

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

CRIMINAL APPEAL NO. 279 OF 2016

Sandeep @ Jounthy Mahadeo Jadhav & Anr. ..Appellants
Versus
State of Maharashtra ..Respondent

Ms. Payoshi Roy i/b. Dr. Yug Mohit Chaudhry for Appellant.
Ms. Veera Shinde, APP for State/Respondent.

**CORAM : SMT. SADHANA S. JADHAV &
SARANG V. KOTWAL, JJ.**

**RESERVED ON : 07th MARCH 2022.
PRONOUNCED ON : 11th MARCH 2022.**

JUDGMENT: (*Per Sarang V. Kotwal, J.*)

1. The Appellants have challenged the Judgment and order dated 14/12/2015 passed by the learned Additional Sessions Judge, Kolhapur in Sessions Case No. 114 of 2014, whereby both the Appellants were convicted for commission of the offence punishable under section 302 r/w. 34 of the Indian Penal Code (for short 'IPC'). They were sentenced to suffer Imprisonment for life and to pay a fine of Rs.5000/- each. The Appellant No.1 was convicted for the offence punishable U/s.504 of IPC and was

sentenced to suffer R.I. for one year and to pay a fine of Rs.1000/-. The sentences awarded to the Appellant No.1 were directed to run concurrently. The Appellant No.2 was acquitted for the offence punishable under sections 504 and 506 r/w. 34 of IPC. The Appellant No.1 was acquitted for commission of offence punishable U/s.504 of IPC.

2. The prosecution case, in brief, is as follows:

The deceased in this case Dhananjay Rajput was serving in a Country Liquor shop at Gangavesh, Kolhapur. The Appellant No.1 came to that shop for consuming liquor on 23/03/2014 in the afternoon. The deceased was sweeping the floor. He requested the Appellant No.1 to move aside. The Appellant No.1 got angry. He went out of the shop. He called the Appellant No.2. At about 3.30p.m. when the deceased was outside the shop, the Appellant No.1 held him from behind. The Appellant No.2 removed a knife and gave two blows on the abdomen and one stab on the chest. Thereafter both the appellants went away on their motorcycle. Dhananjay caught a rickshaw. One Sanjay Patil admitted him to

hospital. Dhananjay's brother Sanjay Rajput and others were informed. They reached the hospital. It is the prosecution case that, Dhananjay narrated the incident to his brother, sister, rickshaw driver and others.

3. In the evening, exploratory and other surgical procedure was performed on Dhananjay. He survived for a few more days and on 29/03/2014 he died. He had developed septicemia. The appellants were arrested. The F.I.R. in this case, was lodged by the brother of the deceased. The investigation was conducted and the charge-sheet was filed. The case was committed to the court of sessions. During trial, the prosecution examined as many as 22 witnesses. Most of the pancha witnesses turned hostile. The prosecution case rests on the circumstantial evidence and mainly on the oral dying declarations.

4. The important prosecution witnesses to whom the oral dying declaration was made by the deceased are PW-11 Sanjay Rajput, who was brother of the deceased, PW-12 Pradeep Powar who was the rickshaw driver who had taken the deceased to CPR hospital and P.W.13 Rekha Rajput, who was sister of the deceased.

5. PW-15 Sangram More was friend of the deceased. He had gone to the CPR hospital and had met the deceased; that time the deceased had narrated the incident to him. PW-17 Sanjay Patil is another witness to whom allegedly the deceased had given oral dying declaration. However, he was declared hostile because his version was materially different in respect of the roles played by both the appellants.

6. Besides these important witnesses, the prosecution examined PW-1 Sagar Sutar and PW-2 Shivkumar Pol, panchas for spot panchanama. They were declared hostile. PW-3 Suresh Khade and PW-4 Mohsin Shaikh were panchas for seizure of clothes of the deceased. PW-3 was declared hostile. PW-5 Ravi Nikam and PW-6 Jaysing Sidhganesh were panchas for seizure of clothes of accused. They were also declared hostile. They did not support the prosecution case. PW-7 Deepak Jagtap and PW-8 Chandrakant Gaikwad were panchas for seizure of motorcycle and knife. They did not support the prosecution case and were declared hostile. PW-9 Ratnakar Pol was the liquor shop owner. He was not present at the time of incident. He has stated in his deposition that, when

he saw the deceased in the hospital, he was not in a position to talk.

7. PW-10 Vilas Chowgule had seen the first part of the incident which had taken place inside the shop when the deceased was sweeping the floor and had asked the appellant No.1 to move aside. After that, this witness had removed the Appellant No.1 from the shop. The deceased went out of the shop after sweeping. PW-10 was looking after the customers. After some time, he saw a mob in front of the shop. He went there. He saw that the deceased was running away holding his stomach and that the Appellant No.1 was going away on his motorcycle. He did not fully support the prosecution case. He did not speak about the presence of the Appellant No.2 and hence, he was declared hostile.

8. PW-14 Srinivas Raybage was a co-worker in the shop. He deposed about the quarrel between the deceased and the Appellant No.1. He had seen the Appellant No.1 dragging the deceased outside the shop and assaulting him. According to him, he had not seen the Appellant No.1 holding the deceased and Appellant No.2

assaulting him on his chest and stomach. He, thus, did not fully support the prosecution case and was declared hostile.

9. PW-16 Babaji Patade was another co-worker. He deposed about the quarrel between the appellant and the deceased, but he has not deposed about the main incident of assault. He was declared hostile.

10. PW-18 Babaso Mane Patil was carrier who had carried the muddemal property for chemical analysis.

11. PW-19 Dr. Gurunath Dalvi was the doctor who had conducted postmortem examination.

12. PW-20 Dr. Kaustubh Mench was the Surgeon who had examined the deceased when he was admitted to CPR hospital. The evidence of these two doctors is important in this case.

13. PW-21 PHC Umnale had recorded the F.I.R. PW-22 PSI Digambar Gaikwad had conducted the investigation. He had recorded the statements of the witnesses. The contradictions and omissions from the statements of witnesses are proved through

him. The panchanamas which were not supported by various panchas were proved through this witness. This witness had requested the Medical Officer to give opinion as to whether the deceased who at that time was admitted to hospital was in a position to give statement or not. He had sought such opinion on 25/03/2014, 28/03/2014 and on 29/03/2014. On all these occasions, the Medical Officer had opined that Dhananjay was not in a position to give any statement. As per the prosecution case, motorcycle and the knife used in the offence were recovered at the instance of the Appellant No.2. The panchas to this recovery had turned hostile. The panchanama was brought on record through the evidence of this witness.

14. Besides this oral evidence, the prosecution produced C.A. reports on record which show that blood found on the shirt of Appellant Nos.1 and 2 was having human blood of 'AB' group. The clothes of the deceased showed the same 'AB' blood group. The knife recovered showed 'AB' blood group. The blood group of the deceased was also 'AB' group. The blood group of both the Appellants was 'O'.

15. Two main questions arise in this Appeal: 1) Whether the Appellants had assaulted the deceased? 2) Whether the offence would be of murder or of a lesser degree?

16. We have heard Ms. Payoshi Roy, learned counsel for the Appellants and Ms. Veera Shinde, learned APP for the State.

17. Ms. Roy submitted that the witnesses to whom the oral dying declaration was made by the deceased are all interested witnesses. They are either relatives or the friends of the deceased. There is no eye witness to the actual incident of assault. In any case, participation of the Appellant No.2 is extremely doubtful. It was quite surprising that the police did not feel it necessary to record the dying declaration in writing, which could have led more credibility to the prosecution story. There are indications that, when the deceased was talking with his brother Sanjay, at that time, the police were taking down something in writing. That writing is not produced on record. Hence, it is a suspicious circumstance. Most of the panchas to important panchanamas have not supported the prosecution case and, therefore, recovery of motorcycle, knife and clothes of the appellants is not free from doubt.

18. On the other hand, learned APP submitted that the dying declaration was not recorded in writing because after the first day, the deceased was not in a position to speak. The oral dying declaration made to the witnesses is sufficiently proved beyond reasonable doubt and conviction can be based on such evidence. The recovery of motorcycle, knife and clothes of the appellants is important because blood of 'AB' group was found on the knife and the clothes of the appellants. The appellants' blood group was different, therefore, it is a strong incriminating circumstance.

19. As far as, the question as to whether the appellants have caused assault is concerned; this can be answered after examining the evidence of the witnesses to whom the deceased had given his oral dying declaration.

20. PW-11 Sanjay Rajput was the brother of the deceased Dhananjay. He has stated that, on 23/03/2014, at about 3.45p.m. he received a message on mobile phone from Dhananjay that two persons had assaulted him. He immediately rushed to the liquor shop. He was told that Dhananjay was admitted in CPR hospital.

He went there. He made inquiries with Dhananjay. At that time, Dhananjay told him the entire story. He told this witness that the appellant No.1 was sitting on a bench under the influence of alcohol at about 3.15 p.m. Dhananjay was sweeping the floor. He requested the appellant No.1 to lift his feet. The appellant No.1 got annoyed. He abused Dhananjay and threatened him. He went out of the shop. The appellant No.1 called his brother, Appellant No.2 at about 3.30p.m. Both the appellants then called Dhananjay outside the shop. They assaulted him by fists and kick blows. The Appellant No.1 caught hold of Dhananjay from behind and Appellant No.2 assaulted Dhananjay by knife on left side of his chest and on abdomen. The co-workers from the shop rushed to save him, but the Appellants threatened them. Other people gathered there and hence, both the appellants went away on their motorcycle. After that, Dhananjay himself went to CPR hospital. On hearing the story, this witness had gone to the police station and had lodged his F.I.R. which is produced on record at Exh.27.

In the cross-examination, he could not tell the phone number from which his brother Dhananjay had called him. He has

stated that, he had received the call from a shop. In the cross-examination he has further stated that, he went to CPR hospital where Dhananjay was admitted. The police came there. The talk between this witness and Dhananjay took place in front of the police. He has stated that, at that time, police were recording it for 15 to 20 minutes. The police did not take his signature in the hospital on that writing.

We find the evidence of this witness to be reliable. He was a natural witness. He had immediately rushed to the hospital. According to PW-20 Dr. Mench, when Dhananjay was admitted to hospital, he was conscious and was able to speak. Thus, there is no reason to disbelieve the version of PW-11 that the deceased had narrated him about the entire incident. Though, he says that police were writing something, but it is not elaborated further. None of the police witnesses are cross-examined on this aspect. After hearing the story from Dhananjay, this witness had gone to the police station and had lodged his F.I.R. The F.I.R. was lodged vide C.R.No.73 of 2014 under sections 307, 323, 504 and 506 r/w. 34 of IPC at Juna Rajwada police station, Kolhapur.

21. PW-13 Rekha Rajput was the sister of the deceased. She had also rushed to the hospital and had made inquiries with the deceased. He had narrated the same incident to her as was narrated to PW-11. Her statement was recorded on the next day of the incident. Besides this, nothing much is elicited in her cross-examination.

22. PW-12 Pradeep Powar is another important witness. He was the rickshaw driver who had taken the deceased to the hospital. The deceased had immediately told him that the accused had assaulted him. The deceased did not elaborate further. This witness had taken the deceased to CPR hospital. The cross-examination of this witness does not really show any significant impact on the prosecution story. His evidence thus shows that the deceased himself had engaged the rickshaw. He was in a position to speak and he himself had requested this witness to take him to the hospital.

In our opinion, evidence of these three witnesses i.e. PW-11, 12 and 13 is sufficiently trustworthy to prove beyond

reasonable doubt that the appellants had caused assault on the deceased and that the deceased had narrated the incident to these witnesses. This fact is also corroborated by PW-15 Sangram More and PW-16 Babaji Patade who have deposed about the first part of the incident regarding quarrel in the shop. Besides this, finding of blood of blood group 'AB' on the knife and clothes of the appellants is also a strong incriminating circumstance. Thus, the prosecution has proved beyond reasonable doubt that the appellants have caused assault on the deceased.

23. The next question to be decided is, as to whether the offence of murder as defined U/s.300 of IPC is made out or it is a lesser offence. In this context, Ms. Roy made strong submissions. She relied on many Judgments in support of her contention. She submitted that, Dhananjay had survived from 23/03/2014 to 29/03/2014. He had undergone surgery on 23/03/2014 itself. After that, septicemia developed and he died on 29/03/2014. According to Ms. Roy it was incumbent on the prosecution to have ruled out the possibility that septicemia could have developed because of surgical wounds. The prosecution had to establish that

the septicemia was a direct result of the stab injuries caused by the appellants and not because of surgical wounds. The prosecution has failed to prove this fact. The prosecution had to prove that the death was caused because of the direct act attributed to the appellants. The prosecution has failed in this regard and hence, offence U/s.300 of IPC is not made out. Ms.Roy referred to the definition of ‘murder’ U/s.300 of IPC. The relevant portion reads thus:

“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 ;

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

XXXXX

XXXXX

24. Ms. Roy emphasized the words “if the act by which the death is caused is done”. According to her, the act of the accused should have direct nexus with death. Therefore, if the death was not the direct result of the injury caused by the accused, but it is

caused by some other extraneous reason; then the offence U/s.300 of IPC is not made out. The prosecution had to prove that septicemia was caused only by the stab wounds and not by surgical wounds. In support of her contention, she has relied on many Judgments. It is not necessary to discuss every Judgment cited before us by her. But a few judgments which are relied on by her in this context are as follows:

i) *Nga Ba Min Versus Emperor*¹. In that case the deceased was injured on the head during *dacoity*. She was treated in the hospital for two days and was discharged on her own request. Subsequently, wounds which were treated became septic and she died due to abscess on the brain on account of septicemia. The accused was acquitted with the following observations:

“In order that a person should be guilty of culpable homicide it is indispensable that the death of deceased should be connected with the act of violence or other primary cause, not merely by a chain of causes and effect, but by such direct influence as is calculated to produce the effect without the intervention of any considerable change of circumstances.”

1 AIR 1935 Rang 418

ii) *Ganga Dass alias Godha Versus State of Haryana*².

In that case the deceased had died after 18 days of the occurrence due to septicemia and other complications. Doctor had found only one injury on the head which was due to single blow inflicted with an iron pipe and not with any sharp edged weapon. The medical evidence showed that the injured deceased was operated but some complications set in and he died because of cardiac failure. Under these circumstances, conviction of the accused U/s.302 of IPC was set aside.

iii) *B. N. Kavatakar and another Versus State of Karnataka*³. In that case the Medical Officer who conducted autopsy on the dead body had opined that the death was a result of septicemia secondary to injuries and peritonitis. The deceased had died after five days of the occurrence. On overall scrutiny of the facts and circumstances of the case coupled with opinion of the Medical Officer, the Hon'ble Supreme Court converted the conviction from section 302 of IPC to Section 326 of IPC.

² 1994 Supp (1) Supreme Court Cases 534

³ 1994 Supp (1) Supreme Court Cases 304

iii) *State of Maharashtra Vs. Kallappa Devu Girmal and another*⁴. In this case, it was observed that, once it was held that the deceased had died as a result of operation or post operative complications, his death cannot be laid at the doors of the accused and therefore, the offence of section 302 of IPC was altered to one under section 326 of IPC. Significantly, in this case in para 8, there were observations that the Medical officer Mr. Patil who had conducted the postmortem examination, in clear terms had stated that the deceased had not died because of his injuries. Both the external and internal injuries, whether taken singly or collectively, were not sufficient in the ordinary course of nature to cause death. The injuries became septic and it was the deepening and spreading of that condition which led to the death of the victim. The septicemia could have been caused because of the injuries or because of the cuts made by the Surgeon. Dr. Patil was not in a position to say what could have caused septicemia that killed the deceased. The benefit of uncertainty was given to the accused in that case.

4 1988 MH.L.J. 147

25. On the other hand, learned APP submitted that the evidence of both Medical Officers taken together shows that the offence of murder as defined U/s.300 of IPC is made out and there is no scope to infer that any lesser offence was committed by the appellants. She relied on the Judgment of the Hon'ble Supreme Court in the case of *Virsa Singh Vs. The State of Punjab*⁵. The Hon'ble Supreme Court had observed that, important consideration in such cases must be given, that is to say, whether the injury is on the leg, or the arm or the stomach, how deep it penetrated, whether any vital organs were cut and so forth. The Hon'ble Supreme Court had further observed in this Judgment that, no one has license to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder.

26. Learned APP also relied on another Judgment of the Hon'ble Supreme Court in the case of *State of Haryana Versus Pala and others*⁶. In this case, there were 7 injuries out of which two were on the head. The cause of death was due to septicemia which

5 1958 AIR 465

6 (1996) 8 Supreme Court Cases 51

resulted as a result of head injury and was sufficient to cause death in ordinary course of nature. The Doctor had stated that septicemia is a direct result of head injury. It was observed that, when the accused beat the deceased with deadly weapon on the head and other parts of the body and death occurred as a result of the injuries, it must be inferred that the attack on vital parts of the body was done with an intention to cause death. Intention is locked up in the heart of the assailant and the inference is to be drawn from acts and attending circumstances.

27. We have carefully considered the ratio of all these Judgments. In this background, now the evidence of two medical officers needs to be discussed.

28. PW-20 Dr. Kaustubh Mench was the General Surgeon. He had examined Dhananjay at about 5.00p.m. on the same day. He had found following injuries:

“1. Stab wounds on abdomen and chest. 2 stab wounds on abdomen and one stab wound on chest.

2. Inter coastal drain and then he was taken for sonography at CPR, thereafter he was shifted in the operation theater.

3. He has undergone exploratory lapartomy proceed RS of Jejunal perforation, and repair of right diaphragmatic tear with lovage.

4. At the time of operation hemoperitonium secondary to ometal tear 3 x 3 cms 7 grade one liver over superior surface.

5. 4 cm right linear diaphragmatic tear, presence of full length jejunal perforation 2 ft from D-J flexure.

6. Rest normal.”

He was conscious and oriented up to 11.35p.m. on 25/03/2014. Thereafter his condition started deteriorating and he died on 29/03/2014.

29. PW-19 Dr. Gurunath Dalvi had conducted postmortem examination. He found following external injuries:

1. A long middle surgical wound over center of abdomen 19 cm long with 16 sutures in insitu.
2. A sutured wound of 2 cm long or on left side abdomen located 8 cm away from mid line and 20 cm below left nipple with 1 suture in situe.
3. A sutured wound of 2 cms long located below umbilicus with 2 suture in situ.
4. A sutured wound of 3 on long located 3 cm away from mid line in 8th iner coastal space.
5. Right side abdominal drain incision (2 cm.)

On Internal examination following injuries are found:

1. Meninges congested, Brain Parenchyma Oedematous, pale, and soft.
2. Right lung: right lung injured of lower lobe with hemo-thorax.
3. Left Lung: Pale, with lower lobe bluish discoloured, hard in consistency on 3rd section white frothy fluid oozes.
4. Pericardium: Free fluid approximately 30 ml. Turbid, suggestive of pericarditis.
5. Abdomen: Walls: Sutured wounds over abdominal walls as mentioned in column 17.
6. Peritoneum : Peritoneal cavity contain yellowish fluid approximately 100 ml. Suggestive of peritonitis.
7. Small and large intestines: partly loaded with fecal matters and gases.

According to him, the probable cause of death was “due to septicemia in case of stab wounds over chest and abdomen”.

In the cross-examination, he was asked the general question to which he had answered that, for surgical wounds septicemia might be possible, but no further questions were asked as to whether in this case the surgical wounds had caused septicemia. There is one stray and ambiguous statement in his cross-examination which reads thus:

“It is not true to say that due to stab in abdominal injury the patient died.”

Though, learned counsel for the Appellants tried to take advantage of this particular sentence, in our opinion, this sentence does not really explain anything. It cannot be treated as an admission of Doctor that the death was not caused due to stab injuries.

30. The Judgments cited by both the sides have to be referred to on the basis of facts in this particular case. The questions would be whether the prosecution has proved that septicemia was a result of stab wounds or was of a result of surgical wounds and whether stab wounds would bring the offence within ambit of Section 300 of IPC. In this regard, opinion of PW-19 is extremely important. As mentioned earlier, he has clearly stated that, in his opinion, the cause of death was due to septicemia in case of stab wounds over chest and abdomen. This opinion leaves no doubt that, according to this doctor septicemia was directly relatable to the stab wounds. The prosecution has discharged its burden to prove septicemia was

a direct result of stab wounds. There is no scope left for the defence to contend that Doctor has not opined that the septicemia was not developed because of surgical wounds.

31. The postmortem notes show that, right lung was injured with hemo-thorax. This certainly was a direct result of stab injury.

32. The force by which the blow was given can be seen from this medical evidence. PW-20's deposition shows that, there was Jejunal perforation, meaning small intestine was perforated. There was repair of right diaphragmatic tear; meaning diaphragm was torn. There was omental tear. There was injury to liver and there was injury to right lung. Thus, vital organs like liver, intestine, lung, diaphragm were perforated and torn because of stab injuries. Most importantly, PW-19 Dr. Gurunath Dalvi has in clear terms stated that in ordinary course of nature injuries were sufficient to cause death. The Appellant No.1 had held the deceased from behind and Appellant No.2 had given three blows with knife one after other; two were on the abdomen and one was on the chest. The act was committed after making preparation as Appellant No.1 had called

the Appellant No.2 at the spot, who had come with a knife. The Appellant No.1 had threatened the deceased. The Appellant No.1 held him from behind and then appellant No.2 gave blows. Thus, the offence was committed with premeditation, preparation, intention and knowledge. The injuries were sufficient in the ordinary course of nature to cause death and they in fact caused death. All the ingredients of Section 300 of IPC are made out. Hence, in this case, it is not possible to bring down the offence to a lesser degree.

33. In this view of the matter, we are not inclined to interfere with the impugned Judgment and order.

34. Hence, the Appeal is dismissed.

35. However, it is clarified that the Appellants are entitled for set off U/s.428 of Cr.p.c. which is not mentioned in the operative part of the impugned Judgment and order.

(SARANG V. KOTWAL, J.)

(SMT. SADHANA S. JADHAV, J.)