
(2014) 06 BOM CK 0079
In the Bombay High Court
Case No : Criminal Appeal No. 327 of 2012

Hari Bhaktabahadur Thapa	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 20-06-2014

Acts Referred:

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

Citation : (2014) 4 BomCR(Cri) 77

Hon'ble Judges : V.K. Tahilramani, J;A.S. Gadkari, J

Bench : Division Bench

Advocate : Shyam Mehta, Advocate (appointed) a/w Hitesh Mutha, Advocate for the Appellant; V.R. Bhonsale, A.P.P, Advocate for the Respondent

Final Decision : Dismissed

Judgement

V.K. Tahilramani, J.—The appellant-original accused has preferred this appeal against the judgment and order dated 28.11.2011 passed by the learned Additional Sessions Judge, Pune, in Sessions Case No. 490 of 2008. By the said judgment and order, the learned Additional Sessions Judge convicted the appellant u/s 302 of IPC and sentenced him to RI for life and fine of Rs. 2000/-, in default RI for 3 months.

2. The prosecution case briefly stated, is as under:

(i) The deceased Govind alias Rajesh Thapa was the husband of Nirmala. He along with his wife and two children were residing at Indrayani Darshan Colony, Dehu Road, District-Pune. Deceased Govind was serving as wireman in Military Engineering Services, Dehu Road. Appellant was the brother of deceased Govind. Appellant was jobless and was addicted to liquor.

(ii) The incident had taken place on 3.4.2008. Deceased Govind came home at about 10 p.m. After completing dinner, Govind went out of his house as usual for walk. However, Govind did not return home for quite sometime. Thereafter, PW-6 Devidas came to the house of PW-1 Nirmala at about 1 a.m. on 4.4.2008 and

informed that the appellant is armed with steel pipe and had picked up quarrel with Govind. Hence, PW-1 Nirmala, her brother PW-2 Jivan and PW-6 Devidas rushed to the said spot. The spot was situated at about 2 minutes walking distance from the house of Nirmala. When Nirmala and Jivan reached the spot, they noticed that the appellant was assaulting Govind, husband of Nirmala, on his head, chest and stomach. The incident was witnessed by Nirmala in the tube-light which was on, as well as lights of the club which were on. On witnessing the incident, Nirmala started shouting. Thereafter appellant fled away from the spot carrying the iron pipe. Due to the assault, Govind had sustained profuse bleeding injuries and he collapsed. Nirmala took her husband Govind in auto-rickshaw and carried him to Dehu Road police station. There ambulance was already present. By the said ambulance, Govind was taken to the hospital. Police came to the hospital. In the hospital FIR of Nirmala was recorded, which is at Exhibit 16. Govind expired on 4.4.2008 at about 8 a.m.

(iii) After filing of FIR the investigation commenced and the appellant came to be arrested on 4.4.2008 at about 11.00 a.m. At the time of arrest, clothes on his person were found blood-stained. They were seized under panchanama, Exhibit-24. The iron rod which was used by the appellant to commit the crime was recovered at his instance and the memorandum and panchanama are at Exhibits 21 and 22. The iron rod was found stained with blood. All these articles were send to the Chemical Analyzer. After completion of investigation the chargesheet came to be filed.

3. Charge came to be framed against the appellant u/s 302 of IPC. The appellant pleaded not guilty to the said charge and came to be tried. The defence of the appellant was 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 in para 1 above, hence, this appeal.

4. We have heard Mr. Mehta, learned Counsel for the appellant and Smt. Bhonsale, learned APP for the respondent-State. We have carefully considered their arguments, facts and circumstances of the case, the judgment and order passed by the learned Sessions Judge and the evidence in this case. After carefully considering the same, for below mentioned reasons we are of the opinion that there is no merit in this appeal.

5. The conviction of the appellant is mainly founded on the ocular testimony of three witnesses i.e. PW-1 Nirmala, PW-2 Jivan and PW-6 Devidas. PW-1 Nirmala has stated that the appellant was the brother of her husband. She has stated that on 3.4.2008 her husband came home at about 10.00 p.m. After having dinner, her husband Govind went out as usual for walk. She has further stated that Govind did not return back for quite sometime. Thereafter, PW-6 Devidas came to the house of PW-1 Nirmala at about 1 a.m. on 4.4.2008 and informed that the appellant is armed with steel pipe and had picked up quarrel with her husband. Hence, PW-1 Nirmala, her brother PW-2 Jivan and PW-6 Devidas rushed to the said spot. The spot was situated at about 2 minutes walking

distance from the house of Nirmala. When Nirmala and Jivan reached the spot, they noticed that the appellant was assaulting Govind, husband of Nirmala, on his head, chest and stomach. The incident was witnessed by Nirmala in the tube-light which was on, as well as lights of the club which were on. On seeing the incident, Nirmala started shouting. Thereupon the appellant ran away from the spot carrying the iron pipe. Due to assault, Govind had sustained profuse bleeding injuries and he collapsed. Nirmala took her husband Govind in auto-rickshaw to Dehu Road police station. There ambulance was already present. By the said ambulance, Govind was taken to the hospital. Police came to the hospital. In the hospital FIR of Nirmala was recorded, which is at Exhibit 16.

6. The evidence of PW-1 Nirmala is corroborated by the evidence of PW-2 Jivan. Jivan is the brother of Nirmala. PW-2 Jivan has stated that he was residing along with his sister Nirmala and the deceased. PW-2 Jivan has stated that deceased Govind, their children and other family members were residing at Indrayani Darshan, Dehu road, Pune. He has stated that he knew the appellant. The appellant was jobless and therefore deceased Govind used to convince the appellant to secure a job and to quit his habit of consuming liquor. Jivan has stated that on this ground quarrel used to take place between the appellant and deceased Govind. PW-2 Jivan has further stated that on 3.4.2008 in the night when he was at home, at about 1 a.m. Devidas (PW-6) came to their house and informed PW-1 Nirmala that quarrel is going on between the appellant and deceased Govind at Carrum club of Dehu road. Devidas also informed that the appellant was armed with iron bar/rod. Hence, PW-2 Jivan along with Nirmala followed Devidas and reached the said spot within three minutes. On reaching the spot, Jivan noticed that the appellant was assaulting deceased Govind with rod on the head and chest. Due to assault bleeding injuries were sustained by Govind. Jivan has further deposed that Nirmala started shouting, thereupon the appellant fled away from the spot carrying rod with him. Then Govind was taken to the police chowki and by ambulance Govind was taken to Lokmanya Hospital, Pune. Govind expired at about 8 a.m.

7. PW-6 Devidas who is the witness to the incident has stated that he is residing in Indrayani Darshan, Dehu road, District-Pune. He knew the appellant and the deceased Govind. He has stated that the appellant used to reside in the club room as well as in the varanda of the house of Devidas. Govind used to come and meet the appellant in the building of Devidas, hence Govind was known to Devidas. PW-1 Nirmala was also known to Devidas as she used to come in front of his building for washing clothes. PW-6 Devidas has stated that on 3.4.2008 he was at home. He noticed that appellant and deceased were chitchatting in the varanda of his house. At that time deceased was convincing the appellant to quit liquor. However, the appellant did not listen to Govind. At that time, appellant took out steel pipe which was lying near the spot for assaulting Govind alias Rajesh. Hence, Devidas rushed to the house of Govind. Devidas informed wife of Govind and Govind's brother-in-law Jivan about quarrel going on between the appellant and Govind. Thereafter they came to the spot and noticed that the

appellant was assaulting Govind with steel pipe. Nirmala started shouting. Thereupon the appellant fled from the spot carrying pipe with him. PW-6 Devidas has further stated that he noticed injuries on head, chest and stomach of Govind @ Rajesh and bleeding was oozing from the injuries. This witness as well as PW-1 Nirmala and PW-2 Jivan have identified the weapon article 8 as the same pipe with which the appellant had assaulted deceased Govind. Nothing has been elicited in the cross-examination of these three witnesses to cause us to disbelieve their testimony. We find their testimony is trustworthy and reliable and, hence, we have no hesitation in relying on the same.

8. PW-5 Dr. Prakash Rokade has performed postmortem on the dead body of deceased Govind alias Rajesh. On external examination Dr. Rokade found the following injuries:

1. Stitched wound over scalp on frontal region of the scalp extending behind and backward from the hairline 3 cm to the left sagittal suture up to the anterior aspect of parietal bone with seven intact sutures.
2. Stitched wound over the right side frontal region of the scalp 2 cm to the right of mid-line.
3. Stitched wound over face right side lateral orbital margin vertically and lower orbital margin with 4 intact sutures.
4. C.L.W. on scalp along with sagittal suture from posterior parietal region to the occipital region upto the occipital protuberance.
5. Stitched wound over the right side body of mandible upto the right side chin.
6. Contusion with swelling over the whole of the right side cheek below the orbital rim anteriorly just in front of the ear lobule laterally and 2 cm away from the right angle of the mouth medially and lower downwards upto the mandible.
7. Surgical incised wound over the left side of chest in between 4th and 5th intercostal space 6 cm laterally from the nipple.
8. Surgical incised wound over the left side of chest 7 cm away from the nipple laterally along the mid axillary line in between 4th and 5th intercostal space.
9. Abrasion over neck above the sternal notch in the mid-aspect above the right side clavicular lateral end.
10. Contusion over left parietal region of scalp.
11. Contusion right side of chest pectoral region of the chest 4 cm below the nipple, 4 in number, one below the other parallel 2 cm apart with clear space in between the margins extending to the left margin of sternum body and the chest below the nipple.
12. Contusion over chest and abdomen extending from the right side of lower margin of the chest. Right hypochondrium thence obliquely to the umbilicus.

13. Contusion over the chest and abdomen extending from the left sided margin of the sternal body obliquely to the right side downwards upto 9th rib with clear space in between the contused margins 3 in number parallel.

On internal examination, Dr. Rokade noticed following injuries:

In respect of skull, there was fracture of skull vault involving both the frontal bones in the mid aspect horizontally of 13 cm. In the brain subdural haematoma was found. Contusion was found over the left and right side of the chest over 2 to 7th ribs with fracture of body of sternum. Fracture of left side of 3rd and 5th ribs with blood in the chest cavities.

Lungs: Puncture wound middle lobe antrolaterally at right lung, the left lung was pale and collapsed. In pericardium blood with clots was found.

Heart: right auricle of size 2.5 x 1 cm found contused. Cut section found in right side of cavity haemorrhagic left ventricle and the right auricle.

Abdomen: Haematoma was found over the right side subcutaneous tissue muscle of the abdomen were contused and haemorrhagic.

350 cc blood was found with ante mortem clots.

Teeth: from lower jaw teeth two teeth were dislocated.

In the opinion of Dr. Rokade death has taken place due to traumatic and haemorrhagic shock due to hemopneumothorax, liver and head injury and above injuries were sufficient in ordinary course to cause unnatural death. In the opinion of the said Doctor the above injuries can be caused by muddemal Art. No. 6 the galvanized pipe. Thus it is seen that the testimony of the eye-witnesses is totally corroborated by the medical evidence.

9. Having perused the material on record and considering the arguments of both the sides, we have no hesitation in holding that the appellant assaulted Govind alias Rajesh with iron pipe and caused his death. The question for our consideration, however, is whether this action of the appellant which caused death of Govind would amount to murder or culpable homicide not amounting to murder.

10. Mr. Mehta, learned Counsel for the appellant has submitted that even if it is accepted that the act of assaulting Govind with pipe resulted in his death, the case would not fall u/s 302 of IPC, but it would fall u/s 304 Part II or at the most Section 304 Part I of IPC. He pointed out that the evidence on record shows that quarrel was going on between the appellant and deceased Govind which has been deposed by PW-6 Devidas. Mr. Mehta has submitted that there was no prior quarrel between appellant and deceased. He further submitted that both appellant and deceased Govind had consumed liquor on the night of the incident. He has further submitted that after consuming liquor, sudden quarrel occurred between them which led to unfortunate assault on Govind at the hands of the appellant which ultimately resulted in the death of Govind. Mr. Mehta has placed

reliance on the decision in the case of Ganesh Vs. State of M.P., , wherein after consuming liquor, a sudden quarrel took place and the accused assaulted the deceased causing him multiple injuries. Mr. Mehta pointed out that in the said case it was held that the case falls u/s 304(II) of the Indian Penal Code. We have carefully perused the said decision. In the said decision what is the number of injuries and nature of injuries is not stated anywhere in the judgment and also whether injuries were serious or grievous in nature is not stated. It is also not stated whether the injuries were on vital part of the body. It is simply mentioned that multiple injuries were caused. Moreover, the accused in the said case had not used any deadly weapon. The decision in the said case was influenced by the fact that the accused person had not used any conventional weapon which is seen from para 12 of the said judgment wherein it is reflected as under:

"The appellant is not said to have used any conventional weapon in causing injuries on the deceased.. According to the prosecution, appellant Ganesh who was under the influence of liquor suddenly picked up a piece of stone lying there and dealt blows on the deceased."

In the present case, injuries received by deceased Govind have been set out in para 8 above. In the present case in all 14 external injuries on the body of deceased Govind were found. Injuries 1 to 4 were on vital part of the body which is "head". Injuries 7 and 8 were also on vital part of the body i.e. chest. There was fracture of skull vault involving both the frontal bones in the mid aspect horizontally of 13 cm. In the brain subdural haematoma was found. Contusion was found over the left and right side of the chest over 2nd to 7th ribs with fracture of body of sternum and from lower jaw, two teeth were dislocated. Thus it is seen that there are serious and grievous injuries to the head, liver, lungs and jaw. In view of the nature of injuries and the weapon used in the present case, the decision in the case of Ganesh (supra) cannot be made applicable to the present case.

11. Mr. Mehta, learned Counsel for the appellant thereafter placed reliance on the decision of the Supreme Court in Manke Ram Vs. State of Haryana, . In the said case, a quarrel took place between the accused and deceased, and the accused picked up his service revolver and fired two shots at the deceased. One shot caused injury on the left thigh and the other shot caused injury was on the right side of the neck. In the said case it was argued that accused had no motive to commit murder of deceased and it was only because of intervention of PW-5, who was younger to the accused and lower in rank, that the accused got annoyed because of which fight started and in that fight the incident took place without premeditation in the heat of passion. Hence it was held that Exception 4 to Section 300 is applicable in the facts of the said case and it was held that accused was guilty of the offence u/s 304 Part II of IPC. In the said decision, it is noticed that only two injuries were caused by the accused to the deceased. Injury no. 1 was on vital part that is neck and other injury was on non vital part i.e. thigh. However, in the present case it is seen that the appellant used iron rod

and caused several injuries to the deceased Govind. In all injuries caused to Govind are 13 in number and most of the injuries are on vital part and there are several fractures sustained by the deceased due to the act of the appellant.

12. It is to be noted that when Exception 4 to Section 300 of IPC is pleaded all the ingredients in Exception 4 must be found. Exception 4 to Section 300 reads as follows:

"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 having taken undue advantage or acted in a cruel or unusual manner"

For the application of Exception 4 to Section 300 of IPC it is not sufficient to show that there was sudden quarrel and there was no premeditation, but it must also be shown that the offender has not taken any undue advantage or acted in a cruel or unusual manner. In the present case, the appellant assaulted deceased who was unarmed with dangerous weapon like iron pipe and gave several blows with iron pipe which caused extensive injuries to deceased Govind which shows that the appellant has taken undue advantage by assaulting an unarmed person repeatedly with dangerous weapon. In such case benefit of Exception 4 cannot be given. Hence, we are not inclined to accept the submission advanced by Mr. Mehta that the case of the appellant falls u/s 304 Part II of IPC. In our opinion the present case falls u/s 302 of IPC.

13. In addition to evidence of above three witnesses i.e. PW-Nirmala, PW-2 Jivan and PW-6 Devidas, the prosecution has also relied on some circumstantial evidence. The prosecution has relied on the fact that at the time of arrest the clothes on the person of the appellant were found blood-stained. These clothes were seized under Panchanama Exhibit 24. It is to be noted that this panchanama has been admitted by the defence and hence it has come on record. Panchanama Exhibit 24 shows that the pant and shirt on the person of the appellant were found with blood-stained. As per CA report Exhibit 8, pant of the appellant was stained with blood of "B" group. The clothes of the deceased Govind were also sent to CA. As per CA report Exhibit 8 clothes of the deceased were stained with blood of "B" group. As per CA report Exhibit 10, the blood group of deceased was "B" group. Thus finding of blood on the pant of the appellant of "B" group is a strong incriminating factor which goes against the appellant.

14. In addition to above evidence, the prosecution is also relying on the circumstance of recovery of iron pipe at the instance of the appellant. The memorandum and panchanama are at Exhibit 21 and 22. The memorandum and panchanama were also admitted by the defence and hence they have come on record. The iron pipe was found stained with blood and it was sent to CA. As per CA report Exhibit 8, the iron rod was stained with blood of "B" group. The said rod was recovered at the instance of appellant. We have already stated earlier

that the blood group of deceased Govind was of "B" group. Thus this circumstance of recovery of iron-rod at the instance of the appellant, on which the blood group of the deceased was found is a highly incriminating circumstance.

15. On carefully going through the record in this case, we find that there is sufficient evidence to show that the appellant assaulted deceased Govind alias Rajesh and caused his death and committed an offence u/s 302 of IPC. Thus, we see no merit in the appeal. The appeal is dismissed.