

(2000) 10 BOM CK 0033
In the Bombay High Court
Case No : Criminal Appeal No. 706 of 1996

Kantilal Alias Chandrakant Shrirang More	APPELLANT
Vs	
The State of Maharashtra	RESPONDENT

Date of Decision : 13-10-2000

Acts Referred:

Penal Code, 1860 (IPC) — Section 299, 300, 302, 304(2)

Citation : (2001) ALLMR(Cri) 1 : (2001) 1 MhLj 660

Hon'ble Judges : Vishnu Sahai, J;D.S. Zoting, J

Bench : Division Bench

Advocate : Mr. A.G. Toraskar, for the Appellant; Mr. Dinesh E. Adsule, Assistant Public Prosecutor, for the Respondent

Judgement

Vishnu Sahai, J.—The appellant aggrieved by the judgment and order dated 30.9.1996 passed by the IIIrd Additional Sessions Judge, Sangli, in Sessions Case No. 192 of 1995, whereby he has been convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs. 3000/-, in default to suffer R.I. for two years for the offence u/s 302 of the I.P.C. has come up in appeal before us.

2. The prosecution case in short is as under :

The appellant and the deceased Vishwas were residents of village Dighanchi situated in District Sangli. On 26.5.1995 at about 11 a.m. Sarjerao Budhawale P.W.3 was grazing sheep's in the area known as Khandoba temple on the outskirts of village Dighanchi. He saw that the appellant with a small sickle attached to a stick climbed a jambul tree and shook some of its branches. When he was about to get down, the deceased Vishwas arrived on the spot. A scuffle between the appellant and Vishwas took place. Both chased one another. Thereafter, the appellant took an axe which was lying at some distance from the jambul tree and inflicted a blow with the same on the neck of Vishwas resulting in his instantaneous death.

3. The evidence of Mohandas More, the younger brother of Vishwas shows that

at about 3 p.m. one Raju Honrao came to Atpadi, and told him that his brother Vishwas had been murdered. Raju Honrao also informed Mohandas to inform the police. On receipt of the said information, Mohandas rushed towards the place of the incident where he found the dead body of his brother covered with a blanket. There was injury on his neck. He then went to police station Atpadi and lodged his F.I.R. same day at 5.15 p.m.

On the basis of the said F.I.R., Dy. S. P. Jay Vasantrao Jadhav P.W.8 registered an offence u/s 302 of the I.P.C. vide C. R. No. 55 of 1995.

4. The autopsy on the corpse of the deceased Vishwas was conducted on 27.6.1995 by Dr. Manohar Chavan P.W.4 who found on it the following injuries :-

"Slightly oblique incised wound over posterior side of neck mainly on right side. 10 cm. x 3 cm. at middle and tapering on both the sides x 8 cm. depth lateral side and which is 8 cm. at medial end on left side."

Wound is extending 3 cm. on left from midline on left side and 7 cm. on right side on the posterior side of neck."

On internal examination, Dr. Chavan found fracture of 6th cervical vertebrae and spinal cord cut throughout.

In the opinion of Dr. Chavan the deceased, died on account of neurogenic shock due to injury to spinal cord with fracture on cervical vertebrae, which injury in his opinion was possible by the axe shown to him (the axe recovered on the pointing out of the appellant).

5. The evidence of Uttam Babar P.W.5 shows that the appellant was the son of his maternal uncle. About 14 months prior to his giving evidence, the murder had taken place on Monday. On Tuesday at about 10 a.m. while he (Uttam) was in his mala, he found the appellant with his cattle and an axe under the jambul tree. He asked him why he came there, whereupon he told him that on Monday on account of jambul fruits there was a quarrel between him and Vishwas and he inflicted an axe blow on Vishwas's person. Thereafter, the appellant told him that he was going to surrender to the police.

6. The investigation was conducted in the usual manner Dy. S. P. Jay Jadhav P.W.8. On 11.8.1995, a group of persons whom he had sent for the search of the appellant produced the appellant before him. He interrogated the appellant.

On 16.8.1995, during the course of interrogation, the appellant stated that he could produce the axe which he had used in the commission of the said offence. Consequently, he sent for two public panchas, out of whom one namely Dharamji Mane P.W.1 has been examined. He recorded the willingness of the appellant in a panchanama in the presence of the panchas. Thereafter, he, the appellant and the panchas on a vehicle proceeded to village Devapur. The appellant directed the vehicle to be stopped near the field called Janichamala. From the said field, from the shrubs, he produced the blood stained axe which was seized under a

panchanama, P.W.8 sent the same to the Chemical Analyst along with other articles.

On 31.8.1995, after completing the investigation, Dy. S. P. Jadhav P.W.8 submitted the charge-sheet against the appellant.

7. The case was committed to the Court of Sessions in the usual manner where the appellant was charged for the offence u/s 302 of the I.P.C. to which charge he pleaded not guilty and claimed to be tried. His defence was of denial.

During trial, in all prosecution examined eight witnesses. One of them namely Sarjerao Budhawale P.W.3 was examined as an eye witness. Other witnesses included Dy. S. P. Jay Jadhav P.W.8 and public panch Dharmaji Mane P.W.1. who deposed about the recovery of the blood stained axe on the pointing out of the appellant and Uttam Babar P.W.5 who deposed about the extra-judicial confession made by the appellant to him.

The learned trial Judge believed the evidence adduced by the prosecution and convicted and sentenced the appellant in the manner stated in para 1, above.

Hence, this appeal.

8. We have heard learned counsel for the parties and perused the entire evidence on record. In our view, this appeal deserves to be partly allowed in -as much as in our Judgment, only an offence u/s 304(2) of the I.P.C. is made out against the appellant and not one u/s 302 of the I.P.C., for which offence, the Trial Court has found him guilty.

The evidence on which the conviction of the appellant is founded, can be classified under two heads namely :-

(a) the ocular account furnished by Sarjerao Budhawale P.W.3; and

(b) circumstantial :-

(i) the extra-judicial confession made by the appellant to Uttam Babar P.W.5; and

(ii) the recovery of blood stained axe on the pointing out of the appellant deposed to by Dharmaji Mane P.W.1 and Jay Jadhav P.W.8, the Investigating Officer.

In our view, the said evidence inspires confidence.

9. We begin with the ocular account furnished by Sarjerao Budhawale P.W.3. In para 2 of this Judgment, we have set out the prosecution story on the basis of the recitals contained in it and hence, we do not intend graphically reiterating to it. In short, he stated that on the date and time of the incident, he was grazing his sheep near the place of the incident. The appellant with a wooden stick in which a sickle was fixed climbed the jambul tree and started shaking its branches. When he was getting down, the deceased Vishwas came there and an altercation between him and Vishwas took place. Both chased one another. In the

meantime, the appellant picked up an axe which was lying nearby and inflicted a solitary blow with the same on the neck of Vishwas resulting in his instantaneous death.

We have examined the said account furnished by Sarjerao Budhawale and in our view, it is convincing. The manner of assault furnished by Sarjerao is corroborated by the evidence of the Autopsy Surgeon who candidly stated that the incised wound suffered by the deceased could be caused by the axe shown to him. Apart from it, we find that Sarjerao has explained his presence on the place of the incident. We also find that he had no enmity or ill will against the appellant which could prompt him to falsely implicate the appellant. In our view, on the basis of the ocular account of Sarjerao simplicitor, the involvement of the appellant has been established beyond reasonable doubt.

10. But, in this case, we have the bonus evidence in the form of circumstantial evidence referred to earlier.

The first circumstances against the appellant is the extra judicial confession which he made to his cousin Uttam Babar P.W.5 on the day following the incident. In the earlier part of our Judgment, we have referred to the circumstances in which the appellant came and made the confession. From a perusal of the evidence of Uttam Babar P.W.5, it is clear that the appellant came to him and told him on Tuesday that on Monday there was a quarrel between him and Vishwas on the issue of jambul fruits on account of which, he gave an axe blow on the latter.

In our view, this extra judicial confession inspires confidence. It should be borne in mind that Uttam Babar was the cousin of the appellant and had no reason to falsely attribute the extra judicial confession to him. We feel that this piece of circumstantial evidence inspires confidence.

We also feel that the evidence of the recovery of the blood stained axe on the pointing out of the appellant inspires confidence. As mentioned by us earlier, the evidence in support of it is of the public panch Dharmaji Mane and Dy. S. P. Jay Jadhav. Earlier, we have mentioned the manner and the circumstances in which the said recovery took place on the pointing out of the appellant and we do not wish to over burden our Judgment by reiterating the details. From the shrubs, the blood stained axe was recovered on the pointing out of the appellant.

It is pertinent to mention that although both Dharmaji Mane and Dy. S. P. Jay Jadhav were cross-examined but, they could not be discredited in respect of this recovery. In our view, unless in their presence, the blood stained axe had been recovered on the pointing of the appellant, they would not have foisted the said recovery on him.

It appears that the deceased was done to death with this axe because, the Autopsy Surgeon found an incised wound on his person which he stated on the axe being shown to him that it could be caused by it.

11. For the said reasons, in our view the involvement of the appellant in the incident has been established beyond all shadow of doubt.

But, we make no bones in observing that the learned trial Judge erred in convicting the appellant for the offence u/s 302 of the I.P.C. and only an offence u/s 304(2) of the I.P.C. is made out against him. It is pertinent to mention that there was no malice or ill will between the appellant and the deceased Vishwas. It should be borne in mind that the whole incident took place on account of the appellant shaking the branches of jambul tree.

The evidence of the solitary eye witness Sarjerao Budhawale shows that when the appellant was about to get down from the said tree, Vishwas reprimanded him; an altercation between the appellant and Vishwas took place; and both of them chased one another; and the appellant picked up an axe which was lying nearby and gave a solitary blow with the same on the neck of the deceased.

In our view, in the factual matrix in which the incident took place, the act of the appellant would not fall in any of the clauses of section 300 of the I.P.C., the breach of which is punishable u/s 302 of the I.P.C., but, would fall within clause thirdly of section 299 of the I.P.C., for in our view, when the appellant inflicted a solitary axe blow on the neck of the deceased, he had the knowledge of his death contemplated by the said clause. Hence, an offence u/s 304(2) of the I.P.C. would be made out against him.

Our view is reinforced by the decisions of the Supreme Court *Kulwant Rai v. State of Punjab*, *Jawaharlal v. State of Punjab*. In both the cases, during a sudden quarrel, a solitary blow with a dagger was inflicted on the vital part of the body of the deceased and the resultant injury was sufficient in the ordinary course of nature to cause death but, the Supreme Court took a view that in the circumstances in which it was inflicted, it could not be inferred that the accused had the intention to cause it and consequently the act of the accused would not fall within the ambit of clause thirdly of section 300 of the I.P.C. Hence, it converted the conviction from section 302 of the I.P.C. to one u/s 304(2) of the I.P.C. In this connections, it would be pertinent to refer to some observations contained in para 15 of *Jawahar Lal and Another Vs. State of Punjab*, which are to the following effect :-

"Merely because, the blow landed on a particular spot on the body, divorced from the circumstances in which the blow was given, it would be hazardous to say that first the appellant intended to cause that particular injury."

It is true that in our case, the Autopsy Surgeon has not stated that the injury suffered by the deceased was sufficient in the ordinary course of nature to cause death but, as the Supreme Court held in para 5 of the case of *Brij Bhukan v. State of U.P.*, that if it is per se apparent that the injuries are sufficient to cause death in the ordinary course of nature, the absence of evidence of a medical witness to state this in so many words, would be inconsequential.

In our case, looking to the dimension of the solitary incised wound sustained by the deceased on his neck and bearing in mind that beneath the said injury, 6 cervical vertebrae and spinal cord was cut throughout, it can safely be said that the injury suffered by the deceased was sufficient in the ordinary course of nature to cause death. However, in the factual matrix of this case, to which we have referred to earlier, it cannot be said that the appellant intended inflicting the said injury.

12. The question which remains is the quantum of sentence to be awarded to the appellant for the offence u/s 304(2) of the I.P.C. After reflecting over it, we are of the Judgment that a sentence of seven years R. I. would meet the ends of justice.

13. In the result, this appeal is partly allowed. Although we acquit the appellant for the offence u/s 302 of the I.P.C. and set aside conviction and sentence of imprisonment for life and fine of Rs. 3000/-, in default to suffer two years R.I. thereunder but, we convict the appellant for the offence u/s 304(2) of the I.P.C. and sentence him to undergo seven years R.I., for the same. The appellant is in jail and shall serve out his sentence. In case the appellant has paid the fine of Rs. 3000/- the same shall stand refunded to him.