
(2016) 03 BOM CK 0162
In the Bombay High Court
Case No : Criminal Appeal No. 569 of 2012

Vishwambhar Ramji Gaikwad

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 07-03-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 149, Section 300, Section 302, Section 304, Section 323

Citation : (2016) ALLMRCri 5037 : (2017) 1 MhLJCrI 469

Hon'ble Judges : A.V. Nirgude and Indira K. Jain, JJ.

Bench : Division Bench

Advocate : Mr. D.Y. Nandedkar, Advocate to assist the A.P.P, for the Appearing Parties; Mr. S.D. Ghayal, A.P.P, for the Respondent/State; Mr. Kishor C. Sant, Advocate, for the Appellants

Final Decision : Partly Allowed

Judgement

A.V. Nirgude, J.(Oral) - The appellants challenged the judgment and order passed by the learned Additional Sessions Judge, Bhokar, District Nanded, dated 16th July, 2012, in Sessions Case No.28 of 2011, convicting all the appellants for the offences punishable under Sections 302 and 323 read with Section 149 of the Indian Penal Code. They were all sentenced to life imprisonment and various other sentences.

2. The incident occurred on 11th March, 2011, at about 09.30 p.m., in an open space at village Borgaon, Taluka Bhokar, which was used for arranging a vegetarian feast by one villager-Maroti Edke. Number of persons had meals there after 06.00 p.m. At about 09.30 p.m., the feast was about to be over. At that time, all appellants/accused went there and started abusing Abaji-the victim. They abused and humiliated him saying that he and his family members were not honourable enough to offer feast to the villagers. Accused No.1 was more aggressive and started scuffle with Abaji. Other accused joined and they also assaulted Abaji. They started dragging Abaji. But, before they could go there,

accused No.2-Gangadhar asked his companions to keep Abaji holding. He left for his house and came back with Katti, a weapon. He then gave blow of the weapon on Abaji's head. Soon thereafter, appellant No.6 - Sainath picked up a stick and gave a blow on Abaji's head. Abaji fell down. He was taken to the hospital where he declared dead. Thereafter, Abaji's wife lodged complaint, and investigation started.

3. At the time of trial, depositions of four eye-witnesses were recorded, who were subjected to lengthy cross-examination. Learned judge of the trial Court held that all accused were members of unlawful assembly which had common object of assaulting victim Abaji. He further held that accused being members of unlawful assembly were armed with deadly weapons. He further held that all accused in prosecution of the common object of the unlawful assembly committed murder of Abaji.

4. Learned counsel for the appellants suggested to us that evidence on record was not reliable and trustworthy and all the accused/appellants deserved acquittal.

5. Let us now go to the eye-witness account of the incident. Prosecution witness No. 6 is Surekha, the wife of victim Abaji. She stated that on the day of incident, her husband's cousin had arranged village feast on his returning from successful pilgrimage. She and her husband victim Abaji went for the feast since morning. She said that the feast started at 06.00 p.m. and continued up to 09.00 p.m.

6. When the hosts were about to sit for meals, the accused came there. The accused asked her husband Abaji as to how could Abaji's family arrange such feast though they were not respectable enough to do so. They even abused Abaji. Accused Nos. 1 and 2 then started scuffle with Abaji. Then, accused Nos. 2, 3, 5 and 6 caught Abaji by his shirt and assaulted him. They started dragging him towards accused No.1's house. They assaulted Abaji in the courtyard belonging to accused No.1 using kicks and fists. Accused No.2 then asked other accused to keep holding Abaji. He left and brought weapon "Katti" (a long cutting weapon) from his house. He gave one blow of Katti on right side of head of Abaji. Accused No.3 gave a blow of centering strip (a piece of wood) on Abaji's head. When witness Balaji tried to rescue Abaji, he too was assaulted using Katti on his right hand. Abaji fell down and started bleeding. Thereafter, witnesses Laxman, Balaji, Madhav and herself took Abaji to Government Hospital, Bhokar. At about 11.00 p.m. they reached there, but the Medical Officer on duty declared Abaji dead on admission. She said, she then went to Police Station and filed the complaint. During cross-examination, it revealed that this victim rather exaggerated her deposition in respect of the first sentence in her deposition, when she said that accused Nos. 1 and 2 started scuffle with Abaji.

7. Prosecution witness No.5 is the second important eye witness. He too stated that after the village feast was about to be over, at about 9-10 p.m., accused No.1 came there under influence of liquor with other five accused. Abaji asked

accused No.1 to take meals, but accused No.1 started abusing Abaji. He caught Abaji by collar and started dragging him. Other five accused were protecting accused No.1 preventing people from intervening. Accused No.2 then went to his house and brought Katti and dealt blow on Abaji's head on the back side. Accused No.1 dealt one blow of wooden plant. Accused Nos. 4 to 6 kept holding victim Abaji during the incident. Balaji came for rescue of Abaji, but accused Nos. 1 and 2 assaulted him too. Even Abaji's wife Surekha was assaulted. Abaji fell down bleeding. All accused ran away. Thereafter, witness Balaji took Abaji to hospital in an auto-rikshaw.

8. The third eye-witness is P.W.No.7 -Balaji. He also stated that at 09.30 p.m. on the day of incident, few people from host family were about to take food. At that time, all accused came there and started abusing Abaji. When Abaji questioned, all accused started scuffle with him and dragged him towards accused No.1's house. They were holding Abaji by his shirt. When he and other two witnesses tried to intervene and requested not to assault Abaji, the accused abused and threatened them. Accused No.2 then told other accused to catch hold of victim Abaji. He went to his house and brought Katti and then dealt a blow on Abaji's head. Accused No.3-Sainath assaulted Abaji by a stick on his head. Other accused, assaulted Abaji by kicks and fists. Accused No.2 assaulted him also by using Katti. After the assault, Abaji fell down. He and others took Abaji to the Government Hospital, Bhokar, in an Auto-Rikshaw. But, Abaji died at about 11.00 p.m. The Medical Officer treated him for his injuries.

9. The last eye-witness is Prosecution Witness No.10-Laxman. This witness stated that he had arranged the feast. The meals went up to 09.00 p.m. At that time, all accused came there and started asking victim Abaji as to why he had arranged the feast. They also assaulted him. All of them then started dragging Abaji towards courtyard of house of accused No.1. Accused No.2 then went to his house and brought Katti. He assaulted Abaji on his head. Accused No.3-Sainath also assaulted Abaji. Abaji fell down and started bleeding. Accused No.2 then assaulted Balaji using Katti on his hand. Abaji was taken to the hospital where he was declared dead. During cross-examination of this witness, he admitted that his deposition about accused No.2 assaulting Balaji by Katti on his hand, did not appear in his police statement.

10. The next prosecution witness is the Medical Officer-P.W.12, who stated that on 11.03.2011 while he was on duty as a Medical Officer at Rural Hospital, Bhokar, Abaji was brought to him. He found Abaji dead before arrival. He informed about it to Police immediately. He, thereafter, conducted post-mortem examination on next day. He found following injuries on Abaji's person :-

- (i) Fracture right parietal bone 4 cm x 2 cm obliquely.
- (ii) Contused lacerated wound on right parietal region 5 cm x 3 cm.
- (iii) Contusion over occipital region 4 cm x 4 cm.

(iv) Contusion over middle back oblique three lines parallel 6 cm x 3 cm each directed central to lateral downwards.

He also found that there was hemorrhage in the brain and cause of death was head injury. In cross-examination, he admitted that injury Nos. 1 & 2 are in-fact one injury.

11. The questions that arise for our consideration are :-

(i) Whether all the accused had shared common object of causing death of Abaji? If not, what was their common object, if their gathering was proved to be unlawful assembly?

(ii) Who caused Abaji's death?

(iii) If accused No.2 had caused Abaji's death, whether it was a case of murder or culpable homicide not amounting to murder?

12. We are inclined to believe the prosecution witnesses, when they stated that all the accused came there and started unprovoked verbal attack targeting Abaji. They humiliated Abaji and ultimately assaulted him. No sooner they committed such offence, their gathering became unlawful assembly. They overpowered Abaji and they started to drag him to a particular place. The common object of the assembly at that time was to humiliate, abuse, to cause simple injury and to drag Abaji to a particular place. Abaji did sustain simple injuries on his back and on his head also. Except injury Nos. 1 & 2, which is said to be one injury, other injuries were simple in nature. Accused No.3 picked up wooden plank, which was found lying at the site. He used this plank to assault Abaji. Witnesses stated that he dealt one blow using plank on Abaji's head. Injury No.3 referred to above could be the injury caused by accused No.3. Other injuries on the back of Abaji could also be caused by accused No.3 utilising plank (no eye witness, however, stated that he saw accused No.3 delivering wooden plank blows on the back of the victim). Nonetheless in the melee, we assume that it was accused No.2, who had such weapon and injuries which were likely to have caused by such plank were found on the back of the victim. Again accused No.3, did not cause grievous injury to the victim, so whatever he did was in furtherance of common object of the unlawful assembly, which is referred to above i.e. causing simple injuries and dragging Abaji to a particular place.

13. The question in such situation arises as to whether accused Nos. 1, 3 to 6 shared any common object with accused No.2. The witnesses stated very categorically that accused No.2 in the midst of assault left the assembly, saying that they should keep holding the victim and he would come back. Within few minutes, he came back with weapon in his hands. As said above, the common object of this assembly was to overpower and to drag forcibly Abaji to a particular place and in order to do so, they would cause simple injuries to Abaji. Abaji was already overpowered. He was already held by other accused. In such situation, accused No.2 appeared there with deadly weapon in his hand. He

delivered one blow on Abaji's head. This was certainly unexpected by other assailants. They never knew that accused No.2 would come back with deadly weapon. They also did not know that he would deliver fatal blow on Abaji's head. This happened suddenly. Accused No.2 could easily deliver blow on victim's head, because he was already overpowered and his hands were pin-down by other assailants. But it cannot be said that assailants who had overpowered and the victim did so for facilitating delivery of fatal blow on the victim's head. It cannot be said that because they held hands of the victim, accused No.2 could deliver fatal blow on victim's head. What accused No.2 did was thus outside the common object of the unlawful assembly. Others should not be held vicariously liable for the act, which was committed by accused No.2.

14. Now next question is - whether accused No.2 committed murder or culpable homicide not amounting to murder. In our view, accused No.2 committed murder. The defence tried to discredit prosecution witnesses by asking in cross-examination to the Medical Officer that injury No.1 would not have been possible if cutting edge of Katti had been used for causing injury. Indeed, had the cutting edge been used in the assault, the injury would have been different in size and nature. Yet, we do not disbelieve the prosecution witnesses when they stated that accused No.2 utilised Katti in his hand for delivering one blow on victim's head. We can assume that the assailant did not use the cutting edge of the weapon at the time of assault. He used back side of the Katti to deliver this blow. It is because of this, the injury did not show any incised injury. It was contused lacerated wound. The blow behind this injury was so forceful that it caused fracture to parietal bone and the victim succumbed to death within short time. Thus, the assailant had intention to cause injury, which was sufficient in ordinary course of nature to cause death. Learned Counsel for the appellants tried to assert that the case could be brought within one of the exceptions to Section 300 of the Indian Penal Code. But, having regard to the facts of the case, we are not able to place this case in any of the exceptions to Section 300 of the Indian Penal Code. This culpable homicide was thus murder, for which accused No.2/appellant No.2 should be convicted. All other accused would get benefit of doubt and therefore cannot be convicted for the offence punishable under section 302 r/w section 149 of the Indian Penal Code.

15. Therefore, the criminal appeal is partly allowed. The operative order of judgment passed by learned Additional Sessions Judge, Bhokar dated 16.07.2012 in Sessions Case No.28 of 2011 is substituted by following order :-

- i. Accused Nos. 1, 3 to 6 are acquitted for the offence punishable under section 302 read with section 149 of the Indian Penal Code.
- ii. Accused No.2 is convicted for the offence punishable under section 302 of the Indian Penal Code and sentenced to suffer life imprisonment. He shall also pay fine of Rs. 5000/- (Rupees Five Thousand), in default, to suffer rigorous imprisonment for six months.

iii. Accused Nos. 1 to 6 are convicted for offence punishable under section 323 read with section 149 of the Indian Penal and sentenced to suffer rigorous imprisonment for one month each and to pay fine of Rs. 500/- (Rupees Five Hundred) each, in default, to suffer further rigorous imprisonment for 15 days.

iv. Accused Nos. 1 to 6 are acquitted for the offence punishable under section 504 & 506 read with section 149 of the Indian Penal Code and under section 37 (1) (3)/135 of the Bombay Police Act.

v. All the sentences shall run concurrently.

vi. Set off be given to the accused for the period of detention already undergone by them.

vii. The muddemal property being worthless be destroyed after the period of appeal is over.