

(2015) 05 BOM CK 0026
In the Bombay High Court
Case No : Criminal Appeal No. 991 of 2008

Yashwant Hiranman Thakare

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 08-05-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235(2), 313
Penal Code, 1860 (IPC) — Section 300, 302, 304, 504, 506

Citation : (2015) ALLMR(Cri) 3583

Hon'ble Judges : V.K. Tahilramani, J;B.P. Colabawalla, J

Bench : Division Bench

Advocate : Sonia Miskin, for the Appellant; G.P. Mulekar, APP, Advocates for the Respondent

Final Decision : Dismissed

Judgement

B.P. Colabawalla, J.

1. By this Appeal, preferred by the Appellant original accused Yashwant Hiranman Thakare, exception is taken to the judgment and order dated 23rd January, 2008 passed by the learned Ad-hoc Additional Sessions Judge 3, Nashik, in Sessions Case No. 25 of 2007. By the said judgment and order, the learned Sessions Judge convicted the Appellant under section 235(2) of the Code of Criminal Procedure, 1973 of the offence punishable under section 302 of IPC and sentenced him to suffer imprisonment for life and to pay a fine of Rs. 1,000/-. In default thereof, the Appellant is to suffer further R.I. for three months.

2. The prosecution case briefly stated, is as under :-

(a) The deceased Kantilal Pandit Thakare was a resident of Village Amburdi, Taluka Kalwan, District Nashik. The deceased Kantilal and the Appellant were known to each other. PW 1 Pandit Pandurang Thakare was the father of the deceased Kantilal.

(b) The incident in question occurred on 26th November, 2004 at around 7.30

p.m. -8.00 p.m. On the said date, in the evening, the villagers had slaughtered a goat and its meat was distributed amongst the villagers. After taking their meal, a fire place was ignited in the court yard. The Appellant, the deceased Kantilal, one Balu Parshuram Jagtap, PW 7 Keda Popat Jagtap, PW 1 Pandit and other persons were sitting around the fire taking warmth from it. At that time, the deceased Kantilal and several of these people were discussing about purchasing a VCD player for seeing a movie. During this discussion, the deceased Kantilal stated that they need to purchase a VCD player from the contribution of the villagers as they always find it difficult to see a movie. He stated that if they purchased the VCD player, they would not be required to go to another village to see a movie. He further stated that for purchasing the VCD player, they should not take the contribution of the Appellant and he should not be allowed to take part in watching the movies. Due to this, the deceased Kantilal had a heated exchange of words with the Appellant. During this exchange of words, the Appellant slapped the deceased Kantilal. Thereafter, the Appellant went to his house and brought an iron pipe and assaulted the deceased Kantilal on his head by means of the said pipe due to which he fell down and sustained serious injuries to his head. Blood also started oozing from the said injuries. In view of this, PW 1 Pandit and others covered the head of the deceased Kantilal by means of a cloth and took him to Abhona in a bullock-cart. The lady doctor present in the hospital at Abhona informed PW 1 Pandit and others that this was a serious case and that the deceased Kantilal should be shifted to Nashik Hospital immediately. Accordingly, the deceased Kantilal was brought to Nashik Civil Hospital where he was admitted and treatment was provided to him. However, on the next day, (i.e. 27th November, 2004) the deceased Kantilal expired at around 12.00 p.m.

(c) After the post mortem on the dead body of the deceased Kantilal was conducted by PW 5 Dr Ashok kachare, it was brought by PW 1 Pandit and others to their village where the funeral rites were performed. Thereafter, PW 1 Pandit went to Abhona Police Station and reported the incident to the Police. His complaint was reduced into writing by the Police (Exh.12). On the basis of this complaint, Crime No. 64/2004 came to be registered for offences punishable under section 302, 504 and 506 of IPC. Thereafter, investigation commenced. The Appellant was arrested on 28th November, 2004. After his arrest, the iron pipe with which the Appellant had assaulted the deceased Kantilal, as well as the blood-stained shirt of the Appellant, were recovered at his instance. After completion of the investigation, charge-sheet came to be filed and in due course the case was committed to the Court of Sessions.

3. Charge came to be framed against the Appellant under section 302 of IPC. The Appellant pleaded not guilty to the said charge and claimed to be tried. His defence was that of total denial and false implication. After going through the evidence adduced in this case, the learned Sessions Judge convicted and sentenced the Appellant as stated earlier in paragraph 1 above. Hence the present Appeal.

4. We have heard the learned Advocate for the Appellant and the learned APP for the State. After giving our anxious consideration to the facts and circumstances of the case, the arguments advanced by the learned Advocates for the parties, the judgment delivered by the learned Sessions Judge, and the evidence on record, for the reasons mentioned hereinafter, we are of the opinion that the Appellant assaulted the deceased Kantilal on his head with an iron pipe and caused his death.

5. The case of the prosecution is based mainly on (i) the testimony of two eye-witnesses i.e. PW 1 Pandit and PW 7 Keda; (ii) the recovery of the iron pipe and the blood-stained shirt of the Appellant, at his instance; and (iii) the medical and forensic evidence in this case. PW 1 Pandit has deposed that the deceased Kantilal was his son and that he knew the Appellant who was residing near his house. PW 1 Pandit has further stated that on the day of the incident, the villagers had slaughtered a goat in the evening and its meat was distributed amongst the villagers. After taking their meal, a fire place was ignited in the court yard. One Balu Parasharam Jagtap, PW 7 Keda, Pakhibai Pandurang Thakare, and his daughter, along with 2 -3 other persons were sitting around the fire, taking warmth from it. They were talking about purchasing a VCD player for watching a movie. The Appellant was also taking part in the aforesaid discussion. At that time, the deceased Kantilal was also sitting near the fire place. During this discussion, a heated exchange of words took place between the Appellant and the deceased Kantilal due to the fact that the deceased Kantilal told the Appellant that he should not take part in the VCD programme. In view of this, the Appellant slapped the deceased Kantilal. PW 1 Pandit has further deposed that thereafter the Appellant went to his house, brought an iron pipe and assaulted the deceased Kantilal on his head by means of the said pipe. Due to this assault, the deceased Kantilal fell down and had sustained serious injuries to his head. Since blood started oozing from the injuries, they covered his head by means of a cloth. Thereafter, they lifted him and put him in a bullock-cart to take him to Abhona. The lady doctor present in the Rural Hospital at Abhona told PW 1 Pandit and others that this was a serious case and therefore, the deceased Kantilal should be shifted to Nashik Hospital immediately. In view thereof, the deceased was shifted to Nashik Civil Hospital where he was admitted and treatment was being provided to him. However, on the next date i.e. 27th November 2004 the deceased Kantilal expired at about 12.00 p.m. He has further deposed that after the post mortem was performed on the dead body of the deceased Kantilal, it was brought by him and others to their village Amburdi where the funeral rites were performed at about 8.00 p.m. PW 1 Pandit has further deposed that thereafter he went to Abhona Police Station and narrated the incident to the Police. His complaint was reduced into writing by the Police and his thumb impression was obtained. During his deposition, PW 1 Pandit has identified the said complaint (Exh.12) and stated that its contents are correct. He has further stated that since he was alone in the family and the deceased Kantilal was his only son, he could not lodge the complaint earlier. During the course of

his deposition, PW 1 Pandit has identified the iron pipe (Art.5) as well as the shirt and the pant (Arts. 6 and 7) that were worn by the Appellant. There is nothing that is elicited in the cross-examination of PW 1 Pandit to discredit his testimony. We find his testimony to be truthful and cogent. We therefore have no hesitation in relying upon the same.

6. The eye-witness account of PW 1 Pandit is also corroborated by the testimony of PW 7 Keda. During his deposition, PW 7 Keda has stated that he knew the deceased Kantilal as well as the Appellant. He has deposed that the incident took place on 26th November 2004 at about 7.30 p.m. As per the customs of their village, the villagers had purchased a goat by collecting contributions and after the goat was slaughtered, the meat was distributed to all. He has deposed that after having dinner, the Appellant, the deceased Kantilal and himself alongwith several other persons were taking warmth from the fire place. During the discussion amongst themselves, the deceased Kantilal said that they always found difficulty for watching a movie and in view thereof they should purchase a VCD player from the contributions of villagers. He stated that if they purchase the VCD player, they would not be required to go to another village to watch a movie. During this discussion, the deceased Kantilal said that no contribution should be taken from the Appellant and he should not be allowed to take part in the programme. PW 7 Keda has deposed that during this discussion, the Appellant got angry and he started abusing the deceased Kantilal and beat him with slaps. Thereafter, the Appellant went to his house, brought an iron pipe and assaulted the deceased Kantilal on the head, due to which his head was broken. Blood was oozing and the deceased Kantilal fell down. Thereafter, the parents and uncle of the deceased Kantilal took him to the Rural Hospital at Abhona. During his deposition, PW 7 Keda has identified the iron pipe which was used by the Appellant for assaulting the deceased Kantilal (Art.5). PW 7 Keda has also identified the Appellant as the person who had assaulted the deceased Kantilal. Here also, nothing has been elicited in the cross-examination of PW 7 Keda to discredit his testimony. On going through the evidence of PW 1 Pandit and PW 7 Keda, we find that their evidence is adequately corroborated by each other's testimony. Both the witnesses were eye-witnesses to the incident. We find their testimony to be truthful, consistent, cogent and reliable. We therefore have no hesitation in relying upon the testimonies of PW 1 Pandit and PW 7 Keda.

7. Over and above the evidence of these two witnesses, the prosecution is also relying upon the recovery of the iron pipe and the blood-stained shirt of the Appellant, at his instance. PW 4 Bhila Rama Thakare has deposed with reference to this recovery. PW 4 Bhila has deposed that he knows the Appellant who was before the Court as well as the deceased Kantilal. He has stated that he knows both of them as they are both his relatives. He has deposed that on 28th November, 2004 he was called to the Abhona Police Station. One Sukdeo Hari Thakare had accompanied him. At that time, the Police showed the Appellant to PW 4 Bhila. After identifying the Appellant in the Police Station, the Appellant, in the presence of PW 4 Bhila, told the Police that he was ready to recover the iron

pipe from the Padavi of his house and he further said to accompany him. Accordingly, a memorandum statement was prepared (Exh.20) and the signatures of the panchas, one of them being PW 4 Bhila, was obtained thereon. During his deposition, this memorandum statement (Exh.20) and its contents thereof were shown to PW 4 Bhila who identified the same and stated that the contents are correct. Thereafter, as per the memorandum statement, they all went alongwith the Appellant to Village Amburdi. There, the Appellant recovered the iron pipe from the Padavi of his house. He also recovered the bed-sheet, towel and his own shirt. A panchanama to that effect was thereafter drawn by the Police (Exh.18) and the signatures of the panchas were obtained thereon. PW 4 Bhila has stated that the said panchanama (Exh.18) bears his signature and its contents are correct. During his deposition, PW 4 Bhila has identified the iron pipe (Art.5) and the shirt (Art.6) that were recovered at the instance of the Appellant. He has further stated that the shirt that was recovered at the instance of the Appellant was blood-stained. Even in the cross-examination of PW 4 Bhila, nothing has been elicited to discredit his testimony. We therefore have no hesitation in relying upon the same.

8. The blood-stained shirt as well as the iron pipe were sent to the Chemical Analyser for examination alongwith the blood sample of the Appellant. The first CA report (Exh.32) discloses that the Appellant's blood group was "A". The second CA report (Exh.33) reveals that even though no blood was detected on the iron pipe, the shirt (Manila) of the Appellant, and which was discovered at his instance, was stained with human blood ranging from 0.1 cm to 3.00 cm in diameter belonging to blood group "AB". The presence of human blood stains belonging to blood group "AB" (and which is not the blood group of the Appellant) on the shirt (Manila) of the Appellant is a highly incriminating circumstance against him. This incriminating circumstance has not been explained by the Appellant in his statement under section 313 of the Code of Criminal Procedure, 1973.

9. It is the case of the prosecution that the deceased Kantilal was assaulted on his head by means of an iron pipe by the Appellant which caused his death. This is also borne out by the medical and forensic evidence. PW 5 Dr Ashok Kachare conducted the post mortem on the dead body of the deceased Kantilal. PW 5 Dr Ashok Kachare has deposed that on 27th November, 2004 the inquest panchanama was brought to him and he performed the post mortem on the dead body of the deceased Kantilal from 2.45 p.m. to 3.45 p.m. On conducting the post mortem, he found the following injuries:-

"i) Abrasion on right shoulder of size 3 x 3 cm

ii) Contused lacerated wound on scalp at partial bone longitudinal. It was stitched of size 6 cm long, it was 4 cm above left ear and 2 cm behind the hair line

iii) Contusion over and behind left ear of size 3 x 1/2 cm.

iv) Haematoma and contusion over left eye of size 3 x 2 cm.

v) Abrasion over right maxila of size 1 x 1 cm.

vi) Contusion on left check of size 2 x 1 cm."

PW 5 Dr Ashok Kachare has deposed that all the injuries were ante-mortem. On internal examination, he found the following injuries :-

"i) Haematoma on scalp extends from hairline to occipital are and from mid to the left ear.

ii) skull was fracture below the CLL.W. (contused lacerated wound) defined at Sr.No. 2 in column No. 17 of the post mortem notes size 8 cm length.

iii) Brain Congestion over the brain and haematoma of of size 5 x 4 x 1/2 cm."

10. In his deposition, PW 5 Dr Ashok Kachare has opined that the cause of death was shock due to head injury. The post mortem report is on record at Exh.22 and PW 5 Dr Ashok Kachare has deposed that it is in his handwriting, bears his signature and the contents are correct. He has stated that the injuries described at serial Nos. 2 to 4 in column 17 of the post mortem report may be caused due to a hard and blunt object. The nature of injury at Sr. No. 2 is grievous whereas at Sr. Nos. 1 and 3 to 6 are simple. PW 5 Dr Ashok Kachare has deposed that the injury at Sr. No. 2 may be caused due to a forceful assault by means of an iron pipe (Art.5) that he identified before the Court. The evidence of PW 5 Dr Ashok Kachare clearly indicates that the deceased Kantilal died because of the assault on his head which could be caused by the iron pipe (Art.5). There is nothing that is elicited in the cross-examination of PW 5 Dr Ashok Kachare to discredit his testimony.

11. In the facts of this case, we find that PW 1 Pandit as well as PW 7 Keda were eye-witnesses to the assault by the Appellant on the deceased Kantilal which ultimately led to his death. Over and above this, the blood-stained shirt of the Appellant as well as the iron pipe with which the deceased Kantilal was assaulted, were recovered at the instance of the Appellant. The shirt of the Appellant was stained with human blood group "AB" which was not his blood group, and he has offered no explanation for the presence of these blood-stains on his shirt. After carefully going through the record, we are of the view that all this evidence clearly points to the guilt of the Appellant and the prosecution has proved its case beyond reasonable doubt that the Appellant assaulted the deceased Kantilal on his head with an iron pipe and caused his death.

12. Mrs. Miskin, the learned Advocate appearing for the Appellant, submitted that even if it is accepted that the Appellant assaulted the deceased Kantilal on his head with an iron pipe and caused his death, the case would still not fall under section 302 of IPC. She submitted that there was no pre-planning in murdering the deceased Kantilal and the assault took place during a sudden fight. In view thereof, Mrs. Miskin submitted that the present case would fall within Exception 4 of section 300 of IPC and therefore the punishment would fall under section 304 part II or at the highest section 304 Part I of IPC.

13. Section 300 of IPC and Exception 4 thereof read as under:-

"300. Murder. --Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

2ndly.-If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

3rdly.-If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

4thly.-If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1. -?????.

Exception 2. -?????.

Exception 3. -?????..

Exception 4.-Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.-It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.-???????.."

(emphasis supplied)

14. To bring the case within Exception 4 to section 300 of IPC, all the ingredients mentioned in it must be found. It is to be noted that the word "fight" appearing in Exception 4 to section 300 of IPC is not defined in the IPC. It takes two or more persons to make a fight. Heat of passion requires that there must be no time for passion to cool down. Exception 4 further stipulates that in the heat of passion upon a sudden quarrel, the offender should not have taken undue advantage or acted in a cruel or unusual manner.

15. In the present case we are unable to agree with the submission of Mrs. Miskin that the case would fall within Exception 4 of section 300 of IPC. The evidence in the present case does not suggest that there was a sudden quarrel between the Appellant and the deceased Kantilal, during which the deceased Kantilal was assaulted and which led to his death. In the facts of the present case, the quarrel first took place between the Appellant and the deceased

Kantilal during which the Appellant slapped the deceased Kantilal. Thereafter, the Appellant went to his house, procured the iron pipe and returned back. It was thereafter that he assaulted the deceased Kantilal with the said iron pipe on his head due to which he sustained severe head injuries which ultimately led to his death. It therefore cannot be said that the assault on the deceased Kantilal was in the heat of passion during a sudden quarrel. We therefore find that the reliance placed on Exception 4 to section 300 of IPC is wholly misplaced and would not apply to the facts and circumstances of the present case. This argument of Mrs. Miskin will therefore have to be rejected.

16. On going through the record, in our opinion, the prosecution has proved its case against the Appellant beyond reasonable doubt. Hence, the conviction and sentence of the Appellant under section 302 of IPC is maintained, and the Appeal is dismissed.

17. The Office is directed to communicate this order to the Appellant who is currently incarcerated in Central Jail, Nashik.

18. We quantify the legal fees to be paid to Advocate Mrs. Sonia Miskin by the High Court Legal Services Committee at Rs. 5,000/-.