

(2015) 07 BOM CK 0282
In the Bombay High Court
Case No : Criminal Appeal No. 329 of 1994

State of Maharashtra

APPELLANT

Vs

Palji Narayan Saparia and Others

RESPONDENT

Date of Decision : 13-07-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 300, 302, 324, 34

Citation : (2015) ALLMR(Cri) 4401

Hon'ble Judges : V.K. Tahilramani, J; Shalini Phansalkar Joshi, J

Bench : Division Bench

Advocate : A.S. Shitole, APP, for the Appellant; V.G. Pradhan, Senior Advocate instructed by R.S. Mhamane, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

Dr. Shalini Phansalkar Joshi, J—This appeal is preferred by the State being aggrieved by the judgment and order dated 24.02.1991 of the learned Additional Sessions Judge, Mumbai in Sessions Case No. 212 of 1982, thereby acquitting respondent Nos. 1 to 4 for the offences punishable Sections 302 and 324 read with 34 of the Indian penal Code. For the sake of convenience, the parties are referred to by their original nomenclature.

2. Facts, as are necessary, for deciding this appeal can be stated as follows :-

Deceased Vishram was the brother of P.W.1 Dinesh. The accused Nos. 2 to 4 are brothers inter se and related to accused No. 1. They are residing in the same area where P.W.1 Dinesh and deceased Vishram were residing. Hence they were knowing each other quite well. P.W.1 Dinesh is married to Jasubai, the cousin sister of accused Nos. 2 to 4, despite their opposition. Hence to some extent, the relations were spoiled between the parties. Moreover on 10.12.1981 in the evening Keshav, the brother of accused No. 1 Palji, had inflicted a blow of knife on P.W.4 Heerubai the wife of Vishram, as she intervened when Keshav was attempting to extort money from one boy. P.W.4 Heerubai, hence lodged

complaint against Keshav. Therefore, Keshav was arrested. Hence accused No. 1 Palji was having grievance against P.W.4 Heerubai and her family members. On that count he had also threatened her husband, Vishram and his family members of dire consequences, on the night before.

3. In this backdrop, the incident giving rise to this case took place on 11.12.1981. On that day at about 6.00 p.m. when P.W.1 Dinesh, his brother Vishram and their friend P.W.5 Khimji were standing near panshop on the road of Squatters Colony, accused Nos. 1 to 4 came there and confronted Vishram as to why his wife P.W. 4 Heerubai has lodged complaint against his brother Keshav. While accused No. 1 Palji was talking with Vishram, accused No. 2 Lalji held Vishram from behind, accused No. 3 held right hand of Vishram; whereas accused No. 4 Jaising caught his left hand. Accused No. 1 then took out knife from his pant pocket and stabbed Vishram on the left side of his chest. When P.W.1 Dinesh attempted to rescue Vishram, he sustained injury near his right thumb. At that time his mother, P.W. 2 Galabai and Vishram's wife P.W.4 Heerubai also reached to the spot. Seeing them, accused No. 2 Lalji hit P.W.2 Galabai with piece of wood on her upper arm, due to which she fell down. During said commotion, all the four accused ran away from the spot. P. W. 4 Heerubai and P.W.5 Khimji took victim Vishram to Cooper Hospital where he was declared dead. P. W. 4 Heerubai, then returned to the house and informed about the same to P.W.1 Dinesh, who then went to Jogeshwari police station and lodged complaint vide Exh.9 against the accused.

4. On his complaint P.W.8 PSI Naik registered C.R. No. 695 of 1981 against accused for offences punishable under Sections 302, 324 read with 34 of the Indian penal Code. He immediately went to Cooper Hospital and made inquest panchanama vide Exh.12. Then alongwith P.W.1 Dinesh, he came to the spot of incident and made spot panchanama Exh.13. On the same night, he recorded statements of P. W. 2 Galabai, P.W.4 Heerubai and P.W.5 Khimji and referred P.W.1 Dinesh and P.W.2 Galabai for their medical examination and treatment. Accused Nos. 2 to 4 were arrested at about 11.00 p.m. on that night. Further investigation of the case was taken over by P.W.11 Police Inspector Chavan. He arrested accused No. 1 Palji on 16.12.1981 and seized the clothes on his person under panchanama Exh.29. The seized muddemal property was sent by him to Chemical Analyzer vide Exh.24. Further to completion of investigation, chargesheet was to be filed in the Court against accused by P.W.9 A.C.P. Kadam.

5. On committal of the case to the Sessions Court, the trial Court framed charge against accused vide Exh.2. Accused pleaded not guilty and claimed trial, raising defence of false implication.

6. In support of its case, prosecution examined in all 11 witnesses and on appreciation of their evidence, trial Court held the guilt of the accused to be not proved beyond reasonable doubt and acquitted them of both the offences.

7. This judgment of the trial Court is being assailed in the present appeal by

learned APP for the State whereas supported by learned counsel for the accused.

8. At the outset itself, learned counsel for accused had sounded a note of caution by submitting that it being an appeal against acquittal, the scope of interference by this Court, in the judgment of trial Court is limited. This Court cannot interfere in the findings of trial Court, unless this Court comes to the conclusion that said findings are perverse. Merely because on appreciation of evidence on record, this Court comes to another view which can also be probable, this Court cannot set aside the view taken by the trial Court, if both views are equally probable.

9. Bearing in mind this note of caution sounded by learned counsel for the accused, we enter into re-appreciation of evidence on record. P.W.6 Dr. Khanolkar has conducted postmortem on the dead body of Vishram and found following injuries:-

I) External injuries.

1. Incised stab wound on left third inter coastal space 5.5 cms medially from left nipple and 4.5 cms laterally from mid line. The wound was oblique spindle shape, sharply cut margins, with pointed angles. Lower angle near midline than upper.
2. Linear abrasion on the back of left upper arm 2.0 x 0.1 cms.
3. Abrasion back of right elbow 3.0 x 2.6 cms.
4. Abrasion just above left eyelashes 1.0 x 0.5 cms.

II) Internal injuries

1. The lower border of fourth rib was cut on left side near costochondral junction due to stab wound.
2. The fourth intercoastal space pierced.
3. The pericardium was cut on left side in the lower region 1.5 x 1.0 cm. large amount of blood and clots were found in the pericardium cavity.
4. The heart was injured 2. cms above the apex; left ventricle punctured, opening in the left chamber of the heart size 1.0 to 0.5 cms, transverse cut.
5. About 1600 blood and clots found in the left Thoracic cavity and pericardial cavity.

According to him, injury No. 1 was sufficient in the ordinary course of nature to cause death and cause of death was stab wound in the heart with a sharp edged tapering end of the blade. In view of these clinical findings and evidence of Doctor, in our opinion, the prosecution has proved homicidal death of Vishram.

10. To prove involvement of the accused in the commission of the crime, prosecution has mainly relied on the evidence of P.W.1 Dinesh, who is an eye witness to the incident, injured in the same incident and has also lodged complaint about the said incident at police station. He has deposed as per

recitals in the complaint (Exh.9) to the effect that at the time of incident, while he himself, his brother Vishram and P.W.5 Khimji were proceeding on the road, accused came there. Accused Nos. 2 to 4 held Vishram and accused No. 1 stabbed him with knife on his chest. As a result, Vishram sustained injuries and fell down. When he intervened, he also sustained injury near right thumb. When his mother P.W. 2 Galabai came there, she was hit with a piece of wood by accused No. 2 Lalji on her upper arm and hence she also fell down. The accused ran away from the spot. His sister-in-law P.W.4 Heerubai and P. W.5 Khimji took Vishram to the hospital. P.W.4 Heerubai returned to the house at 7 to 7.30 p.m, Then he came to know about the death of Vishram. Therefore, he went to the police station and lodged complaint Exh.9. Thereafter he and his mother P.W.2 Galabai were also referred for medical examination.

11. P.W.7 Dr. Parmar, who was attached to Cooper Hospital on that day, at about 9.00 p.m. had examined P.W. 2 Galabai and found following injuries:-

1. Swelling and tenderness on her left forearm, lower third.
2. Contusion over left forearm lower third, 1" x 1.5".

Accordingly he has made entry in the casualty book. The certified extract of the said entry is produced at Exh.19. At the same time, he has also examined P.W.1 Dinesh at about 9.10 p.m. and found minor abrasion over his left hand and first web space. The relevant extract of casualty book is produced at exh.20. According to him, injury to P.W.1 Dinesh could have been caused as a result of coming in contact with rough surface; whereas injury to P.W.2 Galabai could have been caused by hard and blunt object like a stick.

12. The evidence of P.W.2 Galabai, as to the incident, goes to reveal that on 11.12.1981 at about 6.15 p.m. she was sitting by the side of road; whereas her two sons P.W.1 Dinesh and Vishram, alongwith P.W.5 Khimji, were standing in front of pan shop nearby. All the four accused came there, she saw them talking with her sons. Hence, she got up and approached them. As she was approaching them, accused Nos. 2 to 4 caught hold of Vishram and accused No. 1 Palji who was near them raised his arm. Though, she could not see as to what accused No. 1 was holding in his hand, but she advanced towards them to obstruct accused No. 1 from hitting her son Vishram. At that time accused No. 2 Lalji hit her with stick of wood. The said blow hit on her right wrist and she sustained injury. She fell down unconscious. She was taken up from there and carried to her residence. After she could regain consciousness, she was taken to police station.

13. There is corresponding evidence of P.W. 4 Heerubai, the wife of deceased Vishram. She has deposed about earlier incident dated 10.12.1981, when in the evening at about 5.00 p.m. while Keshav, the brother of accused No. 1 Palji, was attempting to extort money from a boy, she had intervened to help that boy to escape. Hence, Keshav assaulted her with knife on her right hand. She had lodged complaint about said incident against Keshav. She was treated for the injury at Cooper Hospital as a result of said incident. On that night 4 to 5 persons

had come to her house and threatened Vishram. She could recognize the voice of accused No. 1 Palji out of those persons who had threatened Vishram. She has also deposed that threat was also given in connection with the marriage of P.W.1 Dinesh with Jasubai, the cousin sister of accused No. 1, which marriage was opposed by accused Nos. 2 to 4 and to pacify them an amount of Rs. 2,500/- was paid to accused No. 2. Hence there was enmity.

14. In the backdrop of these two instances, the present incident took place on that day at about 6.10 p.m. According to P.W.4 Heerubai, while she was in her house, she heard commotion from outside and hence on hearing commotion, she went upto the road. While she was limping due to injuries sustained on the previous day, someone told her on the way that her husband Vishram has been struck with knife. Then she saw Vishram, her husband lying injured in front of a pan shop, by the side of a road. She saw bleeding injury on his left upper side of chest. One Khimji, P.W.5, who was known to her, was present near her husband-Vishram. Both of them took injured Vishram in the taxi of P.W.3 Shabir Vakil to the hospital. In the taxi, Vishram told her that the accused No. 1 Palji had stabbed him and accused Nos. 2 to 4 had also assaulted him. When they reached at Cooper Hospital, Doctors after examination, declared her husband to be dead. Then she returned to house and informed about the said fact to P.W.1 Dinesh. Then she herself, P.W.1 Dinesh and P.W.2 Galabai, went to the police station to lodge complaint.

15. This evidence of P.W.4 Heerubai, P.W.1 Dinesh and P.W. 2 Galabai, gets further support and corroboration from the evidence of P.W.3 Shabir, who had carried Vishram, P.W.4 Heerubai and P.W.5 Khimji, to Cooper Hospital by taxi.

16. P.W.5 Khimji, who as per prosecution case, was also an eye witness to the incident, has, however, turned hostile and not supported the prosecution case. According to P. W. 5 Khimji, at the time of incident, he was in the house. One boy told him that Vishram had been injured with knife and was lying near Panshop. He then went there and helped P.W.4 Heerubai in taking Vishram to Cooper Hospital. He has stated that he has pressed his towel on the chest of Vishram to stop bleeding while taking him to the hospital. As regards oral dying declaration made by Vishram in the taxi to his wife Heerubai, he has stated that as he was in the excited condition, he did not notice whether Vishram had talked with P.W.4 while they were travelling in the taxi to Cooper Hospital.

17. As per learned counsel for accused, P.W.5 Khimji has not stated having witnessed the actual incident of assault. P.W.1 Dinesh has admitted in his cross-examination that P.W.4 Heerubai reached the spot after assault on Vishram; whereas P.W.2 Galabai admitted that though she saw accused No. 1 raising arm and accused Nos. 2 to 4 holding Vishram, she could not see what was in the hands of accused No. 1. Moreover, as she was hit on the wrist by accused No. 2 and hence she became unconscious.

18. Hence according to learned counsel for accused, the only evidence as regards

to actual assault on deceased by accused is that of the solitary testimony of P.W.1 Dinesh. The conduct of P.W.1 Dinesh is, however, according to him, unnatural. Instead of accompanying and taking injured Vishram to hospital, he returned to his house and waited till P.W.4 Heerubai return and inform him about the death of Vishram. He did not went to the police station immediately after the assault to lodge complaint. Therefore, according to learned counsel for accused, implicit reliance cannot be placed on the sole testimony of P.W.1 Dinesh. The trial Court has also accepted this submission and acquitted the accused.

19. In our considered opinion, however, there is absolutely no reason to disbelieve the evidence of P.W.1 Dinesh, whose presence at the time of incident cannot be disputed. He himself was injured in the same incident. Moreover, being the brother of the deceased, he had absolutely no reason to implicate some innocent persons in the assault on his brother and allow real culprits to escape from punishment.

20. It is not also the case that his evidence is the sole piece of evidence on which prosecution is relying. There is corroborating evidence of P.W.2 Galabai, who has seen accused No. 1 raising arm to assault the deceased and accused Nos. 2 to 4 holding deceased. She has remained honest to the fact that she could not see what was actually in the hands of accused No. 1. The evidence of P.W.4 Heerubai also reveals that when she reached the spot, she found Vishram lying in the injured condition with injury on left upper side of chest and bleeding to his chest. P.W.5 Khimji has also deposed about the said fact. Therefore, the spot of incident and occurrence of the incident, as deposed by P.W. 1 Dinesh, has got complete support and corroboration from the evidence of these three witnesses. In the same incident, P.W.2 Galabai was also injured and therefore her presence on the spot cannot be disputed. Her injury certificate is proved by P.W.7 Dr. Parmar.

21. There is also nothing unnatural in P.W.1 Dinesh's returning to the house and not accompanying the injured to the hospital, as his friend P. W. 5 Khimji and wife of deceased, P.W.4 Heerubai had accompanied and taken the injured in the taxi. Moreover, the evidence of P.W.4 Heerbai reveals that it was P.W.1 Dinesh who has arranged for the taxi of P.W.3 Shabir and evidence of P.W.3 Shabir also supports that he has taken the injured in his taxi alongwith P.W.4 Heerubai and P.W.5 Khimji. Therefore, as regards spot of incident, the fact that in the said incident, Vishram was stabbed on his chest with knife and there was bleeding injury on his chest, all are proved by supporting evidence of these three witnesses also.

22. About oral dying declaration made by deceased to P.W.4 Heerubai, it may be true that P.W.5 Khimji has not stated anything about it, but then he has admitted that he was in the state of excitement. Moreover, he being won over by the accused is declared hostile and disowned by the prosecution. Hence the evidence of P.W. 4 Heerubai, relating to oral dying declaration of deceased cannot be disbelieved.

23. As regards submission of learned counsel for accused that as the deceased was declared dead on arrival at the hospital which makes it necessary to infer that he was not in a condition to give such oral dying declaration; the evidence of P.W.6 Dr. Khanolkar goes to reveal that the deceased would have remained fully conscious for at least 10 to 15 minutes, after injury was inflicted on him. Hence as taxi was arranged immediately and in the taxi itself, deceased had made the disclosure, it cannot be disbelieved simply on the assumption that the condition of Vishram could not be fit to make such declaration.

24. P.W.4 Heerubai being his wife, there is nothing unnatural on his part to disclose her about it, especially as she has reached the spot after the assault. There is also nothing unnatural even if immediately on her arrival at the spot, he has not stated so and disclosed about it only in the taxi.

25. For the sake of argument, even if the evidence relating to this oral dying declaration of the deceased is left aside and excluded from consideration, the evidence of P.W.1 Dinesh, as eye witness to the incident cannot be discarded. There is absolutely nothing in his cross-examination to challenge his credibility or bonafides. His evidence is fortified by the complaint, which is lodged immediately at about 7.30 p.m. There is endorsement to that effect in the F.I.R. Exh.9 which is registered by P.W.8 PSI Naik. P.W.7 Dr. Parmar has examined both these injured witnesses P.W.1 Dinesh and P.W. 2 Galabai, on the same night. Therefore, entire sequence of events fortifies the evidence of P.W.1 Dinesh to arrive at a conclusion that he is a witness of truth and hence implicit reliance can be placed on his evidence.

26. The law is well settled that conviction can rest even on the sole testimony of single eye witness, provided his testimony is found to be consistent and reliable. In the instant case, on reappraisal of entire evidence on record, we find that there is no reason at all to disbelieve P. W. 1 Dinesh in any way.

27. On perusal of the impugned judgment of the trial Court, we find that the trial Court has not assigned any valid reason to discard evidence of P.W.1 Dinesh. Trial court has given much emphasis to the fact that as depth of the injury sustained by the deceased was 9 1/2 cm, the blade of the knife ought to have been 9 1/2 cms at least when folded knife and if it is opened, it's length should have been 18 cms. According to trial Court, such a long knife could not have been accommodated in the hip pocket pant of accused No. 1 Palji.

28. However, on this aspect, in our considered opinion, the trial Court has overlooked the evidence of P.W.6 Dr. Khanolkar, who has conducted postmortem and has observed both external and internal injuries sustained by deceased. According to him, the shape of external injury did not indicate that stab weapon had entered the body of the deceased upto its hilt. According to him, injury found on the heart was likely to have been inflicted by tapering end of the blade of stabbing weapon. He denied the suggestion that by co-relating dimensions of the injury at different levels, it has to be necessarily inferred that the injury was

likely to have been inflicted only with a gupti. Therefore, his evidence proves that injury in this case was caused by knife. Merely because knife is not recovered, the ocular account of the eye witness cannot be disbelieved.

29. The act of accused No. 1 of coming to the spot alongwith accused Nos. 2 to 4, being armed with the weapon of assault knife and without there being any quarrel, altercation or provocation inflicting stab wound on the vital part of the body of the deceased like chest sufficiently spells out the intention on his part to commit the murder of the deceased. There was motive also on the part of accused No. 1 to inflict injury, with intention of causing his death. The cause and genesis for the said incident, which is brought on record through the evidence of P.W.4 Heerubai, reveals that accused No. 1 was aggrieved with her and her husband, the deceased, as on the complaint of P.W. 4 Heerubai, Keshav, the brother of accused No. 1 was incarcerated. Hence on the previous night accused No. 1 has given threat of dire consequences to him as disclosed from the evidence of P.W.4 Heerubai. Therefore, as against accused No. 1 prosecution has proved motive. Moreover, his conduct of carrying knife with him, when coming to confront the deceased sufficiently speaks about the intention on his part to commit the murder of the deceased or to inflict such bodily injury as is likely to cause death.

30. Though it is a single blow injury which has resulted into death, that alone cannot be a deciding factor to bring the case of accused in any of the Exceptions under section 300 of IPC to make the offence of culpable homicide not amounting to murder. In order to arrive at this finding, we have considered the manner in which assault was made with premeditation carrying knife in the pant pocket and use of a sharp edged weapon like knife in commission of the assault on the vital part of body, like chest, chosen to inflict the assault; especially in the absence of any evidence, proving that there was any quarrel or altercation or provocation on the part of the deceased or any of prosecution witnesses to do so. Hence in our considered opinion, the prosecution has proved its case against accused No. 1 for the offence punishable under Section 302 of the Indian Penal Code.

31. As regards remaining accused, however, though evidence on record proves that they were alongwith accused No. 1 and they had also held the deceased, the intention on their part to cause death of deceased or to cause such bodily injury to the deceased as is likely to cause his death cannot be inferred. We arrive at this inference mainly from the fact that accused No. 1 was carrying weapon of assault knife in his pant pocket. He had not come there brandishing it or openly carrying it in his hand. His act of assaulting deceased with knife is also not accompanied with any words like, "kill the deceased". Therefore, it cannot be inferred that there was any knowledge on the part of accused Nos. 2 to 4 that accused No. 1 was having an intention to commit murder of the deceased. Moreover, in oral dying declaration of the deceased Vishram, he has not stated anything of accused Nos. 2 to 4 holding him while accused No. 1 assaulted him.

Hence, as regards to accused Nos. 2 to 4, in our considered opinion, the benefit of doubt can be extended to them.

32. To sum up therefore, though we are aware that the scope of interference in the appeal against acquittal is limited to the extent of interference in the findings of the trial court, only if those are found to be perverse, even then in our considered opinion, present appeal is one of such rare instance where interference is warranted by this Court, on account of perversity found in the view adopted by the trial Court, by not giving due weightage to the evidence of P.W.1 Dinesh and other corroborating evidence. The trial Court has, thus, committed an error in arriving at a finding of acquittal of the accused No. 1. The view taken by the trial Court is not at all a possible or a probable view, but a view which cannot be substantiated or validated from the material on record. Hence the impugned judgment of the trial Court acquitting accused No. 1 for the offence punishable under Section 302 of IPC needs to be interfered by this Court and therefore liable to be quashed and set aside.

33. Similarly acquittal of accused Nos. 1 and 2 for the offence under Section 324 read with Section 34 of IPC in respect of voluntary causing injury to P.W.2 Galabai, also needs to be quashed and set aside. Hence, we proceed to pass the following order.

ORDER

1. Appeal is allowed partly.
2. Acquittal of accused No. 1 Palji for the offence punishable under Section 302 of the IPC and acquittal of accused Nos. 1 Palji and accused No. 2 Lalji for the offence punishable under Section 324 read with Section 34 of the Indian Penal Code is hereby quashed and set aside.
3. The accused No. 1 Palji is convicted for offence punishable under Section 302 of the IPC and sentenced to suffer imprisonment for life and to pay fine of Rs. 10,000/- in default of payment of fine to suffer rigorous imprisonment for six months.
4. The accused No. 1 Palju and accused No. 2 Lalji are convicted for the offence punishable under Section 324 read with Section 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs. 5,000/- each in default to suffer rigorous imprisonment for one month.
5. Entire fine amount, if recovered, be paid to legal heirs of deceased Vishram.
6. Both the substantive sentences of imprisonment of accused No. 1 to run concurrently.
7. Both the accused Nos. 1 and 2 are entitled to set off for the period, which they have already undergone in jail.
8. The bail bonds of the accused Nos. 1 and 2 stand cancelled. They shall

surrender within a period of four weeks from today and on their failure to do so, the learned trial Judge shall have them arrested to serve the sentence as above.

9. The appeal against accused Nos. 3 and 4 stands dismissed confirming their acquittal, as recorded by the trial Court for the offences punishable under Sections 302, 324 read with 34 of the Indian Penal Code.