



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

CRIMINAL APPEAL NO. 104 OF 2005

1. Murlidhar S/o Dadarao Gadhekar
Age: 33 years, Occu.: Agriculture.
2. Pralhad S/o Dadarao Gadhekar
Age: 27 years, Occu.: Agriculture.

Both R/o Deolgaon – Taad,
Tal. Bhokardan, Dist.Jalna.

....Appellants
(Ori. Accused Nos.1 and 2)

Versus

. State of Maharashtra

....Respondent

.....
Advocate for Appellants : Mr. Sudarshan J. Salunke
APP for Respondent : Mr.S.K.Shirse
Advocate for Assist to PP : Mr.D.PPalodkar

.....

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 10 OCTOBER, 2024

PRONOUNCED ON : 17 OCTOBER, 2024

JUDGMENT :-

1. In this appeal, there is challenge to the judgment and order of conviction passed by IInd Additional Sessions Judge, Jalna in Sessions Case No.4 of 2002 dated 19-01-2005 holding present appellants guilty for offence under Section 304 Part II read with 34 of the Indian Penal Code (IPC).

PROSECUTION CASE IN BRIEF

2. It is the case of prosecution in trial Court that on 27-09-2001 deceased Dhondiba, husband of PW1 Shantabai, was ploughing the field. He was accompanied by his son and daughter. Accused nos.1 and 2, who are nephews of deceased, and accused no.3 (wife of accused no.2) and accused no. 4 (wife of accused no.1), picked up quarrel on account of damage to ridge/bandh and beat Dhondiba. Ramkisan, son of informant, rushed and passed information to informant, who also ran towards the field. Another son Namdeo of informant also called Appa Pungale, neighbour. Deceased was taken to Dr.Rajput and later on shifted to Civil Hospital, Jalna, where he died due to *biliary Peritonitis with Septicemia with shock due to perforated gall bladder*. PW1 Shantabai lodged report against all four accused for offence under Sections 302, 504 read with 34 of the IPC.

PW9 Nikkam (API) investigated the crime and after gathering sufficient evidence, chargesheeted accused under the aforesaid offences.

Trial was conducted by learned IInd Additional Sessions Judge, Jalna vide Sessions Case No.4 of 2002, who hold that offence under Section 304 Part II of the IPC is made out and not offence under

Section 302 of the IPC and recorded conviction accordingly.

Said judgment and order is under challenge by way of instant appeal.

SUBMISSIONS

On behalf of appellants :

3. Learned Counsel for the appellants submitted that prosecution has failed to prove the charges beyond reasonable doubt. He submitted that independent witnesses have not seen the occurrence and only family members i.e. sons and daughter of informant are examined. That there was previous enmity on account of land dispute. Therefore, there is false implication. Learned Counsel pointed out that witnesses are not consistent and are not lending support to each other. He would strenuously submitted that there were no injuries on the person of deceased Dhondiba. That even Autopsy Doctor has ruled out death due to injuries noticed in column no.17 of post mortem report. That there are allegations of being hit by stones, but there is no injury. He would submit that defence case in trial Court was that deceased Dhondiba fell from bullock cart and suffered injury. The first Doctor to whom deceased was allegedly taken and who treated Dhondiba deposed about the history of fall from bullock cart. He is examined as defence witness. Such Doctor

is not cross-examined and therefore, it is his submission that prosecution has not challenged defence version. He submitted that law is fairly settled that defence witness is at the par with prosecution witness, however, learned trial Court has not considered such position. Thus, according to him, there is improper appreciation of evidence and so he prays to set aside the impugned judgment of conviction.

In the alternative, it is his submission that if the Court is not convinced with above submissions, then as occurrence is of 2001 and more than two decades have lapsed and there is normalcy in the relations, sentence already suffered be awarded to the appellants.

In support of his submissions, he seeks reliance on following rulings :

- (i) Mahindra v. Sajjan Galpha Rankhamb, AIR 2017 SC 2397.*
- (ii) Mayur Panabhai Shah v. State of Gujarat, AIR 1983 SC 66.*
- (iii) Dudh Nath Pandey v. State of Uttar Pradesh, (1981) 2 SCC 166.*
- (iv) Thulia Kali v. The State of T.N., AIR 1973 SC 501.*

On behalf of State :

4. Taking exception to the above submissions and refuting the arguments, learned APP submitted that there is direct eye witness

account. That very sons of deceased, who were present have consistently deposed that their father was beaten by accused. That wife was informed about the incident. That she had also seen accused beating her husband. She has lodged report. That two independent witnesses have seen appellants beating deceased. Therefore, there is cogent, convincing and reliable evidence. Learned trial Court, therefore, has taken such evidence in account and has recorded guilt and hence, it is prayed that as there is no merit in the appeal and defence witness being a got up witness, his testimony has to be discarded and judgment is required to be maintained and upheld.

SUM AND SUBSTANCE OF EVIDENCE IN TRIAL COURT

In support of its case, prosecution has examined as many as nine witnesses.

5. **PW1** Shantabai W/o Dhondiba Gadhekar is informant. She gave evidence that her husband sought back possession of land from accused. That they failed to give possession. That on the date of incident, while her husband was ploughing the field, she was in the house and her son and daughter were accompanied her husband. That her son namely Ramkisan came and informed that accused

nos.1 to 4 were beating her husband, so she went there. She saw accused beating her husband. She also saw Appa Pungale present there. One Namdeo Kolhe tried to intervene but accused persons rushed on him with stones. That her husband was taken to Dr.Rajput at Bhokardan and from there to Civil Hospital, Jalna, where he died and therefore, she lodged report at Hasnabad Police Station.

While under **cross-examination** this witness has admitted about previous dispute. The answers given by her in cross-examination that her husband fell on the ground, suffered injuries, he was assaulted by means of stones, her husband suffered injury on entire body, there was blood oozing, he being taken to hospital of Dr.Rajput and the answer that Dadarao did not spend amount on treatment. Such questions, suggestions and answers clearly show that occurrence is not disputed.

Only omission brought in her cross-examination is that her son Namdeo called Appa Pungale and accused nos.1 and 2 rushed towards Namdeo Kolhe.

6. **PW2** Namdeo Dhondiba Gadhekar, son of informant, in his evidence in paragraph no.1 submitted that,

“01.....On the date of incident myself my brother Ramkisan, sister Janabai had gone to our field with my father at 8 A.M. We were doing sowing operation in our field. At that time accused no.1 to 4 were saying to my father that, we have demolished the bandh. Then my father and accused no.1 to 4 have gone to see whether bandh is really demolished. Accused no.1 and 2 have forcibly carried my father on the band and made him lie on the spot, then accused no.1 and 2 started beating my father with the help of stones. In the meanwhile accused no.3 and 4 also visited to the spot and assaulted my father with the help of fist and kicks. I have rushed to Appa Pungale and narrated him about the incident. Appa Pungale then rushed to the spot, however accused continued to beat my father. After arrival of Appa Pungale accused no.3 and 4 ran away from the spot. At that time accused no.2 pelted stones on my back. My brother Ramkisan had gone to our house to call my mother on the spot.

02. My mother came on the spot after receipt of message from Ramkisan. Then the accused ran away from the spot of incident. Then we have drink water to my father. Then we have taken my father to Mahadeo Mandir from our village in the bullock cart. Then I had gone to village Gahuli to my maternal uncle. On the next day, my maternal uncle came to our house.”

Relevant **cross-examination** in paragraph 3 shows that spot of occurrence is brought on record. Answers of this witness that he went long distance due to stone pelting and the incident lasted for

half an hour also shows that there is no serious challenge to the incident.

Omission brought is to the extent that accused nos.2 and 3 questioned about demolition of bandh and they pelted stone on his back and so he went to village to give message to his uncle and that Dhondiba was not in a position to talk. Such manner of cross-examination also categorically shows that incident is not seriously challenged.

7. **PW3** Appa Sampat Pungale stated that he knew deceased as well as accused. According to him, incident took place three years back. That he was present in the field. That Namdeo came to call him and informed that accused nos.1 and 2 are beating his father, so he visited the spot and intervened in the matter. He also gave Dhondiba water and also made him sit in the bullock cart.

This witness answered in **cross-examination** that Dhondiba was beaten in standing cotton crop and that he himself was present at the spot for five minutes and he noticed abrasion on three parts of Dhondiba. He denied that Dhondiba was in position to speak. Omission is brought to that extent in para 3. Rest is all denial.

8. **PW4** Namdeo Laxman Kolhe stated that incident took place three years back while he was going to Bazar at Kedarkheda. He saw accused nos.1 to 4 beating Dhondiba in his field. He tried to intervene, but accused no.2 threatened him, so he proceeded ahead to the Bazar.

While in **cross-examination** this witness stated that incident took place at 01 to 01.30 p.m. He answered that due to threat by accused no.2 he moved 30 feet away from spot and for the said reason he did not intervene.

Omission is brought regarding he intervening in the matter.

9. **PW5** Ramkisan Dhondiba Gadhekar deposed that he was present in the field alongwith his father, brother Namdeo and sister Janabai. That accused nos.1 and 2 beat his father while sowing operation was going on. That accused nos.1 and 2 forcibly took his father to another cotton field and assaulted with the help of stones. So he ran home to call his mother and when they came back, they saw Appa lifting his father and keeping in the bullock cart. That his father was taken to hospital but he died while undergoing treatment.

Child witness is subjected to lengthy **cross-examination** which commences from paragraph 3 wherein he answered that his father

was forcibly taken by accused nos.1 and 2 from one spot to another spot and he suffered injuries on elbow and knee. He is unable to give exact location of injuries suffered by his father. He answered that he went at around 01:00 p.m. towards his house and returned back to the spot.

10. **PW6** Ankush Sarjerao Shelke is pancha to memorandum of disclosure and recovery of exh.52 and 53 at the instance of accused no.2.

In examination-in-chief, he spoke about memorandum of disclosure given by accused no.2 regarding producing stones and same being seized vide panchanama exh.53.

While under **cross-examination** he stated that at the time of disclosure by accused no.2, other accused were present at the Police Station and enquiry was also made with them and they had disclosed about stones concealed in Maize crop, but they did not give Gut number of the land.

11. **PW7** Jagdish Ramraj Mishra is Head Constable, who drew MLC, prepared inquest and referred body for post mortem.

12. **PW8** Dr.Ravindra Tukaram Guthe is Autopsy Surgeon, who conducted post mortem and issued cause of death.

13. **PW9** Arun Dhamodhar Nikkam is the Investigating Officer, who carried out and completed investigation and chargesheeted accused.

14. Defence has also adduced evidence of one witness.

DW1 Dr.Kapurchand Nandram Rajput gave evidence that on 27-09-2001 injured Dhondiba was brought by his wife with injuries due to fall on ground from bullock cart. That said history was given by wife of injured and his companion. He examined and noticed superficial injuries. He gave treatment and referred patient to Rural Hospital, Bhokardan.

ANALYSIS AND APPRECIATION OF ABOVE EVIDENCE

15. Here on complete and careful appreciation of evidence of informant PW1 Shantabai, wife of Dhondiba and their children namely Namdeo PW2 and Ramkisan PW5, it is noticed that they all are consistent that on that day Dhondiba had been to the field for agricultural work, he was accompanied by his sons Namdeo and Ramkisan and daughter. Namdeo and Ramkisan they both are consistent about dispute being raised and assault being mounted by accused. PW2 Namdeo rushed to inform informant and she came and she too marked presence of accused and her husband lying down and being beaten. PW5 Ramkisan, another son rushed to inform

Appa and Appa is examined as PW3. This witness PW3 Appa is independent witness, who knew both informant and deceased Dhondiba. He has stated that PW2 Namdeo informed him about accused nos.1 and 2 beating his father. He also names accused nos.1 and 2 to be present at the spot. PW4 Namdeo Laxman Kolhe, a passerby also an independent witness testified about accused nos.1 to 4 beating Dhondiba in the field and when he tried to intervene, accused no.2 threatened him. PW5 Ramkisan deposed about accused nos.1 and 2 taking his father towards the cotton field and being beaten and when he returned back with his mother, that time accused nos.3 and 4 hiding themselves in the crop. PW2 Namdeo specifically stated that his father was beaten by means of stones. All witnesses including two independent witnesses PW3 Appa and PW4 Namdeo Kolhe examined by prosecution are marking presence of all accused.

The answers given by them in cross-examination reproduced above clearly show that incident has not been seriously challenged, rather the manner of questioning and suggestions clearly show that occurrence is admitted and rather got confirmed. PW8 Dr.Guthe, Autopsy Surgeon, in his evidence at exh.58, described nature and site of injuries, which according to him, are *ante mortem* in nature.

Hence, ocular account finds support from medical evidence.

16. PW8 Dr.Guthe, Autopsy Surgeon attributed death due to *biliary peritonitis with septicemia with shock due to perforated gall bladder*. He has denied probable cause of death due to injuries noticed and noted in column no.17. Therefore, here incident seems to have taken place due to previous dispute and all of a sudden. There are allegations of beating by means of stones. Therefore, incident has erupted all of a sudden and as such intention to do away was apparently not there. There is no injury on vital parts also. Therefore, offence of 304 Part II i.e. culpable homicide not amounting to murder gets attracted and not offence under Section 302 for which appellants were made to face charge.

17. Learned Counsel for appellants specifically pointed out that there is false implication. That informant herself had reported DW1 Dr.Rajput, the first medical expert to whom Dhondiba was taken to, about Dhondiba falling from bullock cart and suffering injury. Learned Counsel emphasized that his testimony has not been appreciated by learned trial Judge and in view of above referred rulings he seeks equal treatment to defence witness while appreciating evidence. That here DW1 Dr.Rajput has not at all being

cross-examined by prosecution.

It is true that this witness in evidence at exh.68 did testify about Dhondiba being brought to his dispensary on 27-09-2001 on history of injury due to fall from bullock cart. It is equally true as pointed out that, learned APP in trial Court declined to cross-examine this witness. However, as pointed out by learned APP, PW8 Dr.Rajput having at that point of time worked as Medical Officer in PHC, he ought to have maintained medical papers and ought to have produced case papers or medical papers about above history being reported. Such papers are not brought on record. Here there is ocular account, which has remained virtually undisturbed and unshaken and therefore, for above reasons, only on the strength of testimony of DW1 Dr.Rajput, other clinching evidence cannot get eclipsed or overshadowed.

18. Learned Counsel for appellants has submitted that if this court is not convinced with the above submission advanced by him, then considering occurrence to be almost two decades old and sword of conviction hanging over on appellants' head for long, they be let off by awarding sentence already suffered.

19. Gave a careful thought to the above alternative submission.

Here it transpires that incident had though erupted all of a sudden, it was 4 against 1 i.e. deceased alone given beating by four accused persons. Occurrence is watched by children of deceased, who were accompanied him to the field. Independent witness speaks about condition of deceased. Even PW8 Doctor has noticed that injuries noted in column no.17 would not result into death, but death is said to be due to "*biliary Peritonitis with Septicemia with shock due to perforated gall bladder*". Therefore, there is perforation. Occurrence of assault has taken place on 27-09-2001. Death has taken place on 28-09-2001. It has not come on record that deceased suffered from any previous ailment or had any comorbidity. Therefore, offence is definitely of Section 304 Part II i.e. culpable homicide not amounting to murder. Learned trial Judge has awarded sentence of rigorous imprisonment for two years each. It is true that more than two decades have lapsed since the incident. Therefore, sword of conviction is looming large over appellants' head for more than two decades. Considering the background in which incident took place, and the above discussed facts, this Court is not inclined to bring down the sentence to already undergone, but quantum of sentence deserves to be reduced. Accordingly, I proceed to pass following order.

ORDER

- I. The **conviction** awarded to appellant nos.(1) Murlidhar s/o Dadarao Gadhekar and (2) Pralhad s/o Dadarao Gadhekar, by the IInd Additional Sessions Judge, Jalna in Sessions Case No.4 of 2002 for offence punishable under Section 304 Part II of the Indian Penal Code on 19-01-2005 **is hereby maintained and kept intact.** However, the sentence is modified and reduced and instead of rigorous imprisonment of two years each, **they are sentenced to suffer rigorous imprisonment for a period of six (06) months each.**
- II. There is no change in the fine amount as well as in default sentence.
- III. It is clarified that rest of the operative order passed by the trial Court is maintained.
- IV. Set off as provided under Section 428 of the Code of Criminal Procedure, if entitled to, be given to the appellants.
- V. The appeal is disposed of in the above terms.

(**ABHAY S. WAGHWASE**)
JUDGE