

(2020) 08 BOM CK 0014
In the Bombay High Court
Case No : Criminal Appeal No. 314 Of 2018

Hivraj S/o. Kewatram Uikey

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 14-08-2020

Acts Referred:

Indian Penal Code, 1860 — Section 300, 300(4), 302, 304
Code Of Criminal Procedure, 1973 — Section 173, 313

Citation : (2020) 08 BOM CK 0014

Hon'ble Judges : A. S. Chandurkar, J; Amit B. Borkar, J

Bench : Division Bench

Advocate : Kirti S. Deshpande, R. R. Vyas, N. S. Rao

Final Decision : Dismissed

Judgement

Amit B. Borkar, J

1. Hearing was conducted through video conferencing and the learned counsel agreed that the audio and video quality was proper.

2. Through this appeal the appellant challenges the judgment and order dated 23.04.2018, passed by Additional Sessions Judge, Gadchiroli in Sessions

Case No. 79 of 2015 convicting and sentencing him to undergo imprisonment for life and to pay a fine of Rs.1000/- in default to pay the fine to suffer

R.I. for six months for offence under Section 302 of Indian Penal Code.

3. In short, the prosecution case runs as under :

The incident happened on 07.04.2015 in the barren field near the field of accused. On the day of incident Punnibai-(PW-2) along with her sister-in-law

Vanita-(PW-3) were in the field at about 7 A.M. At that time the accused approached them and asked as to who has stolen wood from his field.

When PW-2 and PW-3 denied it, the accused abused them by saying that they were daughters of landlord and collector. While the accused was abusing PW-2, PW-3, deceased came on spot and made enquiry with Punnibai and Vanita, PW-2 and PW-3 told deceased about the incident. Then the deceased asked the accused as to why accused abused PW-2 and PW-3. At that time accused asked deceased to come near him so that the accused would disclose the reason to the deceased. When the deceased went near the accused, the accused assaulted the deceased with axe on his head. The deceased fell on the ground and was declared dead on arrival in hospital. The accused thereafter himself went to police station along with axe and confessed crime by lodging the report. The police station Jaravandi registered a crime bearing No.03/2015 against the Accused.

4. The Investigating Officer submitted Investigation Complete Report under Section 173 of Criminal Procedure Code before the Judicial Magistrate

First Class, Aheri after completing the investigation. The learned Judicial Magistrate First Class, Aheri, committed the case to the Sessions Court as it

being exclusively triable by the Sessions Court by its order dated 07.07.2015. The trial court framed the charge against the accused, which was denied

by the accused and the prosecution was called upon to open the case. The prosecution in all examined 12 witnesses, out of which PW-2 and PW-3

are eyewitnesses. In the statement of the accused recorded under Section 313 of Criminal Procedure Code, the accused raised defence of rivalry

against the deceased, hence the accused was falsely implicated in the case. The accused did not step into the witness box however examined his

father as defence witness to prove that the applicant had Psoriasis to his right hand.

5. The learned trial court believed the witnesses examined by the prosecution and convicted the accused for offences punishable under Section 302 of

Indian penal Code and sentenced for life imprisonment.

6. We have heard Ms. Kirti S. Deshpande, learned counsel for the appellant and Mr. N. S. Rao, learned APP for the state. We have also perused the

depositions of prosecution witnesses, material exhibits rendered and proved by the prosecution, the statement of appellant recorded under Section 313

of Criminal Procedure Code and the impugned judgment.

7. Ms. Kirti Deshpande learned advocate for the appellant submitted that on

account of sudden and grave provocation the incident took place. The injury was without any intention. There was only single blow. It is also submitted that there was a delay of six days in recording statements of eyewitnesses. It is also submitted that the accused was not immediately arrested which cast doubt on the theory of prosecution. There is over writing about date and time in the FIR. The eye-witnesses were related to the deceased and hence were interested. It is submitted that in case the Court comes to the conclusion about involvement of appellant, at the most the offence can be under Section 304 part II and accordingly the sentence be reduced. In support of her contentions, the learned counsel placed reliance on the decisions in Aghnoo Nagesia Vs. State of Bihar reported in AIR 1966 SC 119, Sampath Kumar Vs. Inspector of Police, Krishnagiri reported in (2012)4 SCC 12 4 and Laxman alias Laxmayya Gangaram Zinna Vs. The State of Maharashtra reported in 2012 All MR (Cri.) 1998.

8. Mr. N.S. Rao learned APP submitted that PW-2 and PW-3 are eye-witnesses, who have seen the accused assaulting the deceased. Their testimonies are not shaken in the cross examination. The suggestion that the distance between PW-2 and PW-3 and accused, while assaulting the deceased, was such that they could not see the incident, has been denied by PW-2 and PW-3. PW-4 has corroborated testimony of PW-2 and PW-3 and has seen accused running with Axe. The C.A. Report supports case of prosecution, which confirms blood of deceased on the axe. There is no cross of Investigating Officer on the point of overwriting in FIR. It is submitted that the trial court has rightly come to the conclusion that the offence is squarely under Section 300 and not under Section 304 part II of Indian Penal Code. In support of his submission that the witnesses merely being related to the deceased, their testimonies need to be considered on its own merits, relied upon following judgments State of Rajasthan Vs. Kalki and Another reported in 1981(2) SCC 752, Marandu and Another Vs. State by Inspector of Police, Tamilnadu reported in 2008(16)SCC 529, Mallikarjun and Others Vs. State of Karnataka reported in 2019(8) SCC 359. The learned APP in support of his submission that Section 304 part II of Indian Penal Code, will not apply relied upon judgments of the Honâ??ble Apex Court in the case of State of Rajasthan versus Leela Ram alias Leeladhar, reported in 2019(13) SCC 131, 2006 (11) SCC 444 in the case of P ulicherla

Nagarju V/s State of A.P. and AIR 1958 Supreme Court 465 in the case of Virsa Singh versus State of Punjab.

9. The conviction of the appellant is founded on the testimonies of two eyewitnesses namely Punnibai-(PW-2) and Vanita- (PW-3). From their statements it emerges that on 07.04.2015 at about 7 A.M. Punnibai-(PW-2) along with her sister-in-law Vanita-(PW-3) were in their field. At that

time, accused came near them and asked about stolen wooden sticks from his agricultural field, which is adjacent to the field of Vanita-(PW-3).

Punnibai-(PW-2) and Vanita-(PW-3) denied having taken wooden sticks from the field of accused. On this the accused abused them by saying they

are the daughters of moneylender and collector. At that time deceased came at the spot and asked as to what happened. Punnibai-(PW-2) and

Vanita-(PW-3) narrated to the deceased the aforesaid. Thereupon the deceased sought explanation from accused as to why the accused was abusing

Punnibai-(PW-2) and Vanita-(PW-3) who happened to be daughter-in-law and daughter of the deceased respectively. The accused asked the

deceased to come with him to get explanation as to why the accused was abusing Punnibai-(PW-2) and Vanita-(PW-3). When the deceased

accompanied the accused, the accused assaulted the deceased by means of Axe as a result of which deceased fell on the ground and became

unconscious. Punnibai-(PW-2) and Vanita-(PW-3) shouted for help. Due to call from them, Madhav-(PW-4) came at the spot and after seeing

Madhav-(PW-4), accused fled the spot. Madhav-(PW-4) has corroborated oral Testimony of Punnibai-(PW-2) and Vanita-(PW-3).

10. Diwanji Tirki-(PW-5) and Maniram -(PW-6) deposed that they went to the police station along with villagers after coming to know about the

incident. At that time the accused came in the police station with bloodstained axe and stated that he has killed the deceased. He further stated that

the accused has killed the deceased out of dispute over the field.

11. Somnath-(PW-9) deposed that police seized the plane as well as bloodstained earth from the field of village Kurumwada where the incident took

place below Seizure Panchnama Exhibit -32.

12. Yogeshwar Pardhi-(PW-11) Investigation Officer deposed that on 07.04.2015 the accused came to the police station along with Axe and he

reduced his report as per direction of the accused. The I.O. recovered

bloodstained axe from the accused in presence of Panchas below Exhibit13

and also recovered clothes of deceased. Got prepared map of spot from Circle Inspector below Exhibit -50.

13. The account furnished by Pun nibai-(PW-2) and Vanita-(PW-3) is corroborated by medical evidence in as much as Dr. Unmesh Selukar-(PW-12)

found a solitary incised wound on right parital area admeasuring 8 x 1.5 x 5c.m. which was passing through skull and brain at the angle of 45° in

medial and inferior direction which according to his statement could be caused by axe at Article-C. Dr. Unmesh further stated that the injury to the

right parital bone was sufficient to cause death in ordinary course of nature.

14. Apart from ocular evidence of Pun nibai-(PW-2) and Vanita-(PW-3), eyewitnesses, the lodging of a FIR by accused himself substantially

eliminates the possibility of embellishment and concoction in the prosecution case and also that of false implication of the accused named therein.

15. The testimony of PW-2 and PW-3 eye witnesses has not been shaken in the cross-examination and inspires implicit confidence. The said

testimony is corroborated by PW-4 who was present at the spot immediately after the incident and had seen accused fleeing away from the spot. The

complicity of the appellant in assaulting the deceased has been proved by the prosecution beyond reasonable doubt.

16. For the said reasons, in our view, the learned trial court correctly recorded the finding as regards the involvement of the appellant established in the

incident. The conviction of the appellant, therefore, does not call for any interference.

17. This leaves us with the question namely the nature of the offence. Ms. Kirti Deshpande learned Counsel for the appellant strenuously urged that

there was sudden provocation and the appellant in the heat of moment inflicted solitary axe blow on the deceased, the offence would therefore fall

within the ambit of section 304 part II of Indian Penal Code. Mr. N. S. Rao learned A.P.P. strenuously urged that the offence would fall squarely

within four corners of clauses thirdly of section 300 of Indian Penal Code the breach of which is punishable under section 302 of Indian Penal Code.

Mr. N. S. Rao submitted that this is not the case of sudden quarrel and solitary blow on the skull of deceased which was a deep incised wound on

right parital area admeasuring 8 x 1.5 x 5 c.m. which resulted in almost

instantaneous death of the deceased. In Mr. Rao's contention since both the eye witnesses have categorically stated that the appellant inflicted the blow on this skull of deceased, he had requisite intention to cause death of deceased in terms of firstly of section 300 of Indian Penal Code. In Mr Rao's contention clause thirdly of section 300 would be attracted because the appellant inflicted the injury intentionally which in the opinion of Dr. Unmesh was sufficient in the ordinary course of nature to cause death.

18. In Mr. Rao's contention since both the eye witnesses have stated that the appellant intentionally inflicted axe on the skull of the deceased and since medical expert Dr. Unmesh has categorically stated that the said injury was sufficient in ordinary course of nature to cause death, third Clause of Section 300 will be squarely applicable.

19. The Supreme Court in the oft-referred decision of Virsa Singh versus State of Punjab reported in AIR 1958 SC page 465 has held that for the application of clause thirdly of section 300 of Indian Penal Code it is essential that there should be intention to inflict the external injury inflicted and be the injury inflicted should be sufficient in ordinary course of nature to cause death.

20. It would also be apposite to refer to the judgement of Hon'ble Apex Court in the case of Pulicherla Nagarju Alias Nagaraja Reddy V/s. State of A.P. reported in 2006(11) SCC 444. Speaking for the bench R.V. Raveendran, J. in para 29 observed thus:

29. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether

the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters like plucking of a fruit, straying of cattle,

quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in

deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may

be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the

accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the

courts to ensure that the cases of murder punishable under Section 302, are not

converted into offences punishable under Section 304 Part

I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause

death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the

weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital

part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden

fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any

prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for

such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has

acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of

course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the

question of intention. Be that as it may.â??

21. The third authority and very apposite one is the decision of Supreme Court in the case of State of Rajasthan versus Leela Ram Alias Leela Dhar

reported in 2019(13) SCC 131 where Dr. D.Y. Chandrachud, J. speaking for the bench in para 19 has observed thus:

â??19. In seeking to place the facts of the present case within Exception 4, the High Court has dwelt on whether the incident took place

without premeditation. Exception 4 is extracted below:

â??Exception 4.â?"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.â?? (emphasis supplied)

Under Exception 4, culpable homicide is not murder if the stipulations contained in that provision are fulfilled. They are: (i) that the act was

committed without premeditation; (ii) that there was a sudden fight; (iii) the act must be in the heat of passion upon a sudden quarrel; and

(iv) the offender should not have taken undue advantage or acted in a cruel or unusual manner.â??

22. The conspectus of the decisions can summarised thus:

The offence to fall within Exception 4 of section 300 of The Indian Penal Code 1860 following ingredients must be fulfilled Viz.(i) that the act was

committed without premeditation; (ii) that there was a sudden fight; (iii) the act must be in the heat of passion upon a sudden quarrel; and (iv) the

offender should not have taken undue advantage or acted in a cruel or unusual manner.

23. The intention to cause death as contemplated by thirdly of Section 300 of The Indian Penal Code 1860 can be gathered from following factors:

(i) nature of the weapon used;

(ii) whether the weapon was carried by the accused or was picked up from the spot;

(iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury;

(v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight;

(vi) whether the incident occurs by chance or whether there was any premeditation;

(vii) whether there was any prior enmity or whether the deceased was a stranger;

(viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation;

(ix) whether it was in the heat of passion;

(x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner;

(xi) whether the accused dealt a single blow or several blows.

24. The above list of circumstances is not exhaustive. There may be several other special circumstances with reference to individual cases.

25. Coming back to the facts of the present case, it cannot be conclusively said that act was without premeditation as the accused was already

carrying axe with him. The axe was not taken from the spot. There was no fight between accused and the deceased before accused assaulted the

deceased. The eye-witnesses have stated that the accused had called the deceased towards him and thereafter had assaulted him. From the evidence

on record, it cannot be said that act was committed in the heat of passion or upon sudden quarrel as the deceased accompanied the accused at the

instance of accused. Therefore, present case does not fall within Exception 4 of section 300 of The Indian Penal Code, 1860.

26. The other circumstances to prove intention as contemplated by Section 300 are that the accused was carrying axe which at times is deadly

weapon. The accused was carrying the axe before incident. The blow was on the head of the deceased which is vital part of the body. There is no

evidence of any prior enmity between the accused and the deceased. Though the accused examined his father, said witness has not stated anything

about prior enmity. There was no sudden and grave provocation. Medical expert Dr. Unmesh has categorically stated that the said injury was

sufficient in ordinary course of nature to cause death. The age of deceased was 60 years and age of accused was 35 years on the date of incident.

27. Ms. Kirti Deshpande, the learned counsel for the appellant, strenuously urged that the offence would fall within the four corners of Section 304

part II of Indian Penal Code. We regret we cannot accede to her submission.

28. It is also necessary to consider the submission that the ocular account which is the foundation of conviction of the appellant comprises of testimony

of two extremely interested witnesses namely Punnibai and Vanita PW-2 and PW-3 who are daughter-in-law and daughter of the deceased

respectively and hence it is unworthy of acceptance. Way back in 1965 in the case reported in AIR 1965 SC page 202, Masalti versus State of Uttar

Pradesh, the Supreme Court has held that the mere circumstances that witnesses are interested would only make the court to evaluate their evidence

with caution and not mechanically reject it. We have exercised the necessary caution in evaluating the testimony of two eyewitnesses and we find it

implicitly truthful.

29. Another submission was to the effect that the statement of eyewitnesses were recorded after lapse of six days from the date of incident and there

is overwriting in date and time in FIR. In our considered view testimony of eye witnesses has not been shaken in their cross- examination. Apart from

their testimony, PW-4 has corroborated it by stating that he had seen accused fleeing from the spot immediately after the incident. The accused

himself had launched FIR at the police station immediately after the incident

which has been witnessed by PW-5 and PW-6. There is no cross-examination of the I.O. on the point of overwriting in FIR, therefore, now it is not open for appellant to raise issue of overwriting in FIR. Considering these factors delay of six days in recording statements of eye witnesses and overwriting in date and time of FIR fades into insignificance.

30. In the result, we find no merit in this appeal and dismiss the same. Appellant is in jail and shall undergo the sentence awarded to him.

31. The order be communicated to the counsel appearing for the parties, either on the email address or on WhatsApp or by such other mode, as is permissible in law.