
(2013) 02 BOM CK 0171

In the Bombay High Court

Case No : Criminal Appeal No. 348 of 2009

Harshal @ Banti and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 28-02-2013

Acts Referred:

Citation : (2013) 6 ABR 1026 : (2013) ALLMR(Cri) 3382

Hon'ble Judges : A.P. Lavande, J;A.B. Chaudhari, J

Bench : Division Bench

Advocate : R.M. Daga, for the Appellant; R.S. Nayak, Assistant Public Prosecutor, for the Respondent

Judgement

A.B. Chaudhari, J.—Being aggrieved by the Judgment and Order dt. 12.5.2009 passed by the Adhoc Additional Sessions Judge-1, Chandrapur in Sessions Trial No. 43 of 2008, the appellants/accused have preferred the present appeal. By the said Judgment, the learned trial Judge convicted all the appellants for the offence punishable u/s 302 r/w. 149 of the Indian Penal Code and sentenced them to undergo life imprisonment and to pay a fine of Rs. 2000/- each in default to undergo rigorous imprisonment for six months. The learned trial Judge also convicted all the appellants for the offence punishable under Sections 147 and 148 of the Indian penal Code and sentenced them to undergo rigorous imprisonment for two years. Both the sentences were directed to run concurrently. The prosecution case is that complainant Rukhsat Riyaz Sheikh, r/o. Jalnagar Ward, Chandarpur lodged report (Exh. 35) to Police Station, Ramnagar stating therein that her son Mehraj Riyaz Sheikh, aged about 19 years was killed by the accused persons. On 16.11.2007, at about 8.00 p.m., she came to know from her younger daughter Nainu that the accused persons have assaulted her son Mehraj by gupti and rod and therefore, she rushed to her house and then to the hospital. After the report was taken down by the Police Station Officer, investigation started. All the accused persons were arrested except one namely Ganesh Pendam, who is absconding. After the investigation

was carried out, the charge sheet was filed in the Court. The prosecution examined in all thirteen witnesses in support of its case. The learned trial Court after hearing the evidence convicted the appellants as afore-said. Hence, this appeal.

2. In support of the appeal, Mr. R.M. Daga, learned Counsel for the appellants made the following submissions:

a) The trial Court has relied upon the testimonies of Nalini Adekar (PW-4) and Pravin Adekar (PW-7) as eye witnesses or as direct evidence. According to the learned Counsel, Nalini and Pravin cannot be said to be eye witnesses in view of the inconsistent testimonies of these witnesses. Regarding description of the incident before the Court, he submitted that the evidence of these witnesses is discrepant and looking to the material omissions in their evidence, which are duly proved on the record, the trial Court ought to have disbelieved them. The learned Counsel then argued that witness Nalini was inside the house and she came out of the house only after the incident was over and none of the appellants were there on the spot and therefore, she was not an eye witness to the incident. Pravin Adekar (PW-7) is also not an eye witness as claimed by him because he was inside the house at the relevant time. At any rate, the evidence of Pravin also does not inspire confidence and his evidence also suffers from serious discrepancies. The evidence that witness Pravin saw the incident after coming out of the house is an omission which is very material and therefore, his evidence was liable to be rejected. Inviting our attention to the medical evidence, the learned Counsel argued that the prosecution story is unreliable since the eye witnesses have claimed that all the appellants had assaulted the deceased with the weapons in their hands namely Iron rods, sticks and gupti. As against this, according to the learned Counsel, the medical evidence shows that there is only one injury i.e. stab injury (injury No. 3) which proved to be fatal and injury Nos. 1 and 2 are abrasion and contusion. Thus, there are three injuries, out of which: one is small abrasion, the other is small contusion and the third one is stab wound on the right side lion region. Had there been assault by several weapons, as alleged by the eye witnesses, only three injuries would not have been caused to the deceased. According to the learned Counsel, both the alleged eye witnesses have deposed about the assault being made by gupti twice on the abdomen of the deceased, but that is not at all corroborated by the medical evidence which shows only one stab injury. The account of eye witnesses is, therefore, not true and their evidence will have to be rejected.

b) In the alternative, the learned Counsel for the appellants contended that the evidence for the offence of murder punishable u/s 302 of the Indian Penal Code cannot be said to have been constituted and at the most, the offence which could be said to have been made out may be u/s 324 of the Indian Penal Code. He, therefore, prayed for acquittal of the appellants and in the alternative, for lowering down the sentence for the lower offence.

3. Per contra, the learned A.P.P. supports the impugned Judgment and Order and

argued that the two eye witnesses Nalini (PW-4) and Pravin (PW-7) have rightly been believed by the learned trial Court. The evidence about formation of unlawful assembly by the appellants and then assault on the deceased is strong enough to support the conviction. The learned A.P.P. argued that there is no case for conversion of the major offence of murder into lower offence. He prayed for dismissal of the appeal.

4. We have perused the impugned Judgment and Order passed by the learned trial Judge. We have seen the entire evidence with the assistance of the learned Counsel for the rival parties. We have also heard the learned Counsel for the rival parties at length.

5. At the outset, we find that there is no dispute about homicidal death of deceased Mehraj and therefore, we do not propose to dilate on the said issue, but we confirm the findings recorded by the learned trial Judge in relation thereto.

6. In the instant case, Nalini Adekar (PW-4) and Pravin Adekar (PW-7) are the eye witnesses to the incident. Nalini Adekar (PW-4) stated in her evidence that, at the time of incident she was in the courtyard of her house. She further deposed in her evidence that, on 16.11.2007, at about 7.00 to 7.30 p.m. while she was taking meals. Two boys came running towards her house; one of them entered her house and the other boy sat outside the courtyard. Sunil Jafarwadi was the boy who entered her house and deceased Mehraj was the boy who was sitting outside the courtyard. All the accused came running in front of her courtyard and started beating Mehraj. Accused No. 5 Sk. Sartaj was having gupti in his hand. Accused No. 1 Harshal Gedam, accused No. 2 Amar Patil and accused No. 3 Manoj Kodape were possessing lathis in their hands and accused No. 4 Shriniwas Madkam was possessing rod in his hand and they all started beating Mehraj. Accused No. 5 Sheikh Sartaj delivered a blow of gupti on the abdomen of deceased while the others were beating him by sticks and rod. Thereafter, accused No. 5 Sheikh Sartaj asked her son Pravin and Sunil to come out of the house. Thereafter, accused No. 5 Sheikh Sartaj kept his leg on the neck of Mehraj and inserted gupti in his abdomen and then all the accused ran away with their weapons. In the cross-examination, this witness denied that she came out of the house after the incident. She stated that there was only one injury to the deceased. She denied that, due to darkness, she could not see the incident. She asserted that the incident occurred in front of her house and that there is no courtyard to her house, but there is a road. She denied the defence story that Pravin had caught hold of hair of Mehraj and had brought him in front of her house and had assaulted him by gupti. Nalini (PW-4) further deposed in her evidence that she was not knowing the accused persons by name. She stated that she had omitted to state that two boys came running towards her house and one had entered the house and the other had sat outside the courtyard. She stated that she omitted to state to the police that accused Sheikh Sartaj gave two blows of gupti to Mehraj on his abdomen. She stated that she omitted to

state to the police that accused Sheikh Sartaj put his leg on the neck of Mehraj and assaulted him on his abdomen by gupti. From the perusal of her cross-examination, the aspect of delivery of one blow by means of gupti by accused Sheikh Sartaj is amply proved. Similarly, the fact that the other accused persons assaulted the deceased by means of respective weapons in their hands has also been proved. We have no hesitation in accepting the evidence of this witness as an eye witness to the incident since the incident occurred just in front of her house when she was in her house taking dinner. Her son Pravin, who was in the house, has also supported the prosecution.

7. In his evidence, Pravin Adekar (PW-7) has deposed that, while he was in the house, Sunil entered his house and at that time, he saw all the accused persons beating Mehraj by sticks, due to which he fell down. Accused Sheikh Sartaj took out gupti and gave a blow on the abdomen of Mehraj. His mother also came out of the house in the courtyard. He identified the gupti. Nothing tangible has come in his cross-examination except for the omission that all the accused persons together were beating Mehraj by sticks. But then, the omission is not about the assault made by all the persons. From the evidence of Nalini (PW-4) and Pravin (PW-7), we find that what could be gathered from their evidence is that Sheikh Sartaj gave one blow of gupti and not two blows, as stated by Nalini (PW-4) and which is also corroborated by the medical evidence. About two blows of gupti given on the abdomen of deceased Mehraj, there is no support from the medical evidence. It is further also clear to us that there is no evidence on the record about meeting of minds of all the accused persons to have a common object to commit murder of Mehraj. The evidence of Pravin, on the contrary, goes to show that the other accused persons except accused Sheikh Sartaj assaulted the deceased by sticks and accused Sheikh Sartaj suddenly took out a gupti and gave a blow with the same on the abdomen of Mehraj. There is no evidence that the other accused persons were aware that accused No. 5 Sheikh Sartaj would take out a gupti and gave blow with the same on the abdomen of Mehraj. The prosecution has not brought on record the evidence regarding prior meeting of minds of the accused persons and on the contrary, it appears that Sunil and deceased Mehraj came running as they were followed by the accused persons. In an attempt to save themselves from assault, Sunil entered the house of witness Pravin while Mehraj was sitting quietly in the courtyard, when he was assaulted. In the above background, therefore, we do not find any fault with the trial Court in believing the testimonies of Nalini (PW-4) and Pravin (PW-7) since they are the most natural witnesses who were in their house when these two boys came running being followed by the accused persons and they came out and saw the incident. We, therefore, reject the submission made by the learned Counsel for the appellants that the testimonies of the two witnesses namely Nalini and Pravin should not be accepted.

8. The medical evidence shows that the following three injuries were sustained by the deceased:

1. Abrasion approximately 2 x 2 c.m. over left infra orbital region laterally.
2. Contused lacerated wound 3 x 3 c.m. over the right leg approximately 5.7 c.m. below right knee joint on shin of tibia.
3. Stab wound penetrating injury site on right side loin region approximately 5 c.m. from spine transversely in mid 8.5 c.m. from anterior superior iliac spine laterally and vertically and 9 c.m. from mid clavicular line laterally.

Wound of entry: shape - elliptical injury penetrating incised-size 3.5 c.m., clear cut, inverted abraded and bruised surround tissue.

9. Perusal of the above three injuries shows that injury No. 3 is a stab wound caused on the abdominal portion and out of the other two injuries: one is abrasion and the other is contusion. It appears that it is the stab wound which finally resulted into death of Mehraj. The evidence that the other accused persons assaulted Mehraj by means of iron rod and sticks is not corroborated fully by the medical evidence, but then the above two injuries can be caused by those weapons. The nature of these two injuries, to our mind, do lead us to infer that none of the accused persons except accused No. 5 Sheikh Sartaj wanted to cause serious injury to Mehraj. This, in our opinion, also shows that there was no common object of the accused persons nor was there any intention on their part to commit murder of Mehraj. Even insofar as accused No. 5 Sheikh Sartaj is concerned, as discussed above, he caused one stab wound injury on the abdomen of deceased and ran away. We, therefore, do not find any intention on his part to commit murder of Mehraj.

10. It would be appropriate to discuss the motive furnished by the prosecution at this stage. It has come in the evidence of prosecution witnesses that Sheikh Sartaj had earlier threatened Mehraj that Sunil (PW-5) was not making his payments due and therefore, he would see both of them. It is not the prosecution case nor the case of defence that Mehraj had anything to pay to Sheikh Sartaj or any other accused. Thus, the motive, at the most, that could be attributed to accused No. 5 Sheikh Sartaj is that he wanted to teach lesson to Sunil (PW-5) and not Mehraj. In fact, there was no reason for the accused persons to kill Mehraj and therefore, we conclude that the motive supplied by the prosecution also does not show that any of the accused persons wanted to kill Mehraj.

11. We also find, as stated hereinabove, that except accused Sheikh Sartaj no other accused persons had knowledge that Sheikh Sartaj would give a blow of gupti - a deadly weapon, which may cause death.

12. We, therefore, find that all the other appellants/accused except accused No. 5 Sheikh Sartaj are liable to be held guilty for the offence punishable u/s 324 r/w. 34 of the Indian Penal Code. We further find that accused No. 5 Sheikh Sartaj did not have requisite intention to commit murder of Mehraj, but since he delivered only one blow on the abdomen of the deceased, which is a vital part of

body, he can be held responsible for only stab injury caused by him by gupti which was likely to cause death of Mehraj. We, therefore, hold that accused No. 5 Sheikh Sartaj is guilty of the offence punishable u/s 304-I of the Indian Penal Code.

13. Reliance on the evidence of Sunil Jafarwadi (PW-5) made by the defence is completely misplaced. The evidence of Sunil (PW-5) is wholly unacceptable looking to his evidence, his criminal background and conduct Defence has tried to take advantage of his conduct. We reject his evidence.

14. We, thus, come to the conclusion that accused No. 5 Sheikh Sartaj is guilty of the offence punishable u/s 304-I of the Indian Penal Code while all the other accused persons are guilty of the offence punishable u/s 324 r/w. 34 of the Indian Penal Code. To sum up, the appeal will have to be partly allowed. Hence, we pass the following order:

ORDER

The impugned Judgment and Order dt. 12.5.2009 in Sessions Trial No. 43 of 2008 convicting the appellants for the offence punishable u/s 302 r/w. 149 of the Indian Penal Code for the murder of deceased Mehraj is set aside and the impugned Judgment is modified as under:

(i) Appellant/accused No. 5 Sheikh Sartaj s/o. Sheikh Hafij is convicted for the offence punishable u/s 304-I of the Indian Penal Code and is sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 2,000/- in default to undergo rigorous imprisonment for six months.

(ii) All other appellants/accused persons namely accused No. 1 Harshal @ Banti s/o. Haridas Gedam, accused No. 2 Amar @ Shersingh s/o. Shrawan Patil, accused No. 3 Manoj s/o. Narayan Kodape and accused No. 4 Shriniwas @ Sinnu @ Raju s/o. Shankar Sidam are convicted for the offence punishable u/s 324 r/w. Section 34 of the Indian Penal Code and are sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 2,000/- each in default to undergo rigorous imprisonment for six months.

(iii) All the appellants are entitled to set off for the period of detention in terms of Section 428 of the Code of Criminal Procedure.

(iv) The order passed by the trial Court insofar as disposal of the property is concerned, is maintained.

(v) The Criminal Appeal stands disposed of.