

(2002) 06 BOM CK 0022
In the Bombay High Court
Case No : Criminal Appeal No. 98 of 1997

Nazar Mohammad Shaikh (At Present in Central Prison)	APPELLANT
Vs	
State of Maharashtra	RESPONDENT

Date of Decision : 12-06-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 300, 302, 303, 304

Citation : (2002) 104 BOMLR 369

Hon'ble Judges : V.M. Kanade, J; R.K. Batta, J

Bench : Division Bench

Judgement

V.M. Kanade. J.

1. The appellant/accused was charged u/s 302 of the Indian Penal Code for intentionally causing death of one Raufkhan and was convicted by the Additional Sessions Judge, Nagpur, in Sessions Trial No. 446/95 by Judgment and order dtd. 26th February, 1997 and was sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 500/- in default to suffer rigorous imprisonment for one more month. The appellant/accused is challenging this Judgment and order in the present appeal.

2. Facts :

On 27.6.1995 at about 10.00 p.m. deceased Raufkhan was assaulted. It is the case of the prosecution that one Sultan Sheikh had a tyre puncture repairing shop on Khaparkheda Road. Sultan Sheikh was at the hotel of one Gupta and at that time he noticed that there was a quarrel between two persons in front of his shop and they were abusing each other in filthy language. Sultan Sheikh immediately rushed to the liquor shop and informed Madankishor who was serving as a Manager, about the said quarrel, and also informed him that one person was assaulting Raufkhan by knife. Thereafter, on getting this information, Madankishor, Prakash, Vilas, Manohar, Bhim, Sahadeo, Gani and Kailash who were present in the liquor shop at that time, rushed towards the shop of Sultan

Sheikh. They found that a person wearing black clothes was running towards the road. Sultan Sheikh immediately reported that the said person was an assailant and, therefore, he was arrested by those persons. The said person had knives with him which he dropped after seeing the crowd. It is the case of the prosecution that they found Raufkhan lying in a pool of blood in front of the puncture repairing shop of Sultan Sheikh and that he had received bleeding injuries on his neck, back and on other parts of the body. In the mean time, an autorickshaw driven by one Changdeo arrived there and injured Raufkhan and accused were taken to the Police Out Post, Walni, The accused was handed over to the Police Out Post, Walni where Police Head Constable Ramdas was on duty. Raufkhan was immediately rushed to the Hospital at Walni. However, thereafter he was shifted to Indira Gandhi Medical College, Nagpur, since his condition was found to be very serious. Thereafter, on 28.6.1995, Sultan Sheikh gave oral report at 0.20 p.m. at Police Out Post, Walni and on the basis of the said report the Police investigated the said matter and the Investigating Officer recorded the statement of the witnesses and prepared panchanama and seized the clothes of the accused and also two knives which were used in the said assault by the accused. The spot panchanama was prepared on 28.6.1995 at 6.00 p.m. and articles were seized. The clothes of the accused and other articles were sent to the Chemical Analyser. It was found that the blood of Raufkhan and the accused was of "B" group and that the blood which was found on the knives and on the clothes of the accused, was also of "B" group. The police being prima facie satisfied that the accused had committed the offence, filed the charge-sheet and the charge was framed against the accused for the offence punishable u/s 302 of the Indian Penal Code. The accused pleaded not guilty to the said charge. In the Trial Court, the prosecution examined in all 16 witnesses for proving its case. P. W. 6 Shankar, P. W. 7 Kailash, P. W. 11 Vilas, P. W. 12 Prakash and P. W. 14 Mohd. Suntan were examined as eye witnesses. P. W. 1 Manohar, P. W. 2 Gopalsingh, P. W. 3 Rambihari and P. W. 5 Bharatlal were examined as panch witnesses. P. W. 8 Dr. Shrishankar Shukla and P. W.9 Dr. Vinod Agrawal were examined to prove the post-mortem examination Exhs. 44 and 45. Similarly, the Investigating Officer was examined as P. W. 16 and P. W. 17 Dr. Vinod Waghmare was examined to prove injury certificate in respect of the injuries found on the person of the accused.

3. The accused admitted inquest panchanama dtd. 28.6.95 (Exh. 9), Police Report forwarded to the Medical Officer for post-mortem examination (Exh. 11); requisition to the Chemical Analyser for examination of blood and viscera (Exh. 15) and the seizure memo of clothes of deceased (Exh. 18) dtd. 26.8.1995. The defence of the accused was that of denial. However, in the statement u/s 313 of the Cr. P. C. the accused stated that the Police had arrested him on the next day while he was sleeping in the Truck and that he was falsely implicated.

4. All the eye witnesses of the prosecution turned hostile and did not support the story of the prosecution in respect of having actually seen the accused assaulting the deceased with knife. The prosecution, however, was in a position to establish

the presence of the accused at the scene of offence since he was arrested at the very place where the incident took place and the seizure of the knives and his clothes were also proved by the prosecution.

5. The Trial Court convicted the accused u/s 302 of the Indian Penal Code and gave findings that since the accused was arrested at the spot and was having blood stains on his person and clothes and further he was in possession of the knives which were also having blood stains, the Trial Court, relying on the statement of the witnesses which established that the incident had taken place and that they rushed to the spot, came to the conclusion that the accused was guilty of the offence of murder and convicted the accused u/s 302 of the Indian Penal Code.

6. Shri Daga, learned Counsel appearing on behalf of the appellant/ accused, has taken us through the depositions of the witnesses and as also the evidence adduced by the prosecution. We have gone through the Judgment of the Additional Sessions Judge. We have heard the learned Counsel appearing on behalf of the appellant/accused and the learned A.P.P., appearing on behalf of the State.

7. Shri Daga, the learned Counsel appearing on behalf of the appellant/ accused, has submitted that all the eyewitnesses, which were examined by the prosecution, have not supported the case of the prosecution and as such there is no evidence to show that the accused has assaulted the deceased by means of knife. He further submitted that the prosecution further was not in a position to bring on record the genesis of the said offence and the exact cause of the said incident. He submitted that though it is an admitted position that the witnesses have stated that there was a quarrel between two persons and that subsequently Raufkhan was found in the pool of blood, yet the exact background in respect of the beginning of the said incident, has not been established by the prosecution. He submitted that this assumes importance particularly when it is an admitted position that the accused also had sustained incised injuries on his person and that neither the Head Constable nor the Investigating Officer has been in a position to explain the cause of these injuries. He further submitted that therefore, an adverse inference should be drawn against the prosecution for not explaining the cause of these injuries on the person of the accused. He submitted that though the accused had taken the defence of denial, from the evidence adduced by the prosecution the appellant/ accused could raise the plea of private defence or alternatively submit that if the said assault by the accused against the deceased was held to be proved, his case would, at the most, fall under Exception (iv) to Section 300 of the Indian Penal Code and as a result his case would fall u/s 304 Part I and not u/s 302 of the Indian Penal Code.

8. The learned A.P.P., appearing on behalf of the State, submitted that the presence of the accused at the scene of the offence was proved by the prosecution. In fact, the accused was caught red handed by the witnesses who had seen the commission of the said offence and though there was no eye

witness to the said incident, but the fact remains that the accused was apprehended at the spot and that the knives used by him, were seized and further that the said knives were having blood stains and so also his clothes, establishes beyond reasonable doubt that the accused had assaulted the deceased. The learned A.P.P. submitted that though the prosecution had not explained the injuries on the person of the accused, that by itself could not be a ground for drawing adverse inference against the prosecution case. She submitted that the blood which was found on the clothes of the accused and on the knives, was the blood group "B" and the blood group of deceased was also "B". She submitted that though the blood group of the accused was also "B", the accused had not given any explanation as to how the said blood stains were found on his clothes and on the knives which were in his possession.

9. In our view after having perused the entire evidence on record, it will have to be held that the prosecution had established the presence of the accused at the scene of offence. Similarly, the prosecution also had proved that the blood stains on the clothes of the deceased and on the knives which were recovered and seized from the scene of offence clearly established that the accused had assaulted the deceased with said knives. However, the prosecution has not been in a position to give any explanation in respect of the injuries which were found on the person of the accused and as a result, the possibility of the deceased having initially started fight and having injured the accused, cannot be ruled out. Similarly, it is probable that there was a sudden fight on account of minor quarrel which resulted in both the accused and deceased assaulting each other. From the evidence which is adduced by the prosecution, it has been established that the deceased Raufkhan used to visit the liquor shop every day in the night and that all the witnesses who have been examined by the prosecution also used to visit the liquor shop. There is no evidence to suggest that there was any prior enmity between the deceased and the accused and that there is a definite absence of motive seen from the evidence adduced by the prosecution which gives credence to the possibility that there could have been a sudden fight in which the accused and deceased had assaulted each other.

10. P. W. 1 Manohar who has been examined to prove the spot panchanama (Exh. 28) and the seizure of the various articles lying on the ground at the scene of offence viz. glass pieces of bottle, chappal, one cycle, gamcha i.e., handkerchief and blood stained earth. P. W. 2 Gopalsingh is also examined as a panch witness to the spot panchanama (Exh. 28) and seizure memo (Exh. 29). P. W. 2 Gopalsingh has identified the deceased and also the accused. P. W. 2 Gopalsingh has stated that he knew the deceased Raufkhan as he was serving as a loader in Coal Mines and the accused Nazar was serving as a conductor on a truck. P. W. 3 Rambihari has been examined as a panch witness in respect of the seizure of two knives (Articles 9 and 10) and the seizure memo (Exh. 33) has been proved, so also the arrest panchanama (Exh. 32) has been proved by him. The said witness has proved that the knives were recovered from the spot from the site where the offence has taken place and also the arrest panchanama

showing that the accused was arrested at the very site where the offence has been taken place. The defence was not successfully shaking the testimony of this witness and, therefore, it will have to be held that the prosecution has clearly proved the seizure of the knives and the arrest of the accused at the very site where the offence has taken place. The only suggestion made by the defence that the panchanama was prepared at the Police Station, has been denied by the said witness. P. W. 4 Madankishor has been examined as an eye witness. However, this witness has turned hostile and in his examination-in-chief he has stated that he was informed that the person who was arrested at the scene of offence, had assaulted Raufkhan by a knife. Though this witness has turned hostile, this particular testimony of the witness clearly establishes the presence of the accused. This evidence is relevant and is admissible under the Evidence Act and can be read in evidence. This witness also has stated that various other witnesses were also present and he has mentioned the names of Prakash, Bhim Babulal. Manohar and as also Vilas and Kailash. Though this witness has not stated that he has seen the accused assaulting the deceased with knife, he resiled the statement made before the Police in respect of the identification of the accused, yet the other testimony given by him in the examination-in-chief clearly establishes the presence of the accused. P. W. 5 Bharatlal has been examined as a panch witness in respect of the seizure of the clothes of the accused (Exh. 37). These clothes were having blood stains and the Chemical Analyser Report clearly establishes the blood stains which were found on the clothes of the accused, were of blood group "B" which was the blood group of the deceased. P. W. 6 Bhimkumar though was examined as an eye witness, he did not support the prosecution case and turned hostile. This testimony, therefore, will have to be discarded. However, P. W. 7 Kailash has deposed that they, had caught the accused at the scene of the offence while he was running away and that he was taken to the Police Station and handed over to the Police. He also identified the knives which were found at the scene of offence. Thus, though P. W. 7 Kailash has not supported the prosecution case in respect of witnessing the said incident of the accused actually assaulting the deceased, yet his testimony in respect of the presence of the accused will have to be accepted. This evidence, therefore, clearly establishes that the accused was arrested by them while he was running away from the scene of offence and that he was caught and apprehended by him, Bhimkumar and others and he was handed over to the Police. He has also identified the Articles 10 and 11 i.e. knives which were shown to him. Thus, from all these evidence, it is apparent that the accused was arrested at the scene of offence. That he had also received incised injuries, which fact is proved by P. W. 15 Dr. Ramdas. P. W. 17 Dr. Vinod Waghmare who has deposed that the following injuries were found on the person of the accused.

1. Incised wound on dorsal of left hand at the junction of meta-carpal phalangeal joints 1 cm. skin deep, 1 cm. long, skin deep, margins of the injury were sharp.
2. Incised wound on the palmer aspect of left thumb 1 cm. long skin deep with

sharp margin.

3. Incised wound on left elbow, 1 & 1/2 cm. long, skin deep with sharp margins.

4. Abrasion on the palmer aspect of right little finger 1 & 1/2 cm. in size.

5. Abrasion on left thigh on posterior aspect 2 cm. x 1 cm. in size.

11. Coupled with this fact, the blood stains on the clothes of the accused are of blood group "B" and no explanation has been offered by the accused as to how these blood stains were found on his clothes and also from the knives Articles 10 and 11. Thus, we have no hesitation to hold that the accused had assaulted the deceased with a knife on the said date and that his presence had been proved beyond doubt by the prosecution and the findings of the Sessions Judge on this point, will have to be confirmed. Though there are some minor contradictions in respect of the statement made by the eye witnesses who have turned hostile.

12. The second question, however, is whether the offence committed by the accused, would fall u/s 302 of the Indian Penal Code or u/s 304 - Part I of the Indian Penal Code. In our view, in view of the serious infirmities in the prosecution case, it will have to be held that the case of the accused would fall u/s 304 -Part I and not u/s 302 of the Indian Penal Code. The prosecution has miserably failed to establish the cause of the injuries which were found on the person of the accused. These injuries are not of a very minor nature and thus the injuries clearly suggest that the accused had tried to defend himself from the assault by a knife or by a lethal weapon. Because these injuries are incised wounds which are found on the person of the accused, an adverse inference will have to be drawn against the prosecution because they have failed to establish the genesis of the offence which had taken place in the said case. It would be profitable to refer to the Judgment of the Apex Court in the case of Lakshmi Singh and Others Vs. State of Bihar, in which the Apex Court has held that if there is non-explanation of the injuries sustained by the accused, an adverse inference can be drawn against the prosecution. The Apex Court in para 11 has observed as follows :

It seems to us that in a murder case, the 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.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. In the instant case, when it is held, as it must be that the appellant Dashrath Singh received serious injuries which have not been explained by the prosecution, then it will be difficult for the Court to rely on the evidence of P.Ws. 1 to 4 and 6, more particularly, when some of these witnesses have lied by stating that they did not see any injuries on the person of the accused. Thus, neither the Sessions Judge nor the High Court appears to have given due consideration to this important lacuna or infirmity appearing in the prosecution case. We must hasten to add that as held by this Court in *State of Gujarat Vs. Bai Fatima and Another*, in Criminal Appeal No. 67 of 1971 decided on 19.3.1975 or there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. The present, however, is certainly not such a case, and the High Court was, therefore, in error in brushing aside this serious infirmity in the prosecution case on unconvincing premises.

13. In the instant case also the prosecution has not adduced any evidence or offered any explanation in respect of the injuries on the person of the accused. The Investigating Officer Surendra Pal (P.W. 16) who was examined also does not state as to how those injuries were caused to the accused. Similarly, P. W. 15 Ramdas Nanhe also was not in a position to offer any explanation in respect of the injuries which were found on the person of Nazar Mohammad. P. W. 15. Ramdas Nanhe has deposed as follows in respect of the said injuries :

Some injuries were found on the person of Nazar Mohammad and they are described by me in the arrest panchanama. I do not recollect whether accused Nazar Mohammad was sent to Hospital, Walni for his medical examination.

14. The ratio laid down in *Lakshmi Singh and Ors. v. State of Bihar*, (cited supra) has been approved by the 3 Judges Bench of the Apex Court in the case of *Ram Sunder Yadav and Others Vs. The State of Bihar*, . The Apex Court has held in para No. 3 as follows :

It has now been brought to our notice that earlier a three Judges Bench of this Court had considered the above questions in *Bhaba Nanda Sarma and Others Vs. State of Assam*, and held that the prosecution is not obliged to explain the injuries on the person of accused in all cases and in all circumstances and according to the learned Judges, it is not the law. The same question again came up for consideration before another three Judges Bench of this Court in *Vijayee Singh and others Vs. State of U.P.*, wherein it has been held as under (at pp.

1465 and 1466 of AIR) :

In Mohar Rai and Bharath Rai Vs. The State of Bihar, , it is made clear that failure of the prosecution to offer any explanation regarding the injuries found on the accused may show that the evidence related to the incident is not true or at any rate not wholly true. Likewise in Lakshmi Singh and Others Vs. State of Bihar, also it is observed that any non-explanation of the injuries on the accused by the prosecution may affect the prosecution case. But such a non-explanation may assume great importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the Court can distinguish the truth from falsehood the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence and consequently the whole case.

15. In this view of the matter, merely on account of non-explanation of the injuries on the person of the accused, the evidence adduced by the prosecution cannot be discarded. However, at the same time there being a serious infirmity in the prosecution case, the benefit of doubt will have to go to the accused and, therefore, it will have to be held that the offence committed by the appellant/accused would fall u/s 304-I of the Indian Penal Code and not u/s 302 of the Indian Penal Code.

16. In the result, the appeal is partly allowed. The conviction of the appellant/accused is altered from Sections 302 to 304 - Part I of the Indian Penal Code and the finding of the Sessions Judge is set aside to that extent. The appellant/accused is sentenced to undergo rigorous imprisonment for 10 years. It is clarified that the period during which the appellant/accused is in jail will be adjusted while calculating remaining part of the sentence. The appellant/accused to be released after completion of the said period provided he is not required in any other case.