

(1988) 07 BOM CK 0032
In the Bombay High Court
Case No : Criminal Appeal No. 1598 of 1979

State of Maharashtra

APPELLANT

Vs

Suresh Bhalchandra Gavade and another

RESPONDENT

Date of Decision : 01-07-1988

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 325, 34

Citation : (1988) 07 BOM CK 0032

Hon'ble Judges : S.C. Pratap, J;A.D. Tated, J

Bench : Division Bench

Judgement

A.D. Tated, J.—The State has preferred this appeal against the judgment and order dt. 19th September, 1979 passed by the learned Additional Sessions Judge, Ratnagiri, acquitting respondents 1 and 2 of the charge of murder punishable under S. 302 read with S. 34, I.P.C.

2. The prosecution case briefly stated is that the accused and the deceased Dattaram Godkar and his sons are all residents of the village Talavade in Sawantwadi Tehsil of Ratnagiri District. The complainant had mango grove to the west of the house of the accused. The house of the accused is shown by letter "A" in the map Exh. 14. The accused cultivated the land of Anandibai Gavade. The land of the deceased is at a distance of about 100 ft. from the land under the cultivation of the accused. The house of the accused shown by letter "A" in the map Exh. 14 is to the north of the land under the cultivation of the accused. In between there is a land of Atmaram Vithal Gavade. There is a cactus fencing between the land cultivated by the accused and Atmaram Vithal Gavade. There is a footpath leading to the house of the accused through the land under the cultivation of Atmaram Gavade. The cattle of the accused strayed in the mango grove of the deceased and on that account the relations of the accused and the deceased were strained. Dasharath, P.W. 4, Baburao, P.W. 5 and one Dilip are the sons of the deceased Dattaram and Sadashiv Mayekar, P.W. 6, is his nephew. On 4th November, 1977 at about 7-30 a.m. while Dasharath in his land was

explaining Dilip how the paddy Bunds should be erected, accused 1 was standing in his land at a distance of about 100 to 125 ft. Seeing the complainant, accused 1 said that he would put his cattle into the latter's mango grove and he might protect that grove. Thereupon the complainant asked accused 1 to tell him when he was going to put his cattle into his mango grove. This led to the exchange of abuses between accused 1 and Dashrath. Hearing the noise of the abuses the complainant's mother and Arjun Godkar, P.W. 7 arrived there. The complainant's mother advised the complainant not to indulge in quarrel with the accused. In the meanwhile, the complainant's brother Baburao, P.W. 5, also arrived there. Hearing the loud exchange of abuses, the family members of the accused also came out of their house. There were other houses near the house of the accused. The inmates of those house also came out. The complainant's father Dattaram hearing the abuses also arrived there. Dattaram in order to know from the accused as to why they were abusing the complainant and his brother went to the place where accused 1 and 2 and other persons who had come out of their house were standing. As soon as Dattaram went near the accused, accused 1 gave a lathi blow on his forehead. Dattaram sustained a bleeding injury and fell down unconscious. Baburao, P.W. 5, rushed to lift his injure father. At that time accused 2 dealt a stick blow and thereby caused injury to the left hand finger of Baburao. Accused 1 also gave a stick blow to the complainant Dashrath when he was trying to lift his father. Sadashiv Mayekar, Arjun Godkar, P.W. 7, Jairam Godkar and others who had assembled there separated the parties and thereafter the accused went to their house. The injure Dattaram was carried to the Hospital at Sawantwadi. Sawantwadi police were informed on phone from the hospital. Thereupon Head Constable Dabholkar went to the hospital. He found Dattaram lying in serious condition and was unable to talk. He asked Dashrath to come to the police station for lodging the complaint. Dashrath accordingly went to the police station at about 4-10 p.m. and lodged report Exh. 20. On that report offence under sections 325, 504 read with S. 34, I.P.C. was registered against the accused. The injured Dattaram who was unconscious did not respond to the treatment given to him at the hospital and he breathed his last on 21st November. Inquest was held and thereafter body was sent to post-mortem examination. Dr. (Mrs.) Rao, P.W. 1, held the autopsy on the same day. On 22nd November, Baburao produced the bloodstained clothes of the deceased Dattaram before the police. It was seized under a panchanama. At the police station the offence was altered from S. 325 to S. 302, I.P.C. After necessary investigation accused 1 and 2 were prosecuted. The learned Additional Sessions Judge, Ratnagiri, on 2nd July 1979 charged accused 1 and 2 that they in furtherance of common intention did commit murder intentionally or knowingly by giving sticks blows to Dattaram Babu Godkar and as a result of which he died at Cottage Hospital, Sawantwadi, and thereby they committed the offence punishable under S. 302 read with S. 34, I.P.C. The accused pleaded not guilty to the charge. Their defence was that when they were in their land the deceased Dattaram and his sons armed with sticks arrived in their land and attacked them with sticks. Accused 1 snatched the stick from the hand of Nana and started moving the stick

around him. According to accused 1, he did not know who got injured while he was moving the stick around him. Thus the defence was that the accused exercised the right of self-defence at the time of the incident and as such they have not committed any offence.

3. The learned Additional Sessions Judge, after considering the evidence adduced by the prosecution, held that the prosecution failed to prove the charge levelled against the respondents (accused) and acquitted them. Feeling aggrieved, the State has come up in appeal.

4. The learned Public Prosecutor took us through the evidence on record and he particularly drew our attention on the evidence of the eyewitnesses, Dashrath, P.W. 4, Baburao, P.W. 5, Sadashiv, P.W. 6 and Arjun Godkar, P.W. 7 and submitted that their evidence was consistent and they satisfactorily proved that Dattaram was unarmed when he approached the accused to ask them why they were hurling abuses and to assuage them and at that time accused 1, who was armed with a stick, gave forcible stick blow on the forehead of Dattaram and thereby he sustained serious injuries on his head and fell down. The learned Public Prosecutor took us through the medical evidence of Dr. (Mrs.) Vimal Rao who has proved the injury certificate of the deceased and also held autopsy on the dead body. Her evidence shows that the deceased has contused lacerated wound (4" X 1/8th" X 1/8th") on the frontal parietal mid part with suspected fracture of the skull bone. On 19-11-1977 X-ray photograph was taken and fracture of frontal parietal was detected. Her evidence shows that Dattaram was indoor patient for 17 days at the Cottage Hospital at Sawantwadi and he did not regain consciousness till he expired on 21st November, 1977. Dr. (Mrs.) Rao had noticed depressed fracture on both frontal and parietal aspect. Fissure fracture of right frontal line joined to left side parietal. Right frontal suture was separated partially. In the opinion of Dr. Rao the injury sustained by Dattaram was sufficient to cause his death and according to her he died due to fracture of the skull leading to injury to brain. On considering the above medical evidence there is no dispute that Dattaram met with homicidal death and the cause of his death was the injury that he sustained on 4-11-1977 on his frontal parietal region.

5. It takes us to consider whether the fatal injury sustained by the deceased Dattaram was caused by accused 1 by hitting him with a stick. The evidence of the eyewitnesses Dashrath, P.W. 4, Baburao, P.W. 5, Sadashiv Mayekar, P.W. 6, and Arjun Godkar, P.W. 7, shows that when Dattaram went to the accused to ask them why they were abusing, he was unarmed. Their evidence further shows that accused 1 and 2 were armed with stick and that accused 1 gave a forcible stick blow on the head of Dattaram and thereby he sustained a serious bleeding injury on the forehead and fell down unconscious and when Dashrath, P.W. 4 and Baburao, P.W. 5, went to lift their injured father they were also attacked by accused 1 and 2. Baburao sustained injuries as noted by Dr. Udgir in his certificate Exh. 10. Those injuries are :

"1) (1 cm. X 1/4 cm.) Two C.L.Ws. oblique in the cleft between left hand middle

and index finger 1 cm. from each other anteriorly.

2) (2 cm. X 1 cm.) oblique contusion with (1/2 cm. X 1 cm.) oblique abrasion on the mid of Rt. foot medially. Cause - Hard and blunt substance. Age within 6 hours."

Dashrath, P.W. 4, along with Dilip were already in the field and the exchange of abuse took place between accused 1 and Dashrath and accused 1 said that he would let his cattle loose into the mango grove of the latter. While they were exchanging the abuses, Baburao, P.W. 5, Arjun Godkar, P.W. 7, and Sadashiv Mayekar, P.W. 6, also arrived there. All of them corroborated the testimony of Dashrath that accused 1 was hurling abuses at Dashrath and his brothers from his field. Their evidence shows that accused 1 had a stick with him while he was in his field. Hearing the loud exchange of abuses, the inmates of the house of the accused came out. It is pertinent to note that there were 12 male persons in the family of the accused. As the house of the accused was just near the place of the incident and the time being 7-30 a.m. naturally all came out of the house. Dattaram's house is at a distance of about 1 1/2 furlong from the place of the incident. Hearing the loud exchange of abuses, Dattaram arrived at the field. He asked his sons and others to wait in the field and went to the accused to ask them why they were abusing. The place of the incident is shown by a small red square in the map Exh. 14. Their evidence shows that when Dattaram started going to the accused they also followed him at a distance of about 15 to 20 ft. and as soon as Dattaram went near the accused, accused 1 gave a stick blow on his head. We have carefully scrutinised the evidence of all those witnesses and we do not see any reason to disbelieve their testimony. Their evidence was recorded about 2 years after the date of the incident and, therefore, there are bound to be some minor variations and inconsistencies but those minor variations and inconsistencies do not in any way affect their credibility. The testimony of the complainant Dashrath is fully corroborated by the first information report lodged by him on the same day at Sawantwadi Police Station. We have gone through the judgment of the trial Court and we find that the learned trial Judge has on flimsy grounds rejected the evidence of those eyewitnesses. He has made certain observations in his judgment which are not at all correct as per the evidence on record. At para 18 of his judgment he observed that the evidence adduced by the prosecution does to show that the accused 1 was possessing a stick when he was throwing (hurling) abuses in the name of the complainant. In the same paragraph he also observed that there was no overt act attributed to accused 2. Both those observations are incorrect. Dashrath, P.W. 4 and other eye-witnesses have categorically stated that accused 1 and 2 were armed with sticks. They have also stated that accused 2 gave a stick blow to Baburao, P.W. 5. The complainant Dashrath has stated those facts in the first information report Exh. 20 lodged by him soon after the incident. Therefore, the learned trial Judge was not at all right in saying that there was no evidence to show that accused 1 was armed with a stick and also there was no evidence that any overt act was attributed to accused 2. Similarly, though all the

witnesses stated that accused 1 gave a stick blow on the head of Dattaram and medical evidence also supports the evidence of those witnesses, the learned trial Judge has disbelieved the witnesses on a very minor ground that some of the witnesses stated that the blow was given from the front and others from backside. Reading of the evidence of those witnesses clearly shows that as soon as the deceased Dattaram approached the accused and while he was facing the accused, accused 1 gave a stick blow on his forehead. Therefore, the learned trial Judge was not right in rejecting their evidence on such a flimsy ground. The learned trial Judge has also highlighted that the scene of offence was shifted from one place to another and as such the testimony of the eyewitnesses could not be safely relied upon. On going through the evidence on record, we are unable to agree with the learned trial Judge that there was any shifting of the scene of offence. The offence had taken place in the field of the accused and by the side of the field of the accused there is a field of Atmaram Vithal. When such incident takes place, the parties do not stick fast to one place. They are always moving here and there. There is evidence that they were moving and in such movements if they have sometimes crossed into the nearby field of Atmaram Vithal, it cannot be said that the witnesses while giving the evidence changed the venue of the scene of offence. Thus on careful scrutiny of the prosecution evidence in the light of the criticism levelled by the learned Counsel for the respondents and also on considering the grounds on which the learned trial Judge rejected their evidence, we are satisfied that the eyewitnesses in this case have given a truthful account of the incident and the view taken by the learned trial Judge is clearly unreasonable. The evidence of the complainant Dashrath is fully corroborated by the first information report lodged by him immediately after the incident and his presence at the time of the incident cannot be doubted. Therefore, disagreeing with the learned trial Judge we find that the evidence of those eye-witness can be safely relied upon and relying on their testimony supported by the medical evidence we hold that accused 1 did give a stick blow on the parietal region of Dattaram when Dattaram not armed with any weapon approached him to ask him why he was abusing his sons. Unfortunately, the stick blow proved to be fatal. No other view on the proper appreciation of the evidence is possible.

6. It is necessary to consider whether accused 1 was exercising the right of self-defence when he hit the deceased with a stick on his forehead. According to the Defence, Nana, Dasharath and Dattaram came armed with sticks and gave stick blows on the person of accused 2 and thereby accused 2 fell down and at that time accused, who was standing nearby, also received one stick blow from Nana on his left hand and at that time he snatched the stick from the hand of Nana and started moving that stick. Thus, according to the defence, the deceased Dattaram might have got injured on his forehead while accused 1 was moving the stick in self-defence. The story put forward by the defence is not at all possible in the circumstances of the present case. Had Nana, Dashrath and others from the side of the complainant been to attack the accused armed with

sticks and mounted the attack, one would expect extensive injuries on the person of the accused. Accused 1 Suresh and Accused 2 Bhalchandra were examined by Dr. Udgir on 4-11-1977 at 5.30 p.m. He found the following injuries on the person of accused 2 Bhalchandra :

"(1) Tenderness over occipital region of head.

(2) 3 cm. X 2 cm. oblique contusion with abrasion on the left knee anteriorly.

(3) 3 cm. X 2 cm. oblique contusion with abrasion on the Rt. knee laterally."

According to Dr. Udgir, injuries were caused by hard and blunt substance within 12 hours. The certificate issued by the doctor is at Exh. 11. On the person of accused 1 Suresh he found the following injuries :

"(1) 4 cm. and 1 cm. contusion with abrasion oblique on the left lower forearm posteriorly."

According to him, the cause of the injury was hard and blunt substance and the age was within 12 hours. The certificate issued by the doctor in respect of accused 1 is at Exh. 12. Those injuries sustained by accused 1 and 2 are very minor and they appear to have been caused in the melee that ensued after accused 1 gave stick blow on the head of the deceased Dattaram and Dattaram fell down unconscious. As stated earlier, had 3-4 persons from the side of the complainant armed with sticks mounted an attack on accused 1 and 2, a large number of injuries would have been noticed. The injuries noticed on the person of the accused can be caused by a fall in the melee. They are not such which could be caused by stick blows. Consequently, the defence suggested in this case is not at all probable. We find that the learned trial Judge was not at all right in accepting the defence. The burden of proving the right of self-defence is on the accused. Though the burden is not as onerous as is on the prosecution to prove their case, the defence from the prosecution evidence or by adducing evidence should satisfactorily prove that the accused was acting in the exercise of right of self-defence when he hit some one from the complainant's party and caused a serious injury resulting into his death. In the present case the defence put forward is not at all probable and, therefore, disagreeing with the learned trial Judge we reject the defence put forward by the accused.

7. The prosecution evidence discussed above satisfactorily proves that accused 1 gave a forcible stick blow on the head of the deceased Dattaram when Dattaram unarmed approached him to ask him why he was abusing the complainant and his sorts. There is no evidence that accused 2 gave any stick blow to the deceased. There is also no evidence that there was any pre-concert between accused 1 and 2. Accused 1 and 2 have their house near the scene of offence. Hearing the commotion in the field accused 2 also arrived and stood near his son in his field. From the fact that accused 2 was standing by the said of accused 1 when accused 1 gave a stick blow to Dattaram, it cannot be inferred that accused 1 and 2 entertained a common intention to cause the death of Dattaram or even

to assault Dattaram. Accused 2 is alleged to have given a stick blow to Baburao, P.W. 5. Baburao has given evidence to that effect. It is pertinent to note that there is no charge against the accused for assault on Baburao. As there is no charge against the accused for assaulting Baburao, accused 2 cannot be held guilty for the alleged assault on Baburao. As the prosecution has failed to prove satisfactorily that accused 1 and 2 entertained a common intention to cause the death of Dattaram and in furtherance of the said intention attacked Dattaram, accused 2 who has not taken part in the attack on Dattaram cannot be held guilty with the help of S. 34, I.P.C. Consequently, we find that the acquittal of accused 2 by the learned Additional Sessions Judge is proper and correct.

8. It takes us to consider what offence accused 1 has committed by hitting the deceased Dattaram with a stick on his head and thereby causing his death. There is no evidence either direct or circumstantial to infer that accused 1 entertained an intention to cause the death of Dattaram. The sticks which are produced before the Court and which are alleged to have been used in the crime are not very heavy sticks. Accused 1 gave only one blow on the head of the deceased Dattaram and after he fell down no blow was given by accused 1 to the deceased. From the nature of the weapon i.e. stick and the single blow given by accused 1 on the head of Dattaram neither intention to caused death of Dattaram nor knowledge that the injury to be caused thereby would result into the death can be imputed to accused 1. Therefore, we find that the offence committed by him does not fall within the provisions of S. 302, I.P.C. Accused 1 gave a forcible stick blow on the head of Dattaram and thereby caused grievous hurt to him without intending or knowing that thereby he would cause the death of Dattaram and, therefore, the offence would fall squarely under S. 325, I.P.C. and is liable to be convicted for the same.

9. It takes us to consider the sentence to be awarded to accused 1 for the offence under S. 325, I.P.C. We heard the learned Counsel for respondent 1 (accused 1) on the sentence to be awarded. He submits that the incident took place 12 years back and during the lapse of such a long period the parties must have reconciled themselves and it would not be proper to send accused 1 to prison for a long term. According to him, imprisonment for a small term and some amount of fine will meet the ends of justice. The incident in question took place on 4-11-1977 i.e. about 11 years back and the whole incident has taken place in a heat of passion at the spur of the moment. We do not consider it proper that after 11 years of the incident any heavy sentence of imprisonment is called for. In the peculiar circumstances of the present case we think that the sentence of R.I. for one year and a fine of Rs. 2,000/- will meet the ends of justice.

In the result, the appeal is partly allowed. The acquittal of respondent 2 (accused 2) is maintained. Respondent 1 (accused 1) is convicted of the offence under S. 325, I.P.C. and is sentenced to suffer R.I. for one year and to pay a fine of Rs. 2,000/- or in default to suffer R.I. for six months. Out of fine, if recovered, an

amount of Rs. 1,500/- shall be paid to the complainant Dasharath Dattaram Godkar for and on behalf of the heirs of the deceased Dattaram. Respondent 1 (accused 1) shall surrender to bail.

10. Appeal partly allowed.