

Anand

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 846 OF 2015

1. Murlidhar Waman Bombale .Appellants
(Original
Accused
2. Waman Tulshiram Bombale Nos. 1 to 3)
3. Vishnu Waman Bombale

At present Nashik Central Prison
District : Nashik.

Vs.

The State of Maharashtra
Dindori Police Station,
Nashik.

.Respondent

Mr. Aniket Vagal a/w Mr. Kunal Pednekar, Advocate, for the
Appellants
Mr. A. R. Kapadnis, APP, for the Respondent - State

**CORAM : SUNIL B. SHUKRE AND
ABHAY S. WAGHWASE, JJ.**

RESERVED ON : 09 MARCH 2023

PRONOUNCED ON : 15 MARCH 2023

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

1. By invoking Section 374 of the Code of Criminal

Procedure, appellants, who are the original accused Nos. 1 to 3 have taken exception to the Judgment and Order of conviction passed by the learned District Judge - 7 & Additional Sessions Judge, Nashik dated 08.06.2015 in Sessions Case No. 142 of 2013, thereby convicting them for the offences punishable under Sections 302 r/w 34, 323 r/w 34, 324 r/w 34 of the Indian Penal Code (for short 'IPC') & sentencing them to life, 3 years, 1 year respectively.

FACTS GIVING RISE TO SESSIONS TRIAL ARE AS UNDER :-

2. The complainant, his sons and accused Nos. 1 to 4 are agriculturists and also relatives of each other. Their lands were adjoining to each other. Due to shortage of water, complainant fetched/drew water from Pazar Talav (Percolation Tank). Accused used to prevent the same. This resulted into bitter relations.

3. On 06.12.2012, one of the sons of the complainant namely Dattu and his wife went to fetch water. Another son Raghunath also went to look for them and the complainant claims to have followed all of them to the spot. According to the

complainant, accused persons assaulted Dattu with sickle and they assaulted him and his son Raghunath with stick and sickle respectively and all injured were taken to the hospital. There he set law into motion. Dattu expired.

After completion of investigation, PW.11 charge-sheeted all the four accused persons and on committal of the case, it was tried by the learned Additional Sessions Judge, who on appreciating the evidence held accused Nos. 1 to 3 to be guilty of offence under Section 302, 323 and 324 r/w 34 of the IPC and acquitted accused No. 4 Rani from all charges. It is this order of conviction which is now questioned before this Court on various grounds raised in Appeal Memo.

SUBMISSIONS :-

4. Heard extensively both sides. Learned counsel would challenge the findings reached by the learned trial Judge on the following grounds.

Firstly :- Failure of the learned trial Judge to appreciate the evidence on record in the light of legal requirements.

Secondly :- Testimonies of PW.3, PW.4 & PW.5 are not consistent

and that PW.3 cannot be said to be eye witness.

Thirdly :- No evidence as to whether accused to be armed at the time of occurrence. Rather complainant party had assaulted accused partly.

Fourthly :- Overt act of accused persons is not defined.

Fifthly :- There being single blow to deceased. It is not the case of homicidal death.

STATE - RESPONDENT :-

5. Learned APP would resist on the ground that there is direct, trustworthy and reliable evidence, including that of injured eye witness account. Medical evidence suggests homicidal death of Dattu. Defence admitted injuries suffered by PW.3 - complainant & PW.5 - Raghunath. Consequently, there being incriminating material, learned trial Court rightly accepted prosecution version & held accused guilty. According to him, there being no merit in Appeal, the same may be dismissed.

6. In view of Judgment of Hon'ble Apex Court in the case of *Ishwarbhai Fujibhai Patni Vs. State of Gujarat*, reported in *(1995) 1 SCC (Cri.) 222*, this being Appellate Court, evidence

has to be re-examined, re-assessed and re-evaluated. Hence, we accordingly proceed to do so.

7. The evidence goes to show that on said fateful night, deceased went with his wife - PW.4 to fetch water. Taking into account, the evidence of PW.3 - complainant, it is clear that after deceased & PW.4, his other son Raghunath i. e. PW.5 went to the spot. Therefore, complainant was the last person to reach the spot. Hence, it is doubtful whether he had occasion to see the entire episode. Further, his evidence is general & non-specific about the roles played by accused Nos. 1 to 3. Hence, we refrain from relying his testimony.

8. On carefully scrutinizing the evidence of PW.4 & PW.5, the occurrence gets unfolded. PW.4 was in the company of deceased from inception. Hence, her evidence assumes importance. Similarly, evidence of PW.5 Raghunath is also relevant, as he too is an injured.

9. On minute examination of evidence of PW.4 & PW.5, it is emerging that accused Murlidhar assaulted deceased Dattu with sickle in stomach, whereas accused Nos. 2 & 3 assaulted

PW.5 and complainant - PW.3. Both these witnesses are silent about any overtact by accused Nos. 2 & 3 on the person of deceased Dattu.

However, it seems that accused Nos. 2 & 3 are charge-sheeted by invoking Section 34 of the IPC. In our opinion, to attract the mischief of Section 34, two things are essential i. e. **firstly**, common intention to commit offence and **secondly**, participation in commission of offence. The words “infurtherance of common intention of all” are most essential parts of this provision. It is the common intention to commit crime actually committed. It pre-supposes a state of mind common to all accused to commit crime, which may develop at the eleventh hour, just before or during course of the crime or sometime before. As it is of mind, it has to be ascertained from the surrounding circumstances, and, therefore, role played by each of the accused helps considerably in determining the aspect of common intention.

Here evidence on record is completely silent about the role allegedly played by accused Nos. 2 & 3 in assaulting deceased Dattu.

10. PW.7, a Medico-legal Expert has clearly opined about death of Dattu due to assault by sickle. Sickle is recovered at the instance of accused No. 1. Taking into account the evidence of PW.4 & PW.5 which is direct and consistent evidence and evidence of Medico-legal Expert, it can safely be inferred that ocular account lends support to medical evidence as regards homicidal death is concerned. Therefore, in the light of above discussion, it is evident that only accused No. 1 having assaulted in stomach, which resulted into death is liable and answerable for homicidal death of Dattu.

In the light of aforesaid discussion on the point of applicability of Section 34 of the IPC, here evidence is missing regarding participation and common intention entertained and shared by accused Nos.2 & 3. Hence, they cannot be roped in for offence punishable under Section 302 of the IPC by invoking Section 34 of the IPC.

11. As regards to injuries on PW.3 & PW.5 are concerned, defence has already admitted Exh. 45 in trial Court. Therefore, there is no serious challenge to injuries on PW.3 & PW.5.

Consequently, charge under Sections 323 & 324 of the IPC is made out by the prosecution.

12. To sum up, here it is manifest from the evidence on record that accused No. 1 Murlidhar is the sole author of single injury on deceased Dattu. Injury is on vital part like abdomen. There is said to be use of sickle. Measurement of the injury/wound is narrated by the Autopsy Doctor and is also reflected in the Post Mortem Report. The deceased succumbed on the same day and therefore, there is no hesitation to hold that though, there was a single blow, it was with immense force and has resulted into death.

13. It is strenuously submitted before us by learned counsel for the Appellants that here there is single blow on deceased Dattu and therefore, Section 302 of the IPC is not attracted.

We are not impressed with such submissions. It is settled law that mere fact that there was single blow, is not a circumstance which would warrant conviction under Section 302 of the IPC, being altered to one punishable under Section

304(Part II) of the IPC. There are several cases, where single blow has also resulted in death and has attracted charge under Section 302 of the IPC. The fact that single blow is inflicted by itself would not mitigate the offence to one culpable homicide not amounting to murder.

In series of Judgments like in the cases of *Virsa Singh Vs. State of Punjab*, *Gudar Dusadh Vs. State of Bihar*, *Vasanta Vs. State of Maharashtra*, *Jai Prakash Vs. State (Delhi Admn.)* and *State of Karnataka Vs. Vedanayagam*, the Hon'ble Apex Court lucidly and succinctly has dealt with law on this point i. e. in cases involving single blow resulting into death, thereby attracting offence of murder.

Here also as discussed above, taking into consideration nature of weapon, site of the body targeted, we are of the considered opinion that said blow though single, has turned out to be fatal. Consequently, accused No. 1 Murlidhar, alone being author of said injury, he is solely responsible and rightly held guilty so by the learned trial Judge.

For the aforesaid reasons, guilt of accused Nos. 2 & 3

for charge under Section 302 of the IPC, is in the absence of participation and sharing common intention. Hence, their conviction for the charge under Section 302 of the IPC is misplaced and they are required to be acquitted from the said charge. Thus, we propose to interfere in the trial Court's order only to that extent.

Resultantly, we proceed to pass the following order.

O R D E R

- (i) The Appeal is partly allowed;
- (ii) The Judgment and Order of conviction passed by the learned District Judge - 7 & Additional Sessions Judge, Nashik as against accused No. 1 alone for the offence punishable under Section 302 of the IPC is maintained and kept intact;
- (iii) The Judgment and Order of conviction of accused Nos. 2 & 3 for the offence punishable under Section 302 r/w 34 of the IPC is quashed & set aside;
- (iv) Conviction and sentence against accused Nos. 2 & 3 for the commission of offence punishable under Sections 323 & 324 r/w 34 of the IPC passed by the learned trial Judge is maintained and kept intact.

14. The Appeal is disposed of accordingly.

(ABHAY S. WAGHWASE, J.)

(SUNIL B. SHUKRE, J.)