

IN THE HIGH COURT OF JUDICATURE AT BOMBAY CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.656 OF 2012 WITH CRIMINAL APPLICATION NO.767 OF 2015 WITH CRIMINAL APPLICATION NO.775 OF 2018

Mr. Atikul Habibul Rehman Shaikh & Anr. ...Appellants

vs.

The State of Maharashtra ...Respondent

AND CRIMINAL APPEAL NO.338 OF 2015

Vishwanath Jaynath Yadav @ Motha Kaka ...Appellant

vs.

The State of Maharashtra ...Respondent

---Dr. Yug Mohit Chaudhary for the Appellant in Appeal No.656/2012. Mr. S. V. Marwadi for the Appellant in Appeal No.338/2015. Mr. J. P. Yagnik, APP for the Respondent/State. ---

CORAM : B. P. DHARMADHIKARI & SANDEEP K. SHINDE, JJ. RESERVED ON : 17/10/2019.  
PRONOUNCED ON : 02/12/2019

JUDGMENT:(Per B. P. Dharmadhikari) . The appellants are accused Nos.1 and 2 in Sessions Case

No.33/2009 and 12/2010 decided on 26/4/2012 by Extra Joint Ad-hoc

Additional Sessions Judge, Thane. Both have been convicted under section

302 read with 34 of IPC and sentenced to suffer life imprisonment. They

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are also found guilty under section 324 read with 34 of IPC but no separate sentence is awarded for it. Both accused persons have been given the benefit under section 428 of IPC.

2. The case of prosecution in short is deceased Baban was relative of complainant, a vegetable seller. One Harilal Yadav was murdered in the

area. Complainant's sister by name Padma and her two sons were in jail in connection with this murder. This murder occurred on 23/8/2008 and accused No.2 Vishwas happens to be relative of Harilal. Accused No.1 resided in front of house of complainant Nanda Patole.

3. Nanda Patole witnessed accused persons catching hold of deceased and taking him in front of house of Baban in open space. Accused No.1 had wooden danda whereas accused No.2 had one iron pipe. Accused No.2 gave blow of iron pipe on head of deceased while accused No.1 gave blow of wooden danda on legs and on thigh of deceased. Accused No.2 was shouting allegedly to cut legs and hands of deceased. Accused gave blow of wooden danda on Baban's hand. Complainant in order to save his cousin fell on his body. She sustained injury on her back. Her sari was stained with blood. One person by name Shain present there also requested accused persons not to beat. Due to noise Alka and Anita i.e. two sisters of deceased Baban came out. They also saw both accused persons beating Baban. As Baban was seriously injured she with the help of Baban's sisters brought

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him to Shivaji Hospital, Kalwa where he was declared dead.

4. The short contention of learned counsel for the appellants is deceased had threatened accused persons not to depose against the relatives of deceased who were accused in case of murder of Harilal Yadav. Present accused persons were therefore threatened by deceased Baban not to depose against Padma and her two sons who were in jail in connection with murder of Hari Yadav. In that context deceased Baban gave abuses in

the name of sister of accused No.2 which enraged accused Nos.2 and 1. Because of this abuse losing self control and at the spur of moment they hit deceased and he died. The death therefore cannot be seen as murder under section 302 of IPC and at the most it is an offence falling under section 304(II). The accused persons are in jail since 1/10/2008 and hence have already put in more than 10 years in prison. As such their conviction should be altered to under section 304(II) with suitable modifications in punishment.

5. Our attention is invited to disclosure statement under section 27 of the Evidence Act made by accused No.1 to show that he has pointed out what transpired in the night of 1/10/2008. He has pointed out that on 1/10/2010 in the night deceased Baban gave abuses to his sister Guddu and hence he and accused No.2 tried to pacify him and asked him not to indulge in such abuses. He was not in mood to listen and altercation

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ensued. Therefore he with wooden stick and accused No.2 with iron rod bet Baban on legs, hands and head.

6. Our attention is drawn to judgment of Hon'ble Apex Court reported at *Murli @ Denny vs. State of Rajasthan*, 1995 Supp (1) Supreme Court Cases 39 to submit that such disclosure under section 27 of the Evidence Act can be pressed into service by accused in defence. Similar view is taken by Division Bench of the Court in the case of *Madhavgir s/o Gururatangir*, 2005(1) Mh. L. J. 161 is also relied upon.

7. Mr. Marwadi, learned counsel appearing for accused No.2

submits that evidence of complainant PW-1-Nanda Patole is not very consistent and she has not given true picture. Type of weapon described by her has not been seized by police. For this purpose he draws our attention to evidence of PW-10 Investigating Officer Patil. He further states that according to PW-1, Bablu and accused No.1 are different persons while as per story of prosecution he is one and the same person.

8. He further submits that as per evidence of PW-3 Dr. Mangesh Ghadge though there were total 13 injuries only four were on head/face, stab injury or puncture wound injury at Serial No.11 and 12 has not been explained by prosecution. He has accepted that there is no corresponding external injury insofar as vital organs found to be damaged in post mortem.

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This Doctor has also stated that injury No.11 and 12 are not possible by muddamal object No.2 i.e. wooden stick.

9. Learned APP on the other hand states that the incident occurred at about 11.30 p.m. on 1/10/2008 and FIR has been recorded immediately thereafter. Accused No.1 was arrested on 4/10/2008. Accused No.2 had absconded after judgment when released on parole and was not in jail since for about three years. He has surrendered voluntarily thereafter.

10. Evidence of PW-3 Doctor is relied upon to show that all injuries were on vital part of body and sufficient to cause death in ordinary course of nature.

11. In this backdrop it is submitted that in Murli vs. State of

Rajasthan (supra) , the Hon'ble Apex Court has taken a particular view because of anti social history and violent nature of deceased in that matter. Division Bench of this Court in Madhavgir s/o Gururatangir (supra) has followed that view. Thus, accused using self serving statement has not been laid law down as a principle in this judgment. In present facts according to him accused persons have not raised any such defence during cross examination of any prosecution witnesses or even while recording statement under section 313 of Cr.P.C.

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12. He contends that both accused persons were armed and they have given blows mercilessly on vital parts of body of deceased. He submits that in this situation judgment of conviction does not warrant any intervention.

13. In brief reply arguments, accused have invited our attention to deposition of PW-2-Anita to show that she could not explain why the incident occurred. It is submitted that the trial Court has exhibited entire statement under section 27 made by accused No.1. Not only this, PW-10 has also admitted that contents of this statement at Exhibit 17 are true and correct. Thus, the fact that deceased Baban gave abuses to sister of accused No.1 has been admitted by the prosecution.

14. Homicidal nature of death of Baban is not in dispute before us. The only question is whether it constitutes murder under section 302 of IPC or then because of provocation given by deceased Baban as accused persons lost control, it is culpable homicide not amounting to murder.

15. The facts that present accused persons were being threatened and pressurized not to give evidence against sister of PW-1 by name Padma and her two sons in the matter of murder of Harilal Yadav dated 23/8/2008 are not in dispute.

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16. Perusal of evidence of Dr. Mangesh Ghadge (PW-3) reveals that there were total 13 injuries and his evidence does not show that stab injury or puncture wound at Serial Nos.11 and 12 could not have been caused by iron pipe. These 13 injuries are as follows:

1. Multiple abrasions over head right fronto-parietal region, size ranging from 3 cm x 1.5 cm to 1 cm x 0.3 cm.
2. Stitched wound over left parietal region over head 6 cm x 1 cm with 7 stitches, stitches intact.
3. Abrasion just above right zygoma near outer canthus of eye, of size 2 cm x 1 cm.
4. Abrasion over right ear pinna inner side 2 cm x 0.8 cm.
5. Contusion over right arm lower part 10 cm x 8 cm.
6. Contusion over left arm whole surface.
7. Abrasion over right arm lower part laterally 2 cm x 1 cm.
8. Abrasion over left maxilla 2 cm x 1 cm.
9. Multiple small abrasions over bilateral shoulder joint, of size 1 cm x 1 cm and 0.5 x 0.5 cm.
10. Abrasion over right arm laterally 3 cm x 2 cm.
11. Stab injury over left leg anteriorly midpart 2 cm x 2 cm bone

deep.

12. Puncture wound circular 0.5 cm. X 0.5 cm., 1 cm above injury No.11, muscle deep.

13. Contusion over bilateral thighs lower part extending to upper

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part of leg.

17. Evidence also shows that injuries are on vital part and sufficient in ordinary course of nature to cause death. Doctor has deposed that these injuries can result in instant death. There is no cross examination and challenge in this respect.

18. Doctor has deposed that injuries can be caused by iron rod and wooden log. Again there is no cross examination except to the extent of showing that wooden log could not have caused injury Nos.11 and 12. Once section 34 of IPC is found rightly pressed into service, this admission loses its significance. Kidney, heart, pleura were damaged and though there were no external injury, it is not the case of accused persons that these internal injuries were not on account of their beating. Ribs were found fractured.

19. The evidence of PW-1 has been assailed only by Atibul when she deposes as if Bablu and Atibul are different persons. However her evidence shows that she has also named Kaka Yadav-i.e accused No.2. So this cannot result in any benefit to accused persons.

20. The contention that Baban gave abuses in the name of sister of accused No.1 appears only in disclosure memorandum under section 27 of

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the Evidence Act. This disclosure Memorandum is recorded on 7/10/2018.

The trial Court has not underlined or bracketed its strictly admissible portion in terms of section 27 of the Evidence Act. PW-10 Patil has stated that whatever is recorded as memorandum on 7/10/2008 is true and correct. Trial Court has marked this entire memorandum as Exhibit 17.

This does not mean that the prosecution has admitted correctness or truth of story of abuses disclosed by accused No.1 in it.

21. The other weapon used in the matter is seized vide Exhibit 79 again under section 27 of the Evidence Act from accused No.2. Trial Court again has recorded evidence of Investigating Officer in the same manner and exhibited entire disclosure statement as Exhibit 79. However, accused No.2 does not speak of any abuses by deceased to sister of accused No.1 or to anybody.

22. In this backdrop when cross examination of PW-1-Nanda is seen, there is no attempt to bring on record any such abuses. Perusal of questions put to accused No.1 is question Nos.3, 4 and to accused No.2 is question Nos.3 and 4 in section 313 examination shows that they are denying the entire incident. While answering question No.27 they could have taken defence of abuses to sister by deceased, but there is no such effort. Both of them have stated that they are falsely involved in the matter. Thus, as a matter of fact, defence of abuse in name of sister of accused No.1

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by deceased Baban was never raised and has not been established.

23. Stray sentences appearing in disclosure memorandum Exhibit 17 therefore cannot be allowed to be utilized to build such defence in present facts.

24. Here accused Nos.1 and 2 were armed with weapon danda and iron pipe at odd hours in the night. It is not their case that abuse enraged them and they used wooden stick or iron rod lying on spot to hit deceased. Number of blows given by them therefore is also material. The shouts of provocation given by them at the time of assault are also not in dispute as there is no cross examination about it.

25. Though incident had taken place on 1/10/2008 and FIR is registered on 1/10/2008, in printed copy time of receipt of information is shown as 13.15 hours on 2/10/2008. This error is not fatal in the present matter.

26. This brings us to consideration of two judgments mentioned supra. In the case of Murli vs. State of Rajasthan (supra) , the Hon'ble Apex Court has taken note of fact that appellant Murli has a shop in the bazaar. The deceased also belonged to same place. The deceased was a man of violent nature terrorizing people by use of force and violence. He was

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convicted and sentenced in several matters relating to gambling and there was also proceedings under Gunda Act. On the date of incident deceased went to shop of appellant and began to hurl abuses, enraged accused

inflicted some stab injuries with knife on deceased and proceeded to police station. On the way he met PW-2, PW-3 and PW-7 and confessed them that he had finished an unsocial element. He went to residence of the Police officer and on his direction, the accused proceeded to police station.

27. In these circumstances, Hon'ble Apex Court accepted that accused acted on grave and sudden provocation thereby attracting Exception 1 to Section 300. It has relied upon past history of deceased and what was mentioned in FIR that deceased in an aggressive manner went to the shop of the accused and showered virulent abuses. This statement of accused in FIR was used by the Hon'ble Apex Court not in favour of prosecution, but in favour of accused. Hon'ble Apex Court has accordingly expressly clarified the same in paragraph 5 of the judgment.

28. This explanation by Hon'ble Apex Court is in the backdrop of bad past record of deceased. This judgment therefore does not lay down a law that in all circumstances exculpatory statement made by accused or statement made in defence made by accused can be accepted and acted upon.

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29. Division Bench of this Court has followed this judgment of Hon'ble Apex Court in *Madhavgir vs. State of Maharashtra (supra)*. It has found that explanation for murder by accused to police in first information report may be relied upon to prove motive or provocation with a view to mitigate the offence or sentence. The Division Bench has found that the Hon'ble Apex Court in the case of *Murli vs. State of Rajasthan (supra)* has

held that there is no bar to confession in first information report being used in favour of the accused. In paragraph 11 Division Bench has found that accused stated in first information report that he was refused food and there was quarrel between the couple when he questioned about the missing amount from house. He had stated that his wife bite him and thereafter he lost control and assaulted his wife. Division Bench of High Court found that evidence of Investigating Officer lends credence to this statement. Bite marks were found on accused.

30. Both judgments therefore show that only statement in FIR has not been accepted as extenuating the circumstances to constitute the defence. The Hon'ble Apex Court or Division Bench of this Court found some other evidence on record which corroborated that statement. In facts before us there is no such material. Except for one line in memorandum under section 27 at Exhibit 17, there is no whisper anywhere of the fact that deceased Baban used any abuses against the sister of accused No.1. The above judgments therefore do not help the appellants in any manner.

31. In the light of arguments advanced, we find no case made out by the appellants warranting intervention. The appeals are therefore dismissed.

(SANDEEP K. SHINDE, J.) (B. P. DHARMADHIKARI, J.)