
(2015) 08 BOM CK 0131

In the Bombay High Court

Case No : Criminal Appeal No. 520 of 2015 and Criminal Application No. 779 of 2015 in Criminal Appeal No. 520 of 2015

Kailas Hanumant Nalawade

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 07-08-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 304, 324

Citation : (2015) ALLMR(Cri) 4674 : (2015) 4 BomCR(Cri) 259

Hon'ble Judges : A.R. Joshi, J

Bench : Single Bench

Advocate : Anita A. Agarwal, for the Appellant; Anamika Malhotra, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

A.R. Joshi, J—Heard rival arguments at length on this appeal preferred by the appellant / original accused No. 1 challenging his conviction for the offences punishable under Section 304 (Part II) and 324 of IPC. By the said impugned judgment and order, original accused Nos. 2, 3 and 4 were acquitted of both the charges. The present appellant was sentenced to suffer RI for seven years and one year for the respective offences for which he was convicted. The judgment and order of conviction was passed by the Additional Sessions Judge, Pune on 31.1.2015.

2. The case of the prosecution in nutshell is that in the evening of 18.1.2010 PW-1 complainant had been to the house of his friend one Arun Shingane (PW-3). That time, said Arun Shingane was not at home but his wife was present. That time, said PW-1 had occasion to see one Balasaheb Nalawade (accused No. 4) and there was some altercation and hot exchange of words between them. Apparently, some threats were given by said accused No. 4 to PW-1 complainant. Thereafter the complainant came back to his home and while taking dinner, he narrated the incident of such altercation and threat, to his son

(PW-2). That time his cousin brother one Sandip Sabale was also present in the house. Said Sandip Sabale is the victim who subsequently died in the incident which took place on that night. After the meals and after the discussion it was decided by PW-1, his son and said Sandip Sabale to go to the house of Arun Shingane (PW-3). It was also decided to reprimand said Balasaheb Nalawade for his conduct on that evening of abusing and giving threats to PW-1. As such, they went to the house of Arun Shingane at about 10:30 p.m. or so. On reaching the house, they met Arun Shingane and thereafter they came in front of the house of Arun Shingane on the road. The house of said Balasaheb Nalawade was situated in front of the house of Arun Shingane beyond the road. PW-1 called Balasaheb Nalawade outside his house and in fact there was again some altercation and hot exchange of words. By that time, other co-accused also came there including the present appellant / original accused No. 1 Kailas Nalawade who is son of said Balasaheb Nalawade. All the four accused started assaulting PW-1, PW-2 and PW-3.

3. In the midst of the fight present appellant went back to his house and brought one knife. According to prosecution said knife is Article "A" before the Court. Said knife is having blade length of 5 inches and handle length of about 5 inches. Admittedly said knife produced before the Court as Article "A" is having sharp-edge at one side and blunt on the other. This aspect is of much significance as argued by learned Counsel for the appellant for canvassing the argument that definitely this knife must not have been used for the assault on PW-2 and also assault on PW-3, mainly considering that the injuries received by them were clean-cut injuries and not having any blunt edge margin for one side.

4. According to the case of prosecution during the assault by means of knife, present appellant initially assaulted on the back of PW-2 causing bleeding injury. On this PW-1 and said Sandip Sabale rushed ahead to hold PW-2. That time present appellant stabbed Sandip on the left side of his chest with the help of knife he had brought from the house. Apparently, it was a single blow but on the vital part of the body and it pierced through and through in the chest cavity thus causing apparent instantaneous death. After the incident the injured was taken to the hospital but he was declared dead on arrival. PW-1 asked his son (PW-2) to go to the police station and report the matter. Accordingly PW-2 and one of his friends by name Kadam went to the police station. PW-2 was enquired by the police but he could not understand whether the police wrote down anything but he was given yadi and he was sent for medical check-up. He was examined by one Dr. Santpure (PW-8) for the injuries sustained by him. The injury sustained by the said PW-2 is described by the Medical Officer (PW-8). According to PW-8 said injury was on the back left side para spinal intra scapular to lumbar region oblique injury 1.5 cms X 1 cms X 1/2 cms, muscle deep and margins were sharp. The injury was fresh and within 24 hours.

5. Thereafter said PW-2 and his friend Kadam went to the hospital where by then deceased Sandip Sabale was already taken. Thereafter PW-1 attended the police

station and lodged his complaint at early hours of 19th January, 2010. The offence was registered initially under Section 302 of IPC and other allied offences, against all the four accused persons and it was registered at about 3:00 a.m.. Thereafter spot panchnama was conducted. The clothes of the victim Sandip and also the clothes of the accused persons and clothes of PW-2 were taken charge of under panchnama. At this juncture it must be mentioned that the clothes of PW-2 and clothes of the accused persons were taken under panchnama as stated by Senior PI (PW-11) who was the officer who conducted those panchnamas in presence of panchas. Both the panchas could not be examined as according to PW-11 one panch had died and another panch was blind. It is not ascertained during recording of the evidence before the trial Court as to whether the investigating agency has initially taken a blind person as panch or the said panch became blind during the pendency of the trial. However, the fact remains that none of the panchas were examined so far as recovery of clothes from the person of the accused and clothes of PW-2 are concerned. On 19.1.2010 all the four accused were arrested.

6. During the trial, total 12 prosecution witnesses were examined. Out of them, important witnesses are PW-1, PW-2 and PW-3 i.e. the complainant, his son and his friend Arun Shingane. PW-4 is the pancha so far as inquest panchnama on the dead body of Sandip Sabale is concerned. However, this pancha has turned hostile. PW-5 is the spot pancha and PW-6 is the pancha regarding seizure of clothes of the deceased. PW-7 is one doctor Nanaware who treated the accused No. 1 i.e. the present appellant and observed that there was small wound on the right temporal region of head and said PW-7 Doctor had dressed the said wound and issued the certificate and thus examination of said appellant was done on 18.1.2010 at Pooja Hospital when the appellant had attended said hospital. A medical certificate to that effect was given by PW-7 and it was taken on record as Exhibit-44 before the trial Court. The injury as mentioned in the certificate is small contusion on right temporal region of head and the examination was done at about 11:00 p.m. on 18.1.2010. PW-8 is another doctor Santpure who had examined PW-2. The injuries observed by said PW-8 are earlier detailed in this judgment. PW-9 is a pancha so far as recovery of knife at the instance of the appellant is concerned. This panchnama was conducted on 22.1.2010 and according to the case of prosecution the appellant made a voluntary statement and produced the knife Article "A" from his house and it was taken charge of by the police. Much is argued on this knife and the delay caused sending it to the Chemical Analyzer and said arguments shall be dealt in detail hereunder at the appropriate place. PW-10 is Dr. Khan who had conducted postmortem on deceased Sandeep Sabale. Last two prosecution witnesses PW-11 and PW-12 are the police officers. PW-11 has conducted the investigation and was the officer in whose presence the clothes of the accused persons were taken. As mentioned earlier the panchas regarding the seizure of cloths of the accused are not examined. PW-12 is the police officer who registered the first information report given by PW-1 and also conducted the spot panchnama.

7. Firstly it is to be ascertained whether Article "A" which is produced before the Court during the trial was the weapon of assault and whether it was recovered at the instance of the appellant. So far as recovery of Article "A" is concerned, panch witness (PW-9) is the witness. However, his cross-examination show various things which render his testimony vulnerable and unacceptable. During cross-examination he has stated that he has not read the panchnama. He admitted that his house and the police station are at a distance of 10 minutes and further admitted that occasionally whenever Sangvi police come for some work he go with them but still he denied the suggestion that the police were known to him but then accepted that he knew one police constable Mr. Shivale being his friend. He also accepted that he work in the house of said police constable. The effect of his substantive evidence goes to show that in his presence the appellant / accused did not make any voluntary statement and that he was asked to accompany the police for recovery of knife. In the cross-examination he has stated that constables told him that he has to go for panchnama of knife which was to be taken out. According to him during the spot panchnama procedure the accused was handcuffed and police were interrogating the accused in the jeep. According to this witness the neighbours had gathered on the spot during the panchnama and police went inside and said that they got the knife and then they said panchas that they all should go.

8. Apart from the effect of the substantive evidence of said pancha (PW-9), the another circumstance as to whether said knife Article "A" used in the assault is required to be ascertained. For this purpose, the description of the knife is required to be construed. Admittedly the knife is having blunt edge on one side and sharp edge on the other and having blade of about 5 inch of length. As against this, the description of the injury to PW-2, as reported by the examining Doctor (PW-8) show that the injuries were muscle deep and margins were sharp. During cross-examination, said PW-8 had answered to the following effect in para-6 of the notes of evidence :

"6] One side of knife Art A is sharp and other side is blunt. I have mentioned in MLC papers that both the margins of injury are clean cut. It is not true to say that my opinion is not correct. I have not personally measured the dimension of knife -Art A."

9. Now so far as the injury sustained by the victim deceased Sandip Sabale, the substantive evidence of PW-10 Dr. Khan is of much importance. During the post-mortem said Doctor observed the following external injuries.

"stab injury 2.5 cm X 1 cm cavity deep on right side of chest, costochondral region and penetrating the thoracic cavity. The injuries were ante mortem."

During the cross-examination, the Doctor has admitted that he had not mentioned the margins of the injury in column No. 17 of the postmortem notes but stated that it was a single stab injury. On this aspect of injuries whether can be possible by Article "A", learned APP vehemently argued that both these

doctors i.e. PW-8 and PW-10 have opined that the injuries they observed were possible by Article "A" i.e. knife which was shown to the doctors at the time of recording of evidence before the Court. In fact this solitary answer by way of opinion cannot be read in isolation but it is required to be read in juxtaposition of the answers given by the doctors during their cross-examination. The specific admissions by these doctors are already reproduced hereinabove. At the cost of repetition it can be said that the margins of the injury sustained at the back of PW-2 were clean cut margins. Again said Doctor (PW-8) had mentioned that in MLC papers he had mentioned margins of the injury as clean-cut.

10. So far as the injury of the victim, the substantive evidence of doctor PW-10 is to the effect that he has not mentioned the margins of injury in column No. 17 of the postmortem notes. Moreover, said PW-10 had answered that the police have not referred said weapon Article "A" for his opinion.

11. Considering above evidence, in the opinion of this Court definitely the prosecution has failed to establish that Article "A" was the weapon of assault and that it was the knife which was recovered at the instance of the present appellant.

12. Now this leads this Court to scrutinize the substantive evidence of PW-1 and PW-2 on one side and that of PW-3 on the other side. Apparently, now the entire case of prosecution rests on the oral testimony of these witnesses.

13. Admittedly said PW-3 Arun Shingane, friend of PW-2, did not support the case of prosecution on the vital aspect as to actual incident of assault on PW-2 and deceased Sandip Sabale. Though PW-3 gave evidence as to on that night his friend complainant i.e. PW-1 and others i.e. PW-2 and victim Sandip had been to his house on that late night and there was some sort of altercation but then his testimony rests there so far as supporting the case of prosecution and further he stated that he and his son went inside his house for having dinner. Further said PW-3 says that he alone came down at the column gate of his house after the meals and he saw Sandip was lying on the floor. Sandip was alive. According to this witness he and PW-1 went to bring rickshaw and they took Sandip to Thakur Hospital and from there to Medi Point Hospital. According to this witness Pandurang Jadhav (PW-1) came on motorcycle to Medi Point Hospital. The doctors at Medi Point Hospital declared him dead. According to this witness, Sandip had sustained injury in the scuffle. In the examination-in-chief itself said PW-3 further stated in para-3 to the following effect :

"3] It did not happened that Balasaheb Nalavade has assaulted Pandurang Jadhav with kick and first blows in my presence."

? As such, this witness was declared as hostile and his cross-examination was allowed to be taken by the prosecution. Portion marked A, B, C and D were put to him but he denied the correctness of these contents and those contents are to the effect that on the call given by PW-1 all the four accused came and accused No. 4 Balasaheb Nalavade told said PW-3 that he had brought the killers and the present appellant Kailas went running inside the house and brought the knife and

said Kailas stabbed Shrikant i.e. PW-2 and when Sandip went to rescue he was also stabbed by Kailas. In fact this PW-3 did not support the case of prosecution, as mentioned earlier, on this vital aspects.

14. During the arguments learned APP submitted that though on the actual factum of assault and stabbing PW-2 and the victim, this PW-3 had not supported the case of prosecution, the rest of the facts are admitted by him as to presence of PW-1, PW-2 and the victim Sandip at his house and PW-1 insisting that accused No. 4 be called and be enquired regarding the incident on that evening. It is further argued that the substantive evidence of PW-1 and PW-2 corroborates each other as to the role attributed to the appellant of going inside his house and bringing knife Article "A" and stabbing PW-2 on his back and then giving one stab on the vital part of the chest of victim Sandip. It is further argued that these witnesses cannot be termed as interested witnesses as they are natural witnesses and one of them is injured.

15. Also according to the case of prosecution and also as per the substantive evidence of PW-1 after the incident he asked PW-2 to go to the police station and lodge report and according to him PW-2 went to the police station. However, it is still admitted position that though according to PW-2 police enquired with him but there was no disclosure by him as to the actual happening of the events and also no disclosure of the name of the appellant as the assailant and stabbing PW-2 and deceased Sandip by means of knife after taking knife from his house. In fact it is also factual position that thereafter PW-2 went to Medi Point Hospital as he knew that the victim had been admitted there. According to this witness, in the hospital also the police persons had arrived and were enquiring as by that time the victim Sandip Sabale was already dead and apparently it was a case of murder. Even according to the substantive evidence of PW-1 police were there in the hospital but still no specific information was given to the police by giving the factum of the incident and name of the appellant as the assailant. Apparently there were two opportunities for PW-2 to inform the police immediately when he first went to the police station from the scene of offence and secondly when the police officers were present in the hospital, but, on both these occasions there was no specific complaint to the police. Also there was opportunity to PW-1 to inform the incident immediately to the police when the police had arrived at Medi Point Hospital but the substantive evidence of PW-1 shows that subsequently he went to the police station and gave detailed complaint taking names of the accused persons and name of the present appellant as assailant. According to PW-1 and PW-2 there was discussion at the hospital also and PW-3 Arun Shingane was also present. Apparently according to the case of prosecution said Arun Shingane was on cross terms with Balasaheb accused No. 4 and in fact according to the substantive evidence of PW-3 Arun Shingane, PW-1 had come to this place for asking explanation regarding conduct of Balasaheb which occurred in the evening of 18.1.2010.

16. By pointing out these circumstances and no immediate lodging of the

complaint and apparently lodging of the complaint after due deliberation, learned Counsel for the appellant submitted that it was in fact a plan to implicate the appellant and other co-accused in the incident of assault otherwise there would have been lodging of immediate complaint with the police.

17. Considering the above factual position and considering the admissions given by PW-2 and also omissions brought on record from his substantive evidence to the effect that he knew the accused being neighbours of PW-3 and that he and victim Sandip went to rescue his father PW-1 when Balasaheb was assaulting him and on the aspect as to having street lights in the said area of scene of offence. As such, scrutinizing the substantive evidence of PW-1 and PW-2 on one side with that of PW-3 and considering the factual position that article "A" knife could not have been the weapon of assault and could not have been recovered at the instance of the appellant, in the opinion of this Court, it must be said that the prosecution has not reached that standard of proof required for establishment of guilt for the offences charged. It must be said that the learned trial Sessions Judge had erred in appreciating the evidence of PW-1 and PW-2 with that of PW-3 and other circumstantial evidence and as such interference with the impugned order is warranted. The appeal is disposed of with following order :

ORDER

- i Criminal Appeal No. 520 of 2015 is allowed.
- ii The impugned judgment and order dated 31.1.2015 passed by the learned Additional Sessions Judge, Pune, in Sessions Case No. 411 of 2010 is quashed and set aside to the extent of present appellant. The appellant/accused No. 1 is acquitted of the offence punishable under Sections 304 (Part-II) and 324 of I.P.C.
- iii The appellant/accused No. 1 shall be released from jail custody if not required in any other matter;
- iv If the fine amount is already paid, the same shall be returned to the appellant;
- v Criminal Appeal is disposed of accordingly. Bail application is also disposed of as infructuous.