

(1998) 01 BOM CK 0006
In the Bombay High Court
Case No : Criminal Appeal No. 42 of 1996

Jay Shankar Mallesh

APPELLANT

Vs

State of Goa

RESPONDENT

Date of Decision : 28-01-1998

Acts Referred:

Evidence Act, 1872 — Section 3, 45, 59, 8
Penal Code, 1860 (IPC) — Section 302

Citation : (1998) 5 BomCR 764

Hon'ble Judges : R.K. Batta, J;N.J. Pandya, J

Bench : Division Bench

Advocate : P.P. Singh, for the Appellant; S.B. Faria, Public Prosecutor, for the Respondent

Judgement

N.J. Pandya, J.—On 27 March, 1994 at village Mandopa, Navelin, between 7.00 to 7.30 p.m. the accused is said to have stabbed the deceased Raju in the course of a quarrel between them. On the aforesaid day, there was Hindu festival of Holi. At about 2.00 p.m. on that very day there was minor verbal exchange in connection with unwanted throwing of colours between the accused on one side and the deceased and his friend on the other.

2. As can be seen later on, the actual time of the incident is very much in dispute and is not clearly established. But in the initial part of this judgment, we will be concentrating on the testimony of one of the eye witnesses Francis Fernandes (P.W. 11). According to him, both the deceased and this witness were returning towards Mandopa, when they found the accused standing there.

They were coming on a bicycle which on account of the slope they were not riding but actually leading along with them.

3. Some verbal exchanges were there between the two and the accused is said to have straight away caught hold of the neck of the deceased and thereafter gave a blow which landed on the back side of the deceased's left upper part and

one more blow towards the right side of the back near the right armpit and thereafter the accused tried to run away.

4. The said witness Francis threw the bicycle on the accused, but the accused managed to escape. The said witness also ran away from the place and was traced only four days after the incident from his sister's place at Cortalim.

5. In the meantime, the complainant Kumar Shetye came to be informed by Babujan (P.W. 7) at about 7.30 p.m. Information given to the Police by P.W. 4 Kumar Shetye as complaint (Ex. P.W. 4/A) indicates to the effect that the incident happened at about 7.00 p.m. and it was Babujan who had informed the complainant that the accused had given a blow on the deceased.

6. Thus, there is a time gap of about one hour and fifteen minutes about the actual occurrence of the event. About the death of Raju being homicidal, there is hardly any dispute, The question is whether the prosecution has succeeded in proving its case against the accused, particularly with reference to the manner in which he is said to have attacked the accused with fatal consequences.

7. At this juncture, if P.W. 7 Babujan's testimony is referred to, his testimony as to the incident that the accused is said to have given a blow on the deceased is conspicuous by its absence. It is indeed a moot question as to how Kumar Shetye (P.W. 4) came to know about the said detail which is set out in his complaint that it was the accused who had given a blow on the deceased.

8. In this background, if one turns to the testimony of Dr. Sapeco who performed the autopsy which is at Exh. P.W. 3/A, it becomes clear that the story of the prosecution as sought to be made out by P.W. 7 cannot be accepted.

9. A detailed background of the said Autopsy Report (Exh. P.W. 3/A) clearly shows that the fatal injury was on the left back side on the scapula region. Internal examination on the spot indicated that the sharp cutting instrument had entered the space between the second and third intercostal region and had pierced the upper part of the lung causing profuse bleeding. It is this internal haemorrhage which has resulted into death.

10. If one recalls the testimony of eye witness Francis Fernandes, the blow was given by the accused standing in front of the deceased, after catching hold of his neck. Thereafter he had to take his hand above the shoulder of the deceased and inflict the blow on the aforesaid spot of the body of the deceased to bring about the aforesaid consequences. Looking to the fact that the blow was oblique in direction and had gone 5 to 6 cms. inside the body, which alone could have caused the internal injury, the position of the accused vis-a-vis the deceased as set out by the said witness, makes it virtually impossible.

11. Otherwise also, the story of Francis (P.W. 11) could not be accepted because as per his own admission, he was standing behind the accused in a manner that the accused will have his back towards the witness and in front of the accused so standing with his back towards the witness the deceased would be virtually dead

except in imagining as to what happened with the knife which was raised for giving the blow on the deceased, this witness could not have seen the actual landing of the blow at all.

12. In cross-examination of this witness, it has clearly come that he along with his companion including the deceased had moved towards the accused to attack him. It would thus be clear that this witness is an interested witness and is hiding the fact of the incident in order to save himself.

13. The true incident has thus been carefully not allowed to be brought before us by this very witness. The case of the prosecution as put against the accused, particularly with reference to the landing of the blow, as described above, in our opinion does not inspire any confidence at all.

14. The other witness sought to be relied upon is P.W. 12 Clarina Mascarenhas, but she has not seen anything. She came on the scene after the incident was over. She had seen the deceased lying on the ground. P.W. 7 Babajan as we have already commented saw the deceased fallen on the road. The other witness said, to be eye witness has not seen anything and is P.W. 13 Visvas Chari before the Court. It is quite clear that the prosecution has failed to prove its case against the accused. The learned trial Judge unfortunately has not appreciated the evidence in the aforesaid light of the possibility of the blow having been given in the manner sought to be made out, of the solitary eye witness Francis Fernandes of the entire incident. As stated above, the recital of the nature of the incident cannot be questioned and has not been questioned. What was required to be considered was whether it is the accused who has done the deed.

15. On careful analysis of the evidence, we come to the conclusion that the prosecution has failed to make out its case against the accused.

16. With reference to the weapon, a lot can be said on behalf of the defence. The weapon in question is an ordinary kitchen knife. It has only one side which is sharp and the other side is blunt. The Doctor, in his deposition, has clearly stated that both the edges of the incised wound were clear, which could have been caused by a weapon having sharp edges on both sides. In other words there has to be a double edged weapon. That being not the position here, the case of the prosecution that the injury was inflicted with the help of material object knife itself is not possible to have caused the said injury.

17. The appeal is allowed. The Order of conviction and sentence is quashed and set aside and the accused is ordered to be set at liberty forthwith if not required in any other case.

18. Appeal allowed.