

(1997) 01 BOM CK 0002

In the Bombay High Court

Case No : Criminal Appeal No. 676 of 1984

Motiram Jayram Shinde

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 28-01-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235, 313

Evidence Act, 1872 — Section 3, 45, 59, 8

Penal Code, 1860 (IPC) — Section 299, 323

Citation : (1998) BomCR(Cri) 103

Hon'ble Judges : Vishnu Sahai, J; R.P. Desai, J

Bench : Division Bench

Advocate : J.R. Gore, for the Appellant; V.T. Tulpule, Public Prosecutor, for the Respondent

Judgement

Vishnu Sahai, J.—The appellant, aggrieved by the Judgment and Order dated 19th May, 1984 passed by the Additional Sessions Judge, Nashik, in Sessions Case No. 101 of 1983, convicting and sentencing him to undergo imprisonment for life u/s 304 Part I of the I.P.C. and also convicting him u/s 323 I.P.C. but awarding no separate sentence, has come up in appeal before us.

2. Shortly stated, the prosecution story runs as under :

The appellant is the son of the deceased Jayram Shinde, brother of Kishan Shinde (P.W. 3) the son of Sarjabai Shinde (P.W. 4) and the neighbour of Laxman Borade (P.W. 8). The evidence is that although partition of property, including agricultural lands had taken place between the appellant and the deceased, the appellant had a feeling that he had got a raw deal. He had a feeling that he should have been given a share in the vine-yard.

It is said that on 24th April, 1983 at about 10 p.m., the appellant came to the house of the deceased situated in village Takli, Taluka-Niphad, District Nashik and started demanding from him the share in the vine-yard. The deceased replied that since the partition was over, it did not lie in his mouth to ask for anything

more. It is said that thereafter an altercation took place between the appellant and the deceased and the former is alleged to have told the latter that, if no share was given to him in the vine-yard, he would kill him. Saying this, the appellant caught hold of the neck of the deceased and felled him on the ground. He then started inflicting kick-blows on the private parts of the deceased. Kisan Shinde went to the rescue of the deceased and while he was trying to rescue him, the appellant assaulted him (Kisan Shinde). It is said that this incident was also seen by Sarjabai and Laxman Borade. After assaulting the deceased the appellant is alleged to have run away.

3. The evidence is that the deceased, who had not succumbed to his injuries, asked the informant Kisan Shinde to lodge an F.I.R. Consequently, Kisan proceeded to Police Station Chalisgaon where he lodged his F.I.R. the same day at about 10.30 p.m. On the basis of the F.I.R. Police Havaladar Balu Doke (P.W. 9) registered a non cognizable offence vide Entry No. 154. He then gave a yadi to Kisan for medical examination.

4. The evidence is that alongwith the yadi and his father Jayram Shinde, who was still alive, Kisan went to the Medical Officer of Chalisgaon Health Centre. At the said Centre, Kisan was examined at 8.30 a.m. on 25-4-1983 by Dr. Gopal Ramdas Patil (P.W. 6). He found on his person the following injuries :

"1. Multiple abrasions at the base of left thumb 1/8" x 1".

2. Tenderness on left side of chest.

3. Tenderness on right scapular region."

At 9 a.m. Dr. Patil examined Jayram Ramji Shinde and found on his person the following injuries.

"1. Multiple abrasions on anterior aspect of right knee joint about 1/6" x 1/8".

2. Multiple abrasions 1/3" x 1/2" anterior aspect of left knee joint about 1/8" x 1/10".

3. Abrasion on anterior aspect of left ankle joint 1/6" x 1/8"

4. Abrasion on posterior aspect of left elbow joint 1/6" x 1/8".

5. Multiple abrasions on left parietal region on scalp 1/8" x 1/10".

6. Swelling of right testis about 2 x 2".

7. Tenderness on right side of abdomen."

5. The evidence is that Jayram Ramji Shinde, on account of his serious condition, was transferred to Civil Hospital, Nasik. The evidence of Dr. Gulab Laxman Wagh (P.W. 7) is that, he was admitted in the said hospital on 27-4-1983. The evidence shows that Jayaram Shinde succumbed to his injuries on the morning of 28-4-1983.

The autopsy of the dead body of Jayram Shinde was performed by Dr. Gulab Laxman Wagh (P.W. 7) The doctor found the following external injuries on the corpse.

- "1. Two abrasions over left parietal region 1" x 1/2" and another 1/2" x 1/2".
2. Abrasion over right knee joint 1/2" x 1/2".
3. Abrasion over left knee joint 1/2" x 1/2".
4. Abrasion over shin of left tibia 1/2" x 1/2".

On internal examination, he found perforation of small intestine. In his opinion the deceased died on account of peritonitis resulting from perforation of small intestine. In the opinion of Dr. Gulab Wagh, the injuries of the deceased were sufficient in the ordinary course of nature to cause death.

6. Investigation was conducted in the usual manner by Police Havaldar - Balu Doke (P.W. 9), Police Head Constable - Bhima Londe (P.W. 10) and S.I. Murlidhar Pansare (P.W. 11).

The investigation performed by P.W. 9 Balu Doke related to his giving the informant yadi for his medical treatment and that for the deceased.

The investigation done by H.C. Bhima Londe related to the visiting of the place of incident, preparing panchanama of the scene of offence Exh. 10; recording statements of eye-witnesses; and searching for the appellant. The evidence of Bhima Londe is that on 2-5-1983 he arrested the appellant at Chalisgaon Railway Station.

The investigation conducted by S.I. Murlidhar Pansare comprises of his recording statement of wife of the appellant and some other things which are not relevant to point out.

After completion of investigation, the appellant was charge-sheeted.

7. The case was committed, to the Court of Sessions in the usual manner. In the trial Court, the appellant was charged for offences under sections 302 I.P.C. and 323 I.P.C. He pleaded not guilty and claimed to be tried.

During trial, in all prosecution examined 11 witnesses. Three of them viz. Kisan Shinde, Sarjabai Shinde and Laxman, P.Ws. 3, 4 & 8 respectively were examined as eye -witnesses. In defence no witness was examined.

The learned trial Judge, after recording the evidence adduced by the prosecution; the statement of the appellant u/s 313 Cr.P.C., and hearing learned Counsel for the parties, convicted and sentenced the appellant in the manner mentioned in paragraph 1.

8. Hence this appeal. It is indeed distressing that though the matter is on the Board, the learned Counsel for the appellant Mr. J.R. Gore is not present. Since

this appeal pertains to the year 1984, we are not inclined to adjourn it. In view of the decision of the Apex Court reported in A.I.R.1996 S.C.W. 2986, Bani Singh and others, appellants v. State of U.P., respondent, we proceed to decide it on merits. After going through the entire material on record and reflecting over the matter, we are satisfied that this appeal deserves to be allowed in part. In our view no offence u/s 304 Part I, I.P.C. is made out against the appellant and instead he is guilty of an offence punishable u/s 304 Part II I.P.C. We however, feel that his conviction u/s 323 I.P.C. has been correctly recorded.

8A. The crucial question in this appeal is, whether the testimony of the three eye-witnesses-Kisan Shinde, Sarjabai Shinde and Laxman, P.Ws. 3,4 & 8 respectively, inspires confidence? After thoughtfully reflecting over the said question, we find that the answer should be in the affirmative.

It is true that from the evidence on record it appears that, Kisan Shinde and Sarjabai Shinde were on the side of the deceased Jayram Shinde in his quarrel with the appellant. That however, in our judgment, could not be a reason for them to falsely implicate the appellant on a charge of murder. It should be borne in mind that, after all the appellant was the son of Sarjabai and brother of Kisan. We are not prepared to believe that a mother and real brother would be so callous and cruel to falsely implicate a son and a brother respectively on a murder charge.

Since the incident took place at the house of these witnesses, they were natural witnesses of the same. The description of the incident given by these witnesses namely of the appellant inflicting kick-blows on the deceased is corroborated by the nature of the injuries found on the person of the deceased by both the doctors. The medical evidence in this case shows that the injuries of the deceased were attributable to kick-blows.

We may mention that the evidence of Kisan Shinde setting out the manner in which he was injured also appears credible. Next morning Kisan was medically examined at 8.30 a.m. by Dr. Gopal Patil (P.W.6). In the injury report Dr. Patil has mentioned the duration as 12 hours, meaning thereby, that the injuries could have been caused at 10 p.m. on 24-4-83 at which time, according to the prosecution, the incident took place.

8B. Fortunately, in this case we have independent ocular account in the form of evidence of Laxman Borade (P.W. 8) to clinch the involvement of the appellant in the incident. The evidence of Laxman Borade is that, his house is situated at a distance of about 35 feet from the house of the deceased, He stated that while he was proceeding to his threshing floor he saw that a quarrel was going on between the appellant and the deceased in the lane. The latter was telling the former that his share had been given to him. Thereafter the appellant felled down the deceased on the ground and inflicted fist and kick blows on him.

We have gone through the statement of this witness and we find that the manner of assault as deposed to by him is in conformity with the medical evidence. The

medical evidence reveals injuries attributable to fist blows and kicks on the person of the deceased.

We wish to emphasize that Laxman Borade is a wholly independent witness and had no axe to grind against the appellant. In our judgment had the appellant not been the real culprit, he would not have falsely implicated him.

9. In our view the evidence of all the three eye-witnesses inspire confidence and the learned trial Judge was correct in accepting it.

9A. Assurance is lent to the ocular account by the circumstance that the F.I.R. of the incident was lodged within half an hour of the incident by Kisan Shinde and in the same the appellant is named. This prompt F.I.R. of the incident is a big guarantee of the truthfulness of the prosecution case.

10. We now proposed dealing with the defence suggestion, which has been put in cross-examination, in paragraph 8, to Kisan Shinde. In short it is that it was Kisan and his brother Vasant, who came in front of the house of the appellant at about 8.30 or 9.00 p.m. and thereafter, started abusing the appellant for his having claimed share in the vine--yard. Thereafter, both of them dragged the appellant to the ota of his house and started assaulting him with fists and kicks, and thereafter their father Jayram tried to intervene, and fell down on the ground in that process. This suggestion has been denied by Kisan Shinde and the other witnesses.

10A. Apart from the fact that this defence version does not explain the injuries sustained by the deceased and Kisan Shinde, we find that it is not backed-up with an F.I.R. wherein, it has been set-out. We should not be understood to imply that it is obligatory for the accused to lodge an F.I.R. It certainly is not. But there is no getting away from the fact that where he does lodge an F.I.R. it makes his version probable. To make matters worse he absconded and the evidence in that H.C. Bhima (P.W. 10) apprehended him on 2-5-83 at Chalisgaon Railway Station. This also shows that his version is not true.

10B. It is true that the appellant sustained some injuries which were medically examined the next morning at 9.45 a.m. by Dr. Gopal Patil (P.W. 6) those injuries are:

- " 1. Abrasion on right nostril 1/6" x 1/8"
2. Swelling below the left lower eye lid about 2" x 1".
3. Abrasion on lateral side of left eye brow 1/8" 1/10".

A bare perusal of the said injuries would indicate that they were of a negligible nature. The Supreme Court, in the oft-quoted case of Lakshmi Singh and Others Vs. State of Bihar, has laid down that, it is not obligatory for the prosecution to explain the injuries of the accused if they are superficial. Perusal of the injuries of the appellant shows that they are per se superficial injuries.

11. For the said reasons, the defence version of the incident does not inspire any confidence.

12. Consequently, we are of the view that, the learned trial Judge acted rightly in accepting the involvement of the appellant in the instant crime. But in our judgment he clearly erred in convicting the appellant u/s 304 Part I, I.P.C and instead should have convicted him u/s 304 Part II, I.P.C. The evidence of Laxman Borade (P.W. 8) is of a wholly independent witness. Laxman Borade has stated that prior to the appellant kicking the deceased on private parts, a quarrel and altercation took place for about 15 minutes between him and the deceased. It was during, the heat of this altercation, that the appellant, who was empty-handed inflicted some kick blows on the abdomen of the deceased. The statement of Dr. Gulab Wagh, the autopsy surgeon, is that, the deceased died on account of peritonitis on account of perforation of small intestine. Dr. Wagh further stated that it is one of the rarest cases where perforation of intestine took place on account of blows by kicks on the abdomen. In our judgment in view of Dr. Wagh's evidence the appellant could not have intended causing an injury which was likely to cause perforation of small intestine. And that being so he cannot be convicted u/s 304 Part I. I.P.C

In our judgment on the facts of this case, it would be legitimate to infer that when the appellant kicked the deceased on his abdomen he had knowledge of his death contemplated by Clause thirdly of section 299 I.P.C., the breach of which is punishable under Part II of section 304 I.P.C.

12A. We however, feel that the learned trial Judge acted correctly in convicting the appellant u/s 323 I.P.C. for causing simple injuries to Kisan Shinde.

13. The next question is the quantum of sentence to be awarded to the appellant. It is true that the appellant came unarmed on the place of incident. It is also true that an altercation between the appellant and the deceased preceded his assaulting the latter. But we cannot lose sight of the fact that he committed patricide and that too for no reason or rhyme. The evidence is that he had already got his share in the property and that being so, he had neither any moral nor legal right to take the share in the vine-yard. Keeping in mind his greedy and high-handed conduct, we are of the view that a sentence of five years" R.I., u/s 304 Part II I.P.C., would meet the ends of justice.

14. In the result, this appeal is partly allowed and partly dismissed. Although we acquit the appellant u/s 304 Part-I, I.P.C. and set aside his sentence of imprisonment for life on that account, but we convict him u/s 304 Part-II I.P.C. and award him a sentence of 5 years" R.I. We also confirm his conviction u/s 323 I.P.C.

The appellant is on bail. He shall be taken into custody forthwith to serve out his sentence.

Before parting with the judgment, we would like to record our appreciation for

the extremely fair assistance rendered to us by the learned Public Prosecutor. While assisting us, all the time he had borne in his mind, that we are deciding an appeal in which the Counsel for the appellant was not present.

In case a certified copy of this judgment is applied for, the same shall be issued on an expedited basis.

15. Appeal partly allowed.