

(2014) 01 BOM CK 0205

In the Bombay High Court

Case No : Criminal Appeal No. 137 of 2007

Narayan Aba Pawar, Sou. Laxmibai Narayan Pawar and
Ganesh Narayan Pawar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 31-01-2014

Acts Referred:

Constitution of India, 1950 — Article 21 23

Penal Code, 1860 (IPC) — Section 302 304 304(II) 323 324

Citation : (2015) ALLMR(Cri) 1790 : (2014) 3 BomCR(Cri) 42 : (2014) 1 Crimes
621

Hon'ble Judges : P.V. Hardas, J; A.S. Gadkari, J

Bench : Division Bench

Advocate : Kuldeep S. Patil assisted with Ms. Megha Bajoria, for the Appellant;
S.D. Shinde, APP, for the Respondent

Final Decision : Partly Allowed

Judgement

1. The appellants who stand convicted for an offence punishable u/s 302 read with Section 34 of Indian Penal Code (IPC) and Section 324 read with 34 of IPC and sentenced to imprisonment for life and each to pay fine of Rs. 5000/-, in default of which to undergo further RI for 1 year, and further RI for 1 year and to pay fine of Rs. 1000/- each and in default of which to undergo further RI for 3 months, with a direction that the substantive sentence shall run concurrently, by the Ad-hoc Additional Sessions Judge, Islampur, by judgment dated 22.1.2007, in Sessions Case No. 103 of 1999, by this appeal question the correctness of their conviction and sentence. The facts in brief, as are necessary for the decision of this appeal, may briefly be stated thus:

(i) PW-12 API Sunil Kulkarni who on 1.9.1997 was attached to Islampur Police station, was entrusted with the investigation of Crime No. 180 of 1997 which was registered u/s 302, 323 read with 34 of IPC on the basis of the report lodged by PW-1 Netaji Pawar. The said FIR is at Exhibit-16. On being entrusted with the

investigation, PW-12 API Kulkarni accordingly drew the Inquest Panchanama of the dead body of deceased Tanaji, in the presence of panch-witnesses, at Exhibit 21. On the next day, he drew the scene of incident panchnama in the presence of panch-witnesses, at Exhibit 31. On 2.9.1997, the clothes of the deceased came to be seized under the seizure memo at Exhibit 22.

(ii) The accused were arrested and accordingly their blood stained clothes were seized under seizure memo, at Exhibit 44. The blood stained clothes of the injured witnesses were also seized in the presence of panchas under seizure memo at Exhibit 64. During custodial interrogation, accused no. 3 Ganesh expressed his willingness to point the place where the sticks had been concealed. Accordingly, a memorandum of accused was recorded in the presence of panchas at Exhibit 41. Accused No. 3 led the police and panch to the cattle shed of PW-1 Netaji and produced 4 sticks which came to be seized in the presence of panchas under seizure memo at Exhibit 42. Statements of the witnesses were recorded and the seized property was then referred to the chemical analyzer under a requisition. The report of the chemical analyzer is at Exhibit 65. Further to the completion of the investigation, a chargesheet against the appellants was submitted. The original accused no. 4 who was juvenile was tried separately.

(iii) Postmortem on the dead body of the deceased Tanaji was conducted by PW-10 Dr. Deelip Sawant. PW-10 Dr. Sawant noticed the following external injuries:

1. Ecchymosis right forehead above eyebrow reddish colour oblique 2 cm x 1 cm subcutaneous haemorrhage present.
2. Stab wound over left forehead on eyebrow middle third, 5 mm in diameter on exploration fracture of frontal seen bone seen black blood clot present blood around wound present.
3. Red ecchymosis left malar region lateral to left eyebrow vertical measuring 2.5 cm x 1.5 cm sub cutaneous haemorrhage present.
4. Ecchymosis on tip of nose and right side of nose-subcutaneous present reddish in colour.
5. Abrasion on lateral aspect left elbow 2.5 cm x oblique red crusting present.

On internal examination, he noticed:

skull fracture of right frontal bone obliques 5 cm x 2 mm from supraorbital region to front partial region, intra and extra cranial haemorrhage present.

(iv) He therefore opined that the internal injuries corresponded to injury no. 1 in column 17. He had also noticed: fracture of left frontal bone supra orbital region, irregular. Depressed fracture impacted in frontal lobe. Left frontal durometer cut along the injury no. 2 in column no. 17. Irregular piece of bone impacted in left frontal lobe. Odemater brain matter. He further opined that all those injuries were antemortem injuries. According to PW-10 Dr. Sawant, the cause of death of

neurogenic shock due to head injury. The postmortem report is at Exhibit 51.

(v) On the same day, he had examined PW-6 Nanda wife of deceased Tanaji and had noted the following external injuries:

1. Ecchymosis left arm lateral aspect 5 cm x 1 cm redish colour oblique movement painful.
2. Ecchymosis right arm posterior aspect 7 cm x 1 cm redish colour, local tenderness present movement painful.

(vi) He opined that both injuries are possible by stick and were caused within 24 to 36 hours. Injury certificate of PW-6 Nanda is at Exhibit 53. He had admitted to have examined original accused nos. 1 and had noted the following injuries:

1. Ecchymosis on left infra scapular region on 9.3 horizontal measuring 10 cm 1 cm redish colour and I had suspected fracture of 9th rib.
2. C.L.W. Lateral aspect right eye 5 mm x 3 cm oblique skin deep blood clot present.

(vii) He has opined that the injuries were caused by hard and blunt object within 12 hours. He has further opined that the injuries were possible by sticks. He had also examined accused no. 2 Laxmibai Pawar and had noted the following external injuries:

1. Swelling over lateral aspect of lateral supra malleolar region tenderness present. Crepitual. I suspected fracture lower end of left fibula.
2. Swelling right four foot tenderness on 4th and 5th metra-tarsal right side. Tenderness present. I suspected fracture of 4th and 5th metatarsal bones right side.

According to him the said injuries were caused by hard and blunt object.

(viii) On committal of the case to the Court of Sessions, the Trial Court vide Exhibit 2 framed charge against the appellants for an offence punishable u/s 302 read with 34 of IPC and 324 read with 34 of IPC. The accused denied their guilt and claimed to be tried. The prosecution, in support of its case, examined 12 witnesses.

(ix) The defence of accused no. 1 is that in the morning the complainant party had assaulted accused no. 2 and thereafter the complainant party assaulted accused no. 1. Thus, according to accused no. 1, accused nos. 2 and 3 were not present at the scene of incident.

(x) The Trial Court disbelieving the defence of the accused and held that the injuries sustained by the accused were self-inflicted injuries, and convicted and sentenced the appellants as aforestated.

2. In order to effectively deal with the submissions advanced before us by Shri

Kuldeep Patil, learned Counsel for the appellants and the learned APP, it would be useful to refer to the evidence of the prosecution witnesses.

3. Prosecution has examined PW-1 Netaji an injured eye-witness who deposes that he was residing along with his parents, sister, brother, uncle etc. His brother Tanaji had been given in adoption to one Shevnta Chandru Daingade 25 years back. He then states that the land of accused no. 1 was near his agricultural land. At the time of incident, accused were also residing in village Masuchiwadi. According to PW-1 Netaji, the accused were displeased with the deceased Tanaji on account of holding the lands from his adopted family. About 15 days prior to the incident, there was a quarrel between the accused and the complainant party on account of complainant party using the way through sugarcane crop of the accused. PW-1 Netaji claims that the accused had assaulted him and his father with sticks. In respect of the incident, he deposes that he was driving tractor of one Bhagwan Kadam in the morning and thereafter had gone to his house for his lunch. At that time his father, brother and PW-6 Nandabai and others were present in the house. PW-1 Netaji deposes that he had taken a pot of water from house and had come in courtyard. At that time all the appellants and the juvenile accused had come to the house and the accused were armed with bamboo-sticks. Accused no. 1 dealt a blow of stick on the right shoulder of Netaji, and on the elbow of both hands, on the head and on back of the head. Accused No. 3 Ganesh assaulted Netaji by stick on the right thigh and at the center of his head by a stick. The accused then went to deceased Tanaji and started assaulting him by sticks. Deceased Tanaji collapsed on the ground. One Satpal Kadam came there on motorcycle. Pravin Parab and Pandhrinath Kadam intervened in the quarrel. Thereafter, injured Tanaji was taken in a jeep to the hospital. After examining him, the Medical Officer opined that Tanaji should be shifted to the Mission Hospital at Miraj. Tanaji was accordingly taken to the Mission Hospital at Miraj and the Medical Officer upon examining Tanaji, declared that Tanaji was dead. The dead body of Tanaji was then brought to the Rural Hospital at Islampur and PW-1 Netaji thereafter lodged his report at Exhibit 16. According to him, the sticks articles 21 and 23 were the same sticks with which the accused were armed.

4. In cross-examination, he has admitted that he does not know whether accused nos. 1 and 2 had sustained any injuries. He was asked a question whether he wanted to explain injuries sustained by accused nos. 1 and 2 on which he replied in the negative. He has deposes that the accused had gone to assault his father and he had not chased the accused. He was confronted with portion mark "A" from his First Information Report that all the accused had assaulted father of Netaji. According to him, the portion mark "A" in the FIR was narrated by him. He admitted that he had sustained bleeding injuries on the back of his head and had been administered treatment for that injuries. An omission has been elicited in the FIR about assault of Nandabai. In the cross-examination, he has deposed about assault on Nandabai. He has denied the suggestion that PW-6 Nanda had not sustained any injuries. According to him, the accused were

assaulting Tanaji for about 3 to 4 minutes. He had claimed to have witnessed the accused assaulting deceased Tanaji by sticks. He states that each of the accused had given about 2 to 3 blows to Tanaji. He has admitted to have stated portion-mark "B" in his FIR that all the accused had assaulted deceased Tanaji by sticks on the head of the deceased Tanaji and Tanaji had sustained injuries and had fallen on the ground.

5. The prosecution has examined PW-2 Pravin Pawar, another eyewitness to the incident who deposes that on the date of incident he was present in his house and at about 3 pm he had heard the quarrel and therefore had gone and stood on the road. He had noticed the appellants and accused no. 4 Santosh assaulting Tanaji by sticks. He states that he attempted to rescue Tanaji from the clutches of the accused, but accused did not allow him to rescue Tanaji. Tanaji had sustained injuries on the head and forehead and then fallen on the ground unconscious. The accused thereafter went away. According to him, PW-6 Nanda wife of Tanaji was present there and she was requesting that water be brought and be administered to Tanaji. He states that PW-1 Netaji was also present who was also assaulted by the appellants. Tanaji was thereafter taken on a motorcycle to the hospital where he was declared dead. In cross-examination, he admitted that the quarrel had already commenced when he had reached the scene of incident. He had also admitted that apart from him, no one else had attempted to intervene.

6. Prosecution has examined PW-3 Anjana who states that on the day of incident at about 3 pm she had seen Tanaji lying on the road in front of house of one Dnyanu Aba Pawar. Tanaji had sustained injuries on his head. PW-6 Nanda was present there and was asking people to bring water for Tanaji. Accused nos. 1 to 3 and juvenile offender were standing near cattle shed armed with sticks. PW-3 Anjana further deposes that Netaji was lying in courtyard having sustained injuries. Thereafter Tanaji was removed to the hospital on motorcycle. Tanaji was subsequently declared as dead. In cross-examination, she had admitted that she had not witnessed the incident of assault.

7. The prosecution has examined PW-6 Nanda wife of deceased Tanaji. PW-6 Nanda deposes that in order to reach their land they had to cross the land of the accused. Because of this, there used to be frequent quarrel between the accused and the complainant party. According to her on the day of incident, she was returning home at about 12.30pm and had crossed the sugarcane crop cultivated in the land of accused no. 1. At that time accused no. 3 had abused and threatened Nanda with dire consequence. Accused No. 2 had then come to the courtyard of the house of Nanda and had abused inmates. She further deposes that PW-1 Netaji returned home at about 3 pm and was washing his hands in front of his house. At that time the appellants and the juvenile offender came to their house armed with sticks and had assaulted PW-1 Netaji. Appellant No. 1 assaulted Netaji by sticks on his head and shoulder. Netaji fell on the ground unconscious. Thereafter, accused no. 3 assaulted father of PW-1 Netaji. Accused

nos. 1 and 2 then came towards Nanda, and accused no. 1 assaulted Nanda on her head by sticks. Tanaji came out from the house and thereafter the appellants assaulted Tanaji and took him towards the house of Dnanu Aba Pawar. Nanda states that when she went to rescue him, all the accused started assaulting her by sticks. She claimed that Tanaji fell on ground in front of the house of Dnyanu as he had sustained injuries. Tanaji was thereafter shifted to the hospital where he was pronounced dead.

8. Mr. Kuldeep Patil, learned Counsel for the appellants has urged before us that there are several variances in the testimony of the witnesses. According to PW-1 Netaji he was assaulted in the courtyard, while Tanaji was assaulted in his own house. PW-1 Netaji does not refer to any assault on PW-6 Nanda. PW-2 Pravin also gives a slightly different version of the incident. PW-3 Anjana claims that she had seen injured Tanaji lying in front of the house of one Dnyanu. Similar evidence of Nanda who claims that after Netaji was assaulted, she was also assaulted and thereafter the appellants dragged Tanaji out of his house towards the house of Dnyanu where Tanaji was assaulted. The learned Counsel for appellants has further urged before us that the prosecution has suppressed injuries sustained by the accused and as per evidence of PW-10 Dr. Sawant, it is evident that the accused had also sustained injuries during the incident. He therefore urges before us that the prosecution witnesses have suppressed genesis of the incident and have presented before the Court the coloured version of the incident whereby the prosecution witnesses have underplayed their role and overplayed the role of the accused. He therefore prays that the appeal be allowed and the appellants be acquitted.

9. The learned APP urged before us that despite a minor variations in the testimony of the prosecution witnesses, the otherwise reliable evidence of the prosecution witnesses should not be rejected. Insofar as the injuries sustained by the appellants is concerned, he submits that injuries sustained by the appellants, though they are not explained by the prosecution witnesses, the evidence of the prosecution should not be jettisoned on this count as this evidence is reliable and cogent. The learned APP therefore urges before us that the appeal filed by the appellants be dismissed.

10. Mr. Patil, learned Counsel for the appellants has referred to the judgment of Supreme Court in Lakshmi Singh and Others Vs. State of Bihar, . The Supreme Court has held that in a case where the prosecution failed to explain injuries sustained by accused, two results follow: (1) that the evidence of the prosecution witnesses is untrue; and (2) that the injuries probabilise the plea taken by the appellants. The Supreme Court further held that non explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

11. The Supreme Court further held that the omission on the part of the prosecution to explain the injuries assumes much greater importance where the evidence consist of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution. The Supreme Court, however, held that if the injuries which were sustained by the accused were minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries.

12. The learned APP has referred to the judgment of the Supreme Court in *Sucha Singh and Another Vs. State of Punjab*, . The Supreme Court has held that failure to explain the injuries sustained by the accused would not fatal if the injuries sustained by the accused were minor and superficial or where the evidence was clear and cogent that it far outweighs the effect of the omission to explain the injuries.

13. It is true that there are variations in the evidence of the eyewitnesses. However, according to us, the variations are not of such a degree as it would impel the Court to jettison the evidence of the prosecution witnesses which is otherwise reliable. Prosecution, however, has failed to explain the injuries sustained by accused nos. 1 and 2. The injuries sustained by accused nos. 1 and 2 have been established to have been caused to accused nos. 1 and 2 at about the time of incident by virtue of the evidence of PW-10 Dr. Sawant. Thus, there is no doubt that the injuries sustained by accused nos. 1 and 2 have been caused to the accused during the course of the incident. There is nothing on record to indicate that the injuries sustained by accused nos. 1 and 2 are self-inflicted injuries. In the absence of any evidence to that effect, according to us, the Trial Court erred in holding that the injuries were self-inflicted.

14. Injuries sustained by accused nos. 1 and 2 have been caused due to hard and blunt object i.e. stick. Thus, the accused were also injured during the assault. It is equally true that the accused were aggressor as they had gone to the house of the complainant party. The accused had initially assaulted PW-1 Netaji and thereafter had turned their ire against deceased Tanaji. PW-6 Nanda was also assaulted by the accused. According to PW-6 Nanda, the accused then dragged Tanaji towards the house of Dnyanu and it is at that place that Tanaji was assaulted and was found lying on the road by PW-3 Anjana. It is therefore obvious that neither PW-6 Nanda nor PW-1 Netaji are in fact eye-witnesses to the assault on deceased Tanaji. Netaji claims to have been assaulted in the

house and PW-1 Netaji claims to have been assaulted in the courtyard. It is only thereafter that Tanaji was dragged towards the house of Dnyanu where he was assaulted. It is difficult to believe that all the accused participated in the assault on the deceased Tanaji as deceased Tanaji had only sustained five injuries, out of which one was abrasion which was as result of fall. Thus, Tanaji had sustained only 4 injuries because of sticks.

15. Since neither PW-1 Netaji nor PW-6 Nanda had actually witnessed the assault on Tanaji, failure of these witnesses to explain the injuries sustained by the accused therefore would not be fatal to the prosecution case. It is therefore obvious that there was some scuffle between Tanaji and accused as a result of which accused nos. 1 and 2 had sustained injuries. Since neither PW-1 Netaji nor PW-6 Nanda were armed with any weapons, the possibility of the accused sustaining injuries at their hands is extremely remote. Thus, in the scuffle with Tanaji accused had sustained injuries.

16. The intention of the appellants was not to cause murder of either PW-Netaji, PW-6 Nanda or even deceased Tanaji. It is obvious to say that the intention of the accused at that point of time was to assault the complainant party causing some grievous injuries. Since the prosecution evidence is silent in respect of the accused who had actually delivered fatal blow, all the accused have been convicted with the aid of Section 34 of IPC.

17. According to us, since the intention of the accused was not to commit murder of any person from the complainant side, the inference that the accused shared intention of either one or other the other accused in causing death of Tanaji is not correct. One of the accused who had crossed the intention and had inflicted fatal blow had committed murder of deceased Tanaji. However, the evidence of the prosecution does not establish as to who was the accused who had inflicted fatal blow. Since the intention of the accused was not to commit murder of deceased Tanaji and it was only in the heat of a quarrel or fight that one of the accused had delt fatal blow of the stick, according to us, all the accused cannot be convicted for an offence punishable u/s 302 read with 34 of IPC.

18. According to us, the accused ought to have convicted for an offence of culpable homicide not amounting to murder punishable u/s 304(II) of IPC.

19. It appears that the original accused no. 1 Narayan Aba Pawar is aged 70 years now, while original accused no. 2-Laxmibai Narayan Pawar is aged 65 years as of today. The date of incident is September 1997 and thus nearly 17 years have elapsed since the date of the incident. Accused Nos. 1 and 2 had been arrested on 6.9.1997 and were released on bail on 24.9.1997. Subsequent to their conviction, they were committed to jail on 22.1.2007 and were released on bail by this court on 10.4.2007. Accused Nos. 1 and 2 have thus undergone three months imprisonment till date. Accused No. 3 Ganesh has been in jail throughout and according to learned Counsel for the appellants, he has undergone an imprisonment of more than 5 years.

20. Looking to the age of the accused nos. 1 and 2 and also in the light of the fact that the incident had occurred more than 17 years back, according to us the imprisonment of three months undergone by the accused nos. 1 and 2 would subserve the interest of justice. We are quite conscious of the fact that the imprisonment of 3 months for an offence punishable u/s 304(II) would be a fleabite sentence. However, in the peculiar facts of the case, as stated above, according to us the interest of justice would better be served by imposing the sentence of a period already undergone by accused nos. 1 and 2 as well as the period undergone by accused no. 3. The amount of fine imposed by the Trial Court needs to be enhanced and according to us, it would be appropriate if each of the accused should be asked to payment of fine of Rs. 15,000/-, in default of which to undergo RI for 1 and 1/2 years.

21. Accordingly, Criminal Appeal No. 137 of 2007 is partly allowed and the conviction and sentence of the appellants/original accused no. 1-Narayan Aba Pawar, original accused no. 2-Sou. Laxmibai Narayan Pawar and original accused no. 3-Ganesh Narayan Pawar for an offence punishable u/s 302 read with Section 34 of the IPC is hereby quashed and set aside and instead the appellants are convicted for an offence punishable u/s 304 Part II read with Section 34 of the IPC and are sentenced to the period of imprisonment already undergone by each of them and each of the accused is sentenced to pay a fine of Rs. 15000/-, in default of which each accused to undergo further RI for one and half years.

22. Conviction of the appellants for offence punishable u/s 324 read with Section 34 of the IPC is maintained, but the sentence awarded to them is set aside and instead they are sentenced to the period of imprisonment already undergone by each of them and each accused to pay a fine of Rs. 1000/-, in default of which to undergo RI for one year.

The substantive sentences of imprisonment shall run concurrently.

Entire amount of fine, if paid by the appellants, to be paid to PW 6-Nanda, wife of deceased Tajanji.

Since appellant-accused no. 3 is in jail, he be released forthwith, if not required in any other case, as he has undergone the substantive sentence of imprisonment. Bail bonds of appellant nos. 1 and 2 stand cancelled.