
(2000) 10 BOM CK 0032
In the Bombay High Court
Case No : Criminal Appeal No. 4 of 1999

Vasudeo Bajirao More

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 16-10-2000

Acts Referred:

Penal Code, 1860 (IPC) — Section 101, 104, 105, 302, 304

Citation : (2000) 10 BOM CK 0032

Hon'ble Judges : Vishnu Sahai, J;D.S. Zoting, J

Bench : Division Bench

Advocate : Mr. P.R. Arjunwadekar, for the Appellant; Mr. B.R. Patil, Assistant Public Prosecutor, for the Respondent

Judgement

Vishnu Sahai, J.—Through this appeal the appellant challenges the judgment and order dated 22nd December, 1998 passed by the Additional Sessions Judge. Ratnagiri in Session Case No. 44/1995, whereby he has been convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs. 1000/-, in default to suffer 3 months R. I. for the offence u/s 302 of the I.P.C.

2. Shortly stated the prosecution case runs as under : The deceased Kashiram was the brother of the appellant. They resided in village Deoghar, Nivachiwadi, within the limits of Taluka Khed, Dist. Ratnagiri.

On 9.3.1995 at about 4 p.m. the deceased Kashiram was getting a sag tree cut by his labourers Krishna Katkari and Baban Katkari. At that time the appellant came and shouted who is there and what is he doing. The appellant snatched axes with which Krishna and Baban were cutting the said sag tree. Thereafter the deceased Kashiram picked up one of those axes and proceeded towards appellant Vasudeo saying "Me Todato, Me Todato" (I will break you into pieces). Thereupon the appellant caught hold of the hand of Kashiram with which he was holding an axe and a scuffle between him and Kashiram ensued, during the course of which the axe fell on the ground. Thereupon the appellant took a scythe which he had concealed in his waist and gave a blow with the same on the head of Kashiram.

Thereafter he gave axe blows, from the blunt side, on the head of Kashiram. Finally after picking up two stones and throwing them on Kashiram's hand he went away.

This incident was seen by Tukaram More P.W.3 and Sumitra More P.W.4. After the appellant had run away they went near Kashiram and found him precariously injured. Thereafter Sumitra More went to his residence and Tukaram More went to the residence of Sitaram More. Some persons thereafter came to Sitaram More's house. He asked them for help for taking Kashiram for treatment but none came forward. Thereafter Tukaram More P.W.3 through two boys who were standing there, sent information to Police Patil Krishna More P.W.1.

3. The evidence of Krishna More P.W.1. shows that at the relevant time he was Police Patil of Devghar. On 9.3.95 at about 8.30 p.m. Vasudeo More of his village came and told him that at about 4 p.m. the same day the appellant had given a scythe blow on Kashiram. Consequently Krishna More P.W.1 went to Ogalwadi along with Vasudeo More, where in a field he saw Kashiram critically injured and unconscious. At that time Tukaram More P.W.3 also came there and informed him that the appellant had given a scythe blow to Kashiram.

The evidence of Krishna More P.W.1 shows that he thereafter lodged his F.I.R.

4. The evidence of P.S.I. Pundalik Satose P.W.8 shows that on the night of 9/10.3.95 at about 2 a.m. Krishna More P.W.1, Police Patil of Deoghar, came at Police Station Khed and gave out his F.I.R. which he reduced into writing.

The evidence of P.S.I. Pundalik Satose P.W.8 shows that immediately with Krishna More P.W.1 he proceeded to the place of the incident where he found Kashiram lying in an unconscious condition. Along with yadi he sent him to the hospital at Khed for medical examination.

5. The evidence of Dr. Bhaskar Wagh P.W.7 shows that at the time of the incident he was Medical Officer at Municipal Hospital, Khed. Head constable of Khed Police Station brought Kashiram before him and he medically examined him at 3.30 a.m. on 10.3.95 and found on his person the following injuries :

- 1) Fracture of left upper arm (Humerous);
- 2) Left eye was blacken with edema around it ;
- 3) CLW on right scalp of the size 2 x 1 x 3 inch into bone deep with fracture of occipital bone. Brain matter was coming out of said fracture as there was a small gap.
- 4) CLW on right temporal region of the size 2" x 1" x bone deep, with fracture of right temporal bone brain matter was coming out of the fractured area.

In the opinion of Dr. Wagh all the injuries were grievous in nature ; were caused by hard and blunt object; and were inflicted within 24 hours.

The evidence of Dr. Wagh shows that till 13.3.1995 Kashiram was admitted in his

hospital and was thereafter transferred to Sassoon Hospital, Pune. The evidence is that at the said hospital he died on 17.3.95.

6. The post-mortem examination on the corpse of Kashiram was conducted on 17.3.1995, between 4 and 5 p.m., and the autopsy report shows that the deceased sustained the following external injuries :

- (i) abrasion on occipital region 4" x 3", healing ;
- (ii) stitched wound, right parietal region 1 1/2 inches long, with two stitches ;
- (iii) stitched wound, on front-parietal region in midline, surgical plaes, two inches in length, starting 5 1/2 behind glabella.
- (iv) Haematoma all over under scalp ;
- (v) Depressed communicated fracture of parietal bones, in an area 3" x 2" underlying injury No. 3, extending as crack fracture.
- (vi) Crack fracture left frontal bone in midline measuring 2 inches starting from injury No. 5 ;
- (vii) Crack fracture occipital bone, 2 1/2 inches in length starting from injury No. 5,
- (viii) Abrasion on left arm, middle 1 x 1", healing :
- (ix) Fracture left humerus, middle ;
- (x) Lacerated wound, right leg 1 inch above medial malleolus, 1" 1/2" 1/2".

On internal examination the doctor found fractures of occipital and temporal bones.

In the opinion of Autopsy Surgeon the injuries of the deceased were sufficient in the ordinary course of nature to cause death.

7. The investigation was conducted in the usual manner by Sub-Divisional Police Officer Pratapsimha Patankar P.W.9. On 13.3.95 the appellant expressed his willingness to get the weapon of assault viz. scythe recovered. Consequently he sent for two panchas, out of whom one namely Vyankat Pawar P.W.6 has been examined. In the presence of the said panch the appellant stated that he had concealed the scythe in between the gap of a wall and roof of his residence and was prepared to produce it. The said statement was recorded in a panchanama. Thereafter on the pointing out of the appellant from the said place a scythe was recovered.

After completing investigation Pratapsimha Patankar P.W.9 submitted the charge-sheet against the appellant.

8. The case was committed to the Court of Sessions in the usual manner where the appellant was charged for an offence punishable u/s 302 of the I.P.C. to

which charge he pleaded not guilty and claimed to be tried.

During trial in all the prosecution examined 10 witnesses. Two of them, Tukaram More P.W.3 and Sumitra More P.W.4 were examined as eye witnesses. Pratapsimha Patankar P.W.9 and Vyankat Pawar P.W.6 deposed about the recovery of scythe, on the pointing out of the appellant and were examined to prove the said recovery.

The learned trial Judge rejected the defence of the appellant which was denial and convicted and sentenced the appellant in the manner stated in para 1.

Hence this appeal.

9. We have heard learned counsel for the parties and perused the entire evidence on record. In our view, this appeal deserves to be partly allowed because on the evidence of the two eye witnesses Tukaram More P.W.3 and Sumitra More P.W.4 only an offence punishable u/s 304(ii) of the I.P.C. is made out against the appellant.

10. So far as the involvement of the appellant in the instant case is concerned, the same in our view, has been squarely established by the evidence of Tukaram More P.W.3 and Sumitra More P.W.4. We have set out the prosecution story in para 2 of our Judgment on the basis of the recitals contained in their examination-in-chief and hence we do not intend to graphically recount the details in their evidence because the same would only over-burden our judgment.

In short they have stated that on the date, time and place of the incident two labourers of the deceased Kashiram with axes were cutting the sag tree. In the meantime the appellant came and said who is there and what is he doing and snatched the axes from those who were cutting the said tree and threw the axes on the ground. Thereupon the deceased Kashiram picked up one of those axes and proceeded towards the appellant saying "Me Todato, Me Todato" (I will break you into pieces). Thereupon the appellant caught hold of Kashiram who was holding an axe in his hand and a scuffle took place between the appellant and Kashiram, resulting in the axe falling down from Kashiram's hand. Thereafter the appellant took a scythe which he had concealed in his waist and gave blows with the blunt side of the axe on the head and chest of Kashiram and finally after hurling two stones on the hand of Kashiram, went away.

11. We have examined the statements of the eye witnesses and we find them to be broadly credible. We make no bones in observing that we are not prepared to believe that part of their statement wherein they have stated that the appellant gave a blow with scythe on the head of Kashiram because neither the autopsy report nor the evidence of Dr. Bhaskar Wagh P.W.7, who medically examined Kashiram in his life time, shows that he had sustained any scythe, injury, (incised wound) on his head. However, we believe their evidence that the appellant assaulted Kashiram with the blunt side of the axe on his head and hurled a stone on his hand because the medical evidence, to which we have adverted to

earlier ,shows blunt weapon injuries on the head and hand of the deceased.

It is pertinent to mention that both the eye witnesses have explained their presence on the place of the incident. Tukaram More P.W.3 has stated that while he was sitting on the ota of his house he saw Kashiram passing by the road in front of his house and the appellant proceeding towards his land. He heard the appellant shouting "who is there what is he doing". On that he came down from his ota to the corner of his house from where he saw the incident.

Sumitra More P.W.4 has also explained his presence on the place of the incident. He stated that at the time of the incident, when he and his daughter-in-law Vijaya were in the Court yard of their house they heard a quarrel between the appellant and Kashiram which culminated in the fatal assault being made by the appellant on the deceased Kashiram.

It is pertinent to mention that both Tukaram More P.W.3 and Sumitra More P.W.4 were independent witnesses who had no rancor or ill will against the appellant and in our view, in the absence of the same would not have falsely implicated him. We may also mention that although they were subjected to extensive cross-examination but nothing could be extracted there from which could render their claim of having seen the incident doubtful.

12. In our view, the evidence of Tukaram More and Sumitra More inspires confidence and fixes the involvement of the appellant in the incident.

13. But in our view, from the evidence of Tukaram More P.W.3 and Sumitra More P.W.4 it is specifically clear that the appellant would only be guilty of an offence punishable u/s 304(ii) of the I.P.C. We say this because the evidence of these two witnesses shows that the deceased Kashiram and the appellant were real brothers, there was no malice or enmity between them on the date and time of the incident, the labourers of Kashiram were cutting with axes sag tree which according to the admission made by Tukaram More P.W.3 in his cross-examination was standing in the land of the appellant, the appellant snatched the axes from the labourers of Kashiram which fell down; Kashiram picked up one of the axes from the ground and threatened to break the appellant's body with the same: a scuffle took place between Kashiram and the appellant during the course of which the appellant gave a scythe blow on the head of Kashiram (this part of their evidence we have not believed); thereafter the appellant gave blows from the blunt side of the axe on the head of the deceased : and finally he hurled two stones on the hand of the deceased. The evidence also shows that the deceased succumbed to his injuries 8 days later.

13A. In the factual matrix referred to in the preceding paragraph the appellant had both right to private defence of person (under Section 101 of the I.P.C.) and property (under Section 104 of the I.P.C.) to cause harm short of death to Kashiram. He had the right of private defence of person to cause harm short of death because when the deceased Kashiram picked up the axe and proceeded towards the appellant saying "Me Todato, Me Todato" (I will break you into

pieces) it would be reasonable to infer that the appellant apprehended that hurt would be caused to him. It should also be borne in mind that the right of private defence of person commences as soon as reasonable apprehension of danger to body commences and continues so long as the apprehension lasts.

The appellant also had the right of private defence of property because at the behest of the deceased the labourers of the deceased committed trespass in the land of the appellant and committed mischief by cutting the sag tree which was on it. Section 104 of the I.P.C., in such a situation gave the appellant the right of private defence of property to cause to the deceased harm short of death. It should be remembered that section 105 of the I.P.C. provides that right to private defence of property commences as soon as reasonable apprehension to property commences and continues till such apprehension continues.

14. But we have no reservations in observing that the appellant, did not have the right to kill Kashiram. Since he inflicted injuries which appear to be sufficient in the ordinary course of nature to cause his death he exceeded the right of private defence of person and property.

It should be borne in mind that section 99 of the I.P.C. provides that the right to private defence in no case extends to inflicting more harm than is necessary to inflict for the purpose of defence. It should always be remembered that the right to private defence is a preventive and not a punitive right.

It is true that since the genuineness of the post-mortem report has been admitted and the Autopsy Surgeon has not been examined we are bereft of his statement that the injuries suffered by the deceased were sufficient in the ordinary course of nature to cause death. However, this would make no difference because, a naked perusal of the injuries suffered by the deceased per se shows that they were sufficient in the ordinary course of nature to cause death and in this view of the matter non-examination of the Autopsy Surgeon would make no difference.

We have seen that Dr. Wagh P.W.7 who had medically examined the deceased clearly stated that beneath the head injuries suffered by the deceased there was fracture of occipital and temporal bones. It is common knowledge that fracture of occipital and temporal bones is sufficient in the ordinary course of nature to cause death.

The view which we have taken is fortified by para 5 of the decision of the Supreme Court in Brij Bhukhan v. State of U.P., wherein the Supreme Court has laid down that if injuries per se appear to be sufficient in the ordinary course of nature to cause death absence of medical evidence to this effect would make no difference.

15. For the said reasons in our view, the appellant would not be guilty of an offence punishable u/s 302 of the I.P.C. but for one u/s 304(ii) of the I.P.C.

16. Only one question remains and that is the quantum of sentence to be

awarded to the appellant for the offence u/s 304(ii) of the I.P.C.

We have reflected over the said question and in our view, considering the over all circumstances, a sentence of 7 years R. I. would meet the ends of justice.

17. In the result this appeal is partly allowed. Although we acquit the appellant for the offence u/s 302 of the I.P.C. and set aside his conviction and sentence of imprisonment for life and fine of Rs. 1000/- and three months rigorous imprisonment in default imposed on him thereunder but we find him guilty for the offence u/s 304(ii) of the I.P.C. and sentence him to undergo 7 years R. I. for the same.

The appellant is in jail and shall serve out his sentence. In case he has paid the fine for the offence u/s 302 of the I.P.C. the same shall stand refunded to him.