

irappa and Another Vs. the State of Maharashtra and Others

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Court : Mumbai Aurangabad

Decided On : Jun-14-2013

Judge : Naresh H. Patil & a.I.S. Cheema

Appeal No. : Criminal Appeal Nos. 406 of 1998 & 133 of 1999

Appellant : irappa and Another

Respondent : The State of Maharashtra and Others

Judgement :

A.I.S. Cheema, J.

1.Criminal Appeal No. 406/1998 has been filed by the original accused no.1 Irappa Madhavrao Tondare against his conviction under Section 304 II of the Indian Penal Code, 1860 (IPC in brief) by Additional Sessions Judge, Latur in Sessions Case No.131/1995. Criminal Appeal No. 133/1999 and Criminal Revision Application No.96/1999 were also preferred against the impugned judgment and order.

Criminal Appeal No.133/1999 has been filed by State against original accused No.1 Irappa Madhavrao Tondare and his brothers original accused no.2 Shivaji, accused no.3 Navnath and accused No.4 Tanaji with a prayer to set aside the impugned judgment and order of acquittal of the accused persons and to convict them for offence punishable under Sections 302, 323, 504 and 506 read with Section 34 of the I.P.C.

Suman, wife of deceased victim Nagnath Sadashiv Tondare filed Revision against acquittal of original accused Nos. 2 to 4.

By order dated 2nd September, 2003 this Court admitted Appeal No. 133/1999, only as far as regards accused No.1 Irappa. As regards rest of the accused who were acquitted, it was found that the view taken by trial Judge is possible and there was no error or perversity. The Appeal and Revision against acquittal of rest of the accused challenging their acquittal was rejected.

2. We have heard Criminal Appeal of Irappa against his conviction and we have also heard Appeal by State pressing for conviction under Section 302 of the IPC against Irappa.

3. In short, the facts leading to the filing of these appeals may be stated as under :-

(a) Nagnath Sadashiv Tondare (Deceased) of Shelgaon Tq. Chakur was cousin of accused Nos. 1 to 4 and they were living at Shelgaon, Tq. Chakur. Fields of Nagnath and accused Irappa are adjoining each other. There was dispute between them regarding boundary. On 21.06.1995, Nagnath requested Police Patil - Dhondiram Jaywant Patil and other villagers to settle the boundary dispute and dispute regarding nala (i.e. water channel) between the two fields. Police Patil Dhondiram along with other villagers like Mallikarjun, Vaijnath, Dr. Manmath, Vishwanath Hingne, Mukund Kasture, to act as panchas to the settlement of the boundary dispute, proceeded towards the fields. The agricultural fields of (deceased) Nagnath and accused Irappa are adjacent to each other and on either side of Wadhona Chakur road having survey No. 83 (82/2). The panchas drew the line referred as "nitoba", first on southern side of Wadhona-Chakur road. Accordingly stones were fixed. Thereafter, the process was taken up for bandh (i.e. around of earth for division of lands) which is to the northern side of road and here also "nitoba" was drawn and stones were laid. At such time, another neighbour Vishwanath Tondare requested that similar process be taken up so as to also settle boundary dispute between his and Irappas land. The panchas took consent of both the parties and started drawing line (nitoba) with reference to field of Vishwanath Tondare and accused Irappa. Time was about 7.00 p.m. The line

(nitoba) which was drawn was going inside Irappas land by about 5 feet and this enraged Irappa.

(b) When accused Irappa got enraged, he abused Vishwanath Tondare and slapped him. The case of prosecution is that at such time the accused persons started abusing and threw stones. Accused Irappa then hit Nagnath by means of Ghusa (also referred as Sabbal i.e. crowbar) on the neck of Nagnath from behind as well as on his back. Kashinath, brother of Nagnath was held by original accused No.2 Shivaji and accused no.3 Navnath hit "Tikav" (i.e. mattock) on the back of Kashinath while accused no.4 Tanaji hit stone. The pachas intervened and the accused persons left the spot. Nagnath and Kashinath were taken to the village by bullock-cart and from village they had gone to Wadhona by Jeep. Police Patil Dhondiram and one Babu Kotwal, Vishwanath Tondare and Mukund Kasture accompanied them.

(c) On 21.06.1995 A.S.I. Ganpat Sakharam Gaikwad attached to Police Station, Wadhona, Tq. Udigr, Dist Latur received Complaint from Nagnath Sadashiv Tondare relating to the incident. The matter at that time appears to have been treated as of simple hurt. A.S.I. Ganpat Gaikwad registered non-cognizable case No. 101/1995 at 22.30 hours under Sections 323, 504, 506 read with 34 of IPC and sent Nagnath along with injured Kashinath to hospital for examination. Nagnath was taken to Primary Health Centre, Handarguli where he was examined by Dr. Devidas Ambadas Bhosale. With complainant Nagnath, his brother Kashinath Sadashiv Tondare was also examined by Dr. Devidas Bhosale. In the night itself Dr. Devidas Bhosale referred Nagnath to Civil Hospital at Latur. At Civil Hospital, Latur Nagnath died on 22.06.1995 at 10.25 hours. Thereafter, the Police registered Crime No. 64/1995 under Section 302 and P.S.O. Ashok Sundarrao Salunke investigated the matter and filed charge sheet before Judicial Magistrate, First Class, Udgir against original accused No.1 Irappa Madhavrao Tondare and his brothers Shivaji, Navnath and Tanaji, as mentioned above. They were charged for offence punishable under Sections 302, 323, 504, 506 read with Section 34 of the IPC.

(d) The accused were committed to the Court of Sessions at Latur. Charge was framed for offences mentioned above by Additional Sessions Judge, Latur. The accused pleaded not guilty.

(e) In the trial Court, with reference to the incident, prosecution examined brother of the deceased PW-4 Kashinath Sadasiv Tondare, PW-6 Mukund Bhimrao Kasture, PW-7 Mallikarjuna Havgirao Patil, who had joined as panch for measurement as well as PW-8 Vishwanath Trimbak Hingne, who was assisting in the measurement and also PW-9 Dhondiram Jaywantrao Patil, the Police Patil. PW-1 Dr. Suresh Shivajirao Rankhamb is the doctor from Civil Hospital, Latur who conducted postmortem while PW-2 Dr. Devidas Ambadas Bhosle is doctor who had examined deceased Nagnath as well as Kashinath soon after the incident at Primary Health Centre, Handargulli. ASI Ganpat Sakharam Gaikwad (PW-3) had received the F.I.R. Suman, the wife of deceased Nagnath deposed as PW-5 regarding strained relations between the accused persons and her husband due to the bandh and nali. Evidence of Investigating Officer Ashok Sundarrao Salunke is as PW-10.

(f) Trial Court considered the oral and documentary evidence brought on record by the prosecution. Trial Court by judgment and order dated 09.12.1998 proceeded to convict accused No.1 Irappa under Section 304 II of IPC and to acquit all the accused of Sections 302, 323, 504 and 505 read with 34 of IPC. Thus, these appeals.

4. Advocate Shri Dhorde has taken us through the oral and documentary evidence of witnesses. It is argued that once the measurement of the field of Nagnath and accused Irappa had been done, there was no cause left between accused Irappa and deceased Nagnath to have a quarrel. The incident started when another neighbor Vishwanath Tondare asked for measurement of the boundary shared by him and accused Irappa and it happened that the Nitoba drawn showed that accused Irappa would lose about 5 ft. of land. Thus, according to learned Advocate, even if this was said to be true, that would not be any reason for accused Irappa to quarrel with Nagnath. It is argued that, case of the prosecution is doubtful as the F.I.R. is not proved. There was no recovery of any instrument

from accused. The Advocate submitted that the case has not been proved beyond reasonable doubts.

5. Against this, learned A.P.P. claimed that the witnesses have deposed as to how the F.I.R. was written at the Police Station with the help of a person and Nagnath submitted the same and signed the F.I.R. It has been argued by the State that there are eye witnesses to the incident and medical evidence is consistent. The evidence as regards assault on Nagnath is overwhelming and clear. It is not necessary that the scribe of F.I.R. must necessarily be examined. The witnesses on the spot were natural witnesses and there is no reason why these persons who were mediating should speak against the accused. Nagnath died due to severe injuries.

6. We have gone through the oral and documentary evidence on record. Looking to the evidence on record, it can be said that certain facts are not at all in dispute. In cross examination of eye witnesses and statements under Section 313 of Code of Criminal Procedure 1973, it is not disputed that these villagers did gather at the fields of deceased Nagnath and accused No.1 Irappa so as to settle their dispute regarding the boundary between their fields. There is no challenge to the evidence that these villagers had in fact drawn the lines between the fields of deceased Nagnath and Irappa so that the boundaries could be settled. It is also not in dispute that Vishwanath Tondare had requested to settle the boundary dispute as regards his field and that of accused No.1 Irappa. The incident occurred when that process was going on and it appears that the Nitoba drawn was going to the extent of 5 ft. in the field of accused Irappa. Cross examination of PW-9 - Dhondiram Jaywantrao Patil shows suggestion being put to the witness that there was melee and din. It was suggested that in the melee and din how Nagnath received injuries, nobody knows. The suggestion has been denied by PW-9 Dhondiram. However, what appears from suggestion is that incident taking place as such is not denied.

7. The evidence of P.W. 1 Dr. Suresh Shivajirao Rankhamb available on record (who did the postmortem) shows that deceased Nagnath had suffered contusion on nape of neck on right side extending to occipital region on right side. Occipital

bone of the skull was found fractured on the right side. It was this injury which proved fatal and led to death of Nagnath.

It will be now proper to refer to the oral evidence as to how this injury was suffered by Nagnath. P.W. 4 Kashinath, the brother of deceased deposed that there is common bandh between the land of Vishwanath and Nagnath. This common bandh goes into the field of accused no.1. The witness deposed that Nagnath and Vishwanath had dug a nali by the side of the bandh, which nali went into the land of accused no.1 Irappa. In the land of accused Irappa there was rivulet and the nali was connected with this rivulet. The nali was in existence since 20 years and was flowing east west. He further deposed that on 20.06.1995, accused Irappa filled up the nali. When deceased Nagnath came to know about it, he talked to P.W.4 and on his advise went to Police Patil. He says that there was dispute between accused Irappa and deceased Nagnath on the count of bandh. His evidence is that on the next day, the matter was taken up with the Police Patil and at about 3.00 p.m. deceased Nagnath, accused no.1 Irappa, Police Patil and panchas came to the spot and process to settle the boundary dispute was taken up. P.W. 4 Kashinath has deposed, as to how, nitoba as regards the fields of accused no.1 Irappa and Nagnath was drawn and how another neighbour Vishwanath Tondare requested for similar process and when the process was going on, the last stone of Vishwanaths fields came about 5 ft. inside the field of accused Irappa. The witness deposed that this enraged Irappa and he started abusing Vishwanath. He slapped him twice. The evidence then refers to the acts of other accused. P.W. 4 Kashinath has deposed that panch Vishwanath Hingne was standing near the fifth stone with an iron crowbar, accused Irappa came to him and snatched the crowbar from him and hit the same on the neck of Nagnath from behind. We have gone through the cross examination of this witness and find that, as far as regards this evidence regarding causing of fatal injury to Nagnath is concerned, the witness cannot at all be said to have been shattered.

The evidence of PW-6 Mukund Bhimrao Kasture corroborates P.W. 4 Kashinath and his evidence also shows that when the process of settling boundary dispute between the fields of Vishwanath Tondare and accused Irappa was taken up, it was found that Irappa would lose about 5 ft. of land and this enraged Irappa and

he abused Vishwanath and slapped him twice. This witness also deposed that accused No.1 snatched crowbar from the hands of Vishwanth Hingne and ran towards deceased Nagnath and hit it from back side on the neck of Nagnath, towards the right.

Similarly, if the evidence of P.W. 7 Mallikarjuna Patil, P.W. 8 Vishwanath Trimbak Hingne and Police Patil P.W. 9 Dhondiram Jaywantrao Patil is perused, they are also corroborating and in cross examination these witnesses are not at all shattered and although P.W. 4 Kashinath may be said to be brother of deceased requiring careful scrutiny, there is no reason why the other witnesses are also deposing against accused Irappa.

8. There is further evidence of these witnesses of bringing Nagnath and his brother Kashinath to village and from there these two persons going to the Police Station, Wadhona. At Wadhona Nagnath gave report Exhibit 23 referring to the above incident. In the report Nagnath had further mentioned that accused Irappa given him yet another blow on his back. The incident occurred at about 7.00 p.m. of 21.06.1995 and in the same evening at about 22.30 hours Nagnath had given such report in the Police Station. The Police treated the complaint as non-cognizable. Evidence of PW-3 A.S.I. Ganpat is that Nagnath was conscious when he had come to the Police Station. Evidence of PW-4 Kashinath is that at the Police Station the F.I.R. was written with the help of a person whose name he does not remember or know. This witness, who was also one of the injured, deposed that Nagnath went on telling the F.I.R. to the person at Police Station and accordingly it was written and same was received by PW-3. This witness says that Nagnath had signed the F.I.R. PW-4 Kashinath is corroborated as regards this evidence by PW-6 Mukund Bhimrao Kasture as well as PW-9 Police Patil-Dhondiram.

9. The evidence of P.W. 6 Mukund Bhimrao Kasture is that after the incident Nagnath and Kashinath were brought to village by bullock-cart and from there by jeep they were brought to Wadhona Police Station. Witness claimed that he also accompanied them to the Police Station. His evidence is that Nagnath gave F.I.R. to Police and same was written by some person in the Police Station. The witness

deposed that he does not know who that man is. The witness has deposed that Nagnath signed on the F.I.R. in his presence and he identifies the signature of Nagnath on the F.I.R. Exhibit 23. Evidence of P.W.9 Police Patil, Dhondiram is that when they reached the Police Station, the Police Officer Mr. Gaikwad asked that the report may be given in writing and therefore, Nagnath himself dictated the report to some unknown person who was sitting in the police station and that man reduced the same in writing and such written report was given by Nagnath to the Police Officer before whom Nagnath himself put his signature. Police Patil has deposed that at that time he was present along with others.

10. It has been argued for the accused that the F.I.R cannot be said to have been duly proved as scribe has not been examined. It appears that when deceased along with others had gone to the Police Station, the Police treated the matter as non-cognizable case. It was inappropriate on the part of P.W. 3 Ganpat, not to have himself written down the complaint. But that itself it is no reason to disbelieve the other evidence on record of the eye witnesses which inspires confidence as to how Nagnath went to the Police Station and gave F.I.R. Exhibit-23.

11. In the matter of Krishna Mochi and others V/s State of Bihar reported in (2002) 6 S.C.C. 81, the informant Satendra Sharma had not been examined and it was argued that the F.I.R. cannot be used in evidence. It was observed in para No.35 as under:-

35. It has been further submitted that the informant, Satendra Kumar Sharma has not been examined as such, the first information report cannot be used as a substantive piece of evidence inasmuch as on this ground as well the appellants are entitled to an order of acquittal. The submission is totally misconceived. Even if the first information report is not proved, it would not be a ground for acquittal, but the case would depend upon the evidence led by the prosecution. Therefore, non-examination of the informant cannot in any manner affect the prosecution case.

In the present matter, the position is much better. Here, there is cogent reason why the informant is not available, i.e. Nagnath, who gave the F.I.R. has expired. The informant has expired and the record shows that witnesses who accompanied Nagnath to the Police Station, being villagers as they are, took help from some

unknown person at the Police Station to write down the F.I.R. Exhibit 23. They have deposed as to how the same was prepared and have given evidence as to how Nagnath after getting the same prepared signed and submitted the document. The evidence is reliable to hold that Nagnath himself got the F.I.R. Exhibit 23 prepared and signed and submitted the same to the Police Station. We find that, the F.I.R. is duly proved and there is no reason to doubt the document. Consequently, although at the time when Nagnath gave the report Ex. 23 to the Police, he does not appear to have been expecting that he would die of the injuries he had suffered, the statements in Ex. 23 relating to the incident become relevant keeping in view Section 32(1) of the Indian Evidence Act, 1872, as the evidence shows that the hit given by accused Irappa caused his death.

12. The argument that as the boundary dispute with reference to Nagnath and accused Irappa had already been settled and incident took place when process relating to measurement of portion of field of accused Irappa and Vishwanath Tondare was taken up and so there was no reason for accused Irappa to have assaulted Nagnath, needs to be rejected. The evidence shows that Police Patil and other villagers were mediating between Nagnath and accused Irappa and had drawn line between their fields. It is only when accused Irappa found that he would lose about 5 ft. of land because another neighbour Vishwanath Tondare also took up the matter of boundary dispute that he reacted. It may be that accused Irappa was irritated that his neighbour have taken up such matter with Police Patil and other villagers. A person may vent his anger against both the neighbours in such situation and it cannot be said to be unnatural.

13. It has been argued that no instrument of assault was seized from accused and so accused must get benefit of doubt. We do not think that there is any force in this argument. Evidence of Police Patil P.W.9 Dhondiram Patil read with seizure panchanama Ex. 34 (which is proved by him) shows that after the incident the crowbar and mattock (Articles 6 and 7) were dropped on the spot by accused persons and they then went away. The fact that witnesses had gathered for measuring and settling boundary dispute is not disputed. It is natural that for such process material like Articles 6 and 7 was available on spot. P.W. 9 has deposed that these articles were seized from his house. Seizure Panchanama mentions

that P.W. 9 told panchas that after incident he collected these articles from spot so that no body should take them away and kept them at his house. In the cross examination of P.W. 9 the only suggestion was if he knows to whom Articles 6 and 7 belong. He replied that he does not know. Thus, seizure panchanama Ex.34 proved by P.W.9 is not challenged in the cross examination and there is no reason to discard the same.

14. The evidence of prosecution regarding the death of Nagnath on 22.06.1995 at the hospital is not disputed. The evidence of P.W. 1 Dr. Suresh Shivajirao who did postmortem shows that deceased Nagnath recorded the following external injuries on his body :-

1. deffused swelling on neck on rt. Side adm. 6 cm x 6 cm.
2. contusion on occipital region (on the scalp) of the size of 6 cm x 5 cm extending on nape of neck.

15. According to Doctor, both these injuries were antemortem. On internal examination doctor found that there was contusion on nape of neck on right side extending to occipital region on right side. The occipital bone of skull was found fractured on the right side. In the opinion of doctor, in ordinary course, this was sufficient to cause death. Doctor was shown Article 6 crowbar and Article 7 mattock and in his opinion the injuries sustained by the deceased could have been caused by such articles.

16. Section 299 of the Indian Penal Code reads as under :-

Section 299 :- Culpable homicide :-Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

If the evidence in the present matter is perused, it must be held that when accused Irappa was hitting crowbar on such a vital part of body as the neck from behind, he must be said to have knowledge that he is likely by such act to cause death as the hit was close to skull which did suffer fracture.

17. Looking to the incident it is clear that the culpable homicide was committed without premeditation, in sudden fight, in the heat of passion when Irappa found that "nitoba" was disclosing that he would have to give up 5 ft. of his land. It was a sudden quarrel. The facts also show that the accused Irappa had not taken any undue advantage or acted in a cruel or unusual manner.

18. Under Section 300 of I.P.C. except in the cases which have been excepted in the Section, culpable homicide is a murder inter alia, if the act by which the death is caused is known to the offender to be likely to cause death of the person. Irappa gave a blow with crowbar on the neck from behind to Nagnath. He must be attributed knowledge that such act is likely to cause death. Now if Exception 4 of Section 300 of I.P.C. is perused it reads as under :-

Exception 4:- Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

If the evidence available on record is perused, it is clear that this Exception 4 applies to the matter and it has to be held that accused Irappa committed culpable homicide not amounting to murder.

19. Trial Court recorded that death of deceased Nagnath in the hospital on 22.06.1995 is not a disputed fact. The Court found that Nagnath suffered homicidal death.

As regards accused No.1 Irappa, the trial Court observed that, in his written statement Exhibit 49 itself he admitted his presence at the time of incident as well as the fact that he also tacitly admits that he was a party to the brawl that broke out between the complainant on one side and the accused party on other side. The Court relied on evidence of P.W. 4 and P.Ws. 6 to 9 to find that at the time of incident accused Irappa had suddenly become enraged and in such situation, slapped Vishwanath Tondare and snatched the crowbar from the hands of PW-8 Vishwanath Hingne and hit on the backside of neck of deceased Nagnath. The Trial Court discarded the defence that it was dark at the time of incident which took

place at about 7 p.m. of 21.06.1995 on the ground that 21st June happens to be the longest day of the year and sufficient light was available. Trial Court concluded that accused no.1 alone is liable under Section 304 II of I.P.C. For reasons recorded we find no reasons to differ.

20. We thus uphold the conviction of appellant accused Irappa under Section 304-II of the IPC as imposed by the learned trial Court.

21. As regards sentence passed, learned Advocate for appellant accused Irappa relied on the case of Venkatesh V/s State of T.N. reported in AIR 1993 S.C. 1230 and on the case of Kuldeep Singh V/s State of Haryana reported in AIR 1996 SC 2988. Relying on these rulings, learned Advocate wanted to submit that the sentence may be reduced to the imprisonment already suffered as the incident is old and in the heat of passion it had occurred suddenly without premeditation. In the matter of Kuldeep Singh, the accused had already undergone sentence of two years. As regards the matter relating to Venkatesh, the deceased happened to be a deaf person who was hit by appellant/ accused in that matter for not listening when he was asked to stop singing. The hitting by appellant/accused in that matter caused death of victim Rangan. The appellant/accused in that matter after realising the grievous misdeed, had tried to commit suicide. In such circumstances, the Hon'ble Supreme Court, considering the facts of the record in that matter had interfered with the sentence. The rulings referred to by the learned Advocate had different facts and considering the facts of those matters, the Hon'ble Supreme Court had given certain reliefs. We do not think that the facts can be compared so as to give any benefit to the appellant/accused Irappa in the present matter. We find that in the present matter, accused Irappa has suffered imprisonment hardly for about five month. The offence proved in the present matter is a serious offence where one precious life was lost. PW-5 Suman, widow of Nagnath gave her age as 28 years at the time of her evidence in 1998. Such a young lady with two sons lost her husband. Forgetting deceased and his family who must still be suffering, no undue sympathy can be given to the accused Irappa. We thus maintain the sentence imposed by Trial Court.

22. In the appeal filed by the State, learned A.P.P. has not brought to our notice any reasons to find defect in the findings of learned trial Court. No grounds have been made out to claim that murder as such is proved. There is no reason to interfere with the finding that the offence made out is only under Section 304 II of IPC. There is no substance in the appeal filed by the State.

23. We thus pass following order:-

(1) Criminal Appeal No. 406/1998 and Criminal Appeal No. 133/1999 stand dismissed.

(2) Mr. V.R. Dhorde, learned counsel appearing for the appellant/accused seeks six weeks time to surrender. We grant six weeks time to the appellant/accused to surrender.

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