



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

CRIMINAL APPEAL NO. 723 OF 2002

Mohd. Ismail Mohd. Nabisab,
Age : 42 years, Occu. : Motor Mechanic,
R/o. Degloor Road, Nanded,
Tq. & Dist. Nanded.

... Appellant
(Orig. Accused)

Versus

The State of Maharashtra

... Respondent

...
Mr. H. I. Pathan, Advocate for Appellant.
Mr. N. D. Batule, APP for Respondent - State.
...

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 11th MARCH, 2024

PRONOUNCED ON : 18th MARCH, 2024

JUDGMENT :

1. Judgment and order of conviction passed by learned Additional Sessions Judge, Nanded dated 03.12.2002 convicting accused for offence punishable under section 326 of Indian Penal Code (IPC) in Sessions Case No. 220 of 2000, is herein assailed by convict by filing instant appeal.

FACTS LEADING TO THE TRIAL ARE AS UNDER

2. Deceased Vasant was engaged as a servant/labour in the field by accused. On 15.02.2000, deceased Vasant demanded money from his Master i.e. accused for going back to his native

while they both working in the agricultural field. On refusal to pay, there was heated exchange of words between both of them. Accused got annoyed because of the arrogant behaviour of deceased Vasant and so he gave blows with sugarcane stalk on the head of deceased Vasant, as a result of which, he fell down. He was taken to hospital, but on examination he was declared dead. Therefore, on the basis of information given by Santosh, Ardhapur police station registered crime for offence punishable under section 302 of IPC.

3. Upon completion of investigation, accused was charge-sheeted and was finally tried by learned Sessions Judge, Nanded, who on appreciation of evidence, both oral and documentary, held that case of section 302 of IPC is not made out, however offence under section 326 of IPC is attracted and thereby convicted appellant.

Hence the appeal.

SUBMISSIONS

On behalf of Appellant :

4. Learned counsel for appellant pointed out that, there is false implication. According to him, deceased was in drunken state at the time of alleged incident. That, when his demand of money was not complied, he threatened to touch live electric wire and

therefore was prevented. While going he accidentally fell and landed on sugarcane stump and suffered injuries. There was no assault or beating as alleged.

5. According to learned counsel, it is the case of prosecution that blow was given on right side, but injury is noticed by doctor on the left side. Therefore there is mismatch between ocular account and medical account. Thereby rendering the occurrence itself doubtful.

6. Learned counsel further submitted that, very star witnesses namely PW1 Motiram, PW2 Devidas, PW4 Ramchandra and informant PW5 Santosh have not supported the prosecution. That, they have turned their back from prosecution version. He pointed out that, even panchas have not supported prosecution. Therefore, evidence of prosecution was palpably weak. However, learned trial court has still taken into account such testimonies of very hostile witnesses and has recorded guilt. He further pointed out that, even medical expert (PW6 Dr. Rajendra Kagne), who has conducted post mortem, has admitted about injury to be possible on account of fall. Therefore, apparently there was no convincing or legally acceptable evidence about alleged assault. There is no nexus between assault and death. That, even alleged article is a

mere sugarcane stalk and not deadly or dangerous weapon. However, still learned trial court has accepted the prosecution story and recorded conviction for offence punishable under section 326 of IPC.

7. He next submitted that, evidence of prosecution is full of doubt. Even under section 313 of Cr.P.C. accused has given explanation that deceased fell while under influence of liquor. Therefore, there was no case or any offence made out against accused, but still learned trial court has convicted him. That, there is improper appreciation. Law has also not been correctly appreciated and therefore the conclusion reached at being not sustainable in the eyes of law, he prays to allow the appeal by setting aside the impugned judgment.

On behalf of State : -

8. Per contra, learned APP pointed out that, unfortunately, though prosecution witnesses have not supported the prosecution, however he pointed out that their entire testimonies was not liable to be discarded. That, so much part of the testimonies, which were useful to the prosecution has been taken into account by learned trial Judge. Occurrence is getting unfolded from their testimonies. There is eye witness account.

Medical expert has confirmed the injury and even death is due to said assault. That, possibility of multiple injuries in a single fall are not possible. Death is only due to assault. Therefore, there being convincing evidence, he submitted that, learned trial court has committed no error whatsoever in holding the case of prosecution proved under section 326 of IPC.

EVIDENCE ON RECORD

9. After considering the submissions advanced by both sides and on going through the trial court papers, it seems that case of prosecution is rested on evidence of in all 08 witnesses. Their status and sum and substance of their evidence is as under : -

PW1 Motiram, who is examined at Exh.6, stated that, he was working as a labour in the agricultural field of appellant. Along with him one Devidas was also working as a labour. The said incident took place at around 2:00 to 3:00 p.m. According to him, deceased Vasant came to the agricultural field owned by accused in drunken condition and he was going towards electric starter. He was prevented from getting shock by other servant. That time, accused assaulted Vasant by means of sugarcane plant, as a result of which, he fell down. Accused asked to serve him water, but deceased could not drink it or gulp it. That, deceased was shifted from said spot to a spot beneath a mango tree and he had died.

While under cross he admitted that, police threatened to implicate him and as police beat him, he named accused. He also admitted that, because Vasanta was drunk, he was ousted from that place and while returning from that place, deceased Vasant had fallen and suffered injuries.

Therefore, this witness when was found supporting accused, he was again cross examined by learned APP by seeking permission.

PW2 Devidas deposed that, while he was working on the day of incident, deceased came in drunken condition and sought leave of two days and also demanded money to go to his village. When he refused, deceased started demanding money from accused i.e. Master, who told him that, money was already given to the munim and he shall obtain from him. However, still deceased insisted accused to pay him and threatened that he would go and catch hold of electric starter. While he was proceeding, on the directions of Master this witness drove away Vasant and while returning deceased fell down.

That, finding him not supporting, he was cross examined by learned APP.

PW3 Vishwambhar, inquest panch, deposed about panchanama (Exh.10) being drawn.

PW4 Ramchandra deposed that, at police station he was told that seizure panchanama was to be drawn and he accompanied police to the village Delub and taken to one agricultural land and police pointed to the sugarcane plant and seized it by drawing panchanama. Hence, even he did not support prosecution.

PW5 Santosh claimed that, on that day, he came to know from Motiram that Vasant was died and lying in the land. One complaint was written at police station and his thumb impression is obtained. Therefore, informant also did not support prosecution.

PW6 is the autopsy doctor, who noted following external injuries :-

- “(1) Contusion on right ear pinna on upper part 2-¹/₂ cm x 2 cm reddish-brown in colour.*
- (2) Contusion at right cheek, 2-¹/₂ cm x 1-¹/₂ cm. near maxilla, reddish in colour, and*
- (3) Abrasion of 2 cm. x 1-¹/₂ cm. at lower back over spine, black scab seen.”*

According to him, on internal examination it was revealed that deceased had suffered contusion at right temporal region admeasuring 3 cm. x 2 cm reddish and contusion at right frontal region of 2 cm. x 1½ cm reddish. According to him, cause of death being “subarachnoid hemorrhage and pulmonary odeama” and said internal injuries noticed by him were sufficient in the ordinary course of nature to cause death.

PW7 Daroji Kandhare is the police official, who was a PSO, who had noted complaint given by cousin of deceased and handed over investigation to **PW8** PSI Subhash Shete, who is the Investigating Officer and he narrated all steps taken by him during investigation.

10. Record shows that, initially charge was framed for offence under section 302 of IPC and trial was also undertaken. However, guilt is recorded only for offence under section 326 of IPC, which is also now taken exception to.

11. Case of prosecution in nutshell is that, deceased demanded money from his Master i.e. accused. There was altercation of words and accused assaulted deceased with sugarcane stalk, i.e. on the head of deceased, which resulted his death.

12. The fundamental objection raised in appeal is that firstly including informant, so called eye witnesses have also not supported prosecution having turned hostile and secondly sugarcane stalk is not deadly or dangerous weapon so as to attract offence of 326 of IPC.

13. We proceed to the above objections in sequence.

14. No doubt, including informant other co-workers i.e. PW1 Motiram, PW2 Devidas and PW4 Ramchandra, though deposed about deceased coming to the field that day, they are all found to be consistent about arrival of deceased in drunken condition. On carefully sifting evidence of PW1 Motiram, he is found to be categorical about accused assaulting deceased with sugarcane plant and deceased falling. Though subsequently, he has supported accused by admitting that, Vasant fell on the sugarcane crop and suffered injury. PW2 Devidas has deposed about deceased falling down. But he does not speak about any overt act of accused. PW5 Santosh informant deposed that on the day of incident, he was working in agricultural land of his master and he came to know from Motiram about Vasant lying in the land. But, in cross at the hands of learned APP, he admitted that, he also learnt from Motiram about demand of money being made by accused. He

denied assault by accused, but again stated that he gave FIR against the accused, which was reduced by police and read over to him. Thereafter he gave T.I.. He admitted that contents which were read over to him in the FIR are correct. Therefore, while under cross at the hands of learned APP, he has vouched to the correctness of contents of FIR.

PW2 Devidas also did not support the prosecution.

15. Therefore, above witnesses of prosecution including informant have infact resiled from their earlier versions.

16. Law is fairly settled that even if a witness turns hostile, his entire testimony need not be discarded. That, much part of his testimony which supports prosecution, can definitely be not only taken recourse to, but even relied, if that much part corroborates story of prosecution. The relevant rulings on this point are as under :-

In ***Sat Paul v. Delhi Administration*** (1976) 1 SCC 727, the Hon'ble Apex Court cautioned that *"even if witness is treated as "hostile" and is cross examined, his evidence cannot be written off altogether but must be considered with due care and circumspection and that part of the testimony which is creditworthy must be considered and acted upon. It is for the*

Judge as a matter of prudence to consider the extent of evidence which is creditworthy for the purpose of proof of the case. In other words, the fact that a witness has been declared hostile, does not result in automatic rejection of his evidence. Even, the evidence of a “hostile witness”, if it finds corroboration from the facts of the case, may be taken into account while judging the guilt of the accused. Thus, there is no legal bar to raise a conviction upon “hostile witness testimony” if corroborated by other reliable evidence.”

Likewise law to this extent is also reiterated in the case of ***Dhananjoy Chatterjee @ Dhana v. State of West Bengal*** 1994 (2) SCC 320/[1994] 1 S.C.R. 37 and ***Bhajju v. State of M.P.*** (2012) 4 SCC 327.

The Hon’ble Apex Court in case of ***Koli Lakhmanbhai Chanabhai v. State of Gujrat***, AIR 2000 SC 210, observed that, “*it is settled law that, evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence.*”

17. Applying of a law, here it is found that, visit of deceased to the field of accused is apparently coming on record from the testimonies of all witnesses. PW1 Motiram a direct witness has categorically stated about accused assaulting with sugarcane plant. Medical expert confirms death due to subarachnoid haemorrhage/and pulmonary oedema, which is an internal injury. Investigation Officer, who visited spot on receipt of information, deposed about seeing swelling over the right temporal region above ear of deceased Vasant.

18. Therefore, there is evidence of direct witness finding support of medical witness. Death has taken place in the field itself. However, taking into account the background, in which incident took place, it is apparent that, incident had taken place all of a sudden and is a fall out of sudden quarrel. Sugarcane stalk which was in the field seems to have been put to use. Therefore, definitely there was no intention or premeditated act so as to attract offence under section 302 of IPC. Therefore, learned trial court has rightly held that it is not a case of homicidal death so as to attract of offence under section 302 of IPC.

Defence of accidentally fall cannot be entertained for the simple reason that there are multiple injuries which are not possible in single fall.

19. Second ground of challenge is that sugarcane stalk is not deadly weapon or dangerous weapon. It is true that, nowhere, in the IPC definition of either deadly weapon or dangerous weapon is provided. Provision under Section 326 of IPC thus find place reference to “dangerous weapon or means”.

20. Here, allegation is of use of sugarcane stalk. Head of deceased is reported to be targeted. Sugarcane stalk is in fact like a stick. No doubt, by no means it can be said to be a dangerous weapon as it is not an instrument shooting, stabbing or cutting or any instrument which used as a weapon of offence is likely to cause death. But as stated above, here, autopsy doctor has noticed impact i.e. contusion on upper part of right ear pinna along with contusion on maxilla and abrasion to lower back spine. Doctor has very categorical that, internal examination revealed contusion to right temporal region admeasuring 3 cm x 2 cm and contusion to right frontal region admeasuring 2 cm x 1¹/₂ cm. Doctor has noticed massive subarachnoid haemorrhage over the brain substance and death is said to be caused due to subarachnoid haemorrhage and pulmonary odeama. Doctor has further opined that, internal injuries are sufficient in ordinary course of nature to cause death.

21. But again, said beating is by sugarcane stalk in consequence to heated exchange of words, which had erupted in the backdrop of lending money. Therefore, it is not a pre-determined act. Article sugarcane stalk, which is in the nature of a stick seems to have been put to use. As stated above, it is not dangerous weapon. Hence, in the considered opinion of this court, it can not be said to be an attracting 326 of IPC, but it is an offence attracting of 325 of IPC i.e. voluntarily causing grievous hurt.

Resultantly, offence is required to be brought down from offence under section 326 of IPC to section 325 of IPC and is consequently required to be sentenced accordingly.

22. Perused the judgment under challenged. In spite of prosecution witnesses partly supporting and partly resilling, evidentiary value of hostile witness seems to have been rightly appreciated and due weightage is correctly given to their testimonies. Finding regarding death to be not homicidal is also correctly dealt and reached at. However, conclusion about offence of 326 being made out being erroneous, only interference to that extent is required to be. Hence, following order :-

ORDER

- (i) The criminal appeal is partly allowed.

(ii) The conviction and sentence awarded by the Sessions Judge, Nanded in Sessions Case No.220 of 2000 on 03.12.2002 to appellant Mohd. Ismail Mohd. Nabisab for the offence punishable under Section 326 of IPC, stands set aside.

(iii) Instead, appellant Mohd. Ismail Mohd. Nabisab is hereby convicted for commission of offence under Section 325 of IPC and is hereby sentenced to suffer rigorous imprisonment for two years.

(iv) Order of the trial Court as regards to payment of fine amount is maintained.

(v) It is clarified that there is no change in rest of the order of the trial Court.

(ABHAY S. WAGHWASE, J.)