

(1990) 02 BOM CK 0009
In the Bombay High Court
Case No : Criminal Appeal No. 35 of 1987

Awajkha Shabashkha

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 21-02-1990

Acts Referred:

Evidence Act, 1872 — Section 32
Penal Code, 1860 (IPC) — Section 302, 304

Citation : (1990) 2 BomCR 51

Hon'ble Judges : M.M. Qazi, J;B.U. Wahane, J

Bench : Division Bench

Advocate : P.K. Umre, for the Appellant; L.K. Khamborkar, A.G.P., for the Respondent

Judgement

B.U. Wahane, J.—The appellant Awajkha Shabashkha has challenged the conviction u/s 302 of the Indian Penal Code, and sentence for the offence punishable, passed by Shri S.Y. Gambhir, Sessions Judge, Buldana on 19th December, 1986 in Sessions Case No. 84 of 1986. The appellant-accused was found guilty for the murder of Santosh Konduji Padghan, resident of village Mohodari, Tq. Mehkar, District Buldana.

2. The facts leading to the filing of this appeal may be briefly stated as follows :

Deceased Santosh Konduji Padghan was resident of village Mohodari, Tahsil Mehkar, district Buldana. He was in service of one Sahebrao Suryabhan Lodhe (P.W. 10). One Hamidkha Dagdukha Pathan was also resident of Mohodari. He was the cousin of the appellant-accused and was running a Kirana Shop at Mohodari. The appellant-accused is a resident of village Deolgaon-Mali which is about 2 miles away from Mohodari.

3. On 25-11-1985 Jagannath Haribhau Lodhe, resident of Mohodari lodged a report against deceased Santosh Konduji Padghan, Dattatraya Tukaram Lodhe and Hamidkha with Sakharkherda Police Station alleging that they have

committed theft of cotton crop from his land and Hamidkha Dagdukha purchased the same knowing it to be the stolen property. On the basis of the report, the abovesaid three persons were arrested and later on released on bail. Few days thereafter, Namidkha Dagdukha committed suicide by consuming endrine.

4. On 9-7-1986, the appellant-accused came to Mohodari and went to the land of Sarpanch Narayan and tried to assault him with a knife alleging that he is responsible for the death of his cousin Hamidkha. The labourers present at the land anyhow pacified him and sent away.

5. On the very day deceased Santosh was working in the field known as "Barbhai" and at about 5 or 5.30 p.m. he went to another field known as "Masobache Shet". The appellant-accused also came there and approached deceased Santosh. He said something to deceased Santosh. Immediately, he too out a knife from his waist and stabbed deceased Santosh in the stomach. The appellant-accused withdrew the knife and ran away from the field. Santosh pressed his wound by his hands and ran towards the village. However, he fell down in the field Survey No. 29 towards the east of the Nallah. Sahebrao Dagdu Ingole, who was cutting the branches of the bushes in the near about field, came near deceased Santosh. Jairam Hiraji Thoke (P.W. 11) and others also came near the injured Santosh. They put deceased Santosh in the cart and took him to the Primary Health Centre, Deulgaon-Mail.

6. Seeing the cart in front of the Primary Health Centre, Deulgaon-Mali, Sahebrao (P.W. 10), the master of deceased Santosh who came from Mehkar, gone near the cart. Finding deceased Santosh injured in the cart, he asked him what had happened and he was told that the appellant-accused had stabbed him with a knife. Injured Santosh was taken inside the dispensary of the Health Centre and he was given the medical treatment. Sahebrao (P.W. 10) then informed about the incident to Mehkar Police Station. An entry about the same has been taken in the Station Diary by P.S.I. Rathod. He immediately sent P.S.I. Wankhede with a police staff in a Police Van to Deulgaon Mali. Shri Wankhede took Shri Giri, Executive Magistrate with him to the Health Centre for recording dying declaration of the injured Santosh. Shri Giri ascertained the condition of the injured from the Medical Officer Dr. Nichale and thereafter recorded dying declaration of injured Santosh. The condition of the injured Santosh being serious, the Medical Officer referred the case to the Civil Hospital, Buldhana. He was treated in the hospital at Buldhana. However, he succumbed to the injury on the next day i.e. 10-7-1986.

7. Initially, on the basis of the report, an offence was registered u/s 307 of the Indian Penal Code at Crime No. 0/86. The papers were transferred to Police Station, Sakharkhede, as the incident had occurred within the jurisdiction of that Police Station. On receipt of the papers, an offence was registered as Crime No. 69 of 1986, u/s 307 of the Indian Penal Code. After the death of deceased Santosh, the offence has converted into the offence u/s 302 of the Indian Penal Code. Shri Kharode, P.S.I., carried out the investigation. After completion of the

investigation, charge sheet was filed against the appellant-accused for the offence u/s 302 of the Indian Penal Code in the Court of Judicial Magistrate, First Class, Mehkar who committed the appellant-accused for trial to the Court of Sessions Judge, Buldhana.

8. The charge was framed against the appellant-accused u/s 302 of the Indian Penal Code and the same was explained to him. He denied his complicity and faced the trial. According to the appellant-accuse, it was the deceased Santosh who had come with a knife to the land of Atmaram Shivaji Maghar at Deulgaon-Mali where the appellant-accused was working. He further contended that Sarpanch Narayan Lodhe sent the deceased to kill him. Scuffle took place between the appellant-accused and the deceased. The deceased tried to assault the appellant-accused and in this scuffle the deceased received the injury with the knife in his own hand. Thus according to the defence, the appellant-accused did not assault the deceased but the deceased was accidentally injured while assaulting the appellant-accused. Besides the direct evidence of Jairam (P.W. 11), 3 dying declarations are on record. Clothes and dagger were seized from the appellant-accused on 14-7-1986 vide Exh. 30. On Full-pant of the appellant-accused human blood was found.

9. Shri B.K. Umre, learned Advocate appointed to defend the appellant-accused assailed the conviction of the appellant-accused on various grounds. The first challenge is that the evidence of P.W. 11, Jairam is not credible as the being the partisan and interested witness. He further submitted that though it is alleged by this witness that the incident has taken place in the field known as "Mhasobache Shet" at Mohodari, no drop of blood was found at the place. Similarly, he argued that though there were many persons working in the surrounding fields none could come near the deceased Santosh. We have gone through the evidence of P.W. 11 Jairam Thoke and considering the other circumstances which were brought to our notice, we do not find any infirmity or improbability in his evidence to discard his sworn testimony. P.W. 11 Jairam deposed that---

"At about 5 or 5-30 p.m. on that day Santosh was coming from Barbhai Shet to the "Mhasoba Shet". There was a bullock cart left untied before the Mhasoba temple in the "Mhasobache Shet". There were also to bullocks, Santosh came near the bullocks. At that time the accused came from east towards west. The accused came near Santosh. The accused said something to Santosh. Accused then took a knife (Jambiya) from near his waist and hit Santosh with it on his stomach. The accused then withdrew the knife and then ran away towards north. Santosh put his hands on his stomach and ran towards village. I also ran after Santosh towards the village Santosh fell down in one land towards east of nalla. It was Survey No. 29. Sahebrao Dagadu Ingole was cutting the branches of the bushes. He also came running near Santosh. Other persons also came there from the village. I told Sahebrao and the persons who came from the village that Awazakhan Shabashkhan stabbed Santosh and had ran away. Santosh was then taken by the villagers in a cart to Deulgaon Mali after wrapping a towel round his

stomach. I then went towards my goat."

In the cross-examination of this witness nothing has been brought to discard his testimony. Even there is no suggestion that the incident has not taken place in the field of "Mhasobache Shet" and the deceased himself had been to the field of the accused-appellant in village Deulgaon Mali. There is no suggestion also to the effect that the deceased was sent to the accused-appellant to kill him at the instance of Sarpanch. We do not find any infirmity or improbability in the evidence of P.W. 11 Jairam. The learned trial Court also rightly considered his evidence.

10. The learned Counsel appointed for the accused attacked the dying declarations. The prosecution examined P.W. 12 Pandharinath to whom the deceased Santosh disclosed the fact that he was assaulted by the appellant-accused. P.W. 12 Pandharinath deposed that in the village he learnt that deceased Santosh was stabbed and, therefore, along with other villagers, he too went to the land where the injured Santosh was lying. He found the wound on the stomach of deceased Santosh. His intestines has come out from the wound. Banian and Pant of deceased Santosh were stained with blood. He deposed that he asked deceased Santosh what had happened and in reply to his question, deceased Santosh told him that Awazkhan Shabbaskhan stabbed him with a knife. One Rambhau Tukaram tied a towel on the wound of a Santosh and thereafter he was shifted to Deulgaon-Mali. P.W. 10 Sahebrao Suryabhan Lodhe on seeing the bullock cart with Santosh, approached near him and asked Santosh what had happened to him. Santosh told him that he was injured by Awazkhan Shabbaskhan. He further deposed that P.S.I. and Naib Tahsildar came there. Though this oral dying declaration was attacked by the learned Counsel for the appellant-accused, no clinching circumstance has been brought to our notice to discard his testimony.

11. P.W. 10 Sahebrao Suryabhan Lodhe deposed that he returned from Mehkar to Deulgaon-Mali at about 6.30 or 7.00 p.m. When he got down from the Bus, he noticed his bullock-cart near the Primary health Centre from the Bus Stand. He went there and saw Santosh in the cart. He thus deposed that "I asked Santosh what had happened. He told me that Awazkhan had stabbed him with a knife (Jambiya) in the stomach." He further deposed that he went to post office and made a telephone call to Mehkar Police Station. P.W. 12 Shri Baliram Rathod, P.S.I. took Sanha entry in the Station Diary which is at Exh. 61. The entry is that "Sahebrao Lodhe from Deulgaon Mali informed at this time by phone that Awazkhan Musalman stabbed with a knife in the abdomen of a 17 to 18 years old boy in the boundary limits of Mohadari and the injured is in the Government hospital at Deulgaon Mali. Nothing has been brought on record to disbelieve him. But faint attempt was made that because of the injury on the stomach, Santosh was unconscious and, therefore, the alleged dying declaration to Sahebrao (P.W. 10) is nothing but a concoction. Sahebrao (P.W. 10) specifically deposed in para 5 that "I saw that Santosh was conscious till 12 noon of the next day." Thus we too

find the evidence of P.W. 10 Sahebrao in respect of the dying declaration as credible one.

12. The dying declaration (Exh. 17) recorded by Shri Giri, Executive Magistrate (P.W. 6) was attacked because the dying declaration (Exh. 37) bears neither the signature or thumb impression of deceased Santosh.

13. Our attention was attracted to the evidence of Dr. Dnyaneshwar Nichale (P.W. 13), particularly in respect of the circumstances why either the signature or the thumb impression was not taken of the patient Santosh after recording the statement by Shri Giri. This witness deposed that "after the statement was recorded, the Tahsildar asked Santosh to sign it. The patient Santosh told the Tahsildar that his arm was still and he could not sign. The Tahsildar then called for the ink pad. The ink-pad was not available. The Tahsildar then put his signature on the statement. The Tahsildar then left." Exh. 53 is the requisition dated 9-7-1986 given to the Medical Officer, Deulgaon Mali. The Doctor was requested to examine the injured and give his report with the bearer of the requisition. The Doctor subsequently gave his observations and the treatment given to the injured on the very same requisition which is duly signed by the Doctor. Below the Doctor's signature, rubber stamp is affixed. On this basis the learned Counsel for the appellant-accused has submitted that the Doctor in his deposition said that no ink-pad was available in the hospital, while on the same day, on another paper i.e. Exh. 53 this seal of the office is there and, therefore, the only conclusion is that no dying declaration was recorded by Shri Giri it is a concocted document and, therefore, the dying declaration Exh. 37 should not be taken into consideration, discarding the evidence of P.W. 6. Shri Giri and Dr. Dnyaneshwar Nichale (P.W. 13). Considering the pros and cons, we do not find any substance in these submissions too. There is no reason for the Executive Magistrate and the Doctor to bring into existence the false document and to give false evidence.

14. On the basis of the above discussion, we are fully satisfied that the appreciation of the evidence by the learned trial Judge and his conclusions are judicious. The learned trial Judge rightly arrived at the conclusion that the appellant-accused caused the injury to Santosh on his abdomen with a knife (Jambiya).

15. It is at this stage, considering the evidence and circumstances whether the appellant-accused has committed the murder of Santosh. In other words, whether Part-I or Part-III of section 300 of the Indian Penal Code would be attracted in the facts and circumstances of this case. We are constrained to observe that no material has been brought on record to discard the evidence of the witnesses and the three dying declarations. No private defence has also been taken. Even no suggestions have been made to the witnesses about the enmity or to bring the case in the exception. It is true that the position of an accused in a criminal case is envious and he can keep silent leaving other things to be proved by the prosecution or make mutually contradicting defences also. It is the

duty of the Court to appreciate the prosecution evidence and taking all the aspects into consideration to come to the findings. Dr. Punjab Hire (P.W. 4) performed the autopsy on 11-7-1986 and he was also referred to Medical Officer who found only one incised wound on the abdomen right side. He issued Post Mortem Report (Exh. 32). The accused was arrested and was also referred to the Medical Officer as the police found some injuries on his person. Dr. Dnyadeo Hade (P.W. 1) examined the accused on 14-7-86 at 10.30 a.m. and found the following injuries on his person.

1) Incised wound 2" x 2" x skin deep on the left finger, the middle phalanx front side healing wound, no bleeding.

2) Incised wound 3/4" x 2" x skin deep on the left ring finger, middle phalanx front side-healing wound, no bleeding.

3) Incised wound 2" x 2" x skin deep, on left index finger middle phalanx front side healing wound, no bleeding.

Dr. Hade (P.W. 1) deposed that the injuries were probably caused by sharp cutting object. The age of the injuries was about 6 days. He issued the certificate (Exh. 24). The Doctor further deposed that ---

"It is true that all the three injuries could have been caused at the same time. The injuries can be caused if a person holds some sharp weapon. Such injuries are likely to be caused if an injured tries to hold the weapon to ward off the blow by another. Such injuries in Medico Legal terms are styled as defence wounds."

16. It is apparent from the evidence led by the prosecution that the prosecution has failed to offer any explanation regarding the injuries caused on the accused which shows that the evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. In the instant case before us, the only witness is Jairam (P.W. 11) who was at some distance from the place of alleged incident between the deceased and the accused took place. Therefore, we cannot expect the details about the exchange of words between the two. But certainly one expects that if he has seen the blow alleged to have been delivered by the accused, considering the 3 incised wounds on his person, naturally there must be some scuffle. P.W. 11 Jairam in his examination-in-chief has deposed that the accused said something to Santosh. In the cross-examination he deposed that "it is correct that there was exchange of words between Santosh and Awaskhan in that land."

17. In our opinion having regard to the totality of the circumstances viz., there is only one injury on the stomach of deceased Santosh, there was no pre-meditation, there was exchange of words between the deceased and the accused, which naturally appears to have ensued in a scuffle, the accused received 3 injuries, the death occurred next day, one can only say that the appellant must be attributed the knowledge that he was likely to cause an injury which was likely to cause death. Under these circumstances, in our opinion, the

appellant accused is shown to have committed an offence u/s 302 Part-II of the Indian Penal Code, and he must be convicted for the same and sentenced to suffer R.I. for 5 years.

18. Accordingly we allow the appeal partly in so far that we set aside the conviction u/s 302 of the Indian Penal Code and instead convict the appellant under the Second Part of section 304 of the Indian Penal Code. Having regard to the sentence of life imprisonment the same is reduced to rigorous imprisonment for 5 years.