

(2011) 05 BOM CK 0025
In the Bombay High Court
Case No : Criminal Appeal No. 61 of 2011

Ram Vishwanath Salunke

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 06-05-2011

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 164, 374(2), 428
Penal Code, 1860 (IPC) — Section 299, 300, 302, 304, 323

Citation : (2011) 113 BOMLR 2109 : (2011) 8 RCR(Criminal) 2570

Hon'ble Judges : B.H. Marlapalle, J;A.M. Thipsay, J

Bench : Division Bench

Advocate : Nitin Pradhan, instructed by S.D. Khot, for the Appellant; H.J. Dedhia, APP, for the Respondent

Final Decision : Allowed

Judgement

B.H. Marlapalle, J.—This appeal filed u/s 374(2) of Code of Criminal Procedure is directed against the order of conviction and sentence passed in Sessions Case No. 21 of 2009 by the learned Sessions Judge, Nashik on 10/12/2010. The Appellant-accused came to be tried for the offences punishable under Sections 302, 504 and 506 of IPC as well as Section 135 of the Bombay Police Act. He came to be acquitted for the offences punishable under Sections 504 and 506 of IPC, but has been convicted for the offence punishable u/s 302 of IPC and sentenced to suffer life imprisonment and to pay a fine of Rs. 500/- in default to undergo further SI for 15 days. He also has been convicted for the offence punishable u/s 135 of the Bombay Police Act and sentenced to suffer SI for four months and to pay a fine of Rs. 500/- in default to undergo further SI for 15 days.

2. As per the prosecution, the accused is the husband of P.W. 7-Hema, who is the daughter of the deceased Damodar Hage. The deceased was a patient of leprosy and had opted for voluntary retirement from the employment of Nashik Municipal

Corporation. Consequently, in his place, P.W. 7-Hema came to be appointed on compassionate ground. The accused and P.W. 7 were married sometimes in 2004 and she co-habited with the accused in the matrimonial home for few months and thereafter on account of the matrimonial disputes, she started residing with her father at Walmikinagar along with P.W. 2-Manorama Pande, who is her first cousin from paternal side (daughter of father's sister). On the date of the incident i.e. on 12/10/2008, the accused went to the house of P.W. 6-Smt. Sunanda Ingle located in front of the house of the deceased. He asked P.W. 6 to go to the house of his wife and call her, but his wife did not come and he got enraged. He proceeded towards the house of the deceased to take his wife to the matrimonial home. He was not allowed by P.W. 2-Manorama, but he pushed her aside and entered in the house. To threaten P.W. 2-Manorama, accused took out a knife (Gupti) and after entering into the house, he stabbed his father-in-law-Damodar Hage. Damodar collapsed and was immediately taken to the civil hospital and while under treatment he died at about 6.15 p.m. After Damodar was admitted in the civil hospital, the statement of P.W. 6 was recorded at the Panchawati Police Station and FIR at Exh. 31 came to be registered for the offences punishable under Sections 326, 323, 504 and 506 of IPC and Section 135 of the Bombay Police Act. On the demise of Damodar, the Crime Report came to be amended for the offence punishable u/s 302 of IPC. The accused came to be arrested on 14/10/2008 vide arrest panchanama at Exh. 49. In the meanwhile, the dead body of Damodar was sent for post mortem which was conducted by P.W. 10 -Dr. Hemant Sononis. Inquest panchanama at Exh. 16 was drawn by P.W. 9 PSI-Subhashchandra Deshmukh, who had subsequently undertaken the investigation. Spot panchanama was drawn at Exh. 23 and the sketch of the spot of the incident was also prepared. The weapon used-Gupti (Article 1) and its wooden case (Article 7) were recovered from the spot. P.W. 10 signed the post mortem notes at Exh. 52. On 13/10/2008 police constable Shri Chaudhari produced the clothes of the deceased which were seized under panchanama at Exh. 25 and these clothes were a white coloured baniyan and maroon coloured underpant (Article 2 and 3 respectively). On 16/10/2008, the clothes of the accused, on the disclosure statement made by him, were recovered i.e. Article 4 and 5 Mehendi coloured pant and pista coloured lined shirt. All the seized articles were sent to C.A. The C.A. reports were received at Exhs. 47 and 48. In the meanwhile, the statements of P.W. 2-Manorama and P.W. 7-Hema came to be recorded u/s 164 of Code of Criminal Procedure before the Special Judicial Magistrate on 25/10/2008. On completion of investigation, the charge-sheet was filed and the case being triable exclusively by the Sessions Court, it was committed. Charge at Exh. 8 was framed against the accused on 21/8/2009.

3. The prosecution examined in all 10 witnesses and P.W. 1-Sanjay Yeole, P.W. 3-Madhukar Jagtap, P.W. 4-Ramesh Garad and P.W. 5-Pravin Bairagi were the panch witnesses and P.W. 3-Madhukar Jagtap had turned hostile. The prosecution claimed that P.W. 2-Manorama Pande, P.W. 6-Sunanda Ingle and P.W. 7-Hema

Salunke were the eye witnesses to the incident. P.W. 8-Ashok Nikam was attached to the Panchawati Police Station as Police Head Constable. He had received intimation from Police Head Constable Chavan regarding the incident and, therefore, MLC No. 1199 of 2008 was recorded by him (Exh. 34). He went to the civil hospital, where Damodar was admitted and in his presence the doctor had informed him that Damodar was not in a fit condition to record the statement. On the basis of the complaint given by P.W. 7, he recorded C.R. No. 490 of 2008 for the offences punishable under Sections 326, 323, 504, 506 of IPC and Section 135 of the Bombay Police Act.

4. As per the evidence of P.W. 10-Dr. Hemant Sononis, the only injury noticed on the person of the deceased during the post mortem was,

A sutured wound 2 cm. in length on abdominal wall located 2 cm. above and 2 cm right to the unmilicus.

On internal examination, he noticed an incised wound of 2 cm x 1.5 cm. going inside the abdominal cavity and it had perforated abdominal walls, muscles and peritoneum going obliquely towards infers surface of liver. There was an incised wound on and in the surface of liver about 2 x 2 cm. All the injuries were ante mortem. As per the doctor, the cause of death was "hemorrhagic shock due to stab injury to abdomen". He further stated that the injury noticed on the abdomen was sufficient to cause death in the ordinary course of nature and the injury found on the person of the deceased was possible due to Article 1-Gupti shown to him in the court. He had signed the post mortem notes at Exh. 52. Thus, the evidence of this witness proved that Damodar Hage died a homicidal death on account of the stab injury, on 12/10/2008.

5. Mr. Pradhan, the learned Counsel for the Appellant, does not dispute that Damodar died a homicidal death, despite the fact that the accused had taken a defence before the trial court and by examining D.W. 1-Shri Shrawan Kale that Damodar committed suicide by self inflicting the injury on his abdomen. It was submitted by Mr. Pradhan that even if it is held that it was the accused who inflicted the stab injury to the deceased, he could not be held to be guilty for the offence punishable u/s 302 of IPC and more so when there is no evidence on record to point out that the accused had any dispute with the deceased. There was no motive brought on record by the prosecution in support of its case that the accused had premeditated the assault on Damodar and he had the intention to kill Damodar, when he made a forcible entry in the house of Damodar. The learned Counsel submitted that the incident has taken place in a sudden fight that took place as the accused was not allowed to enter the house and in the heat of anger, he took out the knife without aiming at the deceased and the deceased became an accidental or chance victim. It was further urged that having regard to the evidence of all the three eye witnesses and the pendency of matrimonial disputes between the accused and P.W. 7, the accused, at the best, could be convicted for an offence punishable u/s 304 (Part II) of IPC. It was further submitted that the accused has been in jail for the last more than two

years and, therefore, by allowing the appeal he deserves to be released forthwith. The learned Counsel, in support of his submissions, relied upon the following decisions of the Supreme Court:

(a) Tholan Vs. State of Tamil Nadu,

(b) Ramesh Vithalrao Thakre and another Vs. State of Maharashtra,

(c) Sarup Singh Vs. State of Haryana represented by the Home Secretary,

6. Mr. Dedhia, the learned APP, on the other hand, referred to the evidence of all the three eye witnesses and submitted that the accused had come with a deadly knife to visit his wife and that itself indicated his intentions. The accused did not pick up a knife from the house of the deceased and the stab injury sustained by the deceased was not caused by such a knife. The preparation of the accused to come with a deadly weapon would not bring the offence u/s 304 (Part II) of IPC and though there was no premeditation or preparation to kill Damodar, the accused took out the knife and inflicted one blow on the abdomen of the deceased, without any provocation. The learned APP further submitted that when the prosecution case is supported by the evidence of three eye witnesses, motive, as a circumstance, does not remain significant and even if the submissions of the learned Counsel for the accused are accepted, the offence committed by the accused would fall u/s 304 (Part I) of IPC.

7. As per the prosecution case, the incident had taken place at 2 p.m. on 12/10/2008 and in the house of the deceased. The house of the deceased, as per the Gift Deed at Exh. 59, admeasures 10 x 15 ft. and as per the spot panchanama at Exh. 23, a portion admeasuring 10 x 3 ft. is the kitchen and the remaining area of the living room-cum-bedroom is 10 x 12 ft. This panchanama was sought to be proved through the evidence of P.W. 3-Madhukar Jagtap, but he turned hostile. It is also claimed by the prosecution that the weapon-Gupti (Article 1) was collected from the spot, but the said recovery could not be proved as P.W. 3 turned hostile. The C.A. report at Exh. 48 indicated that on the blade of the weapon blood stains were noticed but its grouping remained inconclusive. The blood group of the deceased appeared to be "O" and on the clothes of the accused blood stains were noticed but its grouping remained inconclusive. The evidence of the three eye witnesses i.e. P.W. 2-anorama, P.W. 6-Sunanda and P.W. 7-Hema, the wife of the accused, unerringly proved that it was the accused who had inflicted a blow on the abdomen of the deceased with a sharp edged weapon and P.W. 7 identified Article 1 Gupti as the weapon which was used by the accused in assaulting her father. The trial court has rightly discarded the evidence of D.W. 1-Sanjay Yeole in support of the defence case that Damodar committed suicide by self inflicting an injury on his abdomen. Hence, the only issue we have to examine is whether the offence committed by the accused would amount to culpable homicide amounting to murder or only culpable homicide.

8. P.W. 7-Hema, in her complaint at Exh. 31, which complaint she verified to be

correct in her evidence before the court, had stated that the accused had his own truck and he used to drive the same. On 18/9/2008 the accused had visited her at about 8.30 p.m. and he had consumed liquor. He assaulted her and P.W. 2 and, therefore, a complaint was registered with the police station. She had warned the accused not to visit her again and also threatened that she would file a complaint against him for the offence punishable u/s 498A of IPC. She further stated that on the date of the incident, she herself, her deceased father and P.W. 2-Manorama were at home at about 2 p.m. when the accused entered her house under the influence of liquor and told her that he wanted to talk to her. She asked him not to talk and on that accused told her to forget the past quarrels and accompany him to go to his house. She informed the accused that her father was not well and was to be taken to Shirdi for an operation. At this point, the accused got angry and started abusing all of them. P.W. 2 took the accused out of the house and tried to convince him. P.W. 2 at that stage had bolted the house from outside, so as not to allow him to re-enter the house, but the accused broke the door and flashed the weapon when he entered into house. He inflicted two blows on the person of her father and her father died in the hospital. When the complaint at Exh. 31 was filed with the police, Damodar was under treatment and, therefore, it was registered for the offences punishable under Sections 326, 323, 504 and 506 of IPC. However, in her depositions before the trial court, she stated that on the date of the incident the accused first went to the house of P.W. 6-Sunanda Ingle and asked her to call his wife as he wanted to talk to her. P.W. 6 came to her house and gave the message of the accused and she was informed that his wife was not willing to meet him. P.W. 2-Manorama went out and pleaded with the accused not to come to their house and not to quarrel. P.W. 2 was standing in the door and P.W. 7 and her father were inside watching the arguments between P.W. 2 and the accused. P.W. 2 was not allowing the accused to enter the house and at that time he took out the weapon which was hidden inside his shirt. P.W. 2 got frightened and she pushed the accused. In turn, she was also pushed by the accused and he entered the house. He asked P.W. 7 to accompany him and she refused, saying that she was illtreated. She further stated that the accused asked her whether she was willing to stay at the house of her father and if that be so he would kill her father and after saying so, he stabbed her father in his abdomen by the weapon.

9. The medical evidence as has come on record in terms of the P.M. note at Exhibit 52 and the depositions of P.W. 10-Dr. Hemant Sononis proved that Damodar received only one injury on his abdomen and, therefore, the statement of P.W. 7 that the accused inflicted two blows with the gupti on the abdomen of Damodar cannot be accepted. At the same time the evidence of P.W. 2 does not corroborate the statement of P.W. 7 that the accused on hearing that his wife was not willing to stay with him and would continue to stay with her father, he would kill him and after saying so he stabbed the deceased. In addition, this statement of P.W. 7 does not find place in her complaint Exh.31.

10. P.W. 2-Manorama Pande stated before the trial court that after P.W. 6-

Sunanda gave the message to P.W. 7 and sent by the accused, she went out of the house to tell the accused that P.W. 7 did not want to meet him, but the accused came to the house of the deceased and while she tried to block his entry by standing in the door, the accused took out a Gupti concealed in his shirt. He put Gupti on her neck and threatened to kill her. She pushed the accused and the accused in turn pushed her and he stabbed Damodar, who was standing behind her (P.W. 2) and at that time P.W. 7-Hema was standing behind Damodar. From the evidence of this witness, it is clear that when there was a scuffle between her and the accused and when the accused was waiving the Gupti in his hand, deceased Damodar was standing behind her (P.W. 2) and in that scuffle between P.W. 2 and the accused, Damodar received a blow of weapon on his abdomen. This quarrel would not have taken place, if P.W. 2 had not obstructed the entry of the accused in her house. The intention of the accused to visit the house of P.W. 7 (his wife) and as is clear from the evidence of all the three eye witnesses was to meet P.W. 7 and persuade her to join him for cohabitation forgetting the past quarrels. It is, therefore, clear that the incident had taken place in a sudden fight and at the heat of the moment, the accused took out the weapon and while scaring away P.W. 2, who was standing in the door, he pushed her and the weapon blow landed on the abdomen of the deceased who was standing behind her. It is also true that there was no premeditation to the crime and the accused had no dispute with the deceased. His complaints were only against P.W. 7. In such circumstances, he cannot be attributed with an intention to cause the death of or such bodily injury to Damodar as was likely to cause his death. We must also keep in mind that at no point of time it was the case of the prosecution that it was Damodar who was insisting that his daughter P.W. 7-Hema should not join the company of her husband.

11. Admittedly, the deceased was a leprosy patient and had opted for voluntary retirement. The evidence of P.W. 7 that after she refused to join the accused he got angry and stabbed her father is an improvement over the complaint Exhibit 31 she submitted to the police station and obviously by way of an afterthought. The matrimonial disputes between the parties are already being litigated before the Competent Court. At the first instance when he entered the house he had not shown any knife or threatened anybody. When P.W. 2 obstructed his re-entry in the house he got angry because of the provocation by P.W. 2, he asked her to move out of his way and when she insisted on stopping his entry he took out the knife and threatened her. When she did not move out of his way even then he pushed her aside and entered the house. At that time the deceased was standing behind P.W. 2. In these circumstances when he was whipping the knife towards P.W. 2 so as to threaten her to move out of his way it is possible that P.W. 2 escaped and the blow landed on the abdomen of Damodar. The circumstance of the accused visiting the house with the weapon-Gupti will not by itself be a factor indicating the intention of the accused to commit the crime. It is possible that he came armed to scare his wife so that she would accompany him to the matrimonial home and, therefore, it cannot be accepted, in the peculiar facts of

this case, that he had prepared to commit the crime.

12. It is also pertinent to note that the doctor who examined the deceased and attended him at the civil hospital was not examined by the prosecution. P.W. 10 stated before the trial court that the incised wound, which resulted in death of Damodar, was 2 cm. X 1.5 cm. The weapon (Article-1) recovered from the spot had a blade of 35 cm. and its width was 2 cm. and the grip was of 10 cm. It had a sharp and pointed edge. If a blow of the weapon was inflicted with an intention to kill any person, the resultant injury would not be of the size of 2 cm. X 1.5 cm. and with the blow of such a weapon the intestine of the victim would have come out, if such a blow was an intended one. The record also shows that the statements of P.W. 2-Manorama and P.W. 7-Hema were recorded u/s 164 of Code of Criminal Procedure before the Special Judicial Magistrate on 25th October 2008 and, in her statement so recorded, P.W. 7 had disclosed that the accused had consumed liquor at the time of the incident. We have also noted that the Medical Officer, who treated victim on his admission at the civil hospital, has not been examined. He could be a better expert witness to state before the Court whether the injury suffered by the victim was sufficient, in the ordinary course, to cause his death. All the circumstances cumulatively support our view that the accused had not intended a knife blow to be inflicted on the deceased and the injury caused to the deceased was accidental and not an intended one. In the first round, the accused had entered the house of the deceased and persuaded his wife to join his company at the matrimonial house and when she refused he was taken out of the house. Till then there was no incident of violence at the hands of the accused but when he tried to re-enter the house of the deceased so as to take P.W. 7 with him, he was not allowed to enter the house by P.W. 2 and that was the sudden provocation to him in as much as P.W. 2 bolted the house from the outside and she stood outside the door so as to prevent his re-entry.

13. In the case of State of Andhra Pradesh Vs. Rayavarapu Punnayya and Another, the Supreme Court held,

12. In the scheme of the Penal Code, "culpable homicides" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice-versa. Speaking generally, "culpable homicide" sans "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest amongst the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

14. Section 299 of I.P.C., defines "culpable homicide". As per the said Section, whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. Thus it has three parts (a) with the intention of causing death or (b) with the intention of causing such bodily injury as is likely to cause death or (c) with the knowledge that he is likely by such act to cause death. At the same time the Exception 1 below Section 300 states that culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the grave and sudden provocation, or causes the death of any other person by mistake or accident. It is trite law that Section 304 (Part II) comes into play when the death is caused by doing an act with the knowledge that it is likely to cause death, but there is no intention on the part of the accused either to cause death or to cause such bodily injury as is likely to cause death. In the instant case as the incident had taken place at the spur of the moment due to the altercation between the accused, P.W. 2 and P.W. 7 and the deceased became a victim by chance or by accident. We, therefore, hold that the offence punishable u/s 304 (Part II) of I.P.C. has been proved against the accused. The view taken by us in this judgment is supported by the decision in the case of Jagriti Devi Vs. State of H.P., .

15. In the premises, this appeal succeeds partly. The order of conviction and sentence passed in Sessions Case No. 21 of 2009 against the accused for the offence punishable u/s 302 of I.P.C. is hereby quashed and set aside and instead the accused is convicted for the offence punishable u/s 304 (Part II) of IPC. He is sentenced to suffer RI for seven years. Undoubtedly, he shall be entitled for set off, if any, u/s 428 of Code of Criminal Procedure.