

(2017) 12 BOM CK 0026
In the Bombay High Court
Case No : 8 of 2015

State of Goa

APPELLANT

Vs

Amog S/o. Prakash Naik & Ors

RESPONDENT

Date of Decision : 14-12-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 378](#) - Appeal in case of acquittal
[Indian Penal Code, 1860](#), [Section 302](#),
[Section 34](#), [Section 324](#)

Citation : (2017) 12 BOM CK 0026

Hon'ble Judges : C.V. Bhadang, Nutan D. Sardessai

Bench : DIVISON BENCH

Advocate : S.R. Rivankar, Y. Kotkar, C. Padgaonkar, P. Lotlikar

Final Decision : Dismissed

Judgement

1. By this Appeal, under Section 378 of the Code of Criminal Procedure (Code, for short), the appellant- State is seeking modification of the conviction of the respondents from one under Section 304(ii) of Indian Penal Code (IPC, for short) to Section 302 of IPC.

2. The brief facts are that the respondents were put on trial before the learned Additional Sessions Judge at Panaji in Sessions Case No.32 of 2008, for having intentionally caused the death of one Ganesh Ranganathan and for an attempt to murder one Mr. Dhananjay Keswan, both of whom, are drivers by profession. The respondents were also charged for the offences punishable under Section 341 of IPC. Thus, the respondents were charged and tried for the offences punishable under Section 302, 307, 341 r/w 34 of IPC.

3. At the trial, the prosecution examined as many as 39 witnesses and produced the record of the investigation. The respondents neither entered into the witness box nor lead any defence evidence.

4. The learned Sessions Judge framed the following points for determination: 1. Has the prosecution proved that the three accused with their common intention committed the offence under Section 341 of Indian Penal code by wrongfully restraining the Indigo car of PW 30, Laxman on 16.08.2008 at around 19.20 hours at Dhavali, Ponda?

2. Has the prosecution proved that on 16.08.2008 at around 19.20 hours at Dhavali, Ponda, the late Ganesh was assaulted with the knife and two punches by the three accused, in furtherance of their common intention, causing him bleeding injuries?

3. Has the prosecution proved that the death of Ganesh was a homicidal death, and not an accidental or suicidal death?

4. Has the prosecution proved that the three accused with their common intention, committed the offence of murder under Section 302 read with Section 34 of Indian Penal Code?

5. Has the prosecution proved that on the above date, time and place, the three accused with their common intention by stabbing PW37 Dhananjay on his back, committed the offence under Section 307 read with Section 34 of Indian Penal Code?

5. On appreciation of the evidence on record, the learned Sessions Judge found point nos. 1 and 2 to be proved. Although, the learned Sessions Judge found that Ganesh died a homicidal death, the learned Sessions Judge came to the conclusion that the only offence made out against the respondents, in so far as, the death of Ganesh is concerned, was one under Section 302(ii) of IPC. Insofar as the offence of an attempt of committing murder of Dhananjay is concerned, the learned Sessions Judge came to the conclusion that the offence proved is one under Section 324 of IPC. In that view of the matter, by the impugned Judgment dated 02/01/2014, the learned Sessions Judge convicted and sentenced the respondents to imprisonment for a period of one month for the offence punishable under Section 341 r/w Section 34 of IPC. In respect of the offence under Section 304(ii) r/w Section 34 of IPC, each of the respondents have been sentenced to imprisonment for a period of five years and lastly, for the offence under Section 324 r/w Section 34 of IPC, the respondents have been sentenced to imprisonment for a period of one year. The substantive sentences have been directed to run concurrently and the period already undergone is directed to be set off.

6. We have heard Shri Rivankar, the learned Public Prosecutor and the learned Counsel appearing for the respondents nos. 1 and 3. None appears for the respondent no.2. With the assistance of the learned Counsel for the parties, we have gone through the evidence and impugned judgment passed by the learned Sessions Judge.

7. It is submitted by Shri S.R. Rivankar, the learned Public Prosecutor that

although, the incident occurred on account of some quarrel, at the spur of moment, the nature of the injuries inflicted on deceased Ganesh are sufficient to indicate an intention to kill and not mere knowledge that death can be caused. The learned Public Prosecutor has taken us through the evidence of S. Dhananjay (PW-37), Allabaksh (PW-25) and Dinkaran Shetty (PW-24), who are eye witnesses to the incident, in order to submit that the learned Sessions Judge ought to have found the respondents guilty of the offence under Section 302 of IPC. In the alternative, it is submitted that the sentence awarded in respect of the offence under Section 304(ii) of IPC, is on the lower side and this Court may enhance the same.

8. The learned Counsel for the respondent nos.1 and 2 have supported the impugned judgment. It submitted that the entire genesis of the incident is such that no premeditation can be inferred or attributed to any of the respondents. The learned Counsel were at pains to point out that the evidence would suggest that deceased Ganesh also assaulted the respondent No.1 by a spanner and there was clear provocation from the side of the deceased. The learned Counsel points out that this is a case which would clearly be covered by exception-4 to Section 300 of IPC.

9. We have given our anxious consideration to the rival circumstances and the submissions made and we do not find that any case for interference is made out. At the outset, it may be mentioned that the appellant-State is not questioning the conviction under Section 324 of IPC as against the charge under Section 307 of IPC. In other words, the challenge is only to the conviction which is recorded under Section 304(ii). The contention is that the learned Sessions Judge ought to have found the respondents guilty under Section 302 of IPC. We have carefully gone through the evidence of the eyewitnesses namely, S. Dhananjay (PW-37), Allabaksh (PW-25) and Dinkaran Shetty (PW-24) and we do not find that the contention can be accepted. The whole genesis of the incident indicates that it was the outcome of some quarrel in the form of a road rage in which PW-37 as also the deceased Ganesh intervened, however, they came to be assaulted, resulting into the death of Ganesh. It has clearly come in the evidence of PW-37 that initially, it was the respondent no.1, who assaulted Ganesh with a punch on his head and thereafter, Ganesh picked up a spanner and assaulted the respondent no.1 and after that it is said that Ganesh was assaulted by means of a knife twice by the Respondent No.3. In the wake of such evidence, the question is whether, the matter can be said to be covered by exception-4 to Section 300 of IPC. The said exception reads thus : "Exception 4 - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

10. It can thus be seen that culpable homicide is not murder, if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender taking undue advantage or having acted in a

cruel and unusual manner. It is significant to note that unlike exception- 1, for the purposes of exception-4, it is immaterial, in such case, which party offered provocation or commits the first assault. Ideally, the situation covered by Exception-4 is in the nature of a free fight, where it is difficult to ascertain which party had offered the provocation or committed the first assault. Be that as it may, the learned Public Prosecutor in all fairness did not dispute during the course of the arguments at Bar that entire incident happened without premeditation and was in the nature of a sudden fight and/or a sudden quarrel. The only contention raised was that the respondents had acted in a cruel and unusual manner and that is the reason why according to the learned Public Prosecutor, exception-4 to Section 300 of IPC may not apply in this case. We would tend to disagree. We are unable to persuade ourselves to hold, on the basis of the evidence available on the record, that the respondents can be said to have acted in a cruel and unusual manner. We are clearly of the view that the manner in which incident has happened would be covered by exception-4 to Section 300 of IPC and thus, no exception can be taken to the finding recorded in this regard by the learned Sessions Judge.

11. The present appeal is in the nature of an appeal against acquittal, inasmuch as the appellant-state is challenging the acquittal of the respondents from the offence punishable under Section 302 of IPC. The law relating to the scope and ambit of the powers available to this Court while hearing an appeal against acquittal are too well settled to be restated. It is only when the view taken or the finding recorded by the Sessions Judge is perverse or is against the weight of the evidence on record or one which can be said to be an impossible view that this Court can justifiably interfere. Considering the overall circumstances, we do not find that the view taken by the learned Sessions Judge can be said to be an impossible view, so as to justify interference.

12. This takes us to the alternate submission on the point of the sentence. The offence punishable under Section 304(ii) of I.P.C. is punishable with imprisonment, which may extend to 10 years or with fine or with both. Considering the fact that there was no premeditation on the part of the respondents and once, we have found that the respondents had not acted in a cruel and unusual manner, we do not find that there are any aggravating circumstances, so as to enhance the sentence, which we otherwise found to be adequate. In that view of the matter, the appeal is hereby dismissed.