
(2015) 04 BOM CK 0111
In the Bombay High Court
Case No : Criminal Appeal No. 162 of 2014

Bhimsha Gurusidha Chendke

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 21-04-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 300, 302, 304

Citation : (2015) 3 BomCR(Cri) 173

Hon'ble Judges : V.K. Tahilramani, J;B.P. Colabawalla, J

Bench : Division Bench

Advocate : Nasreen S.K. Ayubi, for the Appellant; A.S. Pai, APP, Advocates for the Respondent

Final Decision : Dismissed

Judgement

B.P. Colabawalla, J.

1. This Appeal is preferred by the Appellant original Accused Bhimsha Gurusidha Chendke against the judgment and order dated 25th January, 2012 passed by the Additional Sessions Judge 3, Solapur, in Sessions Case No. 210 of 2011. By the said judgment and order, the learned Sessions Judge convicted the Appellant for the offence punishable under section 302 of IPC and sentenced him to suffer imprisonment for life and to pay a fine of Rs.1,000/-. In default thereof, the Appellant is to suffer further R.I. for six months.

2. The prosecution case as stated briefly is thus -

(a) The deceased Shivputra was the son of the Appellant. Shivputra had been living with his wife and children at Solapur where he used to work as coolie in a godown. He also used to cultivate his ancestral land and was earning income therefrom. The deceased Shivputra used to look after his father who used to reside in village Kalappawadi.

(b) On the date of the incident viz. 16th May 2011, Shivputra visited the village

Kalappawadi in order to attend the funeral of an old woman Tippavva Parangote. On 16th May, 2011 at about 11.00 p.m. the Appellant and his son Shivputra came to the house of PW 2 Kasturbai quarreling with each other. The Appellant then assaulted his son Shivputra by means of an axe and inflicted blows on the back, left shoulder and left leg. This incident was eye-witnessed by PW 2 Kasturbai and PW 3 Nagubai. When PW 2 Kasturbai heard a commotion, she came out of the house and saw the Appellant inflicting blows on Shivputra by means of an axe. At the time of the incident, two other villagers viz. PW 3 Nagubai and one Sheshavva came to the spot and both these women also asked the Appellant not to assault the deceased Shivputra. Due to the blows inflicted by the Appellant on Shivputra by means of an axe, Shivputra fell on the ground and died. Thereafter, the Appellant left the scene. PW 2 Kasturbai and other villagers, thereafter, went to the Police Station and lodged the report with the Police. During the course of investigation, the Appellant was arrested on 17th May, 2011 at about 3.00 p.m. The clothes on the person of the Appellant which were blood-stained, were seized. The blood-stained axe was also recovered at the instance of the Appellant. After completion of the investigation, the charge-sheet came to be filed and in due course, the case was committed to the Court of Sessions.

3. The charge came to be framed against the Appellant under section 302 of IPC. The Appellant pleaded not guilty to the said charge and claimed to be tried. His defence was that of total denial and false implication. After going through the evidence adduced in this case, the learned Sessions Judge convicted and sentenced the Appellant as stated earlier in paragraph 1 above. Hence the present Appeal.

4. We have heard the learned Advocate for the Appellant and the learned APP for the State. After giving our anxious consideration to the facts and circumstances of the case, the arguments advanced by the learned Advocates for the parties, the judgment delivered by the learned Sessions Judge, and the evidence on record, for the reasons mentioned hereinafter, we are of the opinion that the Appellant assaulted his son Shivputra with an axe and caused his death.

5. The conviction of the Appellant is mainly based on the evidence of PW 2 Kasturbai and PW 3 Nagubai. PW 2 and PW 3 are eye-witnesses to the incident and are the neighbours of the Appellant. PW 2 Kasturbai has deposed that at about 11.00 p.m. on 16th May 2011, the Appellant and the deceased Shivputra came to her house quarreling with each other. On hearing the commotion, Kasturbai came out of the house and saw that the Appellant was armed with an axe and was inflicting blows with the said axe on the person of Shivputra. She has deposed that he inflicted blows with the axe on the back, left shoulder and left leg of Shivputra. When she asked the Appellant to stop assaulting Shivputra, the Appellant replied that since Shivputra did not provide maintenance to him, he would kill him. During her Examination in Chief, PW 2 Kasturbai also identified the axe used by the Appellant as a weapon of offence on the day of occurrence of the incident as being the same weapon marked as article "A" and which was

shown to her during her deposition. Nothing has been elicited in the cross-examination of PW 2 Kasturbai to discredit her testimony. She is an eye-witness to the incident that took place outside her house on 16th May, 2011. We therefore have no hesitation in relying upon the evidence of PW 2 Kasturbai.

6. The prosecution is also relying on the evidence of PW 3 Nagubai who was also an eye-witness to the incident. PW 3 Nagubai has deposed that on 16th May 2011, the deceased Shivputra had visited the village Kalappawadi so as to attend the funeral of an old woman Tippavva who was a resident of that village. Nagubai has further deposed that at about 11.00 p.m. the Appellant started assaulting the deceased Shivputra. PW 3 Nagubai saw the accused inflicting blows on the left shoulder, back and shin of the deceased Shivputra by means of an axe. When she inquired from the Appellant as to why he had assaulted Shivputra, the Appellant told PW 3 Nagubai that Shivputra did not provide livelihood for him and therefore he deserved to die. After stating this, the Appellant left from the scene. During her Examination in Chief, PW 3 Nagubai also identified the axe used by the Appellant as a weapon of offence on the day of occurrence of the incident as being the same weapon marked as article "A" and which was shown to her during her deposition. Even in the cross-examination of PW 3 Nagubai, nothing has been elicited to discard her testimony. She also is an eye-witness to the incident. Further, her eye-witness account of the events on 16th May, 2011 are consistent to the eye-witness account of PW 2 Kasturbai. We therefore have no hesitation in relying upon the evidence of PW 3 Nagubai.

7. Over and above the evidence of the two eye-witnesses i.e. PW 2 Kasturbai and PW 3 Nagubai, the prosecution is also relying on the recovery of the axe at the instance of the Appellant. PW 6 Rajabhau, a panch witness, has deposed on this aspect. Rajabhau has stated that on the evening of 17th May 2011, the Police called him to act as a Panch. In his presence, the Appellant narrated that he would produce the axe lying in his house at village Kalappawadi. The Appellant thereafter led the Police and the panchas to village Kalappawadi by a Government jeep. The Appellant then produced the axe kept under the roof of the tin-shed of his house. The axe, with a broken handle, was smeared with blood stains. The Police thereafter seized the axe and prepared a panchanama. PW 6 Rajabhau identified the axe (article "A") as the very same axe which was recovered at the instance of the Appellant.

8. The axe recovered at the instance of the Appellant was thereafter sent to the Chemical Analyser. As per the C.A. report (Exh.37), the axe was stained with human blood having ABO grouping "A". There is no explanation given by the Appellant in his statement under section 313 of the Code of Criminal Procedure, 1973 as to how human blood having Blood Group "A" was found on the axe recovered at his instance.

9. In addition to the above evidence, the prosecution is relying on the seizure of the blood-stained clothes on the person of the Appellant at the time of his arrest. As stated earlier, the Appellant was arrested on 17th May, 2011 at about 3.00

p.m. At the time of his arrest, the clothes of the Appellant which is Kopari (Chatan) and Dhoti, smeared with blood-stains, were seized under the panchanama (Exh.27). The said panchanama has been admitted by the Appellant as is reflected from the record. The blood-stained clothes which were on the person of the Appellant were sent to the C.A. As per the C.A. report (Exh.37), the clothes of the Appellant that were seized during his arrest viz. Chatan and Dhoti, were found stained with human blood having Blood Group "A". This is a highly incriminating circumstance against the Appellant. The Appellant has not explained this highly incriminating circumstance in his statement under section 313 of Cr.P.C.

10. In the present case, the C.A. report (Exh. 37) categorically states that the blood on the axe (that was recovered at the instance of the Appellant) and the blood found on the clothes of the Appellant, was one belonging to Blood Group "A". The C.A. report (Exh.38) further states that the Blood Group of the deceased Shivputra was also Blood Group "A". The human Blood Group "A" being found on the axe as well as on the clothes of the Appellant, and which are two highly incriminating circumstances against him, have not been explained by the Appellant in his statement under section 313 of the Cr.P.C, 1973.

11. Having said this, we must also note that the prosecution case of assault by the Appellant with an axe on the deceased Shivputra, is further corroborated by the medical evidence. PW 9 Dr Sham Patil conducted the post mortem on the dead body of the deceased-Shivputra. On external examination, he found the following injuries on the dead body :-

1. Chop wound over left shoulder region, 6 X 3 X 3 cm deep.
2. Chop over left deltoid region, 8 X 3 X 3 cm deep,
3. Chop wound over left thigh region medially, 9 X 6 X 6 cm deep,
4. Chop wound over left calf region of leg, 10 X 6 X 6 cm deep,
5. Chop wound over left subscapular region of thorax, 9 X 3 X 3 cm,
6. Fracture to left shoulder joint, left humerus, left femur bone and tibia and fracture on left scapula.

12. Dr Patil has stated that the injuries quoted above were anti-mortem on the person of Shivputra. He has further deposed that the probable cause of death was due to hypovolemic shock caused by heavy loss of blood due to multiple deep chop wounds. Therefore, the medical evidence also establishes that the deceased Shivputra was assaulted with an axe due to which he died. After carefully perusing all the evidence we are clearly of the view that the prosecution has proved its case beyond reasonable doubt that the Appellant assaulted the deceased Shivputra with an axe and caused his death.

13. Smt. Ayubi, learned Advocate for the Appellant, submitted that even if it is accepted that the Appellant assaulted Shivputra with an axe which resulted in his

death, the case would not fall under section 302 of IPC but would fall under section 304, Part II of IPC or at the most, under section 304, Part I of IPC. Smt. Ayubi drew our attention to the evidence of PW 8 PI Harun Mulani and more particularly paragraph 9 thereof to contend that there was a sudden quarrel that started between the Appellant and Shivputra and therefore the case would fall within Exception 4 of section 300 of IPC. She submitted that there was no pre-meditation or pre-planning to murder Shivputra but it happened on the spur of the moment in a heat of anger. This would bring the case within Exception 4 of section 300 of IPC and would thus be covered by section 304 Part II of IPC, was the submission of Smt. Ayubi.

14. Section 300 of IPC and Exception 4 thereof read as under:-

"300. Murder.--Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or --

2ndly.--If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or --

3rdly.--If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or --

4thly.--If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1. -

Exception 2. -

Exception 3. -

Exception 4.--Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.--It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.-."

(emphasis supplied)

15. To bring the case within Exception 4 to section 300 of IPC, all the ingredients mentioned in it must be found. It is to be noted that the word "fight" appearing in Exception 4 to section 300 of IPC is not defined in the IPC. It takes two or

more persons to make a fight. Heat of passion requires that there must be no time for passion to cool down. Exception 4 further stipulates that in the heat of passion upon a sudden quarrel, the offender should not have taken undue advantage or act in a cruel or unusual manner.

16. In the present case, we are unable to agree with submission of Smt. Ayubi that the case would fall within Exception 4 of section 300 of IPC. Firstly, the deceased Shivputra was not armed and it is nobody's case that Shivputra had at any time physically assaulted the Appellant. Secondly and more importantly, looking to the nature of injuries that were inflicted on the deceased Shivputra by the Appellant, and which have been highlighted in the evidence of PW 9 Dr Sham Patil, we are clearly of the view that the Appellant had taken undue advantage and acted in a cruel manner. There were as many as five deep chop wounds found on the body of the deceased Shivputra. Considering the evidence on record, we are of the opinion that the reliance placed on Exception 4 to section 300 of IPC is wholly misplaced and would not apply to the facts and circumstances of the present case. This argument of Smt. Ayubi will therefore have to be rejected.

17. On going through the record, in our opinion, the prosecution has proved its case against the Appellant beyond reasonable doubt. Hence, the conviction and sentence of the Appellant under section 302 of IPC is maintained, and the Appeal is dismissed.

18. The Office is directed to communicate this order to the Appellant who is in Yerawada Central Prison, Pune 6 and to the Superintendent of Yerawada Central Prison, Pune 6.

19. We quantify the legal fees to be paid to Advocate Smt. Nasreen S.K. Ayubi at Rs. 5,000/-.