

(2014) 03 BOM CK 0025

In the Bombay High Court

Case No : Criminal Appeal No. 210 of 2013

Bhimsing Kheteya Wasave

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 28-03-2014

Acts Referred:

Penal Code, 1860 (IPC) — Section 300, 302, 304, 326, 504

Citation : (2014) ALLMR(Cri) 3204

Hon'ble Judges : P.N. Deshmukh, J

Bench : Single Bench

Advocate : S.M. Godsay, Advocate for the Appellant; A.S. Shinde, A.P.P, Advocate for the Respondent

Judgement

P.N. Deshmukh, J.—This appeal takes exception to the judgment and order dated 16.11.2002, passed by learned First Ad-hoc Additional Sessions Judge, Shahada in Sessions Case No. 137 of 1998, convicting the appellant for the offence punishable under section 304 part II of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for five years. Brief facts of the prosecution can be stated as follows:--

"The appellant is a resident of village Dhavlivihir, Tal. Taloda, Dist. Nandurbar, while deceased Hira Pawara was a resident of Amoni Gavthan, Tal. Taloda, Dist. Nandurbar. Complainant P.W. 1 -Devising is a police patil of village Dhavlivihir. On 31.05.1997 at about 8.00 p.m., when the complainant was present in his house, P.W. 4-Jinga Pawara, resident of Amoni Gavthan visited him for hiring a tractor and they were taking by sitting on the platform in front of house of complainant-P.W. 1-Devising having electric bulb in his house. At that time the appellant along with co-accused Joga @ Jangalsing arrived and informed police patil that two persons from Amoni Gavthan were demanding flesh of chicken on credit to whom they refused. Said two persons were also accompanying the appellant, and at this point of time indulged into quarrel. Though P.W. 1 -Devising-police patil made an attempt to convince those persons, one of them having in his hand

Dengara (big stick) started abusing the appellant. Therefore, the appellant snatched the Dengara (hereinafter referred to as "big stick") from his possession, while co-accused Joga @ Jangalsing caught hold said person and appellant inflicted blow by stick on his head, due to which he sustained bleeding injury. Immediately after this incident, the appellant along with co-accused and the person who had accompanied the injured, ran away from the spot."

According to the prosecution the complainant along with one Suklal Pawara lifted the injured into tractor and took him to Taloda Police Station and thereafter to Government Hospital, Taloda for treatment. In the same night at 12.15 a.m., complainant-P.W. 1 -Devising lodged report with Taloda Police Station and on the basis of said report, offence came to be registered vide Crime No. 57 of 1997 for the offences punishable under sections 326, 504 & 506 of the Indian Penal Code.

2. During the course of investigation spot panchanama came to be drawn and the bloodstained shirt of the injured came to be seized. The appellant came to be arrested on 01.06.1997. The injured, namely, Hira Pawara, who was referred for better treatment to Civil Hospital, Dhule, succumbed to his injury. On the death of the injured, inquest panchanama was prepared and autopsy was carried out at Civil Hospital, Dhule. Due to death of injured as above, offence came to be altered to section 302 of Indian Penal Code, in the crime which was registered earlier. During further course of investigation, clothes of the deceased having bloodstains came to be recovered and on recording statements of witnesses, muddemal articles which were seized, were forwarded for its analysis to Chemical Analyzer. On completion of investigation, charge-sheet came to be filed in the Court of Judicial Magistrate, F.C., Taloda. In the course of time, the case came to be committed to the Court of Sessions for Trial. The charge is framed against the accused, to which they pleaded not guilty and claimed to be tried. The defence of the accused was of total denial. Learned Trial Judge, considering the evidence, found the appellant guilty for the offence punishable under section 304 Part II of the Indian Penal Code and sentenced to suffer rigorous imprisonment for five years. Co-accused Joga @ Jangalsing came to be acquitted of all the charges. Hence, this appeal.

3. Heard learned Counsel for the appellant and learned A.P.P. for respondent/ State. To effectively evaluate the submissions advanced by the learned Counsels for both the sides, with their assistance I have scrutinized the evidence on record. Admittedly, case of prosecution is based on the ocular version of the complainant as well as P.W. 4-Jinga and P.W. 6-Janglya, who were present on the spot at the time of incident. I, therefore, find it material to first consider evidence of eye witnesses.

4. P.W. 1-Devising the complainant who was police patil of village Dhavlivihir, Tal. Taloda on the day of the incident stated that he knows the appellant as well as acquitted co-accused-Jangalsing, since they are from village Dhavalivihir and were indulged in sale of mutton and chicken to the villagers and also to the villagers of Amoni Gavthan. He has stated that on the day of incident at about

8.30 p.m., when he was present in the house, P.W. 4-Jinga visited him for hiring tractor. At that time appellant along with co-accused Jangalsing, deceased Hira and P.W. 6-Janglya Pawara came to him quarreling, when the appellant informed him that those persons were demanding mutton on credit and therefore requested the police patil to intervene and convince the deceased. Though he attempted to convince, they were under influence of alcohol and therefore he directed the appellant and co-accused to go to their respective houses. However, quarrel was going on amongst the appellant and the deceased, who was having in his hand a big stick. He further stated that the appellant snatched said stick from the deceased and gave blow on his head, due to which he fell down. After the incident, all of them ran away from the spot.

P.W. 1 -Devising has further stated that he then called some persons from the village and took the injured to Taloda Police Station in a tractor, where he narrated the incident and lodged his report. The injured was referred to Hospital at Taloda. P.W. 1 -Devising has proved his report at Exh. 28. According to him, he thereafter returned back to his village and directed P.W. 4-Jinga to inform relatives of deceased about the incident and two days thereafter he learnt that the injured died while in hospital at Dhule.

In his cross-examination, it has come on record that before the incident, there was quarrel between co-accused Jangalsing @ Joga, the deceased and the person who was accompanying him. It has further come in the evidence that inspite of his trying to convince the deceased and the person accompanying him, they were not listening to him and had indulged in abusing the co-accused. He further stated that though he tried to separate the scuffle, it went on. The police patil has denied that deceased Hira during the scuffle fell down as he lost his balance. Though in later part of his cross-examination P.W. 1-Devising admits to have stated in his statement recorded by police that at the time of scuffle appellant snatched the big stick, which was in the hands of deceased Hira. Said omission does not appears to be proved by the appellant from the evidence of P.W. 7 Kothareya Gavit, A.P.I., who has recorded his statement. As such, this piece of evidence cannot be considered in favour of the appellant. It is also suggested to police patil who is eye witness to the incident that the deceased and the person who has accompanied him indulged into quarrel with co-accused-Jangalsing, when the appellant went to separate their quarrel, deceased Hira fell down on the ground and sustained head injury. However, said suggestion is also denied. This witness has specifically denied that the appellant has not snatched the big stick from the possession of the deceased. Considering the evidence of P.W. 1-Devising, thus, there appears nothing material brought on record, which can be considered in favour of the appellant.

5. From the evidence of P.W. 4-Jinga Pawara, whose presence on the spot appears to be most natural, as he was present with P.W. 1 -Devising, with reference to hiring the tractor, at about 8.00 p.m. and was sitting with him in front of his house on the platform, where the appellant along with co-accused,

deceased and his companion came quarreling, which had started on account of purchase of mutton on credit, which Devising tried to pacify by speaking to the deceased and his companion. He further stated that deceased Hira was having in his hand one big stick, which the appellant snatched from his possession and gave one blow on his head, due to which he fell down on the ground and sustained head injury and become unconscious and thereafter all of them ran away from the spot.

Evidence of P.W. 4-Jinga corroborates the evidence of P.W. 1-Devising on above material aspect and also on the aspect of P.W. 1 -Devising convincing the appellant as well as the deceased. He has further deposed about P.W. 1-Devising arranging few persons for carrying the deceased to Taloda Hospital and further about P.W. 1-Devising lodging report with the police. He further deposed that he thereafter went to the house of deceased and informed about the incident to his wife.

Even on considering the cross-examination of this eye-witness, whose presence on the spot as already stated above is most natural, nothing material appears to have been elicited to doubt his evidence. On the contrary, it has come in his cross-examination that the co-accused Jangalsing and deceased Hira were abusing to each other on account of appellant not providing mutton on credit to the deceased. This witness has specifically denied that the appellant had not snatched big stick from the hands of the deceased and also denied that the deceased fell down on the spot and sustained head injury. In the circumstances, his evidence appears to be totally unshaken on the material point of assault by the appellant.

6. Next witness whose evidence needs to be considered is P.W. 6-Janglya Pawara, who had accompanied the deceased to the house of P.W. 1 -Devising and who has stated that deceased Hira was his son-in-law and on the day of incident they had visited Taloda for Bazar in the noon and at about 5.00 p.m. they were returning to village Dhavlivihir. On the way to their house they went to the appellant, and the deceased demanded 1 kg. mutton to him on credit. However, the appellant was not willing to give mutton on credit, due to which hot exchange of words took place between them. P.W. 6-Janglya further stated that on this account the appellant took the deceased to the police patil with whom he also accompanied, where the police patil made attempt to convince them. However, the appellant at that time snatched big stick which was in the hands of the deceased and gave blow by it on the head of the deceased, due to which he fell on the ground. He has stated that because of this incident, he ran away to his village and subsequently learnt that he was admitted in the hospital at Dhule.

In the cross-examination, it has come on record that he is resident of village Amoni Gavthan since nine years prior to the incident and has denied that he was not knowing the appellant prior to the incident. He denied that on the day of incident the appellant was not selling mutton and has also denied that at the time of incident the appellant was not present at his shop but was in his field. He

denied that when the appellant refused to give mutton on credit, the deceased abused him and indulged into quarrel.

From his further cross-examination, the case of prosecution of deceased demanding mutton to appellant on credit is further substantiated, when he admitted that after doing Bazar on that day, no money was left with them. P.W. 6-Janglya has denied that on that day he along with deceased had consumed alcohol at Taloda Bazar and as such deceased was under the influence of liquor, due to which he fell down on the ground in the scuffle and sustained injury to his head. He has specifically denied that the appellant has not snatched the big stick from the deceased nor gave blow on his head.

Considering his evidence, there appears nothing brought on record which can be considered in favour of the appellant, as such the evidence of P.W. 1-Devising, the complainant, who appears to be police patil of village, finds fully corroborated by evidence of P.W. 4-Jinga, the independent witness, who happened to be present with P.W. 1-Devising, with reference to hiring of tractor and that of P.W. 6-Janglya, who is near relative of deceased and had accompanied the deceased to the house of P.W. 1 -Devising along with appellant, ocular evidence of all these witnesses appears to be corroborated to each other on the material aspect of assault by the appellant to deceased Hira.

7. Evidence of above witnesses is found further corroborated by P.W. 3-Dr. Jaiwant Phule, when he has stated that on 01.06.1997, when he was Medical Officer attached to Cottage Hospital, Taloda, deceased Hira was referred by police at about 12.05 midnight, who was found to have sustained one CLW over occipital region admeasuring 3 inch x 1/2 inch x 1/2 inch. According to the Medical officer, the injury was caused within 24 hours by hard and blunt object and was grievous in nature. He has suspected fracture of scull. However, for want of X-ray facility, he referred the injured to Civil Hospital, Dhule for better treatment.

8. Evidence of P.W. 11-Dr. Avinash Ruikar further corroborated the case of prosecution when he has stated that on 01.06.1997 when he was attached as Medical officer to Govt. Hospital, Dhule, he performed post-mortem on the body of deceased Hira Pawara and on external examination he found following injuries.

"i. Sutured wound on left parietal region 8-5 cm. after removing suture, it was confirmed as CLW 9.2 cm. x 0.4 cm. in to scalp deep.

ii. Abrasion on left leg medial 3rd front 2.7 x 1.5 cm.

iii. Contusion over right cubital fossa 4.1 x 2.9 cm."

He noted following internal injuries.

"i. Bleeding on mid frontal left parietal region, left temporal muscle contused. There was fracture of left parietal bone, inner table. There was traumatic epidural and subdural bleeding. Brain was showing oedma and congestion."

According to him the cause of death was acute head injury and has accordingly proved post mortem report at Exh. 49. He has further stated that the external injuries found were possible by big stick and it was sufficient in the ordinary course to cause death. All the injuries were noted to be ante-mortem.

Though in the cross-examination this witness has expressed his opinion about possibility of injury sustained by deceased due to fall on stone in drunken condition or due to fall from the height of 8-10 feet on stone, said admission cannot be considered in favour of the appellant in view of ocular version of above witnesses, where from the prosecution has established beyond reasonable doubt that the injuries sustained by deceased Hira were only because of blow given by the appellant on his head.

9. As the evidence of above eyewitnesses is found corroborated by medical evidence and other circumstances as discussed above, I find that prosecution has established involvement of appellant as an assailant of deceased Hira, however, on considering the evidence on record, particularly that of appellant inflicting single blow by stick on the head of deceased, which has resulted into his death, it is noted that the appellant had no intention to cause the death of Hira, nor had knowledge that the injury sustained in all probability will cause his death.

To constitute the offence punishable under Section 302 of Indian Penal Code, it is necessary to establish that deceased died of homicidal death which is established by the prosecution in the present appeal, however, for the reasons stated above, it cannot be said that the death is caused by the appellant by inflicting injury with an intention of causing death, nor appellant can be said to have knowledge that the injury caused is so imminent that in all probability it may cause death. In view of the fact that the appellant inflicted single blow, it can reasonably be inferred that the appellant had knowledge that the injury caused with the stick on the vital part of the deceased would cause death though he may not have intended to commit murder.

10. In the light of facts involved in the appeal, I find it useful to rely on the decision of the Apex Court in the case of Joseph Vs. State of Kerala, . In the said case the appellant suddenly came to the spot and assaulted the deceased with a "lathi" on the head, due to which, there was fracture to the occipital bone extending to the temporal bone. There was also hemorrhage in the brain. The Supreme Court in the said case held that the case would not fall under Section 302 of IPC but it would fall under Section 304 part II of IPC. The facts in the case of Joseph (Supra) are similar to the facts in the present case as can be seen from the extracted portion from the said judgment which is reproduced below:--

"At about 10 p.m. there was a hot exchange of words between the deceased and the accused over the stake money. P.W. 3 intervened and resolved the dispute. Thereafter the deceased left the gambling place and went to the nearby toddy shop. The accused and others also left the gambling place and they were standing near the bunk shop of the accused. There the accused challenged the

deceased by questioning him whether he was courageous enough to go to the shop of the accused. The deceased got out of the toddy shop and stood in front of the shop for a few minutes. In the meanwhile the deceased walked towards the accused who was standing there. The accused attacked the deceased with a wooden lathi."-He dealt two blows on the head of the deceased. The deceased collapsed on the ground in front of the bunk shop of the accused. The accused dealt a third blow on the deceased but it missed the aim. The accused thereafter left the place with the lathi."

In the present case there is only one blow given on the head of the deceased. Two other injuries were injuries of abrasion and contusion. In the case of Joseph (supra) fracture to the occipital bone extending to the temporal bone was found. It was also found that there was also hemorrhage in the brain. The Supreme Court has observed in said case in para 3 as under:--

"In this appeal the learned counsel for the appellant submits that the intention to cause the injury which was found sufficient to cause the death in the ordinary course of the nature was not established. In support of this submission he relied on the circumstances namely that the whole incident took place because of a trivial incident which resulted in a quarrel and that the weapon used was only a lathi and in the circumstances it cannot be said that the accused intended to cause the death by inflicting that particular injury which objectively was proved by the medical evidence to be sufficient in the ordinary course of nature to cause death. In other words he submitted that clause 3 of Section 300 IPC is not attracted in this case. We find considerable force in the submission. The weapon used is not a deadly weapon as rightly contended by the learned counsel. The whole occurrence was a result of a trivial incident and in those circumstances the accused dealt two blows on the head with a lathi, therefore, it cannot be stated that he intended to cause the injury which is sufficient at the most it can be said that by inflicting such injuries he had knowledge that he was likely to cause the death. In which case the offence committed by him would be culpable homicide not amounting to murder. We accordingly set aside the conviction of the appellant under Section 302 IPC and the sentence of the imprisonment for life awarded thereunder. Instead we convict the appellant under Section 304 Part II of IPC and sentence him to five years R.I."

11. From the evidence of P.W. 2-Dadla Pawara, prosecution has established that on 02.06.1997 memorandum statement of the appellant is recorded as per Exh. 30 and in pursuance of statement as above, the Investigating Agency recovered one big stick (Dengara) at the instance of the appellant, which was found concealed behind the grain container (kothi) in his house and seized it under panchanama at Exh. 31. As per the seizure panchanama, the weapon of assault which came to be recovered at the instance of the appellant is admeasuring 3 ft. 8 inch long and about 6 inch in diameter at one end and 7 inch diameter at the other end. As such, the stick involved in this crime cannot said to be a deadly weapon because it was 3 ft. and 8 inches in length. Moreover, the injuries

sustained by deceased Hira are also not serious as the injuries found in the case of Joseph (supra). In that view of the matter, the view taken by the Apex Court in the case above directly applies to the appeal in hand. In the background of facts in appeal, I also find it useful to refer to the decision in the case of Surajit Sarkar Vs. State of West Bengal, . It is found that in that case the deceased, was assaulted with iron rod. The injuries sustained by the deceased could be seen from para 14 of the judgment, which reads thus:--

"14. P.W. 9 Dr. Partha Sarathi Saha confirmed the injuries on Gour Chandra Sarkar and stated that a hard, blunt weapon could have caused them. The injuries were:--

1. 1 1/2" cut mark over the right front parietal region.

2. 1/2" cut mark over the back front parietal region.

There were some abrasion marks over the right ear and right knee. He also found that the right parietal bone was fractured. The membrane and brain matter were ruptured. There was a fracture of the right 6th and 7th ribs and a fracture of the lower end of right radius and dislocation of the right elbow joint. In his cross-examination this witness stated that injuries (1) and (2) above may be caused by contract with a hard and blunt weapon and even by a fall.

Though the Apex Court found that there was shoddy and defective investigation, the Court found that the accused was not entitled to acquittal. However, the Apex Court discussed as to whether offence under Section 302 of IPC was made out or not. It would be relevant to refer to paragraph No. 64 of the said judgment which reads thus:--

"64. Given the nature of injuries, it is difficult to accept the view that Suraj it Sarkar intended to cause death of Gour Chandra Sarkar or that the injuries were so imminently dangerous that they would, in all probability, cause death. The murder of Gour Chandra Sarkar would, therefore, be ruled out. Nevertheless, the injuries were quite serious and inflicted by Suraj it Sarkar on Gour Chandra Sarkar's head with an iron rod, as stated by PW8 Achintya Sarkar. We can surely credit Surajit Sarkar with the knowledge and of a person is hit with an iron rod on the head, then the act is likely to cause the death of the victim. That being so, in our opinion, it would be more appropriate to hold Surajit Sarkar guilty of an offence of culpable homicide not amounting to murder. Since we attribute to him the knowledge of this actions, he should be punished under the second part of Section 304 IPC."

In the appeal in hand, from the evidence discussed above, it, therefore, reveals that in the incident of assault, there is no overt act attributed to the appellant. The appellant is found to have inflicted single blow on the head of deceased Hira by stick. In that view of the matter, the prosecution cannot said to have established beyond reasonable doubt that the appellant had intention to kill Hira. In the circumstances, prosecution is found to have established guilt of appellant,

however, present case would fall under Section 304 Part II of Indian Penal Code.

The view taken by the Trial Court, thus, appears to be correct, just and reasonable. In result, the appeal fails and stands dismissed.

The conviction of appellant Bhimsing Kheteya Wasave under Section 304 Part II of the Indian Penal Code, sentencing him to suffer rigorous imprisonment of five years is maintained.