

(1996) 02 BOM CK 0027

In the Bombay High Court

Case No : Criminal Appeal No. 341 of 1993

Madhukar Awadhutroa Taide and others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 03-02-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 294
Penal Code, 1860 (IPC) — Section 302, 323, 325, 326, 335

Citation : (1996) CriLJ 4025

Hon'ble Judges : V.S. Sirpurkar, J

Bench : Single Bench

Advocate : N.R. Saboo, for the Appellant; K.S. Dhote, Additional Public Prosecutor, for the Respondent

Judgement

1. This is a Criminal Appeal at the instance of the appellants. The appellant Nos. 1, 2 & 4, i.e. Madhukar, Prakash and Damodhar are convicted for an offence u/s 323 while accused/appellant No. 3 Anil is convicted for an offence u/s 326 of the Indian Penal Code. All were originally tried for offence u/s 302 read with Section 34 of the Indian Penal Code for having committed murder of one Punjab Kachru Mahajan.

2. The prosecution story shortly stated is as under :

That on the fateful day, i.e. on 26-11-1988 at about 8 p.m. at Benoda locality Panjabrao Kachruji Mahajan came to the shop of the accused No. 1 Madhukar and asked for some kerosene. Since Madhukar refused to give him kerosene, there was an altercation between Madhukar and Panjabrao. In, the meantime, the other three accused persons came there, out of whom appellant No. 1 was armed with stick. The four accused persons dealt with the said Panjabrao very severely inasmuch as the accused No. 3 dealt him the several stick blows while the other three assaulted him with kicks and fists. Panjabrao is said to have died instantaneously on the spot. One witness P.W. 2 Gajanan is said to have seen the incident and, therefore, went to the wife of Panjabrao by name Asha who is

examined as P.W. 1 and reported the matter. Asha on the basis of this information went to the spot and found that her husband was lying unconscious near the shop. There-fore, she went to the relatives Ananda and Bapurao but since they were not present, she went to the police station and lodged First Information Report Exh. 27.

On the basis of this report, the police sprang into action and started the investigation. P.S.I. Bhaurao Dhaode P.W. 7 then went on the spot after taking an entry in the station diary and registered the offence. He saw that Panjabrao was lying in front of the shop of Madhukar and he was already dead. He, therefore, conducted the further investigation in which there is a discovery by accused No. 2 Prakash of the stick. The stick was discovered in pursuance of the memorandum panchnama Exh. 31. He also recorded the statements of the witnesses like Asha, Gajanan who had seen this incident and one other witness Pramod Pandhare P.W. 6. However, P.W. 6 Pramod turned hostile at the time of the trial.

3. The defence of the accused persons was that of denial. They denied that they had any altercation with the deceased Panjabrao. They also denied that they or any of them had assaulted Panjabrao with sticks and the kicks and fists.

4. During the trial, P.W. 1 Asha was examined to prove the First Information Report, P.W. 3 Jankibai in order to show the movements of Panjabrao prior to his reaching the shop of accused Madhukar. P.W. 2. Gajanan was also examined as an eye-witness, so also P.W. 6 Pramod was examined as an eye-witness. As regards Asha's evidence, all that which can be said is that she is the wife whom Gajanan informed first of the deadly assault on Panjabrao by the accused persons. She has stated in her evidence that Gajanan came and reported the incident that Panjabrao was severely beaten and was lying near the shop of accused No. 1. In her report, she has specifically named that Gajanan told her the names of Madhu, Damo, Prakash and Anya meaning the accused herein. There is nothing to disbelieve Asha as she immediately seems to have gone near the deceased after being informed by Gajanan. In her cross-examination, it was tried to be brought out that Madhukar accused No. 1, Prakash accused No. 2 and Damodhar accused No. 4 were residing separately and Anil was staying separately with his father. She has denied that her husband was addicted to liquor. Some questions were put to her as regards the situation of the houses of the accused persons and she admitted that these accused persons were staying separately while Anil was saying in front of the shop. Beyond that, there is no cross-examination of this witness. P.W. 3 Jankibai is the other witness who had seen Panjabrao standing near the shop of accused No. 1 with the bottle in his hand and at about the same time, i.e. about 7 to 7.45 p.m.

Thus, the fact is established that the deceased Panjabrao had gone to the shop of Madhukar for purchasing the kerosene oil or was at least in that shop. P.W. 2 Gajanan is the eye-witness. He claims that he had gone to the shop of Madhukar to purchase kerosene and he saw his uncle Panjabrao. He claims that he first

purchased the kerosene. However, no kerosene was sold to Panjabrao by Madhukar and Madhukar himself caught hold of Panjabrao's collar and pushed him away from the shop. He claims that immediately thereafter Anil came there with stick in his hand and Prakash and Damodhar also came there. He claims that Anil assaulted Panjabrao with stick while the other accused assaulted him with kicks and fists. He further claims that Panjabrao fell down near the shop. He claims that he thereafter went to Asha's house and informed her about the incident. He also claims that he informed the incident to his other uncle and then went to his house. In the name of cross-examination, very little could be brought out from the evidence of this witness. The only thing that Shri Saboo was able to show from the evidence of this witness is that while in the examination-in-chief he has stated that his uncle had reached prior to him, in the cross-examination he had stated that he had reached before his uncle had reached the shop. That is the only contradiction brought out. There is absolutely no cross-examination of this witness as regards the actual incident. On the other hand, a suggestion is given to this witness that after Panjabrao demanded the kerosene and accused No. 2 refused to give kerosene the dispute arose suddenly. Not only this, but there is a further cross-examination as to what talk took place between Madhukar on one hand and Panjabrao on the other. Thus, even in the cross-examination it is established that when Panjabrao was at the spot he had an altercation with Madhukar. A clear-cut suggestion is given that as soon as Panjabrao started to enter the shop, Madhukar caught him by his collar and pushed him because of which said Panjabrao fell on the ground. The further cross-examination reveals that he was present at the time when the report was given by his aunt Asha. There is hardly any cross-examination of this witness to suggest that Panjabrao was in any manner aggressive or had in any manner tried to be a bully. The only cross-examination which is material is that a suggestion was given to him that accused Prakash was assaulted by his uncle with a stick and in that process accused Prakash had sustained head injury.

5. Shri Saboo, therefore, pointed out the medical certificate of Prakash Awadhoot Taide at Exh. 36. It seems that Prakash lodged a report Exh. 34 against the said Panjabrao on the ground that Panjabrao had come to the shop of his elder brother Madhukar Awadhoot Taide and was altercating and that when Prakash had gone to separate him, Panjabrao gave abuses to him and also assaulted with stick on his head because of which he had sustained the injury. The medical certificate seems to have been admitted in pursuance of the notice u/s 294 of the Criminal Procedure Code.

6. From this Shri Saboo contends that the injuries on Prakash Awadhoot have not been explained and that would bring the prosecution case into suspicion. He also points out that there is no denial of the injury by PW.2 Gajanan who is asked a specific question in the cross-examination on his recall. In that the witness stated that he did not know whether on the date of the incident his uncle had assaulted accused Prakash by stick at about 7 p.m. due to which accused Prakash had sustained head injury. He further says that he does not know how

Prakash received injury. From this, Shri Saboo wants the Court to infer that there was in fact an injury on the head of accused Prakash, that this injury was because of the assault by Panjabrao and that the prosecution version about the incident is not free from doubt. I am afraid, this cannot be accepted. In the first place, the witness was a child witness. He is only 15 years old. He has firstly denied everything about the so-called attack and also about the injury of Prakash. Once he had denied any knowledge about the injury on Prakash, the further question could not have been put as that question was already answered. Be that as it may, even the nature of the so-called injury on Prakash is extremely insignificant. It is the contused lacerated wound 1 1/2" X 1/2" X 1/4" on the occipital region. It is also not known as to whether this was a bleeding injury so that it could have been noticed by the witness. Apart from this, the clothes of Prakash had also not been produced. In the station-diary there is an entry that Prakash came and reported about the assault by Panjabrao on his head. There also does not appear to be any mention about any blood stained clothes or so, so that the injury could have been noticed by the witness. The injury appears to be a simple injury. Considering that it was a simple injury on the parietal region it is extremely insignificant, the failure of the prosecution witness to explain that injury would not affect the prosecution case at all. Shri Saboo further averred that there were number of persons available whose evidence could have been taken but those witnesses have not been examined by the prosecuting agency. He has not been able to name those witnesses who were present allegedly and had seen the incident but were left out by the prosecution.

7. The other witness examined on behalf of the prosecution seems to have turned hostile. He is PW.6 Pramod and he has sufficiently cross-examined. However, since he is a hostile witness, It will not be proper to rely on his evidence at all. It is a common feature in the village that the people normally avoid to become the witnesses even if they have witnessed the incident. It is not the number of witnesses which matters but the quality of evidence. Considering the evidence of PW.2 read with evidence of PW.1, it seems that Gajanan is a truthful witness who had seen his uncle being brutally assaulted. He immediately went and named the assailants to his aunt who has immediately lodged the First Information Report naming all the accused persons. Under such circumstances, it cannot be said that the prosecution story has in any manner suffered. It is also clear from the prosecution evidence that the stick assault was only at the instance of the appellant No. 3 Anil while the others had assaulted with the fists and kicks. The trial Court has taken a view that since it is only the appellant No. 3 Anil who had assaulted with the aid of stick and since the others had used only the fists and kicks, it could not be said that the other appellants had any intention to cause the death of the deceased. The trial Court has also observed that the said intention could not be attributed even to Anil. Since the State has not filed any appeal, it will be futile now to go on the question as to what offence was committed and whether a major offence than the one for which the accused persons have been convicted could have been held to be proved. I will not go

into that question now.

8. However, the conviction of an offence under S. 326 of the Indian Penal Code would not be a proper conviction. Section 326 runs as under :-

"Section 326 : Whoever, except in the case provided for by S. 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance, which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

One glance at the section would show that it will have to be shown that a particular weapon was used in the offence and further that the said weapon of offence was likely to cause death. Admittedly the stick by which the offence is committed is not identified. The evidence is against Prakash who has discovered the said stick. Unless that stick was identified by the witness in the evidence and unless the Court came to independent conclusion that the stick was capable of causing death, the conviction under S. 326 would not be possible. In that case, the conviction would be under S. 325 as admittedly the deceased died because of the grievous injuries on his body including the fracture to his head which was well established in the post-mortem report. Apart from that, the injury suffered by the accused was such which was dangerous to his life. The conviction, therefore, will have to be altered from S. 326 to that under S. 325 and the appeal would succeed only to this extent.

9. In the result, the criminal appeal is partly allowed. The convictions of accused/appellant Nos. 1, 2 and 4 are maintained, so are their sentences. The conviction of accused/appellant No. 3 is converted from that under S. 326 to that under S. 325 of the Indian Penal Code and instead of five years" rigorous imprisonment, his sentence is altered and reduced to rigorous imprisonment for four years. The sentence regarding the fine is maintained. Though amount of Rs. 1,000/- out of amount of fine was ordered to be given to Asha Panjabrao Mahajan, strangely enough, in this appeal the said Asha is not made a party. Sentence of fine cannot, therefore, be interfered with. With the modifications as indicated above, the appeal is disposed of.

10. Appeal partly allowed.