

ATU/RMA

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1032 OF 2015

Sachin Laxman Dandekar

Age: 30 years, Occ: Agriculturist,
R/O. Gangangaon, Dandekar Pada,
Tal: Dahanu, Dist. Palghar.
(Presently in Nashik Jail)

.. Appellant

(Accused No.2)

Versus

State of Maharashtra,

Through P.I. Talasari Police Station,
Mumbai.

.. Respondent

WITH

CRIMINAL APPEAL NO. 1033 OF 2015

Laxman Dharma Dandekar,

Age:55 years, Occ: Agriculturist
R/o. Gangangaon, Dandekar Pada,
Tal: Dahanu, Dist. Palghar.
(Presently in Nashik Jail)

.. Appellant

(Accused No.1)

Versus

State of Maharashtra,

Through P.I. Talasari Police Station,
Mumbai.

.. Respondent

Mr. P.R. Arjunwadkar a/w. Ms. Prabha U. Badadare, Advocates for Appellants

Mr. S. S.Hulke, APP for Respondent – State.

CORAM

: A.S. GADKARI &

MILIND N. JADHAV, JJ.

RESERVED ON

: 05th September,2022.

PRONOUNCED

: 29th September, 2022.

JUDGMENT (PER: MILIND N. JADHAV, J.)

. Criminal Appeal No. 1032 of 2015 is filed by Original Accused No. 2 and Criminal Appeal No. 1033 of 2015 is filed by Original Accused No. 1. Accused No.1 is the father of Accused No. 2.

2. Both Appeals question legality of Judgment and Order dated 18.08.2015 passed by learned Additional Sessions Judge, Palghar in Sessions Case No. 31 of 2011, convicting both Appellants under Section 235(2) of the Code of Criminal Procedure Code, 1973 (for short “**Cr.P.C.**”) for offence punishable under Section 302 read with 34 of The Indian Penal Code, 1860 (for short “**IPC**”) and sentencing both to suffer imprisonment for life with fine of Rs. 1000/- each, in default, to suffer rigorous imprisonment for one month.

3. Shorn of unnecessary details, facts of prosecution case which emerge from the record are as follows:

3.1. Sakham (20 years old) was having a love affair with Jyotsna, daughter of Appellant No.1 and sister of Appellant No.2. Appellants’ family were against their relationship and alliance since they belonged to different castes. One year prior to incident, Appellant No.1 visited house of PW-1 and informed them that he will not perform marriage of his daughter Joystna with Sakham and they should search for another bride. Some months prior to the incident, Appellant No.2 assaulted Sakham and snatched his bicycle near

Umbergaon and threatened that he will murder him if he continued his alliance with Jyotsna.

3.2. On 22.01.2011, at about 06:30 p.m. Sakharam Sukhad Kherva (hereinafter to be referred as “Sakharam”) was returning home from work on his bicycle. He was confronted by Appellants on the road near Karajgaon who came on motorcycle and assaulted him with a blunt object on his head and he was seriously injured. PW-3 Datta Soma Thapad informed PW-1 Ganpat Khevra about the incident. PW-1, along with younger brother Arvind and other villagers proceeded to Karajgaon and found Sakharam lying in a pool of blood.

3.3. PW-1 enquired with bystanders about the incident and learnt that Appellant No.2 and one other person came on motorcycle and assaulted Sakharam; that Appellant No. 2 caught hold of Sakharam from behind and the other person accompanying him gave a blow with hammer on his head leading to bleeding injury; that Appellants continued giving kicks and abused him and only when people gathered around them, they ran away on their motorcycle. Sakharam was taken to hospital by PW-1 and others where he was declared dead on admission.

3.4. PW-1 lodged First Information Report (for short “**FIR**”) and criminal law was set into motion. CR No. I-7/2011 came to be registered. PW-10 Dilip S. Pawar Investigating Officer(“**I.O.**”) arrested

Appellants on the same night at about 09:30 p.m.

3.5. PW-10 conducted inquest panchanama (Exh. 25) of the dead body of Sakharam. He carried out recovery and seizure panchanama (Exh. 38) of blood stained clothes of both accused 'Article Nos. 2, 3, 4 and 5' which they had worn at the time of incident. Clothes worn by deceased Sakharam were seized (Exh. 50) and marked as 'Article Nos. 6, 7 and 8. PW-10 sent the seized articles to the Chemical Analyzer for forensic analysis. C.A. Reports (Exh.52 and Exh.53) vide covering letter dated 06.02.2011 (Exh.51) were produced in evidence. PW- 10 conducted Spot panchanama (Exh.29) and the soil and soil mixed with blood. On 23.01.2011 Appellant no.1 made a voluntary statement to the IO and showed the place where the blood-stained hammer (weapon) and motorcycle were concealed by him. PW-10 prepared seizure memo (Exh.35A) of weapon (hammer) and motorcycle used by Appellants. After investigation charge-sheet was filed in the Court of Judicial Magistrate First Class, (JMFC) Dahanu.

Since the offence under Section 302 IPC is exclusively triable by Court of Sessions, case was committed to the Sessions Court for trial. Charge (Exh.5) was framed against Appellants and read over and explained to them in vernacular, to which both pleaded not guilty and claimed to be tried.

To bring home the guilt of Appellants, prosecution examined 10 witnesses.

4. PW-9 - Dr. Pralhad C. Padghane, conducted postmortem examination on the dead body of Sakharam and prepared PM report (Exh.40) which notified the following injuries:

A. External Injuries

1. *Deep and wide CLW looking like blunt object stab obliquely longitudinal and gapping over left parietal region just behind and above post auricular region measuring about 3 cm x 1.5 cm x 1 & half inch deep allowing probe inside with profuse bleeding. There was a depressed fracture piece of skull bone displaced anteriorly inside.*
2. *Obliquely longitudinal CLW on left side of forehead with crack fracture on skull bone underneath with blood oozing measuring about 2 & ½ cm. x 0.5 cm. x scalp deep.*
3. *Vertically oblique CLW with gapping measuring about 1.5 x 0.3 cm. scalp deep present over temporal aspect of left orbit with crack fracture underneath.*
4. *After scalp dissection there were peripheral scalp hematoma around the scalp wound.*
5. *Obliquely vertical abrasion measuring about 3 x half cm. brownish black discolouration over left zygomatic region at the level of left ear.*
6. *Minor abrasion on left knee joint on patellar region measuring about 1 cm x .5 cm.*
7. *CLW on left leg vertically longitudinal measuring about 1 & half x 0.5 x 2 cm. antero medial aspect and middle of lower half blood oozing.*
8. *Minor abrasion over right forearm measuring about 2 x.5 cm. dorsally on distal 1/4th radial aspect.*
9. *Minor bruise dark blue on left forearm dorsally on distal 1/4 radial aspect.*
10. *Minor abrasion over right knee joint oval shaped, measuring about 2 x half cm.*
11. *Minor abrasion measuring about 1 x 0.5 cm. on middle knuckle horizontal on right hand. At the places over the above injuries reddish brown scabs present.*
12. *Longitudinal contusion over right leg measuring about 2.5 x 0.5 cm located over middle of lower half antero medially.*

B. Internal Injuries

1. *Scalp hematoma one inch in diameter circular shape present over right aspect, frontal region.*

2. *Peripheral scalp hematoma around the corresponding mentioned in Col.No.17.*

C. Injuries on the skull

3. *Depress fracture measuring about 4 x 2 cm obliquely longipudinal shape displaced inside anteriorly situated on left parietal bone*
4. *Crack depress fracture measuring about 1 cm x 0.2 cm elliptical on left temporal bone situated just lateral to left orbit.*
5. *Cracked depress fracture measuring about 2 x 0.5 cm. obliquely vertically situated over frontal bone on left aspect.*
6. *Total half brain hematoma was present on 1 hemisphere.*
7. *Brain substances damaged correspondingly to fracture sites of skull bone.*

4.1. PW-9 in PM Report stated “the probable cause of death was hemorrhagic shock due to multiple injuries to head and brain causing internal, external profused bleeding and assault with hard protruding object.” In his substantive evidence he has stated that “injuries at Sr. No.1, 2, and 3 mentioned in col. No.17 and injuries mentioned in col.no.19 are possible due to assault by a weapon like hammer. Other injuries mentioned in col. No.17 are possible in scuffle.” In his cross examination he has specifically stated that, “it is not true that all these injuries can be caused if a vehicle gives a dash to a person and he falls on a rough kachcha road having gitties and stones.”

5. PW-2, Lakhma Ramu Ambolkar is the sole eye witness to the incident. On 22.01.2011 he was returning from his daily labour job at around 5:30 p.m. and Sakharam was ahead of him on his bicycle. When they reached upto the boundary of village Vasa-Karajgaon, he

saw Appellants riding on motorcycle and they stopped and accosted Sakharam on the road and assaulted him. He has deposed that Appellant No.2 held Sakharam from behind and Appellant No.1 removed a hammer from the carrier/boot of the motorcycle and inflicted a blow on his head; further after Sakharam fell to the ground, he was assaulted by kicks by Appellants; that people gathered at the spot and therefore Appellants ran away on their motorcycle from the spot. Prosecution has heavily relied upon the ocular evidence of PW-2.

6. Mr. P.R. Arjunwadkar, learned Advocate appearing for Appellants vehemently submitted that, prosecution has failed to prove its case beyond reasonable doubt and there are material discrepancies and lacunae in the Judgment passed by the learned Trial Court. He submitted that there is no material brought on record to prove the alleged love affair between deceased and daughter of Appellant No. 1 (Joystna) and hence motive is not proved by prosecution; that there is no incriminating evidence proved against both Appellants to connect them to the crime in question. He submitted that Appellants had no enmity with Sakharam and are falsely implicated by prosecution. Hence he has prayed for setting aside of the impugned Judgment and Order.

7. **PER CONTRA**, Mr. S.S. Hulke, learned APP, appearing on behalf of State has drawn our attention to the deposition of PW- 2, eye

witness, to incident and submitted that he witnessed the assault by Appellants; that ocular evidence of PW-2 stands corroborated by medical evidence given by PW-9 pertaining to injuries sustained by Sakharam. He submitted that PW-1 in his evidence has deposed that Sakharam was having a love affair with daughter of Appellant No.1 (Jyostna) which was not disliked by Appellants and their family members; that Appellant No.2, had some months prior to incident assaulted Sakharam and threatened to kill him if he continued his alliance with Jyostna and thus the motive was proven. He has therefore prayed for dismissal of Appeal.

8. We have heard both the learned advocates appearing for respective parties and with their able assistance perused the entire evidence and record of the case.

It is seen that prosecution case is substantially based on ocular evidence, theory of “motive” and recovery of weapon. In the present case there is a sole eyewitness to the incident.

9. It is pertinent to note that PW-2 is the eye witness who has witnessed the entire incident from a distance of 30 feet, hence he can be classified as a wholly reliable witness based on his testimony which is not shattered in cross-examination; that he is also not an interested witness; his testimony is corroborated by Medical evidence given by PW-9 and the inquest and recovery panchanama conducted by PW-10.

10. From perusal of the record of the case it is discernible that testimony of PW-2 is reliable and therefore needs to be accepted without any doubt. His testimony narrates the entire incident as observed by him in close proximity and it stands further corroborated by recovery evidence (Exh.29 and Exh.35A) and medical evidence (Exh.40).

11. That apart, on minute perusal of the deposition of the PW-1, it is seen that Appellants had a clear motive to harm Sakham, as he continued his love affair with Joystana (daughter of Appellant No.1), which was not approved by Appellants and their family. Further Appellant No. 2's conduct of assaulting Sakham a few months before the incident and threatening to kill him if he continued to meet Joystna proves motive for eliminating Sakham, is one of the strong circumstance indicating motive behind the crime.

12. However in the context of reappraisal of evidence in the present case, it will be apposite to refer to the provisions of Sections 299 and 300 IPC which define offences of culpable homicide and murder respectively and read thus:

"299. Culpable homicide.—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily

infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skillful treatment the death might have been prevented.

Explanation 3.—The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

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."

13. Sections 302 and 304 IPC prescribe the punishment for the offence of murder and that of culpable homicide not amounting to murder respectively and read thus:

"302. Punishment for murder.—Whoever commits murder shall be punished with death or 1[imprisonment for life], and shall also be liable to fine."

"304. Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder, shall be punished with 1[imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is

caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

[emphasis supplied]”

14. In the present case Trial Court has convicted and sentenced Appellants for the offence of murder (as defined in Section 300 IPC) under Section 302 IPC.

15. 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.

16. Keeping in mind the aforementioned statutory provisions, on minute perusal of the evidence and record of the present case, it is discernible that Appellant No.1's daughter (Jyostna) had a love affair with Sakharam which was not accepted by his family. It has come on record that both Jyostna (19 years) and Sakharam (21 years) were of tender age and belonged to different castes and hence their alliance

was not accepted by Appellants' family. From the deposition of PW-1, it is seen that Appellant No.1 had visited Sakharam's house and informed his family that he will not give Joystna's hand to Sakharam and they should find some other bride for him. It is also important to note that few months prior to the incident, Appellant No.2 had also confronted Sakharam at Umargaon and threatened to kill him if he continued his lover affair with Jyostna.

17. From the above mentioned two incidents, it can be evidently seen that Appellants were against their relationship and did everything possible to break the same. This clearly shows that Appellants were enraged with Sakharam as the affair was continuing. In this backdrop, on 22.01.2011 Appellant Nos. 1 and 2 while traveling on their motorcycle saw Sakharam on Karajgaon road ahead of them and accosted him to question him as to why he was still continuing his love affair with Jyostna and abused him profusely. A physical scuffle broke out and it is clearly seen from the evidence of PW-2 that Sakharam was overpowered by both Appellants. Appellant No. 2 held Sakharam's hands and body from behind and Appellant No. 1 in the heat of passion removed the carpenter's hammer from the carrier/boot of his motorcycle and gave a singular blow on Sakharam's forehead and he fell to the ground. Since bystanders including PW-2 gathered at the spot, Appellants ran away on their motorcycle. It is pertinent to note that Appellant No. 1 was a carpenter by profession and it is therefore

not unusual on his part to carry a hammer and other equipment related to carpentry in the boot of his motorcycle. Therefore, in view of the provisions of Exception 4 to Section 300, in our opinion, the act of inflicting a singular blow with the hammer on Sakharam's forehead by Appellant No. 1 can be said to have been inflicted in a heat of passion and on the spur of the moment due to the motive, but certainly cannot be a premeditated and planned act to murder him. We say so for the following reasons.

18. The act of killing Sakharam happened on the road when he was accosted by Appellants. Certainly this cannot be a premeditated and planned act. Further because of the relationship between Sakharam and Jyostna Appellants were enraged with Sakharam for having continued his alliance with Jyostna and this was the very reason for confronting Sakharam. The weapon used by Appellant was the hammer which was not carried in the first instance by Appellant No. 1 before assaulting Sakharam. It has come in evidence that after the confrontation with Sakharam, Appellant No. 2 overpowered and held him, there were abuses and kick blows given to him and thereafter Appellant No. 1 reached to his motorcycle took out the hammer (which is the carpenter's principal tool) from the boot of his motorcycle and inflicted its singular blow on Sakharam's forehead. After inflicting the singular blow, Appellants did not take any undue advantage or act in a cruel or unusual manner but were frightened

since bystanders gathered at the spot. Hence they left the spot on their motorcycle. Further at the behest and instance of Appellant No.1, the weapon (hammer) and the motorcycle was recovered and seized by the IO. Hence it is discernible that it could not have been the intention of Appellants to kill and murder Sakharam but certainly both Appellants wanted to teach him a lesson and reprimand him for continuing with the said alliance. The injury caused to Sakharam by blow of hammer was however fatal leading to his death.

19. The discussion and findings alluded to hereinabove, in our considered opinion pertaining to act of the Appellants does not travel beyond the offence of culpable homicide not amounting to murder in the facts and circumstances of the present case. Act of Appellants due to the motive proved by the prosecution was an act committed in the heat of passion and on the sudden spur of moment whereby the singular blow of hammer was inflicted by Appellant No. 1 on Sakharam's forehead. The Trial Court has therefore certainly erred in convicting and sentencing the Appellants for offence punishable under Section 302 IPC when the Appellants deserve to be given the benefit of doubt. The act of the Appellants' falls within the ambit of punishment for culpable homicide not amounting to murder prescribed under Part-II of Section 304 IPC.

19.1. It is seen that in so far as Accused No.2 i.e. Appellant in

Criminal Appeal No.1032 of 2015 is concerned his role is clearly and admittedly attributed to holding deceased Sakharam's hands behind his back and thereby abetting in the crime. It has come in evidence that Laxman D. Dandekar (Accused No.1) and Sachin Laxman Dandekar (Accused No.2) were both distinctly unhappy with Sakharam's affair with Jyotsna and therefore the present incident as seen was a result of the said animosity. Appellant No.1 was arrested on 22.01.2011 and since then is incarcerated. In so far as Appellant No.2 is concerned, he was arrested on 23.01.2011 and was granted bail during the pendency of his Appeal on 27.12.2016. He has already undergone the sentence of 5 years, 11 months and 4 days as of today. However considering the totality of circumstances and taking into consideration the role of Accused No.2, we are inclined to sentence Accused No.2 for the period already undergone in jail by him.

20. In view of the above discussion and findings, we are of the firm opinion that Appellants acted in a sudden spur of the moment and heat of passion. By such act they acted in a manner that, they knew is likely to cause death of Sakharam but without the intention to kill him.

21. Hence the following order:-

- (i) The conviction of the Appellants in both Criminal Appeal under Section 302 IPC is set aside; instead

Appellants are convicted under Section 304 Part-II IPC and sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 25,000/- each, and in default thereof to suffer further rigorous imprisonment for six months;

- (ii) Accused No.1 i.e. Appellant in Criminal Appeal No.1033 of 2015 was arrested on 22.01.2011. Since he has undergone the sentence awarded hereinabove, he shall be released from prison forthwith unless required in any other case/cases.

In so far as Accused No.2 i.e. Appellant in Criminal Appeal No.1032 of 2015 is concerned he is sentenced to the period he has already undergone in jail. Since he is already enlarged on bail, his bail bond stands cancelled.

22. Both Criminal Appeals are partly allowed in the aforesaid terms.

23. All the concerned to act on an authenticated copy of this Judgment and Order.

[MILIND N. JADHAV, J.]

[A.S. GADKARI, J.]

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