



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 501 OF 2002

1. Rama s/o Shahurao Borude,
Age 35 years, Occupation agriculture,
2. Shivaji s/o Bhaurao Borude,
Age 21 years, Occupation agriculture,
3. Bhaurao s/o Shahurao Borude,
Age 47 years, Occupation agriculture,

All R/o Sindhi Kalegaon,
Taluka and District Jalna.

... Appellants

[Orig. Accused nos. 1, 3 & 4
respectively]

Versus

State of Maharashtra

... Respondent

.....
Mr. Joydeep Chatterji, Advocate for the Appellants.
Mr. K. K. Naik, APP for the Respondent-State.
.....

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 27.06.2024

Pronounced on : 05.07.2024

JUDGMENT :

1. Getting dissatisfied by the judgment and order passed by 1st Adhoc Additional Sessions Judge, Jalna dated 19.08.2002 in Sessions Case no. 114 of 2000, convicting the appellants herein for commission of offence punishable under Sections 324 and 304 Part II of the Indian Penal Code [IPC], the instant appeal has been preferred by the convicts.

PROSECUTION STORY IN NUTSHELL IS AS UNDER

2. Informant and accused are neighbours and they share common *bandh*. There used to be quarrels on account of keeping fodder on the *bandh*. On 16.05.2000, around 8.00 a.m., informant PW1 Sk. Mohammad was working in the field. In the backdrop of keeping fodder over the *bandh*, quarrel took place. Accused nos. 1 to 4 came there. Accused no. 1 Rama and accused no.3 Shivaji were armed with axe, accused no.2 Ashok had stick in his hand and accused no.4 Bhaurao had sword in his hand. Accused no.4 Bhaurao gave blow of sword on the head of Chotu. Accused no.3 Shivaji gave blow of axe on the head as well as back of Hasan. Accused no.1 gave axe blow on the head of informant and also gave blow from blunt side of axe on back and left wrist of informant. Accused no.2 dealt stick blows on all. Injured were taken to hospital. On statement of PW1 Mohammad, crime was registered. PW9 API Jadhav conducted investigation and after gathering evidence, chargesheeted accused persons.

3. On committal, learned 1st Adhoc Additional Sessions Judge, Jalna tried accused nos. 1 to 4 vide Sessions Case No. 114 of 2000, for offence punishable under Sections 302, 324 r/w 34 of IPC and under Section 25(4) r/w 17(1) of the Arms Act. At trial, prosecution adduced oral evidence of in all 10 witnesses and relied on

documentary evidence. After appreciating the oral and documentary evidence, learned trial Judge passed the following order:

“Accused nos. 1 and 4 are convicted for the offence punishable under Section 324 of Indian Penal Code and sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.1,000/- [Rs. One Thousand] each, in default to suffer rigorous imprisonment for three months.

Accused no.3 Shivaji is convicted for the offence punishable under Section 304, Part II of Indian Penal Code and sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs.1,000/- (Rs. One thousand), in default rigorous imprisonment for three months.

Set off be given to accused No.3 as per Section 428 of Criminal Procedure Code from the date of his arrest.

Accused No.2 Ashok is acquitted for the offence punishable under Section 302 and 324 of Indian Penal Code.

Accused Nos. 1 to 4 are acquitted for the offence punishable under Section 25(4) read with Section 17(1) of Arms Act.

Bail Bonds of accused No.2 shall stand cancelled.

Accused Nos. 1 and 4 to surrender their bail.

Muddemal be destroyed after appeal period is over.”

SUBMISSIONS

On behalf of the Appellants :

4. Taking exception of the impugned judgment, learned counsel would submit that there is already history of quarrel and enmity. There is a cross complaint. As regards the conviction of present appellants is concerned, he submits that on visiting cross of prosecution witnesses, their versions are found to be full of inconsistencies, contradictions and omissions, which are material in nature and as such, testimonies of prosecution witnesses are not full-proof and worthy of credence. According to him, ocular account and medical account also does not tally. He submitted that in this case, accused persons have also suffered injury in the same occurrence. Therefore, it was required to be established by prosecution as to who was the aggressor, but the same has not been done. That ,prosecution also failed to explain injuries suffered by accused persons. There is only interested witness account and no independent evidence. Learned counsel also doubted the so called recovery under Section 27 of the Evidence Act. Hence, he criticizes the findings and conclusion reached at by the trial court and seeks interference by allowing the appeal.

On behalf of the State :

5. In answer to above, learned APP also took this court through the testimonies of prosecution witnesses and would submit that occurrence has been cogently and positively proved by not only adducing evidence of direct eye witnesses, but even injured eye witnesses. There is medical evidence supporting injuries suffered by prosecution witnesses. There is prompt report. Deadly weapons were used and the same are recovered and therefore, case of prosecution has been proved in the trial court itself beyond reasonable doubt and so, according to learned APP, guilty so recorded by learned trial court cannot be faulted at and he prays to dismiss the appeal for want of merit.

ROLE AND STATUS OF THE PROSECUTION WITNESSES AND SUM AND SUBSTANCE OF THEIR EVIDENCE

6. It seem that prosecution has adduced evidence of following 10 witnesses in support of their case.

PW1 informant Sk. Mohammad, at Exhibit 44 stated about disputes between his cousin brother Chotu and accused persons over storing fodder on the *bandh* which was common. According to

him, in the field that day at 8.00 a.m., hearing quarrel, he himself, Hasan and wife of Hasan went there. They saw accused persons abusing Chotu. He described the articles held by all four accused persons and further deposed about who hit where to which of the accused and thereafter, they suffering injuries and being shifted to hospital and there, his statement being recorded by police, which is at Exhibit 45. He deposed that Hasan died in the hospital on the next day.

PW2 Sk. Chotu in his evidence at Exhibit 47 stated that around 8.00 a.m., while he was working in the field, accused nos. 1 and 3 came and questioned him for keeping fodder on the *bandh* and there to be hot exchange of words between him and Ram. Hearing it, complainant and deceased Hasan came there. Meanwhile accused no.4 Bhaurao and his son accused no.2 Ashok also came there. He also gave details of the assault made by accused with articles like axe, sword and stick and they being brought to village and from there to hospital and injured Hasan died in the hospital on the next day.

PW3 Trimbak claims that his field and field of deceased Hasan is adjacent to each other. According to him, after hearing noise of quarrel, he went there and saw Hasan lying on the ground in injured condition. According to him, there was quarrel on account of storing fodder on the *bandh*. He marked presence of all four accused at the spot. He also claims that he saw sword in the hand of accused no.4 Bhaurao, axe in the hands of accused nos. 1 Ram and 3 Shivaji and accused no.2 Ashok to be

armed with stick. On seeing Hasan in bleeding condition, he claims to have gone back to his field.

PW4 Jainabbi, wife of deceased Hasan, also stated that hearing commotion, she and her husband went. Accused nos. 1 to 4 were present at the spot. Quarrel was going on, on account of fodder stored on the *bandh*. According to her, when her husband tried to convince accused, accused no.4 assaulted him and Chotu @ Kathhu with sword. Her husband suffered injury. Accused no.3 Shivaji gave blow with axe on the left side of head of her husband causing bleeding injury, and accused no.1 Ram gave axe blow on the back of Hasan. Accused no.3 pushed her and made her fall down. Her husband Hasan died on the next day.

PW5 Md. Parsuwale is the pancha to memorandum of disclosure. He stated that accused no.3 Shivaji gave memorandum Exhibit 54 and from the field of accused no.4, he took out axe and same being seized by panchanama Exhibit 55. He further deposed that accused no.4 Bhaurao gave memorandum Exhibit 56 and produced sword from his field which also came to be seized vide panchanama Exhibit 57. He identified both weapons i.e. axe and sword.

PW6 Girdhari, is pancha to memorandum of disclosure Exhibit 60 at the hands of accused Ram and seizure of axe vide panchanama Exhibit 61.

PW7 Dattu, is Pancha to memorandum of disclosure Exhibit 63 at the hands of accuse Ashok and seizure of stick vide panchanama Exhibit 64.

PW8 Dr. Ambhore, medical expert, who examined injured Hasan and referred him to Government Medical College and Hospital, Aurangabad. He examined Chotu and issued certificate Exhibit 72. He also examined Mohammad and issued certificate Exhibit 73 and he identified said certificates.

PW9 API Jadhav is the Investigating Officer.

PW10 Dr. Jinturkar is the autopsy doctor, who conducted postmortem on the dead body of Hasan and issued opinion regarding cause of death to be due to head injury in the form of contusion of brain in intra cranial haemorrhage due to fracture of skull bone. He identified postmortem report Exhibit 85.

ANALYSIS

7. On critical analysis, it is emerging that according to PW1 to PW4, occurrence has taken place on 16.05.2000. It is beyond dispute that there were quarrels and dispute in the backdrop of storing fodder on the common *bandh* and occurrence in question is a fallout of the same.

8. Testimony of **PW1** informant Mohammad shows that on that day, there was quarrel between accused and Chotu (PW2) and hearing noise, informant claims that he himself, deceased Hasan and his wife Jainabbi went there. According to him, all four accused were abusing Chotu (PW2). He claims that he saw sword in the hand of accused no.4 Bhaurao, axe in the hands of accused no.3 Shivaji and accused no.1 Rama, whereas accused no.2 Ashok had a stick. Defining roles, he stated that accused no.4 gave blow with sword on the head of Chotu, which was obstructed by him by his hand, but he suffered injuries both, to his hand as well as head. Whereas, when Hasan tried to save Chotu, accused no.3 Shivaji dealt a blow with axe on the back side of head of Hasan, causing him bleeding injury and Hasan sat down. When he sat down, again accused no.3 Shivaji dealt a blow on the back of Hasan by axe. When this witness went to see Hasan, that time, accused no.1 Rama dealt a blow with axe, i.e. from blunt side, on his back and left wrist, whereas, accused no.2 Ashok assaulted all with stick.

9. Placing testimony of **PW2** Chotu in juxtaposition to PW1, as regards the occurrence and overt act is concerned, according to PW2, he was working in the field. That time, accused nos. 1 and 3 i.e. Rama and Shivaji came and questioned him as to why fodder was kept on

the *bandh*. This was followed by hot exchange of words. Hearing it, informant PW1 Mohammad and deceased Hasan came there. By that time, even accused nos. 2 and 4 i.e. Ashok and Bhaurao also came there. According to him, accused no.4 Bhaurao gave blow with sword on his head and when he obstructed it with hand, he sustained bleeding injury on his wrist as well as to his head. When Hasan and Mohammad (PW1) tried to save him, accused no.1 Rama gave blow of axe on the head of informant Mohammad, whereas accused no.3 Shivaji dealt axe blow on the head of Hasan from back side, as a result of which, Hasan sat. That time, accused no.3 gave one more blow with axe on the back of Hasan. He initially stated that the blow was given from sharp side, but again corrected and stated that it was from the blunt side. He claims that accused no.2 Ashok assaulted him, informant Mohammad and even Hasan with stick.

10. **PW4** Jainabbi, i.e. wife of Hasan, regarding the occurrence, stated that hearing commotion in the field, she and her husband Hasan went there. She marked presence of all four accused at the spot. She deposed about there to be quarrel on account of fodder stored on the *bandh*. Her husband tried to convince accused. That time, accused no.4 Bhaurao assaulted Kathhu (Chotu) and also inflicted injury on her husband i.e. on his hands. Accused no.3 Shivaji

dealt blow with axe on the left side of head of her husband, as a result of which, he suffered bleeding injury and he sat down. Thereafter, again accused no.1 Ram dealt axe blow on the back of her husband. She tried to rescue, but accused no.3 pushed her.

11. **PW3** Trimbak is the immediate neighbour of Hasan and according to him, around 8.00 a.m., hearing noise of quarrel, he went and saw Hasan lying on the ground with bleeding injury. There was quarrel on account of fodder stored on the *bandh*. He marked presence of Hasan, Kathhu, Mohammad and accused nos. 1 to 4 to be present there. He deposed about there to be quarrel between accused and Hasan, Kathhu, Mohammad. He claims to have seen sword in the hand of accused no.4 Bhaurao and axe in the hands of accused Ram as well as accused no.3 Shivaji. Accused no.2 had stick and stone in his hands. Seeing blood oozing from the head of Hasan, he got frightened and he went back to his field.

12. Minutely examined the cross faced by above witnesses, i.e. PW1, PW2 and PW4.

13. When being cross-examined by learned counsel for accused nos. 1, 3 and 4, **PW1** Mohammad stated that he reached police station at

9.00 a.m.. He answered that he told police constables Joshi and Choudhari how they were assaulted and gave names and details of weapons used. He also stated that such talks were only for two minutes with the police constable. He further answered that police did not write down whatever was stated. Rather, his statement to be recorded after two to three hours in the hospital. He answered that Doctor did not tell police that he was fully conscious when his statement was recorded, and that police did not read over his complaint. He stated that he only caused signature as he could not read and write. Portion marked "A" is brought to his notice, regarding Hasan, Lallu and Ramzan to have intervened and separated the parties. He also answered that portion marked "B" in his supplementary statement to be incorrect. Then he is questioned about the events taking place after arrival of Jainabbi. He is further questioned on previous occurrence. In para 4, this witness has admitted that on the day of incident, accused Shivaji and Ram were working in the field and there to be hot exchange of words between Chotu and them. He also answered that all accused assaulted at one and the same time. He is unable to state number of blows of stick given to deceased Hasan but answered that blow with blunt side of axe was given on the back of Hasan. He answered that he did not notice any wound on the person of accused nos. 1, 2, 3 and 4, but

admitted that accused were with them in the hospital and were treated. He denied that they attacked accused in the field of accused no.4. Omissions are brought regarding Jainabbi and Hasan coming to the rescue, all accused abusing Chotu, about accused no.4 giving blow of sword on the head of Chotu, but it being obstructed, accused no.3 giving blow with axe on the head of Hasan from back side and accused no.1 gave blow with axe on his back and arm of this witness. But he is unable to state why such portion is not appearing in his complaint.

While facing cross at the hands of learned counsel for accused no.2, he is unable to state who informed about the occurrence in the village and that he does not know whether any memo note was given to the injured by police. He answered that he put thumb impression on the next day when his complaint was read over.

14. **PW2** Chotu, in his cross regarding the occurrence, in para 3 answered that quarrel did not take place at the spot where heated exchange of words was going on. He denied having any axe or stick in the hand and also denied that he himself, Hasan and Mohammad going to the field of accused no.4. He also answered that he did not see any wound on the person of accused that day. He answered that

when Hasan fell, there were no stones at that spot. He answered that from the hospital, he went to jail. Omissions are brought in para 4 about injuries suffered by him on the back. He is also unable to state to whom accused no.2 assaulted with stick and on which part. He answered that he does not remember whether he informed police that accused no.4 gave blow with sword on his head and he obstructed it with his hand and that deceased Hasan and Mohammad tried to save him. He is also unable to state whether blow was given from the sharp side of axe or blunt side of axe. Omission is brought about accused running away from the spot.

15. Likewise, in cross of **PW4** Jainabbi, she answered that she did not see blood on the spot where Hasan fell down. She stated that her clothes were stained but she did not show it to police. She is asked the measurement of injury on Hasan. Regarding occurrence, she answered that she did not state to the police that accused Bhaurao assaulted Kathhu with sword. She answered that she stated that accused no.4 gave blow of sword on the hand of Hasan and she also stated to police that after Hasan sat on the ground, accused no.1 Ram gave blow with axe on the back of Hasan. She is unable to state why these facts were not appearing in her statement.

16. As regards **PW3** Trimbak is concerned, he denied that Bhaurao also suffered bleeding injury on his head and was lying on the ground. He denied stating portion marked "A" in the statement to police.

17. From the above substantive evidence of PW1 Mohammad, PW2 Chotu and PW4 Jainabbi, it has come on record that around 08.00 a.m. that day, quarrel took place between accused persons and PW2 Chotu. This is consistently stated by all three witnesses. On careful scrutiny, it is also emerging that all three witnesses are also consistent and unanimous as to which of the accused was armed with which of the article. PW1 and PW2 i.e. informant Mohammad and Chotu as well as PW4 Jainabbi are consistent as to who received blow on which part of the body.

18. PW3 Trimbak, an independent witness, immediate neighbour, has also deposed about seeing Hasan already lying on the floor and he has also categorically marked presence of all four accused. This independent witness has stated that there was sword in the hand of accused no.4 Bhaurao and axe in the hands of accused no.1 Ram and Shivaji, whereas accused no.2 had stick. Therefore, there is overwhelming as well as clinching evidence about accused coming armed with articles like sword, axe and stick.

19. All injured were referred by police to the hospital. **PW8** Dr. Ambhore deposed about examining Hasan and referring him to Government Hospital and examining PW2 Chotu for suffering incise wound with sharp object and injury to be simple in nature. Likewise, he examined PW1 Sk. Mohammad for suffering incise wound on left parietal region with sharp object and two contusions. Injury certificates Exhibits 71, 72 and 73 authored by him are identified by him. Doctor also admitted for not mentioning edges and margins of the incise wounds. Rest of the questions seem to be general in nature, i.e. on medical jurisprudence. Consequently, here, the consistent direct and injured witnesses' account is finding support from medical evidence.

20. Panchas to the memorandum and recovery are examined as **PW5**, **PW6** and **PW7**, causing recovery of axe from both, Shivaji and Ram, sword from Bhaurao and recovery of stick from Ashok. In the light of such evidence, offence of Section 324 IPC is clearly made out against accused nos. 1 and 4 who were armed with articles like axe and sword.

21. All witnesses are consistent about accused Shivaji initially giving blow of axe on the head of Hasan causing him bleeding injury

and again, second blow was dealt by him, though with blunt side, but on the back of Hasan. Taking his such role into consideration, and considering the fact that Hasan succumbed on the next day, he is responsible for offence causing homicidal death not amounting to murder. Therefore, he is guilty for commission of offence punishable under Section 304 Part II of IPC.

22. As regards accused no.2 Ashok is concerned, against whom there are allegations of using stick, it has not come in medical evidence specifying any injury suffered by injured to be due to stick. According to the informant, he allegedly used stick in beating all injured. Therefore offence is clearly made out only against accused nos. 1, 3 and 4. It is noticed, while hearing learned counsel appearing for the accused, that they were more focused only on the aspect that their clients are also victims of assault. They have not succeeded in raising doubt against prosecution version as regards to role of convicts is concerned.

23. Perused the judgment under challenge, apparently, learned trial court has correctly appreciated the testimonies of PW1, PW2, PW4 as well PW3 and has held that offence under Section 324 IPC has been made out against accused nos. 1 and 4. Considering the role of

accused no.3 Shivaji, he is rightly held guilty for commission of offence under Section 304 Part II of IPC. The appreciation is in consonance with the available evidence and as such, there is no reason to disturb the well reasoned findings. Hence, I proceed to pass the following order:

ORDER

The appeal is hereby dismissed.

[ABHAY S. WAGHWASE, J.]

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