

(1999) 11 BOM CK 0034
In the Bombay High Court
Case No : Criminal Appeal No. 187 of 1995

Prabhudas Apparao Bidilia	Vs	APPELLANT
State of Maharashtra		RESPONDENT

Date of Decision : 26-11-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235
Evidence Act, 1872 — Section 45, 59, 8, 9
Penal Code, 1860 (IPC) — Section 302, 304 Part I, 324

Citation : (2000) 5 BomCR 576 : (2000) BomCR(Cri) 576 : (2000) 1 BOMLR 826

Hon'ble Judges : Vishnu Sahai, J; D.G. Deshpande, J

Bench : Division Bench

Advocate : N.S. Khandewala, for the Appellant; A.M. Shringarpure, Assistant Public Prosecutor, for the Respondent

Judgement

Vishnu Sahai, J.—Through this appeal the appellant challenges the judgment and order dated 10-11-1993 passed by IV Addl. Sessions Judge, Thane in Sessions Case No. 355 of 1992 convicting and sentencing him in the manner stated here in under :---

- (i) u/s 302 of the Indian Penal Code to undergo imprisonment for life and to pay a fine of Rs. 1,000/- in default to undergo six months R.I.; and
- (ii) u/s 324 of the Indian Penal Code to undergo two years R.I. and to pay a fine of Rs. 500/- in default to undergo three months R.I.

The substantive sentences of the appellant were ordered to run concurrently.

2. In short, the prosecution case, runs as under : ---

Five eye witnesses of the incident, namely, Tumu Subbarao Laxmayya; Kalingi Raghavan Balkrishna; Lalmani Jaiswal; Hiramana Kadam and Rambhajan Kahar, P.W. Nos. 2, 3, 4, 5 and 6 respectively, informant Minal Chanda (PW 1) and the appellant, at the time of incident, were employed in Ordinance Factory at Ambarnath. On 12th November 1991 at about 10.45 a.m. the appellant

assaulted deceased Badrikhan, who was also employed in the said factory, with an aluminium rod on his head and also Tumu Laxmayya and Kalingi Balkrishna with the said aluminium rod on their head when they tried to rescue Badrikhan on the belief that they had mixed poison in his tiffin. The appellant was apprehended on the spot. Informant Minal Chanda brought him in the office of foreman and handed him over to the security personnel of the factory.

3. Deceased Badrikhan, who was in a precarious condition, was immediately taken to the Ordinance Factory Hospital at Ambarnath, where he was examined by Dr. N.D. Naravane whose examination report is as under:-

"Patient is unconscious.

One V Shape cut (one arm 3" other 2" long both side of parturition right 2" left 2 1/2". On forehead left side small side normally reacting left side slightly constricted reacting to light.

Patient is not alcoholic."

Dr. Naravane referred Badrikhan to Central Hospital, Ulhasnagar.

4. The F.I.R. of the incident was lodged by Minal Chanda (P.W. 1) on the same day at 1.00 p.m. and on its basis an offence vide Cr.No.I-357/1991 was registered at Ambarnath Police Station. It is pertinent to mention that on the basis of the F.I.R. an offence u/s 324 of the Indian Penal Code was registered.

5. Deceased Badrikhan, the injured Tumu Laxmayya and Kalingi Balkrishna were medically examined on the same day between 12.30 noon and 12.45 p.m. at Central Hospital, Ulhasnagar by Dr. Sahahu Rasal.

On the person of Badrikhan the doctor found four contused lacerated wounds (all on head) and one contused lacerated wound each on the head of Tumu Laxmayya and Kalingi Balkrishna

6. Since the condition of Badrikhan was precarious, on the same day, he was shifted to Ashwini Hospital, Bombay, where he was medically examined by Dr. Pramod Jena (PW 13) who found on his person the following injuries :-

1) Lacerated wound of the size 1 cm. x 2 cm. over left parietal bone and bone was exposed.

2) Lacerated wound of the size 8 cm. x 2 cm. over right parietal bone and bone was exposed.

3) One V shape wound of the size 6 cm x 8cm over occipital bone.

4) Black eye of upper eye lid both sides.

X-ray of skull was also taken which revealed linear fracture of left parietal bone. C.T. scan of the brain was also taken which also confirmed the said fracture.

On 13-11-1991 Dr. Jena operated Badrikhan for the head injury. His evidence

shows that Badrikhan died at 11.00 a.m. on 21-11-1991 in Ashwini Hospital, Bombay.

7. It is pertinent to mention that when Badrikhan was about to die Dr. Binod Sharma. (P.W. No. 14) was summoned and by the time he reached there Badrikhan died. In his opinion, Badrikhan died on account of head injuries with skull fracture and subdural haemotoma.

The evidence of Dr. Sharma shows that since Badrikhan died in the hospital, he recommended for post mortem examination of the corpse, but however the same was not done as his son was not willing.

8. The investigation was conducted in the usual manner by H.C. Mohan Bade (P.W. No. 9) and P.S.I. Gorakhnath Godre (P.W. No. 15). The latter, on 21-11-1991 after the death of Badrikhan, sent a report to the Judicial Magistrate's Court for converting the case to one u/s 302 of the Indian Penal Code and on 17-4-1992 submitted a charge sheet against the appellant.

9. The case was committed to the Court of Sessions in the usual manner where the appellant was charged for offences punishable under sections 302 and 324 of the Indian Penal Code. He pleaded not guilty to the charges and claimed to be tried.

His defence was that of denial, but no defence witness was examined.

During the course of trial the prosecution examined in all 15 witnesses. Out of them, five witnesses, namely, Tumu Subbarao Laxmayya; Kalingi Raghavan Balkrishna; Lalmani Jaiswal; Hiramana Kadam and Rambhajan Kahar, P.W. Nos. 2, 3, 4, 5 and 6 respectively were examined as eye-witnesses.

The learned trial Judge believed the ocular account furnished by them and convicted and sentenced the appellant in the manner stated in paragraph No. 1.

Hence this appeal.

10. Although this appeal has been on the final hearing board since long, it is a matter of profound regret that Mr. N.S. Khandewalla learned Counsel for the appellant is not present. Since the appellant is in jail from nearly the last eight years, we did not adjourn it and with the assistance of Mr. A.M. Shringarpure, the learned APP appearing for State, went through the entire record and decided it on merits. That we can do so is clear from the judgment of the Supreme Court reported in Bani Singh and others Vs. State of U.P.,

11. As observed in the preceding paragraph we have gone through the entire record and perused the impugned judgment. So far as involvement of the appellant in the incident is concerned, the same, in our view, is proved by the ocular account furnished by Tumu Laxmayya, Kalingi Balkrishna, Lalmani Jaiswal, Hiramana Kadam and Rambhajan Kahar. All these witnesses in one breath stated that they, deceased Badrikhan and the appellant, at the time of the incident, were working in Ordinance Factory at Ambarnath and on 12-11-1991 at about

10.45 a.m., appellant assaulted Badrikhan with an aluminium rod on his head and when Tumu Laxmayya and Kalingi Balkrishna went to rescue Badrikhan they were also assaulted by the appellant with the said aluminium rod on their head. The evidence of the eye witnesses shows that the appellant was apprehended on the spot.

12. We have gone through the testimony of these five eye witnesses and we find that it is implicitly reliable. Since all of them were employed in Ordinance Factory, where the incident took place, they were very natural witnesses of the same.

It is pertinent to mention that out of them two namely Tumu Laxmayya (P.W. 2) and Kalingi Balkrishna (P.W. 3) were injured witnesses who had each suffered a contused lacerated wound on their head.

The injuries sustained by the witnesses and the deceased are in conformity with the manner of the assault deposed to by the injured eye witnesses and the other three eye witnesses. As seen earlier both the injured eye witnesses and the deceased sustained contused lacerated wounds and it is in common knowledge that the said injuries could be caused by aluminium rod.

It is pertinent to mention that none of the five eye witnesses had any enmity or ill-will against the appellant and in our view in the absence of same, would not have falsely implicated the appellant.

In our considered view their evidence conclusively fixes the involvement of the appellant in the incident.

13. The most clinching circumstance against the appellant is his spot arrest. The evidence of the informant Minal Chanda (P.W. 1) and the eye witnesses shows that the appellant was apprehended on the spot. The appellant has not been able to dislodge his spot arrest in any manner.

14. For the said reasons in our view the learned trial Judge acted correctly in concluding that the prosecution has squarely established the involvement of the appellant in the crime.

15. This only leaves us with one question namely that of offence. We have anxiously reflected over it and in our view, considering the over all stance, the learned trial Judge erred in convicting the appellant for the offence punishable u/s 302 of the Indian Penal Code and instead should have convicted him for one u/s 304 (Part I) of the Indian Penal Code.

This is indeed very sad case. Even according to the prosecution the assault on deceased Badrikhan was not the out come of any pre-existing vendetta on the part of the appellant against the deceased. The evidence of the informant Minal Chanda shows that the appellant had a feeling that deceased Badrikhan and two injured witnesses namely Tumu Laxmayya and Kalingi Balkrishna mixed poison in his tiffin. It was this feeling which prompted the appellant to pick up an aluminium rod which was 26 1/2" in length and 1" in diameter and was lying

there and assaulting Badrikhan, who was aged about 40 years, and the injured witnesses with the same. It appears that appellant inflicted about three to four injuries with the said rod on the head of the deceased and one of them probably injury No. 1, (a lacerated wound over left parietal bone) lead to his death nine days later i.e. on 21-11-1991.

In our view, considering the said facts it would be appropriate to hold that an offence u/s 304 (Part I) of the Indian Penal Code is made out against the appellant. There can be no getting away from the fact that when the appellant assaulted deceased Badrikhan with an aluminium rod on his head, he had the intention to cause such bodily injury as was likely to cause death in terms of section 304 (Part I) of the Indian Penal Code.

Our view stands vindicated by the decision of the Supreme Court reported in Inder Singh Bagga Singh Vs. State of Pepsu, , A perusal of paragraphs 9 and 10 of the said decision would show that the appellant forcibly inflicted repeated blows with lathi on the head of the deceased and the injuries sustained by the deceased were sufficient in the ordinary course of nature to cause death. But since the lathi was not iron shod, the deceased was a young man and succumbed to his injuries three weeks later, the Supreme Court converted the conviction from one u/s 302 of the Indian Penal Code to that u/s 304 (Part I) of the Indian Penal Code.

We may mention that since in our case, at the insistence of the son of the deceased, the postmortem examination of the corpse of the deceased was not done, we are bereft of the evidence of autopsy surgeon whether the injuries suffered by the deceased were sufficient in the ordinary course of nature to cause death.

16. So far as the conviction and sentence of the appellant for the offence u/s 324 of the Indian Penal Code is concerned, the same, in our view, suffers with no infirmity. His sentence on the said count, in our view, is also not excessive.

17. This leaves us with only one question namely the quantum of the sentence to be awarded to the appellant for the offence u/s 304 (Part I) of the Indian Penal Code. From perusal of the impugned judgment and roznama it appears that the appellant is continuously in jail since 12-11-1991. This means he has been in jail for over eight years. In our view since the appellant is in jail for more than eight years, this is a fit case where the sentence should be reduced to the period already under gone by the appellant.

18. In the result, this appeal is partly allowed. Although we acquit the appellant for the offence u/s 302 of the Indian Penal Code and set aside his conviction and sentence of imprisonment for life and fine of Rs. 1,000/- and six months in default thereunder but instead we convict the appellant for the offence u/s 304 (Part I) of the Indian Penal Code, and reduce the sentence thereunder to the period already under gone which is slightly over eight years. We, however, confirm the conviction and sentence of the appellant for the offence u/s 324 of

the Indian Penal Code.

In case the appellant has paid the fine, the same shall be refunded to him.

The appellant is in jail and shall be released forthwith unless required in some other case.

19. Appeal partly allowed.