
(2005) 02 BOM CK 0019
In the Bombay High Court
Case No : Criminal Appeal No. 62 of 1996

Shailendra Raghuwanshi

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 15-02-2005

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 304II, 324
Probation of Offenders Act, 1958 — Section 6

Citation : (2005) 02 BOM CK 0019

Hon'ble Judges : S.T. Kharche, J

Bench : Single Bench

Advocate : R.M. Patwardhan, for the Appellant; Deepak Thakre, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

S.T. Kharche, J.—This criminal appeal takes in exception to the judgment and order of conviction dated 12/2/1996 passed by the learned Additional Sessions Judge in Sessions Trial No. 263/93, whereby the accused has been convicted for the offence punishable u/s 304-II of the Indian Penal Code and sentenced to undergo rigorous imprisonment for five years and to pay fine of Rs. 2,000/-, in default to suffer further R.1. for one month. However, the accused has been acquitted of the offence punishable u/s 302 of the Indian Penal Code and the State did not prefer any appeal against acquittal.

2. Brief facts are required to be stated as under.:

(A) The accused and the deceased were friends. Vivek was residing at Kailash Nagar, Sharda Chowk, Nagpur with his parents, brother and sister. On 8/3/1993 there was a second day of Holi festival. Some friends of the deceased Vivek had gathered at his house at about 9.00 to 9.30 a.m. They had eaten some snacks at the house of the deceased and thereafter they started coming towards Sharda Chowk in order to enjoy Paan. When they arrived near Sharda Chowk, they reached the building owned by one Vairagade. Gajanan Patil was residing in a

room on the first floor of the said building as a tenant and he was conducting tuition classes in the said room. The accused was attending the said tuition classes regularly and on that day he was standing along with one of his friends, Navneet, on the first floor of the building. The accused was called by his friends who were standing on the road and, therefore, he got down from the building and came on the road. The friends of the deceased started quarrel with the accused. The deceased had delivered fist blows on the person of the accused and, therefore, the latter was enraged and he took out Gupti from his waist and delivered its blow on the abdomen of deceased Vivek. After delivering blow of Gupti, the accused had gone towards Vairagade building, entered in the room where tuition classes were going on and closed the doors from inside. Meanwhile, the friends of the deceased immediately rushed towards the building and broke open the door of that room, but the accused took a jump from the first floor and fled away.

(B) The brother of the deceased by name Narendra (PW 1) reached on the spot of incident and saw that Vivek had sustained bleeding injuries. He carried deceased Vivek to one private doctor for medical treatment. However, the doctor was not available and hence the deceased was immediately carried to Government Medical College and Hospital for medical treatment. He was admitted in the hospital and the Medical Officer after examining him, declared that he was dead. The report of Narendra (PW 1) was recorded by ASI Gulab Giri (PW 8) on the basis of which offence punishable u/s 302 of the Indian Penal Code was registered against the accused. The Medical Officer Dr. Haribhau Katde (PW 10) effected autopsy on the dead body of Vivek on 3/3/93 and found as many as three injuries which are described in column No. 17 of the postmortem report. He opined that: the probable cause of death was shock and hemorrhage caused by intra abdominal bleeding due to injury to blood vessel of the abdomen. Accordingly, he issued postmortem report (Exh.42).

(C) ASI Gulab Giri (PW 8) took up the investigation of this crime, visited the spot of incident, drew the spot panchanama and also inquest panchanama of the dead body in the hospital prior to the postmortem examination. The accused was arrested on 9/3/93 and he was interrogated by API Nitnaware (PW 11) in presence of witness Jagdish (PW 2) while the accused was in police custody. The accused had furnished information that he had concealed Gupti which was used as weapon of the offence near the well of Mr. Vairagade and he was ready to point out the same. The memorandum panchanama (Exh.45) was recorded and thereafter the accused led the police party and panch witness near the said well and the accused had pointed out the concealed weapon which was discovered and seized as per discovery panchanama (Exh.46). The said weapon, i.e. Gupti along with seized clothes of the accused and deceased were forwarded to the Chemical Analyser for the purpose of analysis. The report of the Chemical Analyser reveal that the blood group of the accused is "O" and of the deceased was "AB", clothes of the deceased soiled with blood of "AB" group and that there was human blood on the blade of Gupti as well as on the Manila (shirt) of the

accused. On completion of the investigation, the charge sheet was filed in the Court of learned Judicial Magistrate, First Class.

(D) After committal of the case to the Court of Sessions, the learned Additional Sessions Judge framed and explained the charge to the accused to which he pleaded not guilty and, therefore, the trial proceeded with. The prosecution in order to bring home the guilt, has examined as many as 11 witnesses and relied on the direct as well as circumstantial evidence. The direct evidence has been brought on record through the eye witnesses namely; Deepak (PW 5), Dinesh (PW 7) and Shital (PW 9). The defence of the accused is that of total denial in the sense that he claims to be innocent and stated that he has been falsely implicated in this case, on suspicion.

(E) The learned Additional Sessions Judge, on appreciation of evidence has recorded the finding that Vivek died as a result of homicidal death. He also recorded finding that the complicity of the accused in the commission of this crime has been established, but having regard to the facts and circumstances brought on record, he held that the offence committed by the accused would be squarely covered by Section 304-II of the Indian Penal Code and, therefore, he convicted the accused and sentenced him as mentioned above. This judgment and order of conviction is under challenge in this appeal.

3. Mr. Patwardhan, the learned counsel for the appellant-accused contended that Narendra (PW 1), the brother of the deceased had lodged the FIR at Police Station, Sakardara on 8/3/93 at about 1300 hrs. whereas the incident occurred at about 1100 hrs. and the distance between the spot of incident and the police station is about 3 Kms. He contended that there was delay of two hours in lodging the FIR, which has not been explained by the prosecution and this certainly weakens the case of prosecution. He contended that there are many omissions and contradictions in the evidence of Narendra which goes to the root of the matter and the learned Additional Sessions Judge has disbelieved his evidence. He contended that the prosecution though relied on the direct evidence of four witnesses, witness Mohan (PW 6) did not support the case of prosecution and he has given entirely a different version. He contended that the evidence of Deepak (PW 5) who claims to be the eye witness is not reliable because there are omissions and contradictions in his evidence which are duly proved. He contended that this witness has gradually improved the case of prosecution and has gone to the extent of saying that he did not state before the police the contents of portions marked "A" and "B" from his statement. He contended that Deepak did not state before police that; "at that time, Nitin asked Shailesh whether he quarreled with Deepak Tijare, as a result of it altercation took place between them". Thus, according to Mr. Patwardhan, this witness Deepak actually did not witness the incident in question and no implicit reliance could be placed on his evidence.

4. Mr. Patwardhan further pointed out that the evidence of Deepak (PW 5), Dinesh (PW 7) and Shital (PW 9) becomes doubtful especially when the

statement of these three witnesses was recorded on 12/3/93 and there was delay of about four days in recording their statement. Therefore, in such circumstances, the testimony of these witnesses is doubtful and the learned Additional Sessions Judge has committed an error in basing conviction on the improved version of the prosecution brought on record through the mouth of these three witnesses. He contended that Dinesh (PW 7) is a witness who was not present at the spot of incident and considering the large omissions and contradictions in his evidence, the same should have been disbelieved. Same is the case with the witness Shital (PW 9) and, therefore, the entire case of the prosecution appears to be concocted.

5. Mr. Patwardhan, the learned counsel for the appellant-accused further contended that though the Gupti is said to have been discovered in consequence of the information furnished by the accused, panch witness Jagdish (PW 2) did not support the case of prosecution and was declared hostile. He contended that therefore, the discovery evidence which is said to have been proved through the evidence of API Nitnaware (PW 11) is of no consequence and moreover the blood group of human blood found on the blade of Gupti as well as on the shirt of the accused could not be determined. He, therefore contended that the circumstantial evidence in relation to the discovery is not consistent with the testimony of aforesaid eye witnesses and, therefore the impugned judgment and order of conviction passed by the learned Additional Sessions Judge cannot be sustained in law.

6. Mr. Patwardhan, the learned counsel for the appellant-accused contended that the facts and circumstances of this case would at the most show that the offence committed by the accused would be covered by Section 324 of the Indian Penal Code and the age of the accused was 19 years at the time of the commission of the said offence. About 10 years have elapsed from the date of the conviction and, therefore, the benefit of Section 6 of the Probation of Offenders Act, 1958 may kindly be given to the accused by releasing him on probation of good conduct instead of at once sending him to the jail for undergoing sentence.

7. The learned Additional Public Prosecutor contended that it is not in dispute that Vivek died as a result of homicidal death and this fact has been duly established through the evidence of Dr. Katde (PW 10), who found as many as three injuries mentioned in column. No. 17 of the postmortem report and opined that the probable cause of death was due to shock and hemorrhage caused due to intra abdominal bleeding due to injury to blood vessel of the abdomen. He contended that though the eye witness Anup (PW 3), Nitin (PW 4) and Mohan (PW 6) did not support the case of prosecution and were declared hostile, the evidence of other eye witnesses namely; Deepak (PW 5), Dinesh (PW 7) and Shital (PW 9) would clearly indicate that the incident took place on the second day of Holi of 1993 and on that day in the morning at about 8.30 a.m. all these witnesses with deceased had gathered at the house of Deepak where they had eaten some snacks and then all of them proceeded towards Sharda Chowk for

enjoying Paan. When they arrived near the building of one Vairagade, they saw that the accused was standing on the first floor of that building. Some of the friends of the accused called him and, therefore, he got down from the said building and started abusing the prosecution witnesses and to the deceased Vivek. Thereafter the accused had suddenly took out Gupti and delivered blow of the some on the left side of the stomach of Vivek. Consequently he felled down and he was immediately taken to the Government Medical College and Hospital where the doctor declared him dead.

8. He contended that direct evidence of all these three witnesses is corroborated in material particulars by the evidence of each other and there are no material omissions and contradiction on record to discard their evidence. He contended that the evidence of the prosecution witnesses was recorded in the year 1995, after the gap of about two years from the date of the incident and some contradictions are bound to occur in their statements. He contended that so far as the genuineness of the incident is concerned, the version of three eye witnesses namely; Deepak (PW 5), Dinesh (PW 7) and Shital (PW 9) have not been shaken in the cross examination and, therefore, the learned Additional Sessions Judge was perfectly justified in accepting their evidence as trustworthy. He contended that even the evidence in relation to the discovery of Gupti has been proved through the evidence of API Tulshiram (PW 11). The accused was arrested on 9/3/93 and he was interrogated in presence of the panch witness and he had furnished information that he had concealed the said Gupti near the well of Vairagade and consequently that Gupti was discovered in consequence of the information furnished by the accused. He contended that the blade of Gupti was soiled with human blood and the Manila of the accused was also found soiled with human blood. He contended that though the blood group could not be determined, it did not follow that the findings recorded by the Chemical Analyser cannot be considered as sufficient corroboration to the direct evidence.

9. The learned A.P.P. also support the finding of the learned Additional Sessions Judge that the offence committed by the accused would be squarely covered by Section 304-II of the Indian Penal Code. He, therefore contended that in such circumstances there is no reason for this Court to interfere into the impugned judgment and order of conviction and the appeal may kindly be dismissed.

10. This Court has given thoughtful, consideration to the contentions canvassed by the learned counsel for the parties. It is not in dispute that Vivek died as a result of homicidal death. The evidence of Dr. Katde (PW 10) would indicate that he conducted the autopsy on the dead body of Vivek on 8/3/1993 in between 3.40 p.m. to 4.40 p.m. at Government Medical College and Hospital, Nagpur and he found the following external injuries as mentioned in column No. 17 of the postmortem report:

(1) Incised stab wound situated at left iliac fossa, 6 cms. above the iliac crest. Transverse obliquely situated, shape was slit. Size 1.5 cm. x 10 cm. Deep. Structures were cut, skin, muscle, peritoneum, front and right border of

descending colon was cut in length, 3 cm. x 1/2 cm. x 1/2 cm. front side left ureter. Left common iliac artery and vein were cut, 2 cm. below the bifurcation, 1 cm. in length of each and it was surrounded by hematoma (blood clots), direction front to back, above downwards, left to right, edge of injury was clean-cut and inverted.

(2) incised wound situated at upper one third of left forearm, vertical oblique, inner aspect 1 1/2 cm. x 1/2 cm. x 1/2 cm.

(3) Incised wound situated 3 cm. away from injury No. 2 size 1 1/2 cm. x 1/2 cm. x 1/2 cm.

11. Dr. Karde opined that the injury No. 1 could be caused by sharp cutting both edged pointed weapon and injuries Nos. 2 and 3 were caused by sharp cutting object. His evidence further reveal that injury No. 1 was sufficient in the ordinary course of nature to cause the death. The deceased died because of shock and hemorrhage caused by intra abdominal bleeding due to injury to blood vessel of the abdomen. He also opined that the injuries described above could be caused by the weapon, i.e. Gupti (article No. 7) which was shown to him. This medical evidence would clearly reveal that the deceased died as a result of homicidal death and the weapon used for stabbing the deceased was the Gupti (article No. 7).

12. Now, the evidence of Deepak (PW 5), Dinesh (PW 7) and Shital (PW 9) has been assailed by the learned counsel for the accused on the ground that their statements were recorded by police after the gap of about 4 days. Admittedly their statements were recorded on 12/3/93 and the delay of four days has not been explained by the prosecution which would lead to the inference that the evidence of these witnesses does not inspire the confidence and does not appear to be trustworthy. Appreciation of evidence of these witnesses would reveal that there is no merit in this submission. Simply because the statements were recorded on 12/3/93, it did not follow that the delay in recording the statements of witnesses alone would be fatal to the prosecution.

13. The evidence of these three witnesses would clearly reveal that the incident occurred on the second day of Holi festival and on that day all these three witnesses as well as the deceased had gone to the house of Deepak and then they had eaten some snacks at his house and all of them thereafter proceeded towards Sharda Chowk for eating Paan. Then, all of them arrived near the building of Vairagade and they saw that the accused was standing on the first floor of that building. Some of the friends of the accused called him below the building and, therefore, the accused had got down from the building and started abusing to Vivek and the aforesaid prosecution witnesses. The accused then suddenly took out the Gupti and delivered its blow on the left side of the stomach of Vivek and due to the blow of Gupti, Vivek fell down and thereafter he was taken to the Govt. Medical College and Hospital.

14. The evidence of Deepak would clearly reveal that deceased Vivek had come

inside the compound from the road and no sooner he came, he delivered a fist blow on the person of the accused and the accused then immediately took out Gupti from his waist and delivered a blow of Gupti on the left side of the abdomen of the deceased. Immediately Deepak caught hold Vivek and brought him on road from the compound of Vairagade. In the cross examination, Deepak did state that it did not happen that before delivering fist blows by the deceased, there was wordy quarrel between accused and deceased Vivek and that he did not state the contents of portions marked "A" and "B" out of his police statement before the police to the fact that at the time, Nitin asked Shailesh whether he quarreled with Deepak Tijare as a result of it altercation took place between them. This Court, on appreciation of the evidence of Deepak is of the view that no material omission or contradiction has been brought on record to dislodge his version so far as the assault by Gupti on the stomach of Vivek is concerned and, therefore, there is no reason as to why the evidence of this witness should be discarded. His evidence inspires confidence and appears to be trustworthy because, admittedly he has no axe to grind against the accused and it is not possible to accept that he is an interested witness.

15. The evidence of Dinesh (PW 7) corroborate to the version of Deepak in all material particulars and he has also stated that the accused was seen standing on the first floor of the building of Vairagade and while the prosecution witnesses and the deceased were going towards Sharda Chowk and when they leached at the place of incident, accused got down from the building and stated abusing deceased Vivek and also to them. The accused delivered blow of Gupti on the left side stomach of Vivek. Duo to the blow of Gupti, deceased Vivek fell down and thereafter he was taken to the hospital. The evidence of Dinesh has been assailed on the ground that his version is contradictory to the statement before police and, therefore, it is contended that his evidence is liable to be rejected.

16. It is true that this witness deposed that he did not state the contents of portions marked "A", "B", "C and "D" before police while recording his statement to the effect that on 8/3/93 on the second day of Holi festival he started from his house at 9.30 "O" clock in the morning for celebrating Holi with colours. He went to the paan stall of Kishor Dhande at Sharda Square for eating paan. After going there, he had Kharra (mixture of betel nut, tobacco and lime) and after this, Shital Choudhary and Vivek came there. Altercation was going on between Nitin and Shailesh. At that time, Nitin called Vivek. Thereupon Vivek and he went near Shailesh, he also went with him, Vivek asked Shailesh, "What quarrel is going on, on this day of Holi festival?" Hence, altercation took place between Vivek and Shailesh and Vivek assaulted Shailesh with fist blow. Though the aforesaid statement is in the nature of contradiction, it cannot be said that this was the material contradiction so as to discard the evidence of this witness Dinesh, especially when he reiterated in his evidence that it is the accused who had delivered the blow of Gupti on the stomach of Vivek. The omissions and contradictions which do not go to the root of the matter and shake a basic version of the witnesses, cannot be annexed with undue importance.

17. The next and last eye witness of the prosecution is Shital (PW 9) on whose version reliance is placed by the prosecution. His evidence do corroborate the versions of Deepak and Dinesh in material particulars and it is quite significant to note that this witness Shital reiterated in the cross examination that he had stated the contents of portions marked "B" and "D" before the police while his statement was recorded. Those portions marked "B" and "D" are to the effect that; Nitin Kingaonkar called Shailesh downstairs. Thereupon he came down. Nitin asked Shailesh whether he quarreled with Deepak Tijare and that Vivek and other 2-3 boys gave abuses to Shailesh and beat him with fist blows. Hence, Shailesh took out the sword stick kept tucked at his waist and assaulted on the left side abdomen portion of Vivek. This material brought on record in the cross examination of Shital clearly show that whatever has been stated by him is nothing but the truth and goes to establish that it is the accused and none else who had assaulted the deceased Vivek on his abdomen by delivering blows of Gupti.

18. The accused was arrested on 9/3/93 and thereafter he was interrogated while he was in police custody by A.P.I. Tulshiram (PW 11) in presence of panch witness Jagdish (PW 2). It is true that this panch witness did not support the prosecution case and declared hostile, but the evidence of API Tulshiram (PW 11) do indicate that on interrogation, the accused had furnished information that he had concealed the Gupti near the well of the house of Vairagade and he was ready to point out the same. This information supplied by him was reduced into writing in the form of memorandum panchanama (Exh.45) and thereafter the accused led the police party and the panch witness to the said spot from where the Gupti (article No. 7) was discovered in consequence of the information furnished by the accused. Though panch witness turned hostile, it did not follow that the evidence of API Tulshiram (PW 11) is liable to be discarded on this point.

19. The learned Additional Sessions Judge has held that the evidence in relation to the discovery is trustworthy and do corroborate the direct evidence in material particulars because the findings of Chemical Analyser also reveal, that human blood was found on the blade of Gupti and the Medical Officer also opined that the injuries mentioned in column No. 17 of the postmortem report could be caused by the same Gupti (article No. 7). So also the manila of the accused was seized by police and the finding of the Chemical Analyser reveals that Manila of the accused was soiled with human blood. The accused did not explain as to how his Manila was soiled with human blood and in such circumstances, it is quite obvious that even the circumstantial evidence do corroborate the direct evidence in material particulars and, therefore, the complicity of the accused in the commission of this crime has been proved beyond reasonable doubt.

20. Now that takes this Court to consider as to what offence has been committed. The learned Additional Sessions Judge having regard to the facts and circumstances brought on record held that the offence committed by the accused would be squarely covered by Section 304-II of the Indian Penal Code. It is

necessary to reproduce Section 304 IPC, which contemplates as under:

"304. Punishment for culpable homicide not amounting to murder - Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

21. The first paragraph of this provision of law is normally refer as part I whereas the second paragraph as part II. Part I applies where the accused caused bodily injury with intention to cause death or with intention to cause such bodily injury as is likely to cause death. Part II, on the other hand comes into play when death is caused by doing the act with 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.

22. In the present case it is not disputed that the deceased had sustained three injuries which are described in the postmortem report and the injury No. 1 was incised stab injury transverse obliquely in slit shape of size 1.5 cm. x 1 cm. x 10 cm. deep. Structures were cut, skin muscle, peritoneum front and right border of descending colon was cut in length, 3 cm. x 1/2 x 1/2 cm. front side left ureter, left common iliac artery and vein were cut 2 cm. below the bifurcation 1 cm. in length of each and it was surrounded by haematoma (blood clots), direction front to back, above downwards, left to right, edge of injury was clean cut and inverted. This injury was obviously on the vital part of the body. Other two incised wounds were caused on the upper one third of left forearm. It has also been brought on record in the evidence that when the prosecution witnesses and Vivek were going towards Sharda Chowk and when they arrived near the building of Vairagade, they saw that the accused was standing on the first floor and his friends had called him down and then he got down from the building and by that time the deceased Vivek and his friends entered the compound of Vairagade's building. There was exchange of words between these two persons and consequently Vivek had assaulted the accused by fist blows and then the accused was enraged and suddenly look out the Gupti and delivered the blows of the same on the abdomen of Vivek. Therefore, under these facts and circumstances, it is obvious that there was no intention or pre planning on the part of the accused for making assault on Vivek.

23. What transpires is that the blow of Gupti was delivered because the accused was enraged as he was also beaten by fist blows by the deceased. In such a situation, it is apparent that there was no intention to cause death or to cause

such bodily injury as is likely to cause the death. Having regard to the nature of the injuries, the vital part of the body chosen for assault, the manner in which the assault was made, the weapon used for the offence coupled with the aforesaid circumstances would lead to the conclusion that part II of Section 304 of the Indian Penal Code would come into play because in this case it appears that the death is caused by doing an act with the knowledge that it is likely to cause death but there was no intention on the part of the accused either to cause death or to cause such bodily injury as is likely to cause death. Therefore, this Court is of the considered opinion that the learned Additional Sessions Judge rightly held that the offence committed by the accused would be squarely covered by Section 304-II of the Indian Penal Code and no interference into his findings is warranted.

24. The last but not least submission of the learned counsel is that the age of the accused was 19 years at the time of the commission of the offence and since 10 years have elapsed from the date of conviction, the accused may be given benefit of Section 6 of the Probation of Offenders Act, 1958. This Court, on consideration of facts and circumstances, is not inclined to grant the benefit of Section 6 of the Probation of Offenders Act and, therefore, it is not possible to accept the submission of the learned counsel for the accused. Consequently, there is no merit in this appeal and the same is dismissed. The accused shall surrender to his bail and shall appear before the learned Additional Sessions Judge on 07th March, 2005 and the learned Additional Sessions Judge shall commit him to the prison for undergoing the sentence. If the accused fails to surrender on or before the due date, the learned Additional Sessions Judge shall secure his appearance through the Superintendent of Police and shall commit him to the prison for undergoing the sentence.