

(2000) 12 BOM CK 0036

In the Bombay High Court

Case No : Criminal Appeal No. 571 of 1994

Afajal Samasul Ansari and Another

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 07-12-2000

Acts Referred:

Bombay Police Act, 1951 — Section 37(1)

Penal Code, 1860 (IPC) — Section 299, 300, 302, 304, 324

Citation : (2001) ALLMR(Cri) 852 : (2001) CriLJ 889

Hon'ble Judges : Vishnu Sahai, J;T.K.C. Das, J

Bench : Division Bench

Advocate : D.A. Patil, for the Appellant; B.A. Patil, Assistant Public Prosecutor, for the Respondent

Judgement

Vishnu Sahai, J.—Through this appeal the appellants challenge the judgment and order dated 28th July, 1994 passed by the Additional Sessions Judge, Thane, in Sessions Case No. 557 of 1992, whereby they have been convicted and sentenced in the manner stated hereinafter :

(i) u/s 302 read with 34, I.P.C. to suffer imprisonment for life and to pay a fine of Rs. 500/- each, in default to suffer 15 days" S.I.; and

(ii) u/s 324 read with 34, I.P.C. to suffer 1 year"s R.I. and to pay a fine of Rs. 500/- each, in default to suffer 15 days" S.I.

2. Shortly stated the prosecution case runs as under :

On 14-2-1992 at about 12.15 to 12.30 a.m. the informant Abdul Jabbar Shaikh P.W. 1, a resident of Aashabibi Kalyan Road, Nasikwala Chawl, Bhiwandi, returned back to Biwandi in his car. When after parking his car, he was proceeding for his house he saw the Appellant Afajal Ansari easing in front of his house and questioned him, on which the Appellant Afajal Ansari replied whether the place belongs to his father. After easing Appellant Afajal Ansari inflicted fist blows on the informant"s person and caused bite injuries to him. The informant

pushed him and raised shouts hearing which his father Banemiya Shaikh P.W. 2, his paternal aunt Kulsumbi, his wife Hamedha Shaikh P.W. 8, his daughter Tabassum Shaikh P.W. 7, Halimabi Shaikh P.W. 4, Abdul Shaikh P.W. 5 and Iqbal Sayyad P.W. 6, came.

In the meantime, Appellant Afajal Ansari went to his house and came back with a stick and Appellant Asammahammed Noor Mohammed Ansari, with a cable wire in his hand also came. Appellant Afajal Ansari inflicted a stick blow on the informant's back, resulting in his falling down. He also inflicted a stick blow on the head of his paternal aunt Kulsumbi and Appellant Azam Mohammed Noor Mohammed Ansari assaulted Kulsumbi with cable wire on her head. Thereafter Appellant Afajal Ansari assaulted Banemiya Shaikh with the stick.

In the meantime people gathered there. They intervened. Thereafter in the informant's car, the informant, his father Banemiya Shaikh and paternal aunt Kulsumbi were taken to Kumbharwada Police Station where the police told the informant to take his father and paternal aunt to Indira Gandhi Hospital at Bhiwandi, as they were seriously injured. Thereupon the informant took his father and paternal aunt to Indira Gandhi Hospital, Bhiwandi.

3. The evidence of Dr. Khalil Tumandar P.W. 3 shows that from 8 p.m. on 15-2-92 to 8 a.m. the next day, he was on duty at Indira Gandhi Hospital, Bhiwandi and examined Kulsumbi, Banemiya Shaikh P.W. 2 and Abdul Jabbar Shaikh P.W. 1.

On the person of Kulsumbi he found the following injuries :

- (i) C.L.W. over forehead 2" x 1" in frontal region; and
- (ii) C.L.W. over right ear.

She was semi-conscious and he advised that she be taken to Civil Hospital at Thane.

On the person of Banemiya Shaikh P.W. 2, Dr. Khalil Tumandar found the following injuries :

- (i) C.L.W. over frontal region of size 1" x 1.2" and
- (ii) a big haematoma, over left maxillary region size 3" x 2".

He also advised that Banemiya be shifted to Civil Hospital, Thane.

In the opinion of Dr. Khalil Tumandar the C.L.Ws. suffered by the said persons were attributable to a hard and blunt object and could be caused by the stick (Article 2 shown to him).

On the person of Abdul Jabbar Shaikh P.W. 1 the following injuries were found :

- (i) tooth bite mark over left forearm;
- (ii) tenderness over nose and eyes; and

(iii) bleeding from nose.

In the opinion of Dr. Khalil Tumandar, the tooth marks were the result of human bite and bleeding on the nose was possible from fist blows.

4. The evidence of Dr. Khalil Tumandar shows that on 15-2-92 he medically examined Abdul Shaikh P.W. 5. On examination he found tenderness over right leg and left leg; a mark of abrasion over the left arm; and a mark of abrasion over his back; a C.L.W. 1/2" x 1/4" over the forehead: and an incised wound of the dimension of 1/4" on the left finger.

5. The evidence of the informant Jabbar Shaikh P.W. 1 shows that from Indira Gandhi Hospital, Bhiwandi, his brother Asfan took his father Banemiya Shaikh and his paternal Kulsumbi to Civil Hospital, Thane, and he proceeded to Kumbharwada Police Station for lodging F.I.R.

6. The evidence of P.S.I. Pravin Chintalkar P.W. 10 shows that on 15-2-92 at about 3.20 a.m. he recorded the F.I.R. of Jabbar Banemiya Shaikh and on its basis registered a case u/s 324 read with 34, I.P.C. and Section 37(1) of the Bombay Police Act, His evidence further shows that thereafter he commenced the investigation and interrogated the witnesses and arrested the Appellants on the same day itself.

On 20-2-92 he came to know that Kulsumbi (from Civil Hospital, Thane she had been shifted to K.E.M. Hospital, Bombay) had succumbed to her injuries and after meeting the concerned doctor at K.E.M. Hospital and learning from him that she had died on account of head injuries he converted the case to one u/s 302, I.P.C. and handed over further investigation to P.I. Pathak, who filed the charge-sheet.

7. The autopsy on the corpse of the deceased Kulsumbi was conducted on 20-2-92 by Dr. Ramesh Rane P.W. 9, who found on it the following external injuries :

(i) sutured C.L.W. 7.5 c.m. in length over frontal region;

(ii) sutured C.L.W. 8.00 c.m. in length over right ear pinna.

(iii) sutured craniotomy wound 24 c.m. in length over right parietal-temporal occipital region.

On internal examination he found the following injuries.

Subdural haematoma at temporal region, oedema of brain, diffused subdural haemorrhage on temporal and occipital region 40 grams clot at occipital region and intra ventricular haemorrhage.

According to Dr. Rane the deceased died on account of intra-cranial haemorrhage and he was medically hypersensitive.

The evidence of Dr. Rane shows that C.T. scan was done and the same showed a

clot on parietal occipital region.

8. The case was committed to the Court of Session in the usual manner where the appellants were charged on the counts on which they have been found guilty, to which charges they pleaded not guilty and claimed to be tried.

9. During trial in all the prosecution examined 10 witnesses; seven out of them viz. Abdul Jabbar Shaikh PW1, Banemiya Shaikh P.W. 2, Halimabi Shaikh P.W. 4, Abdul Shaikh P.W. 5, Iqbal Sayyad P.W. 6, Tabassum Shaikh P.W. 7 and Hamedha Shaikh P.W. 8 were examined as eye-witnesses. Amongst them Abdul Shaikh P.W. 5 did not support the prosecution case and was declared hostile. The other eye-witnesses, however, supported the prosecution and gave evidence incriminating the Appellants. The learned trial Judge believed the ocular account and convicted and sentenced the Appellants in the manner stated in para 1.

Hence this appeal.

10. We have heard the learned counsel for the parties and perused the entire material on record. In our view, this appeal deserves to be partly allowed, inasmuch as only an offence u/s 304(ii) read with 34, I.P.C. and not one u/s 302 read with 34, I.P.C. is made against the Appellants. We, however, feel that an offence u/s 324 read with 34, I.P.C, is made out against them and they have been correctly convicted thereunder.

11. As mentioned above 7 eye-witnesses were examined by the prosecution, they being Abdul Jabbar Shaikh P.W. 1, Banemiya Shaikh P.W. 2, Halimabi Shaikh P.W. 4, Abdul Shaikh P.W. 5, Iqbal Sayyad P.W. 6, Tabassum Shaikh P.W. 7 and Hamedha Shaikh P.W. 8. As mentioned earlier one of them viz. Abdul Shaikh P.W. 5 did not support the prosecution case and turned hostile.

12. We have examined the evidence of the eye-witnesses. In our view the evidence of the eye-witnesses, other than Abdul Shaikh P.W. 5 who turned hostile, inspires confidence. It is pertinent to mention that out of them the informant Jabbar Shaikh P.W. 1 and his father Banemiya Shaikh are injured eye-witnesses. Jabbar Shaikh has deposed about the entire incident and the other witnesses who came after he was assaulted, on his shouts, have deposed about the assault on Banemiya Shaikh and Kulsumbi.

13. We would first take up the evidence of the informant Jabbar Shaikh. He stated that on 14-2-92 at about 11.30 to 11.45 a.m. he returned back to Bhiwandi and when after parking his car near his house he was proceeding towards his house he found the Appellant Afajal Ansari easing in front of his house and when he reprimanded him, he gave him fist blows on his face and nose and had a bite on his left hand. Hearing his cries his father Banemiya, his paternal aunt Kulsumbi and others came. Afajal Ansari went back towards his house and came back with a stick and Appellant Azam Mohammed Noor Mohammed Ansari, with a cable wire in his hand also came. Thereafter Appellant Afajal Ansari assaulted him, Kulsumbi and his father Banemiya and Appellant

Azam Mohammed Noor Mohammed Ansari with the cable wire assaulted Kulsumbi on head.

14. We have examined the said version of Jabbar Shaikh and we find it to be credible. Earlier we have referred to the injuries found on the person of Jabbar Shaikh, Banemiya Shaikh and Kulsumbi and we find that they are in conformity with the manner of assault furnished by Jabbar Shaikh.

It is pertinent to mention that although Jabbar Shaikh was subjected to extensive cross-examination but nothing could be extracted therefrom which would impair his credibility. In our view, the evidence of Jabbar Shaikh, coupled with the prompt F.I.R. of the incident, lodged by him at 3.30 a.m. on 15-2-92 at Bhiwandi Police Station, is sufficient to fix the involvement of the Appellants in the crime.

15. We are fortunate that in this case there is plurality of ocular account and five other eye-witnesses, other than Abdul Shaikh P.W. 5 who had turned hostile have furnished ocular account; one of them Banemiya Shaikh is an injured eye-witness. They have deposed about the assault on Banemiya and Kulsumbi on the same lines as Jabbar Shaikh. Their ocular account is in accord with medical evidence. It is pertinent to mention that all of them lived in the proximity of the place of the incident and are natural witnesses of the incident and although they were subjected to extensive cross-examination but nothing could be extracted therefrom which would impair their credibility. Hence we believe their evidence also.

16. For the said reasons we feel that the involvement of the Appellants in the incident has been established beyond reasonable doubt. Since Jabbar Shaikh and his father Banemiya Shaikh received simple injuries and the said injuries were caused by the Appellants in furtherance of their common intention we feel that the conviction of the Appellants for the offence u/s 324 read with 34, I.P.C. is correct. However, we have no doubt that the learned trial Judge erred in convicting the Appellants for the offence u/s 302 read with 34, I.P.C. It is pertinent to mention that there was no malice or II-will between the Appellants on the one hand and the deceased Kulsumbi on the other. It is also pertinent to mention that the incident started on account of the informant Jabbar Shaikh questioning the Appellant Afajal Ansari as to why he was easing in front of his house. On that Appellant Afajal Ansari assaulted Jabbar Shaikh who raised cries, resulting in the arrival of Kulsumbi and others. It was at this juncture that Appellant Afajal Ansari brought a stick from his house and Appellant Azam Mohammed Noor Mohammed Ansari came with cable wire and thereafter both of them inflicted blows on Kulsumbi, resulting in her receiving two C.L.Ws., one of which was on the frontal region and one on the right ear.

It is pertinent to mention that the evidence of the autopsy surgeon Dr. Rane P.W. 9 and the post-mortem report prepared by him does not show any fracture beneath the injuries suffered by Kulsumbi and neither has Dr. Rane stated that

the injuries of Kulsumbi were sufficient in the ordinary course of nature to cause death.

It should also be borne in mind that Kulsumbi succumbed to her injuries five days later i.e. on 20-2-92. In the overall factual matrix, referred to above, it cannot be said that the act of the appellants in assaulting Kulsumbi would fall under any of the four clauses of Section 300, I.P.C., breach of which is punishable u/s 302, I.P.C, but would only fall within that of Clause thirdly of Section 299, I.P.C; inasmuch as it can safely be presumed that when the Appellants assaulted Kulsumbi on her head they committed an act with the knowledge that it may cause her death. Hence in our view an offence u/s 304(ii) read with 34, I.P.C. would be made out against them. ,

17. Coming to the question of sentence we find that the Appellants are continuously in jail from 15-2-92. In other, words they have been in jail for nearly 8 years and 10 months. We feel that the sentence already undergone by them, in the circumstances, would be sufficient to meet the ends of justice.

18. In the result this appeal is partly allowed. Although we maintain the conviction and sentences of the Appellants for the offence u/s 324 read with 34. IPC. we, however, acquit them for the offence u/s 302 read with 34, I.P.C. and set aside their convictions and sentences on the said count and instead find them guilty for the offence u/s 304(ii) read with 34, I.P.C. and sentence them to undergo the period already undergone by them.

In case the Appellants have paid the fine for the offence u/s 302, read with 34, I.P.C. the same shall stand refunded to them.

The appellants are in jail and shall be released forthwith unless wanted in some other case.