



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

CRIMINAL APPEAL NO. 128 OF 2022

1. Kamlesh S/o. Narayan Dubey,
Aged 35 years, Occ. Labour.

2. Shekhar s/o. Chandrakishor Dubey,
Aged 35 years, Occ. Labour,
Both R/o. Suraj Nagar,
Behind Baba Chamatkari Temple,
P. S. Nandanvan, Nagpur. **... APPELLANTS**

...VERSUS...

The State of Maharashtra,
Through Police Station Officer,
Police Station, Nandanwan, Nagpur,
Tah. & Dist. Nagpur. **...RESPONDENT**

Mr. D. V. Mahajan, Advocate for Appellants.
Ms M. H. Deshmukh, A.P.P. for Respondent/State.

CORAM : VINAY JOSHI AND MRS.VRUSHALI V. JOSHI, JJ.
DATE OF RESERVING THE JUDGMENT : 06.09.2024.
DATE OF PRONOUNCING THE JUDGMENT : 12.11.2024.

JUDGMENT (PER : MRS.VRUSHALI V. JOSHI, J.):-

1. This is an appeal challenging the judgment and order of the Additional Sessions Judge, Nagpur in Sessions Trial No.39/2018 (State Vs. Kamlesh Dube and Others) thereby questioning the legality of judgment and order of convicting both the appellants under Section 235(2) of the Code of Criminal Procedure for the offence punishable under Section 302

read with Section 34 of the Indian Penal Code, and sentencing both of them for life imprisonment alongwith fine of Rs.5000/- in default to suffer 3 months imprisonment.

2. The facts in short are as under :

On 19.09.2017, one Sumit Kamble died at about 1.46 p.m. It is alleged that appellant Kamlesh Dube and Shekhar Dube committed his murder. It is the prosecution case that both accused and the deceased were working as a driver on garbage vehicle at Kanak Resources Company. On the day of incident i.e. on 19.09.2017 at about 1.46 p.m. Sumit along with his friend Rahul and Yogiraj went to the Bhandewadi Dumping Yard by riding on the motorcycle of Sumit. At said place, the sister of informant Rahul and other women were picking the garbage. Kamlesh and Shekhar both accused also went there to unload the garbage by their garbage vehicle. Kamlesh was on driving seat whilst Shekhar was sitting beside him. Kamlesh has married with the sister of deceased Sumit. Kamlesh and sister of Sumit namely Tanu were having love affair, which was not liked by Sumit. Both of them ran away and performed marriage before 15 days. On their return, sister of Sumit was staying with Kamlesh. Because of said marriage, there was dispute between Kamlesh and Sumit. They used to quarrel with each other. On the date of occurrence, when Sumit saw Kamlesh, he went to him and there was hot exchange of words between them. At that time, Shekhar alighted from truck and assaulted Sumit with

knife on his back, stomach and other parts of the body. Sumit started running, however, Kamlesh also got down from the vehicle and assaulted Sumit by means of knife. Due to said assault, Sumit fell down, on which, Kamlesh went to his vehicle and drove the vehicle on the person of Sumit. The police were called by the informant and others. Informant Rahul Deshmukh set the criminal law into motion by lodging report against the accused, pursuant to which, the offence vide Crime No.354/2017 came to be registered and investigation commenced.

3. Police visited the spot of incident and carried Spot Panchanama. At the time of drawing Spot Panchanama, the dead body was lying on the spot, which was latter sent for the postmortem. The Inquest Panchanama was drawn followed by the postmortem. Statement of witnesses were recorded and after completion of the investigation, charge-sheet has been filed before the Judicial Magistrate First Class, Court No.1, Nagpur. The case was committed to the Court of Sessions. The charge was framed against the accused for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, Sections 4 read with Section 25 of the Arms Act, and Section 135 of the Maharashtra Police Act. The accused have denied the guilt.

4. The prosecution has examined total 10 witnesses to prove the guilt of the accused.

5. The prosecution case is based on direct evidence. Three eye witnesses have stated that both the accused stabbed the deceased and caused him to fall down. Then accused Kamlesh drove the vehicle on the person of the deceased. According to appellants, though the prosecution case is about driving the vehicle on the person of the deceased, however, there are no crush injuries on the person of deceased. It is, therefore, necessary to consider the evidence of doctor, who has conducted the postmortem.

6. PW-9 Dr. Rajesh has stated that there were as many as 8 stab wound on the person of deceased. Apart from that there were contusions, abrasions, lacerated and incised wounds. The doctor has opined that the maxillary bone and mandible on both sides were fractured and all the injuries were ante-mortem. Similarly, internal injuries were also noticed which were under scalp haematoma. There was displaced fracture of skull bone. On examination of brain, meninges was found torn corresponding to skull fracture and the brain was crushed into multiple pieces. Pleura was torn corresponding to rib fractures. 1000 cc of blood and blood clots were present in both sides of pleural cavity. On examination of lungs, stab wound was found, which corresponds to Injury No.2 of Col. No.17. Multiple lacerations were found over upper and middle lobe of right lung. There was stab wound over lower lobe of left lung corresponding to Injury No.3 mentioned in Col. No.17. He also found injury on abdominal wall and

peritoneum was found torn. Abdominal cavity was containing blood about 15 ml. and blood clots. On examination of liver, he found multiple vertical lacerated wounds parenchymal deep present over anterior surface of both lobes of liver. Stab wound was present over the posterior aspect of left kidney, corresponding to Injury No.5 of Col. No.17. All the injuries were ante-mortem in nature. He categorically opined that the cause of death is shock and heamorrhage following multiple injuries sustained to deceased and the injuries mentioned in the P.M. Report are sufficient in the ordinary course of nature to cause death.

7. The accused has come with the defence that because of consumption of alcohol by deceased, it caused dilation and congestion of blood vessels, which caused prolonged bleeding from injuries resulting into death. The defence of the accused is not probable, as there are multiple stab injuries as well as crush injuries on the dead body. The Inquest Panchanama and Spot Panchanama show that the vehicle was run over the head of the deceased, causing crush injury at head. The brain came out from his nose as per Spot Panchanama. We may clarify that while carrying Spot Panchanama, dead body was very much lying on the spot, hence, it also bears description of dead body. The Inquest Panchanama also shows that the face and head was crushed. As per the Spot Panchanama, the wheel mark appears near the waist of deceased. Considering both panchanamas, medical evidence and postmortem report, it is evident that

the deceased died homicidal death. The learned Trial Judge has rightly considered the said aspect. Moreover, the postmortem report is admitted by the accused, therefore, the homicide death is not in serious dispute.

8. The learned Counsel for the appellants has argued that though the stab injuries were present and the prosecution is coming with the case of stabbing, however, both the accused have been acquitted for the offence under Arms Act. It is argued that the charge is defective as allegation is only about crush by vehicle. The said submission is devoid of merits as there exists crush injuries on the dead body. It may be irregularity that particulars about stabbing are not given in charge but accused has not shown any prejudice on said aspect. It is argued that though the prosecution case is about running the vehicle on the person of the deceased, however there are no crush injuries. The said submission would not sustain as the crush injuries are evident from the evidence of Medical Officer coupled with postmortem notes. It is argued that there is no recovery of weapons from the accused.

9. He has further argued that though there are three eye witnesses, the evidence of eye witness PW-5 Yogiraj is not consistent with the evidence of other two eye witnesses about causing injury by Kamlesh and Shekhar. The third eye witness PW-6 Rita has stated that Kamlesh and Sumit were assaulting each other, which is not narrated by the other two eye witnesses.

According to defence, the postmortem report does not disclose crush injury. It is argued that this is not a case of murder as the incident was at the spur of moment and with provocation by deceased Sumit. The appellants have placed reliance on the judgment of this Court in the case of ***Sachin Laxman Dandekar Vs. State of Maharashtra (Criminal Appeal No.1032/2015)***, wherein it is held as under :

“The discussion and findings alluded to hereinabove, in our considered opinion pertaining to act of the Appellants does not travel beyond the offence of culpable homicide not amounting to murder in the facts and circumstances of the present case. Act of Appellants due to the motive proved by the prosecution was an act committed in the heat of passion and on the sudden spur of moment whereby the singular blow of hammer was inflicted by Appellant No.1 on Sakharam’s forehead. The Trial Court has therefore certainly erred in convicting and sentencing the Appellants for offence punishable under Section 302 IPC when the Appellants deserve to be given the benefit of doubt.”

So also, defence has placed reliance on the judgment of ***L/Nk Gursewak Singh Vs. Union of India & Anr. [2023 LiveLaw (SC) 571]***, wherein the Hon’ble Apex Court has observed as under :

“There was a fight between him and the deceased over the issue of seniority. In fact, when the appellant told the deceased to bring water for him, the deceased refused to do so on the ground that he was senior to the appellant. In a disciplined force like Army, the seniority has all the importance. Therefore, there is every possibility that the dispute over seniority resulted in the

appellant doing the act in a heat of passion. It appears that in the heat of passion, the appellant snatched a rifle held by the deceased and fired only one bullet. If there was any premeditation on the part of the appellant or if he had any intention to kill the deceased, he would have fired more bullets at the deceased. Hence, there was no intention on his part to kill the deceased.”

These decisions would not assist defence as the conclusions are based on the facts as respective cases.

It is argued that the eye witnesses have not stated as to who has assaulted, at what part and how many injuries were on the person of the deceased. Alternatively, the appellants have stated that the case comes under Exception 4 to Section 300 of the Indian Penal Code.

10. Further it is argued that there is no seizure of vehicle. The vehicle was not noted in the spot punchanama. The deceased was aggressor and not the accused, therefore, it comes under the Exception 4 to Section 300 of the Indian Penal Code. It is argued that the appellants can not be held guilty of an offence under Section 302 of the Indian Penal Code, but the act of the appellants fall under the purview of Section 304 Part – I of the Indian Penal Code. The learned Counsel for the appellants has also argued that the crime is committed in self defence and relied on the judgment of *Ex. CT. Mahadev Vs. The Director General, Boarder Security*

Force & Ors. [2022 LiveLaw (SC) 551]. He, therefore, submitted that the appeal may be allowed by setting aside the impugned judgment and order and in the alternative the conviction of the appellants be reduced into lesser offence punishable under Section 304 of the Indian Penal Code.

11. The learned A.P.P. resisted the appeal by stating that the crush injuries were found on the dead body as per spot panchanama. As per Inquest Panchanama, the head was totally crushed. PW-2 Rahul has stated that they went to Dumping Yard for casual round. He would submit that the accused took private defence, but as the deceased was unarmed the same is not acceptable. The incident did not occurred at a spur of moment. Even after deceased fell down, the vehicle was taken on his person. Though the eye witness PW-5 Yogiraj has initially stated that Kamlesh caught hold deceased and Shekhar assaulted, the prosecution has declared him hostile. During cross-examination, PW-5 Yogiraj admitted the things as per his police statement. Recovery of weapon is at the hands of accused. There was blood on clothes of deceased. The evidence of doctor PW-9 shows that there were multiple fractures to skull and brain was crushed, which proves that the vehicle was run over on the person of the deceased. It is argued that the common intention can be easily inferred from the proved facts. The Trial Court has rightly convicted both the accused. This is not a case, which comes under Exception 4 to Section 300 of the Indian Penal Code. Hence, prayed for dismissal of the appeal.

12. We have carefully considered the rival submissions and gone through entire material. It is a case of direct evidence. There are three eye witnesses to the occurrence. PW-2 - Rahul, PW-5 – Yogiraj and PW-6 - Rita are the eye witnesses. The incident took place in the broad day light, at the dumping yard. PW-2 - Rahul is the first informant, who went to the dumping yard with the deceased Sumit and Yogiraj. It is his evidence that accused Kamlesh was unloading the garbage from his vehicle. Deceased Sumit went towards Kamlesh and they talked with each other. Accused Shekhar alighted from the vehicle to assault Sumit, who was holding knife. Accused Shekhar assaulted Sumit by means of knife at his waist, stomach and hand. Sumit started running. Kamlesh also alighted from the vehicle and assaulted Sumit by knife. Due to assault, Sumit fell on the ground. Thereafter, accused Kamlesh started his vehicle and run over the same on the person of Sumit by taking back and forth. Thereafter, both accused ran away from the place of occurrence.

13. PW-5-Yogiraj has also deposed on the same line. He was with the deceased and PW-2 Rahul. They went to dumping yard. The accused has brought on record certain inconsistencies in the evidence of both the eye witnesses. As PW-5 Yogiraj has stated that there was hot exchange of words between Sumit and Kamlesh, Shekhar alighted from the vehicle from left side and assaulted Sumit by knife. Sumit started running and Kamlesh chased him after alighting from the vehicle and caught hold him. Shekhar

again assaulted Sumit by means of knife. Thereafter, Shekhar boarded the truck and put his truck on the person of Sumit by taking it back and forth. There is inconsistency in the evidence of PW-5 Yogiraj and PW-2 Rahul, he has stated the role played by Shekhar as of Kamlesh. Learned A.P.P. has declared him hostile and cross-examined the witness. During the cross-examination, PW-5 deposed as per his statement, which corroborates with the evidence of PW-2 Rahul.

14. PW-6 Rita is the another eye witness to the occurrence. It is her evidence that she was at the dumping yard and at about 2.00 p.m. accused Kamlesh came at the dumping yard by his vehicle accompanied by Shekhar. Kamlesh unloaded the garbage from his vehicle at the dumping yard. She was collecting scrap by the side of vehicle. Kamlesh took ahead his vehicle. She and Meena again started collecting scrap material. She saw that quarrel was going on between accused Kamlesh and Sumit. Therefore, she and Meena rushed to the spot. She saw that Kamlesh and Sumit were assaulting each other. Thereafter, accused Shekhar came with knife and assaulted Sumit by means of knife. Due to assault, Sumit started running. Kamlesh chased Sumit and took him near the vehicle. Shekhar caused Sumit to lay in front of the vehicle on which Kamlesh took the vehicle on the person of Sumit twice.

15. Few discrepancies are noticed in the evidence of PW-6 Rita as

she has stated that the scuffle was in between Sumit and Kamlesh. PW-6 is a rustic witness. All three eye witnesses have stated as to how Kamlesh and Shekhar assaulted and put the vehicle on the person of the deceased. Though the statement of PW-6 is recorded on next day, the Investigating Officer has stated that during the investigation when they found that she is an eye witness, police called her at Police Station. No common man would come at his own to the Police Station to give the statement so as to avoid further enquiries and troublesome procedure. Therefore, though the statement of PW-6 Rita is recorded on the next day, the explanation given by the Investigating Officer is satisfactory. The evidence of these witnesses are consistent with each other. There were stab injuries and two knives were recovered from the accused. The knives and the clothes of the accused were stained with blood, which were seized at the instance of both the accused.

16. Thus, prosecution case is mainly based on three eye witnesses, PW-2, PW-5 and PW-6 along with other corroboratory circumstances as narrated above. On appreciation of evidence of three eye witnesses it clearly indicates that on 19.09.2017 at 1.46 p.m. both the accused assaulted the deceased with knife and accused No.1 put the vehicle on his person. Medical evidence on record reveals that Sumit died due to multiple stab and crush injuries. In the circumstance, it can be safely held that both accused have caused death of Sumit.

17. The alternate submission of the accused is that due to sudden provocation, the incident occurred. Two knives were recovered at the instance of both the accused. The deceased was without weapon. No doubt, the deceased was disturbed because the accused No.1 has performed marriage with his sister on which, there was dispute between both of them. Earlier incident of beating and dispute of deceased with accused No.1 is brought on record. The accused persons were carrying weapons and both of them not only assaulted the deceased, but drove the vehicle and crushed his head. The medical evidence on record reveals that the head was crushed. The Spot Panchanama proves that there were tyre marks near the waist. The evidence on record shows that the appellants acted in a cruel and unusual manner while committing murder. It is not the case of grave and sudden provocation to the appellant. As both the accused were having knives, they were determined to commit the murder of the deceased because of earlier quarrel. All above circumstances clearly indicates that the act of accused was well calculated. Deadly weapons have been used to cause multiple injuries over vital parts of body.

18. To bring the case within the Exception 1 of Section 300 of the Indian Penal Code, the ingredients mentioned therein must be found for its application to the facts of the case in hand. To invoke Exception 1 of Section 300 of the Indian Penal Code, following requirements must be satisfied viz. (i) Whilst deprived of the power of self-control by grave and

sudden provocation; (ii) causes the death of person who gave the provocation or (iii) causes the death of any other person by mistake or accident. The learned A.P.P. relied on the judgment of *State of Andhra Pradesh Vs. Rayavarapu Punnayya And Anr. [(1976) 4 SCC 382]*.

19. It emerges from the evidence that both the accused were well prepared for committing murder as they carried dangerous weapons. During the talks, the accused No.2 alighted from the vehicle and assaulted with knife on the vital parts of the deceased. The accused No.1 came with another knife and he also assaulted. When deceased fell down, accused Kamlesh put the vehicle on his person.

20. The very act of accused repeatedly inflicting knife blows on the vital part of the body itself indicates that they intended to cause that particular injury which were sufficient in the ordinary course of nature to cause death. The facts does not discloses that the accused have been provoked or by loss of temper and self control, the act was committed. Notably after inflicting severe blows deceased was not left, but his body was crushed by running over the vehicle. The said brutal act itself indicates that the act was done with determined intention to kill. These facts clearly constitutes the offence of murder as defined under Section 300 of the Indian Penal Code. The defence submission about applicability of Exception 1 is totally unacceptable.

21. In the backdrop of the findings recorded above, we are of the considered view that the prosecution has duly proved that both accused in furtherance of the common intention have committed the offence of murder of deceased Sumit punishable under Section 302 read with Section 34 of the Indian Penal Code. We find no case of interference, hence, appeal being devoid of merit, stands dismissed.

22. The Criminal Appeal is dismissed accordingly.

(MRS. VRUSHALI V. JOSHI, J.)

(VINAY JOSHI, J.)