

(2017) 10 BOM CK 0026
In the Bombay High Court
Case No : 87 of 2004

Sudhakar Jarjan Pawar, & Anr.

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 30-10-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 302](#),
[Section 34](#), [Section 325](#), [Section 304\(2\)](#) - Punishment for murder - Acts done by several persons in furtherance of

Citation : (2017) 10 BOM CK 0026

Hon'ble Judges : Rohit B. Deo

Bench : SINGLE BENCH

Advocate : Vinay Dahat, J.B. Kasat, H.R. Dhumale

Final Decision : Allowed

Judgement

1. Both appeals seek to assail the judgment and order dated 17.01.2004 in Sessions Trial 92/1997 delivered by Additional Sessions Judge, Amravati, by and under which, the appellants are convicted of offence punishable under section 304 Part-II read with section 34 of the Indian Penal Code and are sentenced to suffer rigorous imprisonment for a period of five years and to payment of fine of Rs.250/each.

2. Criminal Appeal 87/2004 is preferred by Sudhakar Pawar (hereinafter referred to as accused 1) and Criminal Appeal 161/2004 is preferred by Balidas Pawar (hereinafter referred to as accused 2) who faced trial for offence punishable under section 302 read with section 34 of the Indian Penal Code. Both the accused are acquitted of offence punishable under section 302 read with section 34 of the Indian Penal Code and are convicted of offence punishable under section 304 PartII read with section 34 of the Indian Penal Code.

3. I have heard Shri Vinay Dahat, the learned counsel for accused 1 and Shri H.R. Dhumale, the learned Additional Public Prosecutor for the respondent/State.

The appeal was adjourned time and again to enable the learned counsel for accused 2 Balidas to assist the Court. However, the learned counsel for accused 2 has chosen to remain absent. The appeal preferred by accused 2 is being decided on merits, after scrutiny of record, consistent with the dictum of the Hon"ble Supreme Court in Bani Singh and others vs. State of Maharashtra (1996) 4 SCC 720.

4. The prosecution case is thus : The complainant one Shalu Daryadas Bhosale was sleeping in front of her hut on the fateful evening of 08.09.1991. The deceased Fulabai Nagindas Pawar, the sisterinlaw of the complainant was sleeping besides her.

The complainant awoke on hearing Fulabai shouting "VERNACULAR MATTER OMITTED". Accused 1 Sudhakar was assaulting Fulabai with stick. The complainant shouted "VERNACULAR MATTER OMITTED" and her husband Daryadas rushed to the spot and caught hold of Sudhakar. Accused 2 Balidas Pawar then inflicted a stick blow on the stomach of Fulabai. Daryadas shouted that the person who is assaulted is Fulabai and then accused 2 Balidas Pawar assaulted Daryadas with stick. Daryadas used Sudhakar as a shield to save himself from the assault launched by Balidas Pawar and in the process Sudhakar received stick blows on neck, leg and waist. One Sudharshan Bhosle intervened and he also suffered stick blows on his legs. Many persons from the Beda (Camp of Pardhis) assembled and accused 2 Balidas fled. The husband of Fulabai Nagindas lifted Fulabai and brought her in front of his hut where Fulabai breathed her last.

The case of the prosecution is that both the accused nudge a grudge against Daryadas. The reason was an altercation which took place at 07:00 p.m. on 08.09.1991. The accused assaulted Fulabai under the mistaken assumption that Daryadas was sleeping besides the complainant.

5. On the basis of the report lodged by the complainant, offence punishable under section 302 read with section 34 of the IPC was registered. The spot panchnama and the inquest panchnama was recorded. One stick was seized from accused 2 Balidas. Another stick was produced by accused 1 Sudhakar which was also seized. The dead body was sent for postmortem examination which revealed that there was a rupture of liver which resulted in death. After the completion of the investigation the chargesheet was submitted in the Court of Judicial Magistrate First Class, Amravati who committed the case to the Sessions Court.

6. The learned Sessions Court framed charge (Exh.32) under section 302 read with section 34 of the Indian Penal Code. The accused abjured guilt and claimed to be tried. The defence of the accused is of total denial and false implication due to inimical relation. The defence examined two witnesses.

7. P.W.1 Shalu Bhosale is the complainant. She has deposed that she saw both the accused assaulting Fulabai with stick. P.W.1 states that she raised an alarm, her husband Daryadas came running and caught hold of accused Sudhakar.

Daryadas said to Sudhakar that the person who is assaulted is Fulabai. Accused 2 Balidas then assaulted the husband of P.W.1 Daryadas. P.W.1 has proved the oral report Exh.44 in the crossexamination, P.W.1 states that there are two Bedas (Camp of Pardhis). One is headed by Daryadas and the other is headed by the accused. The members of the Bedas reside on either side of road. She admits that in her community liquor is traditionally consumed on the eve of festivals and that the incident occurred on Pola. She states that she is not aware if accused 1 and 2 suffered injuries to head and they became unconscious.

8. P.W.2 Daryadas states that there was an altercation between accused 2 Balidas and P.W.2 between 05:00 to 06:00 p.m. on the day of the incident. He states that he informed the Police Patil about the altercation and returned home. P.W.2 states that when he was sitting at the house of his mother, he heard the shouts of P.W.1 and rushed to where P.W.1 and Fulabai was sleeping. P.W.2 states that both the accused were assaulting Fulabai with sticks. He caught hold of accused Sudhakar, used him as a shield and protected himself from the stick blows which accused 2 Balidas intended to inflict. He states that since Sudhakar was used as a shield, he received stick blows inflicted by accused 2 Balidas. P.W.2 then deposes that when other people from the Beda gathered, at the spot, accused 2 Balidas fled. A suggestion is given to P.W.2 during the crossexamination that he and others went to the house of the accused persons and assaulted them with stick, the suggestion is denied. P.W.3 Wasudeo Sakharkar has proved spot panchnama Exh.48. P.W.4 Diwakar Rote is the Police Patil of village Kekatpur since 1975. He states that on Pola day one Home Guard informed him that an altercation is going on in the Beda. After sometime, accused came to the Police Patil and Daryadas, Sheru and others followed. He has deposed that at his house there was a scuffle between accused 1 Sudhakar and Sheru. He made both the accused persons sit at his house and sent Daryadas, Sheru and others back to their house after counseling them. P.W.4 states along with Home Guard he went to Police Station Mahuli Jahangir and gave the information to the Police Station Officer. He was told by the Police Station Officer that since the vehicle is not available he would come to the village later. P.W.2 then returned to his home at 10:30 p.m. P.W.4 Diwakar Rote then deposes that at 10:30 p.m. the wife of accused 1 Sudhakar came to his house and informed him that Daryadas and others have assaulted her husband Sudhakar and Balidas with sticks and both are unconscious. After 5 to 15 minutes, Kalandas and Daryadas Bhosale came to P.W.4 and informed that the accused had murdered Fulabai. P.W.4 further states he went to the Beda, and saw accused Sudhakar and Balidas lying unconscious in the courtyard of Daryadas Bhosale. He saw the body of Fulabai lying in front of her house.

9. P.W.5 Nagindas Pawar is the husband of the deceased. He has not supported the prosecution. It is brought out in the crossexamination conducted by the learned A.P.P. that after the death of Fulabai he married Chandralekha Bhosale who is related to accused 1 Sudhakar.

10. P.W.6 Ashok Dhotre is the Officer who conducted the initial investigation. He admits in the crossexamination that the accused were injured while denying the suggestion that the accused were unconscious and were referred by him to Medical Hospital.

11. P.W.7 Dr. Pushpa Sadhwani conducted the autopsy on the dead body of Fulabai along with Dr. D.M. Tekam. She has proved the postmortem report Exh.16. Her opinion is that the cause of death was haemorrhagic shock due to injuries to liver.

12. P.W.8 Uttam Jadhav recorded the statements of Diwakar Dhotre, Ratnamala and Kalandas and submitted the chargesheet.

13. P.W.9 Ramesh Kale has proved the First Information Report.

14. The defence examined D.W.1 Gopalsing and D.W.2 Kalandas. Gopalsing has deposed that there was an altercation between Daryadas and his family members and the accused at 07:00 p.m. or thereabout on the date of the incident. Gopalsing claims to be standing at a distance of 200 ft. from the spot of the incident. He claims that the accused persons were beaten by the complainant and others and were lying on the road in semiconscious condition. Surprisingly, D.W.1 has not been extensively crossexamined presumably since he states at the very beginning of the crossexamination that he does not know about the incident. However, the version of D.W.1 that he witnessed an altercation in which the accused were at the receiving end, has gone unchallenged. Kalandas who is examined as D.W.2 states that the accused were injured when they were taken into custody by the Police. However, he disclaims any knowledge about the incident and is therefore, not crossexamined in any detail.

15. Three witnesses namely P.W.1 Shalu Bhosale (complainant), P.W.2 Daryadas Bhosale and P.W.5 Nagindas Pawar, the husband of the deceased are the material witnesses who were examined by the prosecution as eye witnesses to the incident. P.W.5 Nagindas Pawar, the husband of the deceased, did not support the prosecution. Nothing is elicited in his crossexamination to take the case of the prosecution any further. Both P.W.1 Shalu and P.W.2 Daryadas have deposed that both the accused Sudhakar and Balidas assaulted the deceased Fulabai with sticks. The postmortem report and the evidence of the Doctor who conducted the autopsy reveals that no external injury was noticed on the person of the deceased Fulabai. The cause of death is puncture of liver. The absence of external injury renders doubtful the evidence that both the accused assaulted the deceased with sticks. The more probable scenario that the deceased is likely to have suffered the rupture of liver due to a single albeit forceful blow. Concededly, even according to the prosecution neither Sudhakar nor Balidas were intending to cause harm to the deceased Fulabai. The intended target was P.W.2 Daryadas. The assault on Fulabai was a case of mistaken identity. It is difficult to ascertain as to which of the accused delivered the fatal blow which caused the liver rupture leading to the death of Fulabai. It is admitted by P.W.6

Ashok Dhotre that both the accused were injured. This admission is consistent with the defence evidence. The learned Sessions Judge has accepted the contention of the prosecution that Sudhakar suffered injuries since he was used as a protective shield by Daryadas to ward off assault launched by Balidas. However, there is no explanation forthcoming as to how Balidas suffered injuries. To my mind, the explanation that Sudhakar was used as a protective shield and took the blows meant for Daryadas, is not free from doubt. However, notwithstanding that the prosecution has not been able to explain the injuries suffered by the accused, which may be due to a retaliatory assault post the suffered injury to Fulabai, it is clear that both the accused arrived at the spot armed with sticks and intended to cause harm to Daryadas. Unfortunately it was the deceased who was mistaken to be Daryadas and who suffered injury.

16. The learned Sessions Judge has convicted the accused for offence punishable under section 304 PartII of the I.P.C. on the reasoning that although the intention to cause death may be absent, the knowledge that the act is likely to cause death can be attributed to the accused. I am not in a position to agree with the reasoning of the learned Sessions Judge. The evidence on record is not sufficient to record a finding that the knowledge that inflicting a stick blow on the sleeping Fulabai is likely to cause death can be attributed to the accused. Moreover, as I have already observed, from the evidence on record it is difficult even to ascertain as to which of the accused assaulted Fulabai. In the light of the evidence on record, I would set aside the conviction of the accused under section 304 PartII of the I.P.C. and instead sentence the accused under section 325 of the I.P.C.

17. The incident occurred 26 years ago. I therefore, sentence the accused to suffer rigorous imprisonment for two years.

18. The conviction of the appellantsaccused in both Criminal Appeal 87/2004 and Criminal Appeal 161/2004 for offence punishable under section 304 PartII of the I.P.C. is set aside and instead the appellantsaccused Sudhakar and Balidas are convicted for offence punishable under section 325 of the I.P.C. and are sentenced to suffer rigorous imprisonment for two years.

19. The accused are entitled to set off the preconviction and post conviction detention, against the sentence.

20. The sentence of fine is maintained.

21. The appeals are partly allowed.