

(2015) 02 BOM CK 0364
In the Bombay High Court
Case No : Criminal Appeal No.319 of 2012

Salim Gulab Khan

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 13-02-2015

Acts Referred:

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

Citation : (2017) ALLMRCri 218

Hon'ble Judges : Shri. P. V. Hardas and Dr. Shalini Phansalkar Joshi, JJ.

Bench : Division Bench

Advocate : Mr. M.K. Kochrekar a/w. Mr. Prashant Pandey Advocates, for the Appellant in Cr. Appeal No. 319 of 2012 and Cr. Appeal No.550 of 2012; Mrs. U.V. Kejriwal, A.P.P, for the Respondent - State; Mr. S.A. Shaikh a/w. Mr. K. Hasanuddin Advocate, for the Appellant in Cr. Appeal No. 988 of 2013

Final Decision : Allowed

Judgement

Dr. Shalini Phansalkar-Joshi, J. - The Appellants herein, who are the Original Accused, convicted for the offence punishable under Section 302 Read with 34 of the Indian Penal Code and sentenced to suffer R.I. for life and to pay fine of Rs.1,000/- each, in default to suffer R.I. for three months, by the Judgment dated 8th February, 2012 in Sessions Case No.13 of 2011 by the Additional Sessions Judge, Dindoshi, Mumbai, by these Appeals challenge their conviction and sentence.

2. As all these three Appeals are arising out of one and same Judgment of the Trial Court, they are decided by this common Judgment. For the sake of convenience, the Appellants are referred to by their original nomenclature as "Accused Nos.1, 2 and 3".

3. Facts, as are necessary, for the decision of these Appeals may briefly be stated thus :

On 13th June, 2010, at about 7 p.m., when PW-9 API Mahendra Sawant was on

duty as SHO at Kandivali Police Station along with PW-11 PI Laxman Chavan, he received the phone call from Bhagwati Hospital informing him that two injured persons were brought to the hospital and on arrival, they were declared as dead. On the receipt of this information, PW-9 API Sawant and PW-11 PI Chavan, along with staff, went to Bhagwati Hospital and made enquiry with PW-1 Ankit Gupta, who was present there. His statement was recorded in the hospital itself and from his statement, it was transpired that Accused No.1 Raunak had stabbed with the broken piece of glass, both, the injured Amit Rathod and Bablu Vishwakarma on account of some trifle incident of the teasing. Accused No.2 Salim and Accused No.3 Usman had facilitated the said assault by Accused No.2 Salim holding Amit, whereas, Accused No.3 Usman holding Bablu.

4. On this statement of PW-1 Ankit, which was treated as F.I.R., PW-9 API Mahendra Sawant registered C.R. No.185 of 2010 against all the three Accused for the offence punishable under Section 302 read with 34 of the Indian Penal Code In the hospital itself, he prepared the Inquest Panchanama (Exhibits 48 and 49) and sent both the dead bodies for post mortem. Thereafter, along with PW-9 API Sawant, he went to the spot of incident and made the Scene of Offence Panchanama vide Exhibit-36. From the spot, in the presence of Panchas, the blood stained mud, simple mud and three broken pieces of glasses were seized. On the same day, PW-8 API Laxman Shinde arrested all the three Accused near Borivali Station and seized their clothes under Panchanama (Exhibit-46). On 14th June, 2010, all the three Accused were taken to Bhagwati Hospital for their medical examination. On that day, PW-11 PI Chavan also recorded the statements of two eye witnesses PW-4 Dinesh Rathod and PW-5 Sachin Rathod. On 17th June, 2010, he recorded the statement of another eye witness PW-7 Mahesh Rathod. On 26th June, 2010, he recorded the statement of PW-6 Sagar Rathod and some other witnesses. He also arranged to collect the blood samples and nail clippings of the Accused persons and then sent all the seized articles, along with the blood samples of the deceased and the Accused, to Chemical Analyzer. On the receipt of the Post Mortem Notes (Exhibits 51 and 52) and completion of investigation, he filed Charge- Sheet in the Court against the Accused.

5. On the case being committed to the Sessions Court, the Trial Court framed charge against the Accused vide Exhibit-2. On the charge being read over and explained to the Accused, they denied the guilt and claimed trial, raising the defence of denial.

6. In order to prove its case, the Prosecution has led the evidence of 11 witnesses. It consists of the evidence of PW-1 Ankit, the Informant, four eye witnesses, the Panchas, the Medical Officer and three Investigating Officers. Trial Court, on appreciation of evidence, accepted the same and convicted and sentenced the Appellants, as stated above.

7. This Judgment of the Trial Court is being challenged in this Appeal by the learned Counsels for the Appellants, whereas, supported by the learned A.P.P. for

the Respondent-State. In our considered opinion, in order to effectively deal with their rival submissions, it would be useful to refer to the evidence on record.

8. To prove the homicidal death of Amit and Bablu, Prosecution has examined PW-10 Dr. Sunil Birhade, who was attached to Borivali Post Mortem Center as Medical Officer and has conducted the post mortem on the dead bodies of Amit and Bablu. On examination of Amit, he found the following external injuries, which he has mentioned in Column No.17 of the Post Mortem Report (Exhibit 51) :-

"(i) Evidence of incised like stab wound present over right side of abdomen, its medial end is 3 cm right to midline and lateral end of wound is 8 cm above and medial to right anterior superior iliac spire spindle shaped. Both angles acute, horizontally oblique, size ? length is 3 cm and maximum breadth at its midpoint is 1.5 cm and it is abdominal cavity deep. On dissection of injury No.(1) Internal injuries are :- Skin, subcutaneous tissue, Anterior abdominal wall muscles at site of injury cut through and through. Mesentry, peritoneum and coils of small intestine and ascending colon cut through and through. Renal vessels along with interior vena cava cut. Blood with clots seen in coils of small intestine and ascending colon.

(ii) Contused abrasion over right side of forehead, 2 cm. above right eyebrow and 5.5 cm. right to midline, size 0.5 cm x 0.5 cm reddish.

(iii) Contused abrasion over midline of forehead 4 cm. above base of nose, horizontal, size 1 cm x 0.5 cm reddish.

Walls ? Right sided anterior abdominal wall cut through and through along with internal injury i.e. Peritoneum ? right sided peritoneum cut through and through."

9. On internal examination, he found following injuries, which he has noted in Column No.19 of the Post Mortem Report (Exhibit 51) :-

"Contusium under scalp as related to Injury No.03 in Column No.17. Horizontal size 1 cm x 0.5 cm."

10. According to him, probable cause of death was "hemorrhage shock due to single incised stab wound", which was found to be sufficient in the ordinary course of nature to cause the death.

11. On examination of Bablu, he found following external injuries, which he has noted in Column No.17 of the Post Mortem Report (Exhibit-52) :-

"(i) Evidence of incised like stab wound present over right side of abdomen, 3 cm right to midline and lower margin of wound is 11 cm. above and medial to right anterior superior iliac spire spindle shaped, both angles acute, obliquely placed, size ? length is 2 cm, maximum breadth at its midpoint is 1.5 cm and it is abdominal cavity deep.

Skin, subcutaneous tissue, anterior abdominal muscle at site of injury cut

through and through. Mesentery, peritoneum and coils of small intestine, ascending colon cut through and through. Interior vena cava cut. Blood with blood clots seen in coils of small intestine and ascending colon."

12. In Column No.21 of the Post Mortem Report (Exhibit-52), he has noted following internal injuries :-

Walls (External Injury) ? Right sided anterior abdominal wall cut through and through along with internal injury i.e. Peritoneum ? cut through and through.

13. The cause of his death, according to him, is "hemorrhage and shock due to single incised like stab wound (unnatural)".

14. There is nothing in his cross-examination to disbelieve the cause of death of both Amit and Bablu as homicidal in nature, as a result of incise wounds caused to them.

15. To prove the complicity of Accused in their deaths, the Prosecution has relied upon the evidence of four eye witnesses. PW-1 Ankit is an eye witness to the incident and also an Informant, on whose complaint offence was registered. As deposed by him, on 13th June, 2010, at about 6 p.m., along with deceased Amit and Bablu, PW-4 Dinesh and PW-7 Mahesh, he was walking on the Link Road. When they came near Anuj Cafe, they saw three Accused standing in same lane. Deceased Amit said to Accused No.2 Salim that he was having hair like a woman. On this comment, there was a laughter and Accused No.2 Salim confronted Amit by retorting why he was teasing him? (mera mazak kyu uda rahe ho?).

16. Amit tried to pacify him by saying that he had no intention of teasing him. However, Accused No.2 Salim started abusing Amit and others in Hindi language. Then he and other Accused rushed to assault Amit. Accused No.2 Salim pushed Amit. Some broken pieces of glass were lying nearby. Accused No.2 Salim held Amit and Accused No.1 Raunak picked up the broken piece of glass and stabbed Amit with the same in his stomach. When Bablu tried to intervene and rescue Amit, Accused No.3 Usman held Bablu from back side and Accused No.1 Raunak stabbed Bablu also in his stomach with the broken piece of glass. As a result of assault, both, Amit and Bablu fell on the ground with bleeding injuries on their stomach. PW-1 Ankit's friend PW-6 Sagar and Munna came there. Then Bablu was taken in the rickshaw to Bhagwati Hospital by PW-6 Sagar and Munna, whereas, in the second rickshaw PW-1 Ankit carried Amit to the same hospital. On arrival at Bhagwati Hospital, both of them were declared dead. As per evidence of PW-1 Ankit, after some time, Police came in the Bhagwati Hospital and recorded his complaint vide Exhibit-27.

17. On the same day, at 11:30 pm, PW-1 Ankit showed the spot of incident to the Police and Panchas. Police seized from the spot three pieces of glass with blood stains, drops of blood and the mud. In evidence before the Court, PW-1 Amit has identified the broken pieces of glass, marked as Articles Nos.1, 2 and 3. He has also identified Article Nos.4, 5, 6 and 7, the clothes of deceased Amit and

Bablu, respectively.

18. In his cross - Examination, PW-1 Ankit has admitted that he, Amit, Bablu, PW-4 Dinesh, PW-5 Sachin and PW-7 Mahesh were friends since childhood. Suggestion put up to him in cross-examination that he and his friends attacked Accused No.1 Raunak is denied by him. It is also denied by him that they tried to press the neck of Accused No.1 Raunak. Except for these suggestions, which are denied by him, there is nothing worthwhile in his cross-examination to disbelieve him.

19. His evidence is fully corroborated by the evidence of PW-4 Dinesh. According to him also, when all of them were walking together, near Anuj Cafe, Amit teased Accused No.2 Salim on account of his long hair and hence Accused persons started quarreling with them. Amit tried to pacify them. However, all the Accused rushed towards them and started assaulting Amit. Accused No.1 Raunak lifted one broken piece of glass and stabbed the same into the abdomen of Amit. At that time, Bablu tried to save Amit. However, Accused No.1 Raunak stabbed him also with the broken piece of glass into his abdomen. Thereafter, Accused ran away from the spot and they took Amit and Bablu to Bhagwati Hospital. In his evidence before the Court, he has also identified the muddemal articles and the Accused.

20. Again there is nothing in his cross-examination except for bringing on record the fact that his statement was recorded by Police on the next day i.e. 14th June, 2010. In our opinion, It was bound to be so, as, by the time Police completed Spot Panchanama, Inquest Panchanama and other formalities, it was already more than 11:30 pm and, therefore, it cannot be said, nor it is argued that there was any delay in recording the statement of this witness. His presence on the spot is also proved by the evidence of other eye witnesses, namely, PW-1 Ankit, PW-5 Sachin and PW-7 Mahesh.

21. The evidence of PW-5 Sachin, who is also an eye witness to the incident, further supports the evidence of these two eye witnesses. According to him, on that day, he had gone on bicycle to purchase his school uniform from Kandivali Station area. At that time, near Anuj Cafe, he saw fighting between Accused persons and his brother Amit and his friends, namely, Bablu, PW-1 Ankit, PW-4 Dinesh and PW-7 Mahesh. So he stopped there and saw that Accused No.2 Salim caught hold of Amit and Accused No.1 Raunak stabbed Amit in his abdomen with broken piece of glass. When Bablu tried to intervene, Accused No.3 Usman held him and Accused No.1 Raunak assaulted him in the abdomen with broken piece of glass. He has further deposed that then both Amit and Bablu were taken in two rickshaws to the Bhagwati Hospital. While returning to the home from hospital, he enquired with PW-4 Dinesh about the cause of quarrel and came to know that it was relating to some minor incident of teasing Accused No.2 Salim on account of his long hair. In his evidence before the Court, he has also identified the broken pieces of glass.

22. Then there is evidence of PW-7 Mahesh, who was present at the time of incident along with the deceased and his friends. He has also deposed about the quarrel on the teasing of Accused No.2 Salim by Amit and has further stated that in the said quarrel Accused No.1 Raunak lifted one broken piece of glass of 7 to 8 inch and stabbed the same into the abdomen of Amit. When Bablu tried to intervene, Accused No.1 Raunak stabbed him also in his abdomen with the broken piece of glass. He has also spoken of the presence of PW-5 Sachin and of PW-6 Sagar, in whose rickshaw Bablu was taken to the hospital, whereas, PW-1 Ankit took Amit in rickshaw to the hospital. He has then identified the broken pieces of glass.

23. Lastly, there is evidence of PW-6 Sagar Rathod, who is not an eye witness to the incident, but whose evidence is relevant as, according to his evidence, when he and Munna were strolling towards S.V. Road, Munna received the call of injured Bablu and, therefore, along with Munna, he went to the spot and saw Bablu and Amit in injured condition with blood oozing from their abdomen. Hence, along with Munna, he took injured Bablu in auto-rickshaw to Bhagwati Hospital. On the way Bablu told him that Accused No.1 Raunak stabbed him with the broken piece of glass. As per his evidence, Bablu was declared dead when he was brought in the hospital. Thus, his evidence proved the oral Dying Declaration made by Bablu to him on the way to hospital.

24. Thus, as regards the actual incident, there is consistent and cogent evidence of four eye witnesses, in addition to the evidence of PW-6 Sagar, before whom Bablu has disclosed the cause of his injury. Despite searching cross-examination, absolutely nothing is elicited and hence their evidence has remained unshattered and, in our considered opinion, the Trial Court has not committed any error in placing implicit reliance on their testimonies.

25. Their evidence gets fortified from the complaint which is lodged immediately after the incident in the hospital itself. It gives the cause and sequence of event and speaks of the presence of these eye witnesses at the time of incidence.

26. This evidence further stands corroborated from the Spot Panchanama (Exhibit-36) proved through the evidence of PW-3 Panch Narsing Rajput and PW-1 Ankit. It was conducted on the same night between 11 pm to 11:30 pm and from the spot of incident, three broken pieces of glass with blood stains thereon were seized.

27. If at all any further corroboration is necessary to this case of Prosecution, then there is also the recovery of the blood stained shirt of Accused No.1 Raunak from his house at his instance under Panchanama (Exhibits 30 and 32) proved through the evidence of PW- 2 Panch Witness Mohd. Hussein. The evidence of PW-11 PI Chavan, the Investigating Officer, goes to prove that he has sent these clothes and the broken pieces of glass collected from the spot to the Chemical Analyzer and as per the C.A. Report (Exhibit-67), the human blood stains were found on the shirt of Accused No.1 and on the broken pieces of glass.

28. Though submission is advanced by the learned Counsel for the Accused that, according to C.A. Reports, the results of the blood group matching are inconclusive, as held in the case of *Khujji @ Surendra Tiwari v. State of Madhya Pradesh*, (1991) 3 SCC 627, "the finding of human blood on the weapon and clothes of Accused is a material circumstance, even in the absence of determination of the blood group, as it lends corroboration to the direct testimony of the eye witnesses".

29. The next contention raised by the learned Counsel for the Accused is that there is no evidence of eye witnesses proving that Accused No.1 Raunak has used more than one broken pieces of glasses for stabbing Amit and Bablu. PW-4 Dinesh and PW-5 Sachin, who are the eye witnesses to the incident, have deposed that both the deceased were stabbed with one broken piece of glass. However, they have identified three broken pieces of glasses. In our considered opinion, this minor discrepancy is of no avail to the Accused, because, when the broken pieces of glasses with blood stains thereon were collected from the spot, the Investigating Officer was not aware as to which one was used for stabbing. Even otherwise also, whether the assault was made with one and same broken piece of glass or by two separate pieces of glass, is totally immaterial once we hold that the assault by glass is proved. Consequently, the death of two persons is also proved and the evidence of all the eye witnesses is consistent that the deceased were assaulted with broken piece of glass. Whether it was one piece or more than one, is not making any dent in the Prosecution case.

30. An attempt is made by the learned Counsel for the Accused to submit that as regards the overt acts attributed to Accused No.2 Salim and Accused No.3 Usman, the evidence on record is not consistent and reliable. Two contradictory versions are coming on record to that effect and, therefore, these two Accused are entitled to get benefit of doubt. It is further submitted that there was no question of premeeting of minds or even common object being developed at the spot itself, because the entire incident of assault has taken place all of a sudden on account of some trifle incident of teasing. Further, it is urged that the role attributed to these two Accused is also not such that one can infer that they had common intention with Accused No.1 Raunak of causing such bodily injury to the deceased as is likely to cause their death.

31. On proper appreciation of evidence on record, we find substance in this submission, because there are two sets of evidence giving two versions. PW-1 Ankit and PW-5 Sachin are attributing role to Accused No.2 Salim and Accused No.3 Usman. According to them, Accused No.2 Salim held Amit when Accused No.1 Raunak stabbed Amit, whereas, Accused No.3 Usman held Bablu at the time of assault by Accused No.1 Raunak. Thus, according to them, Accused No.2 Salim and Accused No.3 Usman facilitated the commission of assault at the hands of Accused No.1 Raunak. However, on this material aspect, the evidence of PW-4 Dinesh, who is also an eye witness to the incident, is silent. He has not attributed any overt act to Accused No.2 Salim and Accused No.3 Usman, as

deposed by PW-1 Ankit and PW-5 Sachin. Similarly, in the oral Dying Declaration of Bablu before PW-6 Sagar also, as deposed by him, no overt act is attributed to Accused No.2 Salim and Accused No.3 Usman. He has only spoken of Accused No.1 Raunak stabbing him with broken piece of glass.

32. Thus, in this case, two witnesses are deposing about the overt act on the part of Accused No.2 Salim and Accused No.3 Usman, whereas, evidence of two other witnesses is silent on this aspect. In a way, they are not supporting the evidence of PW-1 Ankit and PW-5 Sachin on this material part. Naturally, as held in the case of Harchand Singh and Anr. v. State of Haryana, 1974 CRI. L. J. 366, "in the case where the Prosecution leads two sets of evidence, each one of which cannot be reconciled with the other set of evidence, then the benefit of such inconsistency will go in favour of the Accused". Hence, as regards Accused No.2 Salim and Accused No. 3 Usman, as rightly submitted by the learned Counsel for the Accused, they become entitled to get the benefit of reasonable doubt.

33. As regards Accused No.1 Raunak, in our considered opinion, evidence on record is of quite of a clinching nature, thoroughly consistent and trustworthy. Therefore, we have no hesitation in coming to the conclusion that the Prosecution case as against him stands proved.

34. The submission of the learned Counsel for the Accused, at this stage, is that, no explanation is offered by the Prosecution Witnesses as to the injury, which was caused to Accused No.1 Raunak. It is submitted that the Investigating Officer PW-11 PI Chavan has admitted in his cross-examination that Accused No.1 Raunak has sustained the abrasion on the one side of the neck and he has filed Medical Report of the same along with the Charge-Sheet. As per the learned Counsel for the Accused, non explanation of this injury found on person of the Accused No.1 Raunak makes it necessary to draw an inference that Prosecution has suppressed the genesis of the incident. In the alternate, it is submitted that the fact of non explanation of injury also brings the case of Accused No.1 Raunak under Exception IV of Section 300 of the IPC. According to the learned Counsel for Accused, there is every possibility of Accused No.1 Raunak sustaining such injury in a sudden fight, which was ensued as a result of the teasing. In his opinion, therefore, as the alleged offence is committed without premeditation, in a sudden fight, in the heat of passion, upon a sudden quarrel, the act of Accused No.1 Raunak is squarely falling under Exception IV.

35. In our considered opinion, however, this submission cannot be accepted. In the first place, the alleged injury found on the neck of Accused No.1 Raunak is found to be only superficial and minor injury. Secondly, it is not established that the said injury was caused during the course of same incident. Mere existence of injury cannot be synonymous with the fact of injury being caused in the same incident. The evidence of PW - 11 PI Chavan only establishes that there was some injury, which was again of a minor nature, but it does not establishes that it was caused in the same incident. The Medical Officer is not examined to prove the Injury Certificate, nor it is proved that the injury was of a grievous nature, so

as to substantiate the defence of sudden fight or sudden quarrel, in which there was possibility of Accused No.1 Raunak sustaining the injury at the hands of the deceased or the eye witnesses. The evidence of PW-11 PI Chavan goes to show that it was a superficial injury. Hence, in the absence of evidence proving the nature and age of injury, mere existence of such superficial injury will not affect the Prosecution case or will not become fatal to it. The law is well settled on this aspect that if the injuries are not serious and if the evidence of eye witnesses as a whole is so cogent, clear, consistent and credit-worthy, it out-weighs the effect of omission on the part of Prosecution Witnesses to explain the injuries. Therefore, in the present case, Accused No.1 Raunak cannot avail the benefit of the so called injury on his neck.

36. As regards the submission that the case of Accused No.1 Raunak falls under Exception IV of Section 300 of the Indian Penal Code the essential prerequisites for bringing the case within Exception IV are that

(i) the offence is committed in a sudden fight;

(ii) in the heat of passion and

(iii) upon a sudden quarrel. Here, there was no fight or no quarrel as such. The evidence on record does not, in any way, establishes that either the deceased Amit, Bablu or eye witnesses have attacked or rushed upon the Accused so as to lead to a fight. The word "fight" conveys something more than a verbal quarrel. In order to constitute fight, it is necessary that blows should be exchanged, even if they do not all find their target. Here there is nothing on record to show that the deceased or the eye witnesses have exchanged such blows with any of the Accused.

37. Another most important prerequisite for invoking Exception IV is that the blow is given in the heat of passion, without the offender's having taken undue advantage or acted in a cruel or unusual manner. Here in the case, it cannot be accepted that Accused No.1 Raunak stabbed both Amit and Bablu in the heat of passion. One cannot excuse the act of Accused No.1 Raunak as happening in the heat of passion when he has stabbed two persons with the broken piece of glass and that too on the vital part of the body like abdomen. The act of Accused No.1 Raunak of stabbing two persons, one after another, with the dangerous weapon like broken piece of glass, clearly takes out the act of Accused No.1 Raunak out of Exception IV. His conduct and the overt act proves that he has taken undue advantage and has acted in a cruel and unusual manner. Therefore, he cannot get benefit of Exception IV, nor he can advance the submission that as it was a case of single blow, he should be given the benefit of Exception IV. The law is well crystallized that even in a case of a single blow, applicability of Section 300 of the IPC is not ruled out. It depends always on the nature of the weapon used, its size, place of assault, facts leading to assault, part of the body which is injured by the assault etc.. In the instant case, the fatal blow with the broken piece of glass is given not to one person but to two persons on the vital parts of

their body, resulting into their deaths. Therefore, in no way, the offence committed by Accused No.1 Raunak can be reduced to less than Section 302 of the Indian Penal Code

38. In our considered opinion, therefore, after appreciation of entire evidence on record, it has to be held that the Trial Court has rightly convicted the Accused No.1 Raunak for the offence punishable under Section 302 of the IPC. Consequently, the Criminal Appeal No.550 of 2012 preferred by Accused No.1 Raunak holds no merit; hence deserves to be dismissed and stands dismissed accordingly, confirming his conviction and sentence.

39. As regards Accused No.2 Salim and Accused No.3 Usman, considering insufficient evidence on record against them, they are extended benefit of doubt. Consequently, the Criminal Appeal No.319 of 2012 preferred by Accused No.2 Salim and Criminal Appeal No.988 of 2013 preferred by Accused No.3 Usman are allowed. The Judgment of conviction and sentence recorded by the Trial Court against them is quashed and set aside. Both, Accused No.2 Salim and Accused No.3 Usman, are hereby acquitted for the offence punishable under Section 302 Read with 34 of the Indian Penal Code Their Bail Bonds stand cancelled.