

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 777 OF 2015

- | | | | |
|----|--|---|----------------|
| 1. | Ramesh Lasha Palva |] | |
| | An Indian inhabitant aged about 44 yrs., |] | |
| | Residing at Dadade-Paiky Palavpada, |] | |
| | Taluka Vikramgad, Dist. Thane |] | |
| | [Presently in Thane Prison] |] | |
| 2. | Kashinath Lasha Palva |] | |
| | An Indian inhabitant aged about 50 yrs., |] | |
| | Residing at Dadade-Paiky Palavpada, |] | |
| | Taluka Vikramgad, Dist. Thane |] | |
| | [Presently in Thane Prison] |] | ... Appellants |

V/s.

The State of Maharashtra	]	
At the instance of Vikramgad Police Station	]	... Respondent

Ms.Megha Shashi Bajoria, Appointed Advocate for Appellants.
Mr.Ajay Patil, A.P.P. for Respondent-State.

**CORAM : A.S. GADKARI AND
MILIND N. JADHAV, JJ.**

**RESERVED ON : 8th September 2022.
PRONOUNCED ON : 3rd October 2022.**

JUDGMENT (Per : A.S. Gadkari, J.) :-

1. Appellants have questioned the legality and correctness of Judgment and Order dated 12th November 2014 passed by 2nd Additional

Sessions Judge, Thane in Sessions Case No.83 of 2011, convicting them under Section 302 read with 34 of The Indian Penal Code (for short, "I.P.C.") and are sentenced to suffer imprisonment for life and also to pay a fine of Rs.1,000/- each, in default of payment of fine to further suffer rigorous imprisonment for 3 months by each of Appellants.

2. Heard Ms.Megha Bajoria, learned Advocate appointed by Legal Aid Committee to represent Appellants and Mr.Ajay Patil, learned A.P.P. for Respondent-State. Perused entire record.

3. The facts which are necessary to decide present Appeal can briefly be stated thus :-

(i) The name of deceased is Lahanu Jivya Palva. The date and time of incident is 3rd November 2010 at about 1.00 am.

It is the prosecution case that, there was enmity between the deceased and Appellants pertaining to the landed property. That on an earlier occasion at the time of Ganpati festival, Ramesh Palva (Appellant No.1) had beaten elder brother of the deceased, namely, Janya Jivya Palva (PW-4). Lahanu had therefore questioned Appellant No.1, as to why he assaulted his elder brother and on that count Appellants had a grudge in their mind against him. That on 2nd November 2010 in the afternoon some skirmish took place between Appellant No.1, Lahanu (deceased), Dinesh Janya Palva (PW-5) and Jitendra Lahanu Palva (PW-7). Appellant No.1 therefore had filed N.C.

complaint with the local police.

(ii) On 3rd November 2010 at about 1.00 am wife of Lahanu (deceased) namely, Bharati Lahanu Palva (PW-1), Jitendra Lahanu Palva (PW-7), Dinesh Janya Palva (PW-5) along with other family members were chitchatting in the courtyard of the house of Lahanu. Appellant No.1 Ramesh called Lahanu. Lahanu did not respond to the first call and therefore Appellant No.1 again gave another call to Lahanu. Lahanu (deceased) went towards Appellant No.1. At that time, Appellant No.2 Kashinath came from behind of Lahanu and gave a blow on his head and back with 'musal' (wooden pestle). Lahanu fell down on the earth. Appellant No.1 dropped the said wooden pestle at the scene of occurrence and ran away. Lahanu got unconscious on the spot.

(iii) As no vehicle was immediately available in the night at the said place, Dinesh (PW-5) and Jitendra (PW-7) along with other persons in the early morning took Lahanu in the jeep of Sudhir Rawate (PW-9), initially to Vikramgad Rural Hospital, where Lahanu was given first aid.

(iv) On 4th November 2010 Bharati Palva (PW-1), i.e. wife of deceased, lodged a crime with Vikramgad Police Station. It was registered as CR No.86 of 2010, under Sections 324, 504, 506 read with 34 of I.P.C. by Tukaram V. Mor (PW-8), the Police Officer then attached to Vikramgad Police Station. He carried out initial investigation of the said crime. He recorded

Spot cum Seizure Panchanama (Exh.32) in presence of panch witnesses PW-2 and PW-3. He seized the said 'musal' (wooden pestle) from the scene of offence. He also recorded statements of other witnesses.

(v) The Medical Officer from Vikramgad Rural Hospital informed Jitendra (PW-7) and Dinesh (PW-5) to take Lahanu to the Government Hospital at Jawhar. They accordingly admitted Lahanu to a Government Hospital at Jawhar for two days. The Medical Officer at Jawhar subsequently told PW-5 and PW-7 to take Lahanu to a hospital at Nashik. Lahanu was thereafter admitted to Sudarshan Hospital at Nashik owned by Dr.Sanjay H. Dhurjar on 7th November 2010. Dr.Sanjay Dhurjar (PW-10) issued Injury Certificate (Exh.41) on 10th November 2010 to the police.

As per the said Injury Certificate, Lahanu was having cerebral concussion with fracture to right parietal bones. There was large subdural haematoma on the right parietal region with mid line shift with left sided hemiplegia with facial nerve palsy. There was contusion over right parietal region.

(vi) PW-10 operated Lahanu over his head for having injury thereof. Lahanu died on 14th November 2010 at Sudarshan Hospital while undergoing treatment. Dr. Sanjay Dhurjar (PW-10), Medical Officer issued Medical Certificate (Exh.42) recording cause of death of Lahanu. He also informed Bhadrakali Police Station Nashik about the death of Lahanu.

(vii) Police thereafter sent dead body of Lahanu for conducting postmortem. Dr. Deepak Rajput (PW-12) conducted autopsy on the dead body of Lahanu on 14th November 2010. He noticed that, the dead body was having previous head injury with skull fracture; he was already operated and craniotomy was done, having 26 stitches on the occipital region. He found intra cerebral hemorrhage. He gave opinion as to cause of death was due to hemorrhagic shock due to head injury (intra cerebral hemorrhage). He accordingly prepared Postmortem Report (Exh.55).

(viii) After demise of Lahanu, section 302 of I.P.C. was added to the said crime and investigation was entrusted to Shri Vasantrao M. Jadhav, Assistant Police Inspector (PW-11). He recorded supplementary statement of Smt. Bharati (PW-1). He also recorded statements of other witnesses and after completion of investigation submitted chargesheet against the Appellants in the Court of Judicial Magistrate First Class.

(ix) As the offence under Section 302 is exclusively triable by Court of Sessions, the learned Magistrate committed the said case to the Court of District Judge-3 and Additional Sessions Judge, Thane, as per Section 209 of Cr.P.C.. The Trial Court framed Charge below Exh.7 under Sections 302, 504, 506 read with 34 of I.P.C.. The same was read over and explained to the Appellants in Marathi vernacular language. They pleaded not guilty and

claimed to be tried.

(x) In order to establish the guilt of accused, prosecution examined in all 12 witnesses. The statements of Appellants under Section 313 of Cr.P.C. were recorded. Appellants denied all the incriminating circumstances put to them while recording their said statements. Appellants have also examined one defence witness, namely, Mr.Madhukar G. Vartha (DW-1), the neighbour of Appellants and deceased and also a witness to the incident of beating to Appellant Ramesh by Lahanu (deceased), Jitendra (PW-7) and Dinesh (PW-5). The defence of Appellants as can be gathered from the record was that, Lahanu was under the influence of liquor at the relevant time and fell from raised platform (ota/otala) in a gutter and sustained injury to his head. The defence witness has also claimed to have separated the quarrel. The said incident was reported to Vikramgad Police Station and in order to counter that report, the Appellants had been involved in a false case.

(xi) The Trial Court by its impugned Judgment and Order dated 12th November 2014 has convicted Appellants as noted above.

4. The abovenoted admitted facts have been deciphered from the evidence on record of the aforestated witnesses.

5. Ms.Bajoria, learned Advocate for Appellants submitted that, Appellant No.1 Ramesh had filed N.C. Complaint on 3rd November 2010 in the afternoon against Lahanu (deceased), Dinesh (PW-5) and Jitendra (PW-7)

which was prior to the incident in-question. That as per the evidence of Madhukar Vartha (DW-1), on 3rd November 2010 at about 3.00 am in the midnight, Lahanu (deceased) was abusing sister of Appellants in presence of Dinesh (PW-5) and Jitendra (PW-7). That Jitendra (PW-7), Dinesh (PW-5) and Lahanu (deceased) were beating Appellant No.1 Ramesh. That Lahanu was under the influence of liquor and fell down from the raised platform (ota/otala) in a gutter and sustained injury to his head. She submitted that, as the Appellants were having dispute with Lahanu over their landed property, with a view to falsely implicate, the present crime is registered against them. She submitted that, even otherwise in the present case, it is an admitted fact on record that, initially a quarrel took place between Lahanu (deceased) and Appellants and it is alleged that, subsequently Appellant No.2 gave a blow on the head of Lahanu. She submitted that, the act of Appellant No.2 falls under Exception 4 of Section 300 and the conviction of Appellants under Section 302 of I.P.C. awarded by the Trial Court is therefore erroneous. She therefore submitted that, present Appeal may be allowed.

6. Per contra, learned A.P.P. opposed the Appeal and submitted that, both the Appellants were sharing common intention on the date and time of incident and assaulted deceased. That there are three eye witnesses to support the prosecution case. He submitted that, the Trial Court has not committed any error to call for interference of this Court in the present Appeal and

therefore the impugned Judgment and Order may be upheld.

7. In the present case there are three eye witnesses to the incident in question.

Bharati Lahanu Palva (PW-1) is the wife, Jitendra Lahanu Palva (PW-7) is the son and Dinesh Janya Palva (PW-5) is the nephew of deceased.

8. PW-1 has deposed that, due to the earlier enmity on the date and time of incident Appellant No.1 gave a call to her husband and when he approached him, Appellant No.2 came from behind and gave a blow with 'musal' (wooden pestle) on the backside of the head of her husband. Her husband fell down. Appellant No.2 left the said 'musal' there only and ran away. She has categorically deposed that, Appellant No.1 did nothing in the entire act. In her cross-examination she has admitted that, the wooden pestle (Article-1) is readily available in everybody's house in the said village. She has admitted that, the police did not read over the contents of the complaint to her.

9. Dinesh Palva (PW-5) has deposed that, there was enmity between deceased and Appellants over the landed property. That Appellant No.1 Ramesh called Lahanu (deceased) at about 1.00 am in the night of 3rd November 2010. On second call Lahanu approached Appellant No.1. That Appellant No.2 Kashinath approached Lahanu from behind and gave blows from back with wooden pestle (musal). Lahanu fell down and thereafter

Appellant No.2 ran away from the spot leaving the said 'musal' (Article 1) at the spot. That he took Lahanu from the vehicle of Mr.Sudhir Rawate (PW-9) to Vikramgad Hospital. That subsequently Lahanu was taken to Government Hospital at Jawhar and thereafter to a Hospital at Nashik.

10. Jitendra L. Palva (PW-7) has deposed that on 3rd November 2010 at about 1.00 am, he along with his parents and other relatives was chit chatting in the courtyard of his house. That Appellant Ramesh gave a call to his father and called him. On second call Lahanu (deceased) went towards Ramesh. At that time Appellant No.2 came from behind and inflicted a blow on the head and back of his father with wooden pestle (musal). His father fell down and became unconscious. Appellant No.2 ran away leaving behind the said baton at the spot. He thereafter took his father to various hospitals as noted above.

In the cross-examination of this witness a specific suggestion was given that on 3rd November 2010 Appellant No.1 Ramesh had filed N.C. complaint against Lahanu, PW-5 and PW-7 in the afternoon over a skirmish.

11. It is to be noted here that, the weapon used in the present crime as 'musal' (wooden pestle) was seized from the spot of incident itself by PW-8 Police Officer in presence of PW-2 and PW-3 by effecting Spot Panchanama (Exh.32) dated 4th November 2010. As admitted by the prosecution witnesses, the said tool is available in each and every household in the said village for

pounding and grinding purpose. PW-1 has categorically stated that, Appellant No.1 did nothing to the deceased. It appears from the evidence on record that, Appellant No.1 did not share common intention with Appellant No.2 while assaulting Lahanu (deceased) on the fateful night. It further clearly appears that, as the Appellant No.1 had filed N.C. complaint on 3rd November 2010, with a view to either settle the dispute or question the deceased, PW-5 and PW-7, the Appellant No.2 had prompted Appellant No.1 to call Lahanu out of his courtyard and the Appellant No.2 all of a sudden assaulted Lahanu with musal (wooden pestle) on his head from behind. The evidence on record clearly indicates that, the Appellant No.1 except calling the deceased out of his house did not share further common intention as far as assault on deceased by Appellant No.2 is concerned and therefore is entitled for benefit of doubt in that behalf.

12. Evidence on record reveals that, Appellant No.2 did not come to the spot with premeditation to commit murder of Lahanu and has not taken undue advantage or acted in a cruel or unusual manner. As noted herein above, as per the medical experts, the deceased had suffered one injury on his head. The evidence on record is silent about the fact that, Appellant No.2 Kashinath came at the scene of offence with the said wooden pestle (musal) and with intention to commit murder of Lahanu. The act of Appellant therefore falls within the purview of Exception 4 of Section 300 of IPC and as

he had no intention to commit murder of Lahanu, Section 304 (Part II) of IPC would be attracted to the present crime.

13. To bring a case within Exception 4 to Section 300 of IPC, all the ingredients mentioned in it must be found. It is to be noted that the word 'fight' occurring in Exception 4 to Section 300 of IPC is not defined in the IPC. It takes two to make a fight. To invoke Exception 4 to Section 300 of IPC, four requirements must be satisfied viz.:-

- i. It was a sudden fight;
- ii. There was no premeditation;
- iii. The act was done in the heat of passion and
- iv. The assailant had not taken undue advantage or acted in a cruel or unusual manner.

The cause of the quarrel is not relevant nor it is relevant as to who offered the provocation or started to assault first, but what is important is that the occurrence must have been sudden and not premeditated and the offender must not have acted in a fit of anger and must not have taken any undue advantage or acted in a cruel or unusual manner. When during the course of a sudden quarrel, a person in the heat of moment, attacks the other person and causes injury, one of which proves to be fatal, the accused would be entitled to the benefit of this exception.

The evidence on record shows that the appellant did not act in a

cruel or unusual manner. Looking to all these facts, we are of the considered opinion that the case would fall under Section 304 (Part II) of IPC.

14. In view of the above, Appellant No.1 Ramesh is acquitted from the charges framed against him by giving him benefit of doubt.

As far as Appellant No.2 is concerned, we set-aside his conviction under Section 302 of I.P.C. and convict him under Section 304 (Part II) of IPC and he is sentenced to suffer R.I. for 10 years and to pay a fine of Rs.25,000/-; in default of payment of fine to further suffer R.I. for 1 year.

15. Hence, the following Order.

- (i) Appellant No.1 Ramesh Lasha Palva is acquitted from all the charges framed against him in Sessions Case No.83 of 2011 by extending benefit of doubt.
- (ii) Appellant No.2 Kashinath Lasha Palva is convicted under Section 304 (Part II) of I.P.C. and is sentenced to suffer R.I. for 10 years and to pay a fine of Rs.25,000/-; in default of payment of fine to further suffer R.I. for 1 year.
- (iii) Record indicates that, Appellant No.2 Kashinath Lasha Palva is in jail since 12th November 2010 and has completed his sentence of 10 years and also the in default sentence. Therefore Appellant No.2 be released from jail immediately on production of present Order, if not required in any other case/cases.

(iv) Appeal is partly allowed in the aforesaid terms.

16. Learned A.P.P. is directed to communicate this Order to the concerned Jail Authority where the Appellant is lodged.

17. All the concerned to act on an authenticated copy of this Order.

18. Before parting with the Judgment, we would like to place on record our appreciation for the efforts put in by Ms. Megha Bajoria, learned Advocate appointed by the High Court Legal Services Committee, Mumbai for espousing the cause of Appellants, as she was thoroughly prepared in the matter and rendered proper assistance to the Court.

[MILIND N. JADHAV, J.]

[A.S. GADKARI, J.]

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