

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

CRIMINAL APPEAL NO. 400 OF 2019

Sanjaykumar Shivmangal Bharati ..Appellant.
Versus
The State of Maharashtra & Anr. ..Respondents

**WITH
CRIMINAL APPEAL NO. 673 OF 2019**

1. Kundan Chandrashekhar Choudhary
2. Damodar @ Babu Kanhayya Sav ..Appellants.
Versus
The State of Maharashtra & Anr. ..Respondents

**WITH
INTERIM APPLICATION NO. 3408 OF 2022
IN
CRIMINAL APPEAL NO. 673 OF 2019**

Mr. Amit Munde a/w. Dinesh D. Dey for Appellants in both Appeals.

Mr. S. R. Agarkar, APP for State/Respondent No.1.

Mr. Udayan Lalji Shah (Appointed Advocate) for Respondent No.2 in both Appeals.

CORAM : SARANG V. KOTWAL, J.

DATE : 13^h DECEMBER 2022

JUDGMENT :

1. Both these Appeals are decided by this common Judgment because they arise out of the same impugned Judgment and order. For the sake of convenience the Appellants are referred to by their original status in the trial Court. The Appellant Sanjaykumar Bharati in Criminal Appeal No.400 of 2019 was the Accused No.2 and the Appellant No.1 Kundan Choudhary and the Appellant No.2 Damodar Sav in Criminal Appeal No.673 of 2019 were the Accused Nos.1 and 3 respectively in Sessions Case No.580 of 2015 on the file of Additional Sessions Judge, Greater Mumbai.

2. Learned trial Judge vide his Judgment and order dated 26/02/2019 convicted all the accused for commission of offence punishable U/s.304 (II) r/w. 34 of the I.P.C. and they were sentenced to suffer R.I. for 10 years each. They were originally charged for commission of offence punishable U/s.302 r/w. 34 of the I.P.C. They were acquitted from that particular Charge. Under the provisions of Section 357(3) of the Cr.P. C. all the accused were directed to pay the Respondent No.2 herein i.e. wife of the victim,

compensation amount of Rs.25000/- each and in default of such payment each of them was directed to undergo R.I. for a period of 6 months. They were granted set off for the period which they were in custody during investigation and the trial.

3. The prosecution case is that the deceased Firoz Shaikh was having a chicken center. The accused used to go to his shop to buy chicken. However, there were some dues which they had not paid. On 26/01/2015, at about 8.00p.m. accused went to his shop to buy chicken. The deceased Firoz refused to give them chicken because of the pending dues. There was a quarrel between them. It is alleged that the accused No.1 pressed his neck and other two accused gave fist blows on his chest and face. He fell at the spot. The prosecution case is that, he died on the spot. His wife, his employees and other neighbours took him to hospital, but he was declared dead on admission. His wife immediately went to N. M. Joshi Marg police station and lodged her F.I.R. vide C.R.No.23 of 2015 at 11.45 p.m. It is the case of prosecution that, at the time of incident itself the employee of the deceased and a neighbour chased the accused No.1 and caught him. The other two accused

were arrested on the next morning. The investigation was carried out. The statements of the witnesses were recorded. At the conclusion of the investigation, the charge-sheet was filed and the case was committed to the Court of Sessions.

4. The Charge was framed U/s.302 r/w. 34 of the I.P.C. During trial the prosecution examined 10 witnesses. Out of them, four witnesses were the eye witnesses including wife of the deceased. There were two panchas i.e. pancha for inquest panchanama and a pancha for spot panchanama. PW-8 was Nayab Tahsildar who had conducted the test identification parade on 07/03/2015, in which, all these eye witnesses identified all the three accused. PW-9 and PW-10 were the Investigating officers who had investigated this offence.

5. The defence of all the accused is of total denial. Learned trial Judge considered this evidence and based on the evidence of eye witnesses and their identification in the test identification parade, held that all the accused were responsible for this offence. However, learned trial Judge held that there was no intention to

commit murder of the deceased. There was no preparation and premeditation. Therefore, learned Judge convicted all the accused U/s.304(II) r/w. 34 of the I.P.C., instead Section 302 r/w. 34 of the I.P.C.

6. PW-1 Shahajahan Shaikh is an important witness. She was wife of the deceased Firoz. She has deposed that the deceased Firoz and his brother Faiyaz were running that business of chicken shop. PW-3 Tahair was working in that shop. The deceased used to open the shop at 7.00a.m. and used to close it at 9.00p.m. On the date of incident, at about 8.15p.m. Firoz was in the shop. She heard noise of the quarrel. She came out of the house. She saw that the accused No.1 was scuffling with her husband. The accused Nos.2 and 3 were also present there. She has deposed that, she knew all the accused as they used to come to the shop to buy chicken. She has named them in her deposition. She has also named them in the F.I.R. She further deposed that, accused No.1 Kundan was demanding chicken on credit. Her husband refused. There was a quarrel. The accused No.1 caught neck of her husband. The accused No.2 gave a blow on his chest and accused

No.3 pushed him on the ground. All of them started beating her husband. The Accused No.1 pressed throat of her husband. She went to save her husband, but they prevented her from intervening. They pushed her aside. PW-1 and PW-3 started shouting loudly. The other witnesses namely Aakash, Jayshree and Prema came there. They tried to save her husband. The accused started running away, but Aakash and PW-3 Tahir caught accused No.1. Other two accused succeeded in running away. Her husband was motionless. PW-1 and Aakash took him to KEM hospital. The doctor declared him dead on examination. She went to the police station and lodged her F.I.R. The F.I.R. is produced on record at Exhibit 23. After that, she showed the spot of incident to the police. According to her, she was called to the police chowky for identification and she identified the accused there. She also identified all the accused in the Court. She deposed that she knew them.

In the cross-examination, she has deposed that, she was not in a position to get acquainted with the customers by their names. Her husband was not consuming liquor on the daily basis.

When she took her husband to KEM hospital, at that time, the Doctor and the police head constable made inquiries with her. She denied the suggestion that she told them that two unknown persons assaulted her husband. The house of PW-2 Aakash was near her house. Within 5 to 10 minutes Aakash and others came to the spot after hearing the noise. Her F.I.R. at Exhibit 25 substantially corroborates her deposition. She has named all the accused in her F.I.R.

7. PW-2 Akash Kelshikar was a neighbour. He has deposed that, on 26/01/2015 he was in his house. Around 8.15p.m. there was hot exchange of words between Firoz and the accused. He has deposed that, those three accused used to come to Firoz's shop and PW-2 knew them by their faces. He has deposed that, those three accused were beating Firoz. One of them pressed his throat. The other gave kick on the chest and third was also giving fist blows on the chest of Firoz. Firoz was lying on the ground. His wife was shouting loudly. She had fallen down. PW-2 and Firoz's employee chased and caught the accused No.1. PW-2 himself, his mother and PW-1 took Firoz to KEM hospital. There Firoz was declared dead.

This witness's statement was recorded on 30/01/2015. On 07/03/2015 he was called for identification parade at Arthur Road jail. He identified all the three accused in the test identification parade. He identified all the accused in the Court at the time of his deposition. He further deposed that, accused No.1 pressed Firoz's neck, accused No.2 had given first blows and the accused No.3 gave kick blows.

In his cross-examination, he stated that the quarrel was on account of money. PW-2 himself did not intervene. He did not recognize all the customers who visited Firoz's shop. He had not given description of the two persons to the police who had run away from the spot. Doctor at KEM hospital did not make any inquiry with him. He was called by police on 26/01/2015 and 30/01/2015.

8. PW-3 Mohammed Tahair was an important witness. He was Firoz's employee. He has deposed that, at around 8.00p.m. on 26/01/2015 three accused came to their shop. He knew the accused No.1 by his name. The other two persons were not known

to him, but he deposed that he could identify them. They used to come to their shop since 5 to 6 months before the incident for buying chicken. On that day also they wanted chicken, but they wanted it on credit. They were in arrears of Rs.600/-. There was a quarrel as Firoz refused to give chicken on credit. He has deposed that, accused No.1 pressed throat of Firoz. Firoz fell down. One of the other two accused gave blow on the chest of Firoz. He and Aakash chased accused No.1 as accused started running. PW-1 was present in her house when the incident took place. She was shouting by standing outside the shop. Other two accused succeeded in running away. Firoz was lying on the ground. He had stopped breathing. Aakash, his mother and PW-1 took Firoz to the hospital. PW-3's statement was recorded by the police on the same day. He identified all the accused in the Court.

In the cross-examination, he admitted that, he had not given description of those three persons who had entered the shop. Aakash and his mother reached the spot within one or two seconds after PW-3 shouted. According to him, PW-1 was not knowing names of the accused persons. Besides this, there is hardly

anything in his cross-examination.

9. PW-4 Jayshree Kelshikar was mother of PW-2. She has described the incident in the same manner as is described by PW-2. She was not knowing the three accused. She has deposed that, one of them had caught neck of Firoz and other two were assaulting him with kicks and fist blows. PW-4 and others tried to intervene and accused started running away. Aakash and PW-3 succeeded in catching one of them. Firoz was not moving. He was taken to hospital. PW-4 was called for test identification parade on 07/03/2015. She identified all of them in the test identification parade. She also identified them in the Court.

In the cross-examination, she deposed that, Firoz was regularly drinking liquor. At the test identification parade she saw that the dummies were of different height and of different complexions. When she reached the spot of incident, already 7 to 8 persons had gathered there. In the hospital, police were not seen. Her statement was recorded by police on 28/01/2015. At that time, she was told that the accused were arrested by the

police, but she denied the suggestion that she was asked to identify those accused in the police station. She also denied the suggestion that she was shown the accused at the police station.

10. PW-5 Gafar Shaikh was a pancha for inquest panchanama and PW-6 Haresh Malap was a pancha for spot panchanama. Nothing much turned on their evidence.

11. PW-8 Sudam Ladkar was Naib Tahsildar who had conducted the test identification parade on 07/03/2015. The memorandum of test identification parade is produced on record at Exhibit 68. He has deposed that, all the eye witnesses i.e. PW-1 to PW-4 had identified all the accused at the parade. The accused were made to stand in three rows and they were identified by all these witnesses.

12. PW-9 Dattatraya Amrale, P.S.I. was the first investigating officer. He has deposed about lodging of F.I.R. and conducting first part of the investigation consisting of carrying of inquest panchanama, spot panchanama and arrest panchanama of the three accused. The arrest panchanamas are produced on record at

Exhibit 82 to 84.

13. PW-10 Shubada Chavan, PI. was another I.O. who had completed the investigation and had filed the charge-sheet. She had arranged for conducting test identification parade and had sent the articles for chemical analysis examination.

In her cross-examination, she deposed that, in the KEM hospital it transpired that two unknown persons had assaulted the deceased, but she had not seen emergency patient register in the hospital.

14. Another very important witness is PW-7 Dr. Shahank Tyagi. His evidence needs careful consideration. He had conducted postmortem examination on the dead body of Firoz. He has produced various reports on record. Exhibit 50 was Histopathological examination report. Viscera report is produced at Exhibit 51. C.A. report about the blood is produced at Exhibit 52. In the police papers, it was mentioned that there was scuffle between two unknown persons and the deceased was declared dead at 8.45p.m. on 26/01/2015 by the Medical Officer on duty.

Cyanosis was present on nail beds bilateral on hands. There was abrasion over medial inner aspect of lower lip measuring 0.5cm x 0.3cm. reddish in colour. There was abrasion over right side of face of 3cm. below the lateral end of right eye and 7cm. in right tragus measuring 0.2cm x 0.2cm reddish in colour. Meninges was found intact and congested. On cut section of the brain, multiple petechial hemorrhages were seen in white matter at places, congested and edematous. He had reserved his opinion as to probable cause of death. He had obtained samples of Viscera, blood, nail clippings etc. The postmortem report is produced on record at Exhibit 60. He had sent the samples to Chemical Analyzer. After receipt of C.A. report he had given his opinion that cause of death cannot be given on the basis of report of C.A. This is important, because this opinion was given on 27/01/2015 and it mentions thus:

“Opinion as to the cause of death cannot be determined”

15. He has further deposed that, on the basis of injuries found on the dead body, he could say that the cause of death might

be due to cardiac arrest due to vagal inhibition. The police papers show use of multiple blunt force on the chest portion and neck portion of the deceased from which he opined that some persons are hyper sensitive at neck region and such assault may result in vagal inhibition. The death was unnatural. According to him, the injuries mentioned in Column No.19(iii), 20(d)(e) and (g) are sufficient for causing death. These injuries were as mentioned earlier petechial hemorrhages in white matter of the brain, petechial hemorrhages in the right lung, petechial hemorrhages in the left lung and petechial hemorrhages in sub epicardial surface of the heart. In the re-examination conducted by learned APP, he deposed that, those injuries were possible due to compression of neck and multiple punches over the chest region. He denied the suggestion on behalf of the accused that if a person is on medication and if he consumes alcohol, it could be lead to vagal inhibition.

16. Learned counsel for the Appellants submitted that the prosecution has failed to prove its case beyond reasonable doubt. All the witnesses i.e. PW-1 to PW-4 are interested witnesses. It was

possible for the police to have collected the evidence from the independent witnesses as it was a crowded locality, but absence of any independent witnesses show that their evidence is deliberately suppressed. He submitted that, there was no reason for PW-1 to know the names of the Appellants. In fact, PW-3 has also deposed that PW-1 did not know names of the Appellants. Shri. Munde submitted that, PW-3 has deposed that PW-1 was inside the house and, therefore, she could not have seen the incident. Other two witnesses i.e. PW-2 and PW-4 had come at the spot after the incident was over. Therefore, their evidence was not reliable. Even the evidence of PW-3 is not reliable because he is an interested witness and he had not tried to intervene in the quarrel, though, there were weapons for cutting available in the shop. He further submitted that, the spot of the incident itself is disputed by the defence. He submitted that, description of the accused was not given by any of the witnesses. Lastly, he submitted that, even otherwise, conviction U/s.304(II) of the I.P.C. is not proper and there could not be any knowledge that such act would result in death of the deceased.

17. Learned APP, as well as, learned counsel for the Respondent No.2 submitted that, the prosecution has proved its case beyond reasonable doubt on the basis of evidence of eye witnesses. All these witnesses are natural witnesses and there is no reason to disbelieve them. Just because two of the witnesses are neighbours they cannot be termed as an interested witnesses. All the witnesses have deposed consistently. They have identified all the accused in the test identification parade and even before the Court. The accused No.1 was caught at the spot. All of them were named in the F.I.R. which was lodged immediately. They further submitted that, looking at the nature of assault, in particular, pressing of neck resulting in death of the deceased shows that the accused were knowing consequences of their assault. All of them had acted together and, therefore, they were rightly convicted U/s.304(II) r/w. 34 of the I.P.C.

18. I have considered these submissions. As far as merits of the matter is concerned, in respect of occurrence of the incident, I find that the prosecution evidence is quite reliable, cogent and consistent. The accused No.1 was, in fact, caught at the spot after

PW-2 and PW-3 had chased and caught him. All the four witnesses have consistently deposed even with reference to specific role attributed to each of the accused separately. All of them are natural witnesses. They were in the vicinity. PW-3 was inside the shop along with the deceased himself. PW-1 was in the house and she immediately came on hearing the noise. PW-2 and PW-4 also came at the spot on hearing the shouts. The incident was going on at least for some time, by which time all the witnesses could come at the scene and could witness the incident. PW-1, in fact, has given name of all the accused. The F.I.R. was lodged immediately. There is hardly any delay. There was no scope for concoction. Besides this, accused No.1 was caught at the spot and names of the accused Nos.2 and 3 are also mentioned in the F.I.R. They were arrested subsequently. Therefore, it cannot be said that they were named in the F.I.R. based on vague suspicion. Though, PW-3 has deposed that, PW-1 did not know names of the accused, his evidence cannot be used against the deposition of PW-1 because she is the only person who could tell about her knowledge regarding names of the accused.

19. Besides this, all the witnesses had identified all the accused in the test identification parade. In the cross-examination of the Naib Tahsildar – PW-8 there is hardly any material in favour of the accused raising doubt about the procedure in conducting the test identification parade. It was held sufficiently early. There was no delay in conducting the test identification parade. All the witnesses have also identified all the accused in the Court. Therefore, their identity or participation in the offence, as well as, their specific role are sufficiently established beyond reasonable doubt by the prosecution.

20. The next important question is in respect of nature of the offence committed by these accused. Learned trial Judge has observed that the incident had taken place at the spur of moment. There was no premeditation or preparation. It was a result of a quarrel. Neither of the accused was carrying any weapon and, therefore, he has held that there was no intention to commit culpable homicide. However, he relied on the medical evidence and has reached the conclusion that it was homicidal death and, therefore, he attributed knowledge to all the accused and

convicted them U/s.304(II) r/w. 34 of the I.P.C. To that extent, I do not agree with the reasoning of learned trial Judge. In that context, evidence of the Doctor i.e. PW-7 is very important. At the time of conducting postmortem examination, he had reserved his opinion regarding cause of death. Even after receipt of C.A. reports, he still maintained that he was not in a position to give cause of death. After examining the investigation papers, C.A. reports, his own P.M. examination, he finally opined that the death was caused possibly due to cardiac arrest due to vagal inhibition. He has further added that, some people are hyper sensitive at neck region and use of force in the neck region of such a person may result in vagal inhibition. The death was unnatural. The Postmortem notes show that there was petechial hemorrhages in the brain matter, both lungs and near heart tissue in sub epicardial surface. The Dorland's Illustrated Medical Dictionary, 33rd Edition has given meaning of 'vagal inhibition' which originates from 'vegus'. 'Vagal' is something pertaining to the vagus nerve and 'vagus' is described as designating the tenth cranial nerve. 'Nervus vagus' is further described as originating from medulla oblongata

and branching through laryngeal nerves, meningeal nerves, auricular nerve and cardiac nerves. Thus, from this evidence, it is clear that there is some connection of the assault caused by the accused on the deceased and the cause of death as mentioned by the Doctor was inhibition of vagal nerve. There was no serious damage to any of the vital organs because of blows given. There was no fracture. There was no serious injury to brain, lungs, heart except petechial hemorrhages at some places. The only possible reason opined by the Doctor was inhibition of vagal nerve. This is an unusual occurrence and the accused cannot be said to have any knowledge that their act would result in death of the deceased. Therefore, even the offence U/s.304-II of the I.P.C. cannot be held to be proved against any of the accused. Instead, their act would attract the provisions of Section 325 of the I.P.C. i.e. offence punishable for voluntarily causing grievous hurt. The 'grievous hurt' is defined U/s.320 of the I.P.C. and *Eighthly* of that section includes any hurt which endangers life. Section 322 of the I.P.C. defines 'Voluntarily causing grievous hurt'; which reads thus:

“322. Voluntarily causing grievous hurt. - Whoever

voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he cause is grievous hurt, is said “voluntarily to cause grievous hurt”.”

21. Thus, looking at the act of pressing neck and giving blows on the chest, intention and knowledge can be attributed to all the accused of causing such injury which was endangering life of Firoz. In this particular case, requisites of intention and knowledge can be attributed to all the accused. Therefore, the correct section which would apply in this case is Section 325 r/w. 34 of the I.P.C. Therefore, instead of Section 304(II) r/w. 34 of the I.P.C. the Appellants are required to be convicted U/s.325 r/w. 34 of the I.P.C.

22. Once the conclusion is reached about conviction U/s.325 of the I.P.C. then the next question would be about the sentencing part. The maximum punishment U/s.325 of the I.P.C. is 7 years. No minimum punishment is provided. In the present case, all the accused were young at the time of commission of offence as described by learned trial Judge in his Judgment. All of them are in custody for a considerable period. There are no other

antecedents and, therefore, maximum sentence is not warranted. Therefore, in my opinion, R.I. for 5 years would meet the ends of justice, taking into account the fact that the deceased had lost his life in this case. Therefore, more leniency cannot be shown to the accused. As far as compensation amount is concerned, I do not see any reason to interfere with that part of the order.

23. Hence, the following order:

O R D E R

- i) Both the Appeals are partly allowed.
- ii) The conviction and sentence of all the Appellants U/s.304(II) r/w. 34 of the I.P.C. is set aside. Instead, all the Appellants are convicted for commission of offence punishable U/s.325 r/w. 34 of the I.P.C. and each of them is sentenced to suffer R.I. for 5 years.
- iii) Each of the accused is also directed to pay Rs.25000/- each as a fine which on realisation

would be given to Shahjahan Shaikh (wife of the deceased) by way of compensation. In default of payment of fine each of the accused shall undergo R.I. for a period of six months.

iv) The Appellants are granted set off U/s.428 of the Cr.p.c.

v) Rest of the conditions in the operative part of the impugned Judgment and order shall remain as they are.

vi) Both the Appeals are disposed of.

vii) With disposal of these Appeals, the Interim Application No.3408 of 2022 is also disposed of.

(SARANG V. KOTWAL, J.)