

(2016) 02 BOM CK 0017

In the Bombay High Court

Case No : Criminal Appeal No. 648 of 2009

Mohammed Irshad Kamal Hasan Shaikh

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 01-02-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 300, Section 302, Section 304, Section 333

Citation : (2016) 1 AIRBomRCri 656 : (2016) ALLMRCri 3799 : (2016) 1 BomCR(Cri) 678 : (2016) 3 MhLJCrI 269

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

Bench : Division Bench

Advocate : Laxman P. Kanal, for the Appellant; A.S. Shitole, A.P.P., for the Respondent

Final Decision : Dismissed

Judgement

Dr. Shalini Phansalkar Joshi, J.—1. The Appellant, who stands convicted by the Judgment and Order dated 30th March 2009 of Additional Sessions Judge, Greater Bombay, in Sessions Case No. 700 of 2003 for the offences punishable under Sections 333 and 302 of IPC and sentenced to suffer R.I. for three years and fine of Rs. 1,000/-, in default to suffer R.I. for six months; and an imprisonment for life and fine of Rs. 5,000/-, in default to suffer R.I. for one year, respectively, by this Appeal challenges his conviction and sentence.

2. Brief facts of the Appeal can be stated as follows :-

On 29th August 2002, PW-1 PSI Jayendra Sawant was on night duty at Pant Nagar Police Station, Ghatkopar. At about 12:55 am, he received secret information that the thieves, who had stolen away vehicle, are in Sai Leela Hotel at Ghatkopar. He, therefore, gave message to PW-4 Head Constable Rajendra Ghadge, who was on night patrolling duty, to come to Sai Leela Hotel. He also rushed to the said hotel and reached there at about 1:15 am. By that time, PW-4 Head Constable Ghadge, along with PW-2 Police Naik Subhash Panigrahi and

PW-3 Police Constable Vijay Mahagaonkar, came there in mobile van. Police Constable Shrikrishna Pednekar, since deceased, was driving the mobile van.

3. On arrival at Sai Leela Hotel, which was on the first floor of the building, they started climbing the stair-case of the hotel. At that time, two persons were hurriedly climbing down from the stair-case. PW-1 PSI Sawant showed those two persons his identity card and informed them the purpose of raid. However, those two persons manhandled the police staff and tried to run away. PW-1 PSI Sawant, PW-2 Police Naik Panigrahi and PW-4 Police Head Constable Ghadge caught hold of the first person, who was carrying black colour helmet with him. PW-3 Police Constable Mahagaonkar and Police Constable Surve, who was with him, caught hold of second person. The first person, who was caught hold of by PW-1 PSI Sawant, PW-2 Police Naik Panigrahi and PW-4 Police Head Constable Ghadge was later identified as the present Appellant. In order to escape from their clutches, Appellant bit on both the hands of PW-4 Police Head Constable Ghadge and PW-1 PSI Sawant. He also pushed away PW-2 Police Naik Panigrahi. PW-1 PSI Sawant again caught hold of Appellant from behind his back. At that time, Appellant removed the pistol, which was kept at his waist.

4. Meanwhile, in view of the scuffle between PW-1 PSI Sawant and the Appellant, Driver Pednekar rushed towards them. Seeing him, Appellant fired three rounds of pistol towards Driver Pednekar. Out of those three rounds, one bullet hit on the chest and another bullet hit on the hand of Driver Pednekar. The third bullet missed the target. Due to the firing, Driver Pednekar fell down on the ground. Appellant was apprehended by PW-1 PSI Sawant and other Police staff. Driver Pednekar was taken to Rajawadi Hospital by mobile van for treatment. PW-3 Police Constable Mahagaonkar and Police Constable Surve though tried to chase the other person, who was with the Appellant, they could not succeed. However, in the scuffle, they could snatch away the T-Shirt and Bainan of the said person.

5. In Rajawadi Hospital, PW-8 Dr. Gopal Mahadik examined Driver Pednekar and found bullet injury on his chest and left hand. He referred him to Sion Hospital for further treatment. On the same day, he also examined injured PW-4 Police Head Constable Ghadge, PW-2 Police Naik Panigrahi and PW-1 PSI Sawant.

6. PW-14 API Bhalchandra Kadam, who was attached to Pant Nagar Police Station, Ghatkopar, and was on PSO duty on the night of 30th August 2002, recorded the complaint of PW-1 PSI Sawant vide Exhibit-9 and registered C.R. No. 215 of 2002. Then, along with PW-13 Panch Ramdhyan Morya, he went to the spot and from the spot, he collected three empty cartridges, the black colour helmet and the Yamaha Motor Cycle. He also seized the torn banian and T-Shirt, which was produced by PW-3 Police Constable Mahagaonkar under Panchanama (Exhibit-46). The Appellant was arrested by him in the Police Station and from his possession, the pistol came to be seized under Panchanama.

7. On 6th September 2002, Pednekar succumbed to the bullet injuries sustained by him. Hence after the inquest and postmortem, the blood stained clothes on

his person were seized under Panchanama. At the time of autopsy, the bullet was recovered from his dead body. All the seized articles were sent to Chemical Analyzer and on the receipt of C.A. Report, especially, the Ballistic Report, proving that the bullets were fired from the pistol recovered from possession of the Appellant, Charge-Sheet came to be filed in the Court against the Appellant.

8. On committal of the case to the Sessions Court, the Trial Court framed charge against the Appellant vide Exhibit-4. The Appellant pleaded not guilty and claimed trial. In support of its case, prosecution examined in all 15 witnesses and on appreciation of their evidence, the Trial Court was pleased to convict and sentence the Appellant, as aforesaid.

9. This Judgment of the Trial Court is subject matter of the Appeal. In this Appeal, we have heard learned counsel for the Appellant, who has challenged the impugned Judgment, and learned A.P.P., who has supported the same. In our considered opinion, before adverting to the rival submissions advanced by them, it would be useful to refer to the evidence on record.

10. Prosecution case against the Appellant stands on the evidence of in all four eye-witnesses, which evidence, in our considered opinion, is found to be thoroughly consistent and reliable. PW-1 PSI Sawant has deposed that, on the receipt of information that some persons, who had stolen the vehicle, were in Sai Leela Hotel at Ghatkopar, he called upon PW-4 Head Constable Ghadge, along with his staff on the patrolling duty, to reach Sai Leela Hotel. PW-1 PSI Sawant himself also went to the spot. As per the evidence of these four witnesses, namely, PW-1 PSI Sawant, PW-2 Police Naik Panigrahi, PW-3 Police Constable Mahagaonkar and PW-4 Head Constable Ghadge, while they were climbing the stair-case of the Sai Leela Hotel, which was situate on the first floor, they found Appellant and one more person climbing down the stair-case in a haste. Appellant was carrying the helmet. They tried to accost the Appellant and the person with him. They also showed their Identity Cards as police persons, however, instead of co-operating, the Appellant and the other person manhandled PW-1 PSI Sawant and other Police staff and tried to run away. It is the evidence on record that PW-4 Head Constable Ghadge and PW-2 Police Naik Panigrahi caught hold of the Appellant, along with PW-1 PSI Sawant, whereas, PW-3 Police Constable Mahagaonkar and Police Constable Surve tried to catch hold of the other person but in vain. However, the Appellant tried to escape from the clutches of these witnesses by biting on the left and right hand of PW-4 Head Constable Ghadge and PW-1 PSI Sawant. He also pushed PW-2 Police Naik Panigrahi. PW-1 PSI Sawant, however, succeeded in again catching hold of Appellant from behind his back. At that time, Appellant removed the pistol, which was kept at his waist. Seeing the scuffle between PW-1 PSI Sawant and the Appellant, deceased Pednekar, who was the Driver on the mobile van, rushed to the help of PW-1 PSI Sawant. However, the Appellant fired three rounds of the pistol towards the deceased. One bullet hit on his chest, the another bullet hit on the hand of Pednekar and the third bullet missed the target. The Appellant was

then firmly caught hold of and brought to the Police Station, where the complaint was lodged by PW-1 PSI Sawant and the offence was registered by PW-14 API Kadam on the same night.

11. The evidence of all these four witnesses is completely in tune and consistent with each other. Absolutely no contradictions, omissions or inconsistencies are elicited in their cross-examination so as to disbelieve them. Their evidence is also supported from the evidence of PW-5 Sadanand Shetty, the owner of Sai Leela Hotel, who has deposed about this incident of firing that took place in the staircase of his hotel.

12. This evidence of eye-witnesses gets further support and corroboration from the medical evidence of PW-8 Dr. Mahadik, who was attached to Rajawadi Hospital. According to him, on that night, injured Pednekar was produced before him with a history of bullet injury at about 1:00 am. On his examination, he found following two injuries :-7/13 APEAL-648-09.doc infra memory region. It was bleeding.

(i) Wound entric 1 x 1 inch quarry bone deep over left infra memory region. It was bleeding.

(ii) CLW on left hand medial aspect 1 x 1 inch skin deep.

13. The x-ray was taken, which indicated bullet in the wound i.e. left side of the chest. Accordingly, inter coastal drainage was done and injured was transferred to Sion Hospital at about 3 am. He has opined that the injury might have been caused by the bullet.

14. On the same night, he has examined PW-4 Head Constable Ghadge, who has also narrated the history of injury due to human bite. On examination of Head Constable Ghadge, he found CLW with minor abrasion on his right hand and CLW with minor abrasion on left forearm. The injury certificate of Head Constable Ghadge is produced at Exhibit- 28. On examination of PW-2 Police Naik Panigrahi, at about 2:20 am, there was complaint of palpation, chest pain and sweating. His Injury Certificate is at Exhibit-29.

15. On the same night, he has also examined PW-1 PSI Sawant at 3:20 am, who has also given the history of human bite over left hand two hours ago. On his examination, he found two teeth marks on his left dorsal aspect of the hand, just below left forefinger. His Injury Certificate is at Exhibit-30.

16. PW-9 Dr. Mukesh Ghuge has deposed about the postmortem examination on the dead body of deceased Pednekar, who was treated at Sion Hospital but has succumbed to the gun-shot injury on 6th September 2002. According to him, following ante mortem injuries were found on the dead body of Pednekar :-

(i) Gun shot injury over infrolateral aspect of left nipple with margins showing abrasion collar 0.5 cm in diameter directed downwards, backwards and medially on deep dissection found to have penetrated in subcutaneous tissue muscles

infrolateral aspect of pleura and lower lobe of left lung diaphragm as well as stomach.

(ii) Inter Coastal damage left side of the chest in the mid axillary line in 5th inter coastal spine.

(iii) Abdominal drain with infected margin with left lumbar region 5 cm about anterior superior, ilasa spine.

(iv) Midline surgical incised on abdomen midline surgical in 18 cm in length.

17. On internal examination, PW-9 Dr. Mukesh Ghuge found following injuries :

(i) The penetrated injury over infrolateral margin of left lower lobe of the lung. The lungs shown consolidation.

(ii) Yellowish colour fluid of flake of pus collected. The surgical suture wound of stomach was intact.

(iii) In the liver, hemorrhages on the surface were found. The bullet was retrieved from back of the left chest.

18. According PW-9 Dr. Mukesh Ghuge, the cause of the death was "septicemia due to complication of infective peritoni" and hence it was unnatural. The Postmortem Report (Exhibit-32) completely proves the cause of the death and corroborates his oral evidence.

19. This oral evidence of the eye-witnesses and the medical evidence is further supported and corroborated from the forensic evidence. At the time of postmortem examination, as per evidence of PW-9 Dr. Ghuge, one bullet was recovered from the body and it came to be seized under Panchanama (Exhibit-35) in the presence of the Panch PW-10 Bharat Pawar. The said bullet, along with three empty cartridges, recovered from the spot were sent to Chemical Analyzer. PW-12 Nandkumar Rokde, the Ballistic Expert, on examination of the pistol, which was seized from the possession of the Appellant under Panchanama, and on examination of the bullet recovered from the body of the deceased, the said bullet was found to be fired from the said pistol. He also found that the pistol was in working condition and residues of fire ammunition nitrite was detected in barrel washing of pistol. The certificates issued by him are produced on record at Exhibits 41 and 42. The shirt of the deceased, which was seized under Panchanama by PW-14 API Kadam, also reveal a hole on the left pocket.

20. In our considered opinion, this entire evidence, as led by the prosecution, leaves no manner of doubt about the involvement of the Appellant in the homicidal death of the deceased.

21. According to learned counsel for the Appellant, however, the case against the Appellant, accepting to be true as it is, at the most can fall under Section 304 Part II of IPC, as whatever injuries were caused to the deceased were in the

scuffle. According to him, it was a sudden fight; there was no premeditation or the motive. The alleged act of firing the pistol was in the hit of passion. There was no reason for the Appellant to open fire against deceased Pednekar, who was simplicitor a Driver on mobile van. If Appellant had any reason, he would have fired against the Police Officers, who were apprehending him and not against the Driver. Moreover, it is urged that the Appellant had not taken any undue advantage or acted in a cruel manner. Hence, according to learned counsel, the case of Appellant falls under Exception 4 to Section 300 of IPC.

22. In support of his submission, the learned counsel for the Appellant has relied upon the various authorities like Sukhdev Singh Vs. Delhi State (Govt. of NCT of Delhi), , (2003) 7 SCC 441, Dhirajbhai Gorakhbhai Nayak Vs. State of Gujarat, , AIR 2003 SUPREME COURT 2855, Gurmukh Singh Vs. State of Haryana, , (2010) 2 SCC (Cri) 711, and Hari Kishan and State of Haryana Vs. Sukhbir Singh and Ors., , 1989 CRI.L.J. 116, wherein, in the peculiar facts of the cases, the benefit of Exception 4 to Section 300 was extended to the Accused.

23. As against it, from the facts of the present case, we do not find that such benefit can be extended to the Appellant. It is pertinent to note that despite PW-1 PSI Sawant disclosing their identity to the Appellant as police persons, the Appellant has manhandled the Police persons. In order to escape from their clutches, the Appellant has bited PW-4 Head Constable Ghadge and PW-1 PSI Sawant also. He has pushed PW-2 Police Naik Panigrahi. When he saw Driver Pednekar coming to the help of these Police persons, he has open fired on Pednekar; in order to ensure that Pednekar does not reach there to the assistance of other Police persons. In our considered opinion, this conduct of Appellant of manhandling the Police persons, causing injuries to them, making an attempt to escape from their clutches and firing three rounds of pistol, can in no way bring his case within Exception 4 to Section 300 of IPC. We have no hesitation, therefore, in rejecting this plea of the Appellant that his case falls under Section 304 Part II of IPC.

24. In our considered opinion, therefore, the conviction and sentence of Appellant for the offences under Sections 302 and 333 of IPC, as recorded by the Trial Court, does not call for any interference. Hence, the Appeal stands dismissed.