



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 117 OF 2004

1. Bharat Bhagwan Choudhari
Age 22 years, Occ. Labourer,
R/o. Tuljapur, Tq. Tuljapur,
District Osmanabad.

2. Sachin Krushnath Kadam,
Age 22 years, Occ. Labourer,
R/o Tuljapur, Tq. Tuljapur,
District Osmanabad.

... Appellants
[Ori. Accused Nos. 1 & 2]

Versus

The State of Maharashtra

... Respondent

.....
Mr. S. G. Ladda, Advocate for the Appellant (through video
conference)

Mr. N. D. Batule, APP for the Respondent-State.

.....

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 29.07.2024

Pronounced on : 09.08.2024

JUDGMENT :

1. In this appeal, there is challenge to judgment and order of conviction recorded by Additional Sessions Judge, Osmanabad in Sessions Case No. 95 of 1999 recording guilt of appellant for offence under Section 304 Part II of the Indian Penal Code [IPC] on 10.02.2004.

FACTS IN BRIEF, LEADING TO TRIAL

2. Occurrence was noted on the statement of deceased Bhavani Shamrao Kadam, who, while in hospital, reported that on 21.03.1999, around 6.00 p.m., his daughter Nilam was sitting in the courtyard on a cot. A boy named Sachin Krishnath Kadam came and abused his daughter and therefore he was questioned by deceased, upon which, Bharat Bhagwan Choudhari and Sachin Krishnath Kadam counter-questioned him for questioning them and both gave kicks and fist blows on leg, neck, chest and abdomen causing blunt trauma. When his wife came to his rescue, she too was beaten by both. When he fell down, wife of deceased, Shashikant Gorse and Fulchand Shirsat (PW2) initially took him to police station and from there to hospital. There was loss of control over his limbs.

3. On above report, Tuljapur police registered crime bearing no. 42 of 1999 for offences under Sections 325, 323, 504 r/w 34 of IPC. During investigation, injured Bhavani died on 05.04.1999 and hence, investigation was handed to superior officer i.e. PSI Wagh (PW6) and Section 302 IPC was made applied. After conclusion of investigation, accused were chargesheeted, charge was framed for offence under Section 302 r/w 34 of IPC and they were tried by learned Additional

Sessions Judge, Osmanabad vide Sessions Case No. 95 of 1999. In trial court, prosecution adduced evidence of in all 7 witnesses and took recourse to documentary evidence, medical papers, postmortem report and various panchanamas. On appreciating and analyzing the evidence, learned trial Judge acquitted both appellants from charge under Section 302 of IPC, however, held offence under Section 304 Part II to be proved and on recording guilt for the said offence, sentenced both appellants to suffer 7 years imprisonment.

It is the above judgment dated 10.02.2004, which is assailed herein by filing instant appeal.

BRIEF ACCOUNT OF PROSECUTION EVIDENCE IN TRIAL COURT

4. The role and status and the sum and substance of the evidence of 7 witnesses examined by prosecution in support of its case is as under :

PW1 Kusum, wife of deceased, deposed about occurrence taking place at 6 p.m.. On hearing abuses, her husband went out of the house and questioned accused for abusing their daughter. According to her, both accused lifted her husband and dashed him on ground. They gave fist blows and kicks on back, neck and abdomen. When she tried to rescue, after catching hold of

her hair, she too was beaten. She, Shashikant and Fulchand brought her husband in auto rickshaw to police station and from there to Rural Hospital, Tuljapur, where her husband's statement was recorded and he was further referred to Civil Hospital Solapur. Her husband died after 14 days.

PW2 Fulchand deposed that his hut is 150 feet away from the hut of deceased Bhavani. Incident took place at 6.00 p.m. On hearing quarrel, he went there and saw accused giving fist blows and kicks on the face, neck, abdomen, chest and back of Bhavani. He gave call to Shashikant and they both separated the quarrel. Bhavani was lying in front of his hut and he was taken to police station and thereafter referred to Rural Hospital, Tuljapur.

PW3 Dr. Meena Godbole, Medical Officer at V.M. Medical College and General Hospital, Solapur, who conducted postmortem on dead body of Bhavani on 05.04.1999, gave opinion that probable cause of death of Bhavani was due to injury to spinal cord. She identified postmortem report and death certificate Exhibits 23 and 24 respectively.

PW4 Uttam, pancha to spot panchanama, did not support prosecution.

PW5 Police Head Constable Waghmode, who recorded statement of deceased at Rural Hospital, Tuljapur and on the strength of it, registered crime bearing no. 42 of 1999.

PW6 PSI Wagh, who conducted investigation and chargesheeted accused.

PW7 Dr. Sujata Patil, who examined Bhavani at Rural Hospital Tuljapur, deposed that police constable recorded statement in her presence. She thereafter referred the patient to Civil Hospital, Solapur for further treatment.

SUBMISSIONS

On behalf of the appellants :

5. Questioning the conviction, learned counsel for the appellants appraised this Court about prosecution version and also took this Court through the evidence of PW1 wife of deceased and PW2 neighbour. According to him, there are simplicitor allegations of giving kicks and fist blows. He pointed out that autopsy doctor has candidly, in examination-in-chief itself, deposed about not coming across any external injury and even there are no major findings on conducting internal examination. He took this court through the evidence of autopsy doctor and cross faced by her and also invited attention of the Court to the findings recorded by her in column no. 20 and specifically submitted that deceased was suffering from pneumonitis and would submit that death having taken place after 14 days of occurrence, by no stretch of imagination, case can be brought

even under culpable homicide not amounting to murder. That, it was a sudden incidence and there was no ill intention or motive.

6. He further submitted that probable cause of death is mere opinion evidence. That, here, in the instant case, there are other possibilities for deceased dying. Therefore, at the first count, when death had taken place after 14 days of the occurrence, according to him, framing charge under Section 302 IPC was itself unwarranted. According to him, it has not been further demonstrated that death was outcome of fist and kick blows allegedly given on the day of occurrence.

7. He further pointed out that prosecution has not bothered to collect and gather very hospital treatment papers. That, except evidence of two medical experts, there is nothing to show that death was due to alleged assault by appellants only and not otherwise. He emphasized that even otherwise, there are allegations of giving kicks and fist blows which, according to him, at the most would cause blunt trauma but surely not death. He submitted that, death is also possible because of pneumonitis of which deceased was diagnosed of as suffering from. That, there is also possibilities of death due to improper medical treatment and therefore, he criticized the findings

reached at by trial court regarding charge under Section 304 part II of IPC to be established.

8. It is his further submission that in alternative, the case at the most would attract charge of Section 323 IPC and it would not travel beyond it under any circumstances. Resultantly, he prays to interfere and seeks reliance on ruling of ***State by Vidyaranyaapuram Police Station, Mysore City v. Raju and others*** reported in 2006 SCC OnLine Kar 541 ; ***Rajesh Anantram Thakur v. State of Maharashtra*** 1992 SCC OnLine Bom 300 ; ***Ramnath s/o Mahadu Manal*** 1999 SCC OnLine Bom 920 and ***K. Ramachandra Reddy and another v. Public Prosecutor*** (1976) 3 SCC 618.

On behalf of the State :

9. In answer to above, learned APP submitted that, there is direct eye witness account of PW1 Kusum and PW2 Fulchand. That, PW2 Fulchand is an independent witness. They both are lending support to each other. Learned APP pointed out that there is injury to the spinal cord and there are notings to that extent in the PM report itself. He also relied on the testimony of autopsy doctor. He further submitted that PW7 Dr. Sujata Patil, another doctor who examined deceased

Bhavani, had noted the history of assault on neck and complaint of inability to move limbs. Therefore, there was immediate medical examination. Impact of heavy beating was obvious. According to him, considering the medical evidence and autopsy doctor's opinion, learned trial court committed no error in recording guilt for commission of offence under Section 304 part II and so he prays to dismiss the appeal for want of merits.

ANALYSIS OF EVIDENCE

10. Evidence of PW1 Kusum and PW2 Fulchand, according to prosecution, is crucial, it being direct eye witness account. On the point of occurrence, it would be appropriate to reproduce relevant substantive evidence of these two witnesses.

11. PW1 Kusum in para 2 of her examination-in-chief at Exhibit 20 has deposed as under :

“2. The incident took place four years back at about 6 p.m. I was cooking the food in the hut. Nilam was sweeping the hut. Both the accused were standing near the doors of my hut. They began to give abuses to Nilam. At that time my husband returned from work and he was removing the clothes which were hung on the rope. On

hearing the abuses of accused my husband came out of the hut. My husband asked both of them as to why they were giving abuses. At that time both the accused lifted my husband and threw him on the ground. They also gave fist blows and kicks to my husband, on his back, neck and abdomen. I tried to rescue my husband. At that time both the accused caught hold of my hairs and also began to beat me. Shashikant and Fulchand came at that time, and asked the accused to quit. Thereafter, the accused left the spot. My husband was lying on the ground without making any movements

12. PW2 neighbour Fulchand in para 2 of his examination-in-chief, deposed regarding the occurrence as under:

“2. The incident took place about four years back at about 6 pm in front of the house of Bhavani. I was in my house at that time. I heard the loud voice of quarrel near the house of Bhavani Kadam and therefore went there. I saw both the accused giving fist blows and kicks to Bhavani on his face, neck, abdomen and chest. I also saw both of them giving fist blows and kicks on his back. The house of Shashikant Borse is at a distance of about 200 foot from the hut of Bhavani.”

13. In cross of PW1 Kusum, it is brought that there is gutter near the hut and she volunteered that there is bridge over it. She denied

that there were centring implements lying there along with stones, sand and soil for construction of road and bridge. She admitted that while Nilam was sweeping, as the dust went on accused no.2 Sachin, some exchange of words took place between Nilam and him. In para 5 omissions are brought about accused Bharat also giving abuses to Nilam and husband of this witness; that her husband returned from work and was removing clothes; that, both accused lifted her husband and threw him on the ground; about she being kept out when statement of her husband was recorded at Rural Hospital, Tuljapur. Rest is all denial.

14. In cross of PW2, only admission is brought that when they reached the spot, Bhavani was lying on the bridge and that, Shashikant, he himself and wife of Bhavani lifted him and took him to rickshaw, they first went to police station and thereafter to Rural Hospital. Admission is brought about availability of gutter near the hut of Bhavani and he volunteered that there is slab over it. He admitted about sand and stones lying on the southern side of hut of Bhavani meant for construction of gutter. Rest is all denial.

15. Therefore, testimonies of PW1 and PW2 have virtually remained undisturbed and unchallenged as regards initial abuse by

accused Sachin to daughter of deceased and then second accused joining him when questioned by deceased. There is practically and virtually no denial about the incident taking place that evening in which both accused gave kicks and fist blows to deceased Bhavani and he fell down. Though, wife in substantive evidence stated that accused persons lifted her husband and flung him on the ground, it is shown to be an omission and is consequently an improvisation. But as stated above, act of giving kicks and fist blows on chest, neck abdomen of deceased have not been shaken.

16. It further appears that PW5 PHC Waghmode reached Rural Hospital Tuljapur and in presence of PW7 Dr. Sujata Patil, a Medical Officer, recorded statement of deceased Bhavani himself i.e. in the same evening of 21.03.1999. PW7 Dr. Sujata Patil has also deposed that patient himself narrated history of assault on neck and he was complaining of inability to move his upper and lower limbs. Consequently there is material suggesting that immediately after occurrence of beating, Bhavani was examined by medical expert and even his statement was recorded which is at Exhibit 28. Therefore there is prompt reporting of assault.

17. Here, deceased Bhavani expired on 05.04.1999 as is evident from inquest and postmortem Exhibits 24 and 23 respectively. Therefore, death has taken place almost two weeks after the occurrence i.e. while he was being treated at the Hospital at Solapur.

18. Now it is to be seen on re-appreciation as to whether beating at the hands of appellants was the cause of death of Bhavani. For this, evidence of autopsy doctor, findings and notings in postmortem, which assume importance, are required to be carefully analyzed.

19. Autopsy doctor has, in her substantive evidence at Exhibit 22 itself, deposed that there were no external injuries. Similarly, on internal examination she found there to be no fracture to skull and brain. Brain to be oedematous and congested. Thorax and lungs were oedematous. All visceral organs to be congested. She further testified in para 3 as under :

“3. In examination of the spinal cord there is no evidence of extra vasation in neck alongwith vertebral column anteriorly and posteriorly at the level of C5-C6 there is extra vasation in soft tissue. There was evidence of fracture with thrombosis of left vertebral artery.”

In the opinion of doctor, probable cause of death of Bhavani was “injury to spinal cord”. She further deposed that she and doctor Keoliya both signed autopsy report. That, the injury to spinal cord is sufficient in the ordinary course of nature to cause death of a person. That, the injury to spinal cord narrated by her is possible due to fist blows and kicks. That, injury to spinal cord may result into loss of power in upper and lower limbs. That, a person having injury to spinal cord at the level of C5 and C6 can remain conscious and give verbal statement.

In trial court, while under cross, autopsy doctor answered as follows :

“6. It is true that patchy fibrosis to upper lobe is possible due to old lung diseases like tuberculosis. It is true that there was evidence of basal pneumonitis. I can not say whether treatment was taken over pneumonitis or tuberculosis by the deceased. The dead tissues were found in the kidney and I have mentioned about it in para 21 of my report. I can not say the reason as to why necrotic areas are formed. It is not true to say that heart and kidney of deceased Bhavani were totally affected. It is true that both lungs were affected. It is not true to say that heart of deceased Bhavani was not functioning properly. It

is not true to say that there was evidence showing that the deceased must have died due to natural death due to old diseases. It is not true to say that the injury to the spinal cord mentioned by me is possible due to fall in the gutter from the height of 3 to 4 feet. It is not true to say that injuries to spinal cord narrated by me is not possible due to kick blow. It is not true to say that the opinion given by me as to the cause of death of Bhavani is incorrect.”

20. Above discussed doctor’s evidence shows that there was injury to spinal cord with thrombosis and even deceased was suffering from pneumonitis.

21. Here, both the appellants are convicted for offence under Section 304 of IPC which reads as under :

“304. Punishment for culpable homicide not amounting to murder.- *Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death or of causing such bodily injury as is likely to cause death;*

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with

both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.”

22. What is deuced here from the testimony of PW1 and PW2 is that there was initial abuse by accused no.2 Sachin to daughter of deceased. Evidence of PW1 wife of deceased shows that at such point of time, deceased was inside the house and on hearing abuses, he went out of the house. Thereafter, he questioned accused Sachin for abuses. Accused Sachin allegedly counter-questioned him and thereafter accused no.1 Bharat, who was standing nearby, and accused no.2 Sachin, they both allegedly rushed on the person of deceased and started giving him kicks and fist blows.

23. Deceased in his statement in the hospital stated that he was given kicks and fist blows on chest, neck and abdomen. He further reported that accused also assaulted his wife PW1 who came to his rescue. Thereafter, he has stated that he fell down and was taken by his wife, PW2 and one Shashikant, initially to police station and from there to hospital. In the report also, he has stated that he had lost movement/senses of the limbs i.e. hands and legs. Even such complaint is demonstrated to be made to PW7 Dr. Sujata Patil when

she examined him at Rural Hospital, Tuljapur. Therefore, there was complaint of loss of senses and movement to the upper extremities and lower extremities.

24. Here, firstly, it is not getting clear whether only because of kicks and fist blows, deceased fell down, and from what height, and landed on which surface. Defence has attempted to bring on evidence that there were stones, sand and construction material lying there. But neither PW1 nor PW2 spoke about deceased falling on stones or such construction material. However, one thing is clear that deceased fell down after beating.

25. What can be culled out from above discussion is that, incident had taken place all of a sudden on petty count of dust falling on accused no.2 Sachin. After abuse by this accused to daughter of deceased, deceased came at the scene of occurrence and on he questioning accused, both accused showered kicks and fist blows. Therefore there is use of bare hands, however, medical experts confirm fracture to vertebra with thrombosis. Though there are no medical treatment papers, it is to be noted that immediately after the occurrence, deceased had complained of sensory loss to upper and lower extremities and he thereby complained of loss of movement. As

there is fracture, it is a grievous injury. Therefore, in the considered opinion of this Court, taking into consideration the mode and manner of beating i.e. by fist blows and kicks, and further fall of deceased in the occurrence, offence of causing grievous injury definitely gets attracted. Mere opinion of doctor that injury was sufficient in the ordinary course of nature to cause death, cannot be considered in isolation, more particularly when deceased was alive and being treated for almost a fortnight. Taking such circumstances into consideration, offence of Section 325 of IPC gets established.

26. Perused the impugned judgment. Learned trial Judge has failed to consider and appreciate that there are mere allegations of kicks and fist blows and death has taken place after 14 days in hospital while undergoing treatment. Therefore, in the considered opinion of this Court, the findings recorded regarding offence of Section 304 Part II are not appropriate, rather it is a case of grievous injury. Hence, I proceed to pass the following order:

ORDER

- I. The appeal is hereby partly allowed.
- II. The conviction awarded to the appellants i.e. appellant no.1 Bharat Bhagwan Choudhari and appellant no. 2 Sachin Krushnath

Kadam, by learned Additional Sessions Judge, Osmanabad in Sessions Case No.95 of 1999 under Section 304 Part II of IPC stands quashed and set aside.

III. Instead, both the accused i.e. appellant no.1 Bharat Bhagwan Choudhari and appellant no. 2 Sachin Krushnath Kadam are convicted for offence punishable under Section 325 of IPC and are hereby sentenced to suffer rigorous imprisonment for three (03) years and to pay fine of Rs.15,000/- (Rupees Fifteen Thousand only) each, in default to suffer rigorous imprisonment for six (06) months.

IV. Appeal is accordingly disposed of.

[ABHAY S. WAGHWASE, J.]

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