

(2011) 01 BOM CK 0080
In the Bombay High Court
Case No : Criminal Appeal No. 365 of 1999

Shaikh Chand

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 18-01-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 134
Penal Code, 1860 (IPC) — Section 307

Citation : (2011) 01 BOM CK 0080

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : S.P. Chapalgaonkar, for the Appellant; V.G. Shelke, A.P.P, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Shinde, J.—This appeal is filed challenging the judgment and order dated 4.9.1999 passed by the learned I Ind Additional Sessions Judge, Aurangabad in Sessions Case No. 114 of 1996 thereby convicting the Appellant for the offence punishable u/s 304 Part-II of I.P.C. And sentenced him to suffer R.I. For three years and to pay fine of Rs. 5000/- i.d to suffer R.I. For six months.

2. The prosecution case, in brief, is as under;

The accused No. 1 is husband of accused No. 2. Complainant is brother of accused No. 1 and deceased is daughter of complainant. The complainant, accused No. 1 have other brothers namely Shaikh Gani and Shaikh Ismail. Their father Garibshaha had 8 acres of agricultural land at village Jamgaon. After the death of father, brothers started residing separately and each is cultivating his two acres land and they are also residing in their respective shares by constructing a hut.

It is also the case of prosecution that there is common well in the lands of four

brothers and each brother had four Annas share and as per oral agreement they are taking water by rotation of two days at a time. The accused No. 1 started quarreling for last one year and was pressing that he should be given more water and because of which there used to be regular quarrel between brothers.

It is further case of the prosecution that on 25.2.1996 accused No. 2 and her daughter had gone to common well in order to draw water and has started electric motor. Shaikh Gani obstructed them on the count that on that day it was his turn to take water. Because of which Shaikh Gani switched off the electric motor. On the said ground the quarrel took place between accused No. 2, her daughter and Shaikh Gani. On hearing quarrel Nasimabee, the wife of complainant and Rashidabee, the daughter of complainant went to the spot. At that time, some oral altercation and quarrel took place between accused No. 2, her daughter on one side and Shaikh Gani, Nasimabee and Rashidabee on other side.

It is further case of the prosecution that at about 6.30 p.m. accused No. 1 was coming from factory after his day's work. He saw that the quarrel was going on therefore, he started assaulting Shaikh Gani, Nasimabee and Rashidabee. At that time accused No. 1 gave 2 blows of stick on the head of Rashidabee because of which she fell down unconscious and there was bleeding from her ear. Shaikh Gani, Nasimabee and others picked up Rashidabee and took her to the house. Around the same time, complainant who had gone to leave his brother-in-law returned home and saw that his daughter was lying unconscious. He questioned Nasimabee his wife. At that time Nasimabee disclosed that accused No. 1 had assaulted Rashidabee with stick causing her injury which resulted into her unconsciousness. The complainant immediately went towards factory and brought rickshaw and in the same rickshaw carried Rashidabee alone to the police station where he gave information and went to the hospital. In the hospital, Rashidabee was immediately taken up for treatment. In the meantime, complainant went to the police station and signed the complaint and while on the next day morning he carried Rashidabee in S.T. Bus to Government Hospital at Aurangabad. That Rashidabee was conscious for about 10 days and after 10 days she succumbed to the injuries and expired.

It is the further case of the prosecution that in the meantime FIR was registered, police visited the spot and had drawn spot panchnama and had also recorded statement of witnesses. A stick was also seized from the scene of offence. The investigation Officer went to Ghati Hospital and found that the girl was unconscious and not in a position to speak and accordingly he obtained letter from Medical Officer. As the girl expired, the matter was handed over to senior P.S.I. Aute for further investigation. That the inquest panchnama, which was drawn was handed over to PSI Aute. Accordingly, the dead body was sent for post mortem. Doctor had conducted post mortem and had issued certificate to that effect. The body was handed over to the relatives.

That the accused came to have been arrested on 6.3.1996. Investigating Officer

recorded statement of witnesses and after completion of the investigation had submitted charge sheet against the accused in the court of Judicial Magistrate. First Class, Gangapur.

3. The learned Magistrate committed the case to the Court of Sessions as the offence was punishable u/s 302 of I.P.C. and was exclusively triable by the Court of Sessions. Charge sheet came to be filed against the accused u/s 302 of I.P.C. Accused pleaded not guilty and therefore, claimed to be tried. With a view to prove the guilt of the accused, the prosecution examined as many as nine witnesses.

4. The learned I Ind Additional Sessions Judge, Aurangabad after framing necessary points and recording evidence and after hearing the parties convicted the Appellant-accused Shaikh Chand s/o Shaikh Garibshah for the offence punishable u/s 304 Part-II of I.P.C. and sentenced him to suffer R.I. for three years and to pay fine of Rs. 5000/- i/d to suffer R.I. for six months. Hence, the judgment of the learned Sessions Court is under challenge in this appeal.

5. Learned Counsel for the Appellant submitted that there is absolutely no motive, either for this Appellant Shaikh Chand or for his wife Sharifabee since acquitted, to assault Rashidabee on that particular date or otherwise Shaikh Gani P.W.2 and Nasimabee P.W.3 who are the alleged eye witnesses, have told the court in unequivocal words that the quarrel was going on in between witness Shaikh Gani on one side and Sharifabee and Rashidabee on the other side. There was no reason as to why one would assault Rashidabee, who had no concern with the instantaneous quarrel. There is nothing in evidence that Rashidabee had come forward to participate in the quarrel. He thus submitted that the injury caused to Rashidabee has no connection or concern with the quarrel between wife and daughter of the present Appellant on one side and Shaikh Gani on the other side. He further submitted that the record goes to show that there are reasons to believe that Nasimabee P.W.3 who is said to be one of the eye witness was not present on the spot and had misrepresented her husband complainant Shaikh Kalu relying on the false and incorrect story given her by Shaikh Gani, who in all probability, is responsible for the injury on the head of Rashidabee. The complaint is admittedly filed by Shaikh Kalu relying on the story narrated to him by his wife Nasimabee.

Counsel further submitted that Shaikh Gani did not come forward immediately to file F.I.R. to the police about the assault on Rashidabee, that he had no problem in going to the police station especially when present Appellant Shaikh Chand had immediately gone to Gangapur police station and filed complaint against Shaikh Gani for assaulting and injuring him on head with stones. He therefore, submitted that Shaikh Gani had ample opportunity to prepare a false story to be presented before the police through Shaikh Kalu father of Rashidabee.

It is further submitted that it is an admitted position that witness had told the police that there was only one blow given on the head of Rashidabee. Shaikh

Gani and Nasimabee are now telling before the Court that two or three blows were given on the head of Rashidabee probably to suit medical evidence which subsequently appeared on the post mortem examination report. He submitted that it has appeared in the evidence that the quarrel was brought to the end by two brothers namely Ramnath and Uttam son of Ratan Meher, who are holding their own lands near to the spot of incident. The prosecution has examined only Ramnath out of these two brothers, who has supported the claim of the Appellant that the accused Appellant was assaulted with stones by witness Shaikh Gani causing injury. This witness Ramnath Meher has further supported the case of the Appellant stating that only Shaikh Gani and Shaikh Chand were present on the spot and no one else. This goes to support the story of the Appellant that Nasimabee was not present on the spot at the time of incident. This witness Ramnath Meher has expressed ignorance on the question of injury to Rashidabee. The witness was cross examined by the Public Prosecutor but nothing substantial has transpired in favour of the prosecution. He further submitted that P.W.3 Nasimabee told in the court that muddemal stick was not the stick allegedly, which was used by the Appellant at the time of incident.

Counsel further submitted that there is ample record before the Court to show that there were routine quarrels between the family of the accused and the family of witness Shaikh Gani on the ground of taking water. Shaikh Gani has lodged complaint against the Appellant in earlier point of time on the same ground. He further submitted that the sole eye witnesses always gets ample opportunity to develop the story as per his will, to absolve himself from his own misdeeds and to entangle falsely an innocent person such as present Appellant.

Learned Counsel for the Appellant further argued that the witnesses Rama and Uttam are important witnesses, however, they have not supported the prosecution story. Counsel further submitted that the contention of the complainant that though he narrated the complaint to the concerned police Officer, F.I.R. was not signed by giving reasons that his daughter is serious. According to the counsel for the Appellant, the prosecution is not telling truth to this Court. Counsel further submitted that victim was taken to the hospital about 10.00 p.m. and the alleged incident had taken place between 6.00 to 6.30 p.m., therefore, due to not getting proper medical treatment/aid in time, the patient might have died. Learned Counsel further submitted that the proper and fair opportunity was not given to the Appellant while recording the statement u/s 313 of Code of Criminal Procedure Counsel invited my attention to question Nos. 7, 8, 9, 10 and 11 and submitted that in the column of answer nothing has been stated.

Learned Counsel for the Appellant, in support of his contention, has placed reliance on the judgment of the Hon'ble Supreme Court in the case of Naval Kishore Singh v. State of Bihar, reported in AIR 2004 SC 4421 and submitted that the examination of accused should not be carried out as an empty formality. Accused should be given opportunity to explain adverse circumstance in evidence

by putting various items of evidence in form of question. Learned Counsel invited my attention to para 5 and 6 of the said judgment and submitted that entire trial vitiates if the proper opportunity is not given to the accused during the course of recording his statement u/s 313 of Cr.P.C.

6. On the other hand, learned A.P.P. invited my attention to the evidence of mother of deceased and submitted that she has witnessed the incident. There are also other witnesses who have supported the prosecution case. There is other evidence including medical evidence which fully establishes the case of the prosecution. Therefore, he submitted that the no interference is warranted in this appeal and the same deserves to be dismissed.

7. In this case P.W.1 Shaikh Kalu Shaikh Garibshah, is the complainant. In his examination in chief, he has stated that he has other three brothers viz. Shaikh Chand, Gani and Shaikh Ismail. This witness has stated that there used to be quarrel between him and Shaikh Chand over taking water from common well. Shaikh Chand used to insist that he should be given more water.

In his examination in chief, he has stated that the incident took place about three years ago on Sunday. On that day Shaikh Shabbir, his brother-in-law had come to meet him for Ramzan festival. He had come at about 4.30 p.m. After taking meal, he went along with him to Gangapur Bus stand. He returned to home around 7.00 p.m. At that time Rashidabee was in the house. While his daughter Rashidabee was unconscious lying in the house, on questioning his wife, she told him that Shaikh Chand and Sharifabee had beaten Rashidabee. She told that Shaikh Chand had assaulted Rashidabee with stick and also Sharifabee, his wife and others. He has further stated that his daughter was unconscious with injury on her head and she was bleeding from her ears. He brought Rashidabee to police station. From there they went to Government Hospital. He reached Government Hospital at about 9.00 p.m. However, doctor told him that Rashidabee should be taken to Aurangabad for further treatment. After giving complaint, he went to Ghati Hospital at Aurangabad. Rashidabee expired after 10 days. She never regained consciousness throughout within these ten days.

On perusal of the cross examination of this witness, nothing any substantial contradiction or omission has been brought on record so as to disbelieve his evidence. He has stated in his cross examination that his wife told that incident took place at about 6.00 to 6.30 p.m.

8. The evidence of P.W.2 Shaikh Gani Shaikh Garibshah is at Exh.8. In his examination in chief, he has stated that Shaikh Kalu had gone to Gangapur along with Shaikh Shabbir while Nasimabee wife of Kalu was in her house. Accused No. 2 and her daughter Rashidabee had come to his land in order to take water from the well. Accused No. 2 tried to start the motor. On that day, it was his turn to take water therefore, he had gone to stop the motor. He further narrates the minute details and further states that accused No. 2 and her daughter were not permitting him to stop the motor and they started pushing

him. At that time, accused No. 1 was coming from factory and he assaulted Rashidabee with stick causing her injury on head. Rashidabee fell unconscious on the ground. His brother had also beaten this witness and his mother with first and kick blows. So also Nasimabee was also beaten by the accused. It has come in his evidence that accused-Appellant has gave three blows on the head of Rashidabee, Rashidabee was bleeding from her ear.

In his cross examination he stated that when Shaikh Chand came he had first started abusing him. He also abused accused No. He admits that he had assaulted accused No. 1 with stick and stone but it was after accused No. 1 had beaten Rashidabee with stick. This witness has denied certain suggestions given by the defence. He admits that he had assaulted accused No. 1. He also stated that accused No. 1 went to police station and lodged complaint against him.

9. The main and star witness of the prosecution is P.W.3 Nasimabee Kalu Shaha, whose evidence is at Exh.9. This witness is mother of deceased Rashidabee. She has stated that Shaikh Gani, is younger brother of her husband. The incident took place about three years ago on Sunday at about 6.00 or 6.30 p.m. The complainant had been to Gangapur to leave his brother-in-law. On that day, accused No. 1 had gone to Karkhana, while he was coming back, quarrel was going on between Shaikh Gani and daughter of accused No. 1. This witness stated that, "Myself and my daughter Rashidabee came as quarrel was going on. Shaikh Gani was proceeding towards factory and accused No. 1 was coming from factory. Shaikh Gani was proceeding through the field of one Darekar. Accused No. 1 and her daughter were beating Gani. When myself and Rashidabee went there, both the accused beat me and Rashida. Accused No. 1 gave blow with stick to Rashida causing injury on her head because of which there was bleeding from her left ear. So also accused No. 1 gave blow with stick to me and Gani. My daughter fell unconscious. Accused No. 1 gave two or three blows of stick on head of Rashidabee.

(Emphasis supplied)

10. The evidence of Medical Officer P.W.5 Dr. Shrikirshna Ramchandra Bhalchandre is at Exh.13. In his examination in chief, he has stated that on 6.3.1999 he was working as Associates Professor Forensic Department in Ghati Hospital, Aurangabad. He received a dead body of Rashidabee for post mortem at about 8.00 a.m. It was female body aged around 10 years. He conducted the post mortem between 8.30 to 9.30 a.m. There was stitch incised wound on right parital region of size of 4x2 cms. bone deep, margin clean cut, surgical procedure burr hole .Injury was ante mortem in nature.

On internal examination he found following injuries;

- (1) Sub-galial haemotoma seen around wound mentioned in column 17.5x4 cms.
- (2) Sub-galial haematoma seen on left part temporal region 6x4 cms dark red in colour obliquely placed 2 cm away and lateral to mid line.

(3) Circular vent seen on right parital region of 2 cms diameter with wax in site margins clean infiltration staining seen.

Crack fracture of left temporal and parital bone seen of size about 6 cm in length infiltration staining seen. It was oblique in nature. Crack fracture of right parital region seen. 4 cms, in length, Infiltration staining seen.

Extradural haemotoma seen on right parital area 6 x 4 cms Reddish in colour

Blood seen on right frontal area extradural space 3 x 2 cms Reddish in colour

Subdural haemotoma on left parital region 5x4 cms Reddish in colour

Contusion of left partotemporallobe 6 x 4 cms Redish in colour

Contusion of right frontal lobe 5 x 4 cms Reddish in colour.

He has opined the cause of death was "head injury in the form of fracture of skull bones. Intracranial haemorrhage and contusion of brain" The post mortem notes are proved by the prosecution through this witness. He has stated that post mortem notes shown to him are signed by him, he identified his signature and contents of post mortem notes and stated that the same are correct and it is at Exh.14. He has opined that the injuries mentioned in column 19 are sufficient in ordinary course to cause death. The injury mentioned in column No. 19 are not possible by fall on the ground. The injuries mentioned in column are possible by blow of stick. He opined that minimum two blows must have been made to cause this injury. His evidence is not shattered in any manner in cross examination. Apart from this evidence, the other evidence is also collected by the prosecution.

(Emphasis supplied)

11. The argument advanced by the counsel appearing for the Appellant is not convincing so as to set aside the conviction awarded by I Ind additional Sessions Judge, Aurangabad. It is not necessary to burden this judgment by extracting the statement of the witnesses in detailed. Suffice it to say that the evidence of P.W.3, mother of deceased Rashidabee is convincing. The said evidence is corroborated by the evidence of P.W.2. P.W.2 himself was involved in the incident in question and therefore, his presence at the place of incident cannot be doubted. Even the accused does not dispute the incident in question, however, he stated that the assault by stick on the head of Rashidabee is at the hands of Shaikh Gani Shaikh Garibshah. Nothing has been brought on record by the defence to disbelieve the evidence of P.W.3, who is mother of Rashidabee. The father of Rashidabee is real brother of accused Appellant. There is no reason to falsely implicate the accused-Appellant in the offence. The version of P.W.3 is fully trustworthy and corroborated by the Medical evidence and other evidence brought on record by the prosecution including the evidence of P.W.2. It is not in dispute that as a result of the injuries sustained by Rashidabee, she succumbed to death.

The trial court has discussed the evidence of all prosecution witnesses at length

and recorded the findings that the accused Appellant has committed the offence punishable u/s 304 Part-II of I.P.C. and sentenced him to suffer R.I. for three years and to pay fine amount of Rs. 5000/-. The learned Sessions Court in para 30 has considered the nature of offence and also intention of the accused and taking into consideration the evidence brought on record and also the defence of accused, intention, circumstances etc. has come to the conclusion that the accused No. 1 cannot be said to have caused such bodily injuries with intention to cause death or he ever presumed that his act is likely to cause death. Therefore, in my opinion, the trial court has taken correct and possible view thereby holding the accused responsible for the offence punishable u/s 304 Part II of I.P.C.

12. It is also argued by the counsel for the Appellant that he was not given proper opportunity while recording his statement u/s 313 of Code of Criminal Procedure Counsel appearing for the Appellant invited my attention to question Nos. 7, 8, 9, 10 and 11 and submitted that upon perusal of column of answers to the said questions, there is blank space. Therefore, according to counsel for the Appellant, the whole trial vitiates since the Appellant was not given proper opportunity while recording his statement u/s 313 of Code of Criminal Procedure As stated above, in support of his contention counsel has placed reliance on the judgment of the Hon'ble Supreme Court in the case of Naval Kishore Singh (supra) and submitted that the statement of accused u/s 313 of Code of Criminal Procedure should not be recorded as an empty formality. Accused should be given proper opportunity to explain adverse circumstance in evidence by putting various items of evidence in form of questions.

13. Upon careful perusal of the judgment of the Apex Court it appears that in that case the entire evidence against the accused, was put to him in a single question while recording his statement u/s 313 of Code of Criminal Procedure Therefore, the Hon'ble Supreme Court observed that the proper opportunity was not given to the accused Appellant therein. In the instant case, from perusal of 313 statement it appears that as many as 27 questions were put to the accused Appellant. So far as question No. 7, 8, and 10 are concerned, from perusal of the said questions it appears that those questions are in respect of accused No. 2. However, those appears to have been included by mistake in the questioner of the Appellant-accused. If the question Nos. 7, 8 and 10 are in respect of accused No. 2, there is no question of any prejudice caused to the Appellant-accused because of blank space in column of answer to those questions. Those questions can only be answered by accused No. 2 and rightly those have been answered by accused No. 2, as it is evident from the perusal of the 313 statement of accused No. 2. Question No. 9 i.e. it has further come in the evidence that on that day it was turn of Sk. Gani to draw water from the well and therefore, he has gone to stop the electric motor. What have you to say about it? is concerned, by not answering the said questions, no any prejudice is caused to the accused person. Therefore, the question No. 9 has bearing only in respect of quarrel between Shaikh Gani and the accused-Appellant. Therefore, viewed from any angle,

merely because there is nothing recorded in column of answer of question Nos 7,8,9, 10 and 11 would not prejudice the case of the Appellant-accused and certainly does not vitiate the trial. In so far as the question No. 11 is concerned, only because the Appellant was asked about the fact that "as quarrel was going on Nasimabee and her daughter Rashidabee came to the spot" is concerned. In fact, by not answering the said question, no prejudice has been caused to the Appellant-accused certainly the trial would not vitiate on that ground. It is not the case of the Appellant that the Appellant was not given opportunity to answer the questions.

14. As stated earlier, as many as 27 questions were put/asked to the accused Appellant. The prosecution has established its case beyond reasonable doubt by bringing on record the evidence of eye witnesses and also medical evidence and other evidence. The argument of the counsel for the Appellant that there is only evidence of P.W.3 and evidence of P.W.3 cannot be believed since he himself was involved in the incident and therefore, merely relying on evidence of one witness it is not safe to convict the accused is concerned, in my opinion, the said argument is required to be rejected. In the present case, the evidence of P.W.3 is corroborated by medical evidence and also evidence of P.W.2. Even in case of solitary witness, if his evidence is fully trustworthy, even without corroboration, the evidence of single witness can form the basis for conviction. The Hon'ble Supreme Court in the case of *Namdeo v. State of Maharashtra*, reported in (2007) 14, SCC 150 held thus:

It is no doubt true that there is only one eyewitness who is also a close relative of the deceased viz. his son. It is the quality and not the quantity of the evidence which is necessary for proving or disproving the fact. It is clear that Indian legal system does not insist on plurality or witnesses. Neither the legislature (Section 134 of the Evidence Act, 1872) nor the judiciary mandates that there must be a particular number of witnesses to record an order of conviction against the accused. Our legal system has always laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses.

15. In the alternative counsel for the Appellant further submitted that the alleged incident took place on 26.2.1996. He further submitted that the Appellant is on bail from 1999, therefore, this Court may reduce the sentence already undergone. Counsel invited my attention to Clause 3 of the operative part of the order that the accused came to be arrested on 6.3.1996 and released on bail on 8.4.1996. Therefore, counsel prayed to reduce the sentence already undergone. In this respect, I am of the opinion that such prayer cannot be entertained. As a result of assault by the Appellant-accused, Rashidabee, a girl aged about 10 years, has sustained serious injuries and consequently died. Therefore, showing any sympathy to the Appellant-accused would send wrong signal to the society at large. The Hon'ble Supreme Court had an occasion to consider such contention in the case of *State of M.P. v. Kashiram and others*, reported in 2009 (3) Mh.L.J. (Cri.) 107. The Hon'ble Supreme Court in the said case, in para 10, 12, 15, 16

and 17 has observed thus:

10. 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.

12. 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, Indian Penal Code. The determinative question is the intention or knowledge, as the case may be, and not nature of the injury.

15. The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the Courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be.

16. Imposing of sentence without considering its effect on the social order in many cases may be in reality of futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

(Emphasis supplied)

17. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal

16. Therefore, taking over all view of the matter, in my opinion, no case is made out to interfere in the impugned judgment and order. The impugned judgment

and order stands confirmed. The appeal stands dismissed. The bail bonds stand cancelled. The Superintendent of Police, Aurangabad, under whose jurisdiction Gangapur police station is situated, should ensure that accused shall surrender to undergo the remaining period of sentence, as ordered by the Additional Sessions Judge, Aurangabad in Sessions Case No. 114 of 1996 on 4.9.1999.