MASUMSHA HASANASHA MUSALMAN

v.

STATE OF MAHARASHTRA

FEBRUARY 24, 2000

[S. RAJENDRA BABU AND S.S.M. QUADRI, JJ.]

Criminal Law :

Penal Code, 1860 : Section 304 Part II.

Death—As result of injuries inflicted with a dagger on the left side shoulder—Deceased's wife followed the accused and saw a scuffle taking place between them—She also saw the accused stabbing the deceased on his left side shoulder with a dagger—Held : The witness who followed the accused could not have seen him giving a blow to the deceased from the back—Only when the scuffle took place she could have seen those injuries—Hence, conviction under S.302 set aside and conviction under S.304 Pt.II upheld.

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 :

Section 3(2)(v)—Applicability—Held : Only when offence is committed against a person on the basis that he belongs to SC or ST does S. 3(2)(v) apply.

The appellant-accused was convicted for offences under Section 304 Part II of the Penal Code, 1860 and under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and sentenced to undergo rigorous imprisonment for five years. However, the High Court convicted the appellant for the offence under Section 302 IPC and sentenced him to undergo imprisonment for life while maintaining the appellant's conviction under Section 3(2)(v) of the Act. Hence this appeal.

According to the prosecution, on the fateful day, the deceased's wife (PW-4) followed the accused and saw the appellant stabbing the deceased with a dagger at his left side shoulder and thereafter gave blows of dagger to the deceased. She also saw a scuffle taking place between the accused and the deceased.

A **Allowing the appeal, this Court**

HELD : 1. If deceased's wife (PW-4) had been following the appellant, she could not have seen him giving a blow to the deceased from the back. Only when the scuffle started taking place, injures could have been inflicted and she could have seen those injuries. In the circumstances, it
B **is reasonable to infer that only one serious injury was caused by the appellant to the deceased which is on his left side shoulder while all other injuries, as opined by the doctor, could have been caused during the scuffle. Hence, conviction under Section 302 of the Penal Code, 1860 is set aside and that of the trial court restored. [1160-E-G; 1161-F]**

C **2. To attract the provisions of Section 3(2)(v) of the Scheduled Castes and Scheduled Tribe (Prevention of Atrocities) Act, 1989 the *sine qua non* is that the victim should be a person who belongs to a Scheduled Caste or a Scheduled Tribe and that the offence under the Indian Penal Code is committed against him on the basis that such a person belongs to**
D **a Scheduled Caste or a Scheduled Tribe. In the absence of such ingredients, no offence under Section 3(2)(v) of the Act arises. [1161-D-E]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2048 of 1996.

E From the Judgment and Order dated 10.11.95 of the Bombay High Court in Crl.A. No. 232/93 with Crl. A. No. 449 of 1993.

S.K. Pasi, Anand Singh Berwal and Sunil Kumar Jain for the Appellant.

F Mukesh Giri, S.V Deshpande and Pramit Saxena for the Respondent.

The Judgment of the Court was delivered by

G **RAJENDRA BABU, J.** The appellant on being charged by the Sessions Judge, Buldhana of having caused grievous injuries to one Saoji Gamaji Jadhav (the deceased) with *Jambiya* (knife) intentionally and knowingly that they would result in his death and thus committed an offence punishable under Section 302 IPC. He was also charged under Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of
H Atrocities) Act, 1989 [hereinafter referred to as 'the Act']. The appellant

stood convicted of the offence punishable under Section 304 Part II, IPC and sentenced to suffer rigorous imprisonment for five years. He was further convicted of the offence punishable under Section 3(2)(v) of the Act and sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.1,000 in default to suffer rigorous imprisonment for 3 months. Both the State and the appellant filed separate appeals to the High Court. The High Court, on re-examination of the evidence on record, allowed the appeal filed by the State and convicted the appellant for the offence punishable under Section 302 IPC and sentenced him to suffer rigorous imprisonment for life and to pay a fine of Rs.200 in default to suffer further rigorous imprisonment for one month while maintaining the conviction of the appellant for the offence punishable under Section 3(2)(v) of the Act. Both the sentences are stated to run concurrently. The appeal filed by the appellant stood dismissed. Hence this appeal against the common order made by the High Court in the said two appeals.

The prosecution case as unfolded by the witnesses is that between 7 and 8 p.m. on 25.8.92 Saoji Gamaji Jadhav who belongs to the scheduled caste was done away to death. It is stated that the appellant and the deceased are residents of Nandra Koli village situate 7 kilometres from Buldana. On the fateful day the deceased returned to the house at dusk and after some time left the house informing his wife that he would be going out for some time and would return soon thereafter. After about half an hour, the deceased left his home, the appellant came to the house of the deceased and enquired from Deubai (PW-4), wife of deceased Saoji Gamaji Jadhav. She found that he was having a *Jambiya*. On coming to know from her that her husband had gone out of the house, the appellant started running through the lane. As the appellant was seen by Deubai with the *Jambiya*, she got suspicious and followed him and near the hospital of Dr. Kalwaghe, she saw the appellant stabbing the deceased. She stated that the appellant after giving two or three blows with the *Jambiya* and deceased fell on the ground ran away. When he left the place, she found that the deceased was having bleeding injuries and she tried to tie up a cloth around the wound but in the meanwhile he succumbed to the injuries. Thereafter she with the help of the police patil went to the Police Station, Buldana and lodged a complaint when the PSI, Shri Oval visited the spot and after recording her complaint and registering a case conducted inquest. When the appellant was in the custody, he produced *Jambiya*. After completing the investigation a charge-sheet was laid for the offences stated earlier

A before the Jurisdictional Magistrate who committed the same to the Court of Sessions. On charges being framed, the appellant pleaded not guilty to the charge and denied having caused any injuries to the deceased or committed murder. In the course of evidence, the Defence suggested to the prosecution that the deceased was under the influence of alcohol and he himself had a dagger; that a scuffle took place when he attacked the B appellant, as a result of which he died out of injuries caused by himself; that the appellant had not caused any injury and that he tried to save himself.

There was no dispute that the deceased met with homicidal death C and this fact is amply established by the medical evidence on record. There were as many as 10 injuries on him as disclosed by Dr. Umesh Nawade (PW-3), who conducted the postmortem examination. He found that injuries Nos. 4 to 10 were only skin deep or abrasions whereas injuries nos. 1, 2 and 3 were of serious nature. They are as follows :

D "1. Incised wound, left infra-clavicular region in middle of size 6cm x 2.1/2 cm x 4.1/2 cm. Edges gaping blood oozing and blood clots seen.

2. Incised gaping wound, left infra-axillary region in 4th ICS 1 cm x 1 cm skin deep, blood clots seen.

E 3. Incised gaping wound, left posterior axillary line 4cm x 1cm x 2cm deep. Reddish black colour.

4. Abrasion left elbow size 3cm x 2cm.

5. C.L.W. over left ulnear head 1cm x 1cm skin deep.

F

6. Abrasion just below injury No. 5, 1cm x 1cm.

7. Abrasion left posterior ileo crest 1cm x 1cm.

8. Abrasion left angle of lower lip 1cm x 1cm.

G

9. Abrasion right orbit out region 1cm x 1cm.

10. Abrasion right forehead 1cm x 1cm."

He also stated that there is a fracture of the second rib on the left H side in the middle, pleura - incised 5cm x 1cm; that injury no. 1 was

grievous injury and was sufficient to cause death in the ordinary course of nature. He further stated that injury Nos. 2 and 3 could be caused by the same weapon and he was definite that injury no. 1 could not be caused due to fall on curved and pointed stone. He, however, admitted that injury nos. 2 and 3 were skin deep not affecting any bone and could be caused in the course of a scuffle and injury no.1 could not have been caused on the person holding dagger and sitting on the chest of the victim who caught hold the hands with dagger.

The trial court accepted the evidence of Deubai (PW-4) and Manoj (PW-5). Manoj corroborated the evidence tendered by Deubai to the extent of having seen the appellant having a *Jambiya* in his hand when Deubai (PW4) was following him and that he found something very suspicious so he followed both of them. That is how he witnessed the scuffle and the injuries caused by the appellant to the deceased. Deubai admitted in the course of her cross-examination that scuffle took place between the appellant and her husband and her husband fell on the ground; that for considerable time, the scuffle went on; that while on some occasions the appellant was on the ground, on some other occasions her husband was on the ground; that the appellant and the deceased were overpowering each other. PW-5 also stated that he saw that in front of the hospital of Dr. Kalwaghe the deceased coming and the appellant was following him with dagger and gave blows of dagger on the person of the deceased. The trial court found from these circumstances that the appellant had no intention to kill the deceased and that after giving one blow, other injuries had been caused due to scuffle. This was amply supported by the evidence of the Medical Officer that injuries Nos. 2 and 4 to 10 could be caused in the scuffle, or injuries other than injury no. 1 could be caused due to obstruction by the deceased. Therefore, it could not be inferred that the appellant intended to inflict more injuries than injury no.1. If this aspect is borne in mind, it would be clear that the appellant had given only one blow with the *Jambiya* resulting in his death and, therefore, the trial court found that it would not be proper to convict the appellant under Section 302 IPC. The argument relating to private defence was straightaway rejected for there were no injuries on the person of the appellant and the attack had been made by the appellant himself. The trial court discarded the evidence relating to discovery of the weapon and jacket for the reasons set forth in the order. The trial court also convicted the appellant for the offence arising under Section 3(2)(v) of the Act only on the basis that there was

A no controversy that the victim belonged to the scheduled caste and convicted him.

On appeal by the State, the High Court is of the view that the present case is not a case of single injury and there was direct evidence of PWs-4 and 5 in respect of blows given by the appellant to the deceased and the B mere opinion of the doctor that the injuries Nos. 2 to 10 could be caused during scuffle would not rule out the possibility of causing incised injuries. On that basis, the High Court was of the opinion that there was an intention to kill the deceased and did not agree with the view of the trial court that though the appellant had some grudge against the deceased, he did not C intend to kill him but inflicted only a single injury and the other injuries were caused as a result of scuffle that followed.

The findings of the High Court are under challenge before us. The learned counsel for the appellant contended that the view taken by the trial D court is justified and should be accepted and there was no basis for the High Court to rule out the same. Further, he pleaded that no case was established for an offence under Section 3(2)(v) of the Act. The learned counsel for the State, however, supported the view taken by the High Court.

E It is in evidence of Deubai (PW-4) that when she followed the appellant, she saw that the appellant went from behind of her husband and stabbed him with dagger at left side shoulder and thereafter gave blows of dagger to the deceased. If she had been following the appellant, she could not have seen him giving a blow to the deceased from the back. Only when F the scuffle started taking place, injuries could have been inflicted and she could have seen those injuries. In the circumstances, it is reasonable to infer that only one serious injury was caused by the appellant to the deceased which is injury No. 1 while all other injuries, as opined by the doctor, could have been caused during the scuffle. This appreciation of evidence by the trial court stands to reason. The High Court brushed aside G the medical evidence to draw an inference that there was an intention on the part of the appellant to cause all the injuries. The evidence of the Doctor means that injury Nos. 4 to 10, which are mere abrasions or skin deep, could not have been caused by him but these abrasions could have been caused by falling on the ground and coming in contact with a rough H surface. The probability that while injury No.1 could have been inflicted by

the appellant, injury Nos. 2 and 3 could have been caused in the course of the scuffle cannot be ruled out. In this view of the matter, we think that the view taken by the trial court is preferable to the view taken by the High Court as there is a sufficient cogency in the reasoning adopted by the trial court. The High Court does not appear to have appreciated this aspect of the matter at all.

Section 3(2)(v) of the Act provides that whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine. In the present case, there is no evidence at all to the effect that the appellant committed the offence alleged against him on the ground that the deceased is a member of a Scheduled Caste or a Scheduled Tribe. To attract the provisions of Section 3(2)(v) of the Act, the sine qua non is that the victim should be a person who belongs to a Scheduled Caste or a Scheduled Tribe and that the offence under the Indian Penal Code is committed against him on the basis that such a person belongs to a Scheduled Caste or a Scheduled Tribe. In the absence of such ingredients, no offence under Section 3(2)(v) of the Act arises. In that view of the matter, we think, both the trial court and the High Court missed the essence of this aspect. In these circumstances, the conviction under the aforesaid provision by the trial court as well as by the High Court ought to be set aside.

In the result, we reverse the judgment of the High Court in so far as this aspect of the matter is concerned and acquit the appellant of the said charge while we set aside the conviction under Section 302 IPC and restore that of the trial court imposing a punishment of five years for an offence under Section 304, Part II, IPC. It is brought to our notice that the appellant has already been in custody for more than five years now. Therefore he should be set at liberty forthwith. The appeal is allowed accordingly.

V.S.S. Appeal allowed.