

(2009) 11 BOM CK 0046
In the Bombay High Court
Case No : Criminal Appeal No. 254 of 1998

Kannayya @ Kanna Vishnu Vidhate

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 21-11-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 143, 147, 148, 149, 302

Citation : (2009) 11 BOM CK 0046

Hon'ble Judges : Roshan Dalvi, J;B.H. Marlapalle, J

Bench : Division Bench

Advocate : D.G. Khamkar, in Appeal Nos. 254 and 330/1998; J.G. Bhanushali, in Appeal No. 757/1997, for the Appellant; V.B. Konde-Deshmukh, Assistant Public Prosecutor, for the Respondent

Judgement

Roshan Dalvi, J.—These Appeals challenge the judgment and order of the learned Additional Sessions Judge, Greater Bombay dated 11th November 1997 in Sessions Case No. 1320/1992. The appellants shall be referred by their respective numbers as accused in the above Sessions Case. Accused Nos. 1 to 10 were charge-sheeted as members of an unlawful assembly armed with deadly weapons for committing murder and causing death of one Vishwanath Deji Kotian by means of deadly weapons and attempting to commit murder of the complainant Dinesh Subash Shetye in pursuance of the common object of the unlawful assembly for offences punishable under Sections 143, 147, 148, 149, 302 and 307 of the I.P.C. The accused were also charge-sheeted for causing the death of the said Vishwanath Kotian by means of deadly weapons and for attempting to commit murder of the said Dinesh Shetye by means of deadly weapons in furtherance of the common intention for offences punishable under Sections 302, 307 read with Section 34 of the I.P.C.

2. It may be mentioned that as many as 10 accused were arrested in the case. All the accused except accused Nos. 3, 5, 6 and 10 have been acquitted. There is no mention of these acquitted accused in the F.I.R. The acquittal has not been

challenged by the prosecution. We are, therefore, concerned only with the prosecution case against accused Nos. 3, 5, 6 and 10. Accused No. 6 has expired. 8th

3. It is the prosecution case that on July 1992 at about 8 p.m the complainant Dinesh along with his friends Vishwanath, since deceased, and one Jitu Tailor had gone to a photo studio near Priya Hotel, Dutta Mandir Road, Santa Cruz to give negatives for developing the same. At about 8.30 p.m while they were returning from the photo studio, which is opposite the stable of one Nandu Seth, the accused persons came running towards them and surrounded them. They were armed with deadly weapons being Knives, chopper and gupti. They started assaulting Vishwanath and the complainant Dinesh. It is the prosecution case that accused Nos. 3 and 10 assaulted Vishwanath and due to which he ultimately died and accused Nos. 5 and 6 assaulted the complainant in presence of Jitu tailor.

4. This case is sought to be proved by the prosecution essentially through the oral evidence of PW 1 and PW 2. Pw 1 Is the injured witness. PW2 is the other eye witness who had accompanied his friend Vishwanath who succumbed to his injuries as well as PW 1 who was hospitalised for about nine days. The prosecution has sought to prove the weapons through the evidence of PW 3 who was the panch for recovery of the weapons stated to have been recovered from accused No. 8. Accused No. 8 has been acquitted. The prosecution has also shown the recovery of the clothes of the accused and the arrest of the accused through the evidence of PW 4. The clothes have been recovered after several days. Several of the accused who were arrested have already been acquitted. Exhibits 28 to 35 relate to this aspect. The further evidence led by the prosecution is the medical evidence of the Doctor PW 5, who examined the deceased as well as the complainant upon admission to the hospital and who issued the Injury Certificates Eexhibits-37 and 38. Upon the death of Vishwanath the Doctor P.W 6 has carried out the postmortem and submitted the postmortem report Exhibit-40. The prosecution has produced the C.A report in respect of the blood samples of the accused as well as the deceased to show the blood on weapons which is marked Exhibit-53. P.W.7 is the spot panch, who made the spot panchnama Exhibit-42. The clothes of the deceased have been seized under the panchnama Exhibit-22 and got produced through P.W 8. P.W 9 and P.W.10 are the Investigating Officers who investigated the case and who inter alia further produced the Inquest Report Exhibit-26 and the A.D.R Exhibit-46.

5. The oral evidence of P.W.1 and 2 is the most material part of the prosecution case. It will have to be seen whether the evidence of P.W.1, the injured eye witness has been corroborated by the evidence of the other eye witness.

6. We may mention that the learned Advocates on behalf of the accused have drawn our attention to the various anomalies in the description of the weapons, and their recovery from accused No. 8, who has been acquitted. We are satisfied that conviction cannot be based upon the recovery of weapons as shown by the

prosecution. We therefore shall not labour on that fact.

7. We may also mention that the clothes of the accused have been recovered after several days from each of the accused. Upon their arrest each of the accused have offered one pair of clothes. There is nothing incriminating found on the clothes. Nothing could have been found at the distance in time at which the clothes were recovered. It is seen that that was a completely empty formality totally devoid of any application of mind. We may mention that the recovery of clothes would become an incriminating circumstance only if they contain blood or such other substance as would connect the accused with the crime. Consequently, such clothes were to be recovered upon following the prescribed procedure, as soon as the offence occurred if the accused have been expeditiously arrested. If that is not done, mere recovery of pair of clothes being one shirt and one pant of each of the accused would take the prosecution case no further. We have seen such recovery in a number of cases and we wonder why needless effort is made in a completely redundant exercise of the kind. We deem it fit not to labour over such evidence also.

8. The two Doctors who had examined the deceased as well as the complainant, and who had issued the injury certificates and the P.M. Report are material witnesses. It would have to be seen whether the evidence of the description of the offence including the injuries that were caused to the deceased as well as P.W.1 are corroborated by the medical evidence.

9. The evidence of the spot panch P.W.7 and the evidence of the recovery panch P.W.8 who have respectively produced Exhibit-42 and 22 in evidence, is not material to consider the prosecution case.

10. P.W.1 has deposed that the incident occurred on July 1992 at 8 p.m. At that time he along with his friends Vishwanath and Jitu went to the photo studio which was situated near Priya Hotel on Dutta Mandir Road to give the negatives for developing the same. While they were returning to their house at 8.30 p.m and while they were opposite to the stable of Nandu Sheth he noticed four persons coming running towards them They were accused Nos. 3,5,6 and 10. They were armed with weapons. He did not know what weapons were in their hands. They started assaulting them. He has deposed that Accused No. 3 and 10 assaulted Vishwanath. Accused No. 6 caught hold of him, accused No. 5 assaulted him on the right side of his abdomen with a weapon in his hand. He became unconscious. He deposed that he did not know who removed him to the hospital. He was removed to V.N. Desai hospital. After he regained consciousness he came to know that Vishwanath died. He did not know why the accused assaulted him. The relations between Vishwanath and the four accused were not cordial. He knew the four accused. He identified them in court. He knew them for 10 years prior to the date of the incident. He lodged FIR. He has identified the weapons shown to him, which were used by the respective accused describing them as knife, chopper and gupti.

11. In his cross examination he has been asked about the time when his friends came to his house and when they went to the photo studio. He has been asked about the friendship with his friends. He has deposed that he knew Jitu, who was a painter since he was from his neighbourhood. He knew the deceased since his childhood. His cross-examination shows that he did not know about any enmity of the deceased with the accused. He knew the accused since they were from the same locality, though he had no occasion to meet or talk with them. He admitted that he did not know which weapons were in the hands of each of the accused. He visited the hospital for follow-up treatment for about two months after he was discharged. He has deposed about his consciousness upon being hit. He deposed that he became unconscious and remained so, for three days during which period he was operated. He has stated that he had not taken any receipt from the photo studio. He has described the incident in his cross- examination showing that when the 3 friends were walking horizontally, accused No. 6 first caught hold of his left hand. He could not get time to get rid of his left-hand from the clutches of accused No. 6; he was immediately assaulted by accused No. 5. He was stabbed opposite the stable. He did not try to catch accused No. 5 and 6 after he was stabbed; he naturally could not.

12. In his evidence the scene has been graphically described. In his cross-examination that has not been demolished. In fact in paragraph-11 of the cross-examination he has clarified the scene even better. For whatever reason that the three friends had gone to the studio and when they were opposite the stable, they were assaulted by four persons; his friend and he were assaulted by two accused each. Vishwanath was assaulted by accused Nos. 3 and 10. They both had weapons. He was himself caught by accused No. 6 and assaulted by accused No. 5 with a weapon. He suffered injuries whereas Vishwanth succumbed to his injuries. P.W.1 was hospitalised for as long as nine days, operated and then discharged. Even thereafter, he had to undergo follow-up treatment, a fact which has been brought out in his cross-examination. His evidence shows how the work of assault on two persons was partnered by four accused. His evidence shows that four persons came running at them. They were described by name or their nickname. He knew them from the locality.

13. It will have to be seen whether this oral evidence is corroborated. P.W.2 is the third person who was with the two victims. He was not assaulted. He has been able to run from the scene of the crime. P.W.2 has also deposed about the incident of 8th July, 1002. He has given the same time and the same reason for the three friends having been at that place. He has deposed about all the accused who were present at the scene including the accused, who have been acquitted. The roles assigned to accused Nos. 3,5,6 and 10 by him are the same. Aside from that he has also deposed about accused No. 2 to have assaulted Vishwanath. He has deposed that accused Nos. 3 and 10 assaulted him. Accused No. 5 assaulted Vishwanath first. He also assaulted P.W.1. He further deposed that the accused No. 7 kicked him in his abdomen. Further in his evidence he stated that accused No. 6 caught hold of P.W.1 and accused No. 5 assaulted him

with a weapon in his hand. He has described the weapons in the hands of the accused. Then he ran towards his house.

14. His cross examination shows that when he returned to the scene of the offence, no one was present except the deceased. The deceased was unconscious and profusely bleeding. He took him to the hospital. He had not gone to the police station which was on the way to the hospital. P.W.1 was brought to the hospital by his father. That was about 3 or 4 minutes after he reached the hospital. His evidence shows that PW.1 was conscious or semiconscious. He has been cross-examined about how the three friends met before they went to the studio. He did not know what happened to the negatives which were given in the studio. He has been asked about the description of the place. He has described the lane and the spot opposite the stable. His cross-examination shows the various accused coming from various directions; they were in a semicircle. He could not give the description of the weapons to the police. He was asked about the description of various weapons. He had not seen the sharpness of the weapons, but he volunteered to state that, it was a pointed weapon. He did not know the names of the weapons when his statement was recorded. He has given the names in his evidence. He has deposed that the knife was pierced at the time of the incident, and that it was not used by raising the hand and bringing it down. He has admitted certain omissions in his police statement, about the weapons carried by particular accused, as described by him in the evidence. He knew the accused since they resided in his locality though he had no occasion to meet and talk with them. He knew them by their nicknames or first names. He did not know any other names of the accused. He knew the deceased since his childhood. He has refuted the suggestion that he was not present at the time of the incident.

15. His evidence has shown the added role of accused No. 2 who has been acquitted. That was shown to be an omission. His evidence as well as his police statement shows the role of accused Nos. 3 and 10 as deposed by P.W.1 with the difference, that his evidence shows the accused No. 3 had caught Vishwanath and accused No. 10 assaulted him. His evidence has further shown the accused No. 5 had first assaulted Vishwanath. That fact is also shown to be an omission. His evidence shows that accused No. 5 assaulted P.W.1, a fact which corroborates the evidence of P.W.1. Hence a reading of his evidence shows that Vishwanath was assaulted by accused No. 3 and 10 and P.W.1 was assaulted by accused No. 5 and caught by accused No. 6. He has also deposed about a kick blows that he received in his abdomen from accused No. 7, which fact is an omission. Accused No. 7 as well as accused No. 2, who have been mentioned by him in his evidence have been acquitted. The evidence shows his knowledge of the accused. That was by their first names. That was because they lived in the locality, though they were not his friends and had no occasion to talk or meet. After the incident he went to his house and informed Vishwanath's sister. Vishwanath was hospitalised and declared dead. He saw him in a pool of blood when he returned to the spot of the offence after about 15 minutes. No one else was present at the scene of

the offence then. Vishwanath was unconscious and profusely bleeding. He took PW 1 to the hospital. He has deposed that he was conscious or semiconscious then. This cross-examination has shown how the three friends met before the incident and went to the photo studio though they did not produce any receipts of the photo studio. They have given certain description of the weapons upon being asked about their handle, length and sharpness. His evidence confirms that it was a pointed weapon which was pierced into the person of his friends.

16. The evidence of the P.W.2 therefore, largely corroborates the evidence of P.W.1. The knowledge of the accused is seen and hence they could easily identify the accused which both the witnesses have done in the evidence, though they do not know their full names. Since this case is dependent essentially on eye-witness record, the motive of the crime is immaterial to consider. Their evidence relating to the enmity between the victims and the accused is of no consequence. The evidence relating to the weapons becomes immaterial as we do not propose to consider the recovery of the weapons used by the accused as a circumstance which would connect the accused with the crime. Since the evidence of P.W.1 read with the evidence of P.W.2 vividly describes the incident that transpired and the specific roles of the four accused before us in this appeal, the prosecution case relating to the incident to that end becomes believable.

17. It has to be seen whether the oral evidence showing the incident is corroborated by the medical evidence. That is contained in the depositions of P.W.5 and 6 and the documents proved by them by direct oral evidence.

18. P.W. 5 was attached to V.N. Desai Municipal Hospital, Santacruz (East), Mumbai, as medical officer. He has deposed that on 8th July 1992 at 9 p.m he examined the patient Vishwanath in Casualty Ward. The patient was brought by his mother. He had no pulse, heart sound or respiration. He was declared "brought dead". He has shown several injuries suffered by the patient. All of these were incised wounds. The wounds were on the intestine, chest, lumber and scapular regions of the deceased. He made the relevant entry in the Medico Legal Register. He deposed that the injuries were serious in nature and on vital parts of the body. The injuries on the chest and dorsal spine was sufficient to cause his death. He deposed that the weapons produced by the prosecution would cause such injuries.

19. He also deposed about the examination of P.W.1 conducted by him on 8th July 1992 at 9.10 p.m. He was brought to the Casualty Ward with history of assault 20 minutes ago. He has also deposed that the patient was conscious. (This corroborates the evidence of P.W.2 though it runs contrary to the evidence of the patient P.W.1 himself). He deposed about the injuries suffered by P.W.1. That was an incised wound over the right iliac fossa region. His omentum (large intestine) was protruding. He deposed that the injury was of a serious nature on vital part of the body and was sufficient to cause death. Upon being shown the knife he deposed that the weapon would cause death of a person if injured with it.

20. His cross examination shows that detailed history about the injury suffered by Vishwanath was not available. That fact was recorded in the Medico Legal Register entry. He has explained that when both the edges of an injury are sharp, it is known as an incised wound. He was not aware about the depth of the injuries. He has however, agreed that unless the depth of the injuries was known, it would not be certified as serious. The fact remains that Vishwanath had suffered seven incised wounds on vital parts of his body. That resulted in his death. These injuries corroborate the evidence of P.W.1 and 2, both of whom deposed that accused Nos. 3 and 10 caused those injuries as described by them in their respective evidence. Both of them had weapons, the use of which resulted in profuse bleeding as seen by P.W.2 and the seven injuries as reported by P.W.5 show that their assaults were indeed such as would result in the death of the victim. P.W.1 suffered only one injury on his abdomen. This injury corroborates his own evidence that, whilst his left hand was caught by accused No. 6 and accused No. 5 had stabbed him in the abdomen. The Doctor's evidence shows that the omentum (large intestine) was protruding. The incise wound thereon is indeed a vital part of the body. The injury is reported to be of such serious nature, that it was sufficient to cause his death. He had lost consciousness at some time, whether or not, he was conscious upon admission to the hospital. The fact remains that he was hospitalised for as long as nine days. He had to undergo surgery and report to the hospital for two months thereafter. The injury was of such intensity that if proper treatment was not given to him the injury would have caused his death. The injuries caused by one person whilst he was held down by another shows the intention and knowledge on the part of both the persons acting with such common intention to cause such injury as would result in his death if he was not treated in time.

21. Since Vishwanath succumbed to his injuries his postmortem report was prepared by the Doctor, P.W.6 on 9th July 1992. The Doctor has deposed that Vishwanath's right lung was ruptured through and through and his left lobe had collapsed. He has deposed that injuries 3 and 4 mentioned in column No. 17 of the P.M. Notes were necessarily fatal and in the ordinary course of nature sufficient to cause death. His cross-examination shows that if a weapon such as article No. 2 shown to him, which has one sharp and one blunt side, is used to assault it would cause a clean cut injury on one side and a laceration on the other.

22. It has been argued on behalf of the accused No. 3 and 10 that the evidence of P.W.2 that the weapon was pierced in his body stands rejected upon such evidence. Consequently the Doctor has been asked whether the injury showed that one has to raise the weapon upward and then hit the surface to which P.W.6 has agreed. We do not consider this evidence material to come to the conclusion that the injury which has been caused could not have been caused by the weapon used by any of these accused. The Doctor has agreed that the injuries were caused on the vital parts of Vishwanath's body by the weapons shown to him. The oral evidence of P.W.1 & 2 is therefore, fully corroborated by the medical evidence led by P.W.5 and 6. We are satisfied that the evidence of these

two witnesses is sufficient to establish the case of the prosecution that the accused Nos. 3 and 10 caused the death of Vishwanath and accused Nos. 5 and 6 attempted to commit the murder of P.W.1 and caused upon him such grievous bodily injuries which if left untreated would have caused his death.

23. We shall have to see whether this evidence is sufficient to convict the accused for offences punishable under Sections 326 & 307 read with Section 34 I.P.C and 302 read with Section 34 of I.P.C.

24. In the case of Ramjee Rai and Others Vs. State of Bihar, a murder took place in a boat. The murder was witnessed by several persons from different angles including the brother of the deceased who was in the boat, but who swam to safety. The evidence of 4 eye witnesses was considered including a man sitting on a machaan who saw the incident and another man from the field who heard the cries of the deceased until the deceased stopped shouting, which made him realise that the deceased was no more. The recovery of the body of the deceased which was identified, though it was eaten by fish in several parts was the only other corroborative evidence. The Apex Court has considered such evidence enough to maintain the conviction.

25. In the case of Ramji Singh and Another Vs. State of Bihar, the oral evidence of the relatives of the deceased and the eye witnesses corroborated by the medical evidence alone was considered. The entire incident was deposed by the son, wife and the nephew of the deceased. Other witnesses were produced as eye witnesses. Medical evidence corroborated their testimony. There was no evidence of recovery of weapons at the instance of any accused or recovery of clothes of the accused. The corroboration of the evidence of the complainant by the oral evidence of other eye witnesses who were held to be natural witnesses, living in nearby houses of the witnesses who gave a full account of the occurrence was accepted. It was observed that there was no reason for them to implicate the accused falsely by leaving out the real culprits. This oral evidence was seen to be corroborated by the medical evidence for maintaining the conviction.

26. The case of Ramji Singh has been followed by our High Court in the case of Sharfuddin Jamaluddin Shaikh v. State of Maharashtra 2008 (1) Bom.C.R. 81. In that case also the incident of murder was witnessed by witnesses. Their evidence was collated to see contradictions, if any. Their evidence was seen to be corroborative inter se. It was further corroborated by the medical evidence. Relying upon number of judgments of the Supreme Court considering the credibility of oral evidence alone corroborated by medical evidence conviction has been maintained.

27. Upon the oral evidence corroborated by the medical evidence shown by the prosecution and disregarding, the evidence relating to recovery of the weapons or the recovery of clothes of the accused, we find the case against each of the aforesaid accused Nos. 3,5,6 and 10 having been made out. The accused No. 5 is

stated to have expired. Accused No. 5 had worked in unison with accused No. 6 though accused No. 6 is stated to have only held the left arm of P.W.1. We find that that overt act actually aided accused No. 5 in stabbing P.W.1 in his abdomen which resulted in a grievous injury to the vital part of his body. His intestine protruded out. He became unconscious and was hospitalised. An emergency surgery was undertaken. He remained in the hospital for 9 days. Even after discharge he had to attend the hospital for 2 months. If he was not given timely and qualitative treatment, as per the medical evidence, he would have expired. The act on the part of accused No. 5, thanks to the aid, of accused No. 6 would have resulted in his death. It is only because of timely treatment that that has been averted. The treatment given to him is not denied. If this act had caused the death of P.W.1 even at a later date a clear offence of murder would have been made out against them.

28. The acts of accused Nos. 5 and 6 is not independent of the acts of accused Nos. 3 and 10. It has been caused at the same time and during the course of the same transaction. The 4 accused performed their acts of murder upon 2 different individuals, but at the same time and place. It is because they attacked 2 separate persons, the deceased Vishwanath and P.W.1 that they divided their overt acts. Vishwanath Kotian expired; the P.W.1 survived. The acts of the 4 accused Nos. 3,5,6 and 10, therefore, incurred liability upon them to the same extent for the same offence.

29. The argument on behalf of the Accused No. 6 by Mr. Bhanushali that at best he would be liable only for grievous hurt is theoretically incorrect. The accused acted in furtherance of common intention. No separate intention is shown for committing the act by accused No. 6 different from accused Nos. 3 and 10. Consequently each of them are liable for that act in the same manner as if, it was done by him alone. However, it is not the case of the prosecution that accused No. 6 carried a weapon. Consequently though theoretically he would be liable for that act in the same manner as accused Nos. 3 and 10, for want of a weapon in his hand alone, we may accept to treat him differently. The attempt to murder P.W.1 is distinctly seen. Hence, whereas accused Nos. 3 and 10 must be held liable for the murder, accused No. 6 may be held liable only for attempt to murder. Further both the accused are held liable for causing grievous hurt to Vishwanath Kotian.

30. Consequently Criminal Appeal No. 254/1998 and 330/1998 fail and they are hereby dismissed. The order of conviction and sentence passed by the trial Court in Sessions Case No. 1320/1992 against accused Nos. 3 and 10 stands confirmed.

31. The Criminal Appeal No. 757/1997 is partly allowed.

32. The accused No. 6, the Appellant is convicted for the offence punishable u/s 307 read with Section 34 of the I.P.C and his conviction and sentence u/s 302 is set aside. He stands acquitted for the offence punishable u/s 302 read with Section 34 of the I.P.C. He is sentenced to suffer Rigorous Imprisonment for a

period of 10 years and to pay fine of Rs. 2000/-(Rupees two thousand only) in default thereof to suffer Rigorous Imprisonment for 6 months. He is also convicted for the offence punishable u/s 326 read with Section 34 of the I.P.C and he is sentenced to suffer Rigorous Imprisonment for 5 years and to pay fine of Rs. 500/-(Rupees five hundred only) in default to suffer Rigorous Imprisonment for 3 months.

33. The substantial sentences awarded to them are ordered to run concurrently. Undoubtedly all the Appellants would be entitled for set off, if any.

34. Appeals are accordingly disposed off.