

(1999) 07 BOM CK 0022

In the Bombay High Court

Case No : Criminal A. No"s. 337 and 366 of 1993

Gajanan Bapurao Rangale

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 06-07-1999

Acts Referred:

Penal Code, 1860 (IPC) — Section 300, 302, 304, 307, 308

Citation : (1999) 07 BOM CK 0022

Hon'ble Judges : G. D. Patil, J;A. B. Palkar, J

Bench : Division Bench

Advocate : M. R. Daga in Cri. A. No. 337 of 1993, K. R. Lambat in Cri. A. No. 366 of 1993, for the Appellant; A.A. Joshi, Assistant Public Prosecutor in Cri. A. Nos. 337 and 366 of 1993, for the Respondent

Final Decision : Allowed

Judgement

A. B. Palkar, J.—These two appeals are filed by two different accused in Sessions Case No. 168/92 decided by the IInd Additional Sessions Judge, Amravati on 27-8-1993. By the impugned order, the appellant-accused No. 1 (appellant in Criminal Appeal No. 337/93) has been convicted of the offence punishable u/s 302 of Indian Penal Code for committing murder of Vasant Nanaji Rangale and is sentenced to suffer imprisonment for life and the appellant-original accused No. 2 has been convicted of offence punishable u/s 307 of Indian Penal Code for attempting to commit murder of Manohar PW 1 and is sentenced to suffer rigorous imprisonment for a period of 5 years and to pay a fine of Rs. 500/-, in default, to suffer rigorous imprisonment for 3 months. The Original Accused Nos. 3 and 4. who were convicted of the offence punishable u/s 323 of Indian Penal Code were already in jail for more than 14 months during the trial, they have not appealed for the obvious reason that after the judgment of the Sessions Court, they were released as they were not required in any other case.

2. Both the appellants were charged for committing the aforesaid offences in furtherance of common intention of committing murder of Vasant Nanaji Rangale

(deceased). However, the conviction is for aforesaid offences of committing murder and attempting to commit murder simpliciter and not for acting in furtherance of common intention with the other accused.

3. In this Court, the original accused No. 1-Gajanan (appellant in Appeal No. 337/93) was represented by learned Counsel Shri M. R. Daga, whereas the accused No. 2-Raju (appellant in Appeal No. 366/93) was represented by the learned Counsel Shri K. R. Lambat and State was represented by the learned Additional Public Prosecutor Smt. A. A. Joshi.

4. The following statement of facts will reveal the controversy.

The incident in question took place on 25-5-1992 at 11.00 a.m. on public road near the house of accused as well as house of the deceased. After the aforesaid incident Vasanta died on 29-5-1992 and the report of the incident was lodged by P.W. 1 Manohar who is real brother of deceased Vasanta and one Ramesh. The Original Accused Nos. 1-Gajanan and 2-Raju are real brothers, accused No. 3-Shankar is their uncle and accused No. 4-Madhu is son of accused No. 3. Thus, the house of the accused and house of the deceased are in the same locality and adjoining each other. There was partition between Manohar, Vasant and Ramesh sometimes in the year 1982 and since partition Ramesh was living separate and it is not disputed that he was living with accused No. 3-Shankar. On the day of this incident, some times between 10 to 10.30 a.m., Bhaiyya alias Balu s/o Bapurao brother of the accused Nos. 1 and 2 had beaten Dnyaneshwar s/o Manohar. Therefore, P.W. 1 Manohar asked Raju-accused No. 2 as to why Bhaiyya had assaulted his son. There was a quarrel in which accused No. 2-Raju physically lifted Manohar and had thrown him on the ground giving a threat of consequence. Deceased Vasanta intervened in the quarrel and separated them. After some time, deceased and Manohar finished their meals and in view of the threat given by Raju, they decided to approach the police and lodge a report, for the aforesaid purpose, they were to proceed to Police Station. Deceased Vasantrao was inside the House, whereas Manohar was near the bullock-cart as they had decided to go by Cart. Probably sensing their mood, accused No. 1-Gajanan and accused No. 2 Raju came there armed with knives. They called the deceased out of the house and told that they will settle the matter on the spot. When the deceased came out of the house, accused No. 1 Gajanan dealt him 2/3 blows with knife on abdomen. P.W. 1-Manohar intervened in order to rescue his brother. However, accused No. 2 Raju dealt him knife blow on abdomen and one blow on the left side eye. In the meantime, accused No. 3 Shankar and his son Madhukar accused No. 4 came on the spot armed with sticks and Shankar dealt stick blow on the right hand of Manohar and Manohar fell down. Thereafter, accused Nos. 3 and 4 i.e. Shankar and Madhu started beating deceased by means of sticks. As a result, deceased as well as Manohar had fallen down and thereafter the accused made good their escape from the scene of offence. Manohar s wife Kanta and wife of deceased viz. Kamal as well as one Ganu Jogi - P.W. 7 lifted Vasanta and Manohar and took them inside the house. Afterwards,

P.W. 8-Dnyaneshwar and son of deceased viz. Mohan took Manohar and deceased to Police Station Nandgaon Khandeshwar by bullock-cart, where report came to be lodged by Manohar. on the basis of which, the offence was registered u/s 326 read with section 34 of the Indian Penal Code against all the accused and the injured persons were sent to Hospital at Nandgaon Khandeshwar. On 26th May, 1992 i.e. on the next day, P.S.I. Dalvi drew panchanama of spot. On 28-5-1992 a requisition was sent to the Special Judicial Magistrate M. P. Naik P.W. 5 for recording dying declaration of Vasantrao. Further part of the investigation was carried out by P.S.I. Jagdeo Dabhade. After Vasantrao died on 28th May 1992, the offence punishable u/s 302 of Indian Penal Code was registered. The statements of all the accused leading to discovery of different weapons were recorded and weapons came to be seized. Clothes of accused No. 3 having blood stains were also seized. Similarly, clothes of deceased produced by his widow were also seized and samples of blood of accused were taken. Further statements of witnesses i.e. Kamal wife of the deceased Vasantrao, Alka, Dnyaneshwar, Ganu Jogi and some other witnesses were recorded. C. A. reports were received and after scrutinizing all the material collected, the accused were chargesheeted.

5. After the case was committed to the Court of Sessions, charge was framed as indicated earlier and the accused pleaded not guilty to the charge. Denying the guilt, the accused contended that on the morning of that day, deceased Vasantrao and Manohar had assaulted Ramesh and Shankar -accused No. 3, a complaint in respect of that incident was also lodged. At the time of this incident, accused Nos. 3 and 4 were not at all present on the spot. There was dispute between Ramesh and Manohar as well as deceased Vasantrao and as the accused Nos. 3 and 4 were helping Ramesh in looking after his land, Manohar involved all the accused in this serious charge with the assistance of Ganu Jogi -P.W. 7.

6. The prosecution examined 13 witnesses. P.W. 1-Manohar, P.W.2 -Bharti. P.W. 6 Kantabai, P.W. 7-Ganu Jogi. P.W. 8-Dnyaneshwar and P.W. 9 -Kamlabai were claimed to be the eye witnesses. After scrutiny of the evidence, of these witnesses and the other evidence including the dying declaration of deceased Vasantrao. the medical evidence and evidence regarding injuries on the person of Manohar. the learned Judge passed the impugned order of conviction and sentence.

7. From the abovestated facts, it is clear that although it was not specifically contended by the learned advocate appearing in the trial Court that the accused were acting in exercise of their right of private defence, it is clear from the facts that the accused had given a complaint, which as per the prosecution was earlier in time and accused No. 3 as well as Ramesh belonging to their group had received injuries for which they were sent by the police for medical examination.

8. Before we proceed to consider the arguments of the learned Counsel appearing for the accused/appellants and the learned Additional Public Prosecutor, it is necessary to refer to the evidence on record in order to come to

a conclusion regarding the factual matrix.

9. It is also necessary to keep in mind the close relationship between the accused and the deceased as well as injured Manohar-P.W. 1, which has been clearly brought out in the cross-examination of Manohar. Manohar and Vasant are the real brothers. They are the sons of Nanaji and their third brother Ramesh is on the side of the accused. Partition took place between Ramesh. Manohar and deceased Vasantrao in 1982 and after that partition, Ramesh started living with accused No. 3. who is brother of deceased Nanaji and uncle of accused Nos. (11), (2) and Ramesh. Nanaji had one more brother named Bapurao. Ramesh later on got married in the year 1987 with the daughter of accused No. 3-Shankar's sister. Prior to marriage, he was residing with Shankar and thereafter he started living separately. Accused No. 1-Gajanan had shifted to Wardha prior to 3 years of the incident and was living there with his brother-in-law Shridharrao Harne who is Manager of a Theatre. About 3 months prior to the date of incident. Ramesh got his land measured and in that measurement it was found that out of his agricultural land, three rows of land was in possession of the complainant party. He then secured possession of that portion and although Manohar had denied that quarrel took place between them and Ramesh at that time, it appears to be quite natural. It is also the contention of the accused that in respect of this incident, a report was lodged by Ramesh. However, that is not brought on record. The denial of Manohar regarding enmity since after this incident with the accused Nos. 3 and 4 as they were helping Ramesh is to be considered on the aforesaid background.

10. On the date of the incident, accused No. 1 Gajanan had come back to village at about 12.00 noon and Shridharrao Harne had accompanied him.

11. The evidence of Manohar regarding assault specially by the present appellants i.e. accused No. 1-Gajanan and accused No. 2-Raju is fully borne out by the FIR he lodged at Police Station. The crux of the matter that accused No. 1-Gajanan and accused No. 2 -Raju delivered them blows with knives, Gajanan dealing fatal blows to deceased Vasantrao on abdomen and Raju inflicting knife blows to Manohar on abdomen and left eye on his intervention has been stated at the very first opportunity by Manohar and it is borne out by the medical evidence to which we will refer at an appropriate stage. This evidence is supported by the dying declaration of Vasantrao recorded by P.W. 5-Madhukar Naik. Special Judicial Magistrate. Vasantrao was examined by P.W. 12 -Dr. Anil Patil before and after recording of the statement and after he was certified to be in a lit condition, the Special Judicial Magistrate has recorded his dying declaration which is at Exhibit-48. Ganu Jogi is claimed to be an independent witness but he has been disbelieved by the learned Judge and in our opinion rightly because the probability of his presence at the time of the assault appears to be remote in view of the fact that his house is at a considerable distance of 1000 feet and he must have reached after the incident and, therefore, he may not be present there. He does not also appear to be an independent witness as

claimed by the prosecution and even otherwise the fact remains that although he was one of the persons who took the deceased as well as Manohar to the Hospital, his statement came to be recorded after about 5 to 6 days of the incident, for which there is no explanation. He has also admitted that in a theft case, he was sentenced. Similarly, the evidence of Kamlabai-P.W. 9 widow of deceased Vasantrao does not inspire confidence because when admittedly she was with the deceased and was looking after him in the Hospital, her statement came to be recorded after the death of the deceased. The learned Judge accepted her evidence on the ground that she being wife of Vasantrao was with him in the Hospital and so her statement may not have been recorded by the Investigation Officer till the death of Vasantrao. We do not find that when the Investigation Officer was vigilant to record dying declaration of Vasantrao and was aware that Vasantrao may not survive, he would not record the statement of an eye witness who was all the time available. It is only after the offence was converted to one u/s 302 Indian Penal Code., her statement came to be recorded and, therefore, her evidence has to be considered on the background of this fact. She appears to have reached the spot afterwards. That is, however, not the case of P.W. 2-Bhatti. who has stated that immediately on hearing the call given by the accused No. 1-Gajanan to her father Vasantrao, Vasantrao came out of the house and she also came out of the house following her father. That means, she has seen the incident. Her statement was also recorded on the very next day, although she had not accompanied her father to the Hospital. The fact that she is interested need not come in the way of accepting her testimony because her interest is in the fact that the real assailants of her father and uncle should be punished. In addition, there is evidence of Dnyaneshwar -P.W. 8, who is none else than the son of Manohar P.W. 1 and in fact he knows the earlier part of the incident wherein Bapurao's son Bhaiyya alias Balu had slapped him when he was playing with Bhaiyya and he had complained about this incident to his father. He has also stated that when his father and deceased Vasantrao were about to start for Police Station in the Bullock-cart, accused No. 1 Gajanan and accused No. 2-Raju came armed with knives and assaulted Manohar and Vasantrao and accused Nos. 3 and 4 came there with sticks. There is nothing in particular in the cross examination to falsify his evidence and as stated earlier, the fact that he is related to the accused is not sufficient to discard his evidence, as his statement was also recorded on the very next day of the incident. Therefore, leaving aside the evidence of Kamlabai and Ganu Jogi there is overwhelming evidence of firstly the eye witness account of the incident as per the aforesaid evidence as well as dying declaration of deceased Vasantrao which does not suffer from any infirmity. This evidence is further borne out by the medical evidence of Dr. Ismal Chauhan-P.W. 4, who conducted post mortem on the body of the deceased Vasantrao. He found one stab injury on the abdomen of the deceased on the left side having size of 1" x 1/4" x cavity deep and a stitched wound on the right side of forehead. He also found one crackling (fracture) on the right parietal bone near the Occipital parietal junction. According to him the death was caused due to the injuries to fatal organs like stomach, fracture of skull bone and the

stomach injury could be caused by a knife, whereas the fracture of the skull bone could be caused by a stick. P.W. 13 Dr. Pushpa Sadhawani examined Manohar after he was admitted to the Hospital at Amravati and she found one stab wound on abdomen on middle of Epigastium which was horizontal and was having size of 1" 1/4" x 1/4" cavity deep and could be caused by sharp object like knife. She also found a wound on the left side of left eye which could be caused by a blunt object (stick) having size of 1" x 1/4" x 1/4". According to her, the condition of Manohar was also not satisfactory when he was admitted to the Hospital. His pulse and Blood Pressure was low and she has further stated that injury to the stomach was serious one and was likely to cause death. In case of such injury, the patient may survive if the treatment is given immediately.

12. The investigation in the case is, however, far from satisfactory. P.W. 3 - Rajeshwar Marodkar is a wholesale panch witness and has witnessed right from spot panchanama to the different discoveries. It is difficult to accept that all the accused would be anxious to give confessional statements one after another leading to discovery of different weapons. However, the earlier discussed evidence, in our view, is clear and sufficient to conclude that the accused, specially the present appellants accused No. 1-Gajanan and accused No. 2-Raju are assailants, who dealt knife blows respectively to the deceased Vasantrao and P.W. 1 Manohar. It is also proved that human blood was found on the knife and on the spot of the incident and, therefore, what is required to be seriously considered is the later part of the arguments of the learned Counsel that even if the evidence discussed above is accepted, the offence of causing death of accused No. 1-Gajanan does not amount to murder and on the same lines, the case of accused No. 2-Raju will have to be considered even if it is accepted that he dealt blow with knife on the stomach of P.W. 1-Manohar and caused him grievous injury. It is really unfortunate that in the trial Court neither the matter appears to have been properly argued on behalf of the defence nor the learned Judge took into consideration the various facts brought on record in the prosecution evidence, cross examination and in the form of documents to consider the probability of the accused having acted in the exercise of their right of private defence and the question as to whether even if they have acted, whether that was in excess of the right conferred and if so what would be the nature of the offence. A.S.I. Dalvi P.W. 11 has admitted in cross examination that on 25-5-1992 Ramesh and accused No. 3 Shankar had come to the police station and lodged a report. They were referred to Medical Officer for treatment and the certificates of their injuries were also collected. The entry of their report was taken in the Station Diary. But, after sending requisition to the Medical Officer and collecting the medical reports nothing was done as neither any offence was registered nor any investigation was carried out and not even a summary was sent which is obvious from the station diary. It is pertinent to point out that the station diary entry of the said report as well as the medical certificates of the injured accused and their associates were even not produced before the Court and could see the light of the day when the accused No. 1 made an application

and got the same produced. What is material to point out is that the entry regarding report of Shankar and Ramesh was taken at 5.45 and at 6.00 p.m. they were sent for medical examination. They returned back as the Doctor was not present and it appears that thereafter they must have been sent again and their reports were received by the police but no action appears to have been taken for obvious reasons. The report of Manohar was recorded in the station diary at 6.15 p.m. i.e. after the accused No. 3 and Ramesh came back from the Hospital for the reason that Doctor was not available to examine them. In the station diary, they had mentioned deceased Vasantrao. P.W. 1-Manohar as well as Dnyaneshwar and Mohan as the assailants and had also stated that they were under the influence of liquor and had assaulted accused No. 3 and Ramesh with sticks. Exhibits 76 and 77 shows that accused No. 3 -Shankar had following injuries.:

1. Contusion -4 cm x 4 cm at the right elbow region.
2. Contusion -2 cm x 2 cm at the right frontal region above the eyebrow.
3. Infected wound 2 cm x Vi cm x "A cm at the dorsal region of left foot near the root of third toe.

Similarly, Ramesh had 4 injuries:

1. Contusion 10 cm x Vi cm at the back of chest on right side oblique down word.
2. Contusion 10 cm x 2 cm at the (illegible) region on right side oblique linear.
3. Contusion 8 cm x 2 cm at the front of chest on right side over the right Nipple oblique linear.
4. Abrasion 4 cm x 4 cm at the front of chest on right side near the midline infected.

13. The injuries may not be grievous hurts as defined in section 320 of Indian Penal Code., but at the same time cannot be said to be negligible specially considering the extent, the sizes and the fact that they were caused by hard and blunt object like stick and as stated in their complaint that they were assaulted by the complainant party with sticks. Manohar denied the suggestion that he and Vasantrao assaulted Shankar and Ramesh while they were passing by road in front of their house. He also denied the knowledge as to how Ramesh and Shankar received injuries. Even Dnyaneshwar -P.W. 8 who referred to the earlier part of the incident, has not stated anything about the assault by his father and deceased Vasantrao on Ramesh and accused No. 3. None of the witnesses including Manohar have any explanation for the injuries received by the accused. The fact that the accused No. 3 and Ramesh had reached the Police Station earlier and were referred for being examined by Medical Officer even before the complaint of Manohar was recorded is required to be considered. But, as already pointed out, neither argument was advanced in that direction nor the trial Judge has taken into consideration these facts which have come on record.

14. It is pertinent to note that the investigation was completely one sided apart from not being satisfactory. A.S.I. Dalvi admitted that even after the receipt of the report of Ramesh and accused No. 3-Shankar and referring them for examination to the Medical Officer and collecting the certificates, no crime was registered and it is obvious that no action was taken to find out as to how they received injuries which are of considerable size. However, it becomes the duty of this Court to find out whether the defence of the accused is probable.

15. If we consider the nature and number of injuries of accused No. 3 and Ramesh and the part of body on which the injuries were caused, it leaves no room for doubt that they must have been attacked and beaten with a hard and blunt object like stick. In the circumstances the accused could not be expected to keep quiet and watch. Their right of private defence would arise as soon as there is threat of grievous injury being caused to either of them or anybody from their group. Thus the accused had right of private defence in the exercise of which they must have dealt blows with knife. As this was done by them in retaliation of the attack with sticks, they were acting in exercise of the right of private defence. In any case, this possibility of the accused having acted in the exercise of their right of private defence cannot be ruled out altogether. The accused are required only to bring their case in the realm of probability and that having been done the Court would be failing in its duty if the same is not considered.

16. Even accepting the defence of having acted in exercise of such right, it is obvious that the accused exceeded the limit and if their acts were in excess of the right of defence conferred by law then what is the nature of offence committed by each of the appellant.

17. The accused No. 1 -Gajanan having acted in excess of the right of defence his offence would be covered squarely by the second exception of section 300 of Indian Penal Code punishable u/s 304 Part II Indian Penal Code and on parity of reasoning the offence of accused No. 2-Raju would be of attempt to commit culpable homicide not amounting to murder punishable u/s 308 of Indian Penal Code. In 1994 Cri LI 224, Titkaram Gundu Naik vs. State of Maharashtra, the Supreme Court had occasion to deal with a case in which the High Court had convicted the appellant for offence punishable u/s 307 of Indian Penal Code. In the case before the Supreme Court also knife was used and after considering all the attending circumstances, the Supreme Court found that the offence committed was one punishable u/s 308 of Indian Penal Code.

18. Taking into consideration the fact that the appellant-accused No. 1 is in Jail since the date of his arrest, we find that the sentence already undergone being about 7 years of imprisonment is sufficient to meet the ends of justice, whereas appellant-accused No. 2 has also undergone imprisonment for a period of 1 1/2 year from 26-5-1992 to 8-11-1993 when he was released on bail. The punishment for offence punishable u/s 308 in normal course is 3 years and considering this aspect of the matter, we find that in case the fine of appellant Raju is increased and he is given substantive sentence for the period which he

has undergone in Jail, that would meet the ends of justice.

19. In this view of the matter, both the appeals will have to be allowed as aforesaid and are partly allowed as indicated below.

20. Although the finding of guilt against the accused No. 1-Gajanan, appellant in Criminal Appeal No. 337/93 and accused No. 2-Raju, appellant in Criminal Appeal No. 366/93 is maintained, their convictions for the offences punishable u/s 302 of Indian Penal Code and 307 Indian Penal Code respectively are set aside and instead, accused No. 1-Gajanan, appellant in Criminal Appeal No. 337/93, is convicted of the offence punishable u/s 304-11 Indian Penal Code and he is sentenced to suffer imprisonment for the period which he has already undergone and, therefore, he be released forthwith, if not required in any other case. Accused No. 2-Raju, appellant in Criminal Appeal No. 366/93 is acquitted of the charge u/s 307 of Indian Penal Code and is convicted of the offence u/s 308 of Indian Penal Code and he is sentenced to suffer imprisonment for the period which he has already undergone in Jail and is also sentenced to pay a fine of Rs. 3000/- (Rs. Three thousand) in default, to suffer R. I. for four months. He be also released forthwith on payment of fine, if not required in any other case.