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LAXMICHAND @ BALBUTYA

v.

STATE OF MAHARASHTRA

(Criminal Appeal No. 1643 of 2005)

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JANUARY 06, 2011

[HARJIT SINGH BEDI, P. SATHASIVAM AND
CHADRAMAULI KR. PRASAD, JJ.]

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Penal Code, 1860 – s.304 Part II and s.302 – Quarrel between parties – Victim, under the influence of liquor, refused to leave the house of the accused – Accused dragged the victim out of his house and also inflicted blow on his head with a spade, resulting in his death seven days later – Conviction u/s.302 by High Court setting aside the order of acquittal by

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trial court – On appeal, held: Accused had no intention to kill the victim – However, blow was given on a vital part – Accused convicted u/s. 304 Part II with five years of rigorous imprisonment – Evidence – Extra-judicial confession – Witnesses – Sentence/Sentencing.

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According to the prosecution, quarrel arose between the parties. The victim, under the influence of liquor, refused to leave the house of the appellant. The appellant then dragged the victim out of his house and also

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inflicted blow on his head with a spade. The victim became unconscious and succumbed to his injuries seven days later in the hospital. PW-3 and 4 witnessed the incident. The appellant made an extra-judicial confession to PW-2, who later lodged a report. He also made the confessional statement to PW-7 and PW 8.

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Thereafter, the appellant surrendered himself at the police station. PW-12, P.S.I. arrested the appellant and seized the spade. The appellant was charged for the offence under Section 302 IPC. The Court of Sessions acquitted the accused. The High Court, however, convicted the

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appellant under Section 302 IPC. Therefore, the appellant filed the instant appeal.

Partly allowing the appeal, the Court

HELD: 1.1. From the evidence of the eyewitnesses, PWs 3 and 4, the prosecution established that the quarrel was going on between the accused-appellant and the deceased, and the deceased was under the influence of liquor and he was adamant and refused to leave the house of the accused which forced the accused to drag him outside his house and also inflicted injuries with the spade. There is no reason to disbelieve the version of PWs 3 and 4, in this regard. On perusal of their evidence, no material omission or contradiction is found to disbelieve their version. [Para 5] [130-C-E]

1.2. The prosecution examined PW-2 who made a complaint to the police. The accused made an extra-judicial confession to PW-2. The perusal of the report strengthened the evidence of PW-2 about the statement said to have been made to him by the accused. It is also seen from the evidence of PW-12, P.S.I. that when he was scribing the report, the accused arrived at the police station with a spade and PW-12 arrested him and seized the spade. The statement of PW-2 if considered along with other materials, need not be rejected. The accused also made a confessional statement to PW 7. PW 8 also apprised the court about the admission of guilt by the accused. Though there was no need to attach importance to the statements of PWs 7 and 8, if all the materials are considered together, it proves the case of the prosecution that it was the accused who was responsible for the death of the deceased.[Paras 6 and 7] [130-F-H; 131-A-B]

1.3. An attempt was made to record the statement of the deceased by the Special Executive Magistrate but

- A that could not be done. The evidence of PW-1, the Medical Officer supports the version of the prosecution. He issued a certificate that the Injured person was not able to give any statement. When PW-1 was shown spade at the time of examination in court, he opined that
- B It would be possible that such injury could be caused with spade. The High Court held that the medical report, evidence of doctor and the statement of eye-witnesses support the case of the prosecution. PW-9 who conducted the post-mortem on the dead body of the
- C deceased also found that the cause of death was head injury, laceration of the brain matter, resulting into neurogenic shock and peripheral circulatory failure. All the said materials including oral and documentary evidence clearly prove the case of the prosecution and the conclusion arrived at by the High Court is concurred
- D with. [Para 8] [131-C-G]

- 1.4. It is clear from the evidence of PWs 3 and 4 that prior to the incident, there was a quarrel between the accused and the deceased inside the house of the
- E accused, and the deceased consumed liquor and was adamant to leave the house of the accused which necessitated the accused to drag him out of his house and inasmuch as the deceased still refused to accede to the request of the accused, he inflicted blow on the head
- F with the spade. The appellant pointed out that he had no pre-plan or intention to kill the deceased and his main worry was to get the deceased out of his house, who consumed excessive liquor. Considering all these aspects, particularly, the conduct of the deceased in not
- G leaving the house of the accused, he dragged him out of his house, put him on the road and assaulted him with a spade, the accused has no intention to kill the deceased. It is true that blow given by the accused on the deceased was at the vital part because of which he was
- H unconscious for seven days and ultimately succumbed

to his injuries. However, the accused had no intention to commit the offence. [Para 9] [132-A-E]

1.6. Considering all the materials and reasons, the commission of offence attributed to the accused-appellant would come under Section 304 Part II IPC. The incident had occurred in the year 1986 and the accused had no intention to kill the deceased but due to the reasons and circumstances stated, the ends of justice would be met by awarding sentence of rigorous imprisonment for five years. The accused is entitled to have the benefit of deduction of the period already undergone. [Para 10] [132-F-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1643 of 2005.

From the Judgment & Order dated 15.10.2004 of the High Court of Judicature at Bombay, Nagpur Bench in Criminal Appeal No. 48 of 1990.

Sushil Karanjakar for the Appellant.

Shankar Chillarge, Sanjay V. Kharde, and Asha G. Nair for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal is filed by the appellant-accused, who is in Jail, through Superintendent, Nagpur Central Prison, Nagpur under Section 2 of the Supreme Court Enlargement of Criminal Appellate Jurisdiction Act against the final order and judgment dated 15.10.2004 passed by the High Court of Bombay, Nagpur Bench, Nagpur in Criminal Appeal No. 48 of 1990 whereby the High Court allowed the appeal filed by the State and set aside the order of acquittal passed by the Additional Sessions Judge, Gondia.

2. The prosecution case is as follows:

A (a) On 10.08.1986, at about 3.00 p.m., there was a quarrel
between Laxmichand @ Balbutya - the accused and
Gyaniram Mahajan – the deceased, who was in drunken
state, at the house of the accused. The appellant-accused
asked Gyaniram to go home but he was not acceding to
B his request. The accused brought Gyaniram from his
house on the road by lifting him but he fell down. The
accused struck him with a spade on his head. As a result,
Gyaniram sustained injury on his head and had become
unconscious. The accused proceeded towards the house
C of one Police Patel. While going there, he made
disclosure to some persons that he had killed Gyaniram
Mahajan. One Ghanshyam, who was in the employment of
Fulchand and who had heard the utterances of the accused
to the above effect, informed Tejram (PW-2) who was
D sitting in the house of Fulchand that the appellant-accused
was telling that he had killed Gyaniram. Tejram went
towards the Gram Panchayat. The accused was coming
from the side of the house of Police Patel. He again made
similar utterances and informed Tejram that he had killed
E Gyaniram and further asked him to scribe a report. Tejram
advised him to go to the police station.

(b) Tejram went to the police station and lodged an oral
report that he was informed by the accused that he had
killed Gyaniram. The oral report was reduced into writing
F by P.S.I. Narkhede (PW-12) under Section 302 of the
Indian Penal Code. By the time, the accused reached there
alongwith spade, P.S.I. Narkhede (PW-12) arrested him
and seized the spade. Thereafter, he went to the spot and
noticed that Gyaniram was lying unconsciously. Spot
G panchnama was prepared and the samples of blood
stained earth and plain earth were collected.

(c) Gyaniram was sent to the hospital in the cart of Primary
Health Centre, Tirora. The doctor examined him at 9.45
H p.m. and found a lacerated wound on his fore head with
underlying bony fractures into pieces. As Gyaniram was

unconsciousness, P.S.I. could not take his statement. On 17.08.1986, A.S.I. Sahare received a message from Dr. Jaiswal of K.T.S. Hospital, Gondia that Gyaniram had expired. On the same day itself the post mortem was conducted.

(d) After the investigation, the charge sheet was sent to the Court of J.M.F.C. Gondia. The J.M.F.C. committed the case under Section 209(a) of the Code of Criminal Procedure to the Court of Sessions for trial of the accused. The charge for the offence under Section 302 I.P.C. was framed against the accused. The Sessions Judge, Gondia, vide his judgment dated 29.07.1989, acquitted the accused of the charges framed against him.

(e) Against the said judgment of acquittal, the State filed an appeal before the High Court of Bombay, Nagpur Bench. The High Court, vide its judgment dated 15.10.2004, set aside the order of acquittal and convicted the appellant-accused for offence punishable under Section 302 I.P.C.

(f) Aggrieved by the judgment of the High Court, the appellant-accused has filed this appeal from Jail through the Superintendent, Nagpur Central Prison, Nagpur before this Court.

3. Heard Mr. Sushil Karanjakar, learned *amicus curiae* for the appellant and Mr. Shankar Chillarge, learned counsel for the State.

4. As far as the incident and the involvement of the appellant-accused is concerned, the prosecution has mainly relied on the evidence of Fattu Madavi (PW-3) and Mahadeo (PW-4) who are the two eye-witnesses. Apart from these two eye-witnesses, the prosecution has also relied on extra-judicial confession said to have been made by the accused to some of the witnesses.

A 5. It is seen from the evidence of Fattu (PW-3) that the
accused gave a call to him and said that Gyaniram – the
deceased was under the influence of liquor and he was not
willing to leave his house. There was a quarrel between the
B time of quarrel, Mahadeo (PW-4), who was present in the
nearby house of Bhaurao Neware was witnessing the same. It
is also seen from the evidence of Fattu (PW-3) and Mahadeo
(PW-4) that in the course of quarrel, the accused dragged
C Gyaniram outside of his house and gave a stroke of spade on
his head. From the evidence of PWs 3 & 4, the prosecution
has established that the quarrel was going on between the
accused and the deceased and the deceased was under the
influence of liquor and he was adamant and refused to leave
D the house of the accused which forced the accused to drag him
outside his house and also inflicted injuries with the spade. As
rightly observed by the High Court, there is no reason to
disbelieve the version of eye-witnesses, PWs 3 & 4, in this
regard. On perusal of their evidence, we found no material
omission or contradiction to disbelieve their version. On the
E other hand, we agree with the conclusion arrived at by the High
Court as regard to the reliability of two eye-witnesses.

6. Apart from two eye-witnesses, the prosecution has
examined one Tejram as PW-2 who made a complaint to the
F police. The accused has made an extra-judicial confession to
him. Tejram (PW-2) is the person who lodged the report (Ex.21).
The perusal of the above report strengthened the evidence of
Tejram (PW-2) about the statement said to have been made
to him by the accused.

G 7. It is also seen from the evidence of Narkhede, P.S.I.
(PW-12) that when he was scribing the report, the accused
arrived at the police station with a spade and immediately he
arrested him and seized the spade. Though no much
importance needs to be given to the statement of Tejram (PW-
2) but if we consider the same along with other materials, there
H is no reason to reject his version. Another person before whom

the accused has made a confessional statement is Govardhan (PW-7). The accused had gone to his place and informed him about the incident. In the same way, one Udelal, who was examined as PW-8, also apprised the Court about the admission of guilt by the accused. Though there is no need to attach importance to the statements of PWs 7 & 8, as observed earlier, if we consider all the materials together, it proves the case of the prosecution that it was the accused who was responsible for the death of Gyaniram-the deceased.

8. It was submitted that though the injured was alive for seven days but no attempt was made to record his statement about the incident. It is seen from the evidence of Narkhede, PSI (PW-12) that he was not allowed to record his statement by the Doctors as the victim was not in a position to give the statement. It is relevant to note that an attempt was made to record his statement by the Special Executive Magistrate, that also could not be done. The evidence of Dr. Arvind Manwatkar (PW-1), Medical Officer attached to Primary Health Centre, Tirora also supports the version of the prosecution. He also issued a certificate (Ex.19) that the injured person was not able to give any statement. When Dr. Arvind Manwatkar (PW-1) was shown a spade at the time of examination in Court, he opined that it would be possible that such injury could be caused with a spade. As observed by the High Court, the medical report, evidence of Doctor and the statement of eye-witnesses support the case of the prosecution. Dr. Pradip Kumar Gujar (PW-9) who conducted the post-mortem on the dead body of Gyaniram also found that the cause of death was head injury, laceration of the brain matter, resulting into neurogenic shock and peripheral circulatory failure. All the above materials including oral and documentary evidence clearly prove the case of the prosecution and we agree with the conclusion arrived at by the High Court.

9. Coming to the argument that instead of convicting the accused for culpable homicide amounting to murder, his case would fall in the category of culpable homicide not amounting

A to murder as even according to the prosecution one blow alone was caused by the accused that too in a quarrel, we have already pointed out and it is clear from the evidence of PWs 3 & 4 – eye-witnesses that prior to the incident, there was a quarrel between the accused and the deceased inside the house of the accused and the deceased consumed liquor and adamant not to leave the house of the accused which necessitated the accused to drag him out of his house and inasmuch as the deceased still refused to accede to the request of the accused, he inflicted blow on the head with the spade.

B As pointed out by the appellant-accused, he had no pre-plan or intention to kill the deceased and his main worry was to get the deceased out of his house, who consumed excessive liquor. Considering all these aspects, particularly, the conduct of the deceased in not leaving the house of the accused, he dragged him out of his house, put him on the road and assaulted him with a spade, we are of the view that the accused has no intention to kill the deceased. It is true that blow given by the accused on the deceased was at the vital part because of which he was unconscious for seven days and ultimately succumbed to his injuries. However, as discussed earlier, the accused had no intention to commit the offence.

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10. Considering all the materials and reasons, we feel that the commission of offence attributed to the accused-appellant would come under Section 304 Part II Indian Penal Code.

F Taking note of the fact that the incident had occurred in the year 1986 and the accused had no intention to kill the deceased but due to the reasons and circumstances stated above, we feel that the ends of justice would be met by awarding sentence of rigorous imprisonment for five years. The accused is entitled to have the benefit of deduction of the period already undergone.

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11. With the above modification, the appeal is allowed in part.

H N.J.

Appeal partly allowed.