



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

CRIMINAL APPEAL NO.136 OF 2021

Shivaji Gangadhar Borhade
Age 35 years, Occu. Agril.,
R/o Rampuri Adgaon, Tq. Gangapur,
District Aurangabad

... APPELLANT

VERSUS

The State of Maharashtra
(Copy to be served on Public Prosecutor,
High Court of Judicature of Bombay,
Bench at Aurangabad)

... RESPONDENT

.....
Mr. A.S. Barlota, Advocate for appellant
Mr. S.D. Ghayal, A.P.P. for respondent
.....

WITH

CRIMINAL APPEAL NO.302 OF 2021

Shri Sharad s/o Parasram Borhade,
Age 29 years, Occu. Agriculture,
R/o Wadgaon Rampuri, Tq. Gangapur,
District Aurangabad

... APPELLANT

VERSUS

1. The State of Maharashtra
Through Police Inspector,
MIDC Waluj Police Station,
Aurangabad
(Copy to be served on Public Prosecutor,
High Court of Judicature of Bombay,
Bench at Aurangabad)
2. Shivaji Gangadhar Borhade
Age 33 years, Occu. Agriculture,
R/o Rampuri Wadgaon, Tq. Gangapur,
District Aurangabad

**(The present respondent No.2 already
sentenced for life imprisonment with
fine of Rs.2000)**

3. Gangadhar Kaduba Borhade,
Age 57 years, Occu. Agriculture,
R/o Rampuri Wadgaon, Tq. Gangapur,
District Aurangabad
4. Punjaram Kaduba Borhade,
Age 51 years, Occu. Agriculture
R/o Rampuri Wadgaon, Tq. Gangapur,
District Aurangabad
5. Ujawala w/o Shivaji Borhade,
Age 29 years, Occu. Household,
R/o Rampuri Wadgaon, Tq. Gangapur,
District Aurangabad
6. Kaduba Ramrao Borhade,
Age 75 years, Occu. Household,
R/o Rampuri Wadgaon, Tq. Gangapur,
District Aurangabad

... RESPONDENTS
(Accused Nos.1 to 5)

.....
Mr. E.G. Irale, Advocate for appellant
Mr. S.D. Ghayal, A.P.P. for respondent No.1 – State
Mr. A.S. Barlota, Advocate for respondents No.2, 3, 5 & 6
Mr. S.K. Shinde, Advocate holding for
Mr. R.V. Gore, Advocate for respondent No.4
.....

WITH

CRIMINAL APPEAL NO.166 OF 2023

The State of Maharashtra
through Police Inspector,
Police Station, MIDC Waluj,
Tq. Gangapur, Dist. Aurangabad

... APPELLANT

VERSUS

1. Shivaji Gangadhar Borhade,
Age 28 years, Occu. Agriculture
2. Gangadhar Kaduba Borhade,

Age 52 years, Occu. Agri.

3. Punjaram Kaduba Borhade,
Age 46 years, Occu. Agri.
4. Ujawala Kaduba Borhade,
Age 24 years, Occu. Household
5. Kaduba Ramrao Borhade,
Age 70 years, Occu. Household

All R/o Rampuri Wadgaon,
Tq. Gangapur, Dist. Arangabad ... **RESPONDENTS**
(Orig. Accused Nos.1 to 5)

.....
Mr. S.D. Ghayal, A.P.P. for appellant
Mr. A.S. Barlota, Advocate for respondents No.2, 4 and 5
.....

**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ.**

Date of reserving judgment : 21st February, 2024

Date of pronouncing judgment : 6th March, 2024

JUDGMENT (PER R.G. AVACHAT, J.)

This group of three appeals is being decided by this common judgment since the challenge therein is to the judgment and order dated 21/1/2021, passed by learned Additional Sessions Judge, Vaijapur, District Aurangabad, in Sessions Case No.53/2015.

Criminal Appeal No.136/2021 is against conviction of the appellant Shivaji Gangadhar Borhade for the offence punishable under Sections 302 and 452 of the Indian Penal Code and consequential sentences of life imprisonment and rigorous

imprisonment for three years respectively and fine with default stipulation. Both the sentences have been directed to run concurrently.

The other two appeals were preferred against acquittal of the respondents therein of the offences punishable under Sections 143, 147, 148, 504 read with 149 of the Indian Penal Code and Sections 143, 147, 148, 302, 452, 504 read with 149 of the Indian Penal Code. This Court, however, vide order dated 31/1/2023, restricted the scope of those appeals only against the judgment and order of acquittal of the respondents therein of the offences punishable under Sections 143 and 147 of the Indian Penal Code.

FACTS :-

2. The First Information Report (F.I.R.) Exh.53) was lodged by P.W.1 Sharad on 2/5/2015. The gist of the prosecution case as is disclosed from the police papers is as under :

P.W.1 Sharad would reside along with his father and 2 brothers in a house standing on their agricultural land. Appellant Shivaji (in Criminal Appeal No.136/2021) was a distant relative of the informant. He has his agricultural land adjoining the land of the informant. There was a dispute between the two families over a Bandh that separates their lands. The appellant Shivaji had

dismantled a portion of the Bandh on 4/4/2015. A meeting of elders from both the families and some villagers was, therefore, held. It was decided to have both the lands measured through a Surveyor and then lay/ construct a Bandh.

3. It is also the case of the prosecution that it was 2/5/2015, the informant was engaged in tractor repairing work. It was by 5.00 p.m. The informant's wife and the wife of his brother (Kishor) were home. Kishor (deceased) was present outside the house. The house of the appellant Shivaji was also in the neighbourhood. Appellant Shivaji and the respondents in Appeal Nos.302/2021 and 166/2023 – Gangadhar, Punjaram, Ujawala and Kaduba (acquitted accused) came together. All of them picked up quarrel with Kishor. Appellant Shivaji was questioning Kishor as to why did he defame him in the village alleging him to have dismantled the Bandh. All of them started beating up Shivaji's wife Ujawala. Informant and his wife Sujata intervened. Kishor was asked to go home. He obliged. The appellant Shivaji hurriedly went his home and returned with a tong (Chimta), an instrument used for plucking of ripe cotton flowers. He followed Kishor to his house and assaulted on Kishor's head with tong. Kishor fell. He became unconscious. Appellant Shivaji and the respondents then fled. The informant, with the assistance of others, rushed Kishor to Ghati Hospital, at Aurangabad. The doctor there, on examining Kishor, declared him dead. The informant, therefore, lodged the

F.I.R. (Exh.53) with M.I.D.C. Police Station, Waluj, Aurangabad. A crime vide C.R. No.I-89/2015 came to be registered for the offences punishable under Sections 302, 323, 452, 143, 147, 148, 149 of the Indian Penal Code and Section 135 of the Maharashtra Police Act came to be registered.

4. The scene of offence panchanama was drawn. Autopsy was conducted on the mortal remains of deceased Kishor. Pursuant to the disclosure statement made by Shivaji, a tong came to be seized under the panchanama (Exh.5). Statements of persons acquainted with the facts and circumstances were recorded. Upon completion of the investigation, the appellant Shivaji and the respondents were proceeded against by filing a charge sheet. The case was committed to the Court of Sessions, Vaijapur (Trial Court). The Trial Court framed the Charge (Exh.32). The prosecution examined 8 witnesses. On appreciation of the evidence in the case, the Trial Court convicted the appellant Shivaji and acquitted the respondents as stated above.

5. Heard. Learned counsel for the appellant would submit that, the prosecution has suppressed the genesis of the case. Admittedly, there was a dispute over the Bandh. Residential houses of both, the appellant Shivaji and the respondents on one hand and the informant and his family on the other were in the neighborhood of each other. A quarrel had ensued over carving of

the Bandh. None of the respondents even scuffled with deceased Kishor. An oral wrangle took place between deceased Kishor and appellant Shivaji. The incident occurred in a spur of moment. The close reading of the prosecution evidence would indicate the appellant inflicted single blow on the head of Kishor. While the post mortem report indicates Kishor died of head injury and strangulation, the F.I.R. and the supplementary statement given by the informant (P.W.1 Sharad) are conspicuously silent to attribute the appellant Shivaji with strangulation. As such, the prosecution witnesses have made improvements over the F.I.R. and the police statement. According to learned counsel, by no stretch of imagination it could be termed to be an offence of murder. Learned counsel relied on the judgment of the Apex Court in case of **Major Singh Vs. State of Punjab & Anr. [AIR OnLine 2022 SC 1487]**.

6. The learned A.P.P. and the learned counsel for the complainant (appellant in Criminal Appeal No.302/2021) would, on the other hand, submit that, both P.W.1 Sharad and P.W.2 Balu have categorically deposed indicating involvement of the respondents in assaulting deceased Kishor. The respondents were six in number. All of them were the family members. They had come together to assault Kishor. The post mortem report indicates 26 injuries on the person of the deceased. According to learned counsel, the offence of murder has been made out against appellant Shivaji. They would further submit that, the respondents

have committed offence of rioting and they, therefore, need to be convicted therefor.

7. The learned counsel for the appellant/ complainant would submit that, the F.I.R. is not an encyclopaedia. The informant and another witness have given graphic details of the incident in question. The informant's brother had met with homicidal death. One can imagine his plight. A minor omission in F.I.R. has, therefore, been occurred. It was also submitted by learned A.P.P. and learned counsel for the appellant/ complainant that superficial and minor injuries on the person of the accused need not be explained by the prosecution. In support thereof, they relied on the judgment of the Apex Court in case of **Amar Malla Vs. State of Tripura [2002 AIR (SC) 3052]**.

8. According to learned counsel for respondents, in view of their acquittal, the presumption of innocence has been reinforced. If two view are possible on appreciation of the evidence, the one which favours the respondents needs to be adopted. According to them, there is no reason to interfere with the judgment of acquittal. They, therefore, urged for dismissal of the appeals against acquittal.

9. Considered the submissions advanced. Perused the evidence on record. Although the prosecution has examined 8 witnesses, the relevant evidence for deciding these appeals would

be that of the Medical Officer who conducted autopsy, and the eye witnesses namely P.W.1 Sharad (informant), P.W.2 Balu and P.W.3 Archana.

10. So far as regards evidence as regards disclosure statement made by appellant Shivaji, pursuant to which the tong came to be recovered is concerned, the Trial Court has not relied on the same for the reason the investigating officer to have already informed the panch witnesses that tong was to be recovered from the house of the appellant. The Trial Court was, therefore, right in observing that it was not the disclosure statement relevant under Section 27 of the Evidence Act.

11. P.W.5 Dr. Sachin was a Resident Medical Officer with Government Medical College & Hospital, Ghati, Aurangabad at the relevant time. He conducted the post mortem examination of the body of Kishor on 3/5/2015. He noticed following 26 injuries on the person of the deceased, besides 8 corresponding internal injuries. The post mortem report finds place at Exh.81.

- 1) A crescent shaped contused abrasion of size 1 cm x 0.2 cm., over anterior aspect of neck over the thyroid cartilage region, 0.5 cm. lateral and below the prominence Adams apple, reddish.
2. A crescent shaped contused abrasion of size 1 cm. x 0.2 cm., over left anterior aspect of neck at the level of Adams apple 1 cm. lateral from midline and 0.5 cm. from injury No.1, reddish.
3. A crescent shaped contused abrasion of size 1 cm x 0.2 cm.

over right anterior aspect of neck 1.5 cm above level of Adams apple and 1 cm lateral to midline, reddish.

4. A crescent shaped contused abrasion of size 1 cm x 0.2 cm. over left anterior side of neck 0.5 cm above the level of Adams apple 1.5 cm. lateral from midline and 1 cm infero-lateral to injury No.3, reddish.
5. Linear abrasion of size 3 cm x 0.2 cm. obliquely placed over left lateral aspect of neck, at the level of Adams apple reddish.
6. Laceration of size 3 cm x 1 cm x bone deep over lateral aspect of right eyebrow region, reddish.
7. Laceration of size 2 cm x 1.5 cm x bone deep, over left forehead and medial aspect of left eyebrow region, reddish
8. Contused abrasion of size 1 cm x 1 cm over middle 1/3 of nasal bridge region reddish.
9. Contusion of size 4 cm x 3 cm over right lower eyelid and upper maxillary region, reddish.
10. Laceration of size 2 cm x 1 cm x muscle deep, over left side of upper lip, 1 cm lateral to midline, reddish.
11. Laceration of size 2.5 cm x 1 cm x muscle deep, over left side of lower lip. 1 cm lateral to midline, reddish.
12. Contusion of size 1.5 cm x 1 cm over antehelix of left ear pianna, reddish.
13. Laceration of size 2 cm x 0.5 cm x cartilage deep over upper 1/3 of left ear pinna, reddish.
14. Incised looking laceration of size 4 cm x 1 cm x bone deep, horizontally placed over lower border region and parallel to of left side of mandible, 1 cm from midline, reddish.
15. Incised looking laceration of size 2 cm x 1 cm x bone deep, triangular in shape over antero-inferior region of midline of chin, reddish.
16. Incised looking laceration of size 5 cm x 1.5 cm x bone deep over lower border region and parallel to of right side of mandible, 3 cm from midline, reddish.

17. Contused abrasion of size 6 cm x 6 cm irregular, obliquely placed from above down-ward over right maxillary and cheek region, reddish.
18. Laceration of size 0.75 cm x 0.5 cm x bone deep over right zygomatic region.
19. Three abrasions of size 0.5 cm x 0.5 cm each over infero-lateral aspect of left angle of mandible, reddish.
20. Contused abrasion of size 1.5 cm x 1.5 cm obliquely placed over dorsal aspect of distal 1/3 of right forearm, reddish.
21. Contused abrasion of size 1.5 cm x 1.5 cm, obliquely placed over ventral aspect of distal 1/3 of left forearm reddish.
22. Abrasion of size 0.5 cm x 0.5 cm over dorsal aspect of left elbow region, reddish.
23. Contused linear abrasion of size 9 cm. x 0.5 cm. obliquely vertical over middle 1/3 of medial side of left thigh, reddish.
24. Contused linear abrasion of size 3 cm x 0.5 cm over lower 1/3 of medial side of left thigh, 1 cm below injury number 23, reddish.
25. Abrasion of size 0.5 cm x 0.5 cm irregular over anterior side of left knee cap region reddish.
26. A bony hard swelling of size 4 cm x 4 cm x 2 cm over left side of occipital region.

Five palpable fractures were also found. All the injuries were antemortem and fresh.

On internal examination two injuries were found on the head :

- 1) Under scalp haematoma of size 6 x 6 x 1 cm over right temporal and preauricular reddish.
- 2) under scalp haematoma of size 7x6 cm over left eye parietal.

Two following skull fractures were found.

- 1) Linear irregular minimally displaced fracture of length 9 cm left squamous part and anterior petrous part of temporal wound.
- 2) Linear irregular minimally displaced fracture of length 3 cm on orbit roof bone in anterior cranial fossa.

In brain there was contusion admeasuring 3 cm x 3 cm over left frontal region. Brain matter congested and grossly oedematous.

On neck dissection, following eight injuries were noticed :

- 1) Bruise of size 3 cm x 2 cm over right side of neck.
- 2) Bruise 4 cm x 3 cm over left side of neck.
- 3) Haematoma 4 cm x 3 cm x 2 cm over left antero-lateral aspect of upper 1/3 of left side of sterno-cleidomastoid and left parathyroid muscles of neck.
- 4) Haematoma of size 3 cm x 3 cm x 1 cm over right antero-lateral aspect of sublingual and peri-mandibular strap muscles of neck, reddish.
- 5) Haematoma of size 2 x 2 x 1 cm over left lateral aspect of strap muscles of neck, reddish.
- 6) Contusion of size 2 x 2 cm of soft tissue around left end of hyoid bone, reddish
- 7) Adduction fracture of tip of left side of hyoid bone. The fractured margins are blood infiltrated.
- 8) Contusion of wall and mucosa of larynx and adjacent trachea over an area of size 4 x 6 cm reddish.

In the opinion of P.W.5 Dr. Sachin, the cause of death was "Head Injury With Throttling". In his further opinion, the injuries mentioned in Column No.17 to 20 of the post mortem report were possible with an instrument like tong. According to him, single blow of the tong on the head was sufficient to cause death, depending upon the impact and force of the blow.

12. P.W.1 Sharad (informant) was a real brother of the deceased. His evidence indicates that, the agricultural lands of his family and that of the appellant Shivaji adjoined each other. Both the lands have been separated by an existence of a Bandh. Residential houses of both the parties stand in the neighborhood of each other on their respective lands. Appellant Shivaji was suspected to have dismantled/ carved the Bandh on 30/4/2015. it was decided to have the lands measured through Surveyor and then lay a Bandh.

13. The incident took place by 5.00 p.m. on 2/5/2015. It is in the evidence of P.W.1 Sharad (informant) that, appellant Shivaji and all the respondents came near to his residence. He was engaged in tractor repairing work. Appellant Shivaji and the respondents were abusing. He was somewhat away from them. He (informant), therefore, went close to them. Appellant Shivaji thereupon questioned him as to why did he insult him (Shivaji) in the village, alleging him to have dismantled the Bandh. It is further

in his evidence that the appellant and all the respondents started beating up Kishor with fists and kicks. It is further in his evidence that, respondent Ujawala (wife of Shivaji) instigated all others saying "Not to leave Kishor alive". It is further in his evidence that, he therefore asked Kishor to go home. Kishor obliged. Appellant Shivaji then went to his house hurriedly. He returned with a tong. Shivaji followed Kishor to his house and inflicted blow on Kishor's head with a tong. It is further in his evidence that, Shivaji gave two more blows on the face of Kishor with the tong. According to him, Shivaji pressed Kishor's neck. Kishor thereby became unconscious. The appellants thereafter ran away.

14. P.W.3 Archana (widow of deceased) testified that, Kishor was sitting on the platform of the house. It was by 5.00 p.m. on 2/5/2015. Appellant Shivaji and the respondents came together. They started talking with Kishor and even beat him up with fist and kick blows. According to her, she along with her co-sister and the informant came there. Her evidence further indicates that, appellant Shivaji went his house hurriedly and brought tong with him. Kishor thereupon ran into his house. Appellant Shivaji followed him. She and her co-sister Sujata followed him to her house. Shivaji assaulted on the head of Kishor with a tong. Kishor thereby fell. He suffered bleeding injury and became unconscious thereby. Both the informant and P.W.3 Archana were subjected to a searching cross-examination. In response to the questions put to

her, Archana testified that, Kishor, on having been inflicted with a single blow, fell down. She, however, denied that, Kishor suffered injuries due to fall on a sill. According to her, dismantling of the Bandh was the only reason for quarrel and the incident dated 2/5/2015. She admitted that, there was heated exchange of words (quarrel) between Shivaji and Kishor (deceased). She further testified that, appellant Shivaji got annoyed (angered) because of abusive words. The quarrel continued for about 10 to 15 minutes preceding the assault with a tong. It is further in her evidence that, during the quarrel, appellant Shivaji angrily went in his house and brought with him a tong. She went on to admit that, no fight/ scuffle took place between Shivaji and Kishor before infliction of assault with tong. It is further in her evidence that no fight took place between deceased Kishor on one hand and the respondents on the other. Her evidence further indicates that, respondent Kadu was around 80 years of age.

15. The informant (P.W.1 Sharad) testified in his cross-examination that, respondent Kadu was 80 years of age. Gangadhar was 60 plus. He was confronted with F.I.R. (Exh.53) and his supplementary statement. Both the F.I.R. and his supplementary statement are silent to mention therein the appellant Shivaji to have pressed Kishor's neck with tong. This is material omission, amounting to contradiction. His evidence further indicates that he was away from the place whereat the quarrel

ensued. He was engaged in tractor repairing work. When he came to the place where the quarrel was going on, he saw the deceased and the respondents hurling abusive words against each other. He even claimed ignorance as to who started hurling the abuses first. He denied that scuffle was there between Kishor and Shivaji. He, however, admitted that, both Kishor and Shivaji tried to rush on the person of each other. Kishor too was annoyed. He admitted that, none of the respondents beat up his wife and Archana, widow of Kishor. The quarrel took place at a site between both the houses. It is further in his evidence that, the said quarrel took place all of a sudden.

16. Close reading and appreciation of the evidence of both these eye witnesses lead us to conclude that they did not know at whose instance the quarrel ensued first. The quarrel took place at a site in between their respective houses. It, therefore, cannot be said that, appellant Shivaji and the respondents went over to the place of the informant, to describe them as aggressors. Quarrel for 15 minutes ensued before appellant Shivaji inflicted blow on the head of Kishor with a tong. None of the respondents assaulted Kishor. The reason behind the quarrel was dismantling of a Bandh on 30/4/2015. Appellant Shivaji was suspected to have dismantled the same. Since there is no evidence to indicate at whose instance the quarrel had begun, we cannot conclude the respondents and appellant Shivaji to have formed unlawful assembly, the object

whereof was to commit rioting. The Trial Court, on appreciation of the evidence of both the eye witnesses, has acquitted the respondents of the offences with which they were charged. On their acquittal, the presumption of innocence has been reinforced. True, the appellate Court can reappreciate the entire evidence. On close scrutiny of the evidence on record, however, we are unable to take a different view. We do not find the finding recorded by the Trial Court acquitting the respondents to be perverse, warranting interference therewith. In our view, therefore, both the appeals against acquittal do fail.

APPRECIATION :

17. Admittedly, when the quarrel took place, neither Shivaji nor any of the respondents were armed with any weapon. It is only after abusive words hurled against each other by deceased Kishor and appellant Shivaji, the appellant Shivaji hurriedly went his house and returned with a tong. By that time, Kishor had already entered his house on request of the informant. The appellant Shnivaji followed Kishor and assaulted on his head with a tong. Kishor thereby suffered head injury. It is reiterated that, the F.I.R. and the supplementary statement of the informant is silent to state the appellant Shivaji to have given two more blows on the face of Kishor with the tong. The same is also silent to attract appellant Shivaji to have pressed Kishor's neck with the tong. These are vital

omissions, amounting to contradictions. Whatever the informant has deposed to before this Court regarding two more blows and pressing of neck of Kishor is an improved version. To that extent, we are not inclined to believe his evidence.

18. P.W.3 Archana (widow of the deceased) was also in the house. Her evidence indicates the appellant Shivaji to have given only one blow on the head of Kishor. The cause of death of Kishor is head injury with strangulation. There is nothing in evidence to indicate that the head injury suffered by the deceased itself was sufficient to cause his death in ordinary course of nature. Although the appellant Shivaji was annoyed, his going back to his residence and coming armed with a tong would not constitute the act to have been committed as a result of grave and sudden provocation. More so, when Kishor (deceased) had already gone his home. The appellant Shivaji entered Kishor's house. The same constituted an offence of criminal trespass, punishable under Section 452 of the Cr.P.C.

19. Appellant Shivaji assaulting Kishor on his head with a tong would, in our opinion, be an offence of attempt to commit murder. In our view, the appellant Shivaji has committed offence punishable under Sections 307 and 452 of the Indian Penal Code. We are not in agreement with the finding recorded by the Trial Court, holding the appellant Shivaji to be guilty of offence of murder.

To that extent, interference with the impugned order of conviction and consequential sentence of appellant Shivaji is warranted. In the result, the appeals stand disposed of in terms of the following order :-

ORDER

- (i) Criminal Appeal No.136/2021 is partly allowed.
- (ii) Conviction of the appellant Shivaji Gangadhar Borhade for the offence punishable under Section 302 of the Indian Penal Code, by judgment and order dated 21/1/2021, passed by learned Additional Sessions Judge, Vijapur, District Aurangabad in Sessions Case No.53/2015, and the consequential sentence of life imprisonment is set aside. Instead, the appellant Shivaji Gangadhar Borhade is convicted for the offence punishable under Section 307 of the Indian Penal Code and therefore, sentenced to suffer rigorous imprisonment for eight (8) years and to pay fine of Rs.2000/- (Rupees two thousand), in default to undergo rigorous imprisonment for six months.
- (iii) The order of conviction and consequential sentence of the appellant Shivaji Gangadhar Borhade for the offence punishable under Section 452 of the Indian Penal Code to stand unaltered.

- (iv) Both the substantive sentences to run concurrently.
- (v) Criminal Appeals No.302/2021 and 166/2023 are dismissed.
- (vi) All the Criminal Appeals are disposed of.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

fmp/-