
(2012) 07 BOM CK 0233
In the Bombay High Court
Case No : Criminal Appeal No. 182 Of 2008

Rajesh Mahadeo Pakhare

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 23-07-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 307, 320, 325, 333

Citation : (2013) 3 ABR 826 : (2013) ALLMR(Cri) 1009

Hon'ble Judges : P.V. Hardas, J;M.L. Tahaliyani, J

Bench : Division Bench

Advocate : U.K. Kalsi, for the Appellant; T.A. Mirza, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

M.L. Tahaliyani, J.—The appellant Rajesh Mahadeo Pakhare was tried for the offences punishable u/s 302 read with Section 34 and Section 307 read with Section 34 of the Indian Penal Code along with original accused Nos.2, 3, 4 & 5 namely Mahadeo Punjaji Pakhare, Ramdas Shalikram Kanoje, Smt. Manjulabai Punjaji Pakhare and Smt. Pramilabai Mahadeo Pakhare. The original accused Nos. 2 to 5 have been acquitted of both the charges and the appellant has been convicted of both the charges. The learned trial Court has imposed a punishment of life imprisonment and a fine of Rs.1,000/-, in default to suffer rigorous imprisonment for six months for the former offence and jail sentence of ten years and a fine of Rs.5,000/-, in default to suffer rigorous imprisonment for six months for the latter offence. The appellant has impugned the said judgment and order of the learned 3rd Ad hoc Additional Sessions Judge, Amravati dated 13rd February, 2008.

2. The appellant Rajesh Mahadeo Pakhare is son of original accused No.2 Mahadeo Punjaji Pakhare and original accused No.5 Smt. Pramilabai Mahadeo Pakhare. Original accused No.4 Smt. Manjulabai Punjaji Pakhare is mother of original accused No.2 Mahadeo Punjaji Pakhare and grandmother of the appellant

Rajesh Mahadeo Pakhare. Original accused No.3 Ramdas Shalikram Kanoje belonged to some other family but had allegedly taken part in the alleged incident.

3. Deceased Jyoti was wife of Abarao Vighe (P.W. 3). Abarao Vighe was staying with his wife Jyoti, his daughter Swapnali (P.W. 4) and other family members near the house of the appellant. The complainant Subhash was cousin of Abarao Vighe. The complainant Subhash along with his wife Smt. Vaishali (P.W. 2) was staying in the same locality.

4. It is the case of prosecution that construction of compound wall around the said open plot at the instance of Abarao was in progress. The appellant and other accused had serious objection for the same. Due to objection on part of the appellant and other accused, there was a quarrel between the appellant and other accused on the one hand and some of family members of Abarao on the other hand on 7th June, 2006. The quarrel ultimately subsided and all of them went to their respective houses. It is alleged that appellant Rajesh armed with a knife came out of his house after about ten minutes of the said quarrel. He had entered the house of P.W. 3- Abarao and had caused serious injuries to his wife Jyoti. Vaishali Vighe-wife of the complainant was also present there. She was also assaulted by the appellant and in the result, she had also sustained injuries. Gumphabai Vighe-mother of Abarao was also injured in the said incident. Abarao Vighe, who had reached spot immediately after the incident, had also sustained injuries while trying to save his mother Gumphabai. At the same time, Ku. Swapnali-the daughter of Abarao had also been assaulted by the appellant. Ramdas Vighe, Baban Vighe, Shriramji Makeswar, Dadarao Vighe, Balwantrao Ghongle rushed to the spot after hearing shouts. They had attempted to apprehend the appellant Rajesh. Ramdas Vighe had snatched the knife from the appellant. Thereafter the appellant had fled from the spot. Complainant Subhash had also sustained injuries during the said incident. The injured persons were taken to hospital. Jyoti Abarao Vighe died on her way to Irwin Hospital, Amravati. The other injured persons were admitted to hospital at Amravati for further treatment.

5. The complainant Subhash had gone to Walgaon Police Station and had lodged complaint. The police had registered offence vide Crime Registration No.96/2006 against the appellant for the offence punishable u/s 307 of the Indian Penal Code. It seems that complainant did not know that the deceased Jyoti had died before admission. Hence offence was registered u/s 307 of the Indian Penal Code against the appellant only.

6. During the course of investigation, statements of the injured persons and other witnesses were recorded by the Investigating Officer. The Investigating Officer had come to the conclusion that the appellant, in furtherance of common intention of himself and other accused, had caused death of deceased Jyoti Abarao Vighe and caused injuries to witnesses. The Investigating Officer had also come to the conclusion that the injuries sustained by the witnesses were also

serious in nature and the circumstances in which the injuries were caused by the appellant revealed that had any of the injured witnesses died, the appellant and others would have been guilty of the offence punishable u/s 302 read with Section 34 of the Indian Penal Code. The Investigating Officer, therefore, after completion of investigation, filed charge-sheet accordingly against the appellant and original accused Nos. 2 to 5. The case was committed to the Court of Session by the learned Magistrate.

7. The trial Court on 7th June, 2007 framed a charge against the appellant and the original accused Nos.2 to 5 for the offences punishable u/s 302 read with Section 34 and Section 307 read with Section 34 of the Indian Penal Code. The appellant and original accused Nos.2 to 5 had pleaded not guilty and had claimed to be tried.

8. In all eleven witnesses were examined by the prosecution during the course of trial to substantiate the charges against the appellant and the other accused. The trial Court had believed the evidence of the complainant and his wife Vaishali and other witnesses who were present on the spot and had come to the conclusion that the appellant had committed murder of deceased Jyoti with an intention to cause her death and had caused serious injuries to the witnesses with such intention and under such circumstances that had any of the witnesses died, the appellant would have been guilty of the offence of murder. The trial Court accordingly has convicted the appellant for the offences punishable under Sections 302 and 307 of the Indian Penal Code. As already stated, rest of the accused have been acquitted of both the charges.

9. At the outset, it may be mentioned here that during the course of investigation, clothes of most of the injured persons were seized and they were sent to the Chemical Analyzer for examination. Chemical Analyzer's reports were also produced before the trial Court. Spot panchanama drawn by the Investigating Officer was also produced before the trial Court. The conviction of the appellant however is mainly based upon the evidence of P.W. 1-Subhash, P.W. 2-Vaishali, P.W. 3-Abarao, P.W. 4-Ku.Swapnali, P.W. 5-Ramdas and P.W. 6-Shriram.

10. Before we examine the evidence of these six witnesses, let it be stated here that there is no serious challenge to the evidence of P.W. 9-Dr. Ashok Thakare, who had performed Post-Mortem Examination of dead body of the deceased Jyoti. P.W. 9-Dr. Ashok Thakare had found following external injuries on the dead body.

i) Stab wound on right side of chest between 3 and 4 intercostals space. Transversely placed, size of 9 cm. x 3 cm. x 15 cm., cavity deep. Lung protruded from the wound. Injury was cavity deep and extending to right side of the back below scapula.

ii) Incised wound right side of back below scapula size of 1 cm. x 1/2 cm x cavity deep. Direction of injury anterior posteriorly through and through directed

obliquely outward. It was a perforating injury. Both the injuries were caused by hard sharp pointed object.

P.W. 9-Dr. Ashok Thakare had also described in his evidence the internal injuries found during the course of Post-Mortem Examination. The internal injuries have been described as under :-

i) Fourth rib fracture, right side. Right side pleura torn.

ii) Injury to hylum of right lung with injury to pulmonary vasculature, lung hanging on bronchus, congested on cut section. Blood present in right thoracic cavity. Left lung congested on cut section.

After having examined the dead body of the deceased, P.W. 9 had come to the conclusion that the deceased had died due to shock due to injury on right lung. According to this witness, all the injuries were ante mortem and were sufficient to cause death in ordinary course of nature. The Post-Mortem Report was Produced at Exh.74.

11. P.W. 7 is Dr. Shyam Himgade. This witness had examined the complainant Subhash Uttamrao Vighe (P.W. 1) at Irwin Hospital, Amravati on 8th June, 2006. He had found one lacerated wound 1 cm. x 1/2 cm. x 1/4 cm. on middle part of ring finger of right hand of the complainant. The Medical Certificate to that effect was issued, which was produced in the trial Court at Exh.66. There does not appear to be a serious challenge to evidence of this witness also.

12. P.W. 8-Dr.Nitin Rathi had examined injured P.W. 2-Vaishali Vighe, Gumphabai, P.W. 4-Ku. Swapnali and P.W. 3-Abarao Vighe. The injuries received by these witnesses have been described as under:

a) P.W. 2-Vaishali Vighe :-

i) Lacerated wound on right hand at the base of 3" and 4" finger on palm, around 2 inches x 1 inch. No injury to deep tendons.

ii) Lacerated wound on left hand at the base of thumb around 3" x 1" in size no injury to deep tendons.

iii) Lacerated wound on left middle and ring finger both around hand 1" x 1/2" in size on valor aspect.

iv) Lacerated wound on right knee vertical 2" x 1" size subcutaneous deep.

b) Gumphabai Vighe :-

i) Lacerated wound on the left side of chest extra axillary region around 3" x 1" bone deep not extending in chest cavity with big haematoma.

ii) Lacerated wound on left elbow subcutaneous deep on posterior aspects.

c) P.W. 4-Swapnali Vighe :-

i) A lacerated wound on right chest infra mammary region around 2" x 1". It was bone deep.

d) P.W. 3-Abarao Vighe :-

i) Lacerated wound on forearm on the right side, 2" x 1" in size subcutaneous deep on all aspects.

ii) Lacerated wound on index finger right side 1" x 1/2 " right side subcutaneous deep on all aspects.

Medical Certificates to that effect were issued. They were produced before the trial Court at Exh.Nos. 69,70,71 and 72 respectively.

13. We have gone through the cross-examination of P.W. 8-Dr. Rathi. This witness has stated in his cross-examination that the injuries on the person of the witnesses noted by him could be caused during a scuffle. At the same time, he has also stated that such injuries could be caused by a sharp weapon.

14. P.W. 1-Subhash is the complainant and P.W. 2-Vaishali is wife of P.W. 1. P.W. 2-Vaishali was present from the very beginning of the incident and P.W. 1-Subhash had reached after few moments of beginning of the incident. P.W. 3-Abarao had come after the arrival of P.W. 1-Subhash. P.W. 4-Ku. Swapnali was also present since beginning of the incident. P.W. 5-Ramdas had also arrived later on.

15. It is, therefore, convenient to deal with the evidence of P.W. 2- Vaishali and P.W. 4-Swapnali before we go through the evidence of other witnesses. The trial Court has dealt with the evidence of P.W. 1-Subhash and P.W. 2-Vaishali together. However, as stated earlier, we find it appropriate to deal with the evidence of P.W. 2-Vaishali and P.W. 4-Swapnali one after another. P.W. 2-Vaishali has stated that there was a dispute in respect of land and that after the said dispute was over, the appellant had attempted to inflict a blow on P.W. 2 by means of a dagger. P.W. 2-Vaishali tried to save herself. In the process, she had received a bleeding injury on her hand. It is further stated by this witness that the appellant had thereafter entered the house of Abarao and had inflicted blows on deceased Jyoti. He had caused injuries to Jyoti on her chest by means of a dagger, which looked like a spear. In the meantime, Gumphabai-wife of Abarao came there. The appellant had inflicted a dagger blow on Gumphabai's chest also. P.W. 4-Swapnali Vighe, who was present during the incident, was also assaulted by the appellant. In the meantime, Abarao also reached there. He had also sustained injuries on his fingers when he had attempted to intervene. P.W. 2-Vaishali has further stated that her husband had taken her and other injured persons to Irwin Hospital, Amravati and thereafter the injured were shifted to Parashree Hospital of Dr. Gopal Rathi.

16. P.W. 4-Swapnali has stated that the appellant came on the spot of incident armed with a dagger, which looked like a spear and assaulted P.W. 2-Vaishali. He wanted to inflict a blow on neck of P.W. 2-Vaishali. However, P.W. 2-Vaishali had warded off the blow and in the process she had sustained injury on her hand.

Thereafter the appellant had entered house of Abarao (father of P.W. 4) and caused injury on chest of deceased Jyoti (mother of P.W. 4). He had also caused injuries to P.W. 4-Swapnali herself on her right chest. Similarly grandmother of P.W. 4 namely Gumphabai was also assaulted by the appellant and in the process Mrs. Gumphabai had sustained injury on her right chest. It has come in the evidence of this witness that one Mr. Shriram Makeswar and Ramdas had also reached the spot immediately after the incident. The evidence of P.W. 1-Subhash corroborates the evidence of P.W. 2-Vaishali in all material aspects. The nature of injuries described by P.W. 2-Vaishali and P.W. 4-Swapnali are described by P.W. 1-Subhash also. P.W. 1Subhash has stated that he had taken the injured persons to Irwin Hospital and thereafter they were shifted to Parashree Hospital. After that, this witness had gone to Walgaon Police Station to lodge report. He has identified his signature on the report Exh.47 and printed First Information Report Exh.48.

17. P.W. 3-Abarao had reached the spot later on. He had seen that one Shriram had caught hold of the appellant. P.W. 3 had attempted to apprehend the appellant Rajesh. While apprehending the appellant, P.W. 3 had also sustained injuries as he was also assaulted by the appellant. P.W. 3 had seen that his wife Jyoti was lying on the floor in a pool of blood. She had a bleeding injury. P.W. 3 had also seen that his daughter Swapnali and his mother Gumphabai had also sustained injuries.

18. P.W. 5-Ramdas had also reached the spot later on as he was working in the cattle-shed in front of the house. However, he claimed to have seen that the appellant had inflicted a blow on P.W. 2-Vaishali. P.W. 2- Vaishali had sustained injury on her hand. Thereafter the appellant had entered the house of Abarao and had assaulted deceased Jyoti, Gumphabai and Swapnali.

19. P.W. 6-Shriram Makeswar was standing on the road when the incident had occurred. He had rushed to the spot after hearing shouts. He had seen that the appellant had entered house of Abarao. He went there and caught hold of the appellant. It has come in the evidence of this witness that P.W. 5-Ramdas had snatched dagger from the appellant.

20. It is thus clear that the presence of the witnesses on the spot is proved by evidence of P.W. 1-Subhash, P.W. 2-Vaishali, P.W. 3-Abarao, P.W. 4-Ku. Swapnali, P.W. 5-Ramdas and P.W. 6-Shriram. During the course of cross-examination, certain omissions have been brought on record. In the evidence of P.W. 1-Subhash an omission was recorded by the learned trial Judge with regard to the appellant holding a dagger and the deceased lying in the house in an injured condition. In the first place, this omission has not been properly recorded. We have gone through the cross-examination of this witness. The learned trial Judge has not followed the correct procedure of recording omission. The omission could not have been recorded without bringing omitted part to the notice of the witness by referring his earlier statement recorded by the police. It need not be stated that the defence lawyer is entitled to cross-examine the witness with regard to earlier statement of the witness. However, it is also necessary to be

stated here that if witness is required to be contradicted with his earlier statement, it is the duty of the court to see that the attention of the witness is invited to that part of the earlier statement. Apart from this, what we have noticed is that this omission is not proved as P.W. 11-Afazar Khan, the Police Officer, who had recorded statement of P.W. 1-Subhash has not been cross-examined. The learned Advocate for the appellant before the trial Court has not asked any question in this regard to P.W. 11. Therefore, in the first place, the omissions have not been properly recorded by the trial Court and secondly they are not proved and therefore, they are not, in fact omissions. Similarly, some omissions have been recorded in the cross-examination of P.W. 2-Vaishali also. The manner of recording omissions in the previous statement of P.W. 2- Vaishali is also defective. These omissions have also not been proved by the Police Officer who had recorded the statement. It appears from the cross-examination of evidence of P.W. 11 that he had not recorded statement of P.W. 2. It is not clear as to who had recorded statement of P.W. 2-Vaishali during the course of investigation. As such omissions brought in the cross-examination of P.W. 2-Vaishali are also of no consequence and do not in any manner assist the appellant.

21. P.W. 3-Abarao is not eye-witness to the incident. His cross- examination is also very short, in fact his examination-in-chief is also limited to the extent that he had reached the spot later on and had attempted to apprehend the appellant Rajesh. P.W. 4-Swapnali has narrated the incident in detail. Her evidence and evidence of P.W. 2-Vaishali clearly demonstrate as to how the incident had occurred. It is very clear from the evidence of these two witnesses that the appellant had entered house of Abarao and had caused injuries to deceased Jyoti, P.W. 2-Vaishali and P.W. 4-Swapnali. One omission has been brought in the cross-examination of P.W. 4 as regards the role of the appellant. This witness has stated in her cross-examination that she had stated before the police in her statement that the appellant was holding a dagger, which looked like a spear when he had arrived at the scene of offence. She was unable to give any reason as to why word "spear" was missing from her earlier statement. This, in our opinion, is not a major omission in her earlier statement. Moreover, it appears that the Police Officer, who had recorded the statement of Swapnali during the course of investigation, has also not been examined. As such this omission is not proved. No attempt appears to have been made by the defence lawyer to call the concerned police officer. Examination of the concerned police officer, however, would not have changed the course of judgment as the omission is not of material nature.

22. From the evidence of P.W. 5-Ramdas and P.W. 6-Shriram, it appears that the dagger was snatched from possession of the appellant by P.W. 5. It has also come in the evidence of P.W. 5-Ramdas that he had gone to his native place i.e. Jalka Hirapur on the night of incident itself. We have noticed one interesting part in the cross-examination of this witness where he has admitted that the police had visited his house on that night and had asked him to produce the knife. The

Investigating Officer P.W. 11, however, has denied this fact. At the same time it is necessary to be stated here that P.W. 11-Afsar Khan, in his examination-in-chief, has stated that a dagger was seized during the course of spot panchanama. He has further stated that dagger was produced by P.W. 5-Ramdas when the panchanama was being prepared. The panchanama was drawn on 8th June, 2006 at 7-00 a.m. and concluded at 7.45 a.m. The only inference which can be drawn is that the knife might be in possession of P.W. 5-Ramdas and it was later on shown to be seized during the course of panchanama. However, there is no further cross-examination on this issue and therefore, no definite finding can be given whether the dagger (knife) was taken away by P.W. 5-Ramdas with him and later on was produced during the course of panchanama. After having gone through the judgment of trial Court, we find that the trial Court has not examined the effect of this admission on the part of P.W. 5-Ramdas. At the same time, we have also noted that there is no further suggestion to P.W. 5- Ramdas on this aspect of the case. We have further noted that this issue was not raised before the trial Court during the course of arguments, nor this issue has been raised before us by the Learned Counsel for the appellant. In the circumstances, we do not want to dwell much upon this aspect of the case as the cross-examination of the witness on this aspect was left mid-way. There is no suggestion to this witness that he was holding or had used dagger during the incident.

23. P.W. 11-Afsar Khan was the Investigating Officer who had conducted major portion of investigation of this case. Oral report Exh.47 was recorded by him. First Information Report u/s 307 of the Indian Penal Code vide Exh.48 was also recorded by him. After recording of First Information Report, spot of the incident was also visited by him. As already stated, a dagger was seized on the spot when it was produced by P.W. 5-Ramdas before P.W. 11-Afsar Khan. The seized articles were also sent to the Chemical Analyzer by P.W. 11-Afsar Khan through police constable Ramesh.

24. The major portion of cross-examination of the witnesses is devoted to the role of the acquitted accused. The limited cross-examination in respect of role of the appellant has already been referred to by us hereinabove. It is abundantly clear that the cross-examination of eyewitnesses does not in any manner impair quality of evidence adduced by the respondent/State before the trial Court. Minor discrepancies are obviously there in the version of eye-witnesses. They do not however adversely affect the case of prosecution. It is possible to say that the appellant did not intend to cause death of the deceased. However, it is certain that the appellant intended to cause injuries to the deceased and the said injuries are established to be sufficient to cause death in an ordinary course of the nature. The appellant is, therefore, rightly found guilty of the offence punishable u/s 302 of the Indian Penal Code.

25. As far as conviction of the appellant u/s 307 of the Indian Penal Code is concerned, his conviction has been rightly recorded by the trial Court. P.W. 4-

Swapnali has stated that the appellant wanted to inflict a blow on neck of P.W. 2-Vaishali. P.W. 2-Vaishali had warded off of the blow and therefore, she had sustained injuries on her hand. This evidence gets support from the Medical Officer P.W. 8-Dr. Nitin Rathi. Similarly, the injuries found on the person of injured Gumphabai and P.W. 4-Swapnali, though have been described as superficial injuries by P.W. 8-Dr. Nitin Rathi, were on vital parts of body of Gumphabai and P.W. 4-Swapnali. The way in which the appellant had mounted attack on the deceased Jyoti and the witnesses, gives clear impression that the appellant was wild enough to cause any type of injuries to the injured witnesses. In the circumstances, it was possible that one or two more persons could have died. The appellant appeared to have caused injuries to the witnesses indiscriminately and the witnesses had been trying to save themselves. Therefore, the injured witnesses could survive. Moreover, the nature of injuries do not necessarily decide as to whether the offence committed by the appellant was punishable u/s 307 of the Indian Penal Code. The intention of the appellant is one of the important ingredients of the offence punishable u/s 307 of the Indian Penal Code. What the Court has to examine is the intention of the accused and the circumstances in which the act has been committed. The intention of the appellant was abundantly clear that he wanted to cause serious injuries to the deceased and the witnesses.

26. The Hon"ble Supreme Court while dealing with this issue in the case reported at 2008 Cri.L.J. 3869, State of M.P. vs. Imrat and Another, has said at para 11 as under:

11. It is sufficient to justify a conviction u/s 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The Section makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. Therefore, an accused charged u/s 307, IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt.

The Hon"ble Supreme Court has further said at para 14 as under :

"14. 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. The basic differences between Sections 333 and 325, IPC are that Section 325 gets attracted where grievous hurt is caused whereas Section 333 gets attracted if such hurt is caused to a public servant"

27. In the present case also the intention of the appellant can be gathered from the attending circumstances and the injuries found on the person of P.W. 2-

Vaishali and P.W. 4-Ku. Swapnali. Though P.W. 2-Vaishali had sustained injuries on her left and right hands, it has come in the evidence that the target of the appellant was neck of P.W. 2-Vaishali. It is because of intervention of hands of P.W. 2-Vaishali that the dagger did not hit neck of P.W. 2-Vaishali. Similarly, P.W. 4-Ku. Swapnali had also sustained a lacerated wound on right side of chest 2"x1". The said wound was bone deep. The wound was on very vital part of the body. Had the same wound been little more deeper, it would have caused death of Swapnali. As such though none of the witnesses had sustained any grievous hurt as defined u/s 320 of the Indian Penal Code, that itself cannot be a ground to reduce the gravity of the offence committed by the appellant. Nature of injury may be one of the considerations while deciding the intention of the assailant. It cannot be sole deciding factor. In view thereof, the conviction of the appellant for the offence punishable u/s 307 of the Indian Penal Code also cannot be disturbed.

28. Before parting with the judgment, we find it necessary to state that the trial Court has committed mistake while recording final order of the judgment in which it has recorded conviction of the appellant for the offences punishable u/s 302 read with Section 34 and Section 307 read with 34 of the Indian Penal Code. Once the co-accused have been acquitted, there was no basis for convicting the appellant for the offences punishable under Sections 302 and 307 of the Indian Penal Code with the aid of Section 34 of the Indian Penal Code. The conviction should have been simplicitor under Sections 302 and 307 of the Indian Penal Code. The final order of the learned trial Court to that extent shall stand modified. In any event, it does not change the net result of the appeal. The appeal deserves to be dismissed and is dismissed accordingly.