

(1998) 06 BOM CK 0003

In the Bombay High Court

Case No : Criminal Appeal No's. 62, 184 and 185 of 1985 with Criminal Revision Application No. 77 of 1985

Subhash Mallikarjun Menase

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 23-06-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 102, 300, 302, 304, 324

Citation : (1998) 100 BOMLR 533 : (1999) 1 MhLj 143

Hon'ble Judges : Vishnu Sahai, J; T.K. Chandrasekhara Das, J

Bench : Division Bench

Judgement

Vishnu Sahai, J.—Since these four connected matters arise out of the same set of facts and a common impugned Judgment, we are disposing them off by one Judgment.

Subhash Mallikarjun Menase the Original Accused was tried by the IInd Additional Sessions Judge, Solapur in Sessions Case No, 127 of 1984 for offences punishable under Sections 302/324/326 of IPC and was convicted and sentenced vide Judgment dated 22-1-1985 in the manner stated hereinafter :-

(i) u/s 304 Part II IPC to 5 years R.I.

(ii) u/s 324 IPC to 1 year R.I. and to pay a fine of Rs. 200/- in default to undergo R.I. for 2 months.

(iii) u/s 326 IPC to 3 years R.I. and to pay a fine of Rs. 300/- in default to undergo R.I. for 3 months.

Criminal Appeal No. 62 of 1985 has been preferred by Subhash Menase, assailing his said conviction and sentence.

Criminal Appeal No. 184 of 1985 has been preferred by the State of Maharashtra against his acquittal for offence u/s 302 IPC.

Criminal Appeal No. 185 of 1985 has been preferred by the State of Maharashtra with a prayer that the sentence awarded to him for offences u/s 304 Part 2 IPC 324 and 326 IPC be enhanced.

Criminal Revision Application No. 77 of 1985 arises out of suo motu notice issued by a learned Single Judge of this Court (Kotwal, J.) in terms that the appellant should show cause as to why his sentence be not enhanced.

2. In short, the prosecution case runs as under :-

The informant Sharanappa Revansidhappa Hulle P.W. 5, was the husband of the deceased Annapurna. The couple had no issues and therefore adopted Revansidha alias Vilas P.W. 11 as their son. Muktabai P.W. 8 was the real sister of Annapurna. She had two daughters namely Papi alias Snehlata P.W. 10 and Surekha. The latter was married to Revansidha alias Vilas. The said persons lived together in a house called "Hulle Nivas" at Shelgi within the limits of Taluka police station in the District of Solapur.

Sharanappa Hulle P.W. 5 had five tenants. One of them was the accused Subhash Menase. He wanted his tenants to vacate their respective premises as he was short of accommodation. On this score, relations between him and the accused got strained.

On 20-4-1984, at about 8 a.m. Papi P.W. 10 had gone to the back side of the house and a quarrel between her and the accused took place. When Annapurna intervened in the same, the appellant inflicted stick blows on her person. Annapurna lodged complaint (Exhibit 26) in respect of that incident. The same day the accused after locking his room went away.

On 23-4-1984, at about 7 a.m. Papi went to bring a packet of biscuits. She came back and informed the deceased and others that accused was in Mallikarjun temple. Consequently, Sharanappa along with Revansidha, Annapurna, Muktabai and Papi went to Mallikarjun temple to tell him to remove his luggage. On reaching the temple, Sharanappa and others found that the accused armed with a knife (at some places, it has been described as a gupti) was standing near the platform of the temple. On seeing Sharanappa and others, he pushed Papi, sat on her back and started inflicting knife blows thereon. Revansidha rushed to her rescue and thereupon he set her free and started inflicting knife blows on his ribs. In the meantime, he gave a knife blow on the stomach of Annapurna who succumbed to her injuries instantaneously. When Muktabai rushed to the rescue, he inflicted a knife blow on her stomach. Muktabai caught hold of the knife and Sharanappa also tried to catch hold of it and in that process, both Sharanappa and the accused sustained injuries, on their hands.

Apart from the victims, this incident was also seen by Mallikarjun Patil, Chanappa Bableshtar and Basawaraj Kumbhar. Immediately after the incident, a rickshaw was arranged for and in the same, Sharanappa, Revansidha, Muktabai and Papi came to the Civil Hospital Solapur.

3. The injuries of Muktabai, Sharanappa, Revansidha and Papi were medically examined the same day, between 7.15 a.m. and 8.30 a.m. at the General Hospital Solapur by Dr. Ramesh Dadake P.W. 3. On the person of "Muktabai, the doctor found a stab wound below xiphisternum of the size of 7.5 cms x 2.54 cms x 10 cms. The said injury was grievous in nature and was attributable to a sharp weapon like gupti (Article No. 25) shown to him.

On the person of Sharanappa, a contusion 1 cm x 0.5 cms over right lateral aspect of wrist joint was found. It was simple in nature and attributable to a hard and blunt object.

On the person of Revansidha, following injuries were found :-

- (1) Incised wound 2" x 1 1/2" x muscle deep over scalp 1" over occipital of head.
- (2) Incised wound 1" x 1/4" x skin deep over right axillary region.
- (3) Incised wound 1/2" x 1/4" x muscle deep over right scapular region.
- (4) Incised wound 1/2" x 1/4" x muscle deep over left inter scapular region.
- (5) Incised wound, penetrating, 2" x 1/2" x peritoneum deep over right lumbar region.
- (6) Incised wound 1/2" x 1/4" x muscle deep over abdominal wall left lumbar region.
- (7) Incised wound 1" x 1/2" x left lumbar region anterior side 1" below 12th rib.
- (8) Incised wound 1/2" x 1/4" x skin deep on the left arm lateral side.

Excepting injury No. 5 which was grievous in nature, other injuries were simple. They were attributable to a gupti (Article No. 25 shown to him). On the person of Papi, the doctor found a penetrating injury 5" x 3" x peritoneal cavity deep on the left side of the chest on the back side. The said injury was grievous in nature and could be caused by the gupti (Article No. 25) shown to him.

In the opinion of Dr. Dadake, the injuries on all the victims could be caused within 12 hours.

Such was the seriousness of the injuries sustained by Muktabai and Papi that same day, they were operated under the supervision of a surgical team of Dr. Janardan Vasudeo Deshmene, P.W. 6., Head of the Department of Surgery, Dr. V. M. Medical College, Solapur, and were discharged from the hospital after a month. In his statement in the Trial Court, Dr. Deshmene stated that in case Muktabai and Papi had not been operated, they could not have survived.

4. The F.I.R. of the incident was recorded by PSI G.N. Bhosale P.W. 13 the same day at 8.15 a.m. as per the information given by Sharanappa P.W. 5. On its basis, C.R. No. 84 of 1984 u/s 302 and 326 IPC was registered at Taluka Police Station, Solapur.

5. It appears that same day, the accused was arrested and brought to Taluka police station, Solapur. Since he had injuries, he was sent under a yadi to General Hospital, Solapur, for medical examination. He was examined there at 12.25 p.m. same day (23-4-1984) by Dr. Suresh Rankhamb P.W. 2 who found the following injuries on his person :-

(1) Incised wound 2 1/2 "x 1/2" skin deep on the face, left side of Imalor bone.

(2) Incised wound 1 1/2"x 1/2" skin deep on chin.

(3) Incised wound 2 1/2 "x 1/2" tendon deep on left hand at base of thumb.

In the opinion of the doctor, all the injuries were simple in nature and were possible by a gupti (Article No. 25) shown to him.

6. After investigating the case in the usual manner, PSI Bhosale submitted a charge-sheet against the accused.

7. Going backwards, the autopsy on the dead body of the corpse of Annapurna was conducted on 23-4-1984 by Dr. Ashok Kanki P.W. 1 who found a stab injury over the left side of abdomen 4 cm lateral to umbilicus 1 1/2 cm x 1/2 cavity deep, elliptical with sharp edged margins on it. On internal examination, it was found that peritoneum and small intestine were ruptured.

In the opinion of Dr. Kanaki, the said injuries was grievous in nature and was sufficient to cause death in the ordinary course of nature. On being shown the gupti (Article No. 25) Dr. Kanaki stated that the said injury could be caused by it.

8. The case was committed to the Court of Sessions where the accused was charged for offences punishable under Sections 302, 324 and 326 IPC.

During trial, on behalf of the accused the suggestion given to the prosecution witnesses was that Revansidha alias Vilas and others were inimical to the accused and on the date and time of the incident, Revansidha went to the place of the incident with a knife and a leather belt with an intention to kill the accused and he and others attacked the accused and that it was wrong to say that the accused first inflicted knife blows on Revansidha, Papi, Annapurna and Muktabai. The said suggestion was denied by Revansidha and others.

During trial, in all the prosecution examined 13 witnesses. Out of them, 7 namely Mallikarjun Patil, Sharanappa, Chanappa Bableshwar, Muktabai, Basavraj Kumbhar, Papi alias Snehlata and Revansidha alias Vilas, P.Ws. 4, 5, 7, 8, 9, 10 and 11 respectively were examined as eye-witnesses. In defence, 110 witness was examined. The learned trial Judge in para 49 of the Judgment, held the defence suggestion that the accused was not carrying a knife and that it was Revansidha who had brought a knife and after he had caused injuries to the accused with it, the accused snatched it and in exercise of right of private defence of person, inflicted blows on Revansidha to be true. However, the trial Judge felt that there was no justification on the part of the accused to inflict injuries on Annapurna, Muktabai and Papi. Perhaps he also felt that he even

exceeded the right of private defence of person in relation to causing injuries to Revansidha.

In such a situation, the trial Judge felt that the accused had committed offences u/s 324, 304 Part 2 and 326 IPC. From the Judgment of the Trial Court, it appears that the offence u/s 304 Part 2 IPC was in respect of the injuries caused to Annapurna, that u/s 326 IPC was in relation to the Injuries caused to Muktabai and Papi and that u/s 324 IPC was in relation to injuries caused to Revansidha.

As mentioned in para 2, the appellant has assailed his convictions and sentences by preferring Criminal Appeal No. 62 of 1985. The State of Maharashtra has impugned the acquittal of the appellant for offence punishable u/s 302 IPC by preferring Criminal Appeal No. 184 of 1985; the State of Maharashtra has filed Criminal Appeal No. 185 of 1985 for enhancement of sentence of the appellant; and while admitting Criminal Appeal No. 62 of 1985, this Court issued suo motu notice to the appellant to show cause as to why his sentence be not enhanced and from this suo motu notice arises Criminal Revision Application No. 77 of 1985.

9. We have heard the learned Counsel for the parties. We have also perused the depositions of the prosecution witnesses; the material exhibits tendered and proved by the prosecution; the statement of the appellant recorded u/s 313 Cr. P.C.; and the impugned Judgment, After giving our anxious consideration to the matter, we are implicitly satisfied that whereas Criminal Appeal No. 62 of 1985 deserves to be partly allowed, Criminal Appeals No. 184 of 1985 and 185 of 1985 and Criminal Revision Application No. 77 of 1985 warrant to be dismissed.

10. Since the time, date and place of incident is admitted to both appellant and the prosecution, the controversy lies in a very narrow ambit namely whether the learned trial Judge was justified in convicting the appellant for exceeding the right of private defence of person in relation to Revansidha and in causing injuries to Annapurna, Muktabai and Papi. Our answer is in the affirmative as regards his causing of injuries to Annapurna, Muktabai and Papi but, in the negative as far as exceeding the right of private defence is concerned. After perusing the entire evidence, in our view, the trial Judge was right in reaching the conclusion that it was Revansidha who first assaulted the appellant with a knife and he snatched the same from him and assaulted him, Annapurna, Muktabai and Papi with it. As mentioned above, the appellant had sustained 3 incised wounds on his person which were medically examined the same day at 12.25 p.m. by P.W. 2 Dr. Suresh Rankhamb. Since the decision of this appeal primarily rests on appreciation of the injuries of the appellant, we intend having a second look at them. His injuries are as under :-

- (1) Incised wound 2 1/2 " x 1/2" skin deep on the face, left side on lamellar bone.
- (2) Incised wound 1 1/2 "x 1/2" skin deep on chin;
- (3) Incised wound 2 1/2 "x 1/2" tendon deep on left hand at base of thumb.

A perusal of these injuries would show that all of them were incised wounds and the first two were on vital parts of body, face and chin. It is true that although they were simple injuries but, no suggestion has been put to the doctor whether they could be manufactured or were self-inflicted. In our view, it is most unlikely that the appellant would have dared to manufacture himself or have got manufactured incised wounds on vital parts of his body like face and chin, for in that process he could have got more than what he bargained for. In the act of having got inflicted or himself inflicting incised wounds on vital parts of his person, there was even danger of losing his life. The golden rule in criminal cases is to prefer the probable to the possible and in our view, it is not probable that the appellant would have either himself inflicted or got inflicted these incised wounds.

We do not have even an iota of doubt that they were caused during the incident. In this connection, it would be pertinent to refer to the cross-examination of P.W. 4 Mallikarjun Patil who in para 8 has stated "When I went to the temple, I say that the accused had injuries on his chin and below the eye. He had injury also on his hand." In the teeth of this evidence it has to be held that the appellant suffered injuries during the course of the incident. It is well-settled that where the accused suffers injuries during the course of the incident, the prosecution is under an obligation to explain them and the failure on its part to do so, may result in the Court drawing an inference that the prosecution is suppressing the genesis of the incident. See para 11 in the case of Lakshmi Singh and Others Vs. State of Bihar, . In the instant case, the evidence of some of the eye-witnesses only explains incised wound suffered by the appellant on his hand. None of the eye-witnesses have explained the incised wounds sustained by the appellant on his face and chin.

11. We are not impressed by the submission of Mr. R.Y. Mirza, Additional Public Prosecutor that since in his statement u/s 313 Cr. P.C. the appellant only stated that he had received injury on his hand and made no mention of receiving injuries on face and chin it per se appears that the said injuries were manufactured.

The submission of Mr. R.Y. Mirza was attractive on the first blush but becomes unworthy of acceptance on the face of definite evidence of Mallikarjun Patil, referred to above. The said witness has not been declared hostile by the prosecution. It is well-settled that the prosecution swims or sinks, depending on the strength or on the weaknesses of its case. It does not thrive on the frailties of defence.

12. We wish to emphasise that if the benefit of plea of right of private defence is available on the basis of the prosecution evidence, the said benefit cannot be merely denied because, the statement of the accused is not in tune and harmony from what has emerged in favour of the accused from the evidence of a prosecution evidence. This is because the burden on accused, is only to prove his plea of right of private defence by preponderance of probabilities and once that

burden is discharged, in view of the admissions emerging from the prosecution evidence, it hardly matters if a similar admission is not made by the accused in his statement u/s 313 Cr. P.C.

13. We feel that in such a situation, the trial Judge was correct in reaching the conclusion that it was Revansidha P.W. 11 who assaulted the appellant first and the appellant assaulted him and other persons thereafter with a knife which he snatched from him. We also feel that the trial Judge was correct in convicting the appellant for offences punishable u/s 304 Part 2 and 326 IPC but, in our view, the trial Judge should not have convicted him u/s 324 IPC for exceeding the right of private defence in relation to the injuries caused to Revansidha.

It should be borne in mind that the right of private defence of person cannot be weighed in golden scales and the person who is victim of aggression cannot be expected to weigh each blow which he gives. We feel that since the appellant himself had received three incised wounds, out of which two were on vital parts of body, he was entitled to inflict eight injuries on the person of Revansidha. In such matters, a liberal view as against a narrow one, should be taken.

14. But, inspite of adopting a liberal approach in respect of the injuries pertaining to Revansidha, by no force of logic, can the knife assault by the appellant on Annapurna, Muktabai and Papi be justified. As seen above, each of the said persons had sustained grievous injuries involving severe internal damage and such was the severity of the injuries that Muktabai and Papi had to be operated upon by a surgical team under the supervision of Dr. J. V. Deshmane P.W. 6. The evidence of Dr. Deshmane is that operation was the only way out to save their lives. In our view, there was no nexus between even a semblance of the right of private defence of person and the infliction of the injuries on the said persons.

In this connection, it would be pertinent to refer to the provisions contained in Section 102 of IPC which are to the effect that the right of private defence of person commences as soon as reasonable apprehension to ones person from an attempt or threat to commit an offence commences and continues so long as such apprehension lasts. The evidence on record does not show that Annapurna, Muktabai and Papi were armed with any weapon. In that view of the matter, the accused had no apprehension from them. In such a situation, when he inflicted grievous injuries on all three of them, he had no right of private defence of person. It should be borne in mind that the right of private defence of person is a preventive and not punitive right. In our Judgment, the moment the appellant assaulted them, his act became punitive and would not receive protection under the umbrella of right of private defence of person.

For the said reasons, we find no merit in Mr. Mane"s submission that the right of private defence of person which had accrued to the accused also extended to causing injuries inflicted by him on the said persons.

15. We feel that the trial Judge was justified in convicting the appellant for offences punishable under Sections 304 Part 2 IPC and 326 IPC. We do not find

any merit in Mr. Mane's submission that the sentence awarded to him is excessive and the ends of justice would be squarely met if his jail sentence is reduced to the period already undergone and in lieu thereof, some fine is imposed. In our Judgment, considering the enormous internal damage which accompanied the solitary injury suffered by each of the victims (other than Revansidha) the sentence awarded to the appellant on both the counts, is wholly commensurate with the gravity of the act committed by him and calls for no interference. We feel it would be travesty of justice if in cases of the present type, where so much high-handedness is involved, if after serving a nominal jail sentence, on payment of fine, the accused is allowed to go scot-free.

16. This brings us to Criminal Appeal No. 184 of 1985 which has been preferred by the State of Maharashtra against the acquittal of the respondent accused for offence u/s 302 IPC.

17. Mr. R.Y. Mirza, learned Additional Public Prosecutor strenuously urged that since the evidence of the Autopsy Surgeon Dr. Ashok Kanki P.W. 1 is that the injury sustained by Annapurna was sufficient to cause instantaneous death, the case against the accused would fall in the ambit of clause thirdly of Section 300 IPC and his conviction u/s 304 Part 2 IPC be set aside and he be convicted u/s 302 IPC. Mr. Mirza, urged that there was nothing to show that the accused did not intend inflicting the said injury on Annapurna.

Once again, we find the submission canvassed by Mr. Mirza to be very attractive on the first blush but when we deliberated on the overall facts, and the situation in which the accused inflicted a solitary knife blow on Annapurna, we thought that this was a case wherein the ratio laid down in para 15 in the case of Jawahar Lal and Another Vs. State of Punjab, would apply. In that case, in the said para, the Supreme Court held that merely because the blow lands on certain part of body, divorced from the circumstances in which it was inflicted, would not be sufficient to hold that it was intended to be inflicted on that part of the body. We feel that in the thick of the situation, the appellant who was the victim of aggression lost all sense of proportion and inflicted a solitary knife blow on Annapurna. In such a situation, we feel that it would not be proper to hold that he intended inflicting the said blow.

It should be borne in mind that clause thirdly would only have application where there is an intention to inflict both external and internal injuries. In the instant case, as observed above, in our view, there was no intention to inflict the external injury which resulted in the internal injury.

In this view of the matter, the learned trial Judge was justified in convicting the appellant for the offence u/s 304 Part 2 IPC in relation to the injuries on the deceased Annapurna.

18. This brings us to Criminal Appeal No. 185 of 1985 and Criminal Revision Application No. 77 of 1985 which pertain to enhancement of the sentence of the respondent accused. In our view, there is no merit in them. The Supreme Court

in para 15 of the decision in *Bed Raj Vs. The State of Uttar Pradesh*, has thus observed :-

(15) A question of a sentence is a matter of discretion and it is well-settled that when discretion has been properly exercised along accepted judicial lines, an Appellate Court should not interfere to the detriment of an accused person except for very strong reasons which must be disclosed on the face of Judgment.

In a matter of enhancement, there should not be interference when the sentence passed imposes substantial punishment. Interference is only called for when it is manifestly inadequate.

A perusal of the said para would show that the sentence should only be enhanced if it is manifestly inadequate. In our view, a sentence of five years R.I. for offence u/s 304 Part 2 IPC and that of three years R.I. for offence u/s 326 IPC coupled with a fine of Rs. 300/- in default three months R.I. in the facts of this case, cannot be castigated as manifestly inadequate.

In such a situation, we feel that the sentence awarded to the respondent-accused was adequate and does not deserve to be enhanced.

19. In the result :

(A) Criminal Appeal No. 62 of 1985 is partly allowed. Although, we maintain the conviction and sentence of the appellant for offences punishable under Sections 304 Part 2 IPC and 326 IPC, but we acquit him for the offence u/s 324 IPC and set aside his conviction and sentence thereunder. In case he has paid the fine, u/s 324 IPC, it shall stand refunded to him.

The appellant is on bail. He shall be taken into custody forthwith to serve out his sentences.

(B) Criminal Appeal No. 184 of 1985 preferred by the State of Maharashtra against acquittal of respondent-accused Subhash Mallikarjun Menase for offence u/s 302 IPC is dismissed;

(C) Criminal Appeal No. 185 of 1985 preferred by the State of Maharashtra for enhancement of sentence of the respondent, accused is also dismissed;

(D) Criminal Revision Application No. 77 of 1985 arising out of suo moto notice issued by this Court for enhancement of sentence of the respondent-accused is also dismissed. The said notice is discharged.

In case a certified copy of this Judgment is applied for, by the Counsel of the parties, the same shall be issued within four weeks from today.