

(2018) 01 BOM CK 0005
In the Bombay High Court
Case No : 443 of 2004

Sheikh Kamaruddin s/o Sk. Shabbi

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 10-01-2018

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#), [Section 428](#) - Power to examine the accused - Period of detention undergone by the accused to be set off against the sentence of imprisonment

[Indian Penal Code, 1860](#), [Section 304](#), [Section 323](#), [Section 448](#) - Punishment for culpable homicide not amounting to murder - Punishment for voluntarily causing hurt - Punishment for house-trespass

Citation : (2018) 01 BOM CK 0005

Hon'ble Judges : Rohit B. Deo

Bench : Division Bench

Advocate : A.D. Hazare, N.H. Joshi

Final Decision : Dismissed

Judgement

1. Exception is taken to the judgment and order dated 16.07.2004 passed by the 4th Adhoc Additional Sessions Judge, Chandrapur in Sessions Case 155/2000, by and under which, the appellant (hereinafter referred to as "the accused"), is convicted, along with one Gufran, of offences punishable under sections 448, 304 Part-II and section 323 of the Indian Penal Code (" IPC " for short), and while accused Gufran is released on probation, accused Sheikh Kamaruddin is sentenced to suffer rigorous imprisonment for four years and to payment of fine of Rs.1000/-

for offence punishable under section 304 Part-II of the IPC, is sentenced to suffer simple imprisonment for two months and to payment of fine of Rs.200/- for offence punishable under section 323 of the IPC and is sentenced to suffer simple imprisonment for two months and to payment of fine of Rs.200/- for offence punishable under section 448 of the IPC. Azamuddin, who was also tried along with Gufran and Kamaruddin is acquitted of all the offences.

2. The gist of the prosecution case as is unfolded during the trial is thus:-

The informant Mohd. Sharif was residing with his parents and brother at Rayyatwari Colony Miners quarters, Chandrapur. Shamsherali, the deceased, was the father of the informant and was employed with Western Coalfields as Driver. The accused were also residents of the said colony.

The genesis of the incident was an altercation which took place at 07:30 p.m. on 28.11.1999 at the pan shop of one Gupta (P.W.3). The informant Mohd. Sharif (P.W.1) was standing at the pan shop, the accused Gufran came to the pan shop, abused and threatened the informant Mohd. Sharif, P.W.3 intervened and pacified the informant and Gufran. The informant along with P.W.3 went to S.T.D. booth to make telephone call and then the informant P.W.1 went to his house. Accused Gufran and Kamaruddin came to the house of P.W.1, abused P.W.1 and dragged him out of the house by catching hold of the collar. Accused Kamaruddin kicked P.W.1, the mother of P.W.1 intervened and at the same time the younger brother of P.W.4 Wahid also arrived at the scene. The deceased Shamsherali who was sleeping woke up and came out of the house and attempted to pacify the accused. The accused Gufran and Kamaruddin

fetches a wooden stick and iron rod respectively. Gufran assaulted P.W.1 with a wooden stick on the shoulder, accused Kamaruddin rushed towards the deceased Shamesherali with the rod, Shamesherali caught hold of Kamaruddin, accused Gufran dealt a stick blow on the hip of Shamesherali and when he turned towards Gufran, Kamaruddin inflicted a blow on Shamesherali with the iron rod on his head. Shamesherali was taken to the hospital in an auto-rickshaw and was declared dead on admission. P.W.1 lodged the oral report at Ramnagar Police Station, Chandrapur which was reduced to writing and the oral report and the printed F.I.R. are Exhibits 21 and 22 respectively on the record of the trial Court. On the basis of the said report, which was lodged at 22:20 hours on 28.11.1999, offence punishable under section 302 read with section 34 of the IPC was registered.

Investigation ensued, inquest panchnama of the dead body of Shamesherali was recorded, the body was sent for postmortem examination and the report obtained, spot panchnama was drawn and the accused were arrested. The statements of witnesses were recorded, supplementary statement of P.W.1 and statement of Wahid were recorded on 05.12.1999. Pursuant to a statement of admission under section 27 of the Indian Evidence Act, the iron rod and stick were recovered from the bed room of the house of accused Kamaruddin and were seized vide seizure memo Exh.34. A query was made from the Doctor as to whether the injury could be caused by the iron rod to which the Doctor answered that the injury was possible by the rod. The opinion of the Doctor on the reverse of Exh.42 is admitted by the defence. The Doctor however, stated that it could not be definitely opined that the injury can cause

death of a person. Upon completion of the investigation charge-sheet under section 448, 323 and 302 read with section 34 of IPC was submitted in the Court of Chief Judicial Magistrate, Chandrapur, who committed the proceedings to the Sessions Court. The learned Sessions Judge framed charge under section 448, 323, 302 read with section 34 of IPC, the accused abjured guilt and claimed to be tried. The defence of the accused is of false implication. In response to question 51 put in the examination under section 313 of the Criminal Procedure Code, the accused stated that he was not present at the time of the incident.

3. The case of the prosecution is substantially based on the account of the eye witnesses to the incident. The prosecution examined eight witnesses, including sons P.W.1 Mohd. Sharif and P.W.4 Wahid Ali and wife of the deceased Isabano as eye witness to the fatal assault. The owner of the pan shop Ashok Gupta was examined as P.W.3 to throw light on the genesis of the incident. P.W.5 Jalil Ahmed and P.W.6 Yashwant Kove are panch witnesses to the spot panchnama and the seizure memo as regards the weapons, respectively. Dr. Sunil Warghade is examined as P.W.7 and the Investigating Officer Sanjay Khandekar is examined as P.W.8.

4. Shri Hazare, the learned counsel for the accused submits that the evidence on record is grossly inadequate to bring home the guilt of the accused. The seizure of the iron rod from the house of the accused is of no relevance since concededly no blood stains are detected, is the submission. It is further contended that the medical evidence does not exclude the possibility of the deceased suffering head injury due to fall. No independent witnesses are examined although it has come on record that there are several houses near the scene of incident, is the submission.

Shri Hazare, the learned counsel for the accused contends that the judgment impugned is against the weight of evidence on record.

Per contra, Shri Joshi, the learned A.P.P. submits that the evidence of the three eye witnesses is cogent and consistent and the fact that they are related to the deceased is of no significance. No suggestion is given to the I.O. or to any other witness that the incident was witnessed by independent witnesses. The defence did not suggest that the statement of any eye witness was recorded and the witness is not examined. A related witness is not necessarily an interested witness and the presence of the relatives was but natural since the incident occurred in and in front of the house of the deceased. The learned A.P.P. further contends that the fact that the Doctor agreed that collection of blood in cranial cavity is possible due to fall on the ground does not dilute the probative value of the consistent ocular evidence.

5. P.W.3 Ashok Gupta, who is the owner of the pan shop has deposed that between 06:00 to 06:30 p.m. in the evening there was an altercation between accused Gufran and P.W.1 Mohd. Sharif. Sharif accused Gufran of being under the influence of liquor and Gufran retorted that the brother of P.W.1 also consumes liquor. This evidence has gone unchallenged in the cross-examination. It is however, extracted that while going home

P.W.1 uttered that Gufran may come to his house and then he will be dealt with. Shri Hazare, the learned counsel for the accused contends that the evidence of P.W.3 is inconsistent with the evidence of P.W.1 Mohd. Sharif who has given a different version of the genesis of the altercation. P.W.1 Mohd. Sharif has deposed that accused Gufran stepped on his foot and he asked accused Gufran to walk properly and whether accused Gufran had consumed liquor and then an altercation ensued. I do not find the

two versions mutually exclusive. Both P.W.1 and P.W.3 testified that there was an altercation the cause of which was P.W.1 asking Gufran as to whether he was under the influence of liquor. That apart, the variance in two versions and the statement extracted in the cross-examination that P.W.1 uttered some words do not suggest, as is contended by the learned counsel for the accused, that P.W.1 and his family were the aggressors.

6. I have given my anxious consideration to the evidence of the three eye witnesses, and having done so, I am satisfied that the prosecution has proved the complicity of the accused beyond reasonable doubt. It is true that some inconsistencies and omissions are brought on record. But then, the omissions and discrepancies are minor and do not destroy the credibility of the prosecution case. Illustratively, the statement in the deposition of P.W.2 Isabano that accused Kamruddin gave blow of iron rod on his forehead is projected as an omission. However, P.W.2 has stated in her 161 statement that Kamruddin gave a blow with the rod on the left eye of the deceased Shamesherali. The fact that the witness has referred to forehead is of little significance.

Similarly, the omission to the effect that Gufran and Kamruddin caught collar of P.W.1 and took P.W.1 out of the house holding his collar, although the omission is duly proved, is not significant enough to be treated as a contradiction. The ocular account of the wife of the deceased Isabano P.W.2 has stood the test of cross-examination and is confidence inspiring. Similarly, the omissions brought out in the evidence of P.W.1 Mohd. Sharif are again too minor to dent its credibility. I notice from the record that there was indeed some delay in recording the statement of P.W.4 Wahid. The incident occurred on 29.11.1999 and the statement of Wahid is recorded on 05.12.1999. However, apart

from the fact that no attempt is made by the defence to seek the explanation of the I.O. or to cross-examine Wahid on the aspect of delay in recording the statement, what is said by Wahid is amply corroborated by the F.I.R lodged by P.W.1 Mohd. Sharif and the evidence of Isabano P.W.2, whose statement was recorded with promptitude. To be fair to the learned counsel for the accused, no submission is advanced touching the aspect of the apparent delay in recording the statement of P.W.4 Wahid. In the factual matrix, I do not find that the delay in recording the statement can be held against the prosecution or that the Investigating Officer deliberately delayed recording of the statement since he was marking his time or waiting to give a particular shape or colour to the investigation.

7. The evidence of the eye witnesses as regards the incident is cogent and consistent. The eye witnesses are in unison in deposing that it was Kamruddin who dealt blow with iron rod on the head of the deceased Shameherali. The defence that Shamesherali tried to intervene in the altercation and suffered the head injury due to fall is, in the teeth of ocular evidence, unacceptable. It is true that the Doctor agrees that collection of blood in cranial cavity is possible due to fall, but then the fact that the Doctor opines that the injury could be caused in diverse circumstances does not take the case of the accused any further since such opinion as regards possible alternate cause must give way to the ocular evidence on record. Equally untenable is the submission of the learned counsel for the accused that irregular edges of injury would exclude the use of iron rod as a weapon. No authoritative text is brought to my notice in support of the submission. Au contraire, medical jurisprudence recognizes that laceration commonly occurs over bony prominences and tends to

be irregular shape with abraded or contused margins and are typically caused by hard and blunt object. Modi on medical jurisprudence and toxicology states thus:-

When produced by a blunt weapon, such as a club (lathi), crowbar, stone, or brick, a lacerated wound is usually accompanied by a considerable amount of bruising of the surrounding and underlying tissues, and has inverted and irregular edges.

The evidence P.W.7 Dr. Sunil Warghade that the injury mentioned in column 17 of the P.M. report could be caused by hard and blunt object like iron rod, has gone unchallenged.

The suggestion given to P.W.7 that the said injury is not sufficient to cause the death is denied. P.W.7 states that he does not remember if the iron rod was sent to him for examination, however, he asserts that the iron rod produced in the court article "A" may cause such injury. The submission that since no blood stains were detected on the iron rod, the seizure pursuant to discovery at the instance of the accused is of no relevance overlooks the fact that it is not even the case of the prosecution that when the iron rod was seized the same had blood stains.

The corroborative evidence apart, the ocular evidence on record is implicitly reliable and even if the discovery of seizure of the rod is kept out of consideration, I see no reason to differ from the view taken by the learned Sessions Judge that the offence against the accused is proved beyond reasonable doubt. The appeal is sans merit and deserves rejection.

8. The accused is in Central Prison, Nagpur since he was arrested pursuant to non-bailable warrant issued in view of the breach of the conditions of suspension of sentence. The accused be detained in Central Prison, Nagpur or at any other prison to serve the sentence awarded by the learned Sessions Judge.

The accused shall be entitled to set off under section 428 of the

Criminal Procedure Code, 1973.

9. The appeal is dismissed.