

(2015) 03 BOM CK 0423

In the Bombay High Court

Case No : Criminal Appeal Nos. 1094 of 2009 and 505 of 2010

Laxman Hashya Gondhali and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 12-03-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 300, 302, 304, 304(1), 304(I)

Citation : (2015) ALLMR(Cri) 4418

Hon'ble Judges : P.V. Hardas and Dr. Shalini Phansalkar Joshi, JJ.

Bench : Division Bench

Advocate : Niteen Pradhan i/b. S.D. Khot and Ameeta Kuttikrishnan, for the Appellant; H.J. Dedhia, A.P.P., for the Respondent

Judgement

P.V. Hardas, J.—The Appellants/Original Accused Nos. 1 and 3, who stand convicted for offence punishable under Sections 304(I) r/w. 34 of the Indian Penal Code and sentenced to imprisonment for 10 years and to pay fine of Rs. 1,000/- each in default of which to undergo R.I. for 3 months, while Appellant/Original Accused No. 2, who stands convicted for offence punishable under Section 324 of the Indian Penal Code and sentenced to imprisonment for one year and to pay fine of Rs. 500/- in default of which to undergo S.I. for 3 months, by the Ad-hoc District Judge - 1 & Additional Sessions Judge, Raigad by Judgment dated 15.10.2009, by this Appeal question the correctness of their conviction and sentence. Criminal Appeal No. 505 of 2010 has been filed by the State challenging the Judgment of the Trial Judge acquitting the Respondents/Original Accused Nos. 1 to 3 for offence punishable under Section 302 r/w. 34 of the Indian Penal Code. Since both these Appeals arise from the same Judgment of the Trial Court, these Appeals are being decided by this common Judgment. Facts as are necessary for the decision of these Appeals may briefly be stated thus.

PW-9 ASI Raman Indulkar, who was attached to the Taloja Police Station and was on duty on 4.6.2008, was instructed by PSI Jagtap to record the statement of the

injured who had been admitted in the Purohit Hospital. PW-9 ASI Indulkar therefore proceeded to the Purohit Hospital and recorded the statement of Arun Dharma Khutarkar at Exhibit 34. He obtained the endorsement of the Medical Officer on the said statement. The said statement was then handed over by PW-9 ASI Indulkar to PSI Jagtap, who registered an offence vide Crime No. 127 of 2008 under Sections 307, 324 r/w. 34 of the Indian Penal Code. Further investigation was then entrusted to PW-10 PSI Jagtap.

2. PW-10 PSI Sopan Jagtap, who at the time of the incident was attached to the Taloja Police Station was informed by PW-2 Vandana about the incident and that the injured had been admitted to the Purohit Hospital at Panvel. PW-10 PSI Jagtap therefore deputed PW-9 ASI Indulkar to the scene of the incident. He also directed PW-9 ASI Indulkar to record the statement of PW-1 Arun. Statement of Arun was recorded at Exhibit 32 and on the basis of the said statement he registered an offence vide Crime No. 127 of 2008. Injured Dharma was not in a position to give his statement and an endorsement to that effect was given by the Medical Officer at Exhibit 63.

PW-10 PSI Jagtap proceeded to the scene of the offence and drew the scene of the incident panchnama in the presence of panchas at Exhibit 45. From the scene of the incident he seized sample of ordinary mud and blood mixed mud, one yellow coloured cap which was blood stained and an empty cement bag which was also blood stained. He recorded the statement of PW-2 Vandana and PW-1 Arun and deposited the seized articles with the Muddemal Clerk and obtained the receipt at Exhibit 71. A rough sketch of the scene of the incident was also drawn at Exhibit 72.

On 5.6.2008 PW-2 Vandana produced the clothes of injured Dharma and PW-1 Arun which were seized under seizure memorandum at Exhibit 41. The clothes of the injured were deposited with the Muddemal Clerk and the receipt is at Exhibit 73. The accused were not found despite a search taken in the village. An inquiry was made with the Medical Officer if injured Dharma was in a position to speak but the Medical Officer endorsed vide Exhibit 64 that Dharma was not in a position to speak. PW-10 PSI Jagtap conducted the investigation upto 7th June 2008 and thereafter, transferred the investigation to PW-11 PSI Bhosale.

3. PW-11 PSI Ganadhis Bhosale, who was also attached to the Taloja Police Station was entrusted with the investigation of Crime No. 127 of 2008. On being informed that injured Dharma was serious, he proceeded to the Hospital and inquired from the Medical Officer if Dharma was in a condition to give his statement. The Medical officer vide Exhibit 65 opined that he was not in a position to speak. A report was submitted vide Exhibit 75 to the Judicial Magistrate at Panvel for addition of Section 307 of the Indian Penal Code. Statements of witnesses were recorded and PW-11 PSI Bhosale was informed on 19th June 2008 that Dharma had succumbed to his injuries. Vide Exhibit 76 a report was submitted to the Judicial Magistrate at Panvel for addition of Section 302 of the Indian Penal Code. An inquest panchnama of the dead body of

deceased Dharma was drawn at Exhibit 47 by PSI Bendre. The accused were arrested. Clothes of the accused were seized under panchnama at Exhibit 40 and were deposited in the Maalkhana under receipt at Exhibit 71.

During custodial interrogation, accused Laxman expressed his willingness to point out the place where the weapons had been concealed. Accused Laxman led the police and the panch behind the cremation ground and produced one wooden stick, two iron rods and one knife which were seized under panchnama at Exhibit 50. The seized property was deposited with the Muddemal Clerk and the receipt is at Exhibit 78. Supplementary statements of witnesses were recorded on 20th June 2008. Seized property was referred to the Chemical Analyzer under requisitions at Exhibits 80, 82 and 83. The reports of the Chemical Analyzer are at Exhibits 84 to 87. Further to the completion of investigation, a chargesheet against the accused was filed.

4. Postmortem on the dead body of deceased Dharma was performed by PW-7 Dr. Swati Naik. PW-7 Dr. Swati Naik noticed the following external injuries on the dead body of deceased Dharma:-

- (1) Two parallel old sutured healed wound on right and left temporal parietal region 8 c.m. x 1 c.m., left 12 c.m. x 1 c.m. sutured mark seen.
- (2) Tracheotomy wound over anterior aspect of trachea x 2 c.m.
- (3) Left temporal craneotomy wound with removal of flap seen.
- (4) Haematoma 3 x 3 c.m. over left temporo parietal lobe of train.
- (5) Left temporal parietal flap of bone removed. Cerebral oedema ++. Left temporal lobe congested with blood clot 2 x 2 c.m. over left right side extra dural haematoma 5 x 5 c.m.

PW-7 Dr. Naik therefore opined that deceased Dharma had died due to shock with septicemia due to and following right extra dural haematoma. She opined that all the injuries were ante-mortem injuries. The injuries in Column No. 17 i.e. the tracheotomy and left temporal craneotomy are operative wounds. The postmortem report is at Exhibit 53.

5. On the case being committed to the Court of Sessions, the Trial Court vide Exhibit 16 framed charge against the accused for offence punishable under Section 302 r/w. 34 of the Indian Penal Code for having committed murder of deceased Dharma and under Section 307 r/w. 34 of the Indian Penal Code for having caused injuries to PW-1 Arun and Raghubai. The accused denied their guilt and claimed to be tried. Prosecution in support of its case examined 11 witnesses. The defence of the accused is of denial. The Trial Judge upon appreciation of the evidence convicted and sentenced the Appellant Nos. 1 and 3 for offence punishable under Section 304(1) while convicting Appellant No. 2 for offence punishable under Section 324 of the Indian Penal Code. The State being aggrieved by the acquittal of the accused for offence punishable under Section

302 r/w. 34 of the Indian Penal Code has filed an Appeal challenging their acquittal. The Appeal filed by the accused as well as the Appeal filed by the State are being decided by this common Judgment.

6. We have heard Mr. Niteen Pradhan, learned Counsel for the Appellants and the learned APP and in order to effectively deal with the submissions advanced before us by the learned Counsel for the parties, it would be useful to refer to the evidence of the prosecution witnesses.

7. Prosecution has examined PW-1 Arun, son of deceased Dharma, who deposes that deceased Dharma was his father while injured Raghubai was his real mother and PW-2 Vandana was his step-mother. According to him, he alongwith his parents was residing in the house in Navade. PW-1 Arun was residing alongwith his family members on the first floor while some tenants were occupying the ground floor. According to Arun at the time of the incident, the construction of the house of the accused was in progress and they had demolished their old house and had started reconstruction. According to Arun, that due construction of the gallery, the iron rods were protruding in the property of deceased Dharma and therefore, deceased Dharma had asked the accused to construct their gallery within their own plot. According to Arun, this incident occurred on 4.6.2008 at about 5.00 to 5.30 p.m. The accused had replied that they were constructing the gallery in their own plot. In the altercation the accused asked deceased Dharma and others to come on the ground floor and talk with them. As soon as Dharma and others went on the ground floor, the accused attacked them with iron rod. According to Arun, accused Laxman and accused Prashant gave blows of iron rod and wooden stump to deceased Dharma. Accused No. 3 Rakesh was present there and he had also assaulted deceased Dharma on his head. Dharma fell on the ground and PW-1 Arun attempted to catch deceased Dharma. The accused however also attacked PW-1 Arun. Mother of Arun was cooking food on the ground floor while PW-2 Vandana was on the first floor. According to Arun, Raghubai also sustained injury in the incident. Dharma fell on the ground and became unconscious. According to Arun, the incident was witnessed by one Sunil Khutarkar, Tukaram and Kalpana. According to Arun, thereafter, the injured were taken to the Hospital of Dr. Purohit where they were admitted. He has admitted that his statement was recorded at Exhibit 32.

8. In cross-examination he has admitted that he had read his statement at Exhibit 32 before his deposition was recorded. He has admitted as correct that the accused had given a contract for the construction of their house. He has admitted as correct that before a slab of concrete is laid, a skeleton of the iron rod is required to be prepared. He has admitted as correct that a skeleton for the construction of the staircase was prepared. He has admitted that the only iron rods were projecting in the property of Arun and no skeleton had been prepared for laying of the slab.

Omissions have been elicited that he had not stated in his statement at Exhibit 32 that the accused had replied that they were constructing on their own plot

and were at liberty to do whatever they like. Omission is also elicited that he had not stated in Exhibit 32 that the old gallery of the accused was not projecting in the plot of Arun. Omission is also elicited that he had not stated in Exhibit 32 that the accused were challenging Dharma and others to come down and have talk with them if they have courage. Omission is elicited that he had not stated in Exhibit 32 that as soon as Dharma and Arun went down, the accused assaulted them with iron rod. Omission is elicited that he had not stated that accused Prashant assaulted Dharma with a wooden stump. He has admitted that in Exhibit 32 he had not stated that Accused No. 2 Rakesh was armed with any "weapon". Omission is elicited that he had not stated in Exhibit 32 that he attempted to catch accused Laxman and Prashant when they were assaulting Dharma. Omission is elicited that he had not referred to the presence of Sunil, Tukaram and Kalpana at the scene of the incident. Omission is also elicited that he had not stated in Exhibit 32 that Raghubai had intervened and had sustained an injury below her right eye.

9. Prosecution has examined PW-2 Vandana, wife of deceased Dharma, who deposes that on the day of the incident i.e. on 4.6.2008 at about 5.30 p.m. deceased Dharma and PW-1 Arun had gone to convince the accused not to construct the gallery in the premises of deceased Dharma. According to Vandana, there was a quarrel between deceased Dharma and Arun with the accused. The accused had abused Arun and Dharma and had asked the deceased to come down if he had courage. Accordingly, Dharma and Arun had gone on the ground floor. The accused Laxman and Prashant who were armed with iron rods assaulted Dharma on his head. Dharma fell unconscious and thereafter the accused attacked Arun. Raghubai and Tukaram separated the quarrel and Raghubai had sustained the injury below the right eye. The injured were taken to the Purohit Hospital at Panvel. According to her, Dharma was admitted in the hospital for 15 days and thereafter succumbed to his injuries.

10. In cross-examination Vandana has admitted that the workers engaged by the contractor were constructing the house at the site. She has also admitted as correct that there was no construction of the slab for the gallery but the iron rods had been laid in the construction of gallery. Omission has been elicited that she had not stated in her statement that the accused had asked deceased Dharma to come down if he had courage. She has admitted that she could not name the fourth accused who was present at the scene of the incident.

11. Prosecution has examined PW-3 Sunil, who deposes that on 4.6.2008 at about 5.30 p.m. he had come out of the house on hearing the abuses. He noticed that his uncle deceased Dharma and PW-1 Arun were asking the accused not to construct a gallery in the premises of Dharma. According to Sunil, he therefore went down and noticed that accused Laxman and accused Prashant were armed with iron rods and were assaulting Dharma on his head. These accused had also assaulted PW-1 Arun with an iron rod. Accused No. 2 Rakesh who was armed with a knife also assaulted Dharma on his head. According to him, at the scene

of the incident PW-2 Vandana, Raghubai, Tukaram and Kalpana were present. The injured were then taken to the Purohit Hospital at Panvel. He is also a panch witness to the seizure of clothes of accused Laxman and the seizure memorandum is at Exhibit 40.

12. In cross-examination he has admitted that his statement was recorded on 15.6.2008. He has admitted as correct that the accused had given a contract for the construction of their house and were not doing the construction work personally. He has admitted that when deceased Dharma and Arun had gone to the premises of the accused, the accused had assaulted them with iron rods.

13. The scene of the incident is situated in front of the house of the accused and the scene of the incident panchnama is at Exhibit 45. PW-3 Sunil has admitted in the cross-examination that the assault had taken place on deceased Dharma and PW-1 Arun when they had entered the premises of the accused.

14. Injured Dharma had been examined by PW-8 Dr. Pushkar Likhite. PW-8 Dr. Likhite had noticed that Dharma had 2 contused lacerated wounds on temporal and parietal region and there were no other visible injuries on his person. Dharma was admitted in the hospital and was given emergency medical treatment. Dharma had sustained subdural haematoma in the right fronto temporo parietal region and the Neuro Surgeon had advised craniotomy and decompression surgery which was done in the hospital. The patient was on ventilator in the post operative period and had undergone tracheotomy but did not show any improvement. Injured Dharma succumbed to his injuries on 19th June 2008. The certificate relating to the injuries of Dharma is at Exhibit 59 while the case papers are at Exhibit 60.

PW-8 Dr. Likhite had also examined PW-1 Arun and had noticed a contused lacerated wound on left temporal region 2 x 1 c.m. caused by hard and blunt object which was simple in nature. The injury certificate is at Exhibit 39.

15. PW-7 Dr. Swati Naik, who had conducted the postmortem on the dead body of deceased Dharma had deposed that the probable cause of death was shock with septicemia due to and following right extra dural haematoma. In cross-examination she was asked the following questions:-

"Que. What is meaning of the word septicemia?

Ans. Presence of infection in the body of the deceased leading to the death.

I have not taken a note of the word infection in the postmortem report.

Que. Whether septicemia is due to negligence?

Ans. It may be possible."

16. The incident had occurred all of a sudden and there was no premeditation. The accused had no animus nor any motive to commit murder of deceased Dharma. The incident had sparked on account of the dispute between the

accused and deceased Dharma. The deceased was objecting to the accused constructing their gallery which was extending over the land of deceased Dharma. Omissions have been elicited in the evidence of the prosecution witnesses that the accused challenged the deceased to come down and the deceased thereafter had gone on the ground floor. From the evidence it is clear that deceased Dharma and PW-1 Arun had gone to the premises of the accused and there was a scuffle in between them and during the scuffle, the accused had inflicted the injuries to deceased Dharma and PW-1 Arun. The scene of the incident is in front of the house of the accused. The accused did not have the intention to commit murder of deceased Dharma. In fact, deceased Dharma has not died on account of septicemia due to the injuries as the Medical Officer has admitted that septicemia may be on account of negligence. Thus, the Medical Officer has opined that the septicemia may be on account of factors other than the injury. If that be the case, in our opinion, the case of the Appellants would be covered by the Fourth Exception. Clause Thirdly of Section 300 would be inapplicable in the present case as deceased Dharma had not died on account of the injuries inflicted by the accused but had died due to septicemia which had developed on account of factors other than injury. The Judgment of the Trial Court therefore convicting the accused for offence punishable under Section 304(I) of the Indian Penal Code, in our opinion is unsustainable. The Accused Nos. 1 and 3 would be liable to be convicted for an offence punishable under Section 304(II) of the Indian Penal Code. We are further informed by the learned Counsel for the Appellants that the Accused Nos. 1 and 3 have undergone more than six and half years of imprisonment while Accused No. 2 has undergone about six months of imprisonment. In our opinion, the term of imprisonment already undergone by the accused would be sufficient punishment for the offence with which the accused would now stand convicted.

17. Since we have held the accused guilty for offence punishable under Section 304(II) of the Indian Penal Code, there is no merit in the State Appeal and the State Appeal deserves to be dismissed. Accordingly, Criminal Appeal No. 1094 of 2009 is partly allowed and the conviction and sentence of Original Accused Nos. 1 and 3/Appellant Nos. 1 and 3 for offence punishable under Section 304(I) r/w. 34 of the Indian Penal Code is set aside and instead the Original Accused Nos. 1 and 3/Appellant Nos. 1 and 3 are convicted for offence punishable under Section 304 Part II r/w 34 of IPC and are sentenced to the period of imprisonment already undergone by them. Each accused to pay a fine of Rs. 1,000/-, in default of which to undergo RI for three months. Since Accused No. 1 Laxman and Accused No. 3 Prashant are in Jail, they be released forthwith, if not required in any other case.

The conviction of Accused No. 2 Rakesh for offence punishable under Section 324 of the Indian Penal Code is maintained, however, his sentence of R.I. for one year is altered to the period of imprisonment already undergone by him. The sentence of fine of Rs. 500/- and the default sentence of S.I. for 3 months for failure to pay the fine is maintained. The bail bonds of Accused No. 2 Rakesh

Laxman Gondhali stands cancelled.

Criminal Appeal No. 505 of 2010 is dismissed.