
(2015) 02 BOM CK 0209

In the Bombay High Court

Case No : Criminal Appeal Nos. 523 and of 475 1999

Amjad Abdul Jabbar Bubere

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 13-02-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 149, 302, 323, 326

Citation : (2015) ALLMR(Cri) 2143

Hon'ble Judges : P.V. Hardas, J;Shalini Phansalkar Joshi, J

Bench : Division Bench

Advocate : M.K. Kocharekar and Dushyant S. Pagare, for the Appellant; H.J. Dedhia, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

P.V. Hardas, J.

1. Appellant/Original Accused No. 2 Amjad stands convicted for offence punishable under Section 302 of the Indian Penal Code and is sentenced to imprisonment for life and to pay fine of Rs. 5,000/- in default of which to undergo further R.I. for 6 months while Accused No. 1 - Sajid, Accused No. 3 Nadim, Accused No. 4 Danis, Accused No. 5 Arshad and Accused No. 6 Sharik stand convicted for offence punishable under Section 323 r/w. 148 and 149 of the Indian Penal Code and sentenced to S.I. for 1 month and to pay fine of Rs. 1,000/- in default of which to undergo further S.I. for 1 month by the Additional Sessions Judge, Raigad at Alibag by Judgment dated 25.8.1999 in Sessions Case No. 36 of 1995, by these Appeals question the correctness of their conviction and sentence. Criminal Appeal No. 523 of 1999 has been filed by Original Accused No. 2 while Criminal Appeal No. 475 of 1999 has been filed by Original Accused Nos. 1. 3 to 6. Facts in brief as are necessary for the decision of these Appeals may be stated thus.

PW-10 PSI Sanjiv Pimpale, who in August 1994 was attached to the Neral Police

Station and was on duty on the night of 9.8.1994 and morning of 10.8.1994 was shown the report scribed by Constable Ghosalkar at Exhibit 32. The said report had been lodged by PW-1 Anis and on the basis of the said report, initially an offence punishable under Section 326 of the Indian Penal Code was registered. PW-10 PSI Sanjiv Pimpale visited the scene of the incident and drew the scene of the incident panchnama, in the presence of panchas at Exhibit 37. He recorded the statements of the witnesses and on the same day i.e. on 10.8.1994 arrested Accused No. Arshad. Accused Sharik was arrested but since he was a juvenile, steps in accordance with law were taken. Accused Arshad had been arrested under arrest panchnama at Exhibit 51 and his clothes were seized. On 10.8.1994, injured Shamshauddin succumbed to his injuries and Section 302 of the Indian Penal Code was added. The remaining Accused were arrested on 13.8.1994.

On 19.8.1994, during custodial interrogation. Accused No. 1 Arshad expressed his willingness to produce the weapons which had been concealed. Accordingly, a memorandum in the presence of panchas was scribed at Exhibit 52. Accused Arshad led the police and the panch to village Salokhe and took the police and the panch near his cattle shed and from the cattle shed produced 2 iron rods which were seized under panchnama at Exhibit 52. On 22.8.1994, Accused Sajid expressed his willingness to point out the place where a stick and his clothes had been concealed. Accordingly, a memorandum was drawn in the presence of panchas at Exhibit 53. The accused led the police and the panch to village Salokhe and from his poultry farm produced three iron rods, one stick and three shirts and one T-Shirt which were sized under panchnama at Exhibit 53. The seized property was then forwarded to the Chemical Analyzer under requisition at Exhibit 54. The report of the Chemical Analyzer is at Exhibit 55. The report of the Chemical Analyzer does not disclose that any blood stains were found on the said articles.

2. Injured Shamshauddin was initially examined by PW-7 Dr. Satish Parmar, who had noticed the following external injuries:-

- (1) C.L.W. on left parietal region, 3 x 1 c.m. It was simple in nature, caused by hard and blunt object.
- (2) Contusion with abrasion 3 inches x 3 inches, on left parietal region, it was simple in nature, caused by hard and blunt object.
- (3) Abrasion on right side of chest lateral to nipple.

The general condition of the patient suggested to him of some intra-cranial injuries and therefore, the patient was transferred to the Central Hospital at Ulhasnagar. The Injury Certificate is at Exhibit 46. Shamshuiddin, it appears succumbed to his injuries and therefore, postmortem on the dead body of deceased Shamshuiddin was performed by Dr. Bhalchandra Chikhalkar, who noticed the following external injuries:-

(1) Sutured wound i.e. lacerated wound over left parietal region 3 c.m. In length, three stitches it was about 8-5 c.m. Away from left ear and 10 c.m. Away from left eyebrow.

(2) Abrasion over left parietal region 3 c.m. X 2 c.m. in dimension, 2 c.m. Proximal to external Injury No. 1.

(3) Abrasion over right chest 4 c.m. X 8 c.m. in diameter, it was 9 c.m. away from left nipple and 11 c.m. away from mid-line.

(4) Surgical tracheostomy anterior angle of neck 2.5 c.m. long.

On internal examination the following injuries were found:-

(1) Heamatoma under scalp fronto tempora parietal region, bilateral.

(2) Fracture around coronal suture, extending upto temporal bone of both sides.

(3) Fracture of right zygomatic arch.

(4) Fracture of temporal bone of left side extending upto petrous.

(5) Left temporo-occipital suture separately.

(6) Large subdural heamatoma over fronto temporal and parietal region bilaterally.

(7) Left temporo-parietal contusion.

(8) Left frontal contusion.

(9) Contusion haemorrhages in pons.

(10) Left subdural haematoma over temporal region.

(11) Grooving of uncus.

(12) Profuse sub-arachnoid haemorrhage bilaterally.

(13) Blood clots measuring 2 x 2 c.m. In diameter at left tempo parietal region.

(14) Compression of lateral ventricle.

He opined that all the injuries were antemortem and were sufficient in ordinary course of nature to cause death. According to him, all the injuries on the head were possible by iron rods while the injury on the chest was also possible by iron rod. He therefore opined that cause of death of deceased Shamshuddin was due to head injury. The postmortem report is at Exhibit 44.

3. On the case being committed to the Court of Sessions, Trial Court, vide Exhibit 23 framed charge against the accused for offence punishable under Section 148, 149, 302 r/w. 149 of the Indian Penal Code. The accused denied their guilt and claimed to be tried. Prosecution in support of its case examined 10 witnesses. The defence of the accused was of denial. The Trial Court upon appreciation of

the evidence convicted and sentenced the Appellants as aforesated.

4. We have heard Mr. Kocharekar learned Counsel for the Appellants in both the Appeals and the learned APP and in order to effectively deal with the submissions advanced before us by the learned Counsel for the parties, it would be useful to refer to the evidence of the prosecution witnesses.

5. Prosecution has examined PW-1 Anis, the first informant, who deposes that deceased Shamshuddin was his real uncle whose house was adjacent to his house. According to him, on the day of the incident, i.e. on 9.8.1994 at about 10.00 p.m. PW-1 Anis was present in his house. Accused No. 1 Sajid came to call deceased Shamshuddin by saying that the she-buffalo of Shamshuddin was loose. Accused No. 1 Sajid was armed with a stick. Shamshuddin and Accused No. 1 Sajid started proceeding towards the cattle shed. PW-1 Anis followed them and when Shamshuddin reached near the cattle shed. Accused No. 1 Sajid dealt a blow of stick on the back of Shamshuddin. Thereafter, the other accused i.e. Accused No. 2 Amjad, Accused No. 3 Nadim, Accused No. 4 Danis, Accused No. 5 Arshad and Accused No. 6 Sharik arrived there armed with iron rods. Accused No. 2 Amjad gave blow of iron rod on the head of Shamshuddin while the other accused started assaulting Shamshuddin. Shamshuddin sustained bleeding injuries and became unconscious. Thereafter, PW-1 Anis cried for help and on hearing his cries, the other residents of the locality gathered there. Shamshuddin was then taken to the Primary Health Centre at Kalam. Shamshuddin was thereafter taken to the Neral Police Station where PW-1 Anis lodged his report at Exhibit 32. Shamshuddin was taken to Neral Hospital and was then taken to the J.J. Hospital at Mumbai. Shamshuddin succumbed to his injuries on the next day. According to PW-1 Anis, there was sufficient illumination as the electric light near the scene of the incident were burning and in the illumination of those lights, he had witnessed the incident. In cross-examination he has admitted that there were several cases filed between the accused and the complainant side. He has also admitted that he had not attempted to rescue Shamshuddin as the incident was over within a minute or two. According to him, he was witnessing the incident from a distance of 15 ft. He has admitted that he had not asked the accused not to assault deceased Shamshuddin. He has also admitted that he had not gone near the deceased till the accused had fled. An omission has been elicited that he had not stated in his report that Accused No. 1 Sajid was armed with a stick when he had gone to call Shamshuddin.

Interestingly this witness does not refer to the presence of the other eye-witnesses at the scene of the incident.

6. Prosecution has examined PW-2 Shaibaj as an eye-witness. PW-2 Shaibaj deposes that on the day of the incident he was chit-chatting with his friends by the side of the Salokh-Kalam road. He had seen deceased Shamshuddin being called by Accused No. 1 Sajid and also noticed accused Sajid assaulting Shamshuddin with stick. According to him, the other accused came from the shop of Khalid and started assaulting Shamshuddin. Those accused were armed

with iron rods. The cries for help were raised and on hearing the cries, PW-1 Anis and one Hanif also arrived there. 4 to 5 other persons in the village had also come there. Shamshuddin was then taken to the hospital where ultimately he succumbed to his injuries. According to PW-2 Shaibaj, there was a land dispute between Abdul Rashid and father of Accused No. 1 Sajid. According to him, deceased Shamshuddin had attended the Court as a surety for Abdul Rashid and therefore, the accused were aggrieved.

In cross-examination he has admitted that he was sitting near the Out-post of the Mala-Kalam road at the time of the incident and according to him the incident took place just near where he was standing. According to him, he was sitting on the road. He claims that he had seen Accused No. 1 Sajid going to the house of Shamshuddin and thereafter, Shamshuddin coming out with Accused No. 1 Sajid. He has admitted that the a talk between them was not audible to him. He claims to have witnessed from 15 ft. He has also admitted that he did not try to rescue Shamshuddin as he apprehended that he would be assaulted also. He has admitted that he had not cried for help. He has denied the portion marked "A" from the statement that Hanif, Anis and 4 to 5 others have reached at the spot after accused left the scene of the incident. He has denied to have stated the portion marked "A" from the statement.

7. Prosecution has examined PW-3 Abdul Rashid, who deposes that on the day of the incident. Accused No. 1 Sajid come to call deceased Shamshuddin and thereafter deceased Shamshuddin started going towards the cattle shed. According to PW-3 Abdul, he followed deceased Shamshuddin. On reaching the cattle shed, Accused No. 1 Sajid dealt a blow of stick on the back of deceased Shamshuddin. Thereafter, the remaining accused arrived at the scene of the incident armed with iron rod. These accused assaulted deceased Shamshuddin. After deceased Shamshuddin fell on the ground, PW-1 Anis, Hanif, Salim and some other villagers also arrived there. Shamshuddin was taken to village Kalam in a truck. According to PW-3 Saibaj, he had witnessed the incident in the illumination of the electric light.

8. In cross-examination he has admitted that the shop of Khalil is a double storeyed building and there is a road in front of the shop. House of deceased Shamshuddin is towards the rear of the shop. Omission has been elicited that he had not stated in his previous statement that when accused Sajid had gone to call Shamshuddin, he was armed with a stick. He has also admitted as true that he had witnessed the incident because he had followed Shamshuddin. Omission that is elicited that he had not stated in his previous statement that he had followed Shamshuddin and Sajid when they had gone towards the cattle shed. He has also admitted that since the incident was over within two seconds, he could not rescue Shamshuddin. He has also admitted that he had not cried out for help. Omission is also elicited that he had not stated in his previous statement that Accused Danis had informed one witness Mosin that Shamshuddin would be finished by 15th August.

9. Prosecution has examined PW-5 Shabir, who deposes that at the time of the incident he was present in his house and noticed Accused Sajid in front of the house of Shamshuddin. According to him, Accused Sajid informed Shamshuddin that his she-buffalos were untethered and therefore, he should go to the cattle shed. According to Shabir, he was standing near his house and therefore, had heard the conversation. According to him, the distance between his house and the house of Shamshuddin is about 30 ft. He had also noticed accused Sajid armed with a stick. After some time, he heard the cries and therefore, went towards the cattle shed and noticed all the accused assaulting deceased Shamshuddin with iron rods. According to him, he had witnessed the incident in the illumination of the electric light. According to him, Shamshuddin fell on the ground after sustaining the injuries and the accused fled from the scene of the incident. Thereafter, PW-1 Anis, Hanif, Rashid and PW-2 Saibaj and other persons arrived at the scene of the incident. Shamshuddin was then taken to the hospital where ultimately he succumbed to his injuries.

10. In cross-examination he has admitted that deceased Shamshuddin was a distant cousin of his father. Omission has been elicited that he had not stated that Accused Sajid was armed with a stick when he had gone to call Shamshuddin. He has admitted that he had not attempted to rescue Shamshuddin as he was apprehended that he too would be assaulted. He has also admitted that since the incident was over within a short time, he had no opportunity to inform others.

11. It would thus be seen that PW-1 Anis claims to have followed deceased Shamshuddin and Accused No. 1 Sajid. The other eye-witnesses also claimed to have witnessed the incident very close to the scene of the incident. PW-1 Anis does not refer to the presence of any of the witness. PW-2 Saibaj in fact claims that he was sitting on the road and had witnessed the incident and claims that Anis and the other witnesses had arrived at the scene of the incident after deceased had fallen on the ground. He makes no reference to the presence of the other witnesses. PW-3 Abdul Rashid claims that he had followed deceased Shamshuddin and Accused No. 1 Sajid, yet makes no reference to the presence of PW-1 Anis at the scene of the incident. According to PW-3 Abdul, PW-1 Anis and the other witnesses had arrived at the scene of the incident after the accused had fled. Similarly, PW-5 Shabir also claims that he had gone to the scene of the incident on hearing the cries but makes no reference of the presence of other witnesses at the scene of the incident. Categorical admission is given by him that PW-1 Anis, PW-2 Saibaj and other witnesses had arrived at the scene of the incident after the incident was over.

12. In the present case the evidence of the eye-witnesses is self-destructive. If acceptance of the evidence of any one witness, necessarily results in disbelieving or rejecting the evidence of the other eye-witness. Thus, it is extremely difficult to record a finding as to which of the witness was present at the scene of the incident and had witnessed the incident. The truth and the falsehood in the

present case is so intermingled and intertwined and that it is difficult to separate the truth from the falsehood that is the grain from the chaff. An exercise of separating the truth from the falsehood is not possible to be done in the present case and therefore, the evidence of the eye-witnesses is required to be jettisoned. The report of the Chemical Analyzer also does not advance the prosecution case any further.

13. We therefore find that no reliance whatsoever can be placed on the evidence of the eye-witnesses to prove the offence against the Appellants beyond reasonable doubt. The Appellants therefore, in our opinion, are entitled to be given the benefit of doubt. Accordingly, Criminal Appeals are allowed and the conviction and sentence of the Appellants is hereby quashed and set aside and they are acquitted of the offence with which they were charged and convicted. Fine, if paid by them, be refunded to them. Their bail bonds stand cancelled.