

(2016) 01 BOM CK 0235

In the Bombay High Court

Case No : Criminal Appeal Nos. 872 of 2009 and 908 of 2012

Masum Ibrahim Shaikh and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 28-01-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 300, Section 302, Section 304, Section 34

Citation : (2016) 01 BOM CK 0235

Hon'ble Judges : V.K. Tahilramani, Actg.C.J. and Dr. Shalini Phansalkar Joshi, J.

Bench : Division Bench

Advocate : H.E. Palwe, Advocate, for the Appellant; A.S. Pai, APP, for the Respondent

Final Decision : Partly Allowed

Judgement

V.K. Tahilramani, A.C.J.

1. Criminal Appeal No. 872 of 2009 has been preferred by the appellant i.e original accused No. 2 - Masum Ibrahim Shaikh and Criminal Appeal No. 908 of 2012 has been preferred by the appellant i.e original accused No. 1 - Sakharam Bandu Salve. Both the appeals are directed against the Judgment and Order dated 22.7.2009 passed by the learned 1st Ad-hoc Additional Sessions Judge for Greater Mumbai, at Mumbai in Sessions Case No. 571 of 2008. By the said Judgment and Order, the learned Additional Sessions Judge convicted both the appellants under Section 302 r/w 34 of IPC and sentenced both of them to suffer rigorous imprisonment for life and fine of Rs. 2000/- each, in default R.I. for one month.

As both the appeals are directed against the very same Judgment and Order, both the appeals are being heard and decided together.

2. The prosecution case briefly stated, is as under:

(a) Deceased Babasaheb was the son of PW 1 Mandabai. Babasaheb was residing

with his mother, wife and brother Santosh at Naiknagar in Mumbai. The appellants as well as absconding accused Suresh Dashrath Sawant were the friends of Babasaheb. Babasaheb used to talk to Sangita who was the wife of Suresh which was not liked by Suresh.

(b) The incident occurred on 10.5.2008. In the afternoon at about 2.30 p.m. Babasaheb returned home. At that time, the appellant - Masum came to the hut of Babasaheb and asked Babasaheb to accompany him. The Appellant - Masum took Babasaheb to Chikhalwadi near Jaibhavani Chawl. PW 2 Pandurang was residing in Jaibhavani Chawl. At about 3.00 p.m., Pandurang was going to his office. When he crossed a distance of about 10-15 feet, he saw appellant Sakharam, appellant Masum and Babasaheb quarreling. Appellant Masum then caught hold of hands of Babasaheb from behind. Appellant Sakharam then took out a knife and gave a blow with the knife on the chest and back of Babasaheb. Both the appellants then ran away.

(c) PW 1 Mandabai was informed that Babasaheb was lying in injured condition at Chikhalwadi. She went to the spot and saw her son lying dead. Police were present at the spot. The police then carried the body of Babasaheb to R.C.F. Police Station. PW 1 Mandabai then lodged F.I.R. Thereafter investigation commenced.

(d) The dead body of Babasaheb was referred for postmortem. PW 4 Dr. Jawale conducted the postmortem on the dead body of Babasaheb. According to Dr. Jawale, the cause of death was due to shock due to stab wounds and the injuries were caused by sharp edged weapon. During the course of investigation, knife was recovered at the instance of appellant Sakharam and so also blood stained clothes worn by him at the time of the incident were recovered at his instance. These clothes were sent to C.A. After completion of investigation, charge sheet came to be filed. In due course, the case was committed to the Court of Sessions.

3. Charge came to be framed against the appellants under Section 302 r/w 34 of IPC. The appellants pleaded not guilty to the said charge and claimed to be tried. Their defence was that of total denial and false implication. After going through the evidence adduced in this case, the learned Sessions Judge convicted and sentenced the appellants as stated in paragraph 1 above, hence, this appeal preferred by the appellants against their conviction and sentence.

4. We have heard the learned Advocates for the appellants and the learned APP for the State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned Advocates for the parties, the judgment delivered by the learned Sessions Judge and the evidence on record, for the reasons stated below, we are of the opinion that both the appellants in the course of sudden quarrel with common intention caused the death of Babasaheb.

5. There is only one eye witness in the present case i.e PW 2 Pandurang. Pandurang has stated that he was residing in Jaibhavani Chawl. At about 3.00

p.m., after having lunch, he was going to his office. When he crossed a distance of about 10-15 feet, he saw appellant Sakharam, appellant Masum and Babasaheb quarreling. Appellant Masum then caught hold of hands of Babasaheb from behind. Appellant Sakharam then took out a knife and gave a blow with the knife on the chest and back of Babasaheb. Both the appellants then ran away. Nothing has been elicited in cross-examination of Pandurang so as to cause us to disbelieve his evidence.

6. In addition to the evidence of eye witness PW 2 Pandurang, as far as appellant Sakharam is concealed, there is recovery of knife at his instance. PW 3 Munirsingh - Panch Witness has deposed about recovery of the knife at the instance of the appellant. In addition, there is recovery of blood stained clothes which were worn by appellant Sakharam at the time of the incident. PW 8 Ganesh - Panch Witness has deposed about recovery of clothes at the instance of appellant Sakharam. These clothes were sent to C.A. As per C.A. report Exh. 42, human blood stains were found on the knife as well as the clothes recovered at the instance of appellant Sakharam.

7. Learned counsel for both the appellants submitted that even if it is accepted that the act of the appellants resulted in the death of Babasaheb, the case would not fall under Section 302 of IPC but it would fall under Section 304 Part II of IPC. They pointed out that the evidence on record shows that when the incident occurred, a quarrel was going on between deceased Babasaheb and both the appellants. This quarrel has been deposed about by PW 2 Pandurang who is an eye witness to the incident. Both the learned counsel pointed out that the evidence of Pandurang who is sole eye witness in this case shows that only two blows were given by appellant Sakharam to Babasaheb and these blows were given in the course of a sudden quarrel. They further submitted that the assault was not premeditated or preplanned but it happened on the spur of the moment in a fit of anger. They reiterated that the fact that Babasaheb was assaulted during the course of sudden quarrel would bring the case under Exception 4 to Section 300 of IPC and would thus be covered by Section 304 Part II of IPC. Looking to the evidence on record, we find much merit in the submission of both the learned counsel that the case would fall under Exception 4 to Section 300 of IPC that is assault by accused during a sudden quarrel.

8. To bring a case within Exception 4 to Section 300 of IPC, all the ingredients mentioned in it must be found. It is to be noted that the word "fight" occurring in Exception 4 to Section 300 of IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for passion to cool down. In this case, the evidence shows that the parties had worked themselves into a fury on account of verbal altercation going on between them. However, for the application of Exception 4 to Section 300 of IPC, it is not sufficient to show that there was a sudden quarrel and there was no pre-meditation. It has further to be shown that the offender had not taken any undue advantage or acted in a cruel or unusual manner. Both the learned counsel submitted that the accused

have not taken any undue advantage or acted in a cruel or unusual manner. However, we are not prepared to accede to the submission of both the learned counsel that the case would fall under Section 304 Part II of IPC. In our view, the case would fall under Section 304 Part I of IPC because we are of the opinion that the accused persons did not just have the knowledge that the act is likely to cause death but in fact the accused persons intended to cause the death of Babasaheb. We say so on the basis of the overt act of the accused, the weapon used, the part of the body where the injury was inflicted, the force used while assaulting and the nature of injuries. Looking to all these facts, we are of the considered opinion that the case cannot fall under Section 304 Part II of IPC.

9. Considering the evidence on record, we are of the view that Exception 4 to Section 300 of IPC applies to the facts of the case and the appropriate conviction would be under Section 304 Part I of IPC, hence, the conviction of the appellants under Section 302 of IPC is set aside, instead, both the appellants are convicted under Section 304 Part I of IPC. In our view, custodial sentence of eight years rigorous imprisonment and fine of Rs. 2000/-, in default, R.I. for one month would meet the ends of justice.

10. The appeals are allowed to the aforesaid extent.

11. Fees be paid to appointed Advocate Mr. Pravin G. Sawant as per rules.