
(2018) 02 BOM CK 0072
In the Bombay High Court
Case No : 533 of 2010

Avinash @ Pinya Ashok Jadhav

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 17-02-2018

Acts Referred:

Indian Penal Code, 1860, Section 302 - Punishment for murder
Bombay Police Act, 1951, Section 135, Section 37(1)(a) - Penalty for contravention of rule or directions under sections 37, 39 or 40 - Power to prohibit certain acts for prevention of disorder

Citation : (2018) 02 BOM CK 0072

Hon'ble Judges : K. R. Shriram, Dr.Shalini Phansalkar-Joshi

Bench : Single Bench

Advocate : M.K. Kochrekar, Rajiv Sawant, S.S.Kaushik

Final Decision : Dismissed

Judgement

1. This Criminal Appeal is preferred against the judgment and order dated 27th April 2010 passed by the 4th Ad-hoc Additional Sessions Judge, City Sessions Court, Sewree, Mumbai, in Sessions Case No.626 of 2009, thereby convicting the Appellant for the offence punishable under Section 302 of Indian Penal Code (I.P.C.) and sentencing him to undergo "Life Imprisonment" and to pay fine of Rs.1000/- (Rs.One thousand only) and in default to undergo R.I. for "six months".

2. Brief facts of the prosecution case can be stated as follows:- PW-1 Sitaram Bhimaji Sakhare is the complainant in the case. The incident giving rise to the prosecution case took place on 8th August 2009. On that day his son Dhanraj left the house at about 8.30 p.m., after dinner, in order to take a walk. Dhanraj's nephew, Nilesh aged about 15 to 16 years, followed him. After some time, Pravin, a boy residing nearby came to the house of PW-1 Sitaram and informed him that Dhanraj had been stabbed and was lying on road injured in a pool of blood. PW-1 Sitaram rushed to the spot where Dhanraj was lying. He placed

Dhanraj in a rickshaw and along with PW-2 Nilesh rushed to Inlacs Hospital. There, Dhanraj was declared to be dead on admission. Police were informed.

3. PW-6, P.S.I. Anant Vishram Pawar of R.C.F. Police Station, came to the hospital. There he recorded the complaint of PW-1 Sitaram vide Exhibit-13. On this complaint C.R. No.107 of 2009 was registered against the Appellant for the offence punishable under Section 302 of I.P.C. and Section 37(1)(a) read with 135 of Bombay Police Act.

4. During the course of investigation, on the same night, the statement of PW-2 Nilesh was recorded. The clothes of the deceased were seized and his dead body was sent for postmortem. PW-4, Dr.Swaroop Vishwanathrao Bhale, conducted the postmortem and found as many as 9 incise wounds on vital parts of his body and opined the cause of death as shock due to multiple stabs and incised wounds and death was declared to be homicidal in nature. The postmortem report was issued accordingly.

5. On the next day the Appellant came to be arrested and the clothes on his person were seized under panchanama. In police custody, Appellant gave a disclosing statement in the presence of panch PW-5 Shivaji Gajre; the memorandum panchanama of the said statement was made vide Exhibit-25. In pursuance of the said statement, Appellant guided the police and panchas to the house of his father in Dharavi and produced the bloodstained knife from the speaker box kept in the house. The knife and speaker box were seized under panchanama Exhibit-26. The seized muddemal articles, i.e., the knife, the clothes of the Appellant, the clothes of the deceased and the clothes of PW-1 Sitaram were sent to the Chemical Analyzer. The statement of PW-3 Virendra Sasane, another eye witness to the incident came to be recorded in the course of investigation. On completion of investigation, the Charge-sheet came to be filed in the Court of Metropolitan Magistrate, 52nd Court, Kurla, Mumbai.

6. The offence under Section 302 of I.P.C. being exclusively triable by the Sessions Court, the learned Metropolitan Magistrate has committed the case to the Sessions Court. The trial Court framed charge against the Appellant vide Exhibit-3. Appellant pleaded not guilty and claimed trial, raising the defence of denial and false implication.

7. In support of its case, the prosecution examined in all 8 witnesses and on appreciation of their evidence, the trial Court was pleased to hold the guilty of Appellant to be proved beyond reasonable doubt for the offence punishable under Section 302 of I.P.C. and convicted and sentenced him, as aforesaid.

8. As regards the offence punishable under Section 37(1)(a) read with Section 135 of Bombay Police Act, the trial Court found that the evidence on record is not sufficient and accordingly acquitted him for the said offence.

9. This conviction of the Appellant for the offence punishable under Section 302 of I.P.C. is challenged in the present appeal by learned counsel for the Appellant;

whereas supported by learned Addl. Public Prosecutor for the Respondent/State.

10. According to learned counsel for Appellant, the evidence on record in this case is neither cogent, nor convincing or reliable. There are material inconsistencies and discrepancies in the evidence of two eye-witnesses. As to PW-2 Nilesh, it is submitted that, if he was really an eye-witness to the incident, the police should have recorded his complaint, instead of the complaint of PW-1 Sitaram, who was not an eye-witness to the incident. In respect of PW-3 Virendra, it is submitted that he is a got up witness. If he was present at the time of incident, then PW-2 Nilesh would have deposed about his presence. However, evidence of PW-2 Nilesh is conspicuously silent about the presence of this witness. Similarly, PW-3 Virendra is also not speaking about presence of PW-2 Nilesh and therefore according to learned counsel for Appellant it creates serious doubt about the presence of these two eye-witnesses at the time of incident. Except for the evidence of these two eye-witnesses, there is no other convincing evidence on record. As per Chemical Analyzer report, the blood group of the deceased could not be ascertained. Hence the evidence relating to recovery of blood stained knife or blood stained clothes of the Appellant loses its significance. In sum and substance, the submission of learned counsel for Appellant is that the evidence on record in this case is not of a conclusive or clinching nature so as to prove the guilt of the Appellant beyond reasonable doubt. Hence, the trial Court has committed an error in convicting the Appellant, on the basis of such evidence.

11. Per contra, learned Addl. Public Prosecutor has supported the judgment of the trial Court by submitting that PW-3 Virendra is totally an independent eye-witness. There is hardly any reason to disbelieve him. Similarly, PW-2 Nilesh is natural eye-witness, as he has deposed that he followed his uncle as being at home whole day, he was tired and therefore he also went for a walk. It is submitted that PW-2 Nilesh has also deposed the genesis of the incident, which was the incident that took place in the morning, when Appellant has confronted and also threatened the deceased. Thus, according to learned Addl. Public Prosecutor, there is no reason to disbelieve the evidence of these two witnesses, especially when it is also corroborated and supported from the medical evidence proving that the deceased had sustained multiple stab injuries, which ultimately resulted into his death and there is also recovery of the blood-stained knife at the instance of the Appellant.

12. On the basis of these rival submissions advanced at bar by learned counsel for the Appellant and learned Addl. Public Prosecutor the points which necessarily arise for our consideration and our findings thereon for the reasons stated below are as follows:-

Sr.No. Points Answer

1 Whether the death of Dhanraj was homicidal in nature ? Yes

2 Whether the prosecution proves that the Appellant is the author of the injuries

found on the person of the deceased Dhanraj? Yes

REASONS

13. POINT NO.1:- To prove the homicidal death of the deceased Dhanraj, the prosecution has placed reliance on the evidence of PW-4 Dr. Swaroop Bhale, who has conducted the postmortem on his dead body, on that night and found as many as 9 incised wounds, as follows:

"1) Incised wound over right shoulder anteriorly of site 4 x 1 cm. Linear in shape. While margins are clean cut with profuse haemorrhage.

2) Incised wound at right side of shoulder just above the nipple of site 3 x 1 cm. Linear in shape with margins clean cut with profuse haemorrhage.

3) Stab wound below injury no.2 of site 3 x 2 cm with bone deep with margins inverted and elliptical in shape.

4) Incised wound near injury no.3 of site 3 1/2 x 2 cm with margins clean cut with profuse haemorrhage.

5) Incised wound at right side of chest with site 3 x 1 1/2 cm. Margins clean cut linear in shape with profuse haemorrhage.

6) Incised wound left side of abdomen with 12 cm from injury no.5 site 2 x 1 cm 1/2 margins clean cut with profuse haemorrhage.

7) Stab injury at right side of abdomen 3 x 1 cm with elliptical in shape. Margins inverted.

8) Stab injury at posterior trunk right side just below scapula region 4 x 1 1/2 cm with elliptical in shape. Margins inverted.

9) Incised wound at posterior front below injury no.8. Margins clean cut 3 x 1/2 cm."

14. The evidence PW-4 Dr. Swaroop goes to prove that the cause of the death, in view of all these injuries, was "shock due to multiple stabs and incised wounds". He has further opined that all injuries on the deceased are possible by the weapon like knife (Article- 5), which was shown to him. His evidence is corroborated with the postmortem report at Exhibit-23. His evidence has remained unchallenged on record. He is not at all cross-examined on behalf of the Appellant thereby indicating that the Appellant is not disputing the cause of the death of the deceased as homicidal in nature, which was on account of multiple stabs and incised wounds.

15. POINT NO.2:- The case of the prosecution is based on the evidence of two eye-witnesses, viz. PW-2 Nilesh Sakhare and PW-3 Virendra Sasane. The evidence of PW-2 Nilesh is important, as it also goes to prove the genesis of the actual cause of the incident. According to him, at the time of incident he was studying in 9th standard. On 8th August 2009 in the morning at about 11.40

a.m., he and his friend Nilesh Gajre were chitchatting near Prince Bar; where his uncle deceased Dhanraj and his friend came on a motorbike. His uncle asked him as to why he has not gone to school and he informed him that the day before, they had gone to school late and therefore teacher had asked them to stand outside the class and hence on that day they had not gone to school. According to his evidence, by that time, the Appellant came there and confronted the deceased Dhanraj. Some heated exchange of words took place between them and then the Appellant threatened the deceased with dire consequences and also abused him. As per evidence of PW-2 Nilesh, his uncle Dhanraj took him and Nilesh Gajre on the motorbike to the school. As it was 3:15 p.m. and school was closed, he returned to the house. When he came out of the house at 4.30 p.m., he again met the Appellant and Appellant told him that his uncle, i.e., deceased Dhanraj had insulted him and lowered his reputation in the society. Thereafter, PW-2 Nilesh returned to the house.

16. It is further deposed by PW-2 Nilesh that in the night after taking dinner his uncle Dhanraj left the house and he also followed his uncle and in a short interval on the way, he found that the Appellant again confronted Dhanraj and said to him, whether he had become hero in the vicinity and why he has lowered his position in the society. He saw the Appellant then take out a knife from his back side and stabbed the deceased with the said knife on the stomach, chest and back of his uncle. As a result, his uncle fell down injured. Hence, he started running towards his uncle. However, seeing him, Appellant started brandishing the knife in his hand and threatening that if anyone comes to the rescue of the deceased, they will also face the same consequences. As per the evidence of PW-2 Nilesh, after accused ran away and left the spot, he went near his uncle and was trying to lift him for taking to the house. By that time, his friend Pravin Chattise came there. He sent him to his house to inform the family members about the incident. Thereafter, his another uncle Arvind, grandfather PW-1 Sitaram and one Ambadas Gaikwad came there. They took the injured Dhanraj to the hospital in rickshaw, where doctor declared that Dhanraj has succumbed to the injuries.

17. The evidence of this witness gets full support and corroboration from the evidence of PW-3 Virendra Sasane who is another eye-witness to the incident. He is residing in the same locality. According to his evidence, on that night after closing his shop, he returned to his house and in the night left the house for answering the call of nature. At that time, he saw that deceased Dhanraj was standing on the road, the Appellant came near Dhanraj and asked him whether he has become the hero of the area. Further the Appellant also said to Dhanraj that on account of the incident that took place in the morning, his reputation in the locality was lowered and now he will teach Dhanraj a lesson. Thereafter, Appellant took out the knife from his back waist and stabbed Dhanraj several times with the knife on the chest and other body parts. As a result, Dhanraj fell down. Thereafter, the Appellant started brandishing the knife threatening all with similar consequences, if anyone came forward to help Dhanraj. His evidence

reveals that due to fear, therefore he did not go near Dhanraj but he went to the house of Dhanraj to inform his family members. However, nobody was there in the house of Dhanraj. Being scared thereafter he went to his house. On the next day, he came to know that Appellant was arrested and Dhanraj had succumbed to the injuries. His statement came to be recorded by the police and at the time of recording of his evidence, he identified the knife with which Dhanraj was assaulted. He has also identified the Appellant in the Court.

18. It is brought out in his cross-examination that as both deceased and Appellant were residing in the same area, he was knowing them by face; however he has neither strained nor friendly relationship with the Appellant or the deceased. Learned counsel for Appellant has also fairly conceded that this witness is an independent witness. Therefore, there is nothing to disbelieve him in any way.

19. It may be true that there are some inconsistencies in the evidence of this witness and the evidence of PW-2 Nilesh. PW-2 Nilesh has deposed that Appellant gave first blows on the stomach; then deceased turned around and thereafter blows were given on the back and chest of the deceased. PW-3 Virendra is silent about it. He has not stated that deceased turn around. However, in our opinion, this inconsistency is of such a minor nature that much significance cannot be given to it. On the contrary, it gives an in-built guarantee of their truthfulness as it rules out the possibility of they being tutored witnesses.

20. An attempt is also made to contend that both PW-2 and PW- 3 have not stated about the presence of each other but then as can be seen from their evidence, they were standing at different spots. PW-2 Nilesh has deposed that he was standing behind the rickshaw; whereas PW-3 Virendra has deposed that he was at some distance on the road. Hence, there is every possibility of both of them not noticing the presence of each other; especially considering that the incident has taken place in a very short span of time.

21. Though, an attempt is made to contend that the conduct of PW-3 Virendra is not that of reasonable man, we do not find any fault therein. As deposed by him, as Appellant threatened everyone of dire consequences, if anyone comes to the help of deceased, he could not go near the deceased. However, he has gone to the house of the deceased to inform his family members. By that time the family members of deceased had already left being informed of the incident by Pravin. Hence he did not find anyone in the house. The evidence of PW-1 Sitaram is sufficient to that effect. His evidence also shows that they have taken the deceased immediately to the hospital in rickshaw. Therefore this witness has returned to his house. In our opinion, there is nothing unnatural in his conduct. Moreover, there is no general rule of universal application as to how the witnesses should behave or act in a particular situation.

22. As held by the Hon''ble Supreme Court in the case of State of Himachal Pradesh vs. Mast Ram, AIR 2004 SC 5056, "there is no set rule that one must

react in a particular way, for the natural reaction of man is unpredictable. Everyone reacts in his own way and hence natural human behavior is difficult to prove by credible evidence. It has to be appreciated in the context of given facts and circumstances of the case".

23. Similar view has been reiterated in the case of Lahu Kamlakar Patil vs. State of Maharashtra, AIR 2013 SC (Cri .) 441, and also in Kumar Sai vs. State of Madhya Pradesh, 2013 Cri.L.J. 2664, by observing that, "the behavior of witnesses or their reactions would differ from situation to situation and individual to individual. Expectation of uniformity in the reaction of witnesses would be unrealistic".

24. Hence, merely because after going to the house of the deceased and finding no one there, he has returned to his own house, it cannot be said that he has acted in an unnatural manner or that he is a got up witness.

25. It is pertinent to note that the statement of PW-2 Nilesh is recorded on the same night of the incident; whereas the statement of this witness PW-3 Virendra is recorded on the next date. Their evidence is also getting complete corroboration from the evidence of PW-1 Sitaram, who has lodged the complaint Exhibit-13 about the incident on the same night giving all the details of the incident. The offence is registered on the very night. The prompt lodging of First Information Report (FIR) thus containing all the details of the incident, including the role played by Appellant and the presence of PW-2 Nilesh makes it necessary to believe the case of the prosecution. There is also hardly any reason for either PW-1 Sitaram or PW-2 Nilesh or even for PW-3 Virendra to implicate the Appellant falsely in the case. Except for raising a contention that a false case is filed against him, the Appellant has in his statement recorded under Section 313 of Criminal Procedure Code, not raised any specific plea as to what was the enmity or reason for the witnesses to implicate him falsely in the case. No such enmity or reason is brought out even in the cross-examination of any of these three witnesses.

26. The evidence of PW-2 Nilesh and PW-3 Virendra also goes hand in hand with the medical evidence. As stated above, the evidence of PW-4 Dr.Swaroop Bhale clearly goes to prove that in all 9 incised wounds were found on the body of the deceased, thereby indicating that he was assaulted multiple times with the sharp weapon like knife (Article-5).

27. There is also the corroborating evidence of the recovery of the blood-stained knife (Article-5) at the instance of the Appellant. PW-5 panch Shivaji Tukaram Gajre and PW-8 P.I. Pasalwar have deposed about the recovery of the knife at the instance of the Appellant in pursuance of the disclosure statement given by him. The memorandum and recovery panchanama are proved on record at Exhibit-25 and Exhibit-26. The knife is also produced and marked as Article-5. Nothing worthwhile is elicited in the cross-examination of the panch witness or Investigating Officer to disbelieve their evidence. The Chemical Analyzer Report

(Exhibit-38) goes to prove the presence of bloodstains on the clothes of PW-1 Sitaram and PW-2 Nilesh. The Chemical Analyzer Report (Exhibit-38) further proves the presence of human bloodstains on the knife.

28. The human bloodstains were found on the clothes of the Appellant, which came to be seized under panchanama Exhibit-30. The said panchanama is also properly proved through the evidence of the panch PW-7 Yunus Shaikh and PW-6 PSI Anant Pawar. The only contention advanced by learned counsel for Appellant is that as per C.A. Report Exhibit-36, the blood group of the deceased could not be ascertained. However, in our opinion, it will not make much difference, as the bloodstains found on the clothes of the Appellant were not of his blood group. As per C.A. Report Exhibit-39, the blood group of Appellant is "O", whereas as per C.A. Report Exhibit-38, the bloodstains found on his clothes and knife were of "A" group. Thus, presence of human bloodstains on the clothes of the Appellant is sufficient to prove his complicity in the incident. It was for the Appellant to explain how the bloodstains of "A" group were found on his clothes, which were seized under the panchanama. The Appellant has made no attempt to offer any explanation about the same.

29. As held by the Hon"ble Supreme Court in the case of Gura Singh vs. State of Rajasthan, (2001) 2 SCC 205, from the mere fact that, the report of the analysis is inconclusive as to the blood group, no bonus is conferred upon the accused to claim any benefit on the strength of such report. It is for the accused to explain about the presence of bloodstains on his clothes. In this case, Appellant has not offered any explanation.

30. According to learned counsel for Appellant, as per injury Certificate Exhibit-41, the injury in the nature of abrasion was found on the palm of the right hand of the Appellant. However, the prosecution has not offered any explanation about it. In our opinion, considering the nature of the injury which is of a very minor nature like abrasion, much significance cannot be attached to the said injury. There is every possibility of this injury being caused while Appellant inflicting the knife blows on the deceased. The presence of 9 incised stab wounds on the body of the deceased goes to show that the attack made was forceful. Hence, the possibility of such abrasion being caused to the palm of the Appellant in the said assault cannot be ruled out. In this respect, as per suggestion given to PW-2 Nilesh in crossexamination, this injury to the palm might have occurred in the incident that took place in the morning also.

31. Thus having regard to the totality of the evidence brought on record by the prosecution, especially the evidence of two eyewitnesses, out of which one eye-witness PW-3 Virendra is totally an independent eye-witness, corroborated by PW-1 Sitaram and further getting strong support and assurance from the FIR lodged immediately in the same night and the recovery of the blood stained knife at the instance of the Appellant leave no manner of doubt about the complicity of the Appellant. This Court has therefore no hesitation in holding that the prosecution has proved its case against the Appellant beyond reasonable doubt.

32. The conviction and the sentence of the Appellant therefore as recorded by the trial Court for the offence under Section 302 of I.P.C. does not call for any interference. The Appeal being without merits, stands dismissed.