



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

CRIMINAL APPEAL NO.809 OF 2018

Sudam s/o Hira Valvi
Age 42 years, Occu. Agri.,
R/o Pachamba, Tal. Navapur,
District Nandurbar

... APPELLANT

VERSUS

The State of Maharashtra
Through Police Station Navapur,
Dist. Nandurbar
(Copy to be served on office of
Public Prosecutor, High Court of
Judicature at Bombay,
Bench at Aurangabad

... RESPONDENT

.....
Mr. Ram S. Shinde, Advocate for appellant
Mrs. U.S. Bhosle, Addl. P.P. for respondent
.....

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

Date of reserving judgment : 12th January, 2024

Date of pronouncing judgment : 18th January, 2024

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

The challenge in this appeal is to an order of conviction and sentence, dated 25/9/2018, passed by learned Sessions Judge, Nandurbar, in Sessions Case No.05/2018, convicting the appellant for the offence punishable under Section 302 of the Indian Penal Code and sentencing to suffer imprisonment for life and to pay fine of Rs.1000/-, in default to suffer R.I. for three months; and

also convicting the appellant for the offence punishable under Section 341 of the Indian Penal Code and sentencing to suffer simple imprisonment for one month. Both the sentences have been directed to run concurrently.

2. Facts giving rise to the present appeal are as follows :-

Vishal (deceased) was a 23 year old son of P.W.1 Sonarsing. He was serving with a petrol pump at Navapur. P.W.6 ("X") was widow of uncle of deceased Vishal. The appellant wanted to have relationship with her. He had even offered to marry her. P.W. 6 ("X") did not like the same. The deceased was annoyed with the appellant's behaviour. A quarrel over the same took place between the two. While the deceased was passing on his motorbike along the road from in front of the appellant's residence, the appellant intercepted him and gave on his head a stick blow. P.W.4 Vilpesh was said to be in the company of Vishal that time. He and the son of the appellant rushed Vishal to Civil Hospital, Navapur in an autorickshaw of the appellant. Vishal was, however, declared dead on admission.

3. P.W.1 Sonarsing lodged the F.I.R. (Exh.13). A crime vide C.R. No.256/2017, therefore, came to be registered and investigated as well. The appellant was arrested during investigation. Pursuant to a disclosure statement made by him, a thick wooden stick (Dengara) came to be seized. Clothes on the

person of the deceased were taken charge of. Statements of the persons acquainted with the facts and circumstances of the case were recorded. The appellant was proceeded against by filing the charge sheet.

4. The Court of Judicial Magistrate, First Class committed the case to the Court of Sessions for trial in accordance with law. Learned Sessions Judge, Nandurbar (Trial Court) framed the Charge (Exh.6). The appellant pleaded not guilty. His defence is of false implication. According to him, the deceased died of an accident (fall from motorbike).

5. The prosecution examined 14 witnesses and produced in evidence certain documents. The Trial Court, on appreciation of the evidence in the case, convicted the appellant and consequently sentenced him as stated hereinabove. The appellant is therefore before us,.

6. Heard. Learned counsel for the appellant would submit that, P.W.1 Sundarsing, who lodged the F.I.R., is not an eye witness to the incident. He was away in Gujarat. He returned to the village on having learnt about the incident. After funeral of the deceased, his relations and friends had deliberation. According to learned counsel, the F.I.R. is an outcome of such deliberation. P.W.1 Sundarsing had an axe to grind against the appellant as the appellant allegedly wanted to establish relationship with a widow of

his (P.W.1) brother. Turning to an eye witness account, the learned counsel would submit that, there is glaring inconsistency inter-se the evidence of P.W.4 Vilpesh, P.W.7 Avinash and P.W.8 Ravindra. Their presence at the scene of offence is doubtful. P.W.7 Avinash admitted to have learnt the deceased to have met with an accident. The investigating officer did not seize the motorbike. Although the wooden stick came to be seized pursuant to the alleged disclosure statement made by the appellant. The C.A. report regarding blood stains thereon was inconclusive. The witness to the seizure panchanama admitted that the stick was not sealed in his presence. Learned counsel would further submit that, the Medical Officer (P.W.14) Dr. Rechal admitted that the injury suffered by the deceased was possible by accident or fall on rough surface. According to the learned counsel, the prosecution evidence is short of establishing the charge beyond reasonable doubt. He, therefore, urged for allowing the appeal.

7. The learned A.P.P. would, on the other hand, submit the Trial Court to have appreciated the entire evidence on record. It has also observed the demeanour of the witnesses. P.W.4 Vilpesh is an eye witness. Most of the prosecution witnesses are rustic tribals. Evidence of some of the witnesses was recorded with the assistance of interpreters. She took us through the evidence of the witnesses to submit the appellant had given threats of eliminating the deceased. He translated his intention into act. The learned

A.P.P. ultimately urged for dismissal of the appeal.

8. Considered the submissions advanced. Perused the entire evidence, oral and documentary. Let us advert thereto and appreciate the same.

9. Although the prosecution examined 15 witnesses, the evidence of witnesses relevant for deciding the present appeal would be adverted to. Two of the 15 witnesses examined by the prosecution namely P.W.5 Bhagatsing and P.W.9 Manisha were interpreters. P.W.12 Yogesh is a Police Constable who carried muddemal articles to the Regional Forensic Science Laboratory, Nasik. P.W.11 Guman is the witness to the disclosure statement made by the appellant, pursuant to which the stick came to be seized.

10. P.W.14 Dr. Rechal conducted autopsy on the mortal remains of deceased Vishal. He noticed injury in the nature of C.L.W. on the forehead. The injury admeasured 5 X 5 cms. It was grievous in nature and ante-mortem. No other injury was noticed on the person of the deceased. In the opinion of P.W.14 Dr. Rechal, the deceased died of head injury – hypovolemic shock.

11. During cross-examination, P.W.14 Dr. Rechal admitted that the injury noticed on the person of the deceased might have been possible by an accident or fall. As such, the evidence of

P.W.14 Dr. Rechal does not lead us to conclude the deceased died of homicidal death, although the trial Court came to the same conclusion on the very evidence.

12. P.W.1 Sonarsing, father of the deceased lodged the F.I.R. (Exh.13). It is in his evidence that, on the fateful day he was home. The deceased left the house informing him to have been going with his friend. The deceased left on motorbike. It was little past 6.00 p.m. After half an hour, he learnt the appellant to have assaulted his son with a stick and the son had, therefore, been rushed to Civil Hospital, Navapur. He, therefore, rushed to the hospital to find his son to have already breathed his last.

13. He was subjected to a searching cross-examination. Answers given by him to the questions put in cross-examination indicate that he was serving in Gujarat. He was, however, specific to deny to have rushed to the village from Gujarat only after having learnt about the incident. He admitted to have received dead body of his son. According to him, it was about 2.30 p.m. by which last rites of the deceased were performed. He admitted to have had a meeting with his relatives and then it was decided to lodge the report (F.I.R.). It is further in his evidence that, the appellant is his relative. The appellant got irrigated land to his share. He denied to have ever visited the Police Station. According to him, 5 – 6 days after the incident, he was called to the Police Station. His

statement was recorded. According to him, Exh.13 (F.I.R.) is the said statement.

14. It is reiterated that, almost all the witnesses are rustic tribals. The investigating officer got recorded the statements of P.W.1 Sonarsing and some other witnesses under Section 164 of the Code of Criminal Procedure as well. The F.I.R. on record indicates the same to have been registered by 9.00 p.m. The station diary entry to that effect was also made by 9.50 p.m. The scene of offence panchanama was drawn at 12.00 noon on the following day. The inquest was also conducted immediately. The same suggests the investigation of the crime was commenced within hours of the incident. Memory of P.W.1 Sonarsing might not have served him well while he gave evidence before the Court. Since he is not an eye witness to the incident, and based on his report the criminal law was put in motion, we do not propose to give much importance to the evidence elicited during his cross-examination.

15. According to the prosecution, the incident was witnessed by P.W.4 Vilpesh, P.W.7 Avinash and P.W.8 Ravindra. We have closely scrutinized the evidence of the last two witnesses- P.W.7 Avinash and P.W.8 Ravindra to find their evidence to be short of inspiring confidence. Evidence of P.W.7 Avinash indicates that, while he was on way from Sukvel to his village Pachamba, he saw

Vishal (deceased) lying on the road in front of the house of the appellant. He claimed to have seen the appellant assaulting Vishal. He pleaded appellant not to beat. According to him, appellant's son Shirish and P.W.4 Vilpesh rushed Vishal to hospital in appellant's autorickshaw. This witness, in his cross-examination, however, testified that, after having learnt the deceased met with accident, he saw dead body lying on the road. This witness appears to have been won over. Be that as it may. His evidence indicates, he may not have witnessed the incident. For the very reason, we do not propose to rely on the evidence of P.W.8 Ravindra. His evidence suggests that, while he was returning back to village Pachamba, he saw Vishal lying on the road. P.W.8 Ravindra claims to have been in the company of P.W.7 Avinash. He did not accompany the deceased to the hospital. He goes back to his home.

. P.W.10 Sangita is a widow of the deceased. It is in her evidence that, the deceased was serving with a petrol pump. On the given day, the deceased had a night shift i.e. from 11.00 p.m. onwards. Her evidence, therefore, suggests that the deceased was not on duty during the day time. The case is based on evidence of P.W.4 Vilpesh. It is in his evidence that, the deceased was his friend. He was in the company of the deceased. Both of them had been to Sukvel on motorbike. While they were on their way back from Sukvel, the appellant intercepted their motorbike. He hit on

the head of Vishal with a wooden stick (Dengara). According to him, the appellant gave two more blows, one on chest and third one in the back. This evidence would further indicate that the deceased was requesting the appellant not to beat him. The appellant's son Shirish rushed Vishal to the hospital in appellant's autorickshaw.

16. P.W.4 Vilpesh identified the stick before the Court as the one used by the appellant to hit on the head of the deceased. He was, however, categorical to admit that such sticks are easily available in the market and at house of anyone including farmers as well. His evidence would further suggest that he was serving as a Salesman with a cloth shop. He denied that he was in the company of Sarpanch Avinash (P.W.7). He, however, testified to have come with the Sarpanch upto the village Aamlad. He met Vishal there. He accompanied Vishal on his (Vishal's) request. He denied to have not seen the incident. He was categorical to state that it was he and the son of the appellant who shifted Vishal to the hospital. It was specifically suggested to P.W.4 Vilpesh that at the time of incident, he himself, deceased and the son of the appellant were the only persons present. This suggestion goes a long way to conclude the appellant to have admitted presence of P.W.4 Vilpesh at the scene of offence. True, P.W.4 Vilpesh appears to have given some exaggerated version of the incident. We have to sift the grain from chaff. True, this witness attributed the appellant to have inflicted two more injuries. The post mortem report, however,

indicates the deceased died of sole head injury. Since the defence itself admitted the presence of P.W.4 Vilpesh at the scene of offence. After close scrutiny of his evidence, we find presence of P.W.4 Vilpesh at the scene of offence along with the deceased. A false defence at times fill in a missing link. It could not be said to be a co-incidence that the deceased died in front of the house of the appellant. Although the Medical Officer Dr. Rechal (P.W.14) has opined that the head injury suffered by the deceased might have been possible by accident or fall, we are not in agreement with the same. For suffering a forehead injury, a fall must be on face. In the case in hand, the deceased did not suffer even a scratch elsewhere on his body. If we accept the case of the defence that he had fallen from a motorbike, he would have suffered more than one injury. A fall from motorbike could either be on left or right side. While such a fall from motorbike, one would not suffer a forehead injury. Non-seizure of the motorbike would, therefore, be of little consequence.

17. The motive has, however not been proved. It is the case of the prosecution that, P.W.6 ("X") is a widow of the real uncle of the deceased. It is in her evidence that, the appellant would trouble her. He would knock on the door of her residence. The appellant wanted to establish illicit relationship with her. She had sent a message through Vishal (deceased) to the appellant not to trouble her.

18. We do not propose to give much credence to the evidence of this witness. P.W.6 ("X") has grown up children. P.W.10 Sangita (widow of deceased Vishal) testified that, there was suspicion over relationship between the appellant and P.W.6 ("X"). It would have been children of P.W.6 ("X") to be more eager to see the appellant would not trouble their mother. The reason put forth by the prosecution, therefore, appears to be not probable.

19. The incident appears to have a prelude. The appellant gave a disclosure statement (Exh.20) in the presence of P.W.3 Prakash and P.W.11 Guman. Both were serving as Talathi (public servants). These witnesses have no reason to give false evidence. The evidence of both these witnesses indicate the appellant to have made a disclosure statement, pursuant to which a wooden stick came to be seized from a standing sugarcane crop. The disclosure statement given by the appellant was recorded. True, the seized stick was not sealed with a label with signatures of these witnesses while it was taken charge of. The report relating to blood grouping of the blood stains found on the stick was inconclusive. It, therefore, could not be said that the seized stick was used by the appellant to assault the deceased with. The disclosure statement bears the appellant's signature. The confessional part therein would necessarily be inadmissible in evidence against the appellant. In our view, however, whatever non-incriminating deposed to was by the appellant to his aid, could very well be

referred to and relied on. What was deposed to (Exh.20) by the appellant in the presence of these two witnesses is, therefore, reproduced below in verbatim.

"आरोपीचे निवेदन :- माझे नाव सुदाम हिरा वळवी रा. पाचंबा असे असून मी सध्या पोलीस कस्टडीत आहे. माझा पुतण्या विशाल सोनारसिंग वळवी, वय २३, रा. पाचंबा याचे माझ्या मोठ्या बहिणीच्या मुलीशी प्रेम संबंध होते. त्यानंतर विशालचे लग्न झाले. त्याला दोन मुलं झाली. त्याने लग्न झाल्यावरही माझ्या बहिणीच्या मुलीशी पुष्पलता हिच्याशी पुन्हा प्रेम संबंध ठेवले. यावरून आमच्या दोघांच्यात बऱ्याच वेळा वादही झालेले होते. दिनांक ४/११/२०१७ रोजी सायंकाळी ०६/०० च्या दरम्यान मी सुकवेल ते वाटवी या रोडवरील माझ्या शेतातील घरी होतो. तेथे विशाल हा त्याच्या वाटवी येथील मित्रांसोबत मोटरसायकल वर आला मला बोलला की तुला आता घेऊन जातो. मारून टाकतो. तो मला आईवरून शिवी देत होता. त्याने गाडीवरून खाली उतरून मला दगड मारला. तो मी चुकविला व माझ्या अंगणात पडलेल्या लाकडी डेंग्याने त्याच्या डोक्यात मारले. तो डांबरी रोडवर खाली पडला व त्याच्या डोक्यावरून रक्त येवू लागले. मग त्याला माझी रिक्षा क्र. **GJ-26 T 3097** यात टाकून मी, माझा मुलगा शिरीष व विशालचा मित्र असे आम्ही औषधोपचारासाठी सिव्हिल हॉस्पिटलला नवापूर येथे घेवून आलो. तेथे माझ्या मुलाने त्याला एडमिट केले. तो लाकडी डेंगारा कोठे ठेवला आहे ते मला माहिती आहे. तो डेंगारा मी काढून देतो. तुम्ही माझ्या सोबत चला."

20. It is reiterated that, the disclosure statement given by the appellant is not being used against him. The same is, however, relied on in his support. The prosecution cannot disown the same. The statement given by the appellant was earliest in the point of time. He made the same on the following day. His statement indicates the deceased had emotional relationship with the daughter of the appellant's sister. In spite of the deceased getting married with other girl and he having been blessed with two

children, he continued his relationship with the niece of the appellant. A quarrel had, therefore, ensued between the two. It was the deceased, along with his friend had, therefore, been to the residence of the appellant. He abused the appellant and gave threats to his life. He even pelted a stone at the appellant. This version appears to be the reason behind the assault.

21. The prosecution did not lead any evidence to suggest that the appellant was in the know that the deceased was to pass by his residence at a particular time and therefore the appellant lay in wait of the deceased to appear and assault him. What has been deposed to by the appellant in the presence of P.W.3 Prakash and P.W.11 Guman indicates that the appellant did not intend to eliminate the deceased. He gave one blow on the forehead of the deceased. The same proved to be fatal. True, it must have been a forceful blow. The F.I.R. also reveals that the incident took place over old dispute. Had the appellant really intended to commit murder of the deceased, he would have given more than one blow. The incident appears to have taken place without premeditation in a sudden fight in a fit of passion upon a sudden quarrel. The appellant also appears to have not taken undue advantage or acted in cruel or unusual manner. The incident could also be said to have occurred as a result of the appellant to have deprived of power of self control by grave and sudden provocation.

22. It is reiterated, there is no evidence to indicate the appellant was aware that the deceased was to pass by the road in front of his residence and he was armed with a wooden stick, waiting for arrival of the appellant and then to assault him. On the contrary, what has been stated by the appellant in his disclosure statement appears to be probable one and, therefore, the case falls within the exception 1 and 4 to Section 300 of the Indian Penal Code. The conviction recorded by the Trial Court for offence punishable under Section 341 of the Indian Penal Code is, therefore, liable to be set aside. Moreover, the conviction recorded for the offence punishable under Section 302 of the Indian Penal Code is, therefore, required to be modified and the appellant is required to be convicted for the offence punishable under Section 304 of the Indian Penal Code. The sentence of life imprisonment is being converted to rigorous imprisonment for a period of seven and half years. With these observations, the appeal partly succeeds. Hence the order :

ORDER

- (i) The Criminal Appeal is partly allowed.
- (ii) The order of conviction and sentence, dated 25/9/2018, passed by learned Sessions Judge, Nandurbar, in Sessions Case No.05/2018 for the offence punishable under Section 341 of the Indian Penal Code is hereby set aside.

- (iii) The order of conviction and sentence, dated 25/9/2018, passed by learned Sessions Judge, Nandurbar, in Sessions Case No.05/2018 under Section 302 of the Indian Penal Code is hereby set aside. The appellant is convicted for the offence punishable under Section 304(II) of the Indian Penal Code and sentenced to suffer rigorous imprisonment for seven and half years and to pay fine of Rs.1000/- (Rupees one thousand), in default to suffer further rigorous imprisonment for three months.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

fmp/-