
(2019) 01 BOM CK 0118
In the Bombay High Court
Case No : Criminal Appeal No. 496 Of 2006

Waman And Ors	Vs	APPELLANT
State Of Maharashtra		RESPONDENT

Date of Decision : 28-01-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 304, 324, 325, 326

Citation : (2019) 01 BOM CK 0118

Hon'ble Judges : V.M. Deshpande, J

Bench : Single Bench

Advocate : C.A. Joshi, M.K. Pathan

Judgement

V. M. Deshpande, J.

[1] Appellants - Waman Shendge and Sau. Kantabai Shendge, the husband and wife, are challenging their conviction imposed on them by the learned 2nd Ad-hoc Additional Sessions Judge, Washim on 31.8.2006 in Sessions Trial No. 28/2006, by which the Court below convicted both of them for the offence punishable under Section 304 Part II read with Section 34 of the Indian Penal Code and directed to suffer rigorous imprisonment for Five years each and to pay a fine of Rs.200/- each and in default of payment of fine to undergo rigorous imprisonment for One month.

[2] Though, the appellants were charged for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code for committing murder of Deorao Shamrao Gawali in an incident dated 09.2.2005, the Court below acquitted both of them from the said charge. In spite of their acquittal, the State chose not to prefer any appeal against the said acquittal.

[3] I have heard Mr. C.A. Joshi, the learned counsel for the appellants and Mr. M. K. Pathan, the learned Additional Public Prosecutor for the respondent/State. With their able assistance, I have gone through the record and proceedings. Both of them vehemently submitted their respective briefs and prayed for respective

reliefs in their favour.

[4] On 09.2.2005, PW7 Manohar Thakre was attached to Police Station, Shirpur as Head Constable. On the said date, Deorao Gawli (deceased), resident of Ekamba came to police station. He gave his oral report which was recorded by him as per say of Deorao. The oral report of Deorao is at Exh.36. While reducing the report into writing, HC Manohar Thakre noticed that Deorao had injuries one below left knee and another on shoulder. He, therefore, sent him to Medical Officer at Primary Health Centre, Shirpur for examination.

[5] The oral report (Exh.36) lodged by deceased Deorao shows that his cattle shed is situated outside village Ekamba. He used to tether his cattle in the said cattle shed and while going to his cattle shed, he has to proceed from front of the house of the accused persons. The accused used to pick up quarrel with him as he had urinated in front of his house. According to the report, on 09.2.2005 at about 9.00 O'clock in the morning he went to cattle shed to give fodder and water to the cattle and while returning from there along with small she-calf of she-buffalo and a basket of fodder, both the appellants chased him by giving abuses. When he was running away, he was assaulted by big babool stick in front of the house of Baban Lade. Due to that, he fell down. Thereupon, he was assaulted by a big babool stick on his right shin bone, left knee, both elbows and left palm.

[6] PW10 Janardhan Girhe took up the investigation of Crime No. 35/2005 registered for the offence punishable under Section 325 read with Section 34 of the Indian Penal Code. On 25.3.2005, he visited the spot at village Ekamba and prepared the spot panchanama (Exh.21). Appellant Waman produced stick which was seized by him under seizure panchanama Exh.27. After completion of the investigation, he filed the charge-sheet before the learned Judicial Magistrate, First Class, Malegaon for the offence punishable under Section 326 read with Section 34 of the Indian Penal Code. Later on, Deorao expired and therefore, offence under Section 302 of the Indian Penal Code was added. Supplementary charge-sheet was presented by API Bhoge. The case being exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Court of learned Additional Sessions Judge, Washim, which came to be registered as Sessions Trial No.28/2006.

[7] After the charge was framed against the appellants for the offence punishable under Section 302 of the Indian Penal Code, the prosecution examined in all Ten witnesses and also relied upon various documents. The learned Judge of the Court below after appreciating the prosecution case, though acquitted the appellants for the offence for which they were charged, however, convicted them for the offence punishable under Section 304 Part II of the Indian Penal Code.

[8] On 09.2.2005, Dr. Vijay Kanade (PW6) was Medical Officer at Civil Hospital, Washim. He examined Deorao Gawli to notice the following injuries :

[1] CLW over right leg, size 1 x .5 cm caused by hard and blunt object, it was

simple in nature and age within 6 ours (fresh).

[2] Contusion over left knee, fracture of left patella was suspected, caused by hard and blunt object about nature of the injury opinion reserved and age within 6 to 8 hours.

[3] Abrasion over right forearm, 3 in number, having respective mentions : (1) 2 x 0.2 cm; (2) 4 x 0.5 cm and (3) 3 x 0.5 cm. It was caused by hard and blunt object, nature simple and age within 6 to 8 hours.

[4] Abrasion over right elbow, caused by hard and blunt object, size 1 x 1 cm, age within 6 to 8 hours. It was simple in nature.

[5] Contusion over right arm caused by hard and blunt object, simple in nature, age within 6 to 8 hours.

[6] Abrasion over left forearm caused by hard and blunt object, dimension 2 x 2 cm, simple in nature, age within 6 to 8 hours.

[7] CLW over left palm caused by hard and blunt object, size 2 x 2 cm, simple in nature, age within 6 to 8 hours.

His evidence would show that he was suspecting injury to brain though there was no external injury to his head and for want of CT Scan facility, he referred injured Deorao to Government Medical Hospital at Akola. His evidence would show that when he referred the patient to Akola, Deorao was unconscious. Medical Certificate of Deorao given by Dr. Kanade is at Exh.29, whereas his opinion is at Exh.30.

[9] During the course of the trial, the prosecution has also examined Dr. Umesh Gadpal (PW8), a Neuro Surgeon, who runs a private hospital by name Vidarbha Neuro Surgical and Spinal Institute. His evidence would show that Deorao was admitted to his hospital on 11.2.2005 and he was referred to his hospital from Government Hospital, Akola. His evidence would show that Deorao was discharged from his hospital on 16.4.2005. At the time of discharge, he was in altered sensorium. According to Dr. Gadpal, altered sensorium means patient was not fully conscious. At the time of discharge he was advised to have bed sore dressing, tube feeding and medicines. He proved certificate (Exh.41). In the certificate, he has stated that the injured had sustained head injury.

[10] As per Exh.53/1, which is a death intimation, on 05.11.2005 Deorao expired at hospital run by Dr. Gadpal (PW8). Inquest panchanama is at Exh. 25. Dr. Ranjeet Deshmukh (PW9) had performed post mortem over the dead body. The post mortem report is at Exh.44. On examination of the dead body, Dr. Deshmukh noticed multiple bed sores, one over lateral side of thigh on upper third of left thigh, size 11 cm x 9 cm, another bed sore on back and buttock, size 20 cm x 18 cm and third bed sore was over lateral side of upper third of right thigh size 7 cm x 13 cm. All the bed sores were bone deep and infectious. On internal examination, he noticed no injury under the scalp. No evidence of extra

dural or intra dural haematoma, was noticed. No fracture to the skull bone was found. Though, there was multiple black pigmentation present over both lungs, according to the doctor, cause of death was aspiration pneumonia and septicemia with severe anemia.

[11] In the present case, The Court is required to address whether the appellants should be convicted for the offence punishable under Section 304 Part II of the Indian Penal Code as ordered by the trial Court.

[12] The prosecution has examined two eye-witnesses. They are PW1 Gajanan Deokar and PW2 Kisan Lade in order to establish assault on Deorao at the hands of the appellant on 09.2.2005. These two eye-witnesses are resident of very same village i.e. Ekamba. Though, these persons claim that they are eye-witness to the incident, the police statement of PW1 Gajanan was recorded after twenty days of the incident, whereas police statement of PW2 Kisan was recorded after two and half months of the incident, if their evidence is properly scanned. The belated recording of the statements of eye-witnesses without there being any explanation from the Investigating Officer as to why their police statements were recorded so belatedly, naturally raises the eye-brows in respect of their presence on the spot itself.

The law is well crystalized by the Hon'ble Apex Court on the issue of belated recording of the statements of material witnesses, in the case of Ganesh Bhavan Patel and another .vs. State of Maharashtra, reported in AIR 1979 SC 135 ; and in Harbeer Singh .vs. Sheeshpal and others, reported in AIR 2016 SC 4958. It is held by the Hon'ble Apex Court in Ganesh Patel's case that "Delay of a few hours, simplicitor, in recording the statements of eye-witnesses may not, by itself amount to a serious infirmity in the prosecution case, but it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eye-witnesses to be introduced. Thus, under the facts and circumstances of the case, delay in recording the statements of the material witnesses, casts a cloud of suspicion on the credibility of the entire warp and woof of the prosecution story." In Harbeer Singh's case (supra) also it is held by the Hon'ble Apex Court that delay in recording statements of witnesses without there being any satisfactory explanation, would cast doubt upon prosecution case.

In the present case also there is inordinate unexplained delay in recording the statements of the eye-witnesses. Therefore, in view of the law laid down by the Hon'ble Apex Court, I am discarding the evidence of PW1 Gajanan and PW2 Kisan in respect of the assault made by the appellants on Deorao.

[13] However, Exh.36, the oral report, was lodged by Deorao himself on 09.2.2005 itself. According to the oral report, at about 9.00 O'clock in the morning, he was assaulted and perusal of Exh.36 shows that information was received at 10.14 am itself. Further, PW7 Manohar Thakre, who reduced the oral report into writing, found while recording the oral report that there were injuries

over the body of Deorao.

[14] On 09.2.2005 itself, Deorao was examined by Dr. Vijay Kanade (PW6) to notice seven injuries as stated in the preceding paragraph of this judgment. Therefore, it is crystal clear that on 09.2.2005, deceased Deorao was assaulted. Though, in the first information report, deceased has named the wife of appellant no.1 Waman, no overt act is attributed against her.

[15] According to the evidence of PW8 Dr. Gadpal, the patient was referred to his hospital from Government Hospital, Akola. No CT scan reports are placed on record. Further, during internal examination after the dead body was opened by the Autopsy Surgeon, the Autopsy Surgeon did not notice any fracture or injury on head or skull.

PW8 Dr. Gadpal is silent when Deorao was re-admitted to his hospital after 16.4.2005. The incident in question is of 09.2.2005, whereas death of Deorao has occurred on 05.11.2005. According to Dr. Deshmukh (PW9), who conducted post mortem, he noticed septicemia and pneumonia. That shows that no medical care was taken of Deorao. In view of the opinion of the Autopsy Surgeon, it is my considered opinion that the Court below has committed an error in convicting the appellants for the offence punishable under Section 304 Part II of the Indian Penal Code.

[16] However, at the same time, the oral report (Exh.36) which was lodged immediately, shows that the deceased was assaulted by stick at the hands of appellant no.1 Waman alone and stick was also seized under seizure panchanama (Exh.27) in presence of PW5 Prakashrao Gawli. In that view of the matter, appellant no.1 alone can be convicted for the offence punishable under Section 324 of the Indian Penal Code. The record shows that appellant Waman was arrested on 31.3.2005 and the record shows that on 21.3.2006, the learned Additional Sessions Judge, Washim granted bail to him.

Thus, from 31.3.2005 till 21.3.2006, the appellant was in jail. Further, after conviction on 31.8.2006, this Court granted bail on 15.9.2006.

[17] In that view of the matter, on re-appreciation of the entire prosecution case, I pass the following order :

ORDER

[1] The criminal appeal is partly allowed.

[2] The judgment and order of conviction passed by the learned 2nd Ad-hoc Additional Sessions Judge, Washim on 31.8.2006 in Sessions Trial No. 28/2006, insofar as it convicts appellant no.2 - Sau. Kantabai W/o Waman Shendge for the offence punishable under Section 304 Part II of the Indian Penal Code, is hereby set aside.

[3] Appellant no.2 - Sau. Kantabai Waman Shendge is acquitted of the offence punishable under Section 304 Part-II of the Indian Penal Code.

[4] Conviction of Appellant no.1 - Waman S/o Pandurang Shendge is maintained. However, he is convicted for the offence punishable under Section 324, in stead of 304 Part II of the Indian Penal Code as directed by the Court below. Insofar as his jail sentence is concerned, appellant no.1 - Waman Pandurang Shendge's jail sentence shall be the period which he has already undergone in jail.

[5] The sentence of fine is maintained.

[6] Bail bonds of appellant no.2 Smt. Kantabai Shendge shall stand cancelled.

[7] With this, the appeal is partly allowed and disposed of.