

(2016) 10 BOM CK 0172
In the Bombay High Court
Case No : Criminal Appeal No. 279 of 2016

Murlidhar @ Murlya S/o Gangaram Pawara
Vs

APPELLANT

State of Maharashtra

RESPONDENT

Date of Decision : 19-10-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154
Evidence Act, 1872 — Section 118, Section 3
Penal Code, 1860 (IPC) — Section 304, Section 326

Citation : (2017) 1 AIRBomRCri 12 : (2017) ALLMRCri 1940 : (2017) 1 BomCR(Cri) 472 : (2017) MCR 271

Hon'ble Judges : V.L. Achliya, J.

Bench : Single Bench

Advocate : Mr. P.B. Patil, Advocate, for the Appellant; Mr. A.V. Deshmukh, APP, for the Respondent/State

Final Decision : Partly Allowed

Judgement

V.L. Achliya, J.—Being aggrieved by the Judgment & Order dated 10.08.2015 in Sessions Case No. 173/2014 delivered by the Additional Sessions Judge, Dhule whereby the appellant held guilty of offence u/s 304 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for seven years, the appellant has preferred this appeal.

2. In brief, the facts leading to filing of appeal are summarized as under:

(a) On 13.07.2014, Ratilal Gangaram Pawara (PW3) resident of Bhoiti, Tq. Shirpur, Dist. Dhule lodged complaint with Police Station Shirpur alleging therein that on 11.7.2014 at about 7.00 p.m., while his father Gangaram Pawara was weaving rope of cot in the courtyard of their house and his mother Sahabai, brother Shantaram (PW4) and Tukaram were helping him in weaving of rope of cot, at that time the accused came there in a drunken condition and demanded money to his father for consuming liquor. His father refused to pay money and asked him to go away. The accused insisted to pay money and said that he would

not leave the place without taking money and started to give abuses to his father. His father asked the accused in enraged condition as to whether he is going from that place or not. Thereon, the accused lifted sickle lying there, which his father was using for weaving cot and inflicted blow over the cheek and left leg of his father and ran away from the spot leaving the sickle on the spot. The assault made resulted into causing severe injuries to his father. Initially he was taken to Hospital at Shirpur. Later on shifted to Civil Hospital at Dhule. Deceased succumbed to injuries at about 11:00 p.m., while undergoing treatment at Civil Hospital, Dhule. On 12.07.2014, the dead body of deceased brought to his village where last rites were performed. On next day i.e. 13.07.2014, Ratilal (PW3) lodged report in respect of incident dated 11.07.2014.

(b) On the basis of the report lodged by Ratilal (PW3)(Exh. 48), the offence u/s 302 of the Indian Penal Code came to be registered with Police Station Shirpur vide C.R. No. 151/2014 as against the appellant/accused. P.S.I.-Raufkhan Hurmatkhan Pathan (PW6) conducted the investigation. He visited the spot of incident and prepared panchanama of scene of offence vide Exh. 10. At the time of drawing spot panchanama, the complainant (PW3) produced the sickle (Article No. 3) which was used in commission of offence by the accused which was seized. Statements of the witnesses such as Shantaram Pawara (PW4), Magan Pawara (PW5) and other witnesses were recorded. The inquest panchanama as well as clothes of the deceased were seized by the Police Station Dhule, while the deceased was lying admitted and died in the Hospital on 11.07.2014. He had taken charge of those clothes. The dead body of the deceased was referred for post-mortem on 12.07.2014 by official of Police Station, Dhule. He collected those papers which includes the inquest panchanama & Post-mortem report. He arrested the accused on 19.07.2014. The muddemal property such as the clothes of the deceased, sickle, blood sample, simple earth and earth mixed with blood seized from the spot, the blood sample of the deceased & the blood sample of the accused were forwarded to Chemical Analyzer (C.A.). On conclusion of investigation, he prepared the charge-sheet and filed it in the Court of Judicial Magistrate First Class, Shirpur. In due course, the case was committed to Sessions Court.

3. The charge was framed vide Exh. 4. The accused pleaded not guilty and claimed to be tried. In order to prove its case, the prosecution has examined six witnesses. The accused has not entered into defence. On conclusion of the trial, the trial Court has reached to a conclusion that, though the accused tried for offence u/s 302 of the IPC, but no case is made out u/s 302 of the IPC, however the offence u/s 304 of the IPC is proved against the accused. Accordingly learned Addl. Sessions Judge convicted him to undergo rigorous imprisonment for seven years. Being aggrieved, the appellant has preferred this appeal.

4. I have heard the submissions advanced at length by Mr. Prakash Patil, learned counsel for the appellant/accused and learned APP for the State and carefully perused the record & proceedings.

5. In nutshell, it is the contention of the learned counsel for the appellant that there is no cogent, convincing evidence to sustain the conviction u/s 304 of the IPC. He has submitted that, the incident was occurred on 11.07.2014, whereas the complaint was lodged on 13.07.2014. Prosecution has failed to explain the delay of two days in lodging the complaint. In this background the learned counsel argued that, the possibility of accused being falsely implicated in the case at the instance of the complainant after due deliberation cannot be ruled out. He has further submitted that, no independent witness was examined though incident was occurred at a place surrounded by number of houses and therefore the accused deserves to be acquitted. By referring the injuries found on the body of the deceased and over all facts & circumstances of the case that assault was not premeditated, the learned counsel contended that the conviction of the appellant u/s 304 of the IPC is not sustainable in law.

6. On the other hand, the learned APP has supported the Judgment & Order passed by the trial Court & submitted that the prosecution has adduced cogent & convincing evidence to prove its case. He has submitted that, there is no reason to disbelieve the testimony of PW3 & PW4, the witnesses to incident. By referring the testimony of Dr. Ajit Patil (PW2) & injuries found on the body of deceased, the Id. APP submitted that, it can safely be inferred that injuries caused by the accused were caused by applying full force. The impact of assault was so severe that left femur bone of deceased found to be cut through and through. In this background the learned APP submitted that the manner in which the accused has assaulted the deceased is sufficient to reflect that he had a knowledge that by doing such act, death is likely to cause and thereby the trial Court has rightly convicted him u/s 304 of the IPC. So far as the delay in lodging the FIR is concerned, the learned APP has submitted that the delay has been fully explained. The deceased died in the Hospital on 11.07.2014. After the postmortem, the dead body of the deceased was handed over to the family of the deceased on 12.7.2014 and thereafter the body was taken to village where last rites was performed. Immediately on the next day, the complaint has been lodged. He has, therefore, submitted that the delay has been properly explained.

7. In order to appreciate the submissions advanced, I have carefully scrutinized the oral and documentary evidence on record. If we consider over all facts of the case, then the relationship between the accused and deceased is not disputed. So also the fact that the deceased died on account of the injury sustained in the incident dated 11.7.2014 is also not in dispute. The fact that the deceased has died a homicidal death is also not in dispute. Therefore, the limited question which falls for consideration is whether the prosecution has proved beyond reasonable doubt that the homicidal death of the deceased was caused by the appellant/accused and if so, the conviction of the appellant u/s 304 of the IPC is sustainable.

8. Prosecution examined Dr. Ajit Patil (PW2), the Autopsy Surgeon, who conducted autopsy on the body of the deceased. He has deposed that, on

12.07.2014, dead body of Gangaram Pawara (deceased) was referred to him for post-mortem by City Police Station, Dhule along with the copy of inquest panchanama. He conducted the post-mortem on 12.7.2014 between 9.30 and 10.30 hours. On external examination, he noticed the following injuries on the body of the deceased.

1. 2 minor abrasions over neck, left side 1.5 c.m. x 1 c.m., each;
2. Incised wound over left mandibular region 4 x 0.2 c.m. x bone deep.
3. chop wound over left thigh, 5 c.m. above knee, 10 c.m. X 5 x 6 c.m. with underlying bones, muscles, vessels cut through and through.
4. Left femur cut through and through, lower 1/5.

He further deposed that, the injuries were ante-mortem in nature and possibly caused by sharp and cutting object. He deposed that, injury No. 3 - the chop wound over left thigh, 5 c.m. above knee, 10 c.m. X 5 x 6 c.m. with underlying bones, muscles, vessels cut through and through, is sufficient to cause death of any person in ordinary course of nature. He further deposed that, deceased died due to shock and hemorrhage following chop injury. The report of post-mortem is at Exh. 18. He further opined that, the injuries noted in his report are possible by weapon like sickle (Article No.3). Suggestion given to the witness that the aforesaid injuries are possible due to fall on hard and rough surface, the witness has denied the suggestion. Therefore, the testimony of PW2 remained intact. In this view, I have no hesitation to hold that the prosecution has adduced sufficient evidence to establish that the deceased died a homicidal death and that too due to the injuries sustained in an incident dated 11.07.2014. The reasons & findings recorded by the trial Court to this effect are fully in consonance with the evidence on record.

9. Now the next question which falls for consideration is whether the prosecution has proved beyond reasonable doubt that the homicidal death of the deceased was caused by the appellant/accused. In order to establish the complicity of the accused in the commission of offence, the prosecution has examined Ratilal Pawara (PW3), the witness to the incident. No doubt, the witness is close relative of the deceased, but the PW3 is not only the relative of the deceased but he is also brother of accused. In this view, in absence of any strong reason to falsely implicate the accused, the testimony of PW3 cannot be disbelieved. He has deposed as per the case of the prosecution as discussed above and further identified sickle (Article no. 3) used in commission of offence by accused. The witness was cross-examined at length by the Id. counsel for the accused. It has been brought on record that PW3 studied upto 4th std. and is not able to read and write except to put his signature. He admitted that, he is not able to read and write in Marathi the language in which the complaint was recorded and he narrated the incident in Pawara dialect. He denied the suggestion that, he and his family members had strained relationship with accused. Thus, there is no evidence as such to show that PW3 and other members of the family were on

cross terms with accused and they had strong reasons to falsely implicate the accused. He denied the suggestion given in the cross-examination that, while weaving the cot, the rope get entangled with each other and while cutting rope with the help of sickle, his father sustained injury. In my view, only evidence to find support to the case of the accused brought in the cross-examination is that the accused came on the spot without any weapon and entire incident was occurred on account of demand of money by accused to his father.

10. Thus, there is nothing brought through the cross-examination of PW3 to discard his testimony and to show that, report (Exh. 22) was lodged after due deliberation and that too with a view to falsely implicate the accused. If we consider the cross-examination of PW3, then the version of incident as given by the accused has not been disputed. On the contrary, the evidence brought in the cross-examination has strengthened the case of the prosecution that the incident was occurred on account of demand of money by the accused. Thus, there is no reason to discard and disbelieve the testimony of PW3. The testimony of PW3 duly corroborated by PW4.

11. PW4-Shantiram Pawara brother of accused, the another witness examined by the prosecution fully supported the case of the prosecution. He entirely deposed as per case of prosecution. He deposed in the cross-examination that, he narrated the incident in Ahirani dialect, which was reduced into writing by the police. He denied the suggestion that, the deceased sustained injury due to fall on the tar road. He also denied the suggestion that, all of them assaulted the accused by means of sickle. However, he has admitted that, the accused filed case of assault against them and same is pending. It is further brought through the cross-examination of PW4 that when accused reached to the spot, he was not armed with any weapon. Thus, if we consider the over all cross-examination of the witness, then there is nothing to discard and disbelieve the testimony of PW4, who duly corroborated the testimony of PW3. Besides the oral testimony of PW3 & PW4, there is a testimony of Dr. Ajit Patil, the Autopsy Surgeon, which duly corroborates the testimony of PW3 & PW4, on all material facts deposed by them as to the injury sustained by the deceased in the incident dated 11.07.2014. The spot panchanama (Exh.10) and the recovery of the weapon (sickle) from the spot also corroborate the testimony of PW3 & PW4. C.A. report (Exh. 14) establishes that, Sickle (Article No. 3), Kopari (Article No. 4), Earth (Article No. 2), Earth collected from the spot mixed with blood (Article No.1), Underpart (Article No. 5), Kardoda (Article No.6) of deceased were found to be stained with human blood. Thus, the prosecution has adduced cogent & convincing evidence to establish the complicity of the accused in the commission of offence.

12. Although there is a delay of about two days in lodging the report, same is not fatal to the case of the prosecution. Delay has been sufficiently explained by the prosecution. The fact is not in dispute that the deceased succumbed to the injuries on 11.07.2014 at about 11:00 P.M. and the post-mortem on the dead

body of the deceased was conducted on 12.07.2014 in between 9:30 and 10:30 pm. From the hospital at Dhule, the dead body of the deceased was taken to his village at Shirpur where last rites were performed. Immediately on the next day, the complaint (Exh. 22) was lodged by PW3. As per the noting made on complaint Exh. 22, the offence was registered on 13.07.2014 at 10:15 a.m. It has been brought on record in the cross-examination that, PW3 is educated upto 4th std. and at the most, he can put his signature and unable to read & write. He belongs to Adiwas community. He is a son of deceased and brother of accused. Therefore, there is no scope to raise any doubt on account of delay in lodging report & to infer that the delay was deliberate and the complaint was filed after due deliberation. PW3 & PW4 as well as the accused are the rustic persons coming from village background. Therefore, there is no scope to draw inference that the complaint Exh.22 implicating the accused was filed after deliberations made by PW3 with his family members to falsely implicate the accused. There is nothing brought in the cross-examination of PW2 to establish that he and his family members were carrying grudge against the accused and they had strong reasons to falsely implicate him in the case that too in case of murder of his own father. I am, therefore, not inclined to accept the contention of the learned counsel that the delay has not been explained by the prosecution and same is fatal to the case of the prosecution.

13. So far as the submissions advanced by the learned counsel that the prosecution has not examined the independent witness and PW3 & PW4 are closely related persons, I do not find any substance in the submission. No doubt, incident was occurred in a place surrounded by number of houses and no independent witness has been examined by the prosecution. Only for the reason that independent person is not examined the accused cannot claim that the prosecution has failed to prove the guilt beyond the reasonable doubt. The testimony of the close relatives of the deceased is admissible in law. It is a rule of caution based upon the assumption that person being interested may make an exaggeration and to ensure the accused being convicted, such witnesses may depose falsely against him. It is, therefore, rule of a caution which made the court to act cautiously while dealing with the testimony of close relatives. It is not the rule, that irrespective of the facts and circumstances of the case the testimony of close relatives liable to be discarded. Rule of caution at the most leads to court to act cautiously and make close scrutiny of evidence of such witnesses and in appropriate case may insist for corroboration from independent evidence, which may be oral or documentary. In the instant case, PW3 & PW4 are not only the relatives of the deceased but they are also brothers of the accused. As discussed, no evidence has been brought on record against PW3 & PW4 to establish that they had strong reasons to depose falsely against accused. Both the witnesses have denied the suggestion that, they were on cross terms with the accused. In absence of any evidence or circumstances brought on record to raise suspicion as to truthfulness of testimony of PW3 & PW4, their testimony cannot be discarded. On due consideration of their testimony in the

light of the other evidence on record, I have no hesitation to hold that they are wholly reliable and their testimony can be safely accepted without corroboration from independent witness.

14. On reaching to the conclusion that the prosecution has proved the complicity of the accused in commission of offence, the next question which falls for consideration is; whether the conviction of accused u/s 304 of the IPC is sustainable.

15. Now I proceed to appreciate the submissions that the conviction awarded u/s 304 of the IPC is not sustainable in law and in the facts and circumstances of the case, at the most the offence can be termed as an act of voluntarily causing hurt by dangerous weapon punishable u/s 324 of the IPC. At the cost of repetition, the learned counsel for the appellant submitted that it is nowhere the case of the prosecution that the assault was premeditated. On the contrary, the evidence on record reflects that the accused had not carried any weapon with him. He came on the spot in a drunken condition and demanded money from his father for consuming liquor. On refusal to pay money, the accused got annoyed and picked up sickle lying nearby to his father & which he was using for weaving the cot, and assaulted his father by means of sickle over left leg and left cheek which resulted into chop injury. Due to excessive bleeding, the deceased sustained hemorrhagic shock and died in the hospital while undergoing the treatment. In this context, the Id. counsel for appellant has invited my attention to the testimony of PW3 & PW4, the eye witnesses examined by the prosecution and the testimony of PW2 - the Autopsy Surgeon. By referring the testimony of said witnesses and the injuries caused to the deceased, the learned counsel submitted that, by no stretch of imagination it can be inferred that the accused had assaulted the deceased with an intention to cause death or such bodily injuries as likely to cause death to be punishable u/s 304 of the IPC. He has submitted that, act in question cannot be termed as Culpable Homicide not amounting to murder to be punishable u/s 304 of the IPC.

16. On the other hand, the learned APP has strenuously contended that, the manner in which and the force with which the accused has assaulted the deceased sufficient to draw inference that accused had a knowledge of consequences of his act that it would likely to cause death. It is pointed out that the injuries sustained by the deceased at the hands of the accused were so severe that femur bone cut through and through and veins & arteries supplying blood to heart were also cut, which resulted into extensive bleeding. He has further submitted that, PW2 - Dr. Ajit Patil has deposed that the injury caused to the deceased was sufficient in ordinary course to cause death of any person. In this view, the learned APP has supported the conviction of appellant u/s 304 of the IPC.

17. In order to appreciate the above submissions, I have closely scrutinized the evidence on record. There is no dispute as to the fact that the deceased was assaulted by means of sickle by accused. As per the case of the prosecution, at

the relevant date and time of the incident, the accused came in a drunken condition in the courtyard of house of deceased. At that time the deceased was weaving cot and for cutting the rope he was using said sickle. The sickle was lying nearby the side of the deceased. The accused who was already in a drunken condition went near to his father and asked him to pay money to consume liquor. The deceased-father of the accused refused to pay money and asked him to leave the place. In spite of refusal to pay and asked to leave the place, the accused went on insisting his father to pay money to him. After deceased refused to pay money, the accused picked up the sickle lying nearby his father and assaulted him by means of sickle, which resulted into said injuries.

18. After causing the injuries, the accused ran away from the spot by throwing the sickle at same place. Initially the injured was brought to Rural Hospital at Shirpur. Looking to the condition of the deceased, Doctor on duty referred him to District Hospital at Dhule. While undergoing the treatment, the deceased succumbed to injuries and died on 11.07.2014 at about 11:00 p.m. As per PM report, the cause of death has been assigned as "Shock and Haemorrhage following chop injury to left leg". Thus, if we go by the prosecution case and the evidence on record, then it can be said with all certainty, that assault was not premeditated. It is also clear that accused had not carried with him any weapon to assault the deceased. The purpose of accused to visit his father was to demand money for consuming liquor. Refusal to pay money has resulted into incident of assault on the deceased and injuries referred above cannot be termed as injuries inflicted on any vital part of the body of the deceased. Therefore no motive can be attributed on the part of the accused to assault his father and that too with intention to cause his death. So also it can not be inferred that accused acted with such knowledge that his act may likely to cause death of his father. Dr. Ajit Patil (PW2) has deposed that, out of four injuries, the injury No. 3 alone can be treated as a fatal injury and it has resulted into death of deceased. The injury which was caused over the left leg above the knee and resulted into cutting the veins and arteries resulted into stoppage of supply of blood to heart. Due to extensive bleeding, the deceased went in shock. The cause of death has been assigned as "Haemorrhagic shock". Thus, the excessive bleeding due to said injury has resulted into death of the deceased. The injury No. 3 cannot be termed as a injury inflicted on any vital organ of the body of the deceased. Thus, in the light of this evidence, by no stretch of imagination it can be inferred that the accused assaulted the deceased with such knowledge that his act likely to cause death of the deceased and the act in question can be termed "Culpable Homicide" not amounting to murder. In the facts and circumstances of the case, at the most it can be said that the accused had intended to voluntarily cause grievous hurt to deceased which is punishable u/s 326 of the IPC.

19. The line between culpable homicide not amounting to murder and grievous hurt is very thin. If death is likely to be caused, it could be culpable homicide not amounting to murder and if injuries caused only endanger the life it would be termed as grievous hurt and injuries said to be grievous when it puts the life of

injured in danger. The grievous hurt has been defined u/s 320 of IPC. Section 320 of IPC reads as under:

320. Grievous hurt.-The following kinds of hurt only are designated as "grievous":-

(First)

-

Emasculation.

(Secondly)

-

Permanent privation of the sight of either eye.

(Thirdly)

-

Permanent privation of the hearing of either ear,

(Fourthly)

-

Privation of any member or joint.

(Fifthly)

-

Destruction or permanent impairing of the powers of any member or joint.

(Sixthly)

-

Permanent disfiguration of the head or face.

(Seventhly)

-

Fracture or dislocation of a bone or tooth.

(Eighthly)

-

Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

20. In the present case, prosecution has proved that the accused assaulted the

deceased by means of sickle which falls in the category of instrument to be termed as "instrument used for cutting". It is nowhere the case of the accused that the deceased has sustained the injuries accidentally and accused had not intended to voluntarily cause such injuries. On the contrary, the act of the accused to lift the sickle lying nearby his father and then to assault him over the left cheek & left leg reflects that the act of accused to assault his father can very well be termed as voluntary & causing of grievous hurt. Due to assault, the deceased died on the same day.

21. It is evident from the testimony of Dr. Ajit Patil (PW2) and the injuries as reflected in the post-mortem report that the injury No. 3 was dealt with full force, resulted into chop wound of dimension 10 c.m. X 5 X 6 c.m., which resulted into cut of femur bone through and through as well as veins & arteries supplying blood to heart were cut due to said injury. Therefore, the act of accused can very well be termed as an act of voluntarily causing grievous hurt by use of dangerous weapon like sickle which has endangered the life of the deceased and resulted into his death. In this view, though it can be stated that the act of the accused cannot be termed as a culpable homicide not amounting to murder punishable u/s 304 of the IPC, but certainly the act in question can be termed as voluntarily causing grievous hurt by means of dangerous weapon i.e. sickle used for cutting and thereby the accused has committed offence punishable u/s 326 of the IPC.

22. I am not inclined to accept the contention of the learned counsel for the appellant that, in the facts and circumstances of the case, the act in question can be termed as an act of voluntarily causing hurt punishable u/s 324 of the IPC. As discussed, the injury no. 3 found on the body of the deceased, found to be grievous hurt which has resulted into his death. It was caused by means of sickle which is used for cutting. Therefore, by no stretch of imagination the act in question of the accused can be termed as an act of voluntarily causing hurt to be punishable u/s 324 of IPC.

23. Learned counsel for the appellant has referred and relied upon the decision of this court in the case of Dilip Ramaji Kakde v. State of Maharashtra reported in 2000(1) Mh.L.J. 549. In my view the ruling cited have no bearing upon the facts of the present case.

24. In the light of the discussion made in the foregoing paras, although the conviction of the appellant needs to be upheld, but the appeal deserves to be partly allowed to the extent of alteration of sentence awarded u/s 304 of IPC to Section 326 of the IPC. I am therefore, inclined to pass the following order.

ORDER

(i) The appeal is partly allowed.

(ii) The conviction of the appellant u/s 304 of the IPC is set aside.

(iii) The appellant/accused is held guilty of offence punishable u/s 326 of the IPC

and sentenced to undergo rigorous imprisonment for five years and to pay fine of Rs. 3,000/-, in default of payment of fine, to undergo simple imprisonment for three months.

(iv) The appellant be given set off u/s 428 of the IPC.