
(2003) 07 BOM CK 0005
In the Bombay High Court
Case No : Criminal Appeal No. 89 of 1999

Namdeo

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 25-07-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 302, 304, 324, 326

Citation : (2003) 07 BOM CK 0005

Hon'ble Judges : R.K. Batta, J; P.S. Brahme, J

Bench : Division Bench

Advocate : M.R. Daga, for the Appellant; Ahirkar, APP, for the Respondent

Final Decision : Allowed

Judgement

R.K. Batta, J.—The appellant was tried for the murder of his wife u/s 302 of the Indian Penal Code. Prosecution had, in all, examined fifteen witnesses in support of the charge. Many of the prosecution witnesses did not support the prosecution case. The prosecution case rested on recovery of the stick on which the Chemical Analyser found blood-stains. This recovery was made from the accused-appellant u/s 27 of the Indian Evidence Act. Besides this, to some extent, some of the hostile witnesses had supported the prosecution case. The Trial Court, upon appreciation of the evidence, found that the charge of murder had been proved. The theory of fall propounded by the accused-appellant was not accepted by the trial Court. The appellant has been sentenced to suffer life imprisonment and to pay a fine of Rs.500/- in default to suffer rigorous imprisonment for nine months for the offence u/s 302 of the Indian Penal Code. The conviction and sentence imposed on the appellant is challenged in this appeal.

2. Mr. M.R. Daga, the learned Advocate for the appellant, submitted before us that no prosecution witness has supported the charge as against the appellant and that there is no direct evidence on the record to connect the appellant with

the crime and the only circumstance of recovery of stick at the instance of the appellant-accused, upon which the blood stains of "B" group. were found, which is the blood group of the deceased, is not sufficient to sustain the conviction. Alternatively, it is argued by the learned Advocate that it is a case of single blow and in the facts and circumstances of the case, the case of the appellant would at the most fall u/s 304-11 of the Indian Penal Code. It was further submitted by him that the appellant had been in jail in connection with this offence from 9.4.1997 and he has already undergone more than six years of imprisonment and as such, the imprisonment already undergone by the appellant be treated as sufficient punishment.

3. We shall first briefly refer to the evidence on the record. Gana (P.W.1) who lodged the FIR is not the eye-witness of the incident. He is brother of deceased Jayawantabai. According to him, Mohan Shende (P. W.5), son of the deceased, informed him about death of Jayawantabai. Though in the FIR lodged by him, on the basis of the information given by Mohan, it was stated that Mohan had informed him that Namdeo Shende had assaulted the deceased on her head with Khatwa, yet in his deposition in the Court he has stated that the information received by him was that the deceased fell down and she received injury to her head. In the light of what was stated in the FIR, what the learned APP was doing when he examined this witness is not understandable. Be that as it may, Mohan, who was examined as P.W.5, did not support the prosecution case. Manisha (P. W.2), daughter of the deceased and the appellant, also did not support the prosecution case. However, when she was permitted to be cross-examined by the learned APP, she denied to have stated before the police that her father Namdeo came with a stick and beat her mother on her back and head and as such, her mother was lying and blood was oozing out from her head. Mother of this witness namely Jayawantabai, the deceased, has already died and the appellant is her father due to which she did not support the prosecution case. Likewise, Ishwar (P.W.3) also did not support the prosecution case. Parvatabai (P. W.4), who is wife of brother of the appellant, has stated that she saw the deceased lying on the ground with bleeding injury on her fore-head. At that time, the accused was standing with the stick in his house. This stick has been recovered by the police u/s 27 of the Evidence Act, upon which blood-stains of "B" group were found by the Chemical Analyser, which is the blood group of the deceased. She has also not supported the prosecution case and during the cross-examination by learned APP, she admitted that Manisha (P. W.2) had informed that the deceased was beaten by her husband with stick. Of course, again in the cross-examination by the learned Advocate for the accused, she stated that Manisha told her that her mother fell in the Chapari and received injury. The theory of fall has been totally ruled out by Dr. Sudhakar Lanjewar (P. W.6), the Medical Officer who found lacerated wound over the left parietal region of scalp 7 cm. in length and 2 cm in breadth, skin deep, blood clot adherent to wound edges. On internal examination, he found haematoma present under scalp over left parietal region 9 cm. x 3 cm. fracture of left parietal bone of skull. Subdural haematoma present

under brain matter. The death was caused probably due to cardio respiratory arrest secondary to head injury. According to Dr. Lanjewar (P. W.6) the injuries by the stick were sufficient to cause death under normal circumstances. He further stated that the injuries are possible due to stick (Article 4)-shown to him. In the cross-examination, he stated that there was fracture and therefore, there could not be injury due to fall. He further stated that even if a person falls by pressure still the injury could not be possible. Thus, he totally rules out the cause of injury due to fall. Thus, the prosecution witnesses, who are closely related to the appellant and deceased, had suppressed the exact cause of injury since their case is that the injury was on account of fall, but the said possibility-had been totally ruled out by Dr. Lanjewar (P.W.6). The appellant even went to the extent of denying the injury, which is clear from the question No.6 in his statement u/s 313 of the Code of Criminal Procedure. The plea taken by the appellant is that he was not present, whereas Parabatabai Shende (P.W.4) has stated that the accused was sitting with a stick in his house.

4. Maroti Kathane (P.W.7) has stated that one boy came and informed him that the accused had beaten his wife and she fell down and blood was oozing out. The said boy was Ishwar Shende. In the cross-examination, he has stated that the accused told that Namdeo Shende beat by stick. Even Dr. Janardhan Gaidhane (P.W.8) has ruled out the possibility of the injuries caused due to fall.

5. Prosecution has relied upon recovery of blood-stained stick at the instance of the accused-appellant u/s 27 of the Indian Evidence Act. Pancha Bhojram Chute (P. W.9) has stated that the accused was interrogated and he had agreed to produce the stick. The memorandum panchanama (Exh.27) was drawn. Thereafter, the accused produced the stick from his house which was attached under panchanama (Exh.27-A). He has identified the said stick as Article 4. The learned Advocate for the appellant has pointed out that this witness has stated that there was sharp edged stone at the spot which had blood-stains. Therefore, according to him, sustaining of the injury due to fall on the sharp edged stone could not be ruled out. But we are not agreeable with the said argument of the learned Advocate because this question was not put to the Medical Officer and no injury from the sharp edged stone was found on the person of the deceased. The learned Advocate for the Appellant further submitted before us that the accused was arrested only after the recovery, as per the version of panch witness Bhojram (P.W.9) and as such, the recovery cannot be treated as made u/s 27 of the Indian Evidence Act. In this respect, the Investigating Officer has categorically stated that the appellant was first arrested and thereafter, he was interrogated and on interrogation, he made disclosure, pursuant to which stick was recovered. Pancha being a layman may not understand the technical meaning of arrest and as such, in the light of the evidence of investigating officer, we do not find any merit in the submission of the learned Advocate for the appellant. The learned Advocate for the appellant also stated that this witness in the cross-examination has stated that the stick was brought to the Police Station by Namdeo. This witness, however, has categorically stated that

the stick was attached from the house of Namdeo. In this view of the matter, last minute effort of this witness to save the appellant is in the nature of the witness being won over at that stage. In our opinion, recovery of blood-stained stick from the accused has been duly proved. The blood-stains on the stick were found to be of "B" group by the Chemical Analyser and the blood group of wife of the accused is also "B" group. The theory of fall having been totally ruled out by the medical evidence, the circumstantial evidence in respect of recovery of stick on which blood-stains of "B" group were found, which is the blood group of deceased, coupled with the fact that Parbatabai (P.W.4) has stated that the accused was sitting with stick in his house, is sufficient in our opinion, to come to the conclusion regarding complicity of the appellant in commission of the crime. On merits, therefore, we do not find any reason to take a different view of the matter.

6. Mr. Daga, the learned Advocate for the appellant, in the alternative, has argued that the case of the appellant would fall u/s 304-11 of the Indian Penal Code. On single blow, the Apex Court in Mahesh Balmiki @ Manna Vs. State of Madhya Pradesh, , has laid down as under:

There is no principle that in all cases of single blow Section 302, IPC is not attracted. Single blow may, in some cases, entail conviction u/s 304, IPC and in some other cases u/s 326, IPC. The question with regard to the nature of offence has to be determined on the facts and in the circumstances of each case. The nature of the injury, whether it is on the vital or non-vital part of the body, the weapon used, the circumstances in which the injury is caused and the manner in which the injury is inflicted are all relevant factors which may go to determine the required intention or knowledge of the offender and the offence committed by him. In the instant case, the deceased was disabled from saving himself because he was held by the associates of the appellant-accused who inflicted though a single yet a fatal knife blow. These facts clearly establish that the accused had intention to kill the deceased. In any event, he can safely be attributed knowledge that the knife blow given by him is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death. Therefore, conviction of accused under Sections 302 and 324, IPC was proper.

7. The learned Advocate for the accused-appellant has relied upon the case of Joseph Vs. State of Kerala, , wherein the weapon of offence involved was lathi and the learned APP has relied upon the case of Gudar Dusadh Vs. State of Bihar, wherein also the weapon of offence involved in the crime was lathi.

8. In the case of Gudar Dusadh (supra), the attack was premeditated and the ocular evidence relating to the circumstances in which the blow was given was available. In this case, only one blow with lathi was given on the head which resulted in lacerated wound of 2"x1/2" bone deep on the left side of the head of deceased. On dissection, the doctor found 3" long fracture of the left parietal bone about 2-1/2" from the middle line of the top of the head. In the facts and

circumstances of that case, it was found that mere fact that the accused gave only one blow on the head would not mitigate the offence of the accused and make him guilty of the offence of culpable homicide not amounting to murder.

9. In the case of Joseph (supra), the facts were that the accused attacked the deceased with the weapon "lathi" and he dealt with two blows on the head of the deceased. Deceased died after two days of the assault. The Apex Court found that the whole occurrence of the incident was the result of a trivial incident and in the circumstances, even though two blows were given with lathi on the head, it could not be said that the accused intended to cause injury which was sufficient; but, at the most, it can be said that by inflicting such injury, he had knowledge that he was likely to cause the death. The appellant was, therefore, convicted u/s 304-11 of the Indian Penal Code.

10. The case of the appellant is more akin to the judgment in Joseph v. State of Kerala (supra)(referred to above. It was also held in this judgment that stick is not a deadly weapon. The Apex Court, way back in the year 1955, in Inder Singh Bagga Singh Vs. State of Pepsu, had observed that lathi is not an iron shod. We have examined the weapon of offence (Article 4) It is a stick weighing about 600 grams only and the girth of the stick in the middle portion is 4.5 inches. It is a light stick and can, by no means, be said to be a deadly weapon. Only one single blow is said to have been given with this stick as a result of which the deceased, who was 32 years old, died before reaching the hospital, possibly on account of bleeding as a result of the said head injury. The circumstances under which the said blow was given are not available as there is no ocular evidence regarding the assault. In the facts and circumstances, therefore, intention to cause death cannot be attributed to the appellant, but the knowledge that the appellant was likely to cause death by giving single blow can be attributed to him. The offence, therefore, in our opinion, would fall u/s 304-11 of the Indian Penal Code.

11. For the aforesaid reasons, the conviction of the appellant u/s 302 of the Indian Penal Code is set aside. Instead, the appellant is held guilty u/s 304-11 of the Indian Penal Code. The appellant has been in the custody since 9.4.1997 as reflected in the judgment of the learned Additional Sessions Judge which means that the appellant has been in the custody for almost six years and three months now. In the circumstances, we consider that the sentence already undergone is sufficient punishment and the appellant is ordered to be set at liberty in case he is not required in any other case. The fine of Rs.500/- imposed is set aside.

The appeal is allowed in the aforesaid terms.