

(2023) 11 BOM CK 0003
In the Bombay High Court
Case No : Criminal Appeal No. 535 Of 2017

Kishor And Others

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 03-11-2023

Acts Referred:

Indian Penal Code, 1860 — Section 34, 300, 302, 304II

Citation : (2023) 11 BOM CK 0003

Hon'ble Judges : Vibha Kankanwadi, J;Abhay S. Waghware, J

Bench : Division Bench

Advocate : Rajendrraa Deshmukh, Devang R.Deshmukh, S.J.Salgare

Final Decision : Dismissed

Judgement

Abhay S. Waghware, J

1. Both appellants are hereby assailing judgment and order of conviction passed by the learned Additional Sessions Judge, Aurangabad dated 15-09-2017 in Sessions Case No.153 of 2013 by which both appellants are held guilty and thereby convicted for offence under Section 302 read with 34 of the Indian Penal Code (IPC) and sentenced to suffer imprisonment for life.

BRIEF STORY OF PROSECUTION

2. On 16-01-2013 at around 10:00 p.m. there was heated exchange of words between PW1 Pawan and appellant Samadhan. Thereafter, at the instance of appellant Samadhan, 5-6 boys visited house of PW1 Pawan raising shouts. PW1 Pawan called up appellant Samadhan and questioned him why he had sent boys to his house. According to prosecution, appellant Samadhan threw challenge to PW1 Pawan to visit N6 Cidco. PW1 Pawan went to the said place with his younger brother Kapil at around 11:45 p.m. There appellants Samadhan, Kishor and two of their other friends initially assaulted PW1 Pawan with fist and kick blows. Appellant Kishor whisked out knife from his waist and gave several blows on the chest, stomach, waist of Kapil as a result of which he collapsed. PW1 Pawan with

the help of PW3 Chandrakant shifted him to the hospital. Early morning Doctor declared him dead. After last rituals and funeral, PW1 Pawan set law into motion vide Exh.18. Crime being registered, investigated by PW6 Bawiskar (PI) and both appellants were challaned and finally tried by the learned Additional Sessions Judge, Aurangabad, who on appreciation of evidence adduced by prosecution, reached to a conclusion that prosecution has proved the charges and thereby convicted both appellants for charge under Section 302 read with 34 of the IPC.

Above conviction is subject matter of challenge in this appeal on various grounds raised in the appeal memo.

SUBMISSIONS

On behalf of appellants :

3. Mr.R.S.Deshmukh, learned Senior Counsel for the appellants took us through the charge as well as evidence of PW1 Pawan, PW2 Vishal, PW3 Chandrakant and PW6 Pratap (Investigating Officer) i.e. through both examination-in-chief and cross-examination and he would strenuously submit that there was no motive behind the occurrence. He would submit that merely case is put-forth that appellant Samadhan is a 'Gunda element' but there is no iota of evidence documentary or oral. He pointed out that going by sequence enumerated by prosecution witnesses, it is the informant party who themselves had gone to the spot. He would submit that here what actually happened at the spot is neither stated by PW1 Pawan, PW2 Vishal and PW3 Chandrakant, who are relevant witnesses. He pointed out that very genesis of occurrence is also not put-forth by prosecution. That the act was not premeditated one as there was only allegation of assaults by fist and kicks. He pointed out that there is nothing on record to show that appellant Samadhan was aware of appellant Kishor to be armed with knife or he to be using it. Consequently, it is his submission that even common intention could not be attributed with such quality of evidence. He further pointed out that here though there is allegation of assault by appellant Kishor, surprisingly recovery of knife is shown to be at the instance of appellant Samadhan and so it is his submission that so called discovery cannot be attributed to appellant Samadhan, who was neither equipped nor put to use any weapon in the incident. He submitted that viewing from any angle, case in hand would not attract offence under Section 302 of the IPC but at the most it would attract offence of culpable homicide not amounting to murder and more particularly, offence under Section 304 Part II of the IPC and case would not travel beyond it. For all above reasons, he seeks indulgence of this Court by allowing the appeal.

On behalf of State;

4. Countering above submissions, learned APP would submit that it is a clear case of homicidal death. PW5 Dr.Rathod, Autopsy Doctor has confirmed death to be homicidal one. Learned APP invited our attention to the post mortem report Exh.65 in support of his such submission. He further submitted that here there is

direct evidence. PW1 Pawan himself is victim of assault. PW2 Vishal and PW3 Chandrakant, who had no axe to grind and are independent witnesses have also named both the appellants for committing offence of murder. Weapon is recovered and though it is shown to be recovered at the instance of accused Samadhan, in the light of availability of eye witness account, so called recovery also cannot be itself made a ground to acquit accused persons, who are shown to be responsible for death of deceased Kapil, who was mercilessly done to death. Favouring the judgment passed by the learned trial Judge, he submitted that there is full-proof and strong incriminating evidence regarding involvement of appellants. Therefore, they are rightly held guilty and convicted. There is no merit in the appeal and so he prays to dismiss the appeal.

5. In support of its case, prosecution has examined in all six witnesses in the trial Court. Their status is as under :

EVIDENCE ON BEHALF OF PROSECUTION

PW1 Pawan Bhagvandas Vaishnav is brother of deceased and informant. His evidence is at Exh.17.

PW2 Vishal Dinkarrao Kanitkar is also an eye witness. He is an independent witness. His evidence is at Exh.34.

PW3 Chandrakant Nana Gawai is another eye witness. His evidence is at Exh.52.

PW4 Vinod Pralhadrao Farkade is Pancha to memorandum and seizure of knife. His evidence is at Exh.58. Seizure panchanama is at Exh.60.

PW5 Dr.Vikas Madan Rathod is Autopsy Doctor. His evidence is at Exh.64.

Post mortem report is at Exh.65.

PW6 Pratap Wamanrao Bawiskar is Investigating Officer. His evidence is at Exh.73.

6. We have meticulously gone through the evidence adduced by the prosecution in the trial Court and have carefully re-appreciated, re-analyzed and re-examined the evidence of prosecution, more particularly, evidence of PW1 Pawan, PW2 Vishal and PW3 Chandrakant. There is no serious dispute that deceased Kapil met homicidal death. On visiting evidence of PW5 Dr.Rathod, Autopsy Doctor and taking into account the multiple stab injuries found on person of deceased, there is no hesitation to held that it is only and only homicidal death and nothing short of it.

7. Now it is to be seen as to whether both appellants are guilty for the homicidal death of deceased Kapil or not.

On carefully going through the evidence of PW1 Pawan, it is emerging that on 16-01-2013 at around 10:00 p.m. when he was going to visit a Pan stall, appellant Samadhan seems to have given him a call and when PW1 Pawan ignored, appellant Samadhan got annoyed and started hurling abuses and

therefore PW1 Pawan seems to have gone to him and questioned him upon which he had allegedly uttered "Thamb Tula Dakhavato" (wait I shall show you).

It has further come in his evidence that shortly after PW1 Pawan reached home, 5-6 boys visited house of PW1 Pawan raising shouts which prompted PW1 Pawan to make a phone call to appellant Samadhan to ask him as to why he had sent boys towards his house and it is thereafter, PW1 Pawan claims that appellant Samadhan asked him to come to Buddha Vihar located at N6, When PW1 Pawan and deceased Kapil, his younger brother, reached said place, it is stated that both appellants and their two associates started assaulting PW1 Pawan. That time it is stated that appellant Kishor took out a knife from his waist part and gave blows on chest, stomach, waist and hand of Kapil after which he fell down. PW1 Pawan claims that he sought help from PW3 Chandrakant and thereafter, deceased was shifted to hospital and at around 06:00 a.m. in the following morning Kapil was reported to be dead and thereafter, FIR was lodged.

In spite of extensive cross-examination of PW1 Pawan, it is noticed that neither the first incident nor the second incident of assault is seriously questioned. Cross-examination is rather confined to about any previous quarrel, about previous talks, about how he came to know about phone number of appellant Samadhan, about appellant Samadhan to be customer of his shop, from whom he heard regarding appellant to be of a bad element, timing of Pan stall, timing of reaching hospital, how much time spent in hospital and whether information was passed to Police while in hospital i.e. Kamalnayan Bajaj hospital and MGM hospital. Consequently, there is little or no cross-examination about actual assault, which took place including initial beating by fist and kicks and thereafter, appellant Kishor stabbing deceased.

8. Another witness PW2 Vishal, in our opinion, is crucial for the simple reason that he is an independent witness. He is a chance witness as he seems to be passing by the spot to meet his friend Pushkar residing in Sambhaji Colony. He deposed that when he and his friend were chatting at Pan stall, he saw PW1 Pawan and his brother Kapil standing nearby. After 5-10 minutes, appellants came there hurling abuses to PW1 Pawan and they assaulted PW1 Pawan by hands and legs. This witness has stated that when deceased Kapil intervened the quarrel and questioned about assault on his brother, both the appellants started assaulting him also. During the assault by these two persons alongwith two of their associates, appellant Kishor took out knife and inflicted 5-6 blows on deceased i.e. on waist, abdomen and chest as a result of which deceased fell down. This witness stated that he himself, his friend Pushkar went to lift him and by that time, PW3 Chandrakant also came there and they all shifted injured to MGM hospital and Doctors at MGM hospital told that condition is critical and so injured should be taken either to GHATI or Kamalnayan Bajaj hospital and therefore, they shifted him to Kamalnayan Bajaj hospital where Doctor advised surgery to heart. This witness stated that he himself as well as his associated Pushkar spent entire night in the hospital. In the morning at around 06:00 a.m.,

Doctor declared Kapil dead. He has identified accused present in the Court.

Even this witness is not seriously questioned about the occurrence as cross-examination pertains to questions as to whether he is neighbour of informant, and with whom he was that day i.e. whether with his friend Pushkar or informant and his brother. He is asked at which spot he was when the incident took place. He had denied friendly relations with PW1 Pawan or deceased. He is unable to state names of 3-4 persons accompanied accused on that day. He has denied that there was darkness at the spot. Rest are all denial.

9. PW3 Chandrakant in his evidence at Exh.52 stated that on the night of 16-01-2013 at 10:30 p.m. while he was taking dinner in a programme near his house, he heard shouts from the side opposite to his house. He claims to have gone here and saw exchange of hot words between appellant Samadhan and PW1 Pawan. He stated that at that time PW1 Pawan told him about blood oozing from the stomach of his brother Kapil and requested him to bring vehicle. Accordingly, he brought vehicle and shifted Kapil to MGM hospital and from there to Kamalnayan Bajaj hospital. He again reiterated that when he had been to spot that time he saw that appellant Kishor was assaulting Kapil with Sura.

In cross-examination he admitted that on the date of incident, appellant Samadhan had made a phone call to him and this witness also made phone call to PW1 Pawan and about again informant made phone call to this witness at 23:21 hours. He admitted that he tried to settle the quarrel between boys. Rest all is denial.

ANALYSIS AND CONCLUSION

10. On analysis of testimonies of PW1 Pawan, PW2 Vishal and PW3 Chandrakant, it is clearly emerging that on the night of 16-01-2013, there was initial quarrel between PW1 Pawan and appellant Samadhan and subsequently when PW1 Pawan and his deceased brother Kapil went to N6 on being called by appellant, there was also assault initially by fist and kicks but subsequently appellant Kishor stabbing deceased Kapil that night. Such version is consistently and unequivocally coming from the mouth of not only informant, brother of deceased, but even from PW2 Vishal, who is admittedly an independent witness.

In spite of being cross-examined, evidence about occurrence of assault has remained intact in the evidence of both PW1 Pawan and PW2 Vishal. No doubt PW3 Chandrakant seems to have reached later but he is party to shifting of the injured to hospital. All three are naming appellants to be quarreling, abusing and assaulting. Therefore, here there is credible eye witness account as well as injured witness account which has remained unshaken.

11. PW4 Vinod seems to be Pancha to recovery and discovery of knife, but as rightly pointed out by learned Senior Counsel for the appellants, discovery of knife, which was admittedly put to use by appellant Kishor, is shown to be at the instance of appellant Samadhan. However, in the memorandum, appellant

Samadhan himself has made disclosure that knife used by appellant Kishor was taken by himself for hiding. Consequently, even if there is recovery and discovery in such a manner, in the light of availability of direct eye witness account, which is of sterling quality, even if recovery discovery part is ignored, still prosecution has by adducing credible evidence demonstrated that both the appellants are responsible for death of deceased and are rightly held guilty by invoking Section 34 of the IPC.

12. Now let us deal with fundamental objection raised by learned Senior Counsel for the appellants regarding case not to be attracting offence under Section 302 of the IPC but case will fall under Section 304 Part II of the IPC. It is tried to be submitted that there was no premeditation. Appellant Kishor had suddenly taken out knife. Learned Senior Counsel expressed possibility of some quarrel and heated exchange of words resulting into the occurrence and hence, according to him, case would be of culpable homicide not amounting to murder or clause 4thly of Section 300 of the IPC.

After pondering over above ground raised before us and on thoughtful consideration and re-appreciation of the testimonies of PW1 Pawan and PW2 Vishal, we are not convinced that it is not a case of homicidal and is rather case attracting offence under Section 304 Part II of the IPC for the simple reason which is emerging from testimonies of PW1 Pawan and PW2 Vishal that at around 10:00 p.m. on 16-01-2013 there was verbal exchange of abuses by appellant Samadhan with PW1 Pawan. Some boys were sent by the appellant Samadhan to the house of PW1 Pawan and on being questioned to that extent, appellant Samadhan had dared PW1 Pawan to visit him at N6 and accordingly, both PW1 Pawan and his brother Kapil went said spot. There is consistent version of PW1 Pawan and PW2 Vishal about both appellants and their two associates initially assaulting PW1 Pawan and deceased Kapil by fist and kicks and thereafter, appellant Kishor taking out knife and mounting assault on deceased, who questioned them for quarreling with his brother PW1 Pawan. Injuries noted by PW5 Dr.Rathod, Autopsy Docor in column no.17 which are running into three stab injuries, their sites and locations if taken into consideration, by no means in our opinion, it can be said to be a fall-out of sudden quarrel. Appellants had called PW1 Pawan to N6. Appellant Kishor was already armed and equipped with deadly weapon like knife, which he has apparently put to use not once or twice but multiple blows exhibits his very intention to commit murder. Occurrence is at the instance of appellant Samadhan. Therefore, they both are rightly held guilty by the learned trial Court. Taking into account quality of evidence, more particularly, the direct evidence and medical evidence, it is a perfect case of homicidal death attracting only and only offence under Section 302 read with 34 of the IPC and nothing short of it.

13. We have gone through the judgment under challenge, learned trial Court has correctly appreciated the evidence, findings are supported by sound reasons and no perversity is brought to our notice so as to cause interference. Therefore,

finding no merits in the appeal, we proceed to pass following order.

ORDER

Criminal Appeal No.535 of 2017 stands dismissed.