
(1993) 07 BOM CK 0080
In the Bombay High Court
Case No : Criminal Appeal No. 615 of 1991

Shivaji Dattu Patil

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 20-07-1993

Acts Referred:

Arms Act, 1959 — Section 25, 3

Penal Code, 1860 (IPC) — Section 302, 304, 304A, 393

Citation : (1994) 2 BomCR 310 : (1994) CriLJ 1189

Hon'ble Judges : S.P. Kurdukar, J; M.F. Saldanha, J

Bench : Division Bench

Advocate : R.G. Ketkar, for the Appellant; Mrs. K. D. Randive, APP, for the Respondent

Judgement

Saldanha, J.—The appellant before us was put on trial along with two other accused on charges of murder and armed robbery as also unlawful possession of fire arms before the learned Additional Sessions Judge, Malegaon, District Nasik. On the night of 22-12-1990 at about 9.00 p.m. it is alleged that the present appellant who was masked with a monkey cap, entered the residential house of PW 1, Hiralal Kankaria while the family was watching a T.V. programme. He is alleged to have taken out a revolver and held it at the head of the daughter Bharti and tried to snatch her gold chain while at the same time warning other persons in the room to stand with their hands up. The accused undoubtedly was armed with a revolver but considering the fact that there were 3 to 4 members in the room, they unfortunately did not heed the warning from the accused and Hiralal the brother of Rikabchand, went for the accused in order to save the girl from the clutches of the accused. It is not absolutely clear as to what happened thereafter but a scuffle did take place in the course of which Hiralal and Rikabchand caught hold of the accused and were grappling with him. In the midst of this scuffle two shots came to be fired one of which hit Rikabchand on the right side of the chest and since the weapon was a high powered revolver the bullet went right through the body. The second bullet fortunately did not hit

anybody. Hiralal tried to disarm the accused hitting him on the head with a stick.

2. In the mean while their son Rajendra arrived at the house on scooter and he saw one of the accomplices near the house and caught hold of him. Noticing the scuffle going on in the veranda, he handed over the person whom he had apprehended to the watchman and two other persons rushed there and caught hold of the accused who still had the fire arm in his hand, and forcefully banged his arm against the concrete pillar a couple of times until he let go of the revolver which fell to the ground. In the meanwhile Bharti had phoned PW 4 Tarachand Lodha and the police, Lodha arrived on the scene of offence a short while thereafter. They over-powered the accused and made him sit there but his accomplice managed to escape from the clutches of the persons outside and ran away. According to Lodha the third accused who was near the gate was followed by him for some distance but he was unable to apprehend him. When the police arrived on the scene the accused who was present there was handed over to them and the fire arm was taken charge of under a panchanama. Rikabchand in the meanwhile was taken to the hospital of one Dr. Bhandari who was asked to treat him but the doctor on examining him pronounced him to be dead. The body was thereafter moved to the Wadi Hospital and subsequently sent for post mortem. On completion of the investigation the three accused persons were put up for trial before the Sessions Court at Nasik.

3. The accused denied their complicity. As far as accused Nos. 2 and 3 are concerned, the identification evidence was found to be extremely weak and the learned Trial Judge acquitted them. As far as the accused No. 1 who is present appellant is concerned, it was his contention that he has been falsely implicated and he has examined his cousin as a defence witness who states that at the relevant time he was not even present at the scene of offence. The defence appears to be rather inconsistent however because the suggestion that is put to the witnesses and the essential defence that emerges is that the accused No. 1 appeared to have been earlier in the employment of family. There was some pending dispute with regard to certain dues which he was claiming and it is his case that he had gone there in order to recover those amounts in the course of which he was assaulted. The suggestion put to the witnesses is that the fire arm in question was in the possession of the inmates of the house and that it came to be accidentally fired in the course of a scuffle and that the accused No. 1 is in no way responsible for it.

4. We must, at this stage, record one rather disturbing feature which he emerged in the course of investigation namely the fact that the revolver in question turned out to be a high power service revolver of the type that is normally given to the police officers and PW 5 PSI Chindhu Namdeo Mahajan has claimed the ownership of this weapon. He states that it was a service revolver allotted to him and that in the month of March, 1990 i.e. 9 months earlier when he was on bandobast duty in connection with an election procession, that somebody had stolen this weapon from him in relation to which incident he had lodged a

complaint. We do consider it most distressing to note that a service revolver given to a Sub-Inspector of Police seems to have been stolen in the course of some bandobast duty and that this weapon ultimately found its way into the hands of a person who has used it for an armed robbery. We do hope that a greater sense of responsibility will be displayed particularly with regard to the safe custody of weapons and that too ones belonging to member of the police force.

5. The learned Trial Judge accepted the evidence against the present appellant and convicted him under S. 302 and awarded him a sentence of imprisonment for life and to pay fine of Rs. 500/- in default rigorous imprisonment for one year. He was also convicted for the offence under S. 393. I.P.C. and awarded rigorous imprisonment for five years and to pay fine of Rs. 500/- in default rigorous imprisonment for six months. For the offence under S. 3 of the Arms Act and under S. 25 of the Arms Act the appellant was awarded rigorous imprisonment for one year and to pay fine of Rs. 500/- in default rigorous imprisonment for six months. The present appeal assails this set of convictions.

6. Mr. Ketkar, learned counsel appearing on behalf of the appellant has taken us through the entire record. We do not consider it very necessary to reproduce in detail the specific evidence that has come before the Court in examination-in-chief and cross-examination. The learned Trial Judge has accepted the prosecution evidence and held that the offences against the present appellant are proved. For purposes of reassessing the evidence and deciding as to whether those findings are to be upheld, we have gone through the entire evidence and we need to briefly record our views with regard to the same.

7. As indicated by us, the incident took place at about 9.00 p.m. at night in the drawing room of the Kankaria house-hold. The lights were on and the family was watching the T.V. The incident was one that went on for some time. We have on record the evidence of PW 1 Hiralal who is the brother of the deceased and the head of the family and he has described the incident in sufficient details. He has indicated how the accused suddenly entered the room with a monkey cap over his face, how he held the gun at the head of the daughter Bharti and how his brother Rikabchand challenged the accused after which he himself took part in the scuffle and he further states that in order to over power the accused he had given a blow with a stick on the head of the accused which probably explains the injury sustained by the accused during the scuffle. Hiralal has been cross-examined and the attempt was directed towards establishing that the bullet had gone off in the course of this scuffle, that the accused did not aim it at any particular person and that in the confusion it is difficult to attribute the firing of the shot to the accused. In spite of the searching attempt, nothing worthwhile has emerged in the cross-examination. Hiralal's evidence is fully corroborated by that of his daughter Bharti who was the person who was initially caught hold of by the accused and who is the person who telephoned PW 4 Tarachand Lodha and the police. She was present in the room at the material time. She has

identified the accused and she has described the incident in sufficient detail and her accused completely falls in line with that of her father Hiralal.

8. The most important witness in this case is PW 3 Rajendra Hiralal Kankaria who is the young son aged about 26 years who states that it was he who apprehended the co-accused and handed him over to the watchman and other persons. Rajendra is quite categorical about the fact that he was more concerned about the safety of his father and uncle who were grappling with accused on the veranda. We fully understand his anxiety in the situation because he rushed to rescue them, caught hold of the right arm of the accused in order to take the revolver away from him and banged his arm against the concrete pillar until the gun fell to the floor. He is also firm about the fact that the accused was apprehended on the spot and was handed over to the police there only. We also have on record the corroborative evidence of PW 4 who saw one of the co-accused near the gate who tried to follow him but could not catch him and who thereafter came to the house hold and saw Rikabchand lying on a Sofa having sustained bleeding injuries. He and the other persons were instrumental in taking Rikabchand to Dr. Bhandari's hospital but unfortunately the injury was too serious and Rikabchand died shortly thereafter. We have the evidence of Dr. S. S. Bhise who has examined that the bullet injury sustained by deceased Rikabchand and stated that the bullet had gone through the chest cavity, that it went deep in the upper lobe of the left lung and made its exit through the back. This bullet had caused sufficient amount of damage to the vital organs and there was heavy bleeding. The chest cavity was full of blood and it is obvious that Rikabchand had in the course of a short period of time gone into a state of collapse and died. That he met with a homicidal death is more than fully established and that the cause of death was the bullet injury is also a matter of record.

9. On the basis of this material Mr. Ketkar advanced the submission that even if the Court were to discard the evidence of the cousin of the accused who merely states that the accused at the relevant time, was watching a T.V. programme with him and that the police took him up and thereafter falsely implicated him, that the Court will have to accept one position namely that the accused had not used the fire arm against Bharti or against anybody at the initial stages. Mr. Ketkar, therefore, submits that at the highest the accused could be convicted for an offence of armed robbery but, that the charge under S. 302 will have to be set aside. Towards this end, he had relied heavily on the sequence of events as deposed to by the witnesses and he further contends that if unfortunately the deceased Rikabchand and Hiralal had decided to overpower the accused which was an adventurous act considering that the accused was armed with a revolver, that they took the risk of grappling with him and admittedly there was a violent scuffle. It is Mr. Ketkar's submission that obviously the witnesses were trying to get hold of the weapon in the course of this scuffle, it is impossible to conclusively hold that the gun was intentionally fired by the accused. He, therefore, contends that if at all the gun went off it was accidental and that the accused could never be held responsible for it. Mr. Ketkar advances an alternate

submission whereby he contends that even of the responsibility for the act is to be fixed on the accused, that the case would be covered by S. 304-A of the I.P.C. in so far as it could at the most be held that the accused acted in a rash and negligent manner and endangered the life of the persons present in so far as he used the weapon for the purpose of attempting robbery. Mr. Ketkar also submits that if this plea does not appeal to the Court, then ultimately the conviction would rest only under S. 304, I.P.C. because it can never be alleged that there was pre-meditation or that the conduct of the accused was such that the committed an offence of murder.

10. Mrs. Randive learned APP refuted these submission. She points out that the evidence in this case is more than conclusive that the accused was apprehended on the spot, that the fire arm was recovered from that place and that having regard to the fact that this happens to be a tainted weapon, that this Court should take a serious view of the conduct of the accused. Secondly she submits that the manner in which the accused entered the house, the fact that he had come with a loaded high powered fire arm and the fact that regardless of whether he fired at Bharti at the first instance or not, that he was responsible for the death of Rikabchand is more than sufficient to prove that the case squarely falls within the ambit of S. 302 of IPC.

11. After a careful and meticulous examination of the record which includes the various panchanamas, medical evidence, C.A. report etc., in our considered view, the learned Trial Judge was fully justified in holding that both the offences were established as far as the present accused is concerned. Admittedly, he was in possession of the fire arm. He did not possess any licence or authorisation for it and he carried and used this weapon and, therefore, these facts are sufficient to uphold the conviction under the sections of the Arms Act. As regards the charge under S. 393 of the IPC, the evidence conclusively indicates that the object of the accused in entering the Kankaria house-hold armed with a revolver was to commit theft which was more than apparent when he held a revolver at Bharti's head and attempted to snatch the gold chain worn by her. This fact leaves no doubt in our mind that the offence u/s 393, IPC is also established and that the conviction under this head is also correct.

12. As regards the controversy concerning the conviction S. 302, we have taken careful note of the arguments advanced by the learned counsel as also the position the emerges in law. In the first instance, we have taken cognizance of the fact that the weapon which was used by the accused in this case was a high powered service revolver. This is such a type of weapon which, if used, most certainly would have fatal consequences. We have also taken note of the fact that the object of carrying this weapon was not in order to merely frighten the inmates of the house as was sought to be argued but there was definite intention to use the weapon which is why it was fully loaded. Added to this, we have taken careful note of the fact that the accused had kept the revolver near the ear of the daughter Bharti and threatened the remaining persons present there and in our

considered view this act clearly displays the knowledge's and intention that the accused intended to take her life if at all anybody obstructed him. Then comes the second part of the incident when the deceased Rikabchand tried to overpower the accused and to save Bharti. It is at that point of time, that the accused had a choice to either give himself away or to resist and fight back. He had the choice of using the fire arm or not using it and eventhough Mr. Ketkar has vehemently submitted that there is no evidence to conclusively indicate that it was the accused in the course of this scuffle who fired the weapon, we are unable to agree with this view. The main purpose of having assaulted the accused was because he did not let go of the weapon and the scuffle was going on even after he had fired two shots and Rajendra had arrived at the scene of offence. His evidence is very clear and he has stated that when he caught the accused, the revolver was in his hand and that he was not willing to give it up. This fact leaves little doubt in our mind that the accused did intentionally fire a shot from the revolver and it makes no difference whatsoever as to whether he did so with the intention of attacking the persons who were grappling with him. We do not accept for a moment, on the basis of this evidence, that the gun went off accidentally nor do we accept that it happened inadvertently and that it was not with the intention of causing death. The law on the point is quite explicit namely that the person who uses a deadly weapon in such a manner that it can endanger life, cannot be heard to say that eventhough the weapon was used in such manner, that there was no specific intention to kill. We have little doubt on the facts and circumstances of the case that there was a clearly homicidal intention and it has unfortunately happened that a valuable life has in fact been lost. It is in these circumstances, that we are unable to uphold any the submission canvassed on behalf of the defence.

13. As far as the last contention advanced by Mr. Ketkar namely the fact that the accused is a young man and that it appears that he intended to join the army and that he possesses good character etc., we are unable to take any cognizance of these facts because the incident in the present case is extremely grave and the accused has had the benefit of the discretion of the Trial Court on the question of sentence. The punishment for an offence under S. 302 could be one of death but the learned Trial Judge had exercised his discretion and awarded the lesser sentence. There is no further option left and in our consider view, this sentence is a fit case having regard to the facts and circumstances of the case.

14. Before parting with this judgment, we find it necessary to record that in a serious case of the present type where the official record is maintained in the English language, that it is the responsibility of the Trial Court to ensure that the record contains correct and proper translations. We did notice while going through the record that the mutilations are so grave that certain parts of the evidence were virtually unintelligible which necessitated our having to go back to the original documents and to the marathi depositions from time to time. It is very necessary that the Trial Courts pay due and proper attention to this aspect of the matter. The Registrar of this Court shall transmit a copy of this judgment

to the learned District Judge for the purpose of noting our observations and the learned District Judge shall take necessary steps to ensure that henceforth the preparation of the record and in particular the aspect relating to the translations, is duly taken care of so that accuracy does not suffer. The learned District Judge shall bring our observations to the notice of the learned Trial Judge wherever he is posted.

15. In the result, for the reasons stated above, the appeal fails and stands dismissed.

16. Appeal dismissed.