

(2016) 09 BOM CK 0046
In the Bombay High Court
Case No : Criminal Appeal No. 56 of 2013

Vijay s/o. Nagu Kamble

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 19-09-2016

Acts Referred:

Evidence Act, 1872 — Section 3
Penal Code, 1860 (IPC) — Section 302

Citation : (2016) 3 AIRBomRCri 529 : (2017) ALLMRCri 89 : (2016) 4 BomCR(Cri) 413 : (2016) 6 MhLJCrI 592

Hon'ble Judges : S.S. Shinde and Sangitrao S. Patil, JJ.

Bench : Division Bench

Advocate : Mr. Nikhil S. Tekale, holding for Mr. Vinay A. Sarwade, Advocates, for the Appellant; Mr. M.M. Nerlikar, APP, for the Respondent-State

Final Decision : Partly Allowed

Judgement

S.S. Shinde, J.—This Appeal is filed by the original accused, challenging the judgment and order dated 21.12.2012 passed by the Additional Sessions Judge, Kandhar in Sessions Case No. 25/2011, thereby convicting the appellant for the offence punishable under Section 302 of the Indian Penal Code ("IPC" for short) and to suffer imprisonment for life and to pay fine of in default to suffer further rigorous imprisonment for six months.

2. The background facts for filing the present Appeal, are as under: It is the respondent's case that on 18.05.2011, the deceased Naroji Rangnath Jadhav, resident of village Kiroda, had gone to village Pimpalgaon along with Shankarrao Mane and Chintaman Jadhav to attend a marriage. After attending the marriage, they proceeded to Loha by an auto-rickshaw. At Loha, they went to one mutton shop and purchased mutton and thereafter started proceeding towards Loha bus stand by Indira Nagar concrete road. There was a liquor shop located by the side of said road. The appellant made demand of money to Naroji for consuming liquor in front of that liquor shop. Naroji retorted the appellant by saying whether

his father had kept money with him (i.e. Naroji). As the appellant got annoyed with the reply given by Naroji and since Naroji did not give money, the appellant took out a knife from his waist and stabbed on the abdomen of Naroji. Naroji shouted as, "melomelo, wachwa-wachwa" and fell down on the road. Shankarrao Mane and Chintaman Jadhav came forward towards the appellant, but as the appellant was holding knife, they got frightened. Several persons gathered on the spot. Therefore, the appellant ran away from the spot by holding blood stained knife in his hand. Shankarrao Mane and Chintaman Jadhav chased the appellant upto some distance, but the appellant succeeded in fleeing away.

3. Since the said incident did occur by the side of country liquor shop, the servants working in the said liquor shop informed about the incident to one Pankaj Parihar, who is residing just near to the spot. Pankaj Parihar took the injured Naroji to the Rural Hospital, Loha. The Medical Officer examined Naroji and declared him as dead.

4. The incident of stabbing and death of Naroji was informed to his maternal uncle Bhagwan Bhaurao Kadam. He came to Loha Hospital and saw the dead body of Naroji. Thereafter, he went to the Police Station, Loha, and lodged the First Information Report ("FIR" for short) against the appellant, alleging that he committed murder of Naroji by causing him stab injury by a knife due to his refusal to pay money to the appellant for consuming liquor. On the basis of FIR of Bhagwan Bhaurao Kadam, Crime No. 52/2011 came to be registered against the appellant for the offence punishable under section 302 of the IPC in Police Station, Loha. The initial investigation was carried out by the Police Inspector Phulzalke. He visited the Rural Hospital, Loha and prepared inquest panchanama of the body of Naroji and referred the dead body to the Medical Officer for postmortem. The P.I. Phulzalke prepared panchanama of the spot where the incident had occurred. There was pool of blood on the spot. The P.I. Phulzalke collected the samples of blood, blood mixed earth and plain earth from the spot.

5. The Medical Officer of Rural Hospital, Loha, conducted autopsy on the body of the deceased Naroji. He noticed stab wound having size 4 x 3 cm, cavity deep, oblique on left iliac area leading to heavy blood loss in cavity. He also noticed large retro peritoneal haematoma, sigmoid mesentery cut, iliac vessel cut, sigmoid vessels cut and perinephric fat cut leading to hemorrhagic shock. The injuries noticed by the Medical Officer were ante mortem. The Medical Officer opined that the death of Naroji Jadhav was caused due to stab injury, due to heavy blood loss in cavity and due to hemorrhagic shock, and accordingly, he issued the postmortem report.

6. Further investigation of this crime was carried out by the SDPO Mrs. Geeta Chavan. She seized the clothes of the deceased Naroji. She arrested the appellant at 11.30 p.m. on 18.05.2011 and seized his shirt and pant having blood stains. On 21.05.2012, when the appellant was in the custody of Police, he made a disclosure statement and offered to produce a knife hidden by him in a bush. The appellant took the police and panchas to the place where the knife was

hidden by him and then produced the same before. The knife, which was produced by the appellant, was having blood stains. It came to be seized. The seized knife was forwarded by the Investigating Officer to Dr. Mirzapure for his opinion. The Investigating Officer recorded statements of witnesses. The seized articles were forwarded by the Investigating Officer to Chemical Analyst for analysis and report. After completion of the investigation, the Investigating Officer submitted charge-sheet against the appellant in the Court of Judicial Magistrate First Class, Loha, for the offence punishable under Section 302 of the IPC.

7. The Judicial Magistrate First Class, Loha, having noticed that the offence under Section 302 of the IPC is exclusively triable by the Court of Session, by his order dated 05.09.2011, committed the case to the Court of Session for trial. The learned Additional Sessions Judge, Kandhar convicted the appellant for the above mentioned offence. Hence this Appeal.

8. We have considered the submissions of the learned counsel appearing for the appellant and the learned APP appearing for the respondent ? State at length. Though the prosecution examined as many as 15 witnesses, Anjaiah (PW1) and Ravi (PW2) turned hostile. Therefore, their evidence is not useful to the prosecution except their admission before the Court that they saw a person lying on the road and many persons gathered around him near the shop in which both of them were working. Bhagwan (PW4) lodged the FIR on receiving phone call of Shankarrao Mane. He is not an eye witness to the incident. However, on receiving call from Shankarrao (PW3), he visited Loha Police Station at about 4.00 p.m. on the day of the incident and lodged the FIR (Exh.17). He also visited the Hospital where the deceased was taken for treatment.

9. The prosecution has proved that the death of deceased Naroji Jadhav was homicidal by examining Dr. Mirzapure (PW-13). He states that he found 6 external injuries on the person of the deceased Naroji. The said injuries were ante mortem. According to him the cause of death of Naroji was stab injury leading to heavy blood loss in cavity (left retroperitoneal structure). He specifically denied the suggestion that the injury below the ribs is possible if a person falls on the edge of iron rod or a tin sheet. He also denied the suggestion that the deceased would have survived if given immediate medical treatment and blood transfusion.

10. On the day of the incident, Shankarrao (PW3) and Chintaman (PW6) were with the deceased Naroji and had actually witnessed the incident. Shankarrao (PW3) states that he along with deceased Naroji and Chintaman (PW6) went to Loha in the auto rickshaw at about 2.00 p.m. on 18.05.2011. They purchased mutton and then went to Kalal Country liquor shop. The appellant came near them and demanded money from Naroji for drinking liquor. In reply Naroji asked the appellant as to why he was demanding money and whether his father had kept money with him. On receiving such reply from Naroji, the appellant took out a knife and stabbed Naroji in his stomach. On receiving stab injury, Naroji

shouted and fell down on the road and then the appellant ran away. Then Naroji was taken to the Hospital by Pankaj Parihar.

11. The learned counsel appearing for the appellant invites our attention to the cross examination of Shankarrao (PW-3) and submits that the said witness has not stated specific time when they visited the mutton shop, the time of incident and also when they came near the country liquor shop. It has also come in his cross examination that 20-30 persons had gathered near the spot. However, none of the independent witnesses has been examined by the prosecution. Therefore, the evidence of Shankarrao (PW3) cannot be relied on.

12. The evidence of Shankarrao (PW3) is most natural. On the day of the incident, he was accompanying Naroji from his village till the incident took place. It is not expected from him, who is a rustic villager, that he should state accurate timings of places visited prior to the actual incident. On considering his evidence in totality, we are of the opinion that same deserves acceptance.

13. Chintaman (PW6) also states that there was marriage of Santram Jadhav's daughter Sonutai at Pimpalgaon on 18.05.2011. He himself, deceased Naroji, Shankarrao (PW3) and many villagers visited Pimpalgaon and attended the marriage. The marriage was solemnized at 11.30 a.m. and after having lunch, they went to bus stand at Loha by an auto rickshaw. Thereafter, they visited the mutton market. The deceased Naroji purchased mutton and then they started going to Loha bus stand. When they reached near Kalal country liquor shop, the appellant came near them and demanded money from Naroji for drinking liquor. Naroji got upset on such demand and asked the appellant, as to whether his father (i.e. that of the appellant) had kept money with him. Upon receiving such reply, the appellant took out a knife from his waist and stabbed on the stomach below ribs of Naroji.

14. The evidence of Shankarrao (PW3) and Chintaman (PW6), is quite consistent in respect of the occurrence of the incident, manner in which same has been taken place, and the overt acts done by the appellant. The suggestion given by the defence to Chintaman (PW6) in his cross examination that Naroji accidentally fell on the spot has been emphatically denied by him.

15. To sum up, there are two eye witnesses i.e. Shankarrao (PW3) and Chintaman (PW6), whose evidence is quite consistent on all material points showing involvement of the appellant in the incident in question. Their evidence gets corroboration from the medical evidence. Apart from the medical evidence, the prosecution has also brought on record that the blood stains found on the clothes of the appellant were of the same blood group which was that of the deceased Naroji.

16. Pankaj (PW7) states that he went to the spot of the incident. He saw the appellant running away with a knife in his hand. He took Naroji in an injured condition in the auto rickshaw to the Rural Hospital at Loha. The evidence of this witness also supports the case of the prosecution that the appellant, after

stabbing the deceased Naroji ran away with the knife in his hand.

17. If the evidence of the prosecution witnesses and in particular Shankarrao (PW3) and Chintaman (PW6), who have witnessed the incident coupled with the evidence of Bhagwat (PW5), Pankaj (PW7), Dr. Dattaram (PW13) and CA report is taken into consideration an inevitable conclusion would be that the prosecution has proved beyond reasonable doubt the involvement of the appellant in the commission of the crime alleged against him.

18. The learned counsel appearing for the appellant in the alternate argued that, even if the prosecution evidence is taken as it is, it would be clear there was no premeditation and the appellant had no intention to cause death of Naroji. Shankarrao (PW3) and Chintaman (PW6) have stated in their evidence that the appellant demanded money from Naroji for consuming alcohol and upon refusal to satisfy that demand with the remark by Naroji that the father of the appellant had not kept money with him, the appellant got annoyed, took out a knife from his waist and gave only one blow of knife below his ribs on stomach. According to the learned counsel appearing for the appellant, in the circumstance in which the incident took place, instead of sentencing the appellant for the offence punishable under Section 302 of the IPC, the trial Court ought to have held him guilty for the offence under Section 304 Part-II of the IPC.

19. According to the learned APP, since the appellant was possessing a knife and stabbed on the stomach of Naroji, the trial Court has rightly convicted and sentenced the appellant for the offence punishable under Section 302 of the IPC.

20. We have carefully perused the entire evidence brought on record and in particular the evidence of Shankarrao (PW3) and Chintaman (PW6). It clearly emerges from the ocular evidence that the appellant demanded money from Naroji and upon his refusal to pay money coupled with the sarcastical remark that, whether the father of the appellant had kept money with Naroji, the appellant got annoyed and in the heat of anger took out a knife from his waist and gave one blow thereof on the stomach of the deceased Naroji. It is true that the blow of knife is given on the vital part of the body. However, considering the above circumstances, it cannot be concluded that the appellant had intention to kill the deceased. It is a matter of common knowledge that knife can be possessed by a person for more than one reason and not for committing any offence only. Admittedly, the appellant has not repeated blows of knife. He did not take any undue advantage or acted in a cruel or unusual manner. It is clear that the incident took place in the heat of passion and on the spur of the moment. There was no previous enmity or premeditation on the part of the appellant to kill the deceased Naroji. The incident took place on a trifle ground. Therefore, the case in hand is covered by exception 4 of Section 300 of the IPC. In the peculiar facts of this case and in the light of evidence brought on record, the appellant could not be held guilty for an offence punishable under Section 302 of the IPC and on the other hand, according to us, he is guilty of culpable homicide not amounting to murder punishable under Section 304 Part II of the

IPC.

21. In view of the above, the conviction and sentence of the appellant under Section 302 of the Indian Penal Code is set aside and instead, the appellant is convicted under Section 304-II of the Indian Penal Code. Considering the serious consequence of the act done by the appellant i.e. the death of Naroji, we are not inclined to extend the benefit of probation to him. In our view, the ends of justice would be met if the appellant is sentenced to suffer rigorous imprisonment for seven years and to pay a fine of, in default of payment of fine to suffer further rigorous imprisonment for 6 months. We sentence him accordingly. The appellant is entitled for set off as per the provisions of Section 428 of Criminal Procedure Code.

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