



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 151 OF 2018

Digambar @ Digu Baburao Shirole
Age: 43 years, Occu.: Agril.,
R/o. Matapur, Tq. Shrirampur,
Dist. Ahmednagar.

..Appellant
(Ori. Accused)

Verus

1. The State of Maharashtra
Through the Police Inspector,
Taluka Police Station Shrirampur,
Dist. Ahmednagar.
2. Smt. Mangala w/o. Rajendra Shirole
Age: 40 years, Occu.: Agril.
3. Vishal S/o Rajendra Shirole
Age: Minor, Occu.: Nil
4. Karan S/o Rajendra Shirole
Age: Minor, Occu.: Nil

Respondent nos. 3 & 4 are minor
under guardian of mother
respondent no. 2,
R/o. At Post Matapur,
Tq. Shrirampur, Dist. Ahmednagar.

..Respondents

...
Mr. Satesh Jadhav, Advocate holding for Mr. Surendra V. Suryawanshi, Advocate
for Appellant

Mr. S. D. Ghayal, Additional Public Prosecutor for respondent no. 1.
Mr. Hemant U. Dhage, Advocate for Respondent nos. 2 to 4.

...

**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

RESERVED ON : 8 DECEMBER, 2023
PRONOUNCED ON : 15 DECEMBER, 2023

JUDGMENT (PER ABHAY S. WAGHWASE, J.) :

1. Feeling aggrieved and dissatisfied by the judgment and order of conviction passed by the learned District Judge-2 and Additional Sessions Judge, Shrirampur, Dist.Ahmednagar dated 08-02-2018 thereby convicting appellant for offence under Section 302 of the Indian Penal Code (IPC) and thereby sentencing him to suffer imprisonment for life and to pay fine, instant appeal has been preferred by the appellant.

CASE OF PROSECUTION IN BRIEF

2. Shrirampur Taluka Police Station chargesheeted appellant for offence under Section 302 of the IPC on the premise that on 20-12-2015 between 04:00 p.m. to 04:30 p.m. accused appellant came to the field of deceased Rajendra and demanded extra saplings from him. When deceased refused, quarrel took place and thereafter, appellant mounted attack on deceased by means of wooden handle of spade. He also used the handle for pressing neck of deceased Rajendra. Deceased was shifted to hospital where Doctor examined and declared him dead.

PW3 Ashok Shirole, brother of deceased , set law into motion on the strength of which, Shrirampur Taluka Police Station registered crime No.I-148 of 2015 and said crime was investigated and on its completion, appellant was

chargesheeted. Prosecution adduced evidence of in all 13 witnesses and relied on documentary evidence like FIR, inquest panchanama, post mortem report, recovery panchanama etc. Defence denied to lead any evidence. After appreciating evidence of prosecution and on hearing both sides, trial Judge held death of Rajendra to be homicidal one and also held charges proved and thereby convicted present appellant as above, which is now questioned by way of instant appeal.

SUBMISSIONS

On behalf of appellant :

3. The sum and substance of submissions advanced by learned Counsel for appellant is that here even if case of prosecution is considered as it is, according to him, it is not a case attracting charge under Section 302 of the IPC. He pointed out that there was no premeditation or motive or even intention to kill deceased. That going by very story of prosecution, occurrence has taken place as a result of sudden quarrel which took place on the spur of the moment at the spot. Accused had not been armed and he has rather used wooden handle of agricultural implement. Therefore, under such circumstances, charge framed itself was misplaced, erroneous. Secondly, he would point out that infact here there is no eye witness. Some information is alleged to be passed to informant that too on telephone and on the basis of hearsay information, crime has been registered. He pointed out that

surprisingly there was no bleeding injury, but shirt of deceased is shown to be blood stained. He also pointed out that initially occurrence was reported as AD and therefore, very genesis of occurrence has not been established by prosecution. Recovery is also at a belated stage.

Learned Counsel would strenuously submit that deceased died because of so called blunt trauma to liver. That deceased was a weak person. That internal impact was never intended. That there is no supporting forensic evidence and for all above reasons, it is his submission that case was not proved beyond reasonable doubt and initial burden not having been discharged by prosecution, he prays interference of this Court.

On behalf of State :

4. In answer to above, learned APP pointed out that prosecution went for trial with cogent and reliable evidence. There are eye witnesses, whose testimonies have not been dislodged inspite of cross-examining them at length. He would submit that even if incident was fall-out of quarrel, according to him, the nature of article, the manner of its use clearly show that appellant intended to kill deceased and therefore, he is rightly chargesheeted and tried for the charge of murder. Recovery is at his instance. Deceased was declared brought dead by the Doctor. Serious crime has been committed. Persons, who were party to the occurrence, are examined and therefore, learned trial Judge

has rightly accepted prosecution case and has committed no error whatsoever in recording guilt and so he prays for dismissal of the appeal.

OBSERVATION ABOUT HOMICIDAL DEATH

5. After appreciating the submissions and on going through the record, from the evidence of PW8 Dr.Band, Autopsy Doctor, it appears that deceased Rajendra is shown to have suffered sixteen injuries on various parts of body.

External Injuries :

1. Swollen both eyelids of both eyes, dark red colour.
2. Contusion 5 cm x 2 cm x superficial, reddish over right cheek, horizontal.
3. Contusion 4 cm x 2 cm x superficial, reddish over left cheek horizontal.
4. Contusions 2 in number, 8 cm x 1.5 cm x 3 mm (raised) dark reddish over neck anteriorly, below thyroid cartilage horizontal.
5. Grazes, 3 in number, 1.5 cm x 0.3 cm x superficial over left lateral neck, reddish.
6. Graze, 2 cm x 0.5 cm x superficial reddish over left shoulder, superiorly reddish.
7. Contusion 6 cm x 3 cm x 0.2 cm raised, reddish over left chest above nipple horizontally.
8. Contusions, 2 in number 5 cm x 2 cm x 0.3 cm (raised) reddish over left chest below nipple oblique (directed from medially upward to laterally downward), parallel to each other.
9. Contusion 8 cm x 3 cm x 0.3 cm (raised) reddish over right chest horizontally; 15 cm below nipple.
10. Contusion 3 cm x 2 cm x superficial reddish over left hypochondria area of abdomen, horizontally.

11. Contusion 7 cm x 3 cm x 0.3 cm (raised) reddish over right hypochondria abdomen horizontally.
12. Contusion 8 cm x 3 cm x 0.3 cm (raised), 2 in no. reddish over right mid back horizontal, extends onto right lateral chest wall.
13. Contusion 5 cm x 3 cm x 0.3 cm (raised) over left mid back, reddish horizontally.
14. Contusion 4 cm x 2 cm x superficial reddish over right thigh anteriorly, horizontally.
15. Contusion 8 cm x 2 cm x 2 cm (raised) over left thigh anteriorly, horizontally.
16. Contusion 7 cm x 2 cm x 2 mm (raised) over left thigh laterally, horizontally.

Internal Injuries :

Following injuries caused to the Liver :

1. Laceration 4 cm x 0.5 cm x 1 cm deep over left lobe anteriorly, bleeding.
2. Laceration 4 cm x 0.5 cm x 1 cm deep over right lobe laterally, bleeding.
3. Laceration 5 cm x 0.5 cm x 1 cm deep over right lobe posteriorly bleeding.

Autopsy Doctor has attributed probable cause of death due to liver injury due to hard and blunt trauma. Doctor has also noted three injuries to liver on internal examination and also found fracture to ribs of both sides and has further opined that all injuries are possible by use of wooden handle of spade.

In **cross-examination**, Autopsy Doctor has admitted that deceased was very thin in nature. That if a person is addicted of liquor, damage to liver can

6/16

be in the nature of fatty liver cirrhosis. He is unable to state for how long liquor smell remain present in a person, who has consumed liquor before death.

Therefore, taking into account Autopsy Doctor's evidence, it appears that he has narrated both internal and external injuries and has opined that the injuries noticed by him are possible by use of wooden handle of spade. However, Doctor is very categorical about his opinion that death is due to liver injury due to hard and blunt trauma. Lacerations of various measurements are reflected in paragraph no.4 of his evidence. But it is pertinent to note that in substantive evidence, Doctor has not categorically stated about death to be homicidal one or that in the ordinary course of nature, the injuries could cause death. Therefore, with such material on record, it cannot be said for sure that death is only and only homicidal and not otherwise. However, death is attributable to above quoted injuries.

6. Consequently, we are now called upon to visit and consider other evidence adduced by prosecution in the trial Court.

In support of its case prosecution has adduced evidence of in all 13 witnesses. Their status is as under :

PROSECUTION EVIDENCE IN TRIAL COURT

PW1 Balasaheb Murlidhar Wagh is Pancha to inquest panchanama Exh.50. His evidence is at Exh.49.

PW2 Santosh Savleram Wagh is Pancha to seizure of clothes of deceased. His evidence is at Exh.52. Seizure panchanama is at Exh.53.

PW3 Ashok Kachru Shirole is brother of deceased. He is informant. His evidence is at Exh.54.

PW4 Raosaheb Narayan Adsare is Pancha to spot panchanama Exh.57. His evidence is at Exh.56.

PW5 Sangita Subhash Chakranarayan is star witness. She is eye witness. Her evidence is at Exh.60.

PW6 Prakash @ Babasaheb Laxman Shirole is cousin brother of deceased. His evidence is at Exh.63.

PW7 Kailas Vitthal Ghadge is Police Head Constable. He is carrier. His evidence is at Exh.64.

PW8 Dr.Yogesh Kisan Band is Autopsy Doctor. His evidence is at Exh.67.

PW9 Vilas Rajaram Ghane is Police Head Constable, who prepared inquest panchanama. His evidence is at Exh.69.

PW10 Dr.Sharad Madhavrao Satpute is Medical Officer, who initially examined the deceased. His evidence is at Exh.77.

PW11 Sagar Ambadas Pawar is a labour. He has not supported prosecution. His evidence is at Exh.79.

PW12 Jitendra Pandharinath Raut is Assistant Chemical Analyzer. His evidence is at Exh.84.

PW13 Kishorkumar Bhimasing Pardeshi is Investigating Officer. His evidence is at Exh.92.

7. Prosecution has come with a case that there is direct evidence and this precisely refuted by the learned Counsel for the appellant.

PW3 Ashok is informant. We have considered his evidence and on re-appreciation, we find him deposing that he is brother of deceased. According to him, on 20-12-2015 plantation of onion saplings was going on in the land of deceased Rajendra. According to him, PW5 Sangita had bagged Contract of undertaking plantation. He claims that PW5 Sangita telephoned him about Rajendra being beaten with wooden handle of spade. Therefore, he immediately rushed to the spot and claims to have seen Rajendra lying in the field and his other brother namely Vilas informing him about threats to even kill him issued by present appellant. This witness further picked up deceased Rajendra, took him to their residence, changed his clothes and after arranging Ambulance, they took Rajendra to Kamgar Hospital, where he was examined and declared dead. He testified that on next morning, when he asked Sangita, she told that incident occurred on account of saplings of onion and therefore, he lodged report Exh.55.

In initial **cross-examination** he asked about suicidal death of Vilas, time taken to reach Gut No.269/2 on motorcycle, nature of road, Sun set timing in December month, time of labour hours etc. He is further asked about who was

driving motorcycle when deceased was brought home and where was deceased made to sit. There is question regarding distance between Matapur and Shirirampur and timing of reaching to Kamgar Hospital, Shirirampur. There are questions about how much time is spent in Kamgar Hospital, when he reached Police Station, regarding clothes of deceased, where was he and others till post mortem, how many people attended funeral.

Therefore, going by such cross-examination, we do not notice any serious cross-examination on actual assault as regards to this witness is concerned.

8. **PW5** Sangita is a star witness for prosecution and her evidence at Exh.60 shows that on 20-12-2015, she had taken a contract of plantation of saplings of onion in the field of deceased. She stated that she went to his land with her family members. According to her, at that time, there was scarcity of saplings of onion and so deceased called Sagar Pawar with a request to supply more saplings. According to her, Sagar came at around 04:00 p.m. Accused also came to land of deceased at around 06:00 p.m. She claims that while plantation activity was going on, she heard voice of deceased Rajendra and when she looked ahead, she claims to have seen accused beating deceased by handle of a spade and she saw accused was pressing throat of deceased by wooden log. Out of fright she claims that she went to her residence. When she came back home, she asked her son to call PW3 Ashok and they again

10/16

came back to spot. She also claims that she herself also talked with PW3 Ashok on telephone informing regarding beating to Rajendra. She further stated that her statement was recorded by J.M.F.C.

In **cross-examination** she is asked about her house, family members, distance between land of deceased and her residence. She has answered that at the time of incident, nobody was present in the adjoining land i.e. in the vicinity of 50 to 100 acres of surrounding land. She is questioned about suicide of Vilas and non-availability of electricity in Gut no.269/2. She admitted that deceased Rajendra was weak. Rest all are suggestions.

9. On visiting evidence of **PW6** Prakash, it is clear that he has mere hearsay information about actual occurrence of assault as according to him, he received a phone call from PW3 Ashok. He stated that on hearing about it, when he went to the spot, he saw Vilas and Ashok taking Rajendra on motorcycle. He also saw in the light of motorcycle that accused was running away with wooden handle of spade.

Rest are Panchas, Police Head Constable, Carrier and Investigating Officer.

PW11 Sagar has not supported prosecution.

ANALYSIS

10. On critically evaluating above evidence, it is emerging that alleged incident has taken place in the field of very deceased Rajendra, who had

11/16

engaged PW5 Sangita for plantation of onion saplings. PW5 Sangita seems to be the important witness as according to her, in her presence, appellant entered the field of deceased and put up a demand of extra bag of saplings. Very case of informant and PW5 Sangita is that, on refusal to comply with the demand of extra saplings, quarrel erupted between accused and deceased and accused appellant had put to use very handle of a spade and beaten deceased. PW5 Sangita does not speak about appellant reaching to the field getting armed with any article. He seems to have come there for raising a demand of extra saplings and getting annoyed for non-compliance, he seems to have beaten deceased. Apparently even PW5 Sangita speaks of assault being made by wooden handle of spade and medical expert also confirms injuries noticed by him are possible by wooden handle of spade. Resultantly, incident is fall-out of verbal altercation and therefore, in our opinion, there is no premeditation to do away deceased. Article already available at the agricultural field seems to have been put to use. Therefore, taking such material into consideration, in our opinion, it is not a case of homicide. Rather it is a case of culpable homicide not amounting to murder. Now, only it is to be seen whether Section 304 Part I or Section 304 Part II would be attracted.

11. For attracting offence under Section 300 of the IPC, culpable homicide is murder, if the act by which death is caused is done -

1stly with intention of causing death;

2ndly with the intention of causing such bodily injury as the offender knows to be likely to cause death of the person to whom the harm is caused;

3rdly with intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

4thly - with the knowledge that the act is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as is mentioned above.

Offence is not **murder** if it is demonstrated that the case falls within five Exceptions to Section 300 of the IPC.

Exceptions to murder :

(culpable homicide not amounting to murder)

1. *Grave and sudden provocation.*
2. *Right of private defence*
3. *Exercise of legal powers*
4. ***Death caused in sudden fight***
5. *Death with consent*

The Hon'ble Apex Court in the case of ***Surinder Kumar v. Union Territory, Chandigarh; (1989) 2 SCC 217*** has observed that “to derive benefit of **Exception 4** to Section 300 of the IPC, it has to be satisfied that **firstly** it was a sudden fight, **secondly** there was no premeditation, **thirdly** act was done in a

heat of passion, **fourthly** assailant had not taken any undue advantage or acted in a cruel manner”.

12. Here the learned trial Judge has held accused guilty for offence under Section 302 of the IPC and there is serious challenge by the appellant to the same.

Very recently the Hon'ble Apex Court has elaborately discussed subtle distinction between Section 304 Part I and Part II in the judgment of *Anbazhagan v. The State represented by the Inspector of Police* (Criminal Appeal no.2043 of 2023, decided on 20-07-2023). In paragraph no.60 of the said judgment the Hon'ble Apex Court has elaborately discussed applicability and attractability of Section 304 Part I / Part II. Certain principles are enunciated by referring to previous legal pronouncements.

Applying above law in instant case, it is manifest that occurrence took place all of a sudden, that too on petty count. Hence, we are of the firm opinion that, it is not at all a case attracting Section 302 of the IPC. Bearing in mind the circumstances in which incident in question took place, incident being a sudden one, it should attract offence under Section 304 Part I of the IPC only.

SUMMATION

13. Therefore, on meticulous re-examination, re-appreciation of available evidence on record, it appears that there was no motive, intention or premeditation. Incident has taken place all of a sudden only on refusal to comply with the demand of extra saplings. Hence, occurrence having taken place suddenly, exception 4 to Section 300 of the IPC comes into play and it is not at all a case attracting Section 302 of the IPC as held by the learned trial Judge. Therefore, interference to that extent is called for. Accordingly, we proceed to pass following order :

ORDER

(I) Criminal Appeal No.151 of 2018 is partly allowed.

(II) The conviction and sentence awarded to appellant – Digambar @ Digu Baburao Shirole by the District Judge-2 and Additional Sessions Judge, Shrirampur, Dist.Ahmednagar in Sessions Case No.9 of 2016 on 08-02-2018 for the offence punishable under Section 302 of the IPC, stand set aside.

(III) Appellant – Digambar @ Digu Baburao Shirole is hereby held guilty for committing offence punishable under Section 304 Part I of the IPC and is sentenced to suffer rigorous imprisonment for eight years.

(IV) It is clarified that rest of the operative order of the impugned judgment passed by the trial Court is maintained.

(V) District Judge-2 and Additional Sessions Judge, Shrirampur as well as the concerned Jail Authority to take note of this judgment.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

SPT