

(2017) 01 BOM CK 0038
In the Bombay High Court
Case No : Criminal Appeal No.603 of 2012

Pankaj Babu Gaikwad

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 12-01-2017

Acts Referred:

Penal Code, 1860 (IPC) — Section 307, Section 342

Citation : (2017) 2 AIRBomRCri 116 : (2017) ALLMRCri 837 : (2017) 2 MhLJCri 425

Hon'ble Judges : A.M. Badar, J.

Bench : Single Bench

Advocate : Ms. Mallika A. Ingale, Advocate, for the Applicant; Mr. S.V. Gavand, APP, for the Respondent/State

Final Decision : Partly Allowed

Judgement

A.M. Badar J. (Oral)—By this appeal, appellant/accused is taking exception to the Judgment and Order dated 30/04/2012 passed by the learned Assistant Sessions Judge, Sessions Court for Greater Bombay, Mumbai in Sessions Case No.43 of 2012 between the parties thereby holding the appellant/accused guilty of offences punishable under Sections 307 and 342 of the Indian Penal Code ("the IPC" for the sake of brevity). The appellant/accused is sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.10,000/- in default to undergo further simple imprisonment for one year for the offence punishable under Section 307 of the IPC. For the offence punishable under Section 342 of the IPC, the appellant/accused was sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.1000/- in default to undergo further simple imprisonment for three months. Both sentences were directed to run concurrently.

2. Though this appeal is old one and due for final hearing, it is taken up expeditiously as it is reported that the appellant/accused has suffered paralytic attack while in jail and is presently admitted at CPR General Hospital, Kolhapur.

3. Facts leading to the institution of the present appeal are thus :

(a) According to the prosecution case in the evening hours of 04/10/2011, the appellant/accused Pankaj Gaikwad and the alleged victim of the crime in question namely Shyam Parab (P.W.No.6) started consuming liquor in Spice bar, till closure of that Bar for the day. Thereafter, by purchasing the liquor from the said Bar, the booze session continued in the pump house of the transit camp where they both were residing. At about 3.15 a.m. of the night intervening 04/10/2011 and 05/10/2011, according to the prosecution case, by taking up a quarrel with injured Shyam Parab (P.W.No.6) during the booze session at the pump house, the appellant/accused whipped out the knife and gave several blows thereof to Shyam Parab, with an intention to commit his murder. Then the appellant/accused is stated to have bolted the door of the pump house from outside and ran away from the spot. Injured Shyam Parab in order to save his life started kicking the door of the pump house and after hearing that sound, P.W.No.1 Balaji Patil went to the pump house, opened the door and found the injured P.W.No.6 Shyam Parab lying in the pump house smeared with blood. He was taken to Rajawadi Hospital by P.W.No.2 Ravindra Rane where P.W.No.7 Dr. Amogh Vaishampayan found him to have suffered 21 wounds. After necessary medical treatment as indoor patient from 05/10/2011 to 12/10/2011 injured P.W.No.6 Shyam Parab was discharged from the hospital.

(b) The FIR (Exh.26) came to be lodged by P.W.No.5 Snehashree Anil Chavan, which is resulted in registration of Crime No.312 of 2011 for the offences punishable under Sections 307 and 342 of the IPC. During the course of investigation, statement of witnesses came to be recorded. The accused came to be arrested and on the basis of his confessional statement weapon of the crime i.e. knife came to be recovered. After completion of investigation, the appellant/accused was charge-sheeted and ultimately he was tried for the alleged offences. After due trial, he was convicted and sentenced as indicated in opening paragraph of this Judgment by holding that he had wrongfully confined injured P.W.No.6 Shyam Parab after attempting to commit his murder by giving successive blows of knife to him.

4. I have heard the learned counsel appearing for the appellant/accused. By taking me through the evidence of injured witness Shaym Parab (P.W.No.6) as well as statement of the accused under Section 313 of the Code of Criminal Procedure, the learned counsel for the appellant/accused vehemently argued that the appellant/accused is successful in probablising his defence which is to the effect that after a booze session at the Spice Bar and pump house at transit camp, the injured P.W.No.6 Shyam Parab picked up a quarrel with him and started causing injuries to himself. According to the learned counsel for the appellant/accused, the appellant/accused, therefore, left the place. Injuries found on person of injured P.W.No.6 Shyam Parab are self-inflicted injuries. The learned counsel for the appellant/accused argued in the alternative that even if it is found that the appellant/accused has caused injuries to P.W.No.6 Shyam Parab,

then also evidence of prosecution is lacking in the aspect of intention to commit murder. The learned counsel by taking me through the evidence of P.W.No.7 Dr. Amogh Vaishampayan, as well as, injury certificate of the victim argued that almost all injuries caused to victim were simple in nature and though Doctor had described three injuries as grievous injuries, those injuries are not satisfying the parameters set out in Section 320 of the IPC. Therefore, the learned trial Court erred in holding that the offence punishable under Section 307 of the IPC is proved against the appellant/accused. The learned counsel further argued that considering the background facts which depicts that the appellant/accused and the victim were having friendly relations and had indulged in a booze session for a fairly long period of time apart from the fact that the weapon used was knife having blade of 2.5 inches but injuries inflicted were very minor; considering the principle of proportionality of sentence, appellant/accused should be set at liberty on the sentence already undergone by him.

5. The learned Additional Public Prosecutor opposed the appeal by arguing that in all 21 injuries were inflicted by the appellant/accused to injured P.W.No.6 Shyam Parab and many of them were on vital part of his body. The learned Additional Public prosecutor further argued that weapon of the offence as well as conduct of the appellant/accused demonstrating his intention to commit murder of P.W.No.6 Shyam Parab. According to the learned Additional Public Prosecutor, the fact that the door of the pump house in which the injured was lying, was bolted from outside is properly proved by the prosecution and this apart from proving the offence punishable under Section 342 of the IPC, also establishes the offence punishable under Section 307 of the IPC. Therefore, in submission of the learned Additional Public Prosecutor, the appellant/accused is rightly convicted and sentenced by the learned trial Court.

6. I have carefully considered the rival submissions and also perused record and proceedings. Prior to advert to the merits of the prosecution case which is held to be proved, at this juncture, it is apposite to put on record the requirements for proof of the offence punishable under Section 307 of the IPC. In the matter of Vasant Vithu Jadhav v. State of Maharashtra, 2004 Cri.L.J. 1786, it is held thus :

"12. In Sarju Prasad v. State of Bihar (AIR 1965 SC 843) it was observed in para 6 that mere fact that the injury actually inflicted by the accused did not cut any vital organ of the victim, is not by itself sufficient to take the act out of the purview of Section 307.

13. Whether there was intention to kill or knowledge that death will be caused is a question of fact and would depend on the facts of a given case. The circumstances that the injury inflicted by the accused was simple or minor will not by itself rule out application of Section 307 IPC. The determinative question is intention or knowledge, as the case may be, and not nature of the injury."

7. It is thus clear that in order to justify the conviction under Section 307 of the

IPC, it is not essential that bodily injury capable of causing death should have been inflicted. What is material is presence of intention coupled with some overt act on the part of the accused. Let us examine the evidence of prosecution in the light of requirement of proof of offence punishable under Section 307 of the IPC.

8. According to the prosecution case, the appellant/accused had attempted to commit murder of P.W.No.6 Shyam Parab and in that process he had used sharp edged weapon and caused 21 injuries to the victim. P.W.No.6 Shyam Parab as such is an injured witness and it is well settled that injured witnesses are normally witnesses of truth as they themselves being the victim of the crime, are not likely to spare real assailant and rope in the innocent. That apart the case in hand is a case of single accused and single victim and as such there is no scope to hold that the injured would add embellishment to his version in order to rope in other innocent person with whom he might have grudge apart from the real culprit. Similarly, it is well settled that if evidence of single eye witness who is the victim of the crime is found to be wholly reliable, then conviction can be based on his sole testimony. In the instant case, injured P.W.No.6 Shyam Parab has disclosed the incident by stating that at about 8.15 p.m. of 04/10/2011, the appellant/accused had called him to Spice Bar and at that Bar they had consumed liquor. His evidence further shows that after the Bar was closed for the day at about 12.30 a.m. to 1.00 a.m. of the night intervening 04/10/2011 and 05/10/2011, they had taken parcel of the liquor and stated drinking it in the pump house of the transit camp of MHADA, where they were residing. P.W.No.6 Shyam Parab has stated that at about 3.00 a.m. all of a sudden the appellant/accused started assaulting him by a knife by giving blows on face, stomach, back and chest. This according to the P.W.No.6 Shyam Parab was done as after his mobile phone was stolen in the past, he has stopped talking with the accused, but the accused always used to try to speak to him. P.W.No.6 Shyam Parab further deposed that the appellant/accused left the pump house and he started kicking the door of the pump house from inside. As per version of P.W.No.6 Shyam Parab, P.W.No.1 Balaji Patil opened the door of the pump house. So far as weapon of offence is concerned, there is nothing in cross-examination of P.W.No.6 Shyam Parab to disbelieve the statement that the appellant/accused had assaulted him by means of a knife. In his statement under Section 313 of the Code of Criminal Procedure, the appellant/accused had stated that after the booze session, P.W.No.6 Shyam Parab had taken out a knife, thrown the bottle and started causing injuries to his person by knife apart from assaulting the appellant/accused on right index finger. This defence is not probablised by cross-examining the P.W.No.6 Shyam Parab on this aspect. Moreover, scrutiny of other evidence of several prosecution witnesses and particularly evidence of P.W.No.7 Dr. Amog Vaishampayan and the injury certificate goes to show that there were in all 21 injuries over the body of P.W.No.6 Shyam Parab. Though this Medical Officer admitted in cross-examination that such injuries can be self-inflicted injuries, but looking to the number of injuries and the fact that P.W.No.6 Shyam Parab was not cross-examined on this aspect, by no stretch of imagination, it can

be held that the injuries were self-inflicted injuries. It is not possible that a person would cause such a large number of injuries to himself because in the process he may get something more than what is bargained.

9. The evidence of P.W.No.1 Balaji goes to show that upon hearing sounds of kicking the door of the pump house, he went to the pump house and opened the door to find P.W.No.6 Shyam Parab lying inside smeared with blood. Improvement made by this witness that he had seen the appellant/accused bolting the door of the pump house from outside needs to be ignored as the same is not finding its place in the FIR lodged on 05/10/2011 itself. However, evidence of P.W.No.1 Balaji Patil goes to show that he opened the door of the pump house to see P.W.No.6 Shyam Parab lying inside with injuries.

10. P.W.No.4 Jayesh Badrike is a watchman in-charge of the pump house of the transit camp. His evidence shows that after 10.30 p.m. on 04/10/2011 the appellant/accused accompanied by P.W.No.6 Shyam Parab contacted him and demanded key of pump house for consuming liquor. This witness had seen both of them in company of each other in the pump house. It is thus seen that evidence of injured witness P.W.No.6 Shyam Parab is gaining corroboration of version of P.W.No.1 Balaji Patil as well as P.W.No.4 Jayesh.

11. P.W.No.2 Ravindra Rane had taken the injured P.W.No.6 Shyam Parab to Rajawadi Hospital where P.W.No.7 Dr. Amogh Vaishampayan had treated him medically. Evidence of Dr. Amogh Vaishampayan shows that the injured had suffered in all 21 injuries in the nature of incised wounds. This witness has described injuries Nos.4, 10 and 11 to be grievous injuries. Injury No.4 is incised wound of 3 cm. x 0.5 cm. x 2.5 cm. peritoneal breach on middle and downward of right nipple. Injury No.10 and injury No.11 are incised wounds of size 2 cm. x 0.5 cm. x 2 cm. and 2 cm x 0.5 cm x 2.5 cm respectively peritoneal breach on left illiac fossa along mid axillary line. Apart from this, as per version of P.W.No.7 Dr. Amogh Vaishampayan rest of injuries suffered by injured P.W.No.6 Shyam Parab were simple in nature. This version of the Medical Officer as such corroborates the version of injured witness.

12. During the course of investigation, on the basis of confessional statement of the appellant/accused, P.W.No.11 Sanjay Chavan, Investigating Officer had recovered and seized a knife. Memorandum statement and recovery panchanama are at Exh.41 and 42. Cumulative effect of this evidence adduced by the prosecution as such establishes that the appellant/accused had assaulted victim P.W.No.6 Shyam Parab by means of a knife by inflicting 21 injuries on him. Evidence of P.W.No.1 Balaji establishes that the door of the pump house where the victim was lying was bolted from outside and the only conclusion which needs to be drawn in such circumstance is that it was the appellant/accused, who had bolted the door of the pump house after assaulting the injured from outside. Evidence of P.W.No.6 Shyam Parab is sufficient to prove this fact.

13. For proof of the offence punishable under Section 307 of the IPC what is

required is an intention coupled with an overt act. In the case in hand, intention of the appellant/accused in committing murder of injured P.W.No.6 Shyam Parab is writ large from the weapon used, number of blows given to the victim and subsequent conduct in locking the injured victim in the pump house by bolting the door of that pump house from the outside. As such, it cannot be said that the learned trial Court erred in holding that the appellant/accused has committed offences punishable under Sections 307 and 342 of the IPC.

14. The next question which falls for consideration is whether the learned trial Court has kept in mind the principle of proportionality while awarding punishment for proved offences. It is to be kept in mind that considering the nature and circumstance in which the offence is committed, proper punishment is required to be imposed on the accused. The Court is duty bound to impose the punishment commensurate with the gravity of the proved offence. The punishment needs to be proper and not heavy or unduly harsh. If we consider the nature and circumstance in which the crime in question is committed, then it is seen that the appellant/accused is not a person having any criminal antecedents. Though it is tried to prove by the prosecution that the appellant/accused was on inimical term with the victim, evidence of the victim himself goes to show that he responded the call of appellant/accused to visit the Spite Bar for having a booze session, which continued even till morning hours of the next day. Evidence of P.W.No.5 Snehashree Chavan sister of the injured victim indicates that the appellant/accused and the victim were meeting each other in past also. It appears that they were on friendly terms. Evidence on record also indicates that P.W.No.6 Shaym Parab as well as appellant/accused consumed alcohol in large quantity for sufficiently long period of time. This also indicates that they were not on inimical term, but on friendly terms. What actually happened which triggered this attack by the appellant/accused on the victim is not properly clarified by the victim. The cause stated by him does not inspire confidence. It is apparent that something went wrong in the friendly booze session which might have triggered the appellant/accused to be out of senses and to attack his companion in that drinking session. It is obvious that the appellant/accused acted in a heat of passion. The act does not appear to be premeditated act. Moreover, the appellant/accused is now reported to be admitted in the Government Hospital by the Jail authorities as he has suffered a paralytic attack.

15. In this view of the matter, I am of the considered view that the learned trial Court erred in sentencing the appellant/accused for a period of 10 years for the offence punishable under Section 307 of the IPC apart from imposing fine of Rs.10,000/-. Considering the facts and circumstances in which the crime in question took place, the appellant/accused should have been sentenced to maximum six years of rigorous imprisonment apart from imposition of some fine. In this view of the matter, I proceed to pass the following order :

(i) The appeal is partly allowed.

(ii) For the offence punishable under Section 307 of the Indian Penal Code, the

appellant/accused is sentenced to suffer rigorous imprisonment for six years and to pay fine of Rs.3,000/-, in default to undergo further simple imprisonment for six months.

(iii) With this modification rest of the impugned order of conviction and sentence of the appellant/accused is maintained.

(iv) The appeal is disposed of accordingly.