

(2017) 08 BOM CK 0183
In the Bombay High Court
Case No : 269 of 2001

Dipak s/o Ramaji Kurwade, & Anr.

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 31-08-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 34](#), [Section 307](#) - Acts done by several persons in furtherance of common intention - Attempt to murder

Citation : (2017) 08 BOM CK 0183

Hon'ble Judges : Swapna Joshi

Bench : SINGLE BENCH

Advocate : P.V. Navlani, S.B. Bissa

Judgement

1. Being aggrieved and dissatisfied with the judgment and order dated 19th September, 2001 in Sessions Trial No.123/1997 delivered by learned 1st Adhoc Additional Sessions Judge, Wardha, convicting the appellant/ accused no.1Dipak and appellant/accused no.2Shankar, for the offence punishable under Sections 307 read with Section 34 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for a period of seven years each and to pay a fine of Rs.3,000/each, in default, to suffer RI for one year each, the present Appeal has been preferred by the appellants/ accused.

2. The prosecution case in brief is that, on 29.1.1996 between 5.00 and 5.30 pm, Ishar Chudaman Usarbarse (PW7), resident of Arvi, was sitting near the grocery shop of Mahadeo Bahe, at that time, the appellants/accused who are the residents of same village, arrived at that place and after going for some distance, all of sudden turned back and assaulted PW7Ishwar by means of knives, on his chest. Similarly, they assaulted by means of knives near his coccygis bone and caused injuries to him. The accused said to the PW7 that he had broken their tins of liquor. Thereafter the brother of PW7 and persons from the village of PW7Ishwar admitted him to Rural Hospital at Arvi. On 29.1.1996 at 21.00 hours

ASI Madhukar Khodke (PW9) was attached to Police Station, Arvi. He received a telephonic message from head constable Kishor Sarode, who was posted at outpost Rohana, to the effect that a person is beaten and sustained injuries, is sent to Rural Hospital, Arvi. On receipt of said message, PW 9Khodke proceeded to said hospital. He noticed that one Ishwar Chudaman Usarbarse (PW7) was injured and was admitted in the hospital. PW 9Khodke issued a requisition to the Medical Officer and recorded the statement of the injured. On the basis of said statement PW9Khodke, ASI registered the offence vide Crime No.0/96 at Police Station, Arvi. As the matter was within the jurisdiction of Police Station Pulgaon the case papers were referred to Pulgaon Police Station where the offence was registered vide Cr.No. 114/1996. The police seized earth mixed with bloodstains and plain earth from the house of Ishwar Usarbarse. The police effected spot panchnama. The police also recovered knife from both the appellants when they were in police custody in presence of panchas. The police also seized bloodstained clothes of Ishwar and of both the appellants. The blood of the accused persons was also extracted. The knife seized in this case was also sent to the Medical Officer, Rural Hospital, Arvi, for soliciting opinion whether the injuries found on the person of Ishwar Usarbarse could be caused by it. The sealed sample blood of the accused, bloodstained clothes were also sent to the Chemical Analyser, Regional Forensic Science Laboratory, Nagpur, for examination purpose. The police recorded statements of witnesses. After completion of due investigation, the chargesheet against the appellants came to be filed. The learned Judge of the Court below framed the charge, to which the accused pleaded not guilty and claimed to be tried. The defence of the accused was of total denial and that since there was previous enmity with one Deorao, who is the friend of the victim, a false case has been foisted against them. The learned trial Judge on appreciation of evidence and arguments advanced by both sides, came to the conclusion that the accused were guilty of the offence punishable u/s. 307 of IPC and convicted the appellants, as aforesaid.

3. Heard Shri P.V. Navlani, the learned counsel for the appellants and Shri S.B.Bissa, the learned Additional Public Prosecutor for the respondent State. Learned counsel for the appellants vehemently argued that the learned trial Judge has erroneously passed the impugned judgment and order of conviction although there are material discrepancies in the testimony of the victim as well as the alleged eye witnesses and also failed to consider that the recovery of the weapons is not proved by the prosecution. According to him, the judgment passed by the trial Court is illegal and perverse. On the other hand, Shri S.B.Bissa, learned A.P.P. contended that the learned trial Judge has considered the evidence adduced by the prosecution in its right perspective and has rightly convicted the appellants, as aforesaid.

4. The prosecution has heavily relied upon the testimony of the victim PW7Ishwar. According to PW7Ishwar, the incident took place about 4 years back, at about 5 to 5.30 p.m. At the relevant time, he was sitting near the bridge constructed on a drainage near the grocery shop of one Mahadeo Bahe. At that

time the appellants approached holding knives in their hands and dealt blows of knives on his chest, stomach and just above the buttocks; as a result he fell down. However he was in conscious state of mind. According to PW 7, his friend Deorao, who was present with him at that time lifted him in his arms and took him to his house which is just 30 to 35 metres from the place of the incident. Thereafter, the appellants fled away from the place of the incident. PW7Ishwar deposed that the police made enquiry with him at Cottage Hospital at Arvi. PW7 identified the knife article P1. According to him, the said knife was with appellant no.1Dipak. PW7, however, did not identify the other weapon which was a knife having wooden handle. No doubt, PW7 could not reply specifically as to which of the appellant has caused which specific injury on his person. On careful scrutiny of the testimony of PW 7Ishwar, it is noticed that there are no material discrepancies in his version and his testimony inspires confidence. PW7 had no animosity as such to falsely implicate the appellants in the present case.

5. According to PW5Deorao Kurwade, on the date of the incident at about 2.00p.m, he along with Ishwar (PW7) was in a grocery shop of Mahadeo Bahe. When they were sitting on a nullah, both the accused approached at that place and started assaulting Ishwar by means of knives. PW5Deorao specifically stated that both the appellants were holding knives in their hands. They dealt blows of knife on the person of Ishwar, therefore, he received injuries on his buttocks and chest and thereafter the appellants fled away from that place. According to PW5, he took Ishwar to PHC Rohana. The clothes of PW7 as well his clothes were stained with blood. PW5Deorao could not state as to which appellant dealt injury on which part of the body of Ishwar. According to PW5 they reached at PHC Rohana at about 3.00 pm.

6. Few discrepancies were noted in the testimony of PW5Deorao as regards the timings when the actual incident had taken place. According to PW7Ishwar it was in between 5 and 5.30 pm; whereas PW5 deposed that it was between 2.00 and 2.30 p.m. Another discrepancy was pointed out by the defence counsel that immediately after the incident, Ishwar was taken by PW5 to the house of the injured, whereas according to PW5 after the incident he took Ishwar to PHC, Rohana. In my considered opinion, those discrepancies are not material discrepancies as such. The fact remains that after the incident the victim was carried to the hospital.

7. As far as the testimony of the alleged eye witness PW8Saroj Chamke is concerned, according to her, on 29.1.1996 between 5 and 6.00 pm. the incident took place. Her maternal uncle Ishwar (PW7) along with 2/3 persons were sitting on a nullah near the grocery shop of Mahadeo Bahe. When PW8 had been to the shop of Mahadeo Bahe, she noticed that both the appellants were talking with each other. Thereafter immediately they started assaulting her maternal uncle PW7Ishwar by means of knives which were in their hands. They dealt knife blows upon Ishwar. Initially both the appellants dealt blows from the front side and when he tried to rescue himself, both the appellants dealt the knife blows on his

back side. PW8Saroj specifically stated that two knife blows were dealt on the chest of PW 7 and three knife blows were inflicted on his thigh, from his back side. Thereafter PW7 fell down. According to PW8Saroj, Deorao (PW5) took PW7 to his house Then PW7 was taken in a rickshaw to PHC Rohana. The testimony of PW8Saroj is not shaken in her cross-examination on the material aspects, except the version of PW 8 about giving two blows of knife on the chest of Ishwar and three blows on his waist. It is common knowledge that in normal circumstances, witnesses are in the habit of exaggerating the incident they see. On careful scrutiny of testimony of the above-referred witnesses, it is noticed that their testimony is not shattered in the cross-examination on the point of appellants inflicting blows of knives on the chest, stomach and buttocks of Ishwar (PW 7).

8. As far as the medical evidence is concerned, the medical evidence is admitted by the defence. It is not disputed that Ishwar received injuries on chest, abdomen and stab wound over buttocks. The following injuries were noticed by the Medical Officer, Rural Hospital , Arvi:

"(1) Stab wound over sternum 1" above xiphoid sternum of 1 1/2" x 1/2 " size. 1/2 " deep.

(2) stab wound over abdomen in epigastric region of 1/2" x 1/2" size of 1/2 " depth.

(3) Stab wound over back over x illegible x region 3 in number, each of 1/2 " x 1/2 " size 1/4 " deep.

The cause of injury is mentioned as by sharp edged and pointed object; the age of injury is mentioned as within six hours and healing period is mentioned as about 7 to 9 days if no complication arises. The Medical Officer has examined the two weapons i.e. knives sent to him by the Investigating agency. The Medical officer received the report with regard to the weapons (Exh.43). It is noticed that the prosecution has failed to examine the Investigating Officer who has conducted the investigation in this case, so also the panchas on the point of recovery of weapons. They have not supported the case of the prosecution.

9. The Hon'ble Apex Court in the case of State of Maharashtra vs. Balram Patil, reported in 1983 CRI.L.J. 331 has, unequivocally observed that,

9..... To justify a conviction u/s 307 it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be case in which the culprit would be liable under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under

ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in this Section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof."

In the instant case, admittedly, there is no specific opinion of the Medical Officer that the injuries were sufficient to cause death of the patient, in ordinary course of nature.

10. In view of the fact that the injuries were caused by the appellants on the vital part of the body i.e. stomach, chest, abdomen and considering the nature of injuries and also considering the fact that the injuries were caused by deadly weapons, such as knives, in my opinion, the appellants have attempted to commit the murder of PW7Ishwar and thus committed the offence punishable u/s. 307 of IPC. No doubt PW7 has failed to identify the other knife however he had specifically identified the knife which was in the hands of the appellant no.1Deepak. There was no reason for the PW7 and other witnesses to depose against the appellants. The testimony of PW7 is in consonance with complaint (Exh.52), so also the testimony of the eye witnesses is corroborated with the testimony of injuredIshwar (PW7). Moreover it is proved that the appellants shared the common intention.

11. For the reasons aforesaid, I am of the view that the learned trial Judge has rightly convicted the accused. Since there is no scope for interference, the Appeal is liable to be dismissed. Hence the following order : ORDER

i) Criminal Appeal No. 269/2001 is dismissed.

ii) The judgment and order dated 19.9.2001 passed in Sessions Trial No. 123/1997 delivered by the learned 1t Adhoc Additional Sessions Judge, Wardha, convicting both the appellants u/s. 307 r/ws. 34 of the IPC and sentencing them to suffer RI for seven years each and to pay a fine of Rs. 3000/each, in default, to suffer RI for one year each, is maintained.

iii) The appellants who are on bail, shall surrender to their bail bonds, within four weeks, to serve out the remaining part of the sentence.

(iv) If the appellants do not surrender before the trial court, the learned trial Court is directed to take appropriate action in accordance with law.

(v) The muddemal property, if any, be dealt with as directed by the trial Court after the Appeal period is over.