disbelieve the dying declaration. In the dying declaration though no specific role is attributed to the appellant, the motive is attributed to the appellant alone. It is the case of the prosecution and it is also mentioned in the dying declaration that the deceased was talking to the appellant's sisters, which was the reason why the deceased was assaulted in the evening of 3.10.2010.

8. She submitted that based on the dying declaration itself the conviction is properly recorded. She submitted that though the charge under Section 302 of IPC was framed, the learned Judge has given reasons for convicting the appellant for commission of offence punishable under Section 304 (Part I) of IPC and, therefore, the judgment calls for no interference.

9. I have considered these submissions. As far as the

dying declaration is concerned, as rightly submitted by learned APP, there is no reason to doubt the veracity or truthfulness of the dying declaration. The evidence led by PW-6 PSI Jagtap about recording of dying declaration after obtaining endorsement from PW-5 Dr. Patil is sufficiently trustworthy. The deceased had described the incident with sufficient clarity. PW-5 has given endorsement on the dying declaration that the appellant was in a fit condition to give his statement. His fitness is also supported by the fact that the injured survived for a few days. PW-3 has deposed that he was admitted to another hospital after a few days after discharge from the first hospital. Thus, death of the deceased was not immediate or within short time from the date of incident. He had survived for almost fourteen days. Therefore, there is no reason to doubt his state of fitness when the statement was recorded. Therefore, it can safely be held that the statement was recorded by PW-6 when the injured was in a condition to give statement.

10. There is no substance in the submission that the statement was a result of tutoring. There was no reason for any of the relatives of the deceased to implicate the appellant falsely. Even no suggestion to that effect is given that the relatives had any

enmity with the appellant. In fact, PW-1 has deposed that even the deceased did not have any enmity with the appellant.

11. As far as the oral dying declaration to PW-1 is concerned, it was quite vague and even then the injured had not given any reason for the assault. PW-1 has also admitted that he had not named other accused when the injured narrated the incident to him. Considering all these, benefit was given to the other accused and they were acquitted.

12. As far as the weapons are concerned, they were found at the spot. There was no separate recovery at the instance of the appellant. There was no CA report of his clothes to connect the appellant with the act. Therefore, the only circumstance against the appellant is about dying declaration. However, as mentioned earlier there is no reason to doubt the veracity of the narration in the dying declaration.

13. Therefore, in this background, the description in the dying declaration assumes importance. Some salient features of the dying declaration are that it had named four persons. None of the other accused is convicted by the trial Court. There is no specific role attributed to the present appellant of causing any

particular injury either on the head or on the ribs. It has come in the statement that all the four accused assaulted him. The motive, however, was attributed only to the appellant as the deceased was talking to his sisters in the morning of the date of incident. Therefore, even if the dying declaration is accepted and the assault at the hands of the appellant is held to be proved, the next important question would be as to what offence exactly the appellant has committed. Significantly the other accused are acquitted and aid of Section 34 of IPC is not available to the prosecution. The appellant is convicted simpliciter under Section 304 (Part I) of IPC. Learned Judge has not even given reasons as to why the dying declaration could not be believed as far as other accused are concerned. Even then, the question would still remain whether the appellant had the requisite intention to cause death or such serious bodily injury which in all probability could have caused death. The prosecution has not produced on record the medical papers relating to the treatment given to the deceased. Admittedly he had survived from 3.10.2010 to 17.10.2010. The prosecution case is absolutely silent as to what exact treatment was given to the deceased and how his health deteriorated during all

these days. Therefore, the only material available to find out the status of his health is the postmortem examination which shows injuries caused to him. Significantly the head injury showed stitches but there was no internal damages either to the skull or to the brain. Therefore, that head injury was not very serious. The other injuries were on the chest causing rib fracture. The dying declaration has not attributed any particular blow or the narration does not connect the appellant with that particular injury. Therefore, it is difficult to hold that the appellant had the requisite intention or even the requisite knowledge to bring home the guilt for commission of offence of culpable homicide not amounting to murder. At the highest, considering the dying declaration, the appellant can be held responsible for causing fracture or grievous injury to the deceased and, therefore, it has to be held that he has committed the offence punishable under Section 326 of IPC and not under Section 304(I) of IPC. It is also to be noted that the assailants, including the appellant, had ample opportunity to cause assault of vital parts including the head by giving more blows and forceful blows on the injured, but, except for the rib fracture, no other vital part was attacked. Therefore, to that extent, benefit will

have to be given to the appellant. Hence, the conviction under Section 304 (Part I) of IPC will have to be set aside. The appellant was sentenced to suffer RI for five years. Since I am bringing down the conviction to Section 326 of IPC, which is of lesser degree than Section 304 (Part I) of IPC. Sentence of five years is imposed for commission of offence punishable under Section 304(Part I) of IPC. It will have to be reduced to a reasonable extent. However, unreasonable leniency cannot be shown to the appellant in the background of this case. In the interest of justice, the substantive sentence of four years will serve the purpose. Hence, the following order :

:: O R D E R ::

- i. The appeal is partly allowed.
- ii. The conviction of the appellant under Section 304 (Part I) of IPC and the sentence of RI for five years and payment of fine of Rs.20,000/- and in default directions to suffer SI for six months are set aside. Instead, the appellant is convicted for commission of the offence punishable under Section 326 of IPC. He is sentenced to suffer RI for four years and to pay fine of Rs.20,000/- (Rupees Twenty Thousand Only); and in

default of payment of fine to suffer SI for six months.

- iii. Out of the fine amount, Rs.15,000/- are directed to be paid to the father of the deceased, namely, Ramjanak Hariram Gaund, residing at Opp. Omsai Kirana Store, Room of Balu Kamble, Charnipada, Anjurphata, Taluka-Bhiwandi, District-Thane as compensation.
- iv. The appellant is granted set off under Section 428 of Cr.PC. for the period which he spent in jail as an under trial prisoner during pendency of the trial.
- v. Besides these modifications, rest of the clauses in the operative part of the impugned judgment and order are maintained.
- vi. Criminal Appeal is disposed of in aforesaid terms.

(SARANG V. KOTWAL, J.)

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