

(1994) 06 BOM CK 0072
In the Bombay High Court
Case No : Criminal Appeal No. 40 of 1992

Ashok Bhagwan Benjari

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 09-06-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154
Evidence Act, 1872 — Section 3, 45, 59, 61, 8
Penal Code, 1860 (IPC) — Section 302

Citation : (1994) 4 BomCR 180

Hon'ble Judges : Vishnu Sahai, J; M.S. Rane, J

Bench : Division Bench

Advocate : H.E. Mooman, for the Appellant; V.K. Tahirramani, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Vishnu Sahai, J.—This appeal has been preferred by the appellant against his conviction u/s 302 I.P.C. and imprisonment for life imposed thereunder vide judgment and order dated 25-10-1991, passed by Shri N.G. Ghotekar, Additional Sessions Judge, Greater Bombay, in Sessions Case No. 218/1989.

2. The prosecution case in brief, as transpires from the recitals made in the F.I.R. lodged by P.W.1 Moti Gupta and as unfolded in the evidence adduced during trial is as under:-

The informant Moti Gupta is residing in hut No. 22 situate in Baiganwadi, Shivaji Nagar, Govandi, Police Station Deonar, Greater Bombay. In the aforesaid hut, along with him his son Ram Achal (deceased) his brother-in-law Subhash, P.W. 7 and a person of his native place namely P.W. 11 Ram Sahai also used to live. According to the prosecution, the appellant was known to the informant and others because, till 3 to 4 months prior to the incident, he had been working with Nyamatmulla who was residing in Hut No. 28 situate opposite to the house of the aforesaid Moti Gupta.

The case for the prosecution is that at about 15 days prior to the incident at about 12.15 a.m. when the informant and others were sleeping in the aforesaid Hut No. 22 the appellant Ashok entered the hut and while he was trying to steal the clothes, the informant and his son Ram Achal caught hold of him. However, Ashok managed to free himself and run away. On account of the fear of Ashok, who is said to be a person of a desperate type, no report was made either by Moti Gupta or Ram Achal.

On 22-10-1988, according to the prosecution, the informant, his son Ram Achal, his brother-in-law Subhash and Ram Sahai after having dinner were sleeping in the Hut No. 22. At about 11 p.m. there was knock at the door resulting in the informant waking up and inquiring as to who was knocking. It is alleged that on the informant's inquiry, the appellant Ashok replied in Hindi "I am Ashok open the door". It is said that the informant did not open the door and asked Ashok to meet him in the morning. After about fifteen to twenty minutes, somebody threw a stone on the door of the hut of Moti Gupta who and the aforesaid persons who were sleeping with him, woke up. Electric light is alleged to have been burning in the hut. Moti Gupta and Ram Achal came out of the hut and saw that the appellant was standing in front of the door of Hut No. 25, which, as is apparent from the perusal of the site plan is situate at a distance of about 30 ft from their hut. It is said that Ram Achal went and inquired from the appellant as to why he had hurled stone on the door, and this inquiry resulted in the appellant assaulting him with a knife on the left side of his chest. As a result of the blow, blood is said to have started oozing out from injury of Ram Achal. Ram Achal ran to a distance of about 10 to 15 steps and fell down. It is stated in the F.I.R. that the informant made an endeavour to catch the appellant but, he managed to run away. According to the prosecution, apart from the informant Moti Gupta & Subhash P.W. 7 also saw the incident. P.W. 11 Ram Sahai is said to have seen the appellant running away from the place of the incident.

3. After the appellant had run away, the informant Moti Gupta went and got an autorickshaw and on the same along with Ram Achal and Subhash proceeded to police station Deonar where the police authorities finding Ram Achal to be precariously injured sent him along with a constable to Rajawadi Hospital. In the aforesaid Hospital, at 11.45 p.m. P.W. 8 Dr. Jatin Wani medically examined Ram Achal and found on his body a solitary incised wound, on the left side of chest. As the doctor suspected stab in the heart, surgery was performed upon Ram Achal. During surgery, a cardiac stab wound on the left ventricle 1" x 1/2" extending from the anterior wall to the posterior wall was found. Within half an hour, of his medical examination, i.e. at 12.15 a.m. Ram Achal died at the Hospital.

4. At 12.10 a.m. P.W. 12 P.S.I. Baburao Khule along with P.W. 13 P.S.I. Vasant Manohar Revankar went to Rajawadi Hospital. At about 12.30 a.m. P.W. 12 recorded the complaint (F.I.R.) of Moti Gupta in Marathi. After recording it, he explained it to him in Hindi.

At 1.15 a.m. at the police station Deonar, Crime No. 344/1988 u/s 302 I.P.C. was registered against appellant. At the police station, P.W. 12 also recorded statement of P.W. 7 Subhash and P.W. 11 Ram Sahai.

At 1.45 a.m. P.W. 12 along with P.W. 13, P.W. 1 Moti Gupta and police personnel left for the place of the incident. They reached the same at about 2.30 a.m. There, the spot panchanama was prepared and blood stained earth was taken in possession. Sometime between 3.10 a.m. to 3.45 a.m. the appellant was arrested. He was putting on blood stained clothes.

5. The post-mortem examination of the dead body of Ram Achal was performed on 23-10-1988 between 3.45 p.m. and 4.45 p.m. by Dr. Prakash Ambekar (P.W. 9). The autopsy surgeon found the following external injuries on the person of the deceased :-

(1) I.W. on left pericardium 1 c.m. above left nipple oblique in direction measuring 4 cm. x 1 cm. x 7 cm. obliquely heart.

(2) I.W. on right inner side 3 cm. above the elbow joint measuring 3 cm. x 1 cm. x muscle deep. It was surgical wound.

(3) Similar type of vane section wound on left arm. It was surgical wound.

(4) Sutured wound horizontal in direction from left border of sternum 5th and 6th space, going towards axilla obliquely 22 cms. long with continuous sutures. This was surgical wound.

During internal examination, the doctor found as follows :-

(1) 5th rib was absent. It was a result of a operation.

(2) Rupture of 4th inter-costal muscles on left side below the nipple. This injury corresponds to external injury No. 1.

(3) Right lung was pale and mottled. Left lung collapsed. Haemothorax.

(4) Pericardium absent except on post surface. Heart was empty and sutured wound through and through from left ventricle going obliquely to right ventricle. Anteriorly 2 sutures 2 cm. in length prosperously 3 cm. long with Dacron sutured. It was as a result of operation.

In the opinion of the doctor, the deceased died on account of internal haemorrhage resulting from rupture of heart. Knife which is alleged to have been used by the appellant, is said to have been recovered at his pointing out and the same knife (Article No. 7) was shown to the doctor who on seeing it said that external ante mortem injury No. 1 of the deceased could be caused by it. The doctor also stated that the aforesaid ante mortem injury of the deceased was sufficient in the ordinary course of nature to cause his death.

6. On 25-10-1988 at 5 p.m. at the pointing out of the appellant, from the tiles of the roof a hut in Baiganwadi, the knife which is alleged to have been used by the

appellant in the incident is said to have been recovered. The blade of the aforesaid knife was five inches in length.

7. The charge sheet in the instant case was submitted by P.W. 13 P.S.I. Vasant Revankar. In the usual course, the case was committed to the Court of Sessions and the appellant was asked to stand his trial for an offence punishable u/s 302 I.P.C.

8. The defence of the appellant was that of denial and false implication at the instance of the police. In his statement u/s 313 Cr. P.C. the appellant stated that witnesses are deposing against him on account of the influence of the police. However, to substantiate this defence, no defence witness was examined.

9. During the trial, 13 witnesses were examined by prosecution. Out of them two namely P.W. 1 Moti Gupta & P.W. 7 Subhash were eye witnesses and P.W. 11 Ram Sahai saw the accused running away from the place of the incident immediately after the incident. The remaining witnesses included the two doctors, two Investigating Officers, panchas of spot panchanama and recovery of knife at the pointing out of the appellant. The learned trial Judge believed the prosecution evidence and passed the order under appeal.

10. We have heard Shri H.E. Mooman, learned Counsel for appellant and Smt. Tahilramani, learned Additional Public Prosecutor on behalf of the State of Maharashtra, at a considerable length. We have also gone through the statements of the witnesses recorded in the trial Court. We have also perused the various Exhibits proved by the prosecution and the impugned judgment.

11. After giving our anxious consideration to the submissions made, from both the sides perusing the deposition of the witnesses the various Exhibits and the impugned judgment, we are of the opinion that this appeal must fail, for the reasons stated hereinafter.

12. In the first place, in the instant case, the F.I.R. has been lodged very promptly. The incident is alleged to have taken place on 22-10-1988 at about 11.45 p.m. Evidence of P.W. 12 P.S.I. Baburao Khule and P.W. 1 Moti Gupta is that F.I.R. was recorded at Rajawadi Hospital at 12.30 a.m. i.e. within one and a quarter hours of the incident taking place. We need not emphasise the significance to be attached to the lodging of prompt F.I.R. The same considerably reduces chances of false implication and this certainly has not happened in the instant case because the appellant is the sole person who has been named in the F.I.R., as an accused. We are not prepared to hold that the informant would have excluded the real assailant and would have falsely nominated some one else in his place in the F.I.R.

13. Secondly, we find that there is confirmity between the pattern of the assault as given by the eye witnesses and the medical evidence. The eye witnesses P.W. 1 Moti Gupta and P.W. 7 Subhash have candidly stated that the appellant assaulted the deceased with a knife and the autopsy surgeon, as we have

mentioned earlier, when shown the knife (weapon of assault) stated that the ante-mortem injury No. 1 of the deceased was possible with this knife.

14. Thirdly, we find that both the eye witnesses namely P.W. 1 Moti Gupta and P.W. 7 Subhash, as well as P.W. 11 Ram Sahai who is alleged to have seen the appellant running from the place of the incident, immediately after the incident were natural witnesses in as much as they had been residing together along with the deceased Ram Achal since long. Naturally, if the appellant came at the aforesaid hut, it was only probable and natural that P.W. 1 and 7 would have seen the assault on the deceased, and P.W.11 would have seen the appellant running away from the place of the incident.

15. The fourth factor which has weighed with us is that P.W.1 Moti Gupta, P.W.7 Subhash and P.W. 11 Ram Sahai are independent witnesses and they had no axe to grind against the appellant. One fails to understand as to why first of all these witnesses would falsely implicate the appellant and that too at the expense of excluding the real assailant.

16. The fifth factor which has weighed with us is that the earth which was recovered from the place of incident was found by the Chemical Examiner to be stained with blood. This recovery in our opinion, fixes the place of incident.

17. The sixth reason, which in our opinion is very weighty reason showing the appellant to be author of the murder is that on the shirt and pant which he was wearing, the Chemical Analyst found the blood of "A" group. The Chemical Analyst's report is that the blood of the deceased was of group "A". Presence of blood of "A" group on the clothes of appellant, in our opinion, clinchingly fixes his involvement in the instant crime. No plausible explanation from the side of the appellant has been given explaining the presence of "A" group of blood on his clothes.

18. The seventh factor which we have taken in to consideration is that there was motive for the appellant to commit crime. The case for the prosecution is that about 15 days prior to the incident, the appellant tried to commit theft of clothes at the hut of informant but, since the informant woke up, he ran away. According to prosecution, on this score the appellant bore a grudge against informant and the deceased Ram Achal who as said earlier, was the son of the informant.

19. We may also mention that we have meticulously perused the statements of P.W. 1 Moti Gupta P.W. 7 Subhash and P.W. 11 Ram Sahai and we regret to observe that the learned Counsel for the appellant could not point out any such infirmity in their statements which would effect the substratum and the core of the prosecution case. Minor discrepancies in the statements of these witnesses are of course there but, they are natural, particularly because the deposition of these witnesses have been recorded nearly 3 years after the incident taking place.

20. Shri Mooman learned Counsel for the appellant principally made three

submissions before us. His first submission is that in the site plan, it is not mentioned that there was electric light at Hut (Room) No. 25 near which at point A the deceased was assaulted. It is true that in the site plan, there is no such mention. But, we should not lose sight of the fact that the site plan was prepared on 28-8-1991 that is nearly three years after the incident. In the , panchnama which was prepared within three to four hours, of the incident taking place, there is mention about the electric light in room No. 25. Mrs. Tahilramanai, learned Counsel for the State of Maharashtra, urged that in the F.I.R., it is mentioned that there was light in Hut (Room) No. 22. Where the informant and others were residing and sleeping at the time of the incident. She pointed out that according to the site plan, the distance between Hut No. 22 and point A was only 30 feet and naturally the electric light burning in Hut No. 22 would also have been available on point A. In this connection, we may further mention that the appellant was known to the witnesses from before the incident. We have pointed out earlier that there is evidence that till three to four months prior to the incident, the appellant was in employment at the place of Niyamat Mulla who resided in Hut No. 28 which is opposite the complainant's Hut No. 22. Rightly the witnesses claim, that for this reason, they knew the appellant. We further find that the mode of the incident also shows that the witnesses had opportunity to identify the appellant. According to the prosecution, at about 11.00 p.m. when the appellant came, at the informant's hut, he shouted and gave out his name as Ashok. For all these reasons, we reject the first submission of the learned Counsel for defence.

21. The second submission of Shri Mooman is that the claim of the witnesses that they saw the incident is a got up one. He contended that the prosecution case is that at 11 p.m. the appellant came to Hut No. 22 where the informant, deceased and others were sleeping and at about 11.15 pm. at point A near Room No. 22, the incident took place. He also contended that according to the prosecution after the assault on the deceased was over, P.W. 1 Moti Gupta called an autorickshaw on which, he along with Ram Achal and P.W. 7 Subhash went to police station. Shri Mooman has invited our attention to paragraph No. 17 of the statement of P.W. 1 wherein he stated that an autorickshaw had been called at 10.30 p.m. His contention is that according to the prosecution, the incident had taken place prior to the calling of autorickshaw and therefore, the incident did not take place at 11.15 p.m. or 11 p.m. but, sometimes prior to 10.30 p.m. He submits that if once it is held that the incident took place prior to 10.30 p.m. then there was no question of the witnesses seeing the incident at about 11.15 p.m. Hence, Shri Mooman submits that the testimony of these witnesses should be rejected. We regret we cannot subscribe to this contention of Shri Mooman. It is well known that rustic witnesses did not have a chronometric sense of time. Smt. Tahilramani learned Additional Public Prosecutor in this connection placed before us two decisions of the Apex Court. The first decision on which she placed reliance is reported in Balbir Singh Vs. State of Punjab, wherein Their Lordships of the Apex Court have held when a similar contention was advanced before

them, thus "Witnesses being villagers, it cannot be said that they would have the correct estimate of time. Even otherwise, the margin is only half an hour and that would not make much difference". The second decision cited by Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, , respondent. In para 5, their lordships have thus held "in regard to the exact time, of an incident, or the time duration of an occurrence, usually people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again it depends on the time sense of individuals which varies from person to person". In view of the ratio laid down in the aforesaid two cases, simply on account of the discrepancy mentioned earlier we are not inclined to throw out the testimony of the two eye witnesses namely Moti Gupta (P.W.1) and Subhash (P.W.7) and also that of Ram Sahai (P.W. 11) who is alleged to have seen the accused running away immediately after the incident from the place of incident and whose testimony would be admissible u/s 6 of the Evidence Act. The aforesaid discrepancy could have assumed some importance had the witnesses been partisan witnesses or had they some animus or reason to falsely implicate the appellant. They could also have assumed some significance had there been some infirmities in their evidence which would have shaken the core and substratum of the prosecution case. Unfortunately, that is not the case here. Consequently, the second submission of Shri Mooman also fails.

22. The last contention of Shri Mooman is that even if the entire prosecution story is taken to be proved, the liability of the appellant would not travel beyond that contemplated by section 304 I.P.C. and consequently, the conviction of the appellant u/s 302 I.P.C. be set aside and the appellant be awarded a reduced sentence u/s 304 I.P.C. We regret that we cannot accede to this contention of Shri Mooman also. At about 11.15 p.m. armed with a knife the blade of which was five inches in length, the appellant had come to the hut in which the deceased was residing, and when the deceased reprimanded him for coming at such an unearthly hour and pelting stone at his door, the appellant gave him blow with the said knife on the left side of his chest resulting in severe internal damage. In our view, this act of the appellant comes squarely within the ambit of clause firstly and thirdly of section 300 I.P.C. When the appellant gave a massive knife blow on the left side of the chest of deceased, which resulted in severe internal damage, it can safely be inferred that he had intention to cause death of deceased. Not only this, the act of appellant would also fall within the ambit of clause thirdly of section 300 I.P.C. That clause relates to inflicting an injury which is sufficient in the ordinary course of nature to cause death. For bringing a case under the purview of clause thirdly, of section 300 I.P.C., two conditions have to be satisfied. Firstly, it has to be shown that the bodily injury inflicted was the same injury which was intended to be caused. In other words, it was not an accidental injury. The second condition is that the injury caused must be sufficient in the ordinary course of nature to cause death. In the instant case, both these conditions have been satisfied. There is no evidence on record to

indicate that the injury inflicted by the appellant was not intended by him and that it was accidental. The evidence on record is that the appellant intentionally assaulted the deceased with a knife on the left side of his chest. There is also the evidence of the autopsy surgeon that the injury No. 1 of the deceased was sufficient in the ordinary course of nature to cause his death. This being the position, the offence would only be 302 I.P.C. and not 304 I.P.C., as urged by Shri Mooman. Hence, this submission of Shri Mooman also fails. We may mention that the view we have taken in respect of clause thirdly of section 300 I.P.C. is based on the decision of the Apex Court reported in Virsa Singh Vs. The State of Punjab, .

23. For the aforesaid reasons, we find that this appeal is devoid of merit and we accordingly dismiss it. We are informed that the appellant is in jail. He shall continue to remain there and serve out his sentence.