

(2018) 08 BOM CK 0108
In the Bombay High Court
Case No : Criminal Appeal No. 470 of 2007

Suresh @ Babu @ Shetti S/O Shamrao Gode (In Jail)	APPELLANT
Vs	
State Of Mah. Thru. P.S.O. Katol	RESPONDENT

Date of Decision : 24-08-2018

Acts Referred:

Indian Penal Code, 1860 — Section 100, 300, 302, 304I, 307
Code of Criminal Procedure, 1973 — Section 313

Citation : (2018) 08 BOM CK 0108

Hon'ble Judges : A.S. CHANDURKAR, J.

Bench : Single Bench

Advocate : E.W. Nawab, K.R. Lule

Final Decision : Partly Allowed

Judgement

1. The appellant who stands convicted for having committed an offence punishable under Sections 307 and 304 Part 1 of the Indian Penal Code (for short, 'the Penal Code') by virtue of judgment dated 28.03.2007 in Sessions Trial No.293 of 2006 has challenged his conviction.Â The appellant has been sentenced to suffer rigorous imprisonment for a period of seven years for the offence punishable under Section 304 Part 1 of the Penal Code and to pay fine of Rupees One Thousand.Â He has been further sentenced to undergo rigorous imprisonment for a period of five years for the offence punishable under Section 307 of Penal Code and to pay fine of Rupees Five Hundred.Â The sentences have been directed to run concurrently.
2. The case of the prosecution as can be gathered is that the accused as well as Vijay Sadmake and Anwar Pathan were residing in the same locality.Â Anwar Pathan had lent an amount of Rupees Twenty Thousand to the

accused for opening a hotel. The accused had repaid the sum of Rupees Three Thousand and had assured that the balance amount would be paid on the day of Dhulivandan. On that day, said Anwar Pathan had been to Galpura with his friends and they all were returning back at about 7.00 p.m. Vijay Sadmake met them near the market and Anwar Pathan asked him to accompany them for a cup of tea. They had tea at the tea stall of one Sunil Shrivastava. The hotel of the accused was near the said tea stall. While Vijay Sadmake was paying the bill, accused came from behind a tree and gave a blow on the chest of Vijay Sadmake, whereby he fell down. He gave him another blow and then turned towards Anwar Pathan also causing injuries to him. Vishnu Yadav caught hold of the accused and Anwar Pathan seized the Gupti from the hands of the accused. He was again injured in that process. Other people in the market intervened after which the accused went towards his hotel. Anwar Pathan was taken to the rural hospital while Vijay Sadmake who was also taken to the hospital was declared brought dead. On the basis of the report lodged by Anwar Pathan, offence came to be registered. The accused was arrested and his clothes were also seized. He was referred to the medical hospital and it was found that he had suffered simple injuries.

In view of the darkness, the panchnama was conducted on the next day. After completion of investigation, the accused came to be charged for the offence punishable under Sections 302 and 307 of the Penal Code. The accused did not plead guilty and was accordingly tried. At the conclusion of the trial, the accused was convicted and sentenced in the manner stated hereinabove.

3. Shri E.W. Nawab, learned counsel for the appellant, submitted that the prosecution had failed to prove beyond reasonable doubt that the accused committed offences punishable under Sections 307 and 304 Part 1 of the Penal Code. It was submitted that there were various material discrepancies in the case of the prosecution and the actual evidence that was brought on record. While it was the case of the prosecution that the incident had occurred in the tea stall of Sunil Shrivastava, there were no blood stains found at the said tea stall. They were in fact found on the road at a distance of about twenty feet. Significantly, said Sunil Shrivastava was

not examined. It was further submitted that the accused was running 'Mohan Tea Stall' and it was found that considerable damage was done to the material kept at the said tea stall. The handle of the Gupti was seized from the tea stall of the accused when it was not the case of the prosecution that any incident occurred there. The handle of the Gupti had not been sent for verifying the finger prints thereon. Further, the prosecution had failed to explain the injuries that were suffered by the accused which was confirmed in his medical examination. It was then submitted that the accused had taken the plea of exercise of his right of private defence which could be seen from the sequence of events and the evidence on record. According to him, it was not possible for the accused who was alone to have approached the group of the informant with an attempt to assault any one of them. On the contrary, when the accused was at his tea stall, said Anwar Pathan alongwith Vijay Sadmake and others had come there demanding the balance amount that was to be repaid by the accused. They caused damage to the material that was kept in the tea stall and an attempt was made to assault the accused with the Gupti which was in the hands of Vishnu Yadav. In an attempt to save himself, the accused had caught hold of the blade of the Gupti which therefore came out of its handle, thus causing injuries to the hand of the accused. He was then assaulted with wooden sticks which explained the injuries on his back. While exercising his right of private defence, the injuries were caused to Vijay Sadmake which turned out to be fatal. It was submitted that the informant and his colleagues were the aggressors and the accused was their target. The accused had also examined Abdul Rashid as his witness and from his deposition it was clear that it was the accused who had been assaulted by the said group. It was thus submitted that the learned Sessions Judge despite noticing various inconsistencies in the case of the prosecution proceeded to convict the accused. Since the spot of occurrence of the incident was not duly proved and the material seized was from a different place, the case of the prosecution was liable to be disbelieved. In support of his submissions, the learned counsel placed reliance on the decisions in Kashinath Baban Palkar Versus The State of Maharashtra [1996 (1) Bom.C.R. 33], Meharaj Singh (L/Nk.) Versus State of U.P. [(1994) SCC (Cri) 1390], Nabia Bai Versus State of

Madhya Pradesh [1992 Cri.L.J. 526], Ram Swarup & Others Versus State of Haryana [1993 Cri.L.J. 3540], Moti Singh Versus State of

Maharashtra [(2003) SCC (Cri) 1226] and Mohd. Ramzani Versus State of Delhi [1980 Cri.L.J. 1010].

4. Shri K.R. Lule, learned Additional Public Prosecutor for the State, supported the judgment of the Sessions Court. It was submitted that Vijay

Sadmake died on account of injuries caused to his vital organs as could be seen from the Post Mortem report. There was a distinction between an

attempt to exercise the right of private defence and assault with a view to kill. The injuries were caused due to the assault on the part of the

accused and therefore, the conviction as recorded by the Sessions Court did not deserve to be interfered with.

5. I have heard the learned counsel for the parties at length and I have also perused the records of the case. The prosecution examined PW1?

Anwar Pathan at Exhibit 23. This witness has deposed that he had lent an amount of Rs.20,000 to the accused about three months prior to the

incident, out of which amount Rupees Three Thousand was refunded and the balance amount was to be repaid on the day of Dhulivandan. He

further stated that on 26.03.2005, he along with friends while returning from the Fair had gone to the tea stall of Sunil Shrivastava. The accused

had come from behind the Kavit tree and had given blows to Vijay Sadmake with his Gupti. In that process, the said witness also received

injuries. According to him, the accused assaulted Vijay Sadmake because he had a love affair with the sister of the accused. In his

crossexamination, this witness has stated that on the date of the incident, the accused was at his tea stall. There were various stalls between the

teastall of Sunil Shrivastava and the tea stall of the accused. That distance was approximately hundred feet. He admitted that in his report, he

had not stated that the deceased had a love affair with the sister of the accused. He denied the suggestions put to him on the line of exercise of

private defence by the accused.

6. The prosecution has then examined Vishnu Yadav as PW3 below Exhibit 34. He has deposed that the incident took place in front of the shop of

Sunil Shrivastava while he and the other members of the group were having tea. He has deposed that the accused came there carrying the Gupti

and gave a blow on the chest of the deceased. In his cross-examination, he has stated that the deceased as well as PW1 Anwar Pathan received

bleeding injuries and blood was at the spot of incident. He denied the suggestion that on the date of the incident, he had gone to the Fair as stated by the PW1.

7. PW4 Mohan Gajbhiye has also been examined. He has stated that he was also the part of the group that went along with PW1. He has

deposed about the manner in which the accused came from behind the tree and assaulted the deceased. He has further stated that PW1 had caught

hold of accused and had taken him towards the shop of Jamuna Yadav. He has also named the persons who came from the direction of the shop of

the accused and who had separated PW1 and the accused. However, this aspect is not stated by PW1.

8. PW5 Satish has been examined at Exhibit 50. He has acted as the panch witness while preparing the spot panchnama. He has however

admitted that no blood stains were found in the tea stall of Sunil Shrivastava but they were found on the tar road twenty feet away from the tea

stall of Sunil Shrivastava. Some Chappals as well as a wooden pipe were found in front of the tea stall of the accused. He identified the same as

the handle of the Gupti. He then stated that he had seen the incident and that PW1 and other members did not come to the tea stall of Sunil

Shrivastava. He saw the deceased as well as PW1 chasing the accused with sticks and giving a blow on the back of the accused. He stated that

his statement was not recorded by the police and he was disclosing the same for the first time in Court.

9. PW7 is the Investigating Officer who has been examined at Exhibit 66. He has deposed that he was informed by the Head Constable that the

accused was sitting at the house of Rashid after the incident and he went there and caught hold of him. He has stated that during the search of the

accused, he found a Gupti and blood stains on his clothes. He also noticed abrasions and hence he referred the accused to the rural hospital. He

also stated that he found the handle of the Gupti which was kept in front of the hotel of the accused. In his cross-examination, he admitted that no

blood stains were found at the spot of the incident, i.e. the tea stall of Sunil Shrivastava. He further admitted that the handle of the Gupti was not

sent to the Finger Print Expert. He did not make any enquiry with the sister of the accused as regards any love affair between her and the deceased.

10. The report of the Chemical Analyzer is at Exhibit 85 which indicates that there were no blood stains on the Gupti. However, the clothes of the accused had blood stains.

11. The accused in support of his defence examined Abdul Rashid at Exhibit 93. He has deposed that when he was standing at his shop

Rangpanchami day, the accused had come running in a frightened condition with a blade of Gupti in his hand. He had received injuries to his right

middle finger and he narrated the incident that had occurred. This witness accompanied the accused to the Police Station and informed them about the

incident. He has stated that the accused came to his shop between 7.45 p.m. to 8.00 p.m. after which they had gone to the Police Station. He

denied suggestions given to him in his cross examination.

12. The accused gave his additional statement under Section 313 of the Code of Criminal Procedure, 1973. According to the accused, PW1 was

repeatedly demanding the balance amount of Rs.17,000/ from him. On the day of the incident, said PW1 alongwith the deceased and others had

come to his tea stall with the intention of killing him. Vishnu Yadav was having a Gupti while PW1 and the deceased were armed with sticks.

They threw the articles in his tea stall causing damage after which Vishnu Yadav tried to deliver a blow of the Gupti on the accused. He caught

the Gupti by his hands and thus received injuries on his finger. The blade came to his hand while the handle remained in the hand of Vishnu Yadav.

He therefore, threw it there. The deceased and PW1 rushed on the accused and delivered blows with sticks. The accused therefore in his

defence delivered a blow with the blade of the Gupti. He stated that this was done to save himself. He then went to the house of Abdul Rashid

and informed him about the incident. He had also stated that he had lodged a report against PW1 and others but as PW1 had good relations with the

Police Officers, it was the accused who was implicated.

13. The Post Mortem report at Exhibit 39 indicates that the deceased received two stab wounds, two incise wounds and other abrasions. The

cause of death was injury being caused to vital organs. It is not disputed that

the death of Vijay Sadmake was homicidal. While it is the case of the prosecution that it was the accused who had come and assaulted the deceased with a Gupti while PW1 and his group were having tea at the tea stall of Sunil Shrivastava, the defence as raised is that PW1 and his group had come to the tea stall of the accused for recovering the balance amount and in that process had first caused damage in his tea stall and one of the members of the group, viz. Vishnu Yadav, had tried to assault the accused with Gupti and in that process while trying to defend himself, the accused had caused injuries to the deceased and PW1. It would thus be necessary to consider the spot panchnama at Exhibit 51. The same indicates that PW1, deceased and his friends were sitting at the tea stall of Sunil Shrivastava having tea. There was a big tree near the said hotel. The spot of occurrence is shown as situated between the tea stall of Sunil Shrivastava and a Paan Center. The tree was found at a distance of about seventeen feet from the spot of occurrence. Blood stains were found on the tar road that was in front of the line of shops. The hotel of the accused named as 'Mohan Tea and Pan Center' was inspected. A glass jar was seen in broken condition and pieces of glass were spread up to ten feet. The sweets kept in the jar were seen fallen. A wooden pipe was found by the side of the table and it was the hilt of sword stick Gupti that was used. At a distance of about fifteen feet from the shop of Sunil Shrivastava five Chappals were found.

14. The prosecution witnesses are consistent in their statements that while they were having tea at the tea stall of Sunil Shrivastava, the accused had come there along with the Gupti and had sought to attack PW1 and the deceased. However, in the light of injuries received by the deceased as well as PW1, no blood stains were found at the tea stall of Sunil Shrivastava. This is clear from the spot panchnama at Exhibit 51. PW7 Investigating Officer has also admitted that no blood stains were found at the spot of the incident as shown by the prosecution and that blood stains were found on the tar road at a distance of about twenty feet away from the spot of the incident. Thus, there is a doubt raised with regard to the actual spot of the incident in the light of aforesaid material. Another aspect that cannot be ignored is that the prosecution failed to examine the owner of the tea stall, Sunil Shrivastava. He was the best possible witness or even an eye

witness to the incident if the same according to the prosecution occurred at the tea stall of Sunil Shrivastava.

The learned Sessions Judge in paragraph 18 of the judgment while considering this piece of evidence has also found that the spot of incident has not been clearly proved by the prosecution. The observations in paragraph 10 of the decision in Kashinath Baban Palkar (supra) and paragraph 13 of the decision in Meharaj Singh (supra) support the contentions of the appellant.

15. Another aspect to be considered is the seizure of the handle of the Gupti from the tea stall of the accused. According to the prosecution, the incident in question took place in the tea stall of Sunil Shrivastava where the accused assaulted deceased Vijay Sadmake and PW1. None of the prosecution witnesses has stated that the accused took away the Gupti and placed the same in his own hotel. On the contrary, according to the prosecution witnesses, the accused was overpowered at the spot of the incident itself. The spot panchnama further indicates that considerable material that was kept in the tea stall of the accused had been found broken and there is no explanation from the prosecution as to how that damage was caused. If the accused had come to the tea stall of Sunil Shrivastava and the incident in question had taken place there, there is no explanation as to how the material kept in the tea stall of the accused was damaged. This again raises a doubt about the manner in which the incident has occurred. In fact, the learned Sessions Judge has also observed that PW1, PW3 and PW4 had suppressed the genesis of the occurrence. Moreover, the handle of the said Gupti was not sent for obtaining the opinion of the Finger Print Expert as the same could have thrown light on the person holding the same.

16. It cannot be lost sight of that PW1 was alongwith a group of six to seven friends. The accused on the other hand was alone. It is difficult to comprehend that a single person would attempt to assault one person from the group of six to seven persons. On the other hand, it can be easily visualized that as PW1 had to recover an amount of Rupees Seventeen Thousand from the accused, he alongwith the group of six persons had gone to the tea stall of the accused to demand the said amount. The damage caused to the material in the tea stall of the accused is also a pointer to that aspect which has gone unexplained by the prosecution. From the material on

record, it can be concluded that the group of PW1 which included the deceased were the aggressors.

17. Defence has been raised by the accused with regard to the exercise of right of private defence.Â In that regard, it has to be noted that such right of private defence is duly recognized by Section 100 of the Penal Code and the observations in paragraph 10 of the decision in Moti Singh (supra) would be relevant.Â The said observations read as under:â??If the evidence adduced by the prosecution would indicate that the accused were put under a situation where they could reasonably have apprehended grievous hurt even to one of them it would be inequitable to deny the right of private defence to the accused merely on the ground that he has adopted a different plea during the trial.Â The crucial factor is not what the accused pleaded, but whether the accused had the cause to reasonably apprehend such danger.Â A different plea adopted by the accused would not foreclose the judicial consideration on the existence of such a situation.â??

18. It is further well settled that when faced with such situation, it is not possible to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.Â The principles in that regard as laid down in Darshan SinghÂ VersusÂ State of Maharashtra & Another [(2010) 2 SCC 333] required to be considered.Â It is to be noted that the accused received injuries on his person which have not been duly explained by the prosecution.Â As per the medical report at Exhibits 68 and 65, the accused had a linear abrasion on his back and also an abrasion over his palm.Â The injuries were simple in nature.Â Similarly, PW1 also received incise wounds said to be caused by a sharp object.Â The defence as raised that PW3Â Vishnu Yadav had come with a Gupti and had attempted to assault the accused in which process, the accused caught hold of the blade due to which he sustained injury on his finger appears probable.Â According to the accused, in that process, the blade came into his hand while the swordÂ? stick remained in the hand of PW3.Â Thereafter the accused tried to escape towards the teaÂ stall of Sunil Shrivastava and while doing so, the incident occurred on the road.Â The deceased as well as PW1 sought to assault the accused with sticks and in that process, the accused delivered the blow with the blade of Gupti.Â Injuries were also caused to PW1.Â It can thus be seen that in the exercise of the right of private defence, the

accused caused injuries which turned out to be fatal insofar as the deceased is concerned. It is to be noted that there were two stab wounds on the body of the deceased on his vital organs. Though it was urged by the appellant by relying upon the decisions in Mohd. Ramzani and Nabia Bai (supra) that the accused acted within the limits of his defence while repelling the assault on him, considering the nature of injuries as caused to the deceased that contention cannot be accepted. It is thus a case of exceeding the right of private defence.

19. Considering the aforesaid material on record, it is found that the accused in exercise of the right of private defence, exceeded the same. The case would fall in Exception 2 to Section 300 of the Penal Code. Considering the nature of injuries suffered by the deceased, the accused is liable to be convicted under Section 304 Part 1 of the Penal Code. The evidence on record is not sufficient to hold the accused guilty for the offence punishable under Section 307 of the Penal Code. There is no evidence brought on record by the prosecution that the accused had any intention to attempt to murder the deceased. The conviction of the appellant under Section 307 of the Penal Code therefore cannot be sustained.

20. Considering the nature of evidence and the background in which the incident had occurred, appropriate sentence deserves to be imposed on the accused. The accused has been sentenced to undergo rigorous imprisonment for a period of seven years for the offence punishable under Section 304 Part 1 of the Penal Code. It is found that the accused was aged about 22 years when the incident occurred. He has no criminal background and it has been found that he was subjected to sudden assault by PW1 and his group. As it has been found he had exercised the right of private defence but had exceeded the same, a sentence for a period of four years would serve the ends of justice.

21. Accordingly, the following order is passed.

(I) The appellant is acquitted of the offence punishable under Section 307 of the Penal Code.

(II) His conviction under Section 304 Part 1 of the Penal Code is maintained. However, the sentence is reduced to rigorous imprisonment for a period of four years with fine of Rupees One Thousand and in default thereof, to undergo further rigorous imprisonment for a period of two months.

(III) The period spent in jail as an undertrial shall be taken into consideration and necessary set-off be given in that regard.

(IV) The property seized be destroyed after period of further appeal expires.

(V) The Appellant is granted time of eight weeks to surrender and serve the remaining sentence.

22. The Criminal Appeal is partly allowed in the aforesaid terms.