

(1999) 09 KAR CK 0065
In the Karnataka High Court
Case No : Criminal Appeal No. 263 of 1994

The State of Karnataka

APPELLANT

Vs

Akbarsab Ameensab Umachagi and Others

RESPONDENT

Date of Decision : 03-09-1999

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 304 (II), 324, 34

Citation : (2000) CriLJ 5036

Hon'ble Judges : N.S. Veerabhadraiah, J; M.F. Saldanha, J

Bench : Division Bench

Advocate : B.V. Pinto, Addl. S.P.P, for the Appellant; Tomy Sebastian and Associates, for the Respondent

Final Decision : Allowed

Judgement

M.F. Saldanha, J.—This appeal has been preferred by the State of Karnataka assailing the acquittal of the accused persons in Sessions Case No. 130/1990. Before dealing with the facts and the law, we need to clarify that even though there were 3 accused before the trial Court that the original accused No. 1 has died and therefore, in this appeal we are confining the consideration to original accused Nos. 2 and 3 only. Briefly stated, the prosecution case was that on 7-8-1990 at about 9 p.m. at Korageri lane in Harti village within the limits of Gadag Rural Police Station that the accused persons acting in furtherance of their common intention had committed the murder of Channappa Bandi Waddar and that in the course of the same transaction they had caused an injury to his son P.W. 4 Basappa. It is alleged that there was some argument between P.W. 5 and the accused earlier to the incident over the distribution of some relief material to persons who had been involved in a riot. The argument culminated in P.W. 5 and the accused grappling with each other and the deceased is supposed to have come on the scene in an attempt to separate these persons. The problem virtually travelled some distance close to the house of the accused and it is alleged that accused No. 2 came with an axe and aimed a blow at the deceased

whereupon his son P.W. 4 tried to ward off the blow which he was successful in doing because the axe landed on his hand and he suffered a relatively minor injury. P.W. 4 managed to get hold of the axe from accused No. 2 and just at that time it is alleged that accused No. 3 stabbed the deceased who immediately fell down as a result of the injury and died very shortly thereafter. It transpired that accused No. 1 appears to have gone to the Gadag Rural Police station and conveyed some information to the police constable who in turn conveyed the same to the Sub Inspector P.W. 18 who came to the spot and recorded the complaint and thereafter proceeded with the investigation. In the meanwhile, accused No. 1 had been taken to the hospital for medical attention and was kept there until the next day. The investigating officer P.W. 17 has pointed out that pursuant to the statements made by the accused that the weapon in question which is MO. 2 axe and the knife MO. 16 were recovered at their instance. On completion of the investigation, the accused were put up for trial and the learned trial Judge after a consideration of the evidence of P.Ws. 1 to 18 and Exs. P. 1 to P. 23 and MOs. 1 to 16 and Exs. D. 1 and D. 2 recorded the conclusion that the prosecution had failed to establish the charges and acquitted the accused. The present appeal is directed against this decision.

2. At the hearing of the appeal, the S.P.P. initially took us through the judgment of the lower Court, the reason being that this is an appeal against acquittal and it has first got to be demonstrated by the prosecutor that interference is necessary by this Court. We find on a perusal of the judgment that the learned trial Judge has virtually rejected the prosecution evidence from beginning to end and that it does appear to us rather strange that virtually nothing has been accepted by the trial Court. This is a case in which there are as many as seven virtual eye witnesses and having very carefully reviewed the entire record and assessed the quality of their evidence very meticulously we find that there is virtually no conceivable ground on which any Court could have rejected all this evidence despite which it has been done. It is rather unfortunate that this had happened because it is very necessary for criminal Courts to ensure that justice in the true sense of the term is done. While there can be no doubt about the fact that on the ground of well defined principles of appreciation that if the evidence is unsatisfactory or if the evidence is weak or a conviction is not permissible or is not warranted according to law that the Criminal Courts must acquit the accused; it is equally true that in cases where the evidence is more than sufficient where the evidence is credible, where the charge is brought home and where on the basis of all acceptable canons of criminal jurisprudence a conviction is the only correct verdict, that in such cases the Court must be extremely careful about ensuring that there is no miscarriage of justice. This is not the only instance where we are constrained to observe that this has happened which is why it becomes necessary for us to reiterate once again what the law and propriety demand of the trial Court. Suffice it to say that after a perusal of the judgment, we are of the view that the case does require a very serious reconsideration and we have therefore heard the appeal on merits.

3. The prosecution evidence rests heavily on the testimony of P.W. 4 Basappa. We commence with this witness for a special reason in so far as even though he is the first of the seven eye witnesses in order of sequence, what is more important is that he is the son of the deceased and the person who had narrated the entire incident. According to him, even though his party and the accused are on cordial terms in so far as there is no hostility or enmity between them that some argument emanated over the distribution of certain provisions to the riot victims which was resented by the accused, the argument took a physical turn and P.W. 5 Hasanappa and the accused No. 1 were grappling with such other and the deceased tried to play the role of a peacemaker. The matter did not subside immediately and when they reached in front of the house of the accused, accused No. 2 aimed an axe blow at the father of P.W. 4 which P.W. 4 was able to ward off as a result of which he sustained an injury on his thumb. According to him, he snatched the axe from P.W. 2 and threw it down but he states that in the meanwhile P.W. 3 stabbed his father with a knife as a result of which his father collapsed. He was bleeding profusely and he died at that place itself. The witness has more categorically stated that there was enough of light when the incident took place as the streetlight was burning and he has also identified the three accused as they were known to each other. The witness has been cross-examined at some length but as far as his evidence concerning the incident goes, the version remains unshaken. Nothing has been brought out on the basis of which his evidence can be discredited.

4. Next we come to the evidence of P.W. 5 Hassan Sub. He states that the quarrel emanated between himself and accused No. 1 over the distribution of the provisions to the riot victims and that because of the fact that they were grappling with each other the deceased came there and tried to separate them. As far as the main incident is concerned he has set out a version that is identical to that which P.W. 4 has deposed to namely that accused No. 2 was armed with an axe, he aimed a blow at the deceased, that the blow ultimately landed on the thumb of P.W. 4 and that it was accused No. 3 who stabbed the deceased with a knife. P.W. 6 Fakeerappa is also an eyewitness and he speaks of the incident on identical terms as P.Ws. 4 and 5. We need to record here that both P.Ws. 4 and 5 like P.W. 4 have been cross-examined but neither has their version been shattered nor has anything been brought on record on the basis of which their evidence could be discredited.

5. We then have the evidence of two more witnesses P.W. 7 Durgappa and P.W. 8 Doddapundappa. Though the learned trial Judge has virtually rejected their evidence on the ground that they are hostile, we have perused their evidence and find that except for the fact that they disclaim knowledge with regard to the stabbing part of the incident that their evidence is perfectly valid with regard to the crucial aspect namely the presence of accused Nos. 1 to 3 and the roles played by them.

6. There are two more eyewitnesses in this case namely P.W. 9 Neelappa and

P.W. 11 Fakirappa both of whom are again eyewitnesses. A perusal of their evidence indicates that their statements totally and fully corroborate the versions set out by P.Ws. 4, 5 and 6. Their evidence indicates the presence of accused Nos. 1 to 3, the fact that accused No. 2 was armed with an axe and " the fact that he caused injury to P.W. 3 and the fact that accused No. 3 was the person who stabbed the deceased as a result of which he died is also fully borne out from the evidence. Again, the defence has not succeeded in either discrediting these witnesses or in establishing that their evidence should not be accepted by the Court.

7. On a re-appreciation of this evidence which is really the bedrock of the prosecution case, we find that the version set out by these witnesses is absolutely consistent. It was sought to be contended before us on behalf of the respondents that these persons belong to the group of the deceased and that consequently, they are hostile to the accused and that the Court must therefore look for independent evidence. We are unable to accept any such argument in the presence of evidence which is absolutely reliable and more importantly, evidence which is inter se corroborative. Where the prosecution has produced a wide section of persons starting from the son of the deceased to six other eyewitnesses, it is absurd for the defence to contend that any Court must disregard perfectly good and valid evidence on the ground that independent evidence is required. This evidence establishes that it was the accused who were responsible for the injury on PW.4 as also the death of the deceased. It also establishes that accused No. 2 was armed with an axe which was the weapon by which the injury was caused to PW.4 and that accused No. 3 was armed with a knife which is the weapon with which the injury was caused to the deceased.

8. The medical evidence in this case has come through PW. 10 and on a perusal of the medical certificate, it is established that the injury which PW.4 has referred to has in fact occurred and furthermore, that this injury was caused through an axe blow. Next, more importantly, we have perused the postmortem notes and the evidence of the doctor who has in terms deposed to the effect that the deceased died as a result of the stab injury which was sufficient in the ordinary course to cause death. The prosecution has therefore established that the deceased met with a homicidal death, due to the injury caused by accused No. 3.

9. As far as the recovery evidence is concerned, the learned Addl. S.P.P. submitted that the recovery of the axe and the knife have been established and that this recovery incriminates accused No. 2 and accused No. 3. The learned trial Judge has pointed out that as far as the axe is concerned, that PW. 4 has in turn stated that he snatched it from the hands of accused No. 2 and threw it down on the ground and the learned Judge has therefore discarded the recovery evidence on the ground that if the axe was left at the scene of offence that it is impossible that it could have been recovered at the instance of accused No. 2. Again, as far as the knife is concerned the learned S.P.P. pointed out that the evidence of the investigating officer and the pancha establish this recovery, that

the learned trial Judge has expressed certain doubts with regard to the recovery in question. His submission is that the recovery is perfectly valid. The defence has seriously disputed these recoveries and has even pointed out to us that the knife is supposed to have been recovered from a dung-pit in the house of accused No. 3 and it is submitted that it is impossible to allege that it could have been blood stained if it was lodged in this place. We would prefer to leave aside these heads of evidence in view of the controversies because we have already held that there is such overwhelming evidence of a reliable nature as to conclusively establish the charges against accused No. 2 and accused No. 3 that it is totally unnecessary for us to look to any supportive evidence. We have however taken note of the fact that the recovery of the blood stained clothes from accused No. 2 and accused No. 3 which are found to be stained with the same blood group as that of the deceased are factors that incriminate accused Nos. 2 and 3. We would like to however record in passing that irrespective of the submissions canvassed by the defence that the F.S.L. report clearly indicates that both the weapons did have bloodstains on the blades.

10. As indicated by us earlier, accused No. 1 has not taken any part in the main incident and in any event, he has passed away and is therefore excluded from any consideration. The evidence clearly indicates that the injury caused to PW.4 was at the instance of accused No. 2 and that the stab injury caused to the deceased was at the instance of accused No. 3. Accused No. 2 had used an axe and accused No. 3 had used a knife. The injury on PW.4 is a relatively simple injury whereas the injury caused on the deceased was on a vital part of the body with a deadly weapon and has resulted in his death. The last question that remains for us to consider is as to what are the sections under which the accused Nos. 2 and 3 are liable and what is the sentence awardable to them.

11. There is a charge against the accused that they were acting in furtherance of their common intention. It is true that the incident was one of short duration and it is true that accused Nos. 2 and 3 have participated in the incident and that they have acted in quick succession. This last aspect of the matter has thrown up a finer point of law for consideration namely the question as to whether the Court should automatically accept the position as propounded by the learned Addl. S.P.P. that Section 34 would apply and that therefore the same sentence should be awarded to accused Nos. 2 and 3. The defence has pointed out to us that a careful re-creation of the incident will indicate that only one blow has been attributed to accused No. 2 and similarly one blow has been attributed to accused No. 3. Also, what the defence sought to point out to us that these two accused did not act at the same time nor did they act together. This is an aspect which a criminal Court must very carefully take into account. Whereas, it is normally the law that if there are different persons acting in furtherance of their common intention and even if a major role and over acts are attributable to one or some accused and a minor role or relatively insignificant overtact are attributable to another accused, that if they were acting in furtherance of the common intention that all of them would be liable for the same punishment.

Conversely, we need to record that if in a given instance it is demonstrated that the accused persons have undoubtedly assaulted but that each of the acts has no inter connection with the act of the other accused then it would be improper to apply Section 34. Either from the words or from the manner in which the accused have acted or from their body language or other circumstances it would always be permissible to infer whether the accused shared a common intention and acted in furtherance thereof. This last aspect of the matter is of crucial importance and a Criminal Court must never overlook it because there could be a small class of cases wherein more than one accused were present and where the intention cannot be said to have been established from the evidence. This is one of those few cases. The reason for our conclusion is because accused No. 2 had an axe with him and he wielded it and that is all that he has done in the course of the incident. He has not uttered any words nor has he taken any further part in the incident after having aimed one blow which caused the injury to PW. 4. At the same time we notice that accused No. 3 was virtually out of the picture a very short while earlier when accused No. 2 was acting and that accused No. 3 has inflicted the injury on the deceased individually and not at the instigation or instance of any of the other accused or as part and parcel of a common plan or a common operation. We have read and re-read the evidence for purposes of being very clear about the facts of this case and we find that this is one instance where the accused have acted not in consort or together but in succession. That being the position, the liability of accused Nos. 2 and 3 would be restricted to their individual acts. As far as accused No. 2 is concerned, he is liable for conviction for the offence punishable u/s 324, IPC. in view of the fact that even though he had used an axe, the injury caused was on the thumb of PW. 4 and that the medical evidence clearly indicates that the injury was a simple one.

12. As far as accused No. 3 is concerned, the learned S.P.P. vehemently submitted that a stab injury inflicted with a knife on a vital part of the body that has resulted in death is a clear case in which all the ingredients of Section 302, IPC. are fulfilled and that the conviction must be u/s 302, IPC. Normally, we would have straight away accepted this submission except for the fact that it was pointed out to us on behalf of the defence that in the first instance there is no background of hostility between the parties. Secondly, that there is no premeditation that the prosecution has established and thirdly that this part of the incident was a sporadic development. It was obvious that it was an injury that was inflicted virtually in the course of a sudden quarrel in the heat of the moment. We are reinforced in this view because of one telltale circumstance that emerges in the evidence of PW. 4. While he admits that he managed to snatch the axe from accused No. 2, he very meekly states that even after he got hold of the accused that he did not use it but that on the other hand he just threw it down on the ground. It is a little difficult for us to accept this version because PW. 4 himself had sustained an injury from that axe and having caught hold of it is too much to expect that he would have very calmly thrown it on the ground that too when the three accused were still there. In this context, we have taken

note of the fact the accused No. 1 did have two injuries on him and that the prosecution explanation is that while running away he had collided with a tractor and sustained these injuries. These are lacerated wounds and that accused No. 1 was the first person who went to the Gadag rural police station to lodge a complaint that it was the other side who had assaulted him and having regard to this part of the record it is clear to us that PW. 4 must have taken the offensive after he got hold of the axe and it was in these circumstances that accused No. 3 wielded the knife. A combination of these factors is sufficient for us to hold that the offence would come u/s 304(II), IPC. and not Section 302. We are guided in this conclusion by the decision of the Supreme Court reported in Gurmail Singh and Others Vs. State of Punjab, and the decision of the Supreme Court reported in Tholan Vs. State of Tamil Nadu, . In both these cases, on a consideration of very similar facts the Supreme Court brought the offence down to one u/s 304(II) IPC. In our considered view, a sentence of one year rigorous imprisonment for the offence punishable u/s 324, I.P.C. as far as accused No. 2 is concerned would meet the ends of justice and a sentence of six years rigorous imprisonment for the offence punishable u/s 304(II), I.P.C. as far as accused No. 3 is concerned would meet the ends of justice.

13. In the result, the appeal filed by the State is allowed. The order of acquittal recorded in favour of accused Nos. 2 and 3 by the trial Court, is set aside. In its place, accused No. 2 is convicted of the offence punishable u/s 324, IPC. and it is ordered that he shall undergo rigorous imprisonment for a period of one year. Accused No. 3 is convicted of the offence punishable u/s 304(II), IPC. and it is ordered that he shall undergo rigorous imprisonment for a period of six years. Both the accused shall be entitled to set off for the period undergone by them in custody. If as appears from the record, that accused No. 2 has undergone a period in excess of one year rigorous imprisonment, the trial Court shall not direct any further action against him. As far as accused No. 3 is concerned if he is in custody, he shall be required to undergo the balance of the period of sentence. If accused No. 3 is on bail, his bail bond shall stand cancelled and the trial Court shall take him into custody and confine him to prison for purpose of undergoing the remaining sentence. It is clarified that the accused shall be entitled to set off for the period undergone in custody. The appeal is accordingly allowed and stands disposed of.