
(2015) 05 BOM CK 0070
In the Bombay High Court
Case No : Criminal Appeal No. 624 of 2007

Pervinderjeet

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 05-05-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 300, 302, 304 (II), 304(II)

Citation : (2015) 3 BomCR(Cri) 181

Hon'ble Judges : P.V. Hardas, J;Shalini Phansalkar Joshi, J

Bench : Division Bench

Advocate : Nitin Sejpal and Pooja Bhojne Sejpal, for the Appellant; Sangeeta D. Shinde, APP, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

Dr. Shalini Phansalkar Joshi, J.

1. The appellant, who stands convicted by the 9th Ad-Hoc Additional Sessions Judge, Mumbai, in Sessions Case No. 289 of 2005, by judgment dated 17.4.2007, for the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs. 500/- in default to suffer simple imprisonment for one month, by this appeal, challenges his conviction and sentence.

2. Facts, as are necessary for deciding this appeal, may be stated as under :-

On 11th January, 2005 while P.W.16 PSI Rashid Shaikh was on night duty at Versova Police Station, at about 9.40 p.m., he received telephonic message from Cooper Hospital that one Vishal Sharma has been brought to the hospital with history of assault with knife on his chest by the appellant herein. He was brought by P.W.1 Saurab Sharma and on his admission, Vishal was found to be dead. On the receipt of this telephonic message, P.W.16 PSI Shaikh rushed to the Cooper Hospital alongwith staff. There P.W.1 Saurabh was present. He recorded his complaint vide Exh.26 and obtained C.R. No. 14 of 2005 from Police Inspector

Sawant of Versova Police Station.

3. In the hospital itself, P.W.16 PSI Shaikh made inquest panchanama exh.29, on the dead body of Vishal, in the presence of panch P.W.2 Allwyn Logo. Under the said panchanama, he also seized the clothes on the dead body of the deceased. Then alongwith panchas, he visited the spot of incident which was shown by P.W.1 Saurab. The spot of incident was at Bon Bon Junction, in front of Mohan Colour Lab., at J.P. Road, Versova. He drew scene of offence panchanama and also rough sketch of the spot vide Exh.59 and 65. On the same night, he recorded the statement of deceased Vishal's father Vinod Sharma. Then handed over further investigation of the case to P.W.17 Police Inspector Sangita Patil.

4. On being entrusted with the investigation of the said crime, P.W.17 PI Sangita Patil, who was also present with P.W.16 PSI Rashid Shaikh, during the course of earlier investigation, recorded statements of some witnesses. Then she again visited the spot of incident and recorded statement of witnesses, namely Raju Bhatija, the owner of Mohan Colour Lab., adjacent to which incident has taken place. She also took search of the appellant, but on that day, he was not traced. On 13.1.2005, the appellant on his own surrendered at the police station, hence she took him in custody under arrest panchanama Exh.67. During police custody, the appellant expressed his willingness to produce the clothes which he was wearing at the time of incident. His statement was reduced to memorandum panchanama Exh.61 in the presence of P.W.15 panch Samad Lashkaria. The appellant then guided the police and panchas to Flat No.C-3 in Priyanka Society, MHADA Colony, Versova and from the said flat, he produced the Jean Pant and Jean Shirt concealed in the washing machine. Those clothes were seized under panchanama Exh.62.

5. On 14.1.2005, P.W.17 PI Sangita Patil, recorded statement of P.W.12 Photographer Nishikant Bhushe. The photographs of the spot and dead body are produced on record at Exh.56/1 to 56/4. On 15.1.2005, during police custody, the appellant again gave disclosure statement of expressing his willingness to show the motorcycle used in the commission of the offence. Said statement was reduced to Memorandum Panchanama Exh.41 in the presence of P.W.3 Panch Vidyadhar Paradkar. Thereafter the appellant guided the police and panchas to Sunshine Building, Lokhandwala Market, Andheri (W) and showed the motorcycle which came to be seized under panchanama Exh.32. On the same day, P.W.17 PI Sangita Patil recorded supplementary statement of P.W.1 Saurab Sharma and the statements of eye witnesses Shivaji Shinde, Harpeet Singh and Bakilal Jaiswal.

6. On 31.1.2005, P.W.17 PI Sangita Patil, sent requisition to P.W.7 Special Executive Magistrate Mohd. Iqbal to conduct test identification parade of appellant by two eye witnesses, P.W.11 Budhiram Chauvan and Shivaji Shinde. Both of them identified the appellant in the said test identification parade. Memorandum of test identification parade was accordingly prepared vide Exh.40.

7. During the course of further investigation on 1.2.2005, P.W.17 PI Sangita Patil

recorded statement of P.W.5 Anil Rajpal and on 2.2.2005, she recorded statement of another eye witness P.W.6 Gurmindar Singh. On 18.02.2005, she requested P.W.4 Special Executive Magistrate Shivaji Banekar to conduct test identification parade of appellant. Accordingly test identification parade was conducted in presence of witnesses P.W.5 Anil Rajpal and P.W.6 Gurmindar Singh. The memorandum of panchanama of the said test identification parade is prepared accordingly vide Exh.34.

8. As a part of further investigation, she sent the seized Muddemal to Chemical Analyzer under requisition letter Exh.78. C.A. report of blood sample of the appellant is produced at Exh.76 whereas C.A. report of the clothes of the appellant is marked at Exh.77. P.W.17 PI Sangita Patil has then collected Call Detail Records of the conversation between the appellant, his friend Nilesh, P.W.1 Saurabh and his other friend Preety Agarwal. Said Call Detail records are produced at Exh. 71 to 73. The postmortem report is at Exh.49 and the cause of death certificate is at Exh.50. Further to completion of investigation, P.W.17 PI Sangita Patil has filed chargesheet in the Court against the appellant.

9. On the case being committed to the Sessions Court, the trial Court framed charge against the appellant vide Exh.4. The appellant pleaded not guilty and claimed trial.

10. In support of its case, therefore, the prosecution has examined 17 witnesses and produced documentary evidence in the form of panchnamas, C.A. Reports and the postmortem report, referred above; whereas the appellant examined two defence witnesses, namely, Shivaji Shinde and Amritpal Dolly, whose names were cited in the chargesheet but were not examined by the prosecution.

11. On appreciation of this entire oral and documentary evidence on record, the trial Court was pleased to hold the guilt of the appellant to be proved and has convicted and sentenced him as aforesaid.

12. In this appeal, we have heard learned counsel for the appellant Shri. Nitin Sejpal, who has made a fervent plea that the case of appellant, even if entire evidence is taken to be true, as it is, at the most falls within the purview of fourth exception to Section 300 of the Indian Penal Code. According to him, the careful analysis of the deposition of witnesses reveals that the entire incident is outcome of the sudden scuffle that took place between the deceased and the appellant. There was no premeditation on the part of the appellant. Neither there was any intention, nor motive as such to kill the deceased. The appellant has also not taken any undue or unfair advantage in the said quarrel, as only one injury is inflicted on the deceased which ultimately proved fatal. Thus, according to him the trial Court has committed error in rejecting this plea of the appellant and in convicting him for the offence punishable under Section 302 of the Indian Penal Code instead of Section 304 (II) of IPC. He has further submitted that the trial Court has also erred in relying on the statements of defence witnesses recorded by police during the course of investigation. In his opinion, therefore,

the judgment of the trial Court is required to be quashed and set aside.

13. Per contra, learned APP for the State, Mrs. Sangeeta Shinde, has supported the judgment of the trial Court by submitting that even a single injury is sufficient to infer the intention on the part of the of 17 appellant to commit murder, if that injury is on the vital part of the body and the weapon used, as in the present case, is dangerous one. Therefore, according to learned APP, the trial Court has rightly held the guilt of the appellant to be established for the offence punishable under Section 302 of the Indian Penal Code. Hence the appeal holds no merit and is required to be dismissed.

14. In our considered opinion, in order to effectively deal with, these rival submissions, it would be useful to refer to evidence on record.

15. Coming first to the evidence relating to homicidal death of Vishal, the prosecution has examined P.W.10 Dr. Tasgaonkar, who has conducted postmortem on the dead body of Vishal. On his examination, he found following external injury.

1) Incised stab wound over left side of chest anteriorly 2 cm, above left nipple, 11 cm lateral to midline on left side. 6.2 cm below axilla anterior aspect, horizontal. The size of 4 1/2 cm x 2 cm x one angle acute.

On internal examination, P.W.10 Dr. Tasgaonkar found following internal injury.

1) Left forth inter coastal specie perforated due to injury mentioned in col.No. 17, perforated on left side, right lung was intact, partly collapsed. Left lung upper lobe perforated anteriorly due to injury mentioned in col No. 17. Pericardium was perforated anteriorly, laterally and inferiorly.

16. According to P.W.10 Dr. Tasgaonkar, the injury was ante-mortem in nature and was caused by sharp edged weapon. It was also sufficient in ordinary course nature to cause death. In his opinion, the cause of death was haemorrhage and shock due to incise stab wound. He has issued postmortem report Exh.49 accordingly.

17. To prove the complicity of the appellant in homicidal death of Vishal, the prosecution has relied upon the evidence of three eye witnesses. P.W.1 Saurab, is not only the first informant but also an eye witness to the incident. As deposed by him, in September, 2004, he came to Mumbai, from Punjab. Initially he was residing with his friend deceased Vishal, in one room at Suyog Building, RTO Lane, Mumbai. Subsequently, through Vishal, he came to know the appellant and all the three of them became friends. They all were in search of job in the film industry. He had obtained hand loan of Rs. 3,000/-from the appellant. On the date of incident, he was called by the appellant to repay the said hand loan. It is his evidence that the appellant has called him at Parishta Hotel, Lokhandwala, Mumbai at 8.00 p.m. However, before reaching to the said spot, on the way, he stopped at the shop of P.W.8 Nilesh Singh to collect his photographs. Meanwhile he received two phone calls from the appellant to reach on the spot immediately.

However, he requested the appellant to come to the shop of P.W.8 Nilesh. Accordingly within two minutes the appellant reached there, on his motorcycle and started demanding repayment of hand loan of Rs. 3,000/-.

18. P.W.1 Saurabh requested the appellant to give him some time to repay the hand loan. The appellant, however, got furious and insisted that P.W.1 Saurabh should pay the amount immediately. Therefore P.W.1 Saurabh assured the appellant that he would get the amount from his friend Vishal. Hence he made a telephone call to Vishal and requested him to bring the said amount. Within 10 minutes Vishal came there and appellant again insisted on the repayment of Rs. 3,000/-. However, both Vishal and P.W.1 Saurabh requested him to give them some more time. As per evidence of P.W.1 Saurabh, appellant then got annoyed and started giving them abuses. Vishal confronted the appellant and told him not to give such abuses in filthy language, appellant however, pushed Vishal, took out knife from his right pant pocket and inflicted blow of knife on the chest of Vishal. P.W.1 Saurabh tried to intervene in the quarrel. However, by that time Vishal has sustained stab wound on his chest and has fell down. Hence, P.W.1 Saurabh rushed to help of Vishal and took him to Cooper Hospital in injured condition. Meanwhile, the appellant left the spot on his motorcycle.

19. This evidence of P.W.1 Saurabh, gets complete support and corroboration from the F.I.R. Exh.26 which is lodged immediately after the incident giving complete details of the happening. There is also corroboration to his evidence from testimonies of two more eye witnesses viz. P.W.5 Anil Rajpal and P.W.6 Gurmindar Singh. Both of them are independent eye witnesses. P.W.5 Anil Rajpal is doing business of Estate Agent and on the date of incident, he was standing at the spot waiting for his client. At that time he heard shouts from the road and found that two persons were quarreling and the third person was intervening in the said quarrel. One of the persons who was quarreling, then took out knife from his pant pocket and assaulted other person on his chest. Said assailant, then ran away from the spot on his motorcycle. The person who was assaulted by knife fell on the ground, public gathered there, then took the said injured to the hospital. In the test identification parade conducted on 18.2.2005, by P.W.4 Special Executive Magistrate Shivaji Banekar, P.W.5 Anil has identified the appellant as the same assailant. In substantive evidence before the Court also, he has identified the appellant.

20. The evidence of P.W.6 Gurmindar Singh is on the similar lines. He is carrying on the business of film producer. His office is at Andheri (W). On the day of incident at about 8.00 p.m. he was proceeding to Juhu to meet one party and at that time he was standing near the spot of incident. He heard sound of abuses from the distance of 8 to 10 feet on the foot-path and noticed that two boys were abusing each other and quarreling, third boy tried to pacify the quarrel; one of them took knife from his right side pocket of pant and assaulted the other boy on his chest. The person who was assaulted by knife fell on the ground. The assailant then ran away from the spot on the motorcycle. This witness has also

identified the appellant as the same assailant, in the test identification conducted by P.W.4 Special Executive Magistrate Banekar and also in evidence before the Court.

21. Though learned counsel for the appellant has challenged evidence of these two witnesses on the ground that their statements were recorded by police nearly 15 days after the incident, the explanation is given by these witnesses for the said delay; as P.W.5 Anil has after the incident gone to his native place for 15 days whereas P.W.6 Gurmindar Singh has gone to Punjab for 15 days. Both of them being totally independent witnesses, there is hardly any reason to disbelieve them. They had no axe to grind either in favour of the prosecution or against the appellant. Their evidence, thus gives complete corroboration to the evidence of P.W.1 Saurab and individually and collectively the evidence of these three eye witnesses goes to prove occurrence of the incident.

22. P.W.11 Budhiram Chauhan, another eye witness to the incident, who is owner of Pan Stall, situate near the spot of incident has also given corroboration to this evidence by deposing that on hearing shouts from the side of Mohan Lab, he noticed that there was exchange of abuses and one person with something in his hand ran away from the spot on the motorcycle. In the test identification parade conducted by P.W.7 Mohd Iqbal and also in evidence before the Court, this witness has identified the appellant as the same person, who ran away from the spot on the motorcycle.

23. In the face of this overwhelming evidence of eye witnesses produced on record by prosecution, the credibility of which is not at all affected even after exhaustive cross examination of these witnesses; it has to be held that the complicity and guilt of the appellant in the said offence is rightly held to be proved by the trial Court. No other inference except that of the appellant can be drawn from the evidence as adduced by the prosecution.

24. However, real issue for consideration is, whether the case of appellant can fall under fourth exception to section 300 of IPC, which plea is raised by learned counsel for the appellant with all the persuasion at his command.

25. We may state that, in order to bring the case within fourth exception to section 300, it is necessary to prove that the offence was committed without premeditation, in a sudden fight, in the heat of passion and without the offender having taken undue advantage or acted in a cruel or unusual manner. As per Explanation to fourth exception, it is immaterial in such cases which party offers the provocation or commits the first assault.

26. In the instant case, if the cross examination of the prosecution witnesses is scrutinized, then it is apparent that all these four ingredients of the Exception four are being satisfied. Admittedly it was a sudden quarrel without any premeditation. P.W.1 Saurab himself has admitted in his cross examination that the appellant had not called Vishal there, but he had called his friend Vishal at the spot to pay money to the appellant. Thus, Vishal's arrival at the spot was not

anticipated and hence no question of any premeditated act on the part of appellant to commit murder of Vishal. It is also brought on record through cross examination of P.W.1 Saurabh that, hot exchange of words ensued between them which resulted into giving pushes and ultimately into fatal knife blow. He has further admitted that the incident of assault by knife on the deceased took place in a spur of moment suddenly.

27. Another eye witness to the incident P.W.5 Anil Rajpal has also admitted in his cross examination that, initially there was exchange of words between the appellant and the deceased and the entire incident from beginning of exchange of words till assault, lasted for 7 to 8 minutes. P.W.6 Gurmindar Sing has also admitted in his cross examination that the total incident of abusing and assault lasted only for 3 to 4 minutes. The evidence of defence witness Shivaji Shinde also goes to reveal that initially there was scuffle between 2 to 3 persons and thereafter he saw two persons in the scuffle fell down on the ground, one of them escaped from the clutches in the scuffle and ran away. The name of this defence witness Shivaji Shinde is cited in the chargesheet also and nothing is brought out in his cross examination to show that his evidence relating to scuffle is in the nature of omission or improvement.

28. Thus, the evidence on record categorically goes to prove that the incident has occurred in a sudden fight and on the spur of moment. It was not at all premeditated act, done with pre-plan, as the presence of deceased Vishal was not at all expected or anticipated at the time of incident. Moreover, what was followed was, as a result of hot exchange of words and the scuffle between the two. There was absolutely no lapse of time between the scuffle and the assault. Whatever has happened was in the heat of passion. It is immaterial whether the appellant provoked the deceased by giving abuses or otherwise.

29. The injury caused to the deceased, as already stated, was only single stab wound, which proved to be fatal. Hence it cannot be said that the appellant has taken undue or unfair advantage of the situation or acted in a cruel or unusual manner.

30. In these proved facts on record, in our considered opinion, the case of the appellant definitely falls under fourth exception to section 300 of IPC. Hence the conviction of the appellant is required to be altered to section 304 (II) of the IPC instead of Section 302 of the IPC. Since the date of arrest from 13.01.2005 the appellant is in jail, the submission of learned counsel for the appellant to consider the period 9 to 10 years already undergone by the appellant in jail is sufficient punishment for him for the offence proved against him, therefore, deserve to be accepted.

31. Consequently the Criminal Appeal is partly allowed and the conviction and sentence of the appellant for the offence punishable under Section 302 of the IPC is set aside and instead he is convicted for the offence punishable under Section 304(II) of the IPC and is sentenced to suffer R.I. for eight years and to pay fine

of Rs. 5,000/-in default of which to undergo further R.I. for one year. If the appellant has undergone his sentence, he be released forthwith, if not required in any other case.