

(2018) 06 BOM CK 0056

In the Bombay High Court

Case No : CRIMINAL APPEAL NO. 105, 416 OF 2003

SHANKAR SONU MORE AND ANR

APPELLANT

Vs

STATE OF MAHARASHTRA

RESPONDENT

Date of Decision : 15-06-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 304I, 304II, 323, 504

Citation : (2018) 06 BOM CK 0056

Hon'ble Judges : T.V. NALAWADE, J;K.L. WADANE, J

Bench : Division Bench

Advocate : R.V. Dasalkar, Satish S. Jadhav

Final Decision : Dismissed

Judgement

K.L. WADANE, J

1. Criminal Appeal No. 105/2003 is presented against the judgment and order passed by the First Adhoc Additional Sessions Judge, Jalgaon, in

Sessions Case no. 97/1999 dated 27.12.2002, by the original accused No. 1 and 3 against their conviction for the offence punishable under section 304

Part I read with section 34 of the Indian Penal Code and the State also preferred Criminal Appeal No. 416/2003 for the acquittal of the accused

persons for the offence punishable under section 302 read with section 34 of the Indian Penal Code.

2. Brief facts of the case may be stated as follows:

i) PW 8 Gautam, son of the deceased Shivram More, lodged complaint to the police station Bhadgaon on 06.12.1998 alleging that he resides at village

Picharde along with his father Shivram (since deceased), mother Rankorbai, younger brother Jibhau More and Sanju More. He has three sisters and

they are married and residing at their matrimonial house. The appellant/accused persons and their family members are residing in front of the house of

complainant Gautam (PW 8). ii) Two months prior to the incident there was quarrel between wife of Vikram, s/o accused No. 2 Sonu More and the

complainant. Therefore, there was no talking terms with the accused persons. iii) On 06.12.1998 complainant, his father Shivram and other family

members were in their house.Â At about 2 p.m. accused No. 2 Sonu while going to answer nature's call was abusing.Â After 15/10 minutes, while

returning to home, accused No. 2 again started abusing.

iv) Thereafter accused No. 2 Sonu, accused No. 1 Shankar came in front of house of complainant armed with iron rod and lathi.Â They started

abusing to the complainant.Â At that time accused No. 2 armed with Lathi. Then accused No. 1 assaulted the complainant on his back by iron rod.Â

So also accused No. 1 assaulted Shivram on his head by iron rod.Â Accused No. 3 snatched the lathi from the hands of accused No. 2 and started to

beat complainant and his father.Â Due to assault Shivram fall down.Â Even thereafter, accused No. 2 assaulted him with fists and kick blows.Â

When the incident was going on at that time the mother of complainant Rankorbai and brother Jibhau came there. The accused persons assaulted

them also.Â Witness Gahinabai came there and rescued the scuffle.Â The incident was witnessed by one Dhudku More, Sambhaji Wagh, and

Shantabai Dhudku More.Â Shivram received head injury due to which there was bleeding.Â Immediately Shivram succumbed to the injuries.

3) After receipt of the complaint offence came to be registered against accused persons for the offences punishable under section 302, 323, 504 read

with section 34 of the Indian Penal Code vide Crime No. 90/1998.Â Investigating Officer Dinkar Pingale (PW 10), after registration of the crime

arrested the accused persons. He prepared spot panchnama and inquest panchnama. Dead body was sent for postmortem.Â

4. During investigation, the investigating officer recorded the statement of witnesses including statement of PW 7 Gahinabai w/o Shankar Wagh, PW

9 Jibhau Shivram More and other witnesses.Â Clothes of the deceased Shivram were seized vide panchnama Exh. 55.Â During the investigation the

accused No. 1 Shankar made a statement that he will produce the iron rod. Accordingly, his memorandum was recorded vide Exh. 56. In pursuance

to the statement, accused No. 1 Shankar produced iron bar, which was seized as per panchnama Exh. 57. Then accused No. 3 made a statement

that he will produce the stick. Accordingly his memorandum was recorded vide Exh. 58. In pursuance to the statement, accused No. 3 produced

stick, which was seized as per panchnama Exh. 59. PW 5 Pravin, police constable carried the muddemal i.e. iron rod for Chemical Analysis to

Chemical Analyzer's Office. P.W. 6 Balasaheb, police constable, carried the muddemal i.e. soil mixed with blood, plain soil, Dhoti, Bandi and blood

sample of Shivram. PW 11 Dr. Sonwane conducted the postmortem on the dead body of the deceased and also examined complainant Gautam and

issued postmortem report (Exh. 82) and injury certificate (Exh. 83). C.A. Reports were received and same were attached with the police papers.

After investigation the investigating officer filed charge sheet in the Court of Judicial Magistrate, First Class, Bhadgaon, who committed the case to

the Court of learned Sessions Judge, Jalgaon. Learned First Adhoc Additional Sessions Judge, Jalgaon framed charge against accused persons. The

contents of the charge (Ex. 40) were explained to accused, to which they denied and claimed to be tried. The defence of accused is of general

denial.

5. In order to establish the offence of murder committed by the accused No. 1 to 3, in furtherance of their common intention, the prosecution has

examined in all 11 witnesses. After scrutiny of the evidence on record, the learned Adhoc Additional Sessions Judge, convicted the

accused/appellants for the offence punishable under section 304 Part I read with section 34 of the Indian Penal Code.

6. We have heard the arguments of Mr. Satej Jadhav, learned counsel for appellants/accused and Mr. Dhasalkar, learned APP for the respondent/State.

7. To establish the offences levelled against the accused persons, the prosecution has mainly relied upon the oral evidence of P.W. 7 Gahinabai Wagh,

PW 8 Gautam s/o Shivram More and PW 9 Jibhau s/o Shivram More, coupled with recovery of the weapons at the instance of accused No. 1 and

3. In presence of panch witness investigating officer has recovered the iron bar at the instance of accused No. 1. It was sent to chemical analysis

and on chemical examination human blood was detected on it. However, the

determination of the group of blood was inconclusive. Clothes of the deceased Shivram i.e. Dhoti and Baniyan which were sent to chemical analysis on which human blood of 'O' group was detected.

8. From the record it appears that the incident took place in a broad day light at about 2 p.m. on 06.12.1998 in front of house of the complainant.

Further it appears from the record that the house of the accused persons is also adjacent at some distance. Further it reveals from record that there

was a quarrel between complainant and wife of Vikram (another son of accused No. 2 Sonu namely Vikram). The prosecution has claimed that

because of this minor incident the accused No. 2 while returning to his home he abused the complainant and his family members and thereafter the

accused No. 1 came there armed with iron rod and accused No. 2 came there along with stick. So it is necessary to scrutinize the evidence of the

eye witnesses. The complainant Gautam (PW 8) and witness Jibhau (PW 9) are the sons of deceased Shivram, PW 7 Gahinabai appears to be an

independent witness.

9. PW 8 Gautam, who is one of the injured in the same incident deposed that incident occurred on 06.12.1998 at about 3 p.m., in front of their house.

Before two months of the incident, quarrel had taken place between him and wife of Vikram. It further reveals from his evidence that at the

relevant time of incident the accused No. 2 looking at the house of complainant abused as "Gadhadichyala Baghato". After about 15 minutes

he returned back from attending nature's call and while returning to his home he started abusing. After half an hour, accused No. 1 came there.

Then all the accused were abusing. All the accused persons dragged the complainant and his father from courtyard in the lane and started beating

them. He specifically deposed that accused No. 1 was assaulted with iron rod and accused No. 3 was assaulted with stick. Accused No. 1

assaulted him with iron rod on his right hand and also on back. Thereafter accused No. 1 assaulted his father with iron rod on his head. He further

deposed that accused No. 3 snatched the stick from the hand of accused No. 2 and assaulted to the father of complainant. Due to the beating, his

father fall down. At that time Gahinabai and Sambhaji came there. Gahinabai rescued the quarrel. After beating, the accused persons ran

away. Due to the assault, Shivram died on the spot itself. Thereafter police

patil Suresh Wagh came there. P.W. 8 narrated the incident to him

and went along with police patil to Bhadgaon police station, where the first information report was lodged.Â

10. During the crossÂexamination this witness has stated that Vikram had made a complaint with police on 14.10.1998.Â Police had filed a chapter

case against him. Â On perusal of aforesaid admission, it appears that this may be in reference to the earlier quarrel between this witness and the

wife of Vikram.Â On perusal of the crossÂexamination there are some minor variance in the evidence and complaint, however, that are not enough

to disbelieve the entire testimony of this witness.Â

11. The presence of this witness is established on the spot of incident, as he was also injured in the incident. The medical officer, P.W. 11 Dr.

Sonwane deposed that on 16.12.2008 at about 10 p.m. he examined Gautam i.e. complainant and found following injuries.

(1) Whip shaped mark of ecchymosis on left lower arm on dorsal aspect of size 3â??x 1 Â½ â??

(2) On left side of the back upper part, oblique in direction side by side of size 4â?? x 1 Â½â?? and 3 Â½â?? x 1 Â½â??.

(3) Blunt trauma on the abdomen.

All the aforesaid injuries were caused within eight hours from the time of examination.Â The injuries were caused by hard and blunt object and all the

injuries were simple in nature.Â Â So the oral version of this witness regarding beating incident to him is supported with medical evidence.

12. Likewise, P.W. 11 Dr. Sonwane deposed that, he performed autopsy on the dead body of Shivram and found following injuries on his person.

(a) On right upper arm posterior and outer side of size 3â?? x 1 Â½â?? and 2 Â½â?? x 1 Â½â?? and they were side by side.

(b) On left side of abdomen, oblique in direction size 6â?? x 1 Â½â??.

(c) On back right side upper part three in number size 3â?? x 1 Â½â??, 6â?? x 1 Â½â?? and 5â?? x 1 Â½â?? from above downwards.

(d) On left side of head on parietal surface oblique in direction 3â?? x 2 Â½â?? with surrounding haematoma of bluish colour of size 4â?? x 3 Â½ â??.

(e) On right side of parietal surface of head mid part above right ear oblique in direction of size 3â? x 1 Â½â? with haematoma around it ofÂ Â

size 4â?? x 3â??.

13. On internal examination, after opening the scalp PW 11 Dr. Sonwane found that there was blood collection all over skull and muscles were

ecchymosised underneath the injuries on scalp and skull on left side parietal surface was found fractured. That fracture was from coronal sutured

posteriorly up to lamboid sutured (occipital bone). After opening skull, intra cranial haemorrhage was seen all over. Anterior part of left hemisphere

of the brain was lacerated wound of size 2" x 1" x ½" and oblique in direction. In the opinion of this witness, cause of death of deceased

Shivram was due to shock as a result of fracture of skull and intra cranial haemorrhage. Accordingly, he issued postmortem report (Exh. 82).

14. Besides the aforesaid evidence, similar evidence of witness Jaibhau (PW 9) is on record. The same is also in the line of deposition of PW 8

Gautam.

15. There is also evidence of an independent witness namely Gahinabai (PW7) who deposed that house of this witness is at a distance of 40 feet from

the house of deceased Shivram. That time she was going to attend the nature's call. She heard noise of riot and went to the spot. She

specifically deposed that accused No. 1 was holding iron rod and accused No. 3 was holding stick. They were assaulting with the same to

Shivram. Accused No. 2 assaulting Shivram with fist and kick blows. The complainant Gautam and his brother Jibhau who are sons of Shivram

came to the spot. They were trying to pacify the quarrel. This witness also pacify the quarrel. Deceased Shivram fall on the ground and died

on the spot itself.

16. During the cross-examination this witness has admitted that today she came to the Court along with Gautam and his relatives. From the aforesaid

admission it appears that when this witness went to the Court to depose at that time she was accompanied with Gautam and his relatives. Naturally,

the injured and this witness are from one and the same village and if they came together to the Court, it cannot be said that their conduct is abnormal.

On the contrary, the oral evidence of this witness is quite natural. She has nothing to do either with accused or the complainant. Therefore, her

evidence assumes much importance, particularly, there is no reason to disbelieve her version, which is supported by medical evidence.

17. Besides the oral evidence of the prosecution witnesses there is recovery of

weapon at the instance of accused No. 1 and 3, which has been proved by the prosecution by examining PW 3 Virbhan Sonwane as a panch witness. In presence of panch witness the police have seized the clothes of the deceased namely Dhoti, Band, Kaddora vide panchnama exh. 55.

18. He further deposed that on 09.12.1998 he was called in the police station where accused Ravindra was present. He gave statement that he will produce the stick. Accordingly memorandum panchnama was prepared (Exh. 58). They all went to the house of accused No. 3 Ravindra.

Accused Ravindra produced a stick from woods, which is seized under panchnama (Exh. 59).

19. He further deposed that, again he was called by the police on 22.12.1998 to the police station. Accused No. 1 Shankar was present there. He

gave statement before the panch and police that he would produce iron rod, which was concealed in Picharde shivar, on the bank of river Girna.

Accordingly memorandum panchnama was prepared (Exh. 56). In pursuance to the memorandum, accused No. 1 had shown the place where the

iron rod was concealed and from there he produced iron rod, which was seized under panchnama (Exh. 57). So the recovery of weapons at the

instance of accused No. 1 and 3 is duly proved by the prosecution.

20. From the aforesaid oral as well as medical evidence coupled with the evidence of panch witness it has been established by the prosecution that the

accused persons assaulted Shivram by iron rod and lathi and due to which he died.

21. To determine the nature of the offence, which the accused persons have committed, it is necessary to mention here that deceased Shivram died

mostly because of the head injury and from the evidence it appears that the accused No. 1 assaulted Shivram by iron rod. But the evidence of the

prosecution is silent about the multiple assault made by accused No. 1 on the head of Shivram by iron rod. A reference has made to the injuries

sustained to Shivram, as per the postmortem report and evidence of PW 11 Dr. Sonwane. There were five external injuries on the person of

Shivram. Injury No. 'D' and 'E' mentioned in the deposition of PW 11 Dr. Sonwane reads as follows:

(d) On left side of head on parietal surface oblique in direction 3" x 2 1/2" with surrounding haematoma of bluish colour of size 4" x 3 1/2".

(e) On right side of parietal surface of head mid part above right ear oblique in direction of size 3" x 1 1/2" with haemotoma around it of size 4" x 3".

22. So looking to the nature of aforesaid injuries it appears that there were two fracture injuries to the parietal region of the deceased which indicates that there may be two hits given on the head of deceased. However, PW 11 Dr. Sonwane has deposed that if a person falls on the ground on the scalp side and causes fracture to the opposite of that part, fracture can also be caused which is known as counter coup fracture.

23. By referring the nature of the injuries and the aforesaid admission given by PW 11 Dr. Sonwane, Mr. Satej Jadhav, learned counsel for appellants has argued that such two fractures are possible by one hit by a hard substance. The argument of Mr. Jadhav is acceptable for the reason that there is no evidence on record to show that accused No. 1 gave multiple stroke on the head of deceased Shivram with the help of iron rod. So it is seen that there is only one hit given by accused No. 1 on the head and rest of the injuries were caused due to assault by lathi. The accused persons are charged for the offence punishable under section 302 read with section 34 of the Indian Penal Code. But looking to the evidence on record it cannot be said that there was intention of the accused persons to commit murder of Shivram.

24. So looking to the entire evidence, it appears that, the provision of section 304 Part II of the Indian Penal Code is attracted to the present case. When the accused gave one hit with iron rod on the head of deceased, the intention to cause death cannot be imputed to him but it would be reasonable to infer that he had knowledge that any injury on the vital part of the body of deceased would cause death. The accused persons came on the spot armed with iron rod and lathi which indicate that they have common intention to assault Shivram and the complainant. From the record it is seen that the accused No. 1 had given single blow on the head of deceased Shivram, which is proved to be fatal. However, from the circumstances it appears that there was no intention or premeditation in the mind of the appellant/accused to inflict such injuries to the deceased as were likely to cause in ordinary course of nature.

25. Considering the entire evidence including medical evidence, the appellant/

accused persons ought to have been convicted under section 304 part II of the Indian Penal Code instead of under section 304 part I of the Indian Penal Code.

26. In view of the aforesaid finding, the State has failed to establish the offence punishable under section 302 read with section 34 of the Indian Penal

Code against all the accused persons.Â Therefore, the appeal presented by the State is liable to be dismissed.

27. In view of the above, we pass following order.

1. Criminal Appeal No. 105/2003 is partly allowed.

2. Judgment and order passed by the learned First Adhoc Additional Sessions Judge, Jalgaon, in Sessions Case No. 97/1999 dated 27.12.2002 is

modified as follows :

The appellants/accused are convicted for the offence punishable under section 304 Part II read with section 34 of the Indian Penal Code instead of

offence punishable under section 304 part I read with section 34 of the Indian Penal Code and are sentenced to suffer rigorous imprisonment for five

years and to pay fine of Rs. 10,000/Â? (Rs. Ten Thousand only) each.Â

3. Criminal Appeal No. 416/2003 is dismissed.Â

28. Both Criminal Appeals are disposed of accordingly.