

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH : NAGPUR

Criminal Appeal No. 426 of 2003

Appellant : Vinod son of bapuna Kolhe, aged about
43 years, resident of Wasadi Bk, Taluka
Khamgaon, District Buldana
versus.

Respondent : The State of Maharashtra

Mr A.S. Manohar, Advocate for appellant.

Mr S.J. Jichkar, APP for respondent-State

Coram : K.J. Rohee and

A.P. Bhangale, JJ

Dated : 5th December 2008

Judgment (Per A.P. Bhangale, J)

1. The appellant questions legality and validity of judgment and order passed by II Additional Sessions Judge, Khamgaon on

17.5.2003 convicting appellant for offences punishable under Sections 302, 324 and 452 of the Indian Penal Code whereby appellant was sentenced to suffer rigorous imprisonment for life and to pay fine in the sum of Rs. 1000/-, in default, to suffer rigorous imprisonment for six months for offence of murder. The trial Court also awarded rigorous imprisonment for one year and fine in the sum of Rs. 100/-, in default, to suffer simple imprisonment for one month for offence punishable under Section 324 of the Indian Penal Code and further more directed appellant to suffer rigorous imprisonment for one year and to pay fine in the sum of Rs. 100/-, in default, to suffer simple imprisonment of one month for offence punishable under Section 452 of the Indian Penal Code.

2. Prosecution case briefly stated is as under :

On the basis of oral report dated 12.9.1995 by Prayagbai Bhaurao Kolhe (PW 1), Pimpalgaon Raja Police Station registered Crime No. 41/1995 under Sections 302, 323 and 452 of the Indian Penal Code. Police were informed about the incident occurred on 12.9.1995 at about 10.00 pm about appellant Vinod assaulting her

husband Bhaurao on the abdomen by means of “Bhala” (spear) causing bleeding injuries on left cheek, left chest, right ear and near right ear and also causing injuries to first informant Prayagbai (PW 1) and Bharti (PW 2) before appellant Vinod ran away. In the result, Bhaurao after some time succumbed to injuries. On the basis of FIR (exhibit 18) the investigation was taken up. Inquest was held over dead body of Bhaurao (exhibit 23) and spot panchanama was also drawn on the same day. Post-mortem examination was done (vide post-mortem report exhibit 48). Blood-stained clothes of deceased were seized under panchanama (exhibit 30). Seized muddemal articles were sent to the office of Chemical Analyser. Reports were received as per exhibits 52, 52A and 53. After completion of investigation, charge-sheet was submitted before II Judicial Magistrate's court at Khamgaon who committed the case to the Court of Sessions at Khamgaon giving rise to Sessions Case No. 83 of 1995 before II Additional Sessions Judge, Khamgaon. Charge (exhibit 9) was framed on 24.9.2002 to which the appellant pleaded not guilty and claimed trial.

3. Twelve witnesses were examined by the prosecution while one witness was examined by the defence. PWs 1 to 3 were examined as eye witnesses. Placing reliance upon evidence, the trial Court found appellant guilty and sentenced him, as stated in paragraph 1 above.

4. In support of the appeal, learned Advocate Mr A.S. Manohar submitted that the conviction is bad in law on the ground that real story was suppressed by the prosecution and that false and fabricated story was portrayed against appellant by means of got-up witnesses. Further, according to learned Advocate, there was delay of more than three hours to lodge report and possibility of tutoring cannot be ruled out. Mr Manohar also submitted that the conviction ought not to have been recorded on the basis of witnesses who were interested in the success of the prosecution being relatives of the deceased. According to learned Advocate, offence was not proved against appellant beyond reasonable doubt on account of defects in prosecution evidence and, therefore, appellant be acquitted.

5. Learned APP Mr S.J. Jichkar, on the other hand, supported impugned judgment and order and canvassed submission that offences

were proved beyond reasonable doubt.

6. It appears from the prosecution evidence that mainly the evidence consisted of PW 1 Prayagbai (wife of deceased), PW 2 Bharti (daughter-in-law of deceased) and witness no.3 Onkar (independent witness) who were eye witnesses and deposed as to the incident of assault which resulted into death of Bhaurao Kolhe. PW 4 Laxman Wagh deposed that he acted as panch in respect of inquest panchanama (exhibit 23) and spot panchanama (exhibit 24). PW 6 Awachitrao deposed having acted as panch in respect of memorandum panchanama (exhibit 27) and PW 7 Sudhakar deposed about seizure of blood-stained clothes of the deceased (exhibit 30) which were carried in sealed condition to chemical analyzer's office by PW 10 Police Constable Gajanan Kulkarni (vide reports from C.A. exhibits 52, 52A and 53). Medical evidence was led of Dr Gaikwad (PW 12) who performed post-mortem examination (exhibit 48) over dead body of Bhaurao and Dr Mendhe was examined to prove injury certificate issued by him (exhibit 46). We have also gone through evidence of topography of the spot of offence as deposed by PW 9 Mr Hadke, a

revenue inspector who prepared map and other circumstantial evidence, deposed by Madhumati Kolhe (PW 5) and Prabhakar (PW 8 – son of deceased) as evidence of sole defence witness DW 1 Laxmibai (wife of appellant). PW 13 API Mahore deposed as investigating officer. We have also examined impugned judgment and order in the light of submissions at the bar.

7. The first and foremost question is as to whether Bhaurao Kolhe met with homicidal death. Dr Gaikwad (PW 12) who conducted post-mortem examination (exhibit 48) found following ante-mortem external injuries on the dead body of Bhaurao :

- “(a) stab injury anterior abdominal wall supra umbilical with omentum outside the stab above 1-1” x 1” horizontal;
- (b) stab injury left chest infra clavicular region 2” x 1” x 1”.
- (c) Incised wound left cheek vertically 4-1/2” x 1-1/4”.
- (d) CLW with avulsion of skin right supra curicular region 2” x 2”.
- (e) Abrasion right leg anterior lower third 1” x 1/2” there was no fracture. These injuries were ante-mortem injuries.”

Observations as to Internal injuries noted in the post-mortem report proved by Dr Gaikwad are as under :

“Abdomen :

Walls : Stab injury ant. abd. wall supra umbilical horizontal.

Peritoneum: Haemoperitoneum 2 litres.

Cavity : Full of coils of intestine. Omental vessels ruptured.

Stomach
and its

contents : Stab Stab ant. wall horizontal 1” x 1” Pale empty.

No noxious smell.

Liver with
weight and
gall

bladder : Stab injury. Post surface 1”x1”x1” 900 gms.”

8. In the opinion of Dr Gaikwad, the deceased died on account of haemorrhagic shock due to stab injuries. Further, according to Dr Gaikwad, the stab injuries observed were possible by means of “Bhala” (spear) Article No. 9 before the trial Court. Learned Advocate for the appellant invited our attention to the fact that there was absence of medical opinion as to whether injuries were sufficient to

cause death in the ordinary course of nature and, therefore, the evidence cannot lead to the conclusion that deceased Bhaurao met with homicidal death. learned Additional Public Prosecutor, to counter this submission, invited our attention to ruling in Brij Bhukhan v. State of UP (AIR 1957 SC 474) to canvass submission that perusal of injuries observed on abdomen and chest (a) and (b) in post-mortem notes as deposed by Dr Gaikwad demonstrates that they were on vital part like chest and abdomen and were sufficient to cause death in ordinary course of nature. Therefore, absence of the specific statement by Dr Gaikwad would be of no consequence.

9. It is true that in a murder trial, the public prosecutor conducting prosecution should be careful to bring on record as to whether injuries observed in a given case were sufficient in the ordinary course of nature likely to cause death. Medical witness is expected to assist the Court. Similarly, presiding Sessions Judge shall also exercise proper care in recording the statement of the medical witness to ensure that proper dates as also such opinion are brought on record to get at the truth in the interest of justice to arrive at just

and proper decision in a sessions case. A sessions judge can certainly obtain clarification from the medical officer concerned to prevent or remove any obscurity in the medical evidence. In the present case, however, considering the nature of ante-mortem injuries observed in the post-mortem report as deposed by Dr Gaikwad (PW 12) i.e. dimensions; spots where they were inflicted upon; penetration and depth etc., we find that they were inflicted upon vital parts viz. chest and abdomen. Dr Gaikwad observed stab injury anterior abdominal wall; supra umbilical and horizontal and also observed haemoperitoneum 3 litre in the cavity with rupture of omental vessels accompanied with stab injury. Dr Gaikwad also gave specific medical opinion that the deceased died on account of haemorrhagic shock due to stab injuries which were possible by means of “Bhala” (spear) – Article No. 9 before the court. Bearing in mind ocular evidence led in the case in juxtaposition to the medical evidence, in our opinion, injuries were sufficiently described by Dr Gaikwad demonstrating themselves that injuries were on vital part of the body although there is no specific medical opinion about sufficiency thereof to cause death

in ordinary course of nature. We, therefore, agree with submission advanced by learned Addl. Public Prosecutor that prosecution has succeeded to establish the fact of homicidal death of Bhaurao Kolhe. In the submission of learned counsel for appellant, Dr Gaikwad admitted that injuries observed in post-mortem report did not occur at one and the same time. Dr Gaikwad was questioned by defence about injuries described in column 17 of post-mortem notes regarding contused lacerated wound described as (d) above that skin was peeled and about possibility of injury (e) if the body was dragged on hard and rough surface as also the possibility that if haemorrhage was controlled, the patient would have survived. In our considered opinion, merely putting questions in the cross-examination about possibility as above would not be sufficient to nullify the effect of direct ocular evidence led in the case. In our opinion, in the facts and circumstances of the present case, when stab injuries were attributable to the appellant, there is no escape from the conclusion that deceased Bhaurao Kolhe met with homicidal death.

10. The prosecution led direct evidence of Prayagbai (wife of

deceased) who had seen appellant Vinod coming armed with spear and inflicting injury on the abdomen of her husband. Prayagbai (PW 1) had also during the course of incident sustained injuries on her right palm, shoulder and near eyebrow while she tried to save her husband. She had informed police about the incident and lodged a detailed First Information Report (exhibit 17) on the same day at Pimpalgaon Raja Police Station which corroborate her evidence. Another witness PW 2 Bharti (daughter-in-law of the deceased) also deposed as an eye witness having seen the appellant Vinod inflicting spear blow upon her father-in-law while her mother-in-law (PW 1) was obstructing appellant Vinod. According to Bharti (PW 2), after the assault, her father-in-law fell unconscious and Vinod ran away from the back-side of house. Third eye witness Onkar Wagh (PW 3) also deposed that while he was present talking about fodder in the house of deceased Bhaurao he had seen appellant Vinod questioning them as to why they were talking about him and pushing Bhaurao in his presence, Vinod had returned to his house, but later on Vinod came again armed with spear and inflicted spear blow upon Bhaurao. Due

to fear, Onkar (PW 3) returned home. It appears that PW3 Onkar had seen appellant Vinod twice. First, when Vinod questioned them as to why they were talking about him and at that time, Vinod had pushed Bhaurao. Later, Vinod came with spear and inflicted blow on Bhaurao. The admission elicited in the cross-examination that he had seen Bhaurao running at noon time from the river-side, followed by Vinod does not, in our opinion, damage the direct ocular evidence. It is sufficient and reliable to unequivocally impute guilt to appellant Vinod. It is in evidence of Madhumati (PW 5) that appellant Vinod had written a chit to her with obscene contents which was shown by her to Bhaurao (her brother-in-law-deceased) and they had lodged report at Police Station leading to arrest of appellant Vinod. Thus, appellant Vinod was bound to harbour grudge against Bhaurao irrespective of result of that criminal case. From the evidence of PW 6 Awachitrao it appears that weapon of offence namely, blood-stained spear (Article 9) was seized under panchanama during house-search of Vinod. C.A. Report (exhibit 52) indicates that spear was stained with blood on blade and blood detected on it was human.

11. The criticism by learned defence Advocate that PW 1 Prayagbai and PW 2 Bharti were close relatives of the deceased and ought not to have been believed by the trial Court is unwarranted. In our opinion, evidence by close relatives is not to be discarded, because they may be last persons to screen the real culprit and to involve innocent falsely. PW 1 Prayagbai had also suffered assault upon her from appellant Vinod during the incident. Hence, we cannot agree with the submission that the appellant was falsely implicated. It is further submitted on behalf of appellant that PW 2 Bharti and PW 3 Onkar are got-up witnesses and not real eye witnesses. Considering the entire evidence, we cannot accept the submission as correct. The learned trial Judge has considered the direct as well as circumstantial evidence on record to reach conclusion as to guilt of appellant. There is reason to believe that author of the crime was none other than the appellant himself. The trial Court also considered evidence of DW 1 Laxmibai (wife of appellant) who entered in the witness box with a view to save her husband from punishment by introducing a story that Bhaurao had run away with spear after snatching it from her. The

story appears borne of clear after-thought and imaginary. Had it been true, DW 1 Laxmibai would have lodged report with police station since DW 1 alleged that deceased Bhaurao came to her house; used obscene words and outraged her modesty and she took the spear and followed him. Bhaurao snatched it from her and ran away. The story appears invented by the accused with the help of his wife DW 1 Laxmibai only with a view to save himself and, therefore, must be brushed aside as defence which is neither reliable nor acceptable. There was ample direct evidence to prove culpable homicide; assault and house trespass after preparation of assault by the appellant.

12. Next question is as to whether the trial Court was justified to hold appellant guilty of murdering Bhaurao. From the evidence led by the prosecution we have no doubt whatsoever to conclude that appellant Vinod had caused death of Bhaurao Kolhe and it amounted to culpable homicide. However, as already observed by us the medical evidence is absent as to whether the injuries observed were cumulatively sufficient to cause death in the ordinary course of nature. The evidence as to whether the injuries caused were necessarily fatal

or were sufficient in the ordinary course of nature to cause death is important in a murder trial. In the absence of such medical opinion on record, it is not safe to hold appellant guilty of murder punishable under Section 302 of the Indian Penal Code as trial Court cannot judge on probabilities in the absence of such clear medical opinion. Nevertheless the appellant cannot escape liability for culpable homicide not amounting to murder in view of Section 299 of the Indian Penal Code as the appellant by means of “Bhala” (spear) had caused death of Bhaurao by inflicting injuries which were likely to cause death although he may not have intended to aim at vital parts of body of Bhaurao. Learned Advocate for the appellant invited our attention to admission by Dr Gaikwad in the course of his cross-examination that had the haemorrhage due to these injuries controlled, then the patient would have survived. The admission by Dr Gaikwad can no doubt indicate probability of survival in such case notwithstanding the bodily injuries inflicted on the deceased. However, there can be no doubt that the appellant armed with spear (Bhala) had inflicted bodily injuries upon deceased which were likely

to cause death and assaulted Bhaurao. In Sukumar Roy v. State of West Bengal reported in AIR 2006 SC 3406 the Apex Court has observed thus :

“13. From the above evidence it is evident that the deceased Prafulla died due to the wound in his abdomen which was 4 inches deep. In our opinion this shows the intention of the assailant to kill or to cause such bodily injury as is likely to cause death. There is no reason to disbelieve the evidence of the prosecution witnesses that it was the appellant Sukumar who caused the injury on Prafulla, the deceased. The prosecution evidence of the eye-witnesses is corroborated by the medical evidence.

14. Learned counsel for the appellant submitted that it was a case of self-defence because the appellant had purchased the land in question from the deceased who had entered into his land inspite of warning and as a result an altercation ensued. He contended that the deceased and his men assaulted the accused person and the injury on Prafulla was an accidental one in the scuffle which followed. We do not agree.

15. From the evidence it is clear that the deceased and his men were unarmed and there was no provocation on their part. It also seems that the deceased and the

appellant are co-sharers in the land being plot no. 743. There is no evidence on record to show that the deceased and his men assaulted the appellant and his family members. Hence, in our opinion, the conviction under Section 304 Part I read with Section 34 IPC was fully justified.”

It is apparent that the case of the appellant herein is similarly situated. In the facts and circumstances considered in totality, therefore, appellant is liable to be punished under the first part of Section 304 of the Indian Penal Code instead of offence of murder punishable under Section 302 of the Indian Penal Code. The sentence of rigorous imprisonment for ten years and fine in the sum of Rs. 100/- would meet the ends of justice instead of rigorous imprisonment for life with fine.

13. In view of the discussion as above, the appeal is partly allowed. The conviction of the appellant is altered from Section 302 IPC to Section 304, Part-I IPC and the sentence is reduced and modified as below :

The appellant is convicted for offence punishable under



Section 304 Part-I of the Indian Penal Code instead of Section 302 of the Indian Penal Code and shall suffer rigorous imprisonment for ten years and to pay a fine of Rs. 100/-, in default, to suffer simple imprisonment for one month for the offence of culpable homicide not amounting to murder. Rest of the conviction and sentence is confirmed as imposed by the trial Court for offences punishable under Sections 324 and 452 of the Indian Penal Code.

JUDGE.

JUDGE.

hsj