

(2015) 09 BOM CK 0177
In the Bombay High Court
Case No : Criminal Appeal No. 263 of 2001

Shivaji

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 16-09-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 302, 304

Citation : (2015) 09 BOM CK 0177

Hon'ble Judges : M.T. Joshi, J.

Bench : Single Bench

Advocate : V.D. Salunke, Advocate, for the Appellant; V.P. Kadam, APP, for the Respondent

Final Decision : Allowed

Judgement

M.T. Joshi, J.—Heard both sides.

2. Present appellant was tried by learned Sessions Judge, Parbhani in Sessions Case No. 161 of 1998 for the offence punishable under Section 302 of Indian Penal Code. He was acquitted from the said offence vide judgment and order dated 15th June, 2001. Instead, however, he was convicted for the offence punishable under Section 304 Part II of Indian Penal Code and was sentenced to suffer rigorous imprisonment for seven years and also to pay a fine of Rs. 15,000/-, in default, to suffer rigorous imprisonment for one year. Aggrieved by said judgment and order, present appeal is preferred by the appellant/accused.

3. The prosecution case would show that deceased - Balaji s/o. Paraji Dalvi was residing at Asegaon, Tq. Jintur, Dist. Parbhani and was working as farm labour. On 6th August, 1998, he went to a hotel nearby bus stand where, a group of villagers used to play cards. Appellant - Shivaji was one of such persons. The deceased used to carry work of bringing liquor for them. After some period, father of deceased namely, Paraji heard sound of cry of deceased Balaji. When complainant Paraji reached the spot with other persons, he found that deceased

Balaji had suffered injury to his stomach and his intestines were out. When Paraji made inquiry with the persons in the nearby, he came to know that present appellant along with some other villagers including PW 1 - Munja and PW 2 - Prabhakar, were playing cards. During playing of the cards, a scuffle had occurred and in the said scuffle, present appellant stabbed the deceased with a knife. The complainant - Paraji along with his another son i.e. PW 4 - Pandurang took the deceased, who was injured at that time, to the Government Hospital at Parbhani. However, on the way itself, Balaji died. In the circumstances, the complaint came to be filed with the Police Station, Bori on the next day i.e. 7th August, 1998 at 11:00 a.m.

4. During investigation by PW 13 - Subhash Bhujang, P.S.I., statements of eye witnesses were recorded. Besides this, the Investigating Officer got statements of the eye witnesses recorded under Section 164 of the Code of Criminal Procedure Code through Special Judicial Magistrate, PW 8 - Mohd. Khaja. Inquest panchnama was prepared. Post mortem notes were collected. Present appellant was arrested. While in custody, he made statement leading to the recovery of a knife and his clothes. Those were seized. The property was sent to Chemical Analyst and after receiving C.A. report, charge sheet came to be filed.

5. Before the learned Sessions Judge, in all, fourteen witnesses were examined. Before trial could begin, the complainant - Paraji has died. The FIR at Exhibit 39 was, therefore, proved by PW 12 - Radhakisan Katore, A.S.I., who had scribed recorded the FIR on the oral narration made by the complainant deceased Paraji.

6. PW 1 - Munja, PW 2 - Prabhakar, PW 5 - Rasheed and PW 6 - Shivaji were examined as eye witnesses while, PW 4 - Pandurang, brother of deceased, was examined to show that when he went to the spot along with his deceased father, at that time, deceased - Balaji made oral dying declaration to him concerning the incident.

7. The sum and substance regarding the incident as per the prosecution case is, that during playing of the cards, a quarrel arose between present appellant Shivaji and PW 2 - Prabhakar. Deceased Balaji intervened in the said quarrel. After sometime, however, when Bajali had left the place, the appellant followed him and gave one stab in the stomach and fled away.

8. Out of the eye witnesses as detailed above, PW 5 - Rasheed Pathan did not support the prosecution case and turned hostile to the prosecution. PW 6 - Shivaji was relieved from the witness box by learned Sessions Judge as he was found apprehensive and expressed his inability to depose. The prosecution has, therefore, relied on the testimony of PW 1 - Munja, PW 2 - Prabhakar as eye witnesses and PW 4 - Pandurang, brother of deceased, regarding the statement said to have been made by the deceased to him concerning the incident. The clothes and the knife, allegedly recovered on the statement of the appellant, which were sent to C.A., found to have no blood stains (C.A. report - at Exhibit 46].

9. Learned Sessions Judge has relied on the testimony of the two eye witnesses as well as the testimony of brother of the deceased and found that the appellant was the author of the injury caused to the deceased.

10. The post mortem examination carried by PW 3 - Dr. Puri showed that the deceased had suffered incised wound 2" x 2" in epigastric region. Intestine was protruding. The Medical Officer, accordingly, proved the post mortem examination notes at Exhibit 18. In view of the single injury, learned Sessions judge came to the conclusion that it was not the case of murder, but a culpable homicide not amounting to murder and therefore, conviction, as detailed supra, was recorded.

11. Mr. V.D. Salunke, learned counsel for the appellant, submitted before me, that the statements of the alleged eye witnesses i.e. PW 1 - Munja and PW 2 - Prabhakar cannot, at all, be believed. PW 1 - Munja is proved to be a got up witness while, PW 2 - Prabhakar has made statements regarding the fact that it would be hazardous to place reliance on the same. The same is the case of PW 4 - Pandurang, as his evidence does not fit with the circumstances as deposed by the two eye witnesses.

He further submitted that the prosecution case would show that the present appellant had earlier some dispute with deceased - Balaji. Therefore, finding that the deceased had suffered injury, only out of suspicion, present appellant has been framed by belatedly setting up eye witnesses after filing of the FIR by father of deceased Balaji. He therefore took me through the evidence on record and submitted that learned Sessions Judge has wrongly relied upon the statements of the witnesses.

12. On the other hand, learned A.P.P. submitted that the two eye witnesses coupled with PW 4 - Pandurang have clearly proved the case of the prosecution beyond reasonable doubt.

13. On the basis of this material, following point arises for my determination:--

"I. Whether the prosecution has proved that on 6th August, 1998 at about 9:30 p.m., near bus stand at Asegaon, present appellant had knowingly committed culpable homicide not amounting to murder of the deceased ?"

My findings to the above point is in the negative. The appeal is therefore, allowed for the reasons to follow.

REASONS

14. As detailed above, the prosecution has relied on the testimony of four eye witnesses. Out of them, PW 5 - Rasheed Pathan did not support the prosecution. In his cross-examination at the hands of learned A.P.P., what could be brought on record, was that during playing of cards, there was a scuffle between the appellant and PW 2 -Prabhakar in which, deceased Balaji intervened. Thereafter, the appellant held the deceased, but the witnesses intervened and thereafter, all

of them dispersed. He deposed that though he stated to the police that he had witnessed the incident, in fact, he had not witnessed the same. Similar statement was given by him before Special Judicial Magistrate - PW 9.

15. The testimony of PW 6 - Shivaji, as already described, was aborted by learned Sessions Judge midway. In the circumstances, to prove the prosecution case from the mouth of the eye witnesses, we have statement of PW 1 - Munja and PW 2 - Prabhakar.

Out of these two eye witnesses, PW 2 - Prabhakar, as per the prosecution case, had quarrel with present appellant during playing of the cards. PW 9 - Special Judicial Magistrate had recorded statement of this witness at Exhibit 35. In the said statement, he did not state that he had witnessed the incident of assault on deceased by present appellant causing him injury. According to this statement, after the game of cards was over, since the appellant started chasing him, he fled away to his house and on the next day, he came to know that the deceased was killed.

16. In the circumstances, no reliance can be placed on the statement of PW 2 - Prabhakar in the court, that after the game was over, the appellant followed the deceased and stabbed him in his stomach. The statement of next of the alleged eye witnesses namely, Shivaji - PW 6, recorded by Special Judicial Magistrate, would also show that this PW 2 - Prabhakar after quarrel, ultimately, had left the place.

17. We are, therefore, left with the testimony of PW 1 - Munja. After giving details of the quarrel between the appellant and PW 2 - Prabhakar and intervention of deceased - Balaji between the same, this witness deposed that after the game of card was over all of them dispersed. While deceased Balaji was leaving the bus stand, the appellant followed him and stabbed him with a knife. During cross-examination, he admitted that the deceased was his distant relative. During cross-examination, he denied that deceased Balaji was supplying liquor to the card players. He also deposed that he did not find any one drunk.

As against this, the prosecution case itself, however, is that not only the players were drinking but also the deceased Balaji was working as supplier of liquor them. He also deposed in cross-examination, that after stabbing the deceased, though the appellant ran away, he did not reach to help the deceased. Further, he did not inform the incident to anyone. In the said night, he slept in a shop and in the morning, went to land after the cattle and did not tell the incident to anybody till his statement was recorded by police.

18. He has further deposed in the cross-examination that prior to stabbing of the deceased by the appellant, there was no quarrel or exchange of abuses between the appellant and the deceased. Without any quarrel, the appellant just followed the deceased and stabbed him.

19. PW 2 - Prabhakar, however, deposed that not only drink was being supplied

by the deceased - Balaji during play, but also a scuffle took place between Balaji and deceased and even during the scuffle, deceased Balaji beat the appellant and during that scuffle, appellant stabbed the deceased.

20. All these facts would show that except the singular statement from the mouth of these two eye witnesses i.e. PW 1 - Munja and PW 2 Prabhakar that they had seen the appellant stabbing the deceased, none of their other statements is consistent. Even PW 2 - Prabhakar went further by saying that the appellant had given two stabs to the deceased, one on the stomach and another on the back, as against the prosecution case.

21. The fact that none of the eye witnesses came forward for a period of two days and the FIR was filed by the father of deceased on the basis of the news heard by him, would show that it would be hazardous to place reliance on the testimony of these eye witnesses.

22. This takes us to the statement of PW 4 - Pandurang, brother of deceased, that when he went to lift the deceased in injured condition, at that time, the deceased made a statement to him that the appellant had attacked him. According to this witness, the deceased was able to make this singular statement and thereafter, he took him by a vehicle to the hospital and on way, the deceased died. Intestine of deceased was protruding from his stomach. Moreover, the complainant - Paraji, father of deceased, as well as this witness, though according to the FIR, had both rushed at the spot of occurrence, in the FIR, there is no recital that the deceased had made any such statement, as later on disclosed by PW 4 - Pandurang to the Investigating Officer during investigation.

23. In all these circumstances, a reasonable doubt arises as to whether, present appellant is the author of the injury suffered by deceased - Balaji.

24. Hence, the following order:--

"A] The appeal is hereby allowed.

B] The impugned judgment and order dated 15th June, 2001 passed in Sessions Case No. 161 of 1998 by learned Sessions Judge, Parbhani, thereby convicting the appellant for the offence punishable under Section 304 Part II of Indian Penal Code sentencing him to suffer rigorous imprisonment for seven years and to pay fine of Rs. 15,000/-, is hereby set aside.

Instead, the appellant is acquitted from the offence punishable under Section 304 Part II of Indian Penal Code.

C] Bail bonds of the appellant shall stand cancelled.

D] Muddemal property involved in the offence be disposed as per the directions issued by learned Sessions Judge."