



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

Criminal Appeal No.389/2019

1. Sudhakar r/o Rajanna Durge, (Accused no.1)
Aged about 31 years, Occ.-Cultivation,
2. Baswaiyya s/o Rajaram Durge, (Accused no.2)
Aged about 23 years, Occ.Cultivation
Both R/o. Chhallelwada, Tahsil Aher,
District Gadchiroli. Appellants.

(PRESENTLY AT CENTRAL PRISON, NAGPUR).

-Versus-

The State of Maharashtra,
through Police Station Officer,
Sub Police Station Repanpalli, District Gadchiroli. Respondent.

Mr. R.M. Daga, Advocate for appellants.
Mr. Amit Chutke, Assistant Public Prosecutor for respondent.

CORAM : Nitin B. Suryawanshi &
M.W. Chandwani, JJ.

Date : 15-01-2025

Oral Judgment (Per Nitin B. Suryawanshi, J.)

This appeal is directed against the judgment and order of conviction passed by learned Sessions Judge, Gadchiroli in Sessions Case No.17/2017, thereby convicting the appellants for offence punishable under Section 302 r/w 34 of the Indian Penal Code (IPC) and awarding the sentence of imprisonment for life and to

pay a fine of Rs. 1000/- each with default clause. They are also convicted for offences publishable under Section 307 r/w 34 of the IPC and sentenced to suffer rigorous imprisonment for 10 years each and to pay a fine of Rs. 1000/- each with default clause. By this appeal, they have challenged their conviction.

ii. Prosecution case in short is that on 11-11-2016 at about 9.00 pm when informant/appellant no.1 -Sudhakar was talking with his friend Sanjay Dahekar in front of his house, Vishwanath Durge was taking his bullock-cart in a fast speed from there. Sudhakar asked to Vishwanath to ride the bullock-cart solely, as it may cause injury to the calves and the children playing outside. Vishwanath that time went away and came back again with the bullock-cart in the courtyard of Sudhakar and abused him in filthy language. There was scuffle between Sudhakar and Vishwanath. Thereafter, Vishwanath went away to his house. At about 3.45 pm Vishwanath again came to the courtyard of Sudhakar alongwith his brothers Harinath and Sunil to assault him. On seeing them Sudhakar came in the Courtyard. He saw his brother Baswaiyya sitting in the courtyard. He gathered an impression that somebody

might have assaulted him. When he was running towards his brother Baswaiyya, Harinath rushed on his person. Hence, Sudhakar stabbed him on his abdomen by knife apprehending that he would assault him. Due to the assault, Harinath fell down. At that time Sunil rushed on Sudhakar to assault him by stick. Sudhakar therefore assaulted Sunil by knife on abdomen. Sunil and Vishwanath then fled away from the spot. Sudhakar and Baswaiyya went to the Police Station and reported the incident to the Police. Police registered Crime No.008/2016 against accused Sudhakar and Baswaiyya under Sections 302, 307 r/w 34 of the IPC. On completion of investigation, chargesheet was filed. Both the accused were charged under Sections 302, 307, 34 of the IPC. Prosecution has examined total 14 witnesses in support of its case. Defence of the appellants was that they have exercised right of private defence. Trial Court found the appellants guilty of the charge and convicted them as aforesaid.

iii. Heard learned Advocate for the appellants and learned APP for the State.

iv. Learned Advocate for the appellants strenuously submits that the evidence on record clearly indicates that the informant and his deceased brother were the assailants as they had come in front of the house of appellant no.2-Sudhakar. Prosecution has failed to explain the injuries on the person of accused no.2-Baswaiyya. Thus, the prosecution has suppressed the genesis of offence and hence the appellants defence that they exercised their right of private defence is liable to be accepted. He further submits that the charge framed against the appellants is defective and there is no recovery of stick which is allegedly used by accused no.2. He further submits that Sunil (PW-4) has not suffered grievous injury and therefore conviction under Section 307 of the IPC is unsustainable. In the alternate he submits that, at the most, the offence can be said to be proved against the appellants under Section 304-I of IPC. By this time the appellants have undergone 11 years of imprisonment. He, therefore, submits that they may be released on the sentence already undergone.

v. Learned APP, on the other hand, supported the impugned judgment and order of conviction. He submits that evidence of

Ashok (PW-2) and Sunil (PW-4) is consistent and corroborates each other. As per their evidence, accused no.2 had caught hold the hands of the deceased from behind when accused no.1 assaulted on Sunil by knife, therefore accused no.2 is rightly convicted under Section 302, 34 of the IPC as the assault is on the vital part of the body of deceased. He, therefore, submits that there is no substance in the appeal and is liable to be dismissed.

In support of his submissions he relied on the judgment of the Hon'ble Apex Court in case of *Parshuram vs State of M.P.*, reported in *2023 SCC Online SC 1416.*

vi. With the assistance of learned Advocate for the appellants and learned APP, we have perused the record.

Ashok (PW 2) is the eye witness who has lodged the FIR (Exhibit-41). He has deposed that deceased Harinath was his friend. At the time of incident he along with deceased and his brother Sunil were going to the field through the road in front of the house of accused. Both accused were standing near their house. Both accused called them, so they went near the accused. Accused no.1 Sudhakar stabbed deceased Harinath with knife on

chest, accused no.2-Baswaiyya hit Sunil on legs with wooden stick. Then Sunil fell down. Deceased Harinath was shouting "Melo re Dada, Melo re Dada". Accused Baswaiyya caught hold the hands of Sunil from behind, then Sudhakar took out the knife from the chest of Harinath and stabbed on the abdomen of Sunil. Then both the accused saw him and they were saying to catch him, however he fled away. After the incident he along with brother-in-law of Sunil brought Sunil to his home. Thereafter, they went to Renapalli Police Station. Both the accused were already present there. They saw the injury on the head of accused no.2-Baswaiyya.

In cross examination, he admitted that Baswaiyya got head injury in the incident and Sunil and Baswaiyya were admitted in the hospital. He has denied the suggestion that due to the blow of axe given by Sunil on the head of accused Baswaiyya, he fell down.

vii. Omissions to the effect that Harinath was shouting "Melo re Dada, Melo re Dada", "Sudhakar removed the knife from the chest of Harinath". While giving statement before Magistrate under Section 164 of Cr.P.C., he stated about "beating Sunil with stick" and "Baswaiyya caught hold the hands of Sunil from behind"

(this omission is limited to the words "from behind and by hands") were brought on record in his cross examination.

viii. Sunil Durge (PW 4), who was injured, is the brother of deceased Harinath. He deposed that the incident happened on 11-11-2016 at about 9.30 pm. On that day they were going towards their field along with Ashok Gandham and Harinath. Both accused were standing on the road in front of their house. Both accused called Harinath towards them, Harinath went near them, accused Sudhakar took out a knife and stabbed in the chest of Harinath. Accused Baswaiyya hit him with stick on his legs, so he fell down. Baswaiyya had caught hold of him and then Sudhakar hit him with knife below umbilicus. He put his hand on the injury and fled away. Ashok also fled away from the spot. When he was going home his brother, sister and her husband met him on the way. He went home and collapsed. Then he was taken to Repanpalli Police Station. He narrated the incident to Police then he was referred to Government Hospital, Aherti.

ix. In cross examination he admitted that before the incident there was quarrel between his brother Vishwanath and Sudhakar, on account of bullock-cart. He denied the suggestion that he assaulted Baswaiyya on head with axe. He admitted that Ashok (PW-2) was his good friend and that he and Baswaiyya were taken together to hospital. Omissions from this statement under Section 164 of Criminal Procedure Code to the effect that, 'Ashok was flee away and while going to home, my brother, sister and her husband met me on the way. Accused Sudhakar chasing Ashok saying "catch, catch ". "After going home I was collapsed. On going to the police station I narrated the incident to Police" were brought on record. He has failed to assign any reason for the said omissions.

x. It has come on record that accused had reached Police Station before injured Sunil (PW-4) and Ashok (PW-2) reached there. Accused no.1 gave report (Exhibit-40) to the Police Station stating that on 11-11-2016 in the night time at about 9.00 pm when he was chatting with his friend Sanjay Darekar in front of his house, Vishwanath Durge was taking his bullock-cart in a high speed. He therefore asked Vishwanath that he should drive the

bollocks-cart slowly otherwise the calves or the small children playing outside may get hurt. Vishwanath left the place without saying anything. Thereafter he returned back and quarreled with accused no.1. There was a scuffle between them. Then Vishwanath left for home. Thereafter at about 9.45 pm Vishwanath came in the courtyard of his house along with Harinath and younger brother Sunil for beating him. When he saw them coming he came in the courtyard, he saw that his brother Baswaiyya was sitting down. He apprehended that somebody has assaulted Baswaiyya and rushed towards him. At that time Harinath came to assault on him apprehending assault at the hands of Harinath, he stabbed Harinath with knife on abdomen. Due to the assault Harinath fell down. Then Sunil (PW-4) came to assault on him with stick. He therefore gave a blow of knife on his stomach. Thereafter Sunil (PW-4) and Vishwanath ran away from the spot and he came to the Police Station along with Baswaiyya to give report. On the basis of this report, the investigation has commenced.

xi. It is necessary to mention here that it is not the case of appellant no.1 that Harinath rushed on him carrying some weapon and apprehending assault at the hands of Harinath,

appellant no.1 stabbed him with knife. If at the time of incident Sunil (PW-4) was carrying stick then he could have inflicted stick blow on accused no.1, before accused no.1 dealt a knife blow to him. In this view of the matter, we are unable to accept that accused no.1 assaulted Harinath and Sunil while exercising his right of private defence.

xii. Fact remains that prosecution has failed to explain injury on the person of accused no.2-Baswaiyya. As a matter of fact, no injury is found on the person of Sunil (PW-4) who was allegedly assaulted by stick by accused no.2. It is therefore clear that the prosecution as well as defence have suppressed true and correct facts and the manner in which actual incident has taken place from the Court. Evidence of Ashok (PW-2) and Sunil (PW-4) that accused no.2 participated in the alleged offence by catching hold the hands of Sunil (PW-4) and accused no.1 stabbed him is unacceptable in absence of any injury by stick on Sunil (PW-4).

xiii. On careful scrutiny of the prosecution evidence it appears that neither the prosecution nor the defence is giving true version and the manner in which the incident has taken place. Ashok

(PW-2) and Sunil (PW-4) are giving different sequence of events and the manner in which the incident has taken place. According to (PW-2) both accused called Harinath, Sunil and him, while they were going to field. (PW-4) states that both accused called Harinath towards them. However, both of them are telling that accused no.1 Sudhakar stabbed Harinath with knife in the chest. They also state that accused no.2 Baswaiyya hit (PW-4) on leg with wooden stick due to which Sunil (PW-4) fell down. If this is true then their further evidence that accused no.2 Baswaiyya caught hold of Sunil's hand from behind is totally improbable. When Sunil had fallen down, accused no.2 would not be in a position to catch hold of his hands from behind. Absence of any injury of stick blow allegedly given by Baswaiyya on Sunil (PW-4) and non recovery of the stick used in the crime, further creates doubt about the version given by (PW-2) and (PW-4).

xiv. From the evidence on record it appears that prosecution as well as defence have suppressed the genesis and origin of the incident and both having not presented true version. Prosecution has failed to explain injuries of Baswaiyya (accused

no.2). Since Baswaiyya was injured in the incident it is doubtful whether he has actually participated in the incident by catching hold on Sunil's hand from behind. In this view of the matter we are of the view that prosecution has failed to prove involvement of Baswaiyya (accused no.2) in the present crime, beyond reasonable doubt and hence he is entitled for benefit of doubt.

xv. It is matter of record that Baswaiyya (accused no.2) has received head injury in the incident which is not explained by the prosecution witnesses. Dr. Ishan (PW-8), Medial Officer has treated accused no.2 and Sunil (PW-4). He has deposed that accused no.2 had suffered two injuries i.e lacerated wound measuring 6x2 cm on temporo parital area which is possible by sharp object and abrasion admeasuring 2 x 2 cm on the backside of head on right side, which is possible by blunt object.

Dr. Ishan (PW-8) has also proved injury certificate of Sunil (PW-4). History of assault by someone is mentioned in the said injury certificate (Exhibit-47). On examination he found that Sunil has suffered a lacerated wound admeasuring 3 x 2 cm on supra pubic area which was a grievous injury, it may be possible

due to sharp object. It has come in the evidence of PW-4 that due to the said injury he was admitted at Nagpur hospital as a indoor patient for 15 to 20 days.

xvi. Though injury certificate (Exhibit-47) shows that injury no.1 suffered by Baswaiyya was grievous, Dr. Ishan (PW-8) has put a question mark against the word 'grievous'. He has explained that he was doubtful whether it was a grievous injury. Fact remains that accused no.2 had suffered two injuries which are not explained by the prosecution witnesses. It is therefore clear that PW-2 and PW-4 are lying on most material aspect of involvement of accused no.2 and therefore their evidence implicating accused no.2 is not reliable.

Following observations in Laxmi Singh and others vs State of Bihar reported in (1976) 4 SCC 394 support the case of accused no.2 : -

“12. It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences: (1976) 4 SCC 394

“(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.”

On appreciation of evidence on record it appears that there was scuffle between accused Sudhakar and Baswaiyya on one side and deceased Harinath, Ashok (PW-2) and Sunil (PW-4) on the other side. In that scuffle Baswaiyya received head injuries and appellant Sudhakar gave knife blows to Harinath and Sunil. This fact is stated in the FIR (Exhibit-40) given by appellant about the incident. As noted supra, he has not stated that Harinath and Sunil were carrying any weapon due to which he apprehended assault on him.

xvii. Medical evidence shows that appellant no.1 has given a single knife blow to deceased Hariram which has caused injury on the left side of deep penetrating to upper lobe, live and heart. It

therefore appears that in the scuffle between appellants and Hariram and prosecution witnesses Sunil and Ashok, appellant no.1 has dealt one blow to Hariram which was proved to be fatal. In these facts, it can be said that appellant no.1 had knowledge that the blow of knife may cause death of Hariram. However, it cannot be said that appellant no.1 intended to kill Hariram.

xviii. In **Parshuram** (supra), the Hon'ble Apex Court has held that injuries sustained by three accused persons were not at all explained. Non explanation of injuries on the persons of accused would create a doubt, as to, whether, prosecution has brought on record the real genesis of the incident or not. Undisputedly, as observed herein above a cross case was also registered against the complainant party for the injuries sustained by the accused persons.

"33. Undisputedly, in the present case also, the witnesses are interested witnesses. The injuries sustained by three accused persons are not at all explained. The trial court and the High Court have not considered this aspect of the matter.

34. Non-explanation of injuries on the persons of the accused would create a doubt, as to, whether, the prosecution has brought on record the real genesis of the incident or not. Undisputedly, as observed hereinabove, a

cross case was also registered against the complainant party for the injuries sustained by the accused persons.

35. The defence taken by the accused persons is that when they were coming back from the Police Station, it was the complainant party which started assaulting them resulting into a free fight. Their further case is that in the said free fight, the persons from both the sides received injuries. As a result of the injury caused in the said free fight, Madan died."

xix. In the case in hand though the accused have not taken taken defence of free fight on the contrary the defence as is disclosed from the FIR (Exhibit-40) lodged by accused no.1 is that Harinath and Sunil came to assault him and therefore he stabbed them with knife. Therefore, this ruling is rendered in different facts. and hence cannot be said to be of any assistance to the case of appellants.

Trial Court has failed to appreciate the evidence in the proper perspective and has ignored the above aforestated lacunae in the prosecution case.

xx. For the aforestated reasons, we are of the considered view that appellant no.1 has given a single blow to deceased Hariram. Therefore he is liable to be convicted under Section

304(I) of the IPC. However, for assaulting Sunil (PW-2) his conviction under Section 307 of IPC is liable to be sustained. In the result, following order is passed :-

ORDER

- (a) Conviction of the appellants under Section 302 of the Indian Penal Code is hereby quashed and set aside.
- (b) Appellant no.2-Baswaiyya Durge is acquitted of all the charges. He be released forthwith, if not required in any other case.
- (c) Appellant no. 1- Sudhakar Durge is convicted under Section 304(I) of the IPC and is sentenced to suffer the sentence already undergone.
- (d) Conviction of Appellant no. 1- Sudhakar Durge under Section 307 of IPC is maintained and he is sentenced to suffer sentence already undergone. He may be released forthwith, if not required, in any other case.

(M.W. Chandwani, J.)

(Nitin B. Suryawanshi, J.)