
(2002) 06 BOM CK 0026
In the Bombay High Court
Case No : Criminal Appeal No. 218 of 1997

Shaikh Hanif

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 06-06-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 428
Penal Code, 1860 (IPC) — Section 299, 302, 307, 326

Citation : (2003) 105 BOMLR 620

Hon'ble Judges : V.M. Kanade, J; R.K. Batta, J

Bench : Division Bench

Judgement

R.K. Batta, J.—The appellant was tried for murder of Sufi Mohammad Hussain Ali u/s 302 of the Indian Penal Code. The appellant had pleaded not guilty and the prosecution had examined 11 witnesses in support of the charge. The prosecution evidence consisted of the First Information Report recorded by the Police Officer after obtaining a Certificate of Fitness from the Doctor which was treated as dying declaration; dying declaration recorded by the Executive Magistrate; recovery of the blood stained knife at the instance of the appellant having blood stains of "A" Group which was the blood group of deceased; recovery of the blood stained clothes on the person of the appellant which had blood stains of "O" Group and non-explanation of the blood stains by the appellant on his clothes, as also medical evidence and other evidence on record. On the basis of this evidence, the Trial Court convicted the appellant for the offence u/s 302 of the Indian Penal Code and sentenced him to undergo imprisonment for life and a fine of Rs. 1000/- in default R.I. for one year. The appellant has challenged his conviction and sentence in this appeal.

2. Learned Advocate for the appellant though initially extensively argued the matter on merits, yet, ultimately in the light of the evidence on record, he submitted that the challenge in the appeal is restricted to the offence disclosed on the basis of the evidence on record. According to the learned Advocate for the appellant, even on the merits of the case, no offence is made u/s 302 of the

Indian Penal Code but the offence would fall only u/s 326 of the Indian Penal Code. In view of the submissions, it is not necessary to go into the merits of the case except for the examination of the evidence on the question as to whether the offence disclosed on the face of the case as deposed by the witnesses and brought by the prosecution would fall u/s 302 of the Indian Penal Code or as contended by the learned Advocate for the appellant. The offence would fall u/s 326 of the Indian Penal Code?

3. On the other hand, according to the A.P.P., the facts disclosed by the witnesses make out an offence u/s 302 of the Indian Penal Code since according to him, on the face, it can be clearly gathered that the appellant had intention to cause death of the deceased especially in view of the fact that even on earlier occasion about 10 years prior to the incident the appellant had tried to murder the deceased but he did not succeed in his attempt to do so and had been convicted for the offence of attempt to commit murder of deceased u/s 307 of the Indian Penal Code and had been sentenced to 5 years R.I. which sentence was undergone by him. According to the A.P.P., the medical evidence on record proves that the death resulted on account of poemia due to the injuries on the person of the deceased. Relying upon Explanation (2) to Section 299 of the I.P.C. as also the Judgment of the Apex Court in the case of Patel Hiralal Joitaram Vs. State of Gujarat, , and in the case of Fattesingh Pancham Ghodke v. State of Maharashtra 2002 All M.R. 1128 : 2001 (1) Mah. L.J. 491 it was urged that the offence squarely fall u/s 302 of the Indian Penal Code and that there is no case to scale down the offence u/s 326 of the Indian Penal Code. Therefore, he contends that the appeal be dismissed.

4. On the question as to whether the offence in question would fall u/s 302 of the Indian Penal Code as contended by the A.P.P. or u/s 326 as contended by learned Advocate for the appellant, it is necessary to deal with the medical evidence on record. No doubt it is true that the assault was in the background of previous attempt to murder the deceased for which the appellant had been convicted and undergone sentence imposed on him. The assault by the appellant resulted in 4 injuries on the person of the deceased. The deceased was first examined by Dr. Madan (P.W. 8) who found the following injuries on his person.

1. A transversely placed stab wound over right hypo chondrium. The size was 1 & 1/2" x 1" x cavity deep. Tenderness present, Minimum surgical emphysema present.

2. A stab wound on left posterior axillary fold at the level of third inter costal space size was 1 inch x 1/2 inch x cavity deep.

3. Incised wound 2 & 1/4" x 1 & 1/2" by skin deep left temporal region. It extends from just above the left ear to the temporal corner of left eye brow.

4. C.L.W..Cut Lacerated wound/obliquely involving the left mid ring and little finger. It extends from the middle border of metacorpo phanengeal joint of little finger obliquely upwards cutting the M. P. joints crease of ring finger. It then

extends to upward to proximal inter phalangeal joint of ring finger. Muscles and flexor tendons were cut from her it extends obliquely upwards to cut the middle finger between the proximal and distant I.P. joint. All injuries were fresh they were caused by a sharp cutting pointed object.

5. The deceased was assaulted on 1.7.1996 and died on 11.8.1996 that is to say after about one month and ten days of the assault. Doctor Ashish (P.W. 7) who conducted post-mortem on the dead body of the deceased found following injuries on his person.

1. Infected wound present over anterior abdominal wall 1" left to mid line and starting 2" below lower costal margin, vertical 3 & 1/2" x 2" x cavity deep. Intestinal coils adherent pus and pus pockets present. Evidence of stitching present over medial margin.

2. Bed sore infected present over sacral region.

3. Stitched incised wound present over palmar aspect at the phyllynx. Oblique 1" x 1/4" x bone deep evidence of healing present.

4. Stitched incised wound present over palmer aspect at middle phyllynx oblique medial end corresponding with lateral end of injury No. 3-1 & 1/2" x 1 & 1/4" x bone deep evidence of healing present.

5. Stitched incised wound present over palmer aspect at terminal phyllynx oblique medial end corresponding with lateral end of injury No. 4-2" x 1 & 1/4" x bone deep. Evidence of healing present. There was evidence of pericardium present. Pericardium adherer to heart. No pericardia fluid.

6. In this respect, it is pertinent to refer to column 23 of the Post Mortem Report as also the deposition of Dr. Ashish on this aspect. In column No. 23(a) of the Post Mortem Report, the answer to the question whether the ante-mortem injuries found on the dead body, were sufficient, in the ordinary course of nature, to cause death, is affirmative. Reply to column 23(b) which reads "if yes, which of injuries were individually sufficient, in the ordinary course of nature, to cause death, is injuries described in column Nos. 17 and 21 with their complications. Five injuries recorded in column No. 21, have already been reproduced above. In column No. 21, the Medical Officer has recorded that there was stitching of wall present in mid line 2" below xyphosternum for 5". Reply to column No. 23(c) which reads "which of the injuries collectively were sufficient in the ordinary course of nature to cause death", is none. According to the Medical Officer the probable cause of death was poemia due to injuries described. In his deposition before the Court, he has stated that poemia means infection present in the blood. If there is an internal injury which affects the blood vessels and if there is infection, it may reach to the blood and other organs. In the case under consideration the part affected due to poemia were lungs, pericardium, liver, spleen and kidneys and such infection can cause death of a person. It is, however, pertinent to note that according to the Medical Officer Dr. Ashish (P.W.

7) it was difficult for him to say that a particular injury, mentioned in column No. 21, can cause death. He also stated that he can not say how the infection in the wound was caused and if the proper instruments are not used, infection can be caused. The only fatal injury, if at all, it could be injury No. 1 which was on the stomach. This injury was only cavity deep and as a result of this injury none of the internal organs were cut. In the circumstances and especially in view of the medical evidence on record, it is difficult to come to the conclusion that injury No. 1 was sufficient in the ordinary course of nature to cause death. For the applicability of Second Explanation to Section 299 of the I.P.C., the first requirement is that there should be intention or knowledge to cause death. No such intention or knowledge can be inferred in the case under consideration in the light of the medical evidence on record. Accordingly, in the light of the injuries on the person of the deceased, only Section 326 of the Indian Penal Code would be attracted as rightly submitted by the learned Advocate for the appellant. We do not find any merit in the submissions of the learned A.P.P., that the offence disclosed in this case would be u/s 302 of the Indian Penal Code.

7. Learned Advocate for the appellant had urged before us that the appellant is in Jail for the last 6 years now and as such imprisonment already undergone be treated as sufficient punishment for the appellant and he be ordered to be released. Learned A.P.P., on the other hand, urged that taking into consideration the back ground of the case and fact that even earlier the appellant had made an attempt to murder the deceased but the deceased had survived and the appellant was convicted u/s 307 of the Indian Penal Code but this time deceased did not survive, the punishment which may be imposed on the appellant should not be less than 10 years. We have given serious thought on the punishment to be imposed on the appellant. In the facts and circumstances and taking into consideration the background in which the incident occurred, we are of the opinion that the ends of justice would be met by imposing rigorous imprisonment for 7 years on the appellant u/s 326 of the Indian Penal Code.

8. In view of the above, the appeal is partly allowed. The conviction and sentence of the appellant u/s 302 of the Indian Penal Code is set aside and the appellant is held guilty u/s 326 of the Indian Penal Code. The appellant is sentenced to undergo 7 years rigorous Imprisonment u/s 326 of the Indian Penal Code. It is not considered to impose any fine on the appellant since the appellant is in custody since beginning of the commission of the offence till today. The period undergone by the appellant from the date of his arrest till he was sentenced by the Sessions Court shall be set off u/s 428 of the Cr.P.C.

The appeal is allowed in the above terms.