

(2014) 02 BOM CK 0086

In the Bombay High Court

Case No : Criminal Appeal Nos. 662 and 378 of 2010

The State of Maharashtra

APPELLANT

Vs

Siddhartha Ganpat Damodare

RESPONDENT

Date of Decision : 03-02-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 302, 304, 307, 325, 34

Citation : (2014) ALLMR(Cri) 2556

Hon'ble Judges : B.R. Gavai, J;A.S. Chandurkar, J

Bench : Division Bench

Advocate : N.S. Khubalkar, APP and Mahesh Rai, Advocate for the Appellant;
Prashant Gode, Advocate and N.S. Khubalkar, APP, Advocate for the Respondent

Judgement

B.R. Gavai, J.—Both these appeals take exception to the judgment and order passed by the learned Sessions Judge, Washim in Sessions Trial No. 47/2009. The prosecution case in nutshell is as under: That on 6.1.2009 at around 8:30 p.m. accused No. 1 with iron rod and accused No. 2 with an axe assaulted Ganesh, the brother of P.W. 1 Shrikant since the accused were suspecting of illicit relationship between deceased and wife of accused No. 2 Siddharth. The accused assaulted the deceased Ganesh and his servant P.W. 2 Pundlik. Deceased Ganesh died as a result of the said assault and Pundlik sustained serious injuries. The First Information Report (FIR) came to be lodged on the basis of the complaint of P.W. 1 Shrikant. Investigation was carried out by the Investigating Officer. Statements of witnesses were recorded and an axe was seized vide memorandum u/s 27 of the Indian Evidence Act from accused No. 2 and on conclusion of the investigation, charge-sheet came to be filed before the learned Court of J.M.F.C. Since the case was exclusively triable by the Sessions Court, the case was committed to the learned Sessions Judge. The learned Sessions Judge framed charge against both the accused for the offence punishable under Sections 302 and 307 of Indian Penal Code and on conclusion of the trial, the

learned Sessions Judge convicted the accused No. 1 for the offence punishable under Sections 302 and 325 of Indian Penal Code and sentenced him to suffer rigorous imprisonment for life and two years respectively and to pay a fine of Rs. 1,000/- and Rs. 500/- respectively and in default to suffer rigorous imprisonment for 6 months and 3 months respectively. Insofar as accused No. 2 is concerned, he was acquitted of the charge.

2. Being aggrieved by the order of conviction and sentence, the appellant has approached this Court. The State has approached being aggrieved by the acquittal of accused Nos. 2 and not convicted accused No. 1 for the offence punishable u/s 307 of Indian Penal Code.

3. Advocate Shri Mahesh Rai appearing on behalf of accused No. 1 submits that the learned trial Judge has grossly erred in convicting the accused for the offence punishable u/s 302 of Indian Penal Code. He submits that the incident occurred upon sudden and grave provocation and therefore, sentence u/s 302 is not sustained. Insofar as accused No. 2 is concerned, the learned Counsel submits that the trial Judge is right in not convicting the accused as there was no evidence against the said accused.

4. The learned Additional Public Prosecutor, on the contrary, submits that accused No. 2 has been specifically implicated by P.W. 3 Manoj. He submits that though he has been cross-examined, nothing damaging has come in the evidence and therefore, the learned trial Judge ought to have convicted the accused No. 2 also. The learned Additional Public Prosecutor further submits that the prosecution has established the motive and meeting of minds of both accused from the evidence of P.W. 1 Shrikant and therefore, the learned trial Judge also ought to have convicted accused No. 2 for the offence punishable u/s 302 of Indian Penal Code.

5. The learned Counsel for the appellant in this respect relies on the decision of the Hon''ble Apex Court in the case of Girija Shankar Vs. State of U.P.,

6. The learned Additional Public Prosecutor further submits that the learned trial Judge has further erred in convicting the accused No. 1 for the offence punishable u/s 325 of Indian Penal Code. He submits that merely because the injuries were not grave or serious cannot be a ground for not convicting the accused for the offence punishable u/s 307 of Indian Penal Code. Learned Additional Public Prosecutor relies on the decision of the Hon''ble Apex Court in the case of Ratan Singh Vs. State of M.P. and Another,

7. Advocate Shri Prashant Gode, appearing for respondent No. 2 in Criminal Appeal No. 378/2010, supports the argument advanced by the learned Additional Public Prosecutor.

8. With the assistance of the learned Additional Public Prosecutor so also the learned Counsel for the parties, we have scrutinized the entire evidence on record.

9. Insofar as the evidence of P.W. 1 Shrikant is concerned, in his evidence, he states that 45 days prior to the incident, accused Nos. 1 and 2 came and stated deceased that he has an evil eye on their wives and threatened to kill him. He states that he has convinced the accused and then they went away. He states that on 6.1.2009 when he was working in his field, the deceased came there and went for some time along with Pundlik. He states that when he was in field, he was informed by his cousin Manoj that accused Nos. 1 and 2 had assaulted deceased by iron pipes. Accordingly, he rushed to Watod Fata. He saw a vehicle coming from the side of his village and thereafter took the deceased to the hospital. The FIR is registered on the complaint of this witness. However, this witness is not an eye witness and therefore, his evidence would not be of much assistance to collect as to what occurred on the spot.

10. P.W. 2 Pundlik is the servant of the deceased. He states that when on the date of incident they were passing through the house of accused and reached in front of the house of Jairam, accused No. 1 gave a call to deceased and accused No. 1 was holding iron pipe and accused No. 2 was holding axe. They came near them and said to the deceased that as to why he looks towards their wives with evil eye. He states that thereafter both accused started assaulting deceased by iron pipe and axe. He intervened to separate, however, accused No. 1 dealt blows by iron pipe on his head, left shoulder and left hand. Thereafter, he shouted for rescue. Hearing him, Raju Dhakulkar, Manoj Katkar, Suresh Katkar rushed there. On seeing them, the accused ran away with weapons. This witness has been sought to be discarded on the ground that he was servant of the deceased and that some land was gifted to him after the incident. It is to be noted that this witness has also admitted in his examination that there was a talk in the village that deceased had illicit relations with wife of accused No. 2. However, it has come in the cross-examination that this witness had initially implicated only accused No. 1 and had subsequently implicated accused No. 2.

11. P.W. 3 Manoj is a relative of the deceased. He states that at about 8:30 p.m. he reached to the house of Suresh Dhakulkar and they saw accused Nos. 1 and 2 assaulting deceased Pundlik by means of iron pipe and axe. However, it is to be noted that this witness is an interested witness, inasmuch as he related to the deceased. No doubt that evidence of interested witness is not to be discarded only on the ground that he is an interested witness. However, the evidence of such witness has to be scrutinized with more caution. It has come in the evidence of P.W. 2 Pundlik that P.W. 2 and deceased had gone to the area in question to search for labourers to work in the field. The presence of the said witness on that spot, therefore, appears to be somewhat doubtful. In any case, the prosecution had not examined the independent witnesses, who were available. It has come in the evidence that there were 15-20 houses surrounding the spot. In that view of the matter, we find that the only evidence which can be relied is that of P.W. 2, since he is an injured witness.

12. The learned trial Judge found that implication of accused No. 2 subsequently

by P.W. 2, is not corroborated by any other witness and therefore, he has found that the prosecution has failed to prove the case beyond reasonable doubt against the accused No. 2. We, therefore, find that the acquittal of accused No. 2 cannot be faulted with. In any case, the finding in that regard can neither be said to be perverse or impossible.

13. Now, what leaves with us is the appeal of accused No. 1.

14. Accused No. 1 himself has admitted that he has assaulted the deceased with iron rod. However, in the statement u/s 313 of Code of Criminal Procedure, he clearly states that when he was sitting in front of the house of the deceased, P.W. 1 came there and started abusing him on the basis of woman and started laughing at him. He states that therefore he got annoyed and assaulted deceased with iron rod, which was lying beside. He states that after giving 23 blows, he kept the iron rod and went inside the house. It is to be noted that though P.W. 2 Pundlik is an injured witness, he is also an interested witness, inasmuch as he admits to be servant of the deceased and P.W. 1. As has been observed hereinabove, the prosecution has not examined any independent witnesses, though they were available. Not only that but the prosecution has also not examined Suresh Dhakulkar and Rajesh Dhakulkar, who were along with P.W. 3. Non-examination of the independent witnesses, who were available, therefore, creates a doubt as to whether the prosecution has unfolded true genesis of the matter or not. It is quite possible that though P.W. 2 is an injured witness, he is not unfolding as to what has actually happened on the spot. It is to be noted that even in the evidence of the prosecution witnesses, it has come that there was suspicion in the village that the deceased was having illicit relations with the wife of accused No. 2. In that view of the matter, the version given by the appellant/accused cannot be said to be improbable. It is further to be noted that the weapon used by the appellant/accused is an iron rod and not any sharp weapon. We, therefore, find that the possibility of the incident happening on account of a sudden fight in the hit of passion upon a sudden quarrel cannot be ruled out. It cannot be said that the appellant/accused had taken undue advantage or acted in a cruel and negligent manner.

15. We, therefore, find that the prosecution has failed to prove the case beyond reasonable doubt for conviction u/s 302 of Indian Penal Code. We find that the case would rather be under Part I of Section 304 of Indian Penal Code.

16. Insofar as judgment of the Hon"ble Apex Court in the case of Ratan Singh Vs. State of M.P. and Another, is concerned, the said case was arising out of quashing of charge-sheet by the High Court for the offence punishable u/s 307 of Indian Penal Code. Therefore, the said judgment would not be applicable in the facts of the present case.

17. Insofar as judgment of the Hon"ble Apex Court in the case of Girija Shankar Versus State of U.P. (Supra) is concerned, no doubt that by invoking Section 34, a person can also be convicted without there being an overt act on his part.

However, as already discussed hereinabove, the finding of acquittal insofar as accused No. 2 is concerned can neither be said to be perverse or impossible. The law regarding interference in the finding of acquittal is well settled. Unless the finding is found to be perverse or impossible, it is not permissible for this Court to interfere in the same. Hence, we pass the following order.

ORDER

(i) Criminal Appeal No. 662/2010 is dismissed.

(ii) Criminal Appeal No. 378/2010 is partly allowed. The conviction for the offence u/s 302 of Indian Penal Code is converted to one u/s 304 Part-I of Indian Penal Code and conviction of life imprisonment is reduced to rigorous imprisonment for seven years.

(iii) Rest of the order including conviction for the offence u/s 325 of Indian Penal Code and fine etc. is maintained.