

(2022) 10 BOM CK 0098
In the Bombay High Court
Case No : Criminal Appeal No. 936 Of 2015

Mahadeo @ Jijya Nathu Thorve

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 17-10-2022

Acts Referred:

Indian Penal Code, 1860 — Section 34, 143, 147, 148, 300(4), 302, 304II, 323, 325, 504, 506(2)

Code Of Criminal Procedure, 1973 — Section 161, 209, 313

Citation : (2022) 10 BOM CK 0098

Hon'ble Judges : A.S. Gadkari, J; Milind N. Jadhav, J

Bench : Division Bench

Advocate : Ganesh Bhujbal, S. S. Hulke

Final Decision : Partly Allowed

Judgement

A. S. Gadkari, J

1. Appellant (Org.A-1) has impugned Judgment and Order dated 3rd September, 2015 passed by the learned Additional Sessions Judge, Khed-Rajgurunagar, District Pune, in Sessions Case No.337 of 2014, convicting Appellant under Sections 302, 143, 147, 148 of the Indian Penal Code (for short "the I.P.C.") and is sentenced to suffer rigorous imprisonment for life under Section 302 of the I.P.C. and for other prescribed sentence on other counts and to pay a total fine of Rs.6,500/-.

2. Heard Mr. Bhujbal, learned Advocate appointed by the High Court Legal Services Committee, Mumbai to represent Appellant and Mr. Hulke, learned APP for State. Perused entire record.

3. Shorn of unnecessary details, the prosecution case in brief is that :-

(i) The name of the deceased is Shankar S. Bhosale. The date and time of the alleged incident was 24th February, 2014 at about 6.00 p.m..

Appellant and his family members (Org.A-2 to 6) were having dispute on account of open space of land situated at village Charohli Khurd, Taluka Khed, District Pune with the deceased Nathu Jijaba Thorave and his family members. Appellant and deceased were neighbours. That, due to the said dispute in respect of open space, Original Accused No.2 namely Sangita R. Thorave used to abuse deceased.

(ii) Prior to two months of the incident, because of the harassment at the hands of all Accused persons, Shantabai Bhosale (PW-4) i.e. wife of Shankar Bhosale and Shankar Bhosale went to reside at their daughter's place at Khed. On 24th February, 2014 at about 10.00 a.m. Shantabai Bhosale (PW-4) and her husband Shankar Bhosale had been to village Charholi. They saw that, Appellant and his family members had cut down shrubs which were grown in the disputed open space. Shankar Bhosale asked the Appellant and his family members as to why they cut down the shrubs and some bickering took place. On the same day i.e. on 24th February, 2014 at about 6.00 p.m. Shankar Bhosale was sitting at the door of his house. He was uttering/prating some words, due to which Appellant and his family members came on the road in front of the house of Shantabai Bhosale (PW-4).

(iii) PW-4 heard shouts of her husband and therefore peeped from the window of her house and saw that, all Accused persons were assaulting her husband. She therefore came out of the house. She saw that, Appellant was armed with a stick and was assaulting her husband with it. Other Accused persons (Org.A-2 to 6) were assaulting her husband by fist and kick blows. All the Accused persons were abusing and instigating each other to kill her husband i.e. Shankar Bhosale. Shantabai Bhosale (PW-4) tried to intervene in the quarrel. As Accused persons tried to nab Shantabai Bhosale she rushed to Police Station, Aalandi. The Police did not take cognizance of her grievance and therefore she returned to her home at about 7.30 p.m. to 8.00 p.m.. Her husband was at home.

(iv) She therefore called Prashant P. Karale (PW-6) to her home. Prashant P. Karale (PW-6) came to her house at about 8.30 p.m. by his four wheeler vehicle. PW-4, PW-6 alongwith one other person took Shankar Bhosale to YCM Hospital, Pimpri. Shankar Bhosale was admitted to the hospital and was declared dead while undergoing treatment in the mid-night.

(v) Shantabai Bhosale (PW-4) lodged First Information Report (FIR) (Exh-23). Appellant alongwith other Accused was arrested. Cloths of Appellant were seized in presence of Satyawar K. Gawade (PW-1) by effecting panchanama (Exh-24). The stick (Article-1) used by Appellant in the present crime was recovered in the presence of panch witnesses Nitin D. Gholap (PW-2) and Nandu P. Gholap (PW-3) by effecting panchanama (Exh-30). The spot panchanama (Exh-36) was also effected in presence of PW-2 and PW-3. Bhaskar H. More (PW-8), the Investigating Officer conducted inquest panchanama (Exh-35) and the body of Shankar Bhosale was sent for post mortem.

(vi) Dr. Milind V. Sonawane (PW-7) conducted post mortem on the dead body of

Shankar Bhosale. He found seven external injuries and seven internal injuries while conducting autopsy. The said external and corresponding internal injuries are as follows :-

(a) Imprint stick contusion over mid back, over left side lateral aspect, over mid scapula, margins dark bluish, obliquely horizontal and size was of 8 cm x 2 cm. Shape imprint stick, long rectangular, cause by hard object like stick, age of injury was within 12 to 24 hours. Nature of injury was grievous. Corresponding internal injury was left posterior Thoracic wall shows, Sub-cutaneous tissue, Muscular layers shows huge haematoma, mid scapula fracture, fracture 3rd rib to 7th rib along the intercostal regions, Left side diaphragm shows huge haematoma due to contusion, Haematoma and fracture third rib posteriorly and adjacent Thoracic Vertebra shows Para-vertebral fascic and muscle haematoma, right dome of diaphragm also shows huge haematoma due to contusion, posterior wall of left lung, lower part of upper lobe and whole lower lobe shows huge haematoma, right lung shows huge haematoma over posterior wall middle lobe, size 8 c.m. x 5 c.m. over all both lungs oedematous and grievously injured.

(b) Imprint stick contusion with abrasion over mid back, just below and adjacent to injury No.1, Horizontal, margins dark bluish and abrasion shows pale brownish, over lower border of scapular region. Size 7 c.m. x 1.5 c.m. shape was imprint stick, long rectangular caused by hard object like stick. Age of injury was within 12 to 24 hours. Nature was grievous. Corresponding internal injury same as injury No.1 internally.

(c) Imprint stick contusion, over upper back, over left side of supra scapular region, below shoulder aspect, margins dark bluish, obliquely horizontal. Size of injury was 3 c.m. x 1 c.m. Shape was rectangular (imprint stick) caused by hard object like stick. Age of injury was within 12 to 24 hours. Nature of injury was grievous. Corresponding injury was sub-cutaneous tissue, muscle coat shows huge haematoma, underneath Acromion process of Scapula bone shows crack fracture Haematoma present over floor of fracture region.

(d) Lacerated wound over right hand, over third finger (middle), ventral aspect, vertical, over upper and lower digit, nail intact, margins dark reddish. Size was 3 c.m. x 1.5 c.m. Shape was irregular caused by hard and blunt object. Age of injury was within 12 to 24 hours. Nature of injury was grievous. Corresponding internal injury was sub-cutaneous tissue, muscle coat shows huge haematoma, underneath 2nd digit shows fracture, floor dark haematoma present.

(e) Imprint stick contusion, over left thigh over ventral aspect, obliquely-horizontal, 11 c.m. and knee and 29 c.m. below inguinal ligament, covering ventral and medial aspect of thigh, margins dark bluish, central part is pale. Size was 12 c.m. x 4 c.m. shape was imprint stick, long rectangular, caused by Hard object like stick. Age of injury was within 12 to 24 hours, nature of injury as simple. Corresponding internal injury was sub-cutaneous tissue and superficial and deeper muscle coat shows huge extra vasation with haematoma, floor shows

haematoma extending uptill Femur Bone, No fracture.

(f) Multiple abrasions over left foot, over knee joint and just below it, dark brownish, 3 in numbers. Sizes were of (1) 2 c.m. x 1 c.m. (2) 1 c.m. x .5 c.m., (3) 0.25 c.m. x 0.25 c.m., shape irregular caused by blunt object/surface. Age of injury was within 12 to 24 hours. Nature was simple. No gross corresponding internal injury was found.

(g) Contusion over right foot, over just below knee, horizontal, pale bluish, associated with swelling and shortening of foot, on palpation shows fracture upper end of Tibia. Size was 5 c.m. x 6 c.m.. shape was irregular, caused by hard and blunt object. Age of injury was within 12 to 24 hours. Nature of injury was grievous. Corresponding internal injury was Sub- cutaneous tissue and all muscle layers shows extra-vasation with haematoma, fracture upper end of Tibia well seen with lower fracture end shows upward displacement, Haematoma also present around fracture end.

(vii) PW-7 opined that, the above mentioned injuries were ante-mortem. Injuries Nos. 1 to 3 and corresponding injuries were sufficient to cause death in ordinary course. He further opined that, cause of death was traumatic shock due to bilateral ribs fracture due bilateral Thorasic injuries due to hard stick Trauma due to assault and the death of victim was possibly homicidal.

(viii) After receipt of post mortem report and on conclusion of investigation Bhaskar H. More (PW-8) submitted charge-sheet against six Accused persons in the Court of Judicial Magistrate First Class, Khed, Taluka Khed, District Pune. Learned Magistrate committed the case to the Court of Sessions as contemplated under Section 209 of the Code of Criminal Procedure (for short "the Cr.P.C.").

(ix) The Trial Court framed charge below Exh-5, which was read over and explained to the Accused persons in vernacular language to which Accused persons pleaded not guilty and claimed to be tried.

The prosecution in support of its case examined in all eight witnesses. The statements of Accused persons under Section 313 of the Cr.P.C. were recorded by the Trial Court. Appellant in response to question No.21 answered that, he would be filing written submissions. All the Accused persons accordingly filed their common written submissions/ explanations (Exh-50). It was the defence of the Accused that, deceased Shankar Bhosale, his wife Shantabai Bhosale (PW-4) and their son Pandurang Bhosale had assaulted Nathu J. Thorve i.e. father of Appellant with an axe and therefore Accused persons had lodged a crime with Aalandi Police Station which was culminated into Regular Criminal Case No. 141 of 2001, under Sections 325, 323, 504, 506(2) read with Section 34 of the I.P.C. The deceased Shankar Bhosale, Shantabai Bhosale (PW-4) and their family members were pressurizing Accused persons to withdraw the said case. That, deceased Shankar Bhosale was addicted to liquor and used to smoke 'Ganja'. That, deceased Shankar Bhosale was also having dispute with many other persons in the village. PW-4 and deceased Shankar Bhosale had threatened

Accused persons that, they would falsely implicate them in a false crime if they do not withdraw the said case filed by them with Aalandi Police Station. That, on 24th February, 2014 Shankar Bhosale (deceased) had consumed liquor in large quantity and fell down on street and died due to the said fall. However, with a view to falsely implicate Appellant and his family members, present crime has been registered against them.

4. Learned Trial Court by its impugned Judgment and Order has convicted Appellant under Section 302 of the I.P.C., however was pleased to acquit original Accused Nos. 2 to 6 from all the charges levelled against them.

5. The aforestated facts have been deciphered from the evidence of said witnesses and repetition of the same hereinafter is avoided for the sake of brevity.

6. At the outset, it is to be noted here that, Satyawar K. Gawade (PW-1), panch witness to the seizure of clothes of Accused persons panchanama (Exh-25 and 26), Nitin D. Gholap (PW-2) and Nandu P. Gholap (PW-3) panch witnesses to the spot panchanama and seizure of Chappal panchamana (Exh-36) have been declared hostile by the prosecution. Therefore, the evidence of eye witness Shantabai Bhosale (PW-4) i.e. wife of deceased; Lata S. Bhosale (PW-5) neighbour and daughter-in-law of deceased; Prashant P. Karale (PW-6); Dr. Milind V. Sonawane (PW-7), who conducted autopsy on the dead body of Shankar Bhosale, is relevant for deciding the present Appeal. PSI Bhaskar H. More (PW-8), the investigating officer of the present crime has proved inquest panchanama (Exh-35); spot of incident panchanama (Exh-36) and C.A. Reports (Exh-Nos.38, 40, 41, 42).

7. Shantabai Bhosale (PW-4) in her examination-in-chief has admitted that, at about 6.00 p.m. on the said day her husband was sitting at the door of her house and was uttering some words, due to which the Accused persons came on the road in front of her house. She was inside her house and heard shouting of her husband. She saw from window of their house that, Accused persons were assaulting her husband. That, Appellant was armed with a stick and was assaulting her husband with it. She tried to intervene however all the Accused persons were saying to nab her and therefore she rushed to Police Station, Aalandi. Police did not take cognizance of her complaint and therefore she returned to her home at about 7.30 p.m. to 8.00 p.m. That, her husband was at home. She thereafter called Prashant P. Karale (PW-6) and from his four wheeler vehicle took her husband to hospital. PW-4 has identified stick (Article-1) shown to her.

In her cross-examination she has admitted that, her husband used to drink liquor and smoke 'Ganja'. That, on 5th August, 2001 her husband and her son Pandurang Bhosale had beaten Nathu J. Thorave i.e. father of Appellant with an axe and they were facing criminal prosecution in the Court at Khed. She has further admitted that, on the date of incident her husband had consumed liquor.

She has denied the suggestion that, whenever her husband used to drink liquor, he fell on the earth under the influence of it. That, after returning home from Police Station she offered water to her husband and thereafter she found that, she should take her husband immediately to Rural Hospital, Aalandi. A suggestion was given to her that, as she and her husband were insisting original Accused No. 5 Rajendra Thorave and his father Nathu Thorave to depose in their favour in the Court in respect of assault incident. That, as the Accused persons herein did not accede to the request they have been falsely implicated in the present crime.

8. Lata S. Bhosale (PW-5) is the daughter-in-law of deceased and was his neighbour. This witness resiled from her statement under Section 161 of the Cr.P.C. and therefore was declared hostile by prosecution. In her cross-examination she has admitted that, Appellant used to bicker with deceased Shankar Bhosale and his wife on account of open land dispute. She has admitted that, on the date of incident Appellant was assaulting deceased with a stick and other Accused persons were assaulting by fist and kick blows.

9. Prashant P. Karale (PW-6) is also a panch witness to the recovery of stick panchanama (Exh-30) at the instance of Appellant. He has admitted that, on 24th February, 2014 at about 8.00 p.m. he received a phone call from Shantabai Bhosale (PW-4) and at her request he took Shankar Bhosale to the hospital from his car. That Shankar Bhosale was lying in the courtyard of the house of Shantabai Bhosale (PW-4). He with the help of Avinash Patole and Shantabai Bhosale (PW-4) took Shankar Bhosale to YCM Hospital, Pimpri.

10. The deposition in examination-in-chief of Dr. Milind V. Sonawane (PW-7) has already been noted briefly in para No. 3 (vi) and (vii). Dr. Sonawane (PW-7) in his cross-examination has admitted that, injuries Nos.1 to 3 and 5 may be possible due to multiple falls on cement road linner ridge under influence of liquor. That, injury Nos. 4, 6 and 7 may be possible by fall on hard and blunt surface.

11. After carefully analyzing of evidence of witnesses, it clearly appears to this Court that, Shankar Bhosale was addicted to liquor and 'Ganja'. That, on the date and time of incident he was uttering some words due to which the Accused persons got enraged and they came on the road in front of the house of Shankar Bhosale. It appears that, a sudden quarrel ensued and the Appellant with a stick assaulted Shankar Bhosale in a sudden fight in the heat of passion. It further appears that, Shankar Bhosale was alive till Shantabai Bhosale (PW-4) came back from Police Station and thereafter offered him water. The description of weapon used in the present crime i.e. the stick as can be discerned from the recovery panchanama (Exh-30) is 2 feet in length having 1½ inch diameter. There is no evidence on record to indicate that, Appellant came at the scene of offence after doing preparation to assault deceased with the said stick. It further appears from record that, Appellant took stick from the bushes which was lying on the said place and all of sudden assaulted deceased with it. The admission

given by PW-7 that injury Nos. 1 to 3 and 5 may be possible due to multiple fall on cement road linear ridge under influence of liquor can not be lost sight of. This admission has to be read in conjunction with the admission given by PW-4 that, on the date of incident her husband had consumed liquor and at the time of the incident he was uttering some words due to which Accused persons came on road and thereafter she saw assault on her husband by them. A cumulative effect of the said admission would lead us to draw safe inference that, the Appellant is entitled to claim Exception 4 of Section 300 of the I.P.C. and has committed an offence as contemplated under Section 304 (Part-II) and not under Section 302 of the I.P.C..

12. In view of the above, we are of the considered opinion that, Appellant has committed an offence punishable under Section 304 (Part-II) and not under Section 302 of the IPC.

13. Hence, the following Order :-

(i) The conviction of Appellant under Section 302, 143, 147, 148 of the I.P.C. is set aside and instead he is convicted under Section 304 (Part-II) of the I.P.C. and sentenced to suffer rigorous imprisonment for ten years and to pay a total fine of Rs.10,000/-, in default of payment of fine further suffer rigorous imprisonment for six months.

(ii) Appellant is entitled for set off for the period which he has already undergone during the pendency of Trial and present Appeal.

(iii) Appeal is partly allowed in the aforesaid terms.

14. Before parting with the Judgment, we would like to place on record a word of appreciation for the efforts put in by Mr. Ganesh Bhujbal, learned Advocate appointed by the High Court Legal Services Committee, Mumbai for espousing the cause of Appellants as he was thoroughly prepared in the matter and rendered proper assistance to the Court.