

(2018) 03 BOM CK 0036
In the Bombay High Court
Case No : CRIMINAL APPEAL NO.200 OF 2004

RUSHI DOMAJI UIKE

APPELLANT

Vs

THE STATE OF MAHARASHTRA

RESPONDENT

Date of Decision : 09-03-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302
Code of Criminal Procedure, 1973 — Section 313

Citation : (2018) 03 BOM CK 0036

Hon'ble Judges : V. M. DESHPANDE, J

Bench : Single Bench

Advocate : F. N. Haideri, N. R. Rode

Final Decision : Allowed

Judgement

1. The present appeal is directed against the judgment and order of conviction passed by learned 3rd Ad hoc Additional Sessions Judge, Nagpur in

Sessions Trial No.13/2003 dated 08.12.2003. By the said judgment and order of conviction, the appellant is convicted for the offence punishable under

Section 304A of the Indian Penal Code and is directed to suffer rigorous imprisonment for 6 years and to pay a fine of Rs.2000/ and in default of

payment of fine, simple imprisonment for six months.

2. The criminal law was set into motion by Sitaram (PW1). He lodged an oral report (Exh.17) to police Station, Hingna. On the basis of the same, a

crime was registered vide Crime No.211/2002 in the said Police Station for the offence punishable under Section 302 of the Indian Penal Code against

the appellant. The printed FIR is at Exh.18.

3. As per the prosecution case, on 15.10.2002, it was Dashera day. On the said day, the first informant was present in his house so also the deceased

Rajaram, his brother who resides adjacent to him, was also present. At that time, the appellant Rushi Uike was quarreling with Murlidhar Ikhate

(PW4). Therefore, the deceased Rajaram went to them to intervene in the said quarrel and at that time, as per the prosecution case as disclosed in the

FIR, the appellant was having two knives in his hand and he quipped, "Who are you to intervene in the matter?" and he gave knife blows on the

person of the deceased Rajaram resulting into serious injuries. Thereafter, Rajaram came to the house and collapsed and died immediately.

4. After the report was reduced into writing, the offence was registered by Vinod Patole (PW7) and swung into action. He went to the spot and in

presence of panchas namely; Ramesh Thote (PW6), drawn panchanama (Exh. 36). Simple as well as blood stained sand was seized under seizure

memo (Exh. 37). Inquest was done under inquest panchanama (Exh. 41). Thereafter, he referred the dead body for post mortem. The post mortem

report (Exh. 34) is on record. The cause of death was hemorrhage and shock due to stab injury to the heart. Under the arrest memo (Exh. 42), the

appellant has arrested on 15.10.2002 itself. Seizure memo (Exh. 38) is in respect of seizure of clothes of the appellants. He also seized one weapon

which is Gupti; Article 10 under seizure memo (Exh. 22) from the house of Dulbanbai Kodape (PW2).

He also seized one weapon from the house of Nirmalabai, wife of the brother of appellant by drawing seizure panchanama (Exh. 31), it is at

Article 12. When the appellant was under police custody, he gave his memorandum statement (Exh. 46) and agreed to show the place where he

has concealed the weapon and accordingly, from the cattle shed, a weapon was seized by drawing recovery panchanama (Exh. 46A) and Article

11 is the said weapon. After completion of the usual investigation, the charge sheet was filed.

5. The learned Ad hoc Additional Sessions Judge framed the charge against the appellant for an offence punishable under Section 302 of the IPC. In

order to bring home the guilt of the appellant, the prosecution has examined in all 7 witnesses. They are; Sitaram Deogade (PW1) brother of the

deceased, Dulbanbai Kodape (PW2), Ramesh Chapurkar (PW3), Murlidhar Irpate (PW4), Keshao Dhobale (PW5), Ramesh Thote (PW6) and Vinod

Patole (PW7). Ramesh Chapurkar (PW3), Keshao Dhobale (PW5) and Ramesh Thote (PW7) were examined by the prosecution as pancha

witnesses to prove various recoveries and seizures. Ramesh Chapurkar (PW3) and Keshao Dhobale (PW5) have turned hostile and they did not

support the prosecution case. Ramesh Thote (PW6) has proved various seizure memos and recoveries. Sitaram Deogade (PW1), Dulbanbai Kodape

(PW2) and Murlidhar Irpate (PW4) are examined as eye witnesses.

6. After appreciating the entire evidence, by the impugned judgment, the learned Judge of the Court below acquitted the appellant of the offence

punishable under Section 302 of the IPC. However, convicted him for the offence under Section 304ÂII of the IPC. Though, the appellant was

acquitted of the offence punishable under Section 302 of the IPC, no appeal is preferred before this Court by the State. Hence, this appeal.

7. It is always a burden on the shoulder of the prosecution to prove the guilt of the accused beyond reasonable doubt. The accused can take various

defences during the course of trial or he can even remain a mute spectator. If a defence is taken by the accused, the degree of proving the said

defence is not equal to the degree of proof that the prosecution is required to prove its case. Even without adducing any independent evidence, or

without entering the witness box, accused can probabalize his defence on the basis of the evidence brought on record by the prosecution witnesses.

8. Keeping the aforesaid principles in mind, now let us examine the case at hand. According to the prosecution, on the day of Dashera, there was a

quarrel in between the appellant and Murlidhar (PW4) on account of love affair of the appellant with Lata, daughter of Murlidhar. At that time, the

deceased Ramrao went to them in order to calm down the quarrel. According to the prosecution, at that time, the appellant got enraged and gave blow

on the chest of Ramrao, resulting into his death.

9. Though, when the appellant was examined by the learned Judge under Section 313 of the Code of Criminal Procedure, he stated that he is being

falsely implicated in crime. However, from the line of crossÂexamination of Sitaram (PW1), Dulbanbai (PW2) and Murlidhar (PW4) it is his defence

that when the deceased went to pacify the appellant as well as Murlidhar, in lombazombi (melee), the weapon which was in the hand of Murlidhar

landed on the chest of Rajaram resulting into his death.

10. From the post mortem report (Exh.Â34), there is a single injury which can be caused by a sharp weapon. Other two injuries are in the nature of

simple contusions. The Doctor is not examined by the prosecution since the defence admitted the post mortem report (Exh. 34).

11. Two weapons were also sent to the doctor for obtaining his opinion as to whether the weapon sent to the Doctor can cause injury as mentioned in column no.17 of post mortem report (Exh. 34)

12. The query report (Exh. 33) given by Dr. Prakash Mohite in the department of Forensic Medicines and Government Medical College, Nagpur. It

is dated 19.12.2012 and the said document is also an admitted document. Perusal of this document (Exh. 33) would show that the two weapons

which were sent were Gupti and blade of Gupti and according to the query report, the injury as noticed in column no.17 of the post mortem report can be caused by the said weapon.

13. During the course of investigation, the muddemal properties were sent to the chemical analyzer. Page 4 of the paper book gives the list of articles

filed in Sessions Trial No. 13/2003. It shows that 12 articles including the sample of earth; both simple as well as blood mixed, clothes of the deceased,

clothes of the accused and three weapons namely; one Gupti, one iron blade and one knife.

14. By CA form (Exh. 31), muddemal properties were sent to the chemical analyzer for analysis. It shows that Article 10 Gupti seized from the

house of Dulbanbai (PW2) under Exh. 22 and iron blade seized on the memorandum of the appellant Exh. 47, were sent to the chemical analyzer

along with the clothes of the deceased so also the clothes of the appellant.

15. Though oral report of appellant Sitaram (PW1) (Exh. 17), gives description of the weapon in the hand of the appellant as that of knife, he states

in his evidence that the appellant was carrying two Guptis in his hands. According to his evidence, Rushi, the appellant caught hold of Rajaram by one

hand and gave blow by other hand on the chest of Rajaram. The FIR is never a substantive piece of evidence. It can always be used for the purpose

of corroboration or for contradiction.

16. In the cross-examination, Sitaram (PW1) has accepted that he knows the difference between Knife, Gupti and Patti. During his cross-

examination when his report was confronted to him, he states that he is unaware as to why the description of weapon Gupti or Patti is not mentioned

in the FIR. However, the investigating officer, in his cross-examination, has

stated that while lodging the report, Sitaram did not disclose that the appellant Rushi was having two Pattis in his hands.

17. What is important to note from the evidence of Sitaram (PW1) that in fact, he has stated in his examination in chief itself that the quarrel

between Murlidhar (PW4) and appellant Rushi was going on and his brother deceased Rajaram went near the quarrel. Further, important to note that

in his cross-examination Sitaram (PW1) has admitted that at that time Murlidhar (PW4) was having a weapon in his hand. Thus, it is brought through

the cross-examination of this prosecution witness that quarrel was going on between Murlidhar and Rushi (appellant) and at that time Murlidhar

(PW4) was also holding a weapon.

18. Dulbanbai (PW2) is neighbour of Murlidhar (PW4). Her evidence would also show that an altercation between Murlidhar and Rushi was going on.

She states that the appellant challenged Murlidhar to come out of the house. However, he did not come out. Rushi was abusing him in filthy language

and at that time, the deceased came to give an understanding to Rushi.

However, at that time, Rushi assaulted on the chest of Rajaram by one weapon out of two which were in his hands. She further states that she tried to

separate the quarrel between Rushi and Murlidhar and snatched one weapon from Rushi and kept it in her house. It is at Article 10.

19. From the cross-examination, it is clear that there was a long standing dispute between Rushi and Murlidhar on account of eve teasing by the

appellant Rushi to Lata, the daughter of Murlidhar. Not only that, Murlidhar and his wife prior to the incident, went to the house of Rushi to give

understanding to him that he should not even go from the way where the house of Murlidhar is situated. It is also stated in her cross-examination that

on the day of Dashera, Rushi was moving in front of the house which was not liked by Murlidhar and his wife. Therefore, they came out of the house

for quarrel. What she had stated in her cross-examination it is reproduced hereinbelow:

â??It is true that Murlidhar kept weapon in my house. I have produced the weapon to the police.â??

From the evidence of this witness it is clear that on the day of Dashera, the appellant was moving on the road in front of the house of Murlidhar,

which was not liked by Murlidhar and his wife. Therefore, they stepped out and

there was a quarrel between appellant and Murlidhar and even this prosecution witness tried to separate the said quarrel. Though, this prosecution witness has stated that Murlidhar had a weapon and that was kept in her house, in the re-examination of this witness, she stated that Murlidhar did not give any weapon to her. However, in the cross-examination after re-examination, she has admitted that she is having very good relations with Murlidhar. From the quality of this type of evidence, it is clear that this witness is ready to give different types of versions. Further, her version in respect of the quarrel between the appellant and Murlidhar is corroborated by brother of deceased Rajaram, namely; Sitaram. Therefore, to that extent, her evidence can be safely accepted. Further, to this witness also, a suggestion is given, which is, of course, denied by her that in the Lombazombi deceased was stuck with a blow.

20. That takes this Court for evaluation of the evidence of Murlidhar Irpate (PW4). As per the report (Exh. 17) lodged by Sitaram (PW1), the quarrel between the appellant, Murlidhar (PW4) Sitaram (PW1) shows that the house of Murlidhar is near his house. Whereas his evidence shows that the house of appellant is situated about 125 houses away from the house of Sitaram. The evidence of Dulbanbai (PW2) establishes the factum of situation of the houses of Murlidhar (PW4). According to her, house of Murlidhar is in front of her house.

21. Sitaram (PW1) and Dulbanbai (PW2) corroborate each other that prior to the incident, the relations between Murlidhar and the appellant became soar on account of appellant's behaviour towards Lata, daughter of Murlidhar. Siraram's evidence shows that the appellant and Lata were in love and prior to 15 days of the incident, she was seen in company of the appellant at river and for this reason, the dispute arose in between them.

22. Even Murlidhar (PW4) has stated from the witness box that prior to 8 to 10 days of Dashera, his daughter Lata when used to go to river, that time the appellant extended threat to her that she should marry with him on the point of dagger and when this fact was made known to him by his daughter, his wife went to the house of the appellant where she had an altercation with the appellant. The evidence of Murlidhar in his examination is in chief is in most general words. Though, he states presence of the appellant before his house armed with Guptis in his hands and was abusing him, he did not

disclose in his examination that he stepped out of his house. What he states that when the appellant was abusing at that time, the deceased came there to pacify and at that time, he was attacked. What is interesting to note from his examination is that he states that he had seen the weapon in the hands of the appellant from a long distance and therefore he may not identify the same. Thus, in his examination, he completely absolved himself from the quarrel with the appellant. However, in the cross-examination, he admitted that since the appellant Rushi came to his house on the day of Dashera, he became angry. Of course, this prosecution witness has denied the suggestion of lombazombi (melee) between him and the appellant, obviously for the reason he is keeping himself at a distance. However, in view of the positive evidence of two witnesses, the brother of the deceased and Dulbanbai that when quarrel was going on in between appellant and Murlidhar, the deceased came there to intervene. Not only that, Dulbanbai even states that she intervened in between quarrel of Murlidhar (PW4), appellant and the deceased. Further, there was no reason for Sitaram and Dulbanbai to state from the witness box that in front of the house of Murlidhar there was a quarrel going on in between him and the appellant. Murlidhar was already knowing the activities of appellant, which were pertaining to his daughter Lata. Not only that, the appellant was warned by Murlidhar that he should not even be seen on the road outside his house. All this, in my view, shows that Murlidhar is hiding from the Court that there was a quarrel between him and the appellant.

23. From the post mortem report (Exh. 34), it is clear that the deceased was stabbed from the front side on his chest by the appellant. Even the prosecution case to that extent is to be believed. The clothes of the appellant, the weapon Article 10 and Weapon Article 11 were sent to the Chemical Analyzer in a sealed condition. The Chemical Analyzer's report (Exh. 48) shows that both these weapons were not having any blood stains. Further, the clothes of the appellant, which were sent to Chemical Analyzer do not show that they were stained with human blood. Therefore, the scientific evidence does not corroborate the prosecution version about the assault made by the appellant. It is pertinent to note that though presence of Murlidhar was shown on the spot for the reasons best known to the investigating officer, the clothes of Murlidhar were not seized.

24. As observed, Dulbanbai has stated in her cross examination that she snatched the weapon from the hands of Murlidhar, though in the re

examination, she denied the same, in my view, the truth has already surfaced on record. Further, according to the prosecution, the appellant went near

the spot armed with two weapons in his hands. His dispute was with Murlidhar. Murlidhar was present, quarrel was going on. Therefore, had there

been any intention on the part of the appellant to use his weapon, he could have used it against Murlidhar. Presence of the deceased there on the spot

was to pacify the quarrel. There was no previous enmity between the appellant and the deceased. Therefore there was no reason for the appellant to

give all of a sudden stab blow to the deceased. True it is that nobody can visualize and/or guess what will happen at the spur of a moment. However,

the events have to be judged from the rationale.

25. The cumulative reading of the entire prosecution case, in my view, probablizes the defence as put forth by the appellant.

The said defence as raised cannot be completely ruled out, meaning thereby the prosecution has failed to prove its case against the appellant beyond

doubt. That leads me to pass the following order.

ORDER

(i) Criminal Appeal No.200/2004 is allowed.

(ii) Judgment and order dated 3rd Ad hoc Additional Sessions Judge, Nagpur in Sessions Trial No.13/2003 thereby convicting the appellant for an

offence punishable under Section 304AII of the Indian Penal Code is quashed and set aside. The appellant is acquitted of an offence punishable under

Section 304AII of the Indian Penal Code.

(iii) Bail bonds of the appellant stand cancelled.