

(2013) 08 BOM CK 0014

In the Bombay High Court

Case No : Criminal Appeal No. 374 of 2005 with Criminal Application No. 1744 of 2012 with Criminal Appeal No's. 13, 60 of 2005

Chintamani Balaram Kadam and Another

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 22-08-2013

Acts Referred:

Citation : (2013) ALLMR(Cri) 3924 : (2014) 2 BomCR(Cri) 805

Hon'ble Judges : Revati Mohite Dere, J;P.V. Hardas, J

Bench : Division Bench

Advocate : D.G. Khamkar, in Cr. Appeal No. 374 of 2005 and Cr. Appeal No. 13 of 2005 and Mr. B.B. Tiwari, in Cr. Appeal No. 60 of 2005, for the Appellant; H.J. Dedhia, APP, for the Respondent

Judgement

P.V. Hardas, J.—Criminal Appeal No. 374 of 2005 has been filed by original accused Nos. 1 and 3, while Criminal Appeal No. 13 of 2005 has been filed by original accused No. 2 and Criminal Appeal No. 60 of 2005 has been filed by original accused No. 4. The appellants, being aggrieved by the judgment of the Additional Sessions Judge, Brihan Mumbai dated 19/10/2004, in Sessions Case No. 442 of 2003, convicting original accused Nos. 1 and 3 for offence punishable u/s 302 of IPC and sentencing them to imprisonment for life and to pay a fine of Rs. 10,000/- each, in default to undergo RI for one year and for offence punishable u/s 307 read with Section 34 of IPC, however, no separate sentence is passed, and convicting original accused Nos. 2 and 4 for offence punishable u/s 326 of IPC and sentencing them to RI for three years and to each pay a fine of Rs. 5000/-, in default of which to undergo RI for one month, by these appeals question the correctness of their conviction and sentence. Facts in brief as are necessary for the decision of this appeal may briefly be stated thus:--

PW 1 - PI Anand Raorane, who, on 27/3/2003, was attached to the Malvani Police Station, received a message at about 9.30 to 9.45 p.m. informing him about the vehicular accident of a motorcycle at Julias Wadi. On receipt of the said

information, PSI Raorane, accordingly, proceeded to the scene of the incident and noticed a motorcycle lying on the ground and had also noticed blood stains. He learnt that two persons had been assaulted there and were taken to the Bhagwati Hospital. He accordingly proceeded to the Bhagwati Hospital and learnt that the injured were being treated in the hospital. The injured were not in a position to give their statements. He, therefore, returned to the police station and presented his complaint at Exh. 10. On the basis of the said complaint, an offence was registered vide Crime No. 33 of 2003 u/s 307 read with Section 34 of IPC.

PW 7 - PI Janardhan Chaskar, who, on 27/3/2003 was attached to the Malvani Police Station was informed about the message received by PW I - PSI Raorane. He accordingly proceeded to the hospital and thereafter proceeded to the scene of the incident. He drew the scene of the incident panchanama in the presence of panch witnesses at Exh. 19. At the hospital, he learnt that injured Kasim Ali had succumbed to his injuries and accordingly an inquest panchanama of the dead body of deceased Kasim Ali was drawn at Exh. 20. The clothes of deceased Kasim Ali were seized in the presence of panchas at Exh. 17. The other injured, namely, PW 3 - Tanvir was shifted to Nair Hospital for treatment. Injury certificate was obtained. Statements of witnesses were recorded on the next day. On 29/3/2004 three accused were arrested and the fourth accused was arrested on 30/3/2004. The clothes of the accused were seized under panchanama.

Post mortem on the dead body of deceased Kasim Ali was performed by PW 9 - Dr. Ramdas Sanap, who noticed the following external injuries:--

- (i) CLW over right occipito parietal area 4 cm. x 1.5 cm. x scalp deep.
- (ii) CLW over right occipital area 3 cm x 1 cm x scalp deep
- (iii) CLW over left occipital area 3 cm x 1 cm x scalp deep
- (iv) Abrasion over right frontal area 3 cm in diameter
- (v) Abrasion over right ear pinna two in Nos. each of size 1 cm x 1 cm each.
- (vi) Abrasion over right post-auricular area 3 cm in diameter
- (vii) Abrasion over right eye upper eye lid 1 cm x 1 cm
- (viii) Abrasion over nose three in Nos. of 0.5 cm. x 0.5 cm. each
- (ix) Abrasion over left Zygomatic area 2 cm x 2 cm
- (x) Abrasion over lower lip two in nos 1/2 cm x 1/2 cm each
- (xi) Abrasion over chin 1.5 cm. in diameter
- (xii) Abrasion over left mandibular area 3 cm x 1.5 cm.
- (xiii) Abrasion over left post-auricular area 2 cm x 2 cm

- (xiv) Abrasion over neck left side 4 cm x 2 cm
- (xv) Contusion over left forearm middle 1/3rd 5 cm x 1 cm
- (xvi) Abrasion over left iliac area 3 cm x 1.5 cm.
- (xvii) Abrasion over right wrist 1 cm x 1 cm
- (xviii) Abrasion over right forearm middle 1/3rd 1 cm x 1 cm
- (xix) Multiple abrasions over right forearm upper, 1/3rd
- (xx) Contusion over chest left side 5 cm x 5 cm.

On internal examination he noticed hematoma under the scalp and also noticed fracture of skull left occipital area 5 cm. x 6 cm. in length. He also noticed subdural and sub arachnoid hemorrhage. He, therefore, opined that deceased Kasim Ali had died due to "head injury with multiple injuries". The post mortem report is at Exh. 28.

2. Further to the completion of investigation, a charge-sheet against the appellants came to be filed. On committal of the case to the Court of Sessions, trial court vide Exh. 2 framed charge against the appellants for offence punishable u/s 302 read with Section 34 and Section 307 read with Section 34 of IPC. The appellants denied their guilt and claimed to be tried. Prosecution, in support of its case, examined 12 witnesses. The entire case of the prosecution rests on the testimony of PW3 -Tanvir, who is an injured eye witness to the incident. PW 4 - Sandeep, PW 5 - Kamlesh who were eye witnesses to the incident did not support the prosecution and were declared hostile. Similarly, PW 6 - Pravin also did not support the prosecution and was declared hostile.

3. In order to effectively deal with the submissions advanced before us by the learned counsel for the appellants and the learned APP, it would be useful to refer to the evidence of the prosecution witnesses.

Prosecution has examined PW 3 -Tanvir, who states that he knew the deceased as well as the appellants. He further states that on 27/3/2003, he had borrowed a motorcycle from his friend and thereafter along with deceased Kasim Ali went to Gate No. 7 at Malvani. Near Julius Wadi, opposite Thakur Tea Stall, the appellants were present with wooden stick and iron rod. When Tanvir was near tea stall, accused No. 3 - Sachin slapped Tanvir and Tanvir, therefore, fell on the ground. Accused No. 1 - Chintamani, thereafter, assaulted Tanvir by an iron rod on his head and the deceased was assaulted by accused No. 1 - Chintamani and accused No. 3 - Sachin. Tanvir states that he became unconscious.

In cross-examination, he has admitted that he was driving the motorcycle. He has further admitted that he had regained his consciousness after about 10 to 15 days. He has further admitted that he was able to talk after about 15 days of hospitalization. He has admitted that at the spot, there was a speed breaker and other obstacles. He has also admitted that he was not knowing accused No. 2 -

Jayesh prior to the incident. He has admitted that there was no enmity between him and the accused. He has admitted that he could not explain as to how it was recorded in his statement that he became unconscious within seconds.

4. PW 3 - Tanvir was examined by PW 10 - Dr. Milind Jaguste, who states that Tanvir was brought in the hospital at about 10.28 p.m. by Police Constable, Buckle No. 29149 of Malvani Police Station. Dr. Jaguste further states that the history of vehicular accident was given by the said Police Constable. He has further stated that the victim/injured was unable to state anything and was vomiting blood. PW 10 - Dr. Jaguste further states that he had noted a head injury which was caused by blunt object and there were multiple abrasions with swelling on the face. In cross-examination, he has admitted that he had noticed that Tanvir had consumed alcohol. He has further admitted that such injuries were possible if a person falls headlong on his face from a speeding motorcycle. He has further admitted that the injured was accompanied by another person, possibly the brother of the patient.

5. Statement of Tanvir was recorded on 12/5/2003, while the date of the incident is 27/3/2003. The witnesses who had informed PW 1 - PSI Raorane about the victim and deceased Kasim Ali being assaulted, have not supported the prosecution and have been declared hostile. The medical evidence of PW 10 - Dr. Jaguste does not corroborate that the injuries were caused to Tanvir in an assault. Dr. Jaguste has further stated that Tanvir was under the influence of liquor. Tanvir has further admitted that he became unconscious immediately on falling from the motorcycle. He has further admitted that at the scene of the incident, there was a speed breaker.

6. From the above circumstances, it appears to us that PW 3 -Tanvir was driving the motorcycle in an inebriated condition and in that condition met with an accident and had fallen from the motorcycle, sustaining the injuries as were noticed by PW 10 - Dr. Jaguste. It is quite possible that persons who were present there may have assaulted deceased Kasim Ali. The enormous delay in recording the statement of PW 3 - Tanvir and particularly in the absence of any other evidence to indicate that Tanvir and deceased Kasim Ali were assaulted by the appellants, we find that no reliance can be placed on the solitary statement of PW 3 - Tanvir that the appellants had assaulted him. In fact, no motive has been alleged by prosecution and the prosecution has utterly failed to prove motive for the appellants to assault Tanvir and deceased Kasam Ali. The motive also does not appear to be of robbery as PW 3 - Tanvir does not claim that any valuables were looted by the appellants. In such circumstances, we, therefore, find it inexplicable that the appellants, all of a sudden, would assault PW 3 - Tanvir and deceased Kasim Ali. As pointed out by us above, since PW 3 - Tanvir had become unconscious immediately on falling from the motorcycle, it is not possible for him to have witnessed the assault on deceased Kasim Ali. Moreover, PW 3 -Tanvir was in an inebriated condition and the enormous delay in recording his statement, which is of more than one and half months, impels us to reject

the evidence of PW 3 -Tanvir in respect of the assault by the appellants.

7. We, thus, find that there is absolutely no evidence of a satisfactory nature, which would establish that the appellants had assaulted PW 3 - Tanvir and deceased Kasim Ali. The appellants, in our opinion, therefore, are entitled to be given the benefit of doubt. Accordingly, Criminal Appeal No. 374 of 2005 is allowed and the conviction and sentence of the appellants/Original Accused Nos. 1 and 3 is hereby quashed and set aside and they are acquitted of the offence with which they were charged and convicted. Fine, if paid by them, be refunded to them. Since the appellants/Original Accused Nos. 1 and 3 are in jail, they be released forthwith, if not required in any other case.

Criminal Appeal No. 13 of 2005 is allowed and the conviction and sentence of the appellant/Original Accused No. 2 is hereby quashed and set aside and the appellant is acquitted of the offence with which he was charged and convicted. Fine, if paid by the appellant, be refunded to him. His bail bond stands cancelled.

Criminal Appeal No. 60 of 2005 is allowed and the conviction and sentence of the appellant/Original Accused No. 4 is hereby quashed and set aside and the appellant is acquitted of the offence with which he was charged and convicted. Fine, if paid by the appellant, be refunded to him. His bail bond stands cancelled.

In the light of the judgment delivered by us in the appeal filed by the applicants, acquitting them, Criminal Application No. 1744 of 2012 does not survive and is accordingly dismissed.