



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 296 OF 2002

1. Vijay S/o Gopinath Shinde,
Age : 24 years, Occ : Agri,
R/o Mahur, Tq. Shrirampur,
Dist. Ahmednagar.
2. Gangadhar s/o Gopinath Shinde,
Age : 37 years, Occ : Agri,
R/o as above.
3. Bapu alias Sonya Bapu S/o Goind
Shinde, Age : 34 years, Occ : Agri,
R/o as above.
4. Dattu S/o Govind Shinde,
Age : 25 years, Occ : Agri,
R/o as above.
5. Sharad S/o Gangadhar Shinde,
Age : 24 years, Occ : Agri,
6. Govind S/o Gangadhar Shinde,
Age : 55 years, Occ : Agri,
R/o as above.
7. Gopinath S/o Gangadhar Shinde,
Age : 52 years, Occ : Agri,
R/o as above.

... Appellants.
(Orig. Accused Nos. 1 to 7)

Versus

1. The State of Maharashtra,
through Virgaon Police Station,
Tq. Vaijapur, Dist. Aurangabad.
2. Shivaji Vishwanath Shinde,
Age : 53 years, Occ : Agri,
R/o. Mahur, Tq. Shrirampur,
Dist. Ahmednagar.

... Respondents.
(Orig. Complainant)

WITH

CRIMINAL APPLICATION NO. 1164 OF 2002

1. Dnyaneshwar s/o. Vishwanath Shinde,
Age : 38 years, Occu. Agri.,
2. Vishwanath Gangadhar Shinde,
Age : 73 years. Occ. : Agri,
3. Suresh S/o Vishwanath Shinde,
Age : 50 years, Occ. Agri,
4. Shivaji Vishwanath Shinde,
Age 43 years, Occ. Agri,

All R/o Naur, Tq. Shrirampur,
Dist. Ahmednagar.

... Applicants.
(No.1 Orig. Complainant)

Versus

1. The State of Maharashtra
2. Vijay s/o Gopinath Shinde,
Age : 28 years, Occ. Agri,
3. Gangadhar s/o Gopinath Shinde,
Age 40 years, Occ. Agri,
4. Bapu @ Sonya Bapu s/o Govind Shinde,
Age : 38 years, Occ. Agri,
5. Dattu s/o Govind Shinde,
Age : 25 years, Occ. Agri,
6. Sharad s/o Govind Shinde,
Age : 28 years, Occ. Agri,
7. Govind s/o Gangadhar Shinde,
Age : 48 years, Occ. Agri,
8. Gopinath s/o Gangadhar Shinde,
Age 56 years, Occ. Agri

... Respondents.
(Resp. Nos.1 Orig. Complainant,
Resp. Nos.2 to 8 are Orig. Accused)

...
Mr. V. R. Dhorde, Advocate for Appellants in APPEAL/296/2002
Mr. N. D. Batule, APP for Respondent – State.
Mr. M. G. Kolse Patil, Advocate for Applicant in Cri.APPLN/1164/ 2002.
...

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 22 FEBRUARY 2024

PRONOUNCED ON : 27 FEBRUARY 2024

JUDGMENT :

1. Both above appeal and application, i.e. appeal by convict, challenging the judgment and order of conviction and the application by original complainant praying for enhancement of sentence are arising out of judgment and order passed by learned IIIrd Ad-hoc Additional Sessions Judge, Aurangabad, dated 09.05.2002 in Sessions Case No. 213 of 1998.

FACTS IN BRIEF LEADING TO TRIAL

2. Informant and accused are not only relatives, but also adjoining land owners of each other. There is a common ridge separating their agricultural land. There is civil litigation over land Gut no.116. In above backdrop, it is the case of prosecution that when informant, and his brother, father, mother and wife of his brother were harvesting crop, accused party came, abused and mounted assault. There are allegations that accused Sonya Bapu caught Shivaji and thereafter accused Vijay inflicted axe blow on

the head of Shivaji, whereas accused Sharad Govind and Dattu Govind beat Shivaji with sticks. Rest of accused gave sticks blows on the thighs of father of the informant. Ladies also indulged in abuse and scuffle. When Shivaji was admitted in hospital, his brother Dnyaneshwar lodged report, on the strength of which crime was registered and investigated by PW7 PI Shivaji Patil.

Upon trial, learned trial Judge convicted present appellants for offence punishable under sections 323, 324, 326, 143, 147 read with section 149 of Indian Penal Code (IPC). But, instead of sentence, they were given benefit of section 360 of Cr.P.C.

Aggrieved by the above, exception has been taken by convicts by preferring instant appeal.

SUBMISSIONS

3. Learned counsel for appellants would submit that, admittedly, informant and accused party are relatives as well as neighbours of each other. That there is a civil dispute over possession of Gut no.116. It is pointed out that, there are cross complaints. However, learned trial Court has not appreciated the prosecution evidence in its correct perspective. He would submit that, without any evidence, learned trial Court has recorded

finding that appellant convicts are aggressors. That, in fact, there was no material to reach to any conclusion of such sort. He submitted that, even recovery and discovery is doubtful. Even actual spot of occurrence has not been proved beyond reasonable doubt and when rather prosecution has failed to establish the genesis itself, it is his submission that, findings and conclusions are not legally sustainable.

4. Respondent - original complainant, who had instituted complaint found fault to the extent of offence for which guilt is recorded and even prayed for recording guilt for offence under section 307 of IPC and to further enhance the sentence. According to him, there is overwhelming evidence about use of deadly weapon that too on vital part and moreover when medical expert in witness box had categorically stated that injury over the injured Shivaji was life threatening, it is his submission that, charge of section 307 of IPC ought to have brought home, but learned trial Court instead brought down the offence and convicted appellant under section 326 of IPC without assigning sound reasons. He seeks reliance on following rulings :-

1] *Surendra Singh Rautela @ Surendra Singh Bengali v. State of Bihar, AIR 2002 SC 260*

2] *Sumer Singh v. Surajbhan Singh & Ors., AIR 2014 SC 2840.*

5. On behalf of State, learned APP also supported the above submissions of complainant and submitted that, there is sufficient evidence for attracting offence under section 307 of IPC, however learned trial Court has not appreciated the evidence in required manner. He supports the judgment to the extent of holding appellants guilty for mounting assault in the capacity of aggressors.

EVIDENCE BEFORE TRIAL COURT

6. It seems that, in support of said charge, prosecution has examined in all 7 witnesses. The sum and substance of their evidence is as under :-

PW1 Dnyaneshwar, informant deposed that, accused Govind and Gopinath are his uncles and others are their sons and one grand son. Land Gat no. 226 stands in the name of his father. That day, around 9:00 a.m. to 10:00 a.m., when he, his brother Shivaji, father Vishwanath, Mirabai, Hirabai and Sindubai were working in the field, accused came, questioned them for harvesting crop. Thereafter, accused Sonyabapu caught his brother Shivaji, Vijay gave axe blow on the head of Shivaji, whereas accused Sharad and Dattu gave stick blows on the back of Shivaji. Rest of the accused also beat to his father. Because of the blow, Shivaji suffered bleeding injury and was initially taken to Vaijapur

hospital, but thereafter referred to Aurangabad. He lodged report (Exh.22) at police station.

PW2 and **PW3** panchas to spot panchanama and recovery panchanama, have not supported the prosecution.

PW4 injured Shivaji stated that, incident had occurred in Gat no. 116 on 22.02.1998. Accused persons asked them not to harvest crop. They abused. Sonya Bapu held him, whereas Vijay gave blow with axe on his head. Dattu and Sharad hit him with sticks. Govind, Gopinath and Gangadhar hit his father with sticks, whereas Sonya Bapu, Sharad and Dattu beat his brother. Because of axe blow, he suffered bleeding injury and was treated at Aurangabad for 7 to 8 days.

PW5 Dr. Govind Narvane, who deposed that, on 22.02.1998 he examined Vishwanath and noticed following injuries :-

- "1) Contusion over right thigh 6 x 4 cm.
 - 2) Contusion over left thigh 10 x 5 cms.
- Age of both injuries within 6 hours caused by hard and blunt object, nature was simple."

He examined Shivaji and noticed following injuries :-

- "1) Contused lacerated wound on right tempere-parietal region of scalp 6x3x2 cm.
- 2) Head injury with hemorrhage
age of both injuries within 3 hours."

He identified certificates Exh.33 and 34.

PW6 Dr. Anagha Warudkar, another doctor deposed at Exh.44 that, she was carrying medical papers of admission of Shivaji.

PW7 PI Shivaji Patil, the Investigating Officer, who narrated all steps taken by him during investigation till filing of charge-sheet.

ANALYSIS

7. On carefully going through the substantive evidence, here, Shivaji seems to be the prime victim of injuries. His brother Dnyaneshwar has reported the occurrence. Both in their chief have consistently deposed that, in the morning around 9:00 a.m. while they both, their parents and other ladies were working in the field, accused persons came, abused and prevented them from harvesting crop. Both are consistent about Shivaji being held by Sonya Bapu and axe blow given by Vijay and Sharad and Dattu giving stick blows to Shivaji and his father. Rest of the accused were also named for giving stick blows and kick blows.

8. Victim Shivaji has been examined and treated at Ghati Hospital. PW5 Dr. Govind Narvane, medical expert has described the injuries noticed on Vishwanath as well as Shivaji and had identified injury certificates (Exh.33 and 34). PW6 Dr. Anagha

Warudkar, another doctor has deposed that, there was CLW over right parietal region of Shivaji with evidence of depressed fracture to the parietal bone as well as fracture to the forearm.

9. Prosecution attempted to prove recovery by examining PW3 Dattu, but he has not supported the prosecution. However, Investigating Officer PW7 PI Shivaji Patil has deposed about memorandum of disclosure given by accused Vijay from whom axe has been recovered. The said memorandum and its panchanama is at Exh.26 and 27. There is no reason to discard said recovery, which is caused on 24.02.1998.

10. Therefore, above discussed evidence shows that, PW1 Dnyaneshwar, PW4 Shivaji, PW5 Dr. Govind and PW6 Dr. Anagha Warudkar confirmed occurrence as well as injury. On visiting cross of PW1 Dnyaneshwar and PW4 Shivaji informant and injured, it is evident that, not only occurrence is confirmed but even presence of accused is virtually admitted. Genesis is civil dispute and possession of agricultural land. Litigation to that extent is admittedly pending.

11. Judgment of conviction is primarily questioned on the ground that learned trial Court has brandished accused party as aggressors. According to learned Counsel, there is no evidence to

that extent. However, admittedly both parties, though relatives, are loggerheads over actual holdings in Gat no. 116 i.e. 6 acres and 2 acres respectively. Here, spot panchanama has not been proved. However, there is no issue or dispute that it is the accused party, who had gone towards complainant party, abused and then mounted assault. Therefore, taking such act of accused into consideration and when actual ownership and possession of spot/scene of occurrence being undecided, *prima facie*, accused party having gone near complainant party as is evident from the testimony of PW1 Dnyaneshar and PW4 Shivaji, there is no hesitation to hold that, accused persons initiated the action. Therefore, finding of trial Judge holding accused party aggressor cannot be faulted with. Here, main occurrence of assault has been proved, there is use of axe and sticks. Medical experts confirmed injuries.

12. Therefore, in the considered opinion of this court, taking the background, nature of articles used and circumstances into consideration, occurrence gravitated for offences under sections 326, 323 and 324 of IPC for which guilt has been recorded. There is no patent perversity or illegality in the guilt recorded by trial court.

13. As regards to application of complainant seeking recording guilt for section 307 of IPC and enhancing sentence is concerned, though it has come in the evidence of medical expert PW5 Dr. Govind Narvane that, injury was likely to cause death, taking into consideration, the background in which incident took place, the element of very intention to kill is patently missing and therefore, prayers raised for recording guilt under section 307 of IPC instead of 326 of IPC cannot be considered. No case is made out for converting offence to 302 and 307 of IPC or even enhancing sentence. Hence, I proceed to pass the following order :-

ORDER

1) Criminal Appeal No.296 OF 2002 is hereby dismissed.

2) Criminal Application No.1164 of 2002 is hereby rejected.

(ABHAY S. WAGHWASE, J.)