

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 672 OF 2016

Subhash S/o. Hiranman Bedwal,
Age – 31 years, Occu: Labour,
R/o : Hivarkheda (Nandgirwadi),
Taluka Kannad, District Aurangabad. ... Appellant

Versus

The State of Maharashtra
Through, Kannad Police Station,
Taluka Kannad, District Aurangabad. ... Respondent

.....
Mr. J. V. Deshpande, Advocate for the Appellant
Mrs. V. S. Choudhari, APP for Respondent-State
.....

**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATED : 06-07-2023

JUDGMENT [ABHAY S. WAGHWASE, J.] :

1. By invoking Section 374 of the Code of Criminal Procedure (Cr.P.C.), appellant is taking exception to the judgment and order passed by the learned Sessions Judge, Aurangabad in Sessions Case No.77 of 2015 dated 20-09-2016, by which appellant – accused no.1 is held guilty for offence under Section 302 of the Indian Penal Code (IPC) and sentenced to suffer imprisonment for life for committing murder of Sultan Gani Pathan.

FACTS IN BRIEF GIVING RISE TO SESSIONS TRIAL

2. Accused, informant himself and his deceased son Sultan Gani Pathan were all residing at Hiwarkheda in the same lane. Accused no.2 Hiranman had taken up construction work of latrine and bathroom at a place which was situated between house of accused and informant. Both informant and accused staked claim over the said piece of land and on such count there was dispute.

On 08-01-2015, finding some stones at the disputed spot, accused no.1 Subhash alongwith co-accused namely Hiranman and Satish went to house of informant to question the same and both co-accused were holding sticks. Accused no.1 knocked the door of Naved (son of informant), who is residing with his family in a room of house of informant. As Naved was not available at home, **PW7** Sumayya, daughter-in-law of informant asked from inside the room as to who has come. At that time, informant **PW1** Gani asked his deceased son Sultan to see as to who has come. Finding accused at the doors, deceased Sultan questioned accused. Informant **PW1** Gani also reached there. Altercation took place between accused no.1 and Sultan. Accused whisked out knife from his pocket and stabbed Sultan in his stomach as a result of which he collapsed. **PW1** Gani, father of deceased went to rescue and even tried to hold Sultan. At that time, accused fled away. Injured Sultan was shifted to hospital

but on examination, he was declared dead and therefore, **PW1** Gani, set law into motion by lodging FIR at Kannad Police Station, on the strength of which crime was registered. After **PW10** Dnyaneshwar Shamrao Payghan investigated the crime, chargesheet was filed against all three accused for commission of offence under Sections 302, 323, 504 read with 34 of the Indian Penal Code.

After explaining the charge, trial was undertaken during which prosecution adduced oral and documentary evidence. Accused - convict denied to lead any evidence. After appreciating oral and documentary evidence and on hearing both the sides, learned trial Judge reached to a finding that prosecution has succeeded in establishing offence under Section 302 of the IPC but only against accused no.1 Subhash and thereby he was sentenced to suffer imprisonment for life whereas accused nos.2 and 3 were both acquitted from all the charges.

It is the above judgment and order of conviction which is now assailed before us.

SUBMISSIONS

On Behalf of Appellant :

3. Learned Advocate for the appellant would challenge the impugned judgment and order on following grounds :

GROUND

- (a) Firstly, prosecution miserably failed to prove the case beyond reasonable doubt.
- (b) Secondly, learned trial Judge failed to consider and appreciate oral and documentary evidence in its correct perspective.
- (c) Thirdly, prosecution utterly failed to establish motive behind the crime as no evidence whatsoever was collected with regard to alleged civil dispute.
- (d) Fourthly no independent witness but only close relatives of deceased are examined who are interested witnesses.
- (e) Fifthly there was no intention or premeditation and therefore, charge under Section 302 of the IPC is misplaced.
- (f) Sixthly, quarrel having taken place all of a sudden, at the most case would attract offence under Section 304 (Part II) of the IPC but definitely not offence under Section 302 of the IPC.

In support of above grounds and submissions, learned Advocate for the appellant seeks reliance on the ruling of Hon'ble Apex Court in the case of *Rampal Singh v. State of Uttar Pradesh; (2012) 8 Supreme Court Cases 289* and *Kala Singh @ Gurnam Singh v. State of Punjab; (2021) 10 SCC 744*.

On Behalf of APP :

4. Countering the above submissions, learned APP for the respondent State pointed out that prosecution has clearly made out a case for commission of offence under Section 302. That death is shown to be homicidal one. Secondly, there was motive which too has been cogently established by prosecution. There is both, direct as well as circumstantial evidence, which is sufficient to fasten the guilt. That occurrence was witnessed by father, brother, sister-in-law of the deceased and they all are unanimous and consistent and lending support to each other on the points of arrival of accused to their house, raising dispute, initially abusing and indulging in altercation and thereafter, having come armed with knife, appellant put the same to use by stabbing deceased Sultan in the vital part of the body like stomach, death had taken place and merely few hours of assault, there is proper complaint. There is recovery of weapon at the very instance of appellant, blood stains over the knife were proved to be of deceased and therefore, with such quality of evidence, it is submitted that learned trial Judge has committed no error whatsoever in recording guilt and conviction of the appellant. Lastly, it is submitted that there is no merit in the appeal and same deserves to be dismissed.

5. This is an appeal under Section 374 of the Cr.P.C. which prompts this First Appellate Court, which is also last fact finding Court to re-appreciate, re-evaluate and re-examine the entire oral and documentary evidence and also test the legality of the judgment under challenge. Accordingly, we undertake the said exercise.

EVIDENCE ON BEHALF OF PROSECUTION

6. On going through the evidence on record, it seems that, to prove guilt of the accused, prosecution has examined as many as 10 witnesses . Their status and role during the trial are as under :

7. **PW1 Gani Begu Pathan** is father of deceased and informant. His evidence is at Exh.23. He gave the account of whatever he claims to have seen during the visit of accused persons to his house at around 09:30 p.m. He narrated about he himself, deceased son Sultan attending accused, who raised dispute, indulged in altercation and thereafter, stabbed deceased Sultan with knife in the stomach.

8. **PW2 Shaikh Babu Sk. Gafoor** is panch to memorandum of recovery under Section 27 of the Indian Evidence Act. It is at Exh.27 and 28 and panch to seizure of clothes Exh.29. His evidence is at Exh.26.

9. **PW3 Javed Gani Pathan** is brother of deceased Sultan. His evidence is at Exh.30. He stated that at around 09:30 p.m. on 08-01-2015 while he was sleeping, he heard abuses being hurled and shouts of accused to his brother. So he and other neighbours came out of house, at that time he states convict inflicted knife in stomach of his brother Sultan and ran away, whereas Hiranman and Satish assaulted this witness with sticks.

10. **PW4 Balasaheb Wamanrao Magar** is panch to clothes of deceased Exh.33. His evidence is at Exh.32.

11. **PW5 Dr.Shaikh Rizwan Shaikh Mannan** is Autopsy Doctor, who conducted post mortem on dead body. His evidence is at Exh.37. He narrated external and internal injuries noted by him on dead body. According to him, death was due to shock and hemorrhage due to stab injury. He answered that knife shown to him is capable of causing such injuries.

12. **PW6 Syed Rafik Syed Amin** is another panch to memorandum of recovery under Section 27 of the Evidence Act.

13. **PW7 Sumayya Naved Pathan**, sister-in-law of deceased Sultan.

She stated that accused knocked the door of their house. Her brother-in-law Sultan answered the call and came out of the house. She stated about accused no.1 abusing her brother-in-law Sultan. According to her, after altercation between accused no.1 and deceased, she heard accused issuing threats to kill and thereafter when her father-in-law also came out of the house, she stated that she saw her brother-in-law Sultan lying in injured condition and her father-in-law had caught-hold of him. Her father-in-law informed her that accused no.1 Subhash dealt a blow of knife on the stomach of her brother-in-law Sultan. Her another brother-in-law came and he chased accused. She also named accused Hiranman and Satish for slapping and giving fist blows.

14. **PW8 Sk. Riyaz Sk. Munir** is another brother of deceased. His evidence is at Exh.43. He stated that on hearing shouts, he came out of house and according to him, he saw in street lights that his brother deceased Sultan lying on ground in injured condition. According to him, he saw appellant convict running holding knife in his hand and his brother being taken to the hospital.

15. **PW9 Suryakant Gulabrao Bhamre** is carrier. His evidence is at Exh.45.

16. **PW10 Dnyaneshwar Shamrao Payghan** is the Investigating Officer, who spoke about steps taken by him while investigating the case till filing of the chargesheet.

Above is the evidence on behalf of prosecution in trial Court. Charge being under Section 302 of the IPC, at the outset it is to be seen that prosecution has established death of Sultan to be homicidal one. To find the answer, we need to visit evidence of doctor. **PW5 Dr.Shaikh** in his substantive evidence stated about receipt of dead body of Sultan for autopsy. He noted following external injuries :

“A single stab injury over abdomen in right iliac fossa region measuring 3.5 c.m. breadth x 2 c.m. height cavity deep penetrating the underline mesentry in multiple places and further penetrating the small and large intestines cutting it at multiple places (perforating intestine)

Above injury is directed backwards, upwards and medially with sharp bleeding margins with small and large intestines herniating outside abdominal cavity”

On internal examination, this witness claims to have noted following internal injuries :

Walls - Perforated due to stab injury as mentioned in column no. 17.

Peritoneum - Perforated as mentioned in column no.17.

Cavity - Abdominal cavity filled with aprox. 2 liters of
blood clots and foecal matter.

According to him, “death was due to shock and hemorrhage due to stab injury”.

Defence questioned above medico legal expert, however, on going through the manner of course, we are convinced that aspect of death due to stab injury and hemorrhage has not been rendered doubtful by any means. Taking into account the above medico legal expert’s evidence, there is no hesitation to hold that deceased Sultan met only and only homicidal death and as such prosecution has proved that death is homicidal one.

17. After hearing the submissions advanced by learned Advocate for the appellant, we have noticed that there is serious challenge on behalf of appellant to the charge under Section 302 of the IPC. The tenor and the manner of argument suggests that a case is tried to be advanced that it is not at all a case of homicide, rather it would at the most be a case of culpable homicide not amounting to murder.

ANALYSIS

18. We have carefully re-examined and re-analyzed available direct evidence on behalf of prosecution. In the light of nature of case of prosecution, in our opinion, evidence of **PW1** Gani, informant is very crucial. Likewise evidence of **PW7** Sumayya, sister-in-law and other brothers of deceased is also decisive. Evidence of father and brothers of deceased clearly goes to show that there was a dispute over the place of construction of latrine and there is no serious challenge to this aspect inspite of above witnesses being cross-examined by defence. Therefore, animosity is forthcoming. Consequently, submission of learned Advocate for appellant that prosecution did not prove motive has no substance. True it is that investigating machinery has not gathered documentary evidence about dispute, but mere failure of Investigating officer to gather documentary evidence itself is not damaging the case of prosecution. It could be at the most said to be a lapse on the part of the Investigating Officer. However, informant is very categorical about annoyance of accused over construction of latrine and this aspect has not been rendered doubtful inspite of all witnesses cross-examined on this count. Therefore, in our considered opinion, there is motive behind the alleged incident.

19. On carefully sifting the evidence of **PW1** Gani - informant, who

in our opinion had a very clear occasion to see the incident at around 09:00 p.m. on 08-01-2015 and it appears that convict had himself visited the house of Naved (son of informant). PW7 Sumayya, daughter-in-law of informant, has spoken about knocking of door and she questioning as to who has come. According to informant, after hearing the knocks, he has asked deceased son Sultan to check who has come and therefore, Sultan went ahead. Informant also claims that he also followed Sultan. Informant spoke about accused to be present with co-accused Hiranman and Satish. He stated that accused started giving abuses and therefore, his deceased son questioned accused what was he doing there and further saying that wife of his brother Naved is alone in the house. Witness stated that accused no.1 convict asked deceased Sultan as to who kept the stones at their land and started abusing him in filthy words and stated that altercation took place between accused no.1 convict and deceased Sultan. According to informant, accused no.1 took out knife from the pocket of his pant and stabbed in the stomach of Sultan, who shouted loudly and collapsed on the ground. Informant stated that he immediately caught-old his deceased son Sultan. Other sons namely Javed, Salman and neighbours Gaffar, Shaikh Nazir, Jameel Pathan, Shafiq, Shaikh Munir gathered there and at that time accused no.1 fled away. He stated that as Javed chased accused no.1 at that time,

accused nos.2 and 3 namely Hiranman and Satish gave fist blows to his son Javed. Informant took Sultan to Government Hospital, Kannad, where on examination Doctor held him dead and so he lodged report at 01:30 a.m.

20. Initial **cross-examination** of the informant is focused on number of houses in the locality. In **paragraph no.4** of the cross-examination, he is initially asked about length and width of road and he is asked as to whether he has given any document to the Police of land over which construction of latrine and bathroom started. He answered it in negative. He is asked since when there used to be quarrel between accused and informant. Witness answered that it is taking place from 1 and ½ years prior to incident. Witness had admitted that prior to 1 and ½ years construction of latrine and bathroom in the lane was made. He is asked as to whether he had made any complaint to Gram Panchayat and he answered it in negative and he denied about filing any suit against accused. Again on the point of occurrence, in **paragraph no.6** witness answered that initially his son Sultan went out of house. He answered that he followed and his sons Javed and Salman came out of house. He answered that at the time of altercation, approximately 7 to 8 people have gathered. In **paragraph no.7** of the cross-examination, he is asked about distance between

Kannad and Hiwarkheda, while taking Sultan to hospital whether there was blood stains on clothes and hands of this witness and whether he signed or put thumb impression on FIR. Then he is asked as to who accompanied him to the hospital. Rest all is denied.

21. Alongwith testimony of above witness, it is also emerging from testimony of **PW3** Javed, another son of informant, that he was sleeping in the house and he woke up hearing shouts. His evidence shows that when he came out, at that time, convict was running with a knife in his hand. This witness claims that he was hit by co-accused Hiranman and Satish by wooden sticks. His cross-examination exposes that there are material omissions about convict dealing blow of knife in the stomach of deceased and about co-accused hitting this witness. However, in his cross-examination existence of dispute since 1 and ½ years due to construction activity is brought on record.

22. Similarly, testimony of **PW7** Sumayya, daughter-in-law of informant, on careful examination goes to show that she was inside the house and whatever she has deposed is learnt from her father-in-law i.e. informant and therefore, her evidence is hearsay.

23. Though other witness like **PW8** Sk. Riyaz, cousin of deceased is

examined, even his evidence shows that when he came out of the house, at that time, actual occurrence was already over.

SUMMATION ON EVIDENCE OF OCCURRENCE

24. Thus, here there is evidence of father, sons and sister-in-law of deceased. There is serious criticism on behalf of appellant that only near and dear ones are examined and there is no independent witness. True it is that witnesses examined by prosecution are family members of deceased. However, it is to be taken note of fact that it is accused who had visited the house of Naved (son of informant) and deceased, who were residing together adjacent to each other in the same house alongwith other brothers. Therefore, obviously the only witnesses, who could be readily available are family members. It is trite law that merely witnesses being close family members or relatives, is itself not sufficient to disbelieve or discard their evidence, rather what law expects is cautious approach while analyzing evidence. On doing so, we are convinced that evidence of **PW1** Gani is trustworthy and credible. He was present at the time of visit of the accused no.1. This witness spoke about appellant convict accompanied by co-accused and he has named them. He has categorically given sequence which ensued after accused no.1 was questioned by deceased Sultan. Testimony of this witness about

taking out knife and stabbing deceased in the stomach has virtually remained undisturbed. The manner of suggestion given to the witness clearly shows that there is no serious dispute about previous enmity on account of land. In cross-examination, the timeline has been brought from the mouth of this witness. Therefore, entire occurrence has been suggested in cross-examination thereby bringing incriminating material against accused. As stated above, sons of informant, who have rushed to the spot, are also categorical about presence of accused and injury to their deceased brother in the stomach. One of the sons has also been assaulted by co-accused. Therefore, taking into account such evidence, we are convinced that there is cogent and reliable evidence in the form of direct evidence.

25. Now, let us advert to the principal ground of challenge raised before us i.e. case to be not homicidal, rather at the most case to be of culpable homicide not amounting to murder. Learned Advocate for the appellant is specific that it is at the most case under Section 304 (Part II) of the IPC and nothing more than that. He is very emphatic that there is a single stab injury / single blow and that too upon sudden quarrel and hence, no premeditated murder as claimed by prosecution.

26. We are not impressed with above argument put forth by the learned Advocate for the appellant for the simple reason that, here going by sequence of events as narrated by **PW1** Gani, whose testimony we have accepted as inspiring confidence, it has clearly come on record that there was dispute over land since 1 and ½ years prior to the incident. According to **PW1** Gani, accused persons used to throw waste material in his plot and also hurl abuses to the lady members of the family. Around 09:00 p.m. on 08-01-2015 appellant convict accompanied by Hiranman and Satish had come to the house of deceased. Spot panchanama indicates that occurrence has taken place in front of house of informant.

Therefore, with such evidence it is abundantly clear that it is accused persons who went at night hours to the house of Naved (son of informant). **PW1** Gani is very categorical about accused no.1 Subhash after altercation, taking out knife from pocket of his pant and stabbing Sultan in the stomach as a result of which Sultan collapsed on the spot. As discussed above, it has come in the Autopsy Doctor's evidence that he came across a single stab injury, which he initially noted in column no.17 of the post mortem report and narrated before Court in his testimony at Exh.37. The impact of the blow goes to show that the weapon had penetrated in the small as well as large intestine cutting it at multiple places (perforating

intestine). Said injury is directed backwards, upwards and medially with sharp bleeding margins. Doctor has noted that small and large intestines were herniating outside abdominal cavity. Therefore, it is explicit that injury was forceful one and had turned out to be disastrous as deceased was declared dead within two hours of examination.

27. Learned Advocate for the appellant has tried to persuade us to view this single blow as a result of sudden quarrel and it was not premeditated. We are afraid whether such submission can at all be entertained, when accused had been to the house of Naved (son of informant) and deceased getting armed with deadly weapon like knife. Therefore, he went there with preparation and having put said deadly weapon to use by stabbing and penetrating at such depth that intestine was protruded. Intention coupled with knowledge of accused no.1 convict is writ large.

28. No doubt there was a single blow, but unfortunately it had itself turned out to be fatal. By series of judgments, the Hon'ble Apex Court and various High Courts have reiterated that there is no principle that in all cases of single blow, offence of murder is not made out. It has been held that the question with regard to the

nature of offence has to be gone into by taking into consideration the facts and circumstances of each case. The nature of injury, whether it is on vital part or non-vital part, the nature of weapon used, the circumstances under which injury was inflicted, manner of causing injury, are all factors which are required to be taken into consideration and borne in mind while testing the case as to whether it falls under Section 302 or 304 (Part II) of the IPC. Law to the above extent has been lucidly spelt out in the cases of *Mahesh Balmiki v. State of Madhya Pradesh; (2000) 1 SCC 319*, *State of Rajasthan v. Leela Ram @ Leela Dhar; (2019) 13 SCC 131* and also recently reiterated by affirming above legal position in the case of *Stalin v. The State, represented by the Inspector of Police; (2020) 9 SCC 524*.

29. We also refuse to entertain the submission that occurrence took place all of sudden because if we take into consideration sequel of occurrence **PW1** Gani is very categorical that appellant convict questioned and abuse deceased and after altercation he inflicted blow with knife with which he was armed. The very fact of coming armed with deadly weapon is indicative of the fact that it was planned incident. Consequently, the ground raised by appellant holds no water and is liable to be rejected. We have gone through the

citation taken recourse to. We find that the facts in those case materially differ as regards to sequence of occurrence is concerned, when compared to the evidence in case in hand and therefore, said ruling does not come to rescue of the appellant.

30. To sum up, here there is legally acceptable truthful version of eye witness account of **PW1** Gani, father of deceased. This witness has unfolded the background of the occurrence as well as narrated whatever he saw with his own eyes at the doors of his house. Consequently, we do not find any merit or substance in the appeal.

31. We have also gone through the impugned judgment. We are convinced that learned trial Judge has considered and appreciated evidence as required under law and findings have been supported by sound reasons. No infirmity or perversity is brought to our notice in appeal so as to interfere in the judgment and order under challenge. Hence, we proceed to pass following order :

ORDER

(I) Criminal Appeal is dismissed.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]