
(2013) 07 BOM CK 0256
In the Bombay High Court
Case No : Criminal Appeal No. 542 of 2011

Kashinath and Parvati

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 29-07-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 357, 428
Penal Code, 1860 (IPC) — Section 300, 302, 304, 323, 34

Citation : (2014) ALLMR(Cri) 909 : (2014) 3 BomCR(Cri) 534

Hon'ble Judges : Naresh H. Patil, J; A.I.S. Cheema, J

Bench : Division Bench

Advocate : Satej S. Jadhav, for the Appellant; S.G. Nandedkar, Additional Public Prosecutor, for the Respondent

Judgement

Naresh H. Patil, J.—The Appellants were convicted for the offence punishable u/s 302 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay a fine of Rs. 2000/-, by the trial Court. The Appellant No. 2 was convicted for the offence punishable u/s 323 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for a period of six months and to pay a fine of Rs. 500/-. The Appellant No. 2 was also convicted for the offence punishable u/s 506 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for a period of one year and to pay a fine of Rs. 500/-. The prosecution case in brief, is that PW-1 Savita Ghodke is wife of deceased Dharmaraj Ghodke. The Appellant No. 1 is real brother of deceased Dharmaraj and Appellant No. 2 is wife of Appellant No. 1. Both the brothers were residing together along with their families in the ancestral house (Wada) situated at village Naholi, Tq-Ausa, Dist-Latur. On some trivial issue the Appellant No. 2 and the wife of the deceased used to have quarrel with each other. The immovable property was partitioned between both the brothers but they were residing together. About four months prior to the incident, the Appellant No. 1 purchased another house and started residing separately. Both the brothers had seven acres agricultural land, which was divided equally.

2. The prosecution case is that on the day of incident i.e. 6th September 2010, the Appellant No. 2 threatened the wife of the deceased, PW-1 Savita with dire consequences that she will kill both of them. On the day of incident, at about 2.00 p.m., it is alleged that the Appellant No. 2 Parvati assaulted wife of the deceased by a cycle tyre and threatened that she will see PW-1 Savita after she comes to the field. The deceased Dharmaraj had gone to the agricultural land in the morning hours. At about 3.00 p.m., PW-1 Savita, wife of the deceased, had also left home and went to her field. She had brought tiffin for her husband. Her husband was grazing bullocks in the field. On seeing PW-1 Savita, her husband came to her and they were talking to each other. At that time, Appellant No. 1, armed with stick and Appellant No. 2, armed with sickle, came near the deceased and PW-1 Savita. They started abusing them. Thereafter, Appellant No. 1 gave blow by stick on the head of Dharmaraj, due to which he fell down. Dharmaraj sustained bleeding injuries on his head. He became unconscious. The wife of deceased started shouting. Balaji Patil and Rajendra Patil reached the spot. They took Dharmaraj to Bhada on motorcycle of the Appellant No. 1. Thereafter they shifted the deceased in Civil Hospital, Latur. The medical officer advised that deceased be shifted to Solapur. They made arrangement to shift the deceased to Solapur, but on the way condition of Dharmaraj became critical, therefore, he was taken to private hospital at Latur. Dharmaraj died while he was taking treatment in private hospital, Latur.

3. Savita, wife of the deceased, lodged complaint on 6th September 2010, which is at Exhibit 23. Police registered Crime at No. 65 of 2010, in Bhada police station. Inquest panchnama was carried out. The police seized stick and sickle from the place of incident and prepared spot panchnama, Exhibit 29. Clothes from the person of the deceased were seized under Panchnama, Exhibit 28. The clothes of Appellant No. 1 were seized under Panchnama, Exhibit 30. Investigating Officer recorded statement of witnesses and sent seized articles to the Chemical Analyzer. The charge-sheet came to be filed against the Appellants.

4. PW-1 Savita Dharmaraj Ghodke, wife of the deceased, deposed before the Court about the strained relationship between herself and Appellant No. 2. On the day of incident, Appellant No. 2 had threatened that she will kill PW-1 and her husband. Appellant No. 2 had also assaulted PW-1 Savita at about 2.00 p.m. The witness further deposed that in the afternoon when she went to the field with tiffin, the Appellants came to the spot and started abusing. The Appellant No. 1 gave blow of stick on the head of Dharmaraj, due to which he fell down. He became unconscious. The Appellant No. 2 was having sickle in her hand. One Balaji Patil and Rajendra Patil reached the spot, no sooner they heard cries of the wife of the deceased. On motorcycle the deceased was taken to Bhada and thereafter to Civil Hospital, Latur. The deceased was shifted to private hospital at Latur and while taking treatment, he died.

? During cross-examination, the witness deposed that Appellants were residing with the family of the deceased for near about five years. She accepted that

agricultural lands were partitioned and both the brothers got 3 and 1/2 acres of land to their share. Even after the partition, both the brothers were residing together for a long time in the same house. She admitted that Appellant No. 1 purchased a house with the consent of his brother, deceased Dharmaraj. Both the houses are opposite to each other. In the agricultural land, the pipeline for supply of water is common. Both the brothers have separate cattle-sheds in the land. She admitted that there was no dispute or quarrel between Appellant No. 1 and deceased Dharmaraj. She also admitted that motorcycle on which the deceased was carried to Bhada, was owned by Appellant No. 1. Appellant No. 1 was present with the family when deceased was taken to Civil Hospital, Latur. When the doctor advised that deceased be taken to Solapur, Appellant No. 1 called vehicle from village Bhada and then all including the witness and Appellant No. 1, proceeded to Solapur. The witness admitted that her brother-in-law and brother asked her to put her thumb mark on the complaint which was drafted by them and accordingly the witness put her thumb mark on the first information report, Exhibit 23. This first information report was written in the private hospital by her brother and brother-in-law.

5. PW-2 is Dnyandeo Manmathappa Kevalram. He is a pancha of seizure of clothes of deceased Dharmaraj and also spot panchnama. He deposed that place of incident was found to have been trampled. One stick and one sickle was found lying at a distance of 30 feet from the place of incident. The said articles were seized. He identified the articles. This witness is real brother of PW-1 Savita. According to him, Basveshwar Uttam Patil, another pancha, is husband of his cousin sister.

6. PW-3 Sopan Dharmaraj Ghodke, was 16 years old boy at the time of deposition. He is son of deceased. He deposed before the Court that he went to field with his mother. While they were together along with the deceased, the Appellants reached there and started abusing his parents. Thereafter Appellant No. 1 rushed to his father and gave 2-3 blows by stick on the head of his father. Appellant No. 2 was having sickle in her hand. Appellant No. 2 asked Appellant No. 1 to cut his mother, PW-1 Savita, with the help of sickle. Appellant No. 1 was having stick in his hand. His father fell down and became unconscious. He referred to presence of Balaji Ghodke, Dhananjay More and Raju Patil, who reached the spot. According to him, Balaji went to his house and brought motorcycle and took his father on the motorcycle to hospital at Bhada.

? During cross-examination, the witness stated that he is a school going boy. His school timings are from 7.30 a.m. to 1.30 p.m. He admitted that at about 3.00 p.m. his father was taken from the field to hospital and at that time, he and his grand mother were in the house. An important omission is brought on record in the evidence of this witness to the extent of his deposing before the Court that Appellant No. 2 asked Appellant No. 1 to cut his mother by sickle.

7. PW-4 is Dr. Sunil Soudagar Ravte, who was private medical practitioner at village Bhada. He examined the deceased Dharmaraj as O.P.D. Patient. The

witness applied bandage to the injuries of deceased Dharmaraj. Though the witness claims to have maintained the record of the treatment, he had not brought the same to the Court on the day of deposition.

8. PW-5 is Dr. Dharmaraj Apparao Dudde. He conducted post-mortem of the deceased. He noticed following two injuries on the dead body:-

i) Abrasion over right forearm of size 1/2 X 1/2 c.m.

ii) Sutured wound over left parieto occipital region, six sutures in number which crack fracture of parietal and occipital bone left side.

? The doctor deposed in his examination-in-chief that fractures were seen on left parietal and occipital bone of the deceased and the injuries were ante-mortem. On internal examination, he noticed hematoma of size 8 X 6 c.m. at left parieto occipital region. According to him, Dharmaraj died due to "head injury". The post-mortem notes are at Exhibit 36. According to the medical officer, the injuries received by the deceased were sufficient to cause death. The injuries were possible by hitting a stick on the head.

? In the cross-examination the witness deposed that there was fracture to the skull and the injuries received by the deceased could be possible by fall from tree.

9. PW-6 Anant Mahipatrao Kulkarni was the Investigating Officer. He gave brief narration of the investigation. In his cross-examination, he deposed that no weapon was recovered from the accused.

10. The Appellant Nos. 1 and 2 had submitted a written statement under the provisions of Section 313 of the Code of Criminal Procedure, Exhibit 47.

11. Learned counsel Shri. Satej Jadhav appearing for the Appellants, submitted that relations between the Appellant No. 1 and deceased were absolutely cordial. There is nothing on record to suggest contrary. Whatever little differences between Appellant No. 2 and the wife of the deceased, were of trivial nature, which could be routine wear and tear of day to day life. Both the brothers were residing together happily. They got their lands partitioned and they were looking after their agricultural lands without any disturbance and interference. The financial condition of Appellant No. 1 was better than the deceased. In respect of the evidence brought on record regarding assault made by the Appellant No. 1, it was submitted that there were trees in the field. The deceased had climbed up a Bor tree, he had fallen down and due to which he sustained injuries. There was no motive for the Appellant No. 1 to assault his own brother. The first information report was written by brother-in-law and brother of PW-1 Savita, who was made to put her thumb mark on the same. Probably PW-1 Savita was not aware what was written in the complaint, which was treated as first information report. The conduct of the Appellant No. 1 was highlighted by the learned counsel. It was submitted that motorcycle for taking the deceased to hospital, was owned by Appellant No. 1. Appellant No. 1 was present in the hospital at Latur and had also called vehicle for taking deceased to the hospital at Latur and was with the

family while it was advised that deceased shall be taken to Solapur. It means that all along Appellant No. 1 was with the deceased and his family. Learned counsel submitted that PW-3 Sopan, son of the deceased, must not be an eye witness. He must be got-up witness. He was not there on the spot, considering his evidence. Learned counsel further submitted that, alternatively, in case the prosecution case is to be believed, then considering the medical evidence, the relationship between the parties and the suddenness of the incident, it could be gathered that Appellant No. 2 did not commit any offence individually, neither she shared common intention with Appellant No. 1 to give a stick blow on the head of the deceased. Therefore, the Appellant No. 2 cannot be held guilty for committing an offence punishable u/s 302 of the Indian Penal Code. In the alternative, the learned counsel submitted that the Appellant No. 1 had no motive, neither intention to cause death of the deceased. If prosecution case is believed, then the case would fall under category of exception IV of Section 300 of the Indian Penal Code. The counsel placed reliance on the written statement filed by the Appellants under the provisions of Section 313 of the Code of Criminal Procedure.

12. The learned A.P.P. submitted that there are two eye witnesses, mother and son, who have deposed against the Appellants. Evidence of both the eye witnesses is reliable. Their evidence is supported by the medical evidence. From the spot, sickle and stick were recovered by the investigating officer. The spot where the incident took place, had black soil which was wet on the day of incident and therefore theory of defence of deceased falling down from Bore tree, is imaginative. The Appellant No. 1 did not bring the deceased to the Hospital. There were other persons who had brought the deceased to the Hospital. The Appellant No. 2 had threatened the wife of the deceased on the day of incident, with dire consequences. It was Appellant No. 2 who intimidated and prompted the Appellant No. 1 to cut PW-1 Savita with the help of sickle. The sickle was in the hands of the Appellant No. 2. The Appellant No. 1 was having a stick. No sooner they saw the PW-1 and deceased together, they reached the spot with intention to commit serious crime, therefore, no leniency be shown to either of the Appellants and the Appeal be dismissed.

13. We have perused the entire record and considered the submissions advanced. From the prosecution evidence, it becomes clear that for a long time both the brothers along with their family, were residing in the ancestral house (Wada). With the consent of deceased, Appellant No. 1 purchased new house opposite Wada and he started residing there. Relations between two ladies, wives of both the brothers, were not cordial. It has come on record that on the day of incident, Appellant No. 2 threatened the wife of the deceased and even assaulted her. In the afternoon when the wife of the deceased went to field with tiffin, she met her husband there in the field who had left the house in the morning. They were talking with each other. That time the Appellants who were also working in the field, came there and started abusing, according to the prosecution evidence. Evidence shows that Appellant No. 2 was having sickle and Appellant No. 1 was

having stick. Though PW-3 Sopan, son of the deceased stated that Appellant No. 2 told Appellant No. 1 to cut his mother with the sickle, but there is no reference of such utterances made by Appellant No. 2 in the evidence of wife of the deceased. Wife of the deceased does not refer to the presence of her son. It needs to be appreciated as to whether Appellant No. 2 shared common intention with Appellant No. 1, to commit murder of deceased. From the evidence brought on record, conduct of parties, we are of the considered opinion that Appellant No. 2 did not share intention to commit murder of deceased or cause any such bodily injuries to the deceased which would endanger his life.

14. The evidence suggests that relations between both the brothers were absolutely cordial. Then question arises as to why Appellant No. 1 assaulted his brother with a stick, due to which he fell down and died in the private hospital during treatment. The evidence on record as to the reason which prompted the Appellant No. 1 to assault the deceased with a stick blow, is not clear and lacking in necessary particulars.

15. The suggestion of the defence that the deceased must have fallen from Bor tree and suffered injuries, is not acceptable suggestion. Considering the spot panchnama, the attending circumstances and the evidence on record, we are of the view that deceased could not have suffered such injuries by falling from a tree. The land on the spot was of black soil, it was wet and even if the deceased had fallen from 30 to 40 feet from Bor tree, still such injuries were not possible. We therefore reject the defence taken by the Appellants in respect of the cause of injuries suffered by the deceased.

16. We find substance in the evidence of PW-1 to the extent that Appellant No. 2 had abused her and assaulted her on the day of incident. At the same time, it cannot be ignored that complaint was drafted by the brother and brother-in-law of the wife of the deceased and she was made to put her thumb mark on the same. PW-1 has accepted the same. Considering the medical evidence, the nature of injuries suffered by the deceased, we are of the opinion that the deceased died due to one stick blow which was inflicted by the Appellant No. 1. It is unfortunate that the blow landed on the head of the deceased. Considering the facts and circumstances, the quality of evidence, the relations between the Appellants and the deceased, we are of the view that Appellant No. 1 cannot be convicted for an offence punishable u/s 302 of the Indian Penal Code. The case would fall under Part-II of Section 304 of the Indian Penal Code. The conviction of Appellant No. 2 for offence punishable u/s 302 of the Indian Penal Code is not sustainable.

17. Considering the evidence on record, we find that the Appellant No. 1 shall be convicted for an offence punishable u/s 304 Part-II of the Indian Penal Code. The Appellant No. 2 deserves to be acquitted from the offence punishable u/s 302 of the Indian Penal Code, whereas the order of conviction and sentence u/s 323 and 506 of the Indian Penal Code imposed by the trial Court on Appellant No. 2, deserves to be confirmed. In the facts of the case we find that appropriate fine is

required to be imposed on Appellant No. 1 under the provisions of Section 357 of the Code of Criminal Procedure, for the purposes of giving compensation to PW-1 Savita. On this issue, we elicited information from the counsel appearing for the defence in respect of the financial condition of the family of the Appellants. We find that this is a fit case where PW-1 Savita, wife of the deceased shall be compensated. It is very unfortunate that she lost her husband, when the relations between both the brothers were absolutely cordial through-out their life.

ORDER

- 1) Criminal Appeal No. 542 of 2011 is partly allowed.
- 2) The Judgment and order dated 9th September 2011 passed by the Additional Sessions Judge, Latur in Sessions Case No. 111 of 2010 convicting the appellant Nos. 1 and 2, namely, Kashinath s/o Dnyanoba Ghodke and Parvati w/o Kashinath Ghodke, for an offence punishable u/s 302 read with 34 of the Indian Penal Code, 1860 and sentencing them to suffer imprisonment for life and to pay a fine of Rs. 2,000/-, in default, to suffer rigorous imprisonment for two months is quashed and set aside.
- 3) Appellant No. 1 - Kashinath s/o Dnyanoba Ghodke is convicted for an offence punishable u/s 304 part II of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs. 25,000/- (rupees twenty five thousand only), in default of payment of fine, to suffer rigorous imprisonment for six months. If the fine amount is paid, the same shall be paid to the complainant, wife of the deceased, namely Savita Dharamraj Ghodke as compensation u/s 357 of the Code of Criminal Procedure, 1973.
- 4) The appellant No. 2-Parvati w/o Kashinath Ghodke is acquitted of the offence punishable u/s 302 of the Indian Penal Code. Fine amount, if paid, be refunded to appellant No. 2.
- 5) The order of conviction and sentence passed by the trial Court against appellant No. 2-Parvati w/o Kashinath Ghodke for offence punishable under Sections 323 and 506 of the Indian Penal Code is maintained.
- 6) The appellants are entitle to the benefit of set off as prescribed u/s 428 of the Code of Criminal Procedure, 1973.