

(2011) 08 BOM CK 0076
In the Bombay High Court
Case No : Criminal Appeal No. 745 of 2009

Madhu Dharamji Ovhal

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 25-08-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 428
Penal Code, 1860 (IPC) — Section 299, 300, 302, 304

Citation : (2011) 113 BOMLR 3268

Hon'ble Judges : V.M. Kanade, J;A.M. Thipsay, J

Bench : Division Bench

Advocate : Daulat G. Khamkar, for the Appellant; A.T. Jhaveri, for the Respondent

Final Decision : Allowed

Judgement

A.M. Thipsay, J.—The Appellant was the accused in Sessions Case No. 591 of 2005 in the Court of Sessions at Pune. The allegation against him was that he had committed murder of his father. The learned Addl. Sessions Judge, Pune after holding a trial held that the charge against the Appellant was proved and convicted him of an offence punishable u/s 302 of the Indian Penal Code. The Appellant was sentenced to suffer Imprisonment for life and also to pay a fine of Rs. 100/-, in default to suffer RI for one month. The Appellant being aggrieved by the said judgment of conviction and sentence has approached this Court in appeal.

2. We have heard Mr. Khamkar, Learned Counsel for the Appellant and Ms. Jhaveri, learned APP for the State. We have gone through the entire evidence adduced before the trial court. We have gone through the impugned judgment. The case of the prosecution before the trial court was as follows:

Dharamji (deceased) had two wives, one Jaibai and one Ashabai. Jaibai had five children from Dharamji including Smt. Vimal Bhandare, the first informant (PW 1). Ashabai had only one child from Dharamji i.e the Appellant. The Appellant

was unmarried. He had no occupation. He was addicted to liquor. He often used to demand money from Dharamji for liquor and there used to be quarrels between them over this. Vimal Bhandare (PW 1) used to stay near the place where Dharamji and the Appellant used to stay and as such whenever she would hear the quarrels between Dharamji and the Appellant, she would go to their house to tell the Appellant not to consume liquor and not to quarrel. However, the Appellant did not show any improvement in his behaviour.

On 10th July 2005 at about 6.30 p.m, a quarrel took place between the Appellant and Dharamji. On hearing the quarrel, Vimal went to their house. The quarrel was going on. The Appellant was holding a brick in his hand. Ashabai - mother of the Appellant - was holding the Appellant but despite the same, Appellant gave a blow of the brick to Dharamji near his right eye. On account of the said blow, Dharamji felt giddy. Vimal gave him water and went to her home. According to the case of the prosecution, at that time, the Appellant told Dharamji that he would commit his murder.

On the next day i.e. on 11th July 2005 at about 10.30 a.m, Ashabai called Vimal and informed that Dharamji had not woken up in the morning. Vimal went to the house of Dharamji. She removed the blanket from Dharamji's face and observed that his face was swollen and it had become dark. Vimal felt that Dharamji had passed away. Vimal learnt from Ashabai that the Appellant had left the house by taking away the gold ring and wrist watch of Dharamji as well as the gold marriage string and cash that was in the cupboard. Vimal thereafter went to Khed police station and lodged a report which was treated as First Information Report (Exhibit 18). The FIR was recorded by Shahu Bhuse (PW 2) Police Head Constable attached to Khed police station at the material time. Umesh Yadav (PW 4), attached to the Khed police station as Sub- Inspector of Police at the material time, commenced investigation. He drew the inquest panchnama (Exhibit 12) and then forwarded the dead body to Rural Hospital, Khed for post mortem examination. Dr. Shivaji Sonawane (PW 5) conducted post mortem examination on the dead body. He opined the probable cause of death to be the "head injury with fracture on right parietal temporal region". The post mortem examination was conducted between 9.30 a.m to 10.15 a.m on 12th July 2005. Dr. Shivaji Sonawane opined the time of death as approximately 24 hours before the post mortem examination. PSI Umesh Yadav (PW 4) also drew spot panchnama (Exhibit 23) with Sitaram (PW 3) acting as one of the panchas. A stick (Article 1) and a piece of brick (Article 2) were seized under the said panchnama.

The Appellant was arrested on 11th July 2005 itself. During the course of investigation, statements of several persons were recorded and on completion of investigation, a charge-sheet was submitted against the Appellant.

3. As the Appellant pleaded not guilty, the prosecution examined five witnesses in the trial court, all of whom have been referred to above. Ashabai - mother of the Appellant - who was supposed to be the eye witness to the incident, however, could not be examined during the trial. The record shows that it was

reported that her whereabouts could not be ascertained.

4. Mr. Khamkar attempted to suggest that Vimal who claims to be an eye witness, is actually not an eye witness at all. In order to appreciate this contention, we have carefully gone through her evidence. Indeed, we do find that Vimal came to the scene of the offence when the quarrel was going on. However, we are unable to agree that she is not an eye witness to the incident. Though it appears that she arrived on the scene when the quarrel or fight between the deceased Dharamji and Appellant was going on, she appears to have seen the Appellant actually hitting the deceased with the brick. It cannot be suggested that she had come to the spot after the quarrel or fight was over, or after the blow had been given. She has also described as to what happened after the blow was given. In the cross examination, her evidence is not shaken at all. The trial court has believed her evidence. We find her evidence to be natural and consistent with the rest of the evidence. As such, we find it safe to accept her evidence that the Appellant had indeed assaulted Dharamji on his head i.e near the right eye, with a brick.

5. Upon considering the evidence of Dr. Shivaji Sonawane (PW 5), there can be no doubt that the death of Dharamji was homicidal. Dr. Sonawane had noted the following external injuries on the dead body.

1. Old abrasion on skin of left Tibia healed blackish scales present age of injury 7/8 days approximately.
2. Eye blackish colourage diffuse swelling.
3. Big diffuse swelling haematoma over right frontal parietal region extending from frontal region to posterior.

He had noticed the following internal injuries.

1. Big Haematoma under scalp right front parietal region extending from right frontoregion to posterior aspect 10-12 cm.

Fracture of skull:-

1. 8 cm. Medio lateral over right parietal bone.
2. 10 cm. Anterior posterior over right temporal region.

It may be recalled that Dr. Sonawane has given his opinion as to the cause of death as "head injury with fracture on right parietal temporal region". The correctness of his opinion has not been shaken in the cross examination. It can therefore, be safely concluded that the Appellant had indeed assaulted the deceased Dharamji and that Dharamji died on account of the injuries which he received during the said assault.

6. The evidence of PW 2 Shahu Sidha Bhuse and the evidence of PW 3 Sitaram Pawar is not of much consequence and there has been no challenge to that evidence except the contention that the panchnama of the scene of the offence

was done a day after the incident. In the facts and circumstances of the case, not much turns on this aspect or the correctness of the identification of the brick (Article 2) by this witness.

7. Mr. Khamkar, Learned Counsel for the Appellant contended that even if the deceased is held to have died a homicidal death on account of the assault by the accused still the offence allegedly committed by the accused would not be one punishable u/s 302 of the Indian Penal Code. According to him, neither the intention nor the knowledge requisite for offence punishable u/s 302 can be spelt out from the facts of the case as appearing from the evidence.

8. Indeed, what offence the accused has committed requires careful consideration. Naturally, for ascertaining the same, the intention and/or knowledge behind the assault needs to be examined.

9. It is well settled that, the intention behind the assault is the factor which is significant in deciding as to what offence has been committed. However, intention is not something which can be perceived by the witnesses independently of the act. Thus, that an act is done with a particular intention or with a particular knowledge is largely a matter of inference to be drawn from the overt-act itself and the circumstances in which it was committed.

10. In the facts of this case, that the accused is guilty of an offence of culpable homicide, can not be doubted at all; but what would need to be examined is whether the offence committed by the accused is of "culpable homicide amounting to murder".

11. The distinction between "culpable homicide not amounting to murder" and "murder" has been very ably stated by the Supreme Court of India in State of Andhra Pradesh Vs. Rayavarapu Punnayya and Another, . The relevant observations of the Supreme Court, which provide guidance in that regard are worth- reproducing below :

In the scheme of the Penal Code, culpable homicide is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice-versa. Speaking generally, "culpable homicide" sans "special characteristics of murder" is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognizes three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the gravest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as, "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304." [Para 12 of the reported Judgment]

The Supreme Court further observed that :

The academic distinction between "murder" and "culpable homicide not amounting to murder" has vexed the Courts for more than a century.

12. The Supreme Court further stated that the safest way of approach to the interpretation and application of these provisions seems to be, keep in focus the keywords used in the various clauses of Sections 299 and 300. After comparing the clauses in the said Sections, the Supreme Court further observed as follows :

From the above conspectus, it emerges that whenever a Court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of a case, it would be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such casual connection between the act of the accused and the death leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is, prima facie, found in the affirmative, the stage for considering the operation of Section 300, Penal Code, is reached. This is the stage at which the Court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of definition of "murder" contained in Section 300. If the answer to this question is in the negative, the offence would be "culpable homicide not amounting to murder" punishable under first or the second part of Section 304 depending respectively, on whether the second or third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the Exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the First Part of Section 304, Penal Code." [Para 21 of the reported Judgment]

13. These observations were later on referred to and reproduced by the Supreme Court of India in the case of Shankar Narayan Bhadolkar Vs. State of Maharashtra, . They were again reproduced by the Supreme Court of India in the case of Abdul Waheed Khan alias Waheed and others v. State of Andhra Pradesh (2005 SCC (Cri) 1302)

14. From the observations of the Supreme Court in the above cases, it becomes clear that there is no radical difference between the offence of culpable homicide (punishable u/s 304 of I.P.C.) and murder (punishable u/s 302 of I.P.C.). Criminal intention or knowledge is necessary in both the cases. The true difference lies in the degree-there being a greater intention or knowledge of the fatal result in case of murder than in case of culpable homicide not amounting to murder. It would be necessary, therefore, to see whether in the instant case, though the requirements of Section 299 of I.P.C. are fulfilled; whether one or more of the requirements of Section 300 of I.P.C., have been proved.

15. In this case, there is nothing to indicate that the Appellant had the intention

to cause the death of the deceased who was his own father. In fact, the case of the prosecution is that the Appellant was without any occupation and that he used to depend on the pension of his father for his own survival. It is also established that there used to be frequent quarrels between the Appellant and deceased as the Appellant would demand money from the deceased for consuming liquor. During such quarrels, Appellant used to abuse and beat the deceased. There is nothing on record to indicate that on 10 July 2005, i.e when the incident took place something different from usual had happened and that such happening formed an intention on the part of the Appellant to cause the death of his father. It does not appear that the assault committed by the Appellant was with the intention of committing the murder of the deceased. Undoubtedly, Vimal has stated in her evidence that the Appellant had stated that he would kill the deceased but not much importance to this statement by the witness - even if true - can be given, to hold that there was an intention to kill the deceased.

16. We may now examine whether the knowledge that would be necessary to constitute the offence of murder can be attributed to the Appellant. That would necessarily be a matter of inference to be drawn from the nature and seriousness of the assault and the circumstances in which it occurred. In the instant case, we find that the piece of brick which is said to be the weapon of assault had not been specially brought from anywhere by the accused after the quarrel had started. Apparently, it was lying in the house itself. After hitting the deceased with the said brick piece, the Appellant had dropped the same in the house itself. The evidence indicates that after Vimal and Ashabai intervened, the Appellant discontinued the assault.

17. The nature of injuries sustained by the deceased is also significant in this context. There was only one injury which could be termed as "serious". That injury as aforesaid was on the right side of the eye extending towards the right ear. Now, undoubtedly, this injury was inflicted on a vital part of the body and it had caused fracture of the skull of the deceased. This would indicate that considerable force was, indeed, used by the Appellant while giving the blow. At the same time, we have noted that the deceased was of 70 years and Dr. Shivaji Sonawane (PW 5) in his evidence has admitted that because of old age, bones become fragile and that therefore, they are susceptible to easy fracture.

18. It also appears that the Appellant was intoxicated at the time of the incident. Voluntary intoxication cannot be a defence in respect of the accusation of a criminal charge, but even voluntary intoxication would be a factor that may need to be taken into consideration while ascertaining the state of mind and particularly the knowledge of the offender at the given time.

19. In the facts and circumstances of this case, it is not possible to hold that the degree of knowledge of the probability of death, (which determines whether the offence would be one punishable u/s 302 of the Indian Penal Code or one punishable u/s 304 of the Indian Penal Code), being caused by the injury was so

high as to bring the case within the definition of "murder". It may be observed that the injury was not thought to be serious at that time which is clear from the fact that the deceased was not taken to hospital. Considering all the relevant aspects of the matter, we are of the opinion that the offence committed by the Appellant in the present case would be one punishable u/s 304 of the Indian Penal Code falling in Part-I thereof. We are therefore inclined to allow the appeal to this extent.

20. The appeal is partly allowed. The conviction of the Appellant with respect of an offence punishable u/s 302 of the Indian Penal Code is set aside. Instead the Appellant is convicted of an offence punishable u/s 304 Part I of the Indian Penal Code and is sentenced to suffer RI for eight years and to pay a fine of Rs. 100/-, in default to suffer RI for 10 days.

21. The Appellant shall be entitled for set off in accordance with section 428 of the Code of Criminal Procedure.

22. The appeal is allowed in the aforesaid terms.