

Vidya

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 93 OF 2009

1. Vinay Vijay Shinde
2. Santosh Kashinath Mhatre
3. Anil Kashinath Mhatre
4. Ravindra @ Ravi Kashinath Mhatre ... Appellants
Vs.
The State of Maharashtra ... Respondent

Mr. Niteen Pradhan i/b. Ms. S.D. Khot and Ms. Ameeta Kuttikrishnan,
Advocate for the appellant nos. 1 to 3.
Mrs. A.S. Pai, APP for the Respondent/State.

CORAM: **SMT. V.K. TAHILRAMANI &
MRS.MRIDULA BHATKAR, JJ.**

DATE: **JUNE 23, 2016**

JUDGMENT (Per Mrs. Mridula Bhatkar, J.)

This Appeal is filed by the appellant/accused nos. 1 to 4 challenging the judgment and order dated 13th January, 2009 passed by the Additional Sessions Judge, Greater Mumbai thereby convicting all the four accused for the offences punishable under section 302 r/w. 34 of the Indian Penal Code sentencing them to suffer R.I. for life and to pay fine of Rs.500/- each, in default of payment of fine, to suffer R.I. for one year; the accused were also convicted for the offences punishable under section 324 r/w. 34 of the Indian Penal code thereby sentencing them to suffer R.I. for two years each and to pay fine of Rs.250/- each, in default to suffer R.I. for 6 months. Accused no.

4 Ravindra alias Ravi Kashinath Mhatre has expired during the pending of Appeal.

2. It is the case of the prosecution that the incident of assault took place on 20th August, 2003 at around 3.30 to 4.30 a.m. at Santacruz, Chunabhatti. One Rakeshkumar Mishra was assaulted by the appellants/accused outside his house. On that day in the early morning, Rakesh's brother Brijesh Kumar and his wife wanted to go to railway station to catch a train, therefore, his other brother Akhilesh went out to bring autorickshaw. There were verbal altercations between Akhilesh and appellants/accused and then the appellants started assaulting Akhilesh with bamboo, stumps and fist blows. Rakeshkumar, elder brother of Akhilesh went to the spot to rescue Akhilesh and Brijesh Kumar. All the accused assaulted Rakesh with bamboo, stumps and fist blows and ran away. All the three brothers went to the police station, however, the police referred them to the hospital for treatment. So, they went to Cooper Hospital. Rakeshkumar required head surgery, so he was shifted to Nanavati Hospital. Surgery was performed on him, however, 7 days after the incident, Rakesh Kumar died, i.e., on 27th August, 2003. On the date of incident, i.e., 20th August, 2003, Brijesh Kumar gave information to the police, pursuant to which the FIR was registered at C.R. No. 309 of 2003. The said FIR is marked as Exhibit 17.

Thereafter the police visited the spot, carried out spot panchnama, recorded statement of the witnesses. After the death of Rakeshkumar, Section 302 was added. Thereafter the accused were arrested. The police drew recovery panchnama of the weapons. After completion of the investigation, they filed charge sheet in the Court of Magistrate. The case was committed to the Sessions Court. The learned Sessions Judge framed charge. The accused pleaded not guilty. The learned Sessions Judge considered the evidence tendered by the prosecution and convicted the accused persons. Hence, this Appeal.

3. In all the prosecution has examined 9 witnesses, i.e., PW-1 Brijeshkumar Mishra, who is an eye-witness and a brother of the deceased; PW-2 Arvind Ramchandra Ugale, C.M.O.; PW-3 Dr. Manohar Pandurang Srivastava, who performed postmortem; PW-4 Kuppu Swami Mukan Harijan, panch on spot panchnama; PW-5 Dr. Rajeev Kamlakant Desai; PW-6 Dr. Harshad Chandrakant Parekh, who performed surgery on Rakesh Mishra; PW-7 Akhilesh Mishra, eye-witness; PW-8 Pushpa Anilkumar Mishra; PW-9 Raghunath Narayan Mahale, P.S.I. attached to Santacruz Police Station.

4. The learned senior counsel Mr. Niteen Pradhan has submitted that

considering the evidence against the appellants, conviction for murder is illegal and is to be set aside. He assailed the evidence of PW-1 Brijesh Mishra, PW-7 Akhilesh Mishra and PW-8 Pushpa Mishra on the point of probabilities and challenged that whether the incident has taken place the manner in which it is narrated by these eye-witnesses. Considering the evidence of Brijesh, Akhilesh and Pushpa, the injuries were caused due to bamboo to the injured and deceased Rakesh Mishra. As per their evidence, accused no 3 Anil Mhatre and accused no. 4 Ravindra Mhatre assaulted Akhilesh and Brijesh with fist blows. There are discrepancies in the evidence of these eye-witnesses on the point of assault. However, the injured witness have been the independent witness and Ravindra Pandey, who claimed to be injured, was not examined by the prosecution. He further argued that as per the evidence of Akhilesh, the incident has taken place suddenly. As per his case, accused no. 1 was having wooden bamboo in his hand and accused no. 2 assaulted with stump. There is delay in recording of the FIR though all the three brothers went to Santacruz Police Station and they were sent to Cooper Hospital for medical treatment and thereafter FIR was registered. There are material omissions in the statement of Pushpa Mishra which is marked as Exhibits 60 & 61. He further relied on CA report dated 10th February, 2004 (Exhibits 49, 50 & 51) and pointed that blood on bamboo stick and cricket stump is found inconclusive. He relied

on the evidence of PW-6 Dr. Harshad Parekh, who has conducted emergency surgery for craniotomy on deceased on 20th August, 2013. He submitted that after 7 days from the incident, the deceased died due to head injury and septicemia. The learned senior counsel submitted that there was no intention of the accused to kill the deceased. It was a sudden fight. Three factors were not taken into account by the learned trial Judge. The learned senior counsel pleaded for clear acquittal and alternatively he prayed for lesser sentence.

5. Learned APP while opposing the Appeal has submitted that considering the medical report and the evidence of eye-witnesses, conviction under section 302 is justified.

6. It is a short case of 7 witnesses. There are three eye-witnesses. We found evidence of these three eye-witnesses consistent. They corroborate each other. Specific role is attributed to accused nos. 1, 2, 3. Accused nos. 1 and 3 were holding bamboo and accused no. 2 was holding stump. After going through the evidence of Akhilesh, it is to be necessarily concluded that it was not premeditated attack but it was a sudden fight which took place out of verbal altercations in the early hours of morning. We do not find any reason to disbelieve the evidence of these three eye-witnesses on

the point of actual assault and attributing role of assailants to the accused.

7. The prosecution has tendered sufficient medical evidence to establish a fact of assault. PW-2 Arvind Ramchandra Ugale examined Brijesh Mishra and gave evidence in respect of injuries on the person of Brijesh, i.e., entry in casualty medical register (Exhibit 19). He also examined other injured persons, namely, Ravindra Prasad Pandey, Akhilesh Mishra PW-7 and made entry in the medical casualty register marked at Exhibits 19 & 21. He produced medical certificates about the injuries of Brijesh Mishra, Akhilesh Mishra and Ravindra Pandey, which are marked at Exhibits 22, 23 and 24. On the same day he also examined deceased Rakesh Mishra. He noted down history of assault by known persons. Rakesh Mishra was referred to surgical department. His entry in the medical casualty register marked at Exhibit 25.

8. Dr. Manohar Shrivastav PW-3 has performed postmortem on 27th August, 2008 on the body of Rakesh Mishra and he has opined that due to extradural haemorrhage with fracture temporal bone and septicemia of brain. However, in the cross-examination he agreed that if craniotomy is not properly performed, it may result in haemorrhage.

9. As per the evidence of PW-6 Harshad Parekh, it was emergency surgery for removal of the clot and decompression. He produced case papers, which are marked Exhibit 40.

10. This shows that Rakeshkumar had unnatural death. Other eye-witnesses were also injured on that day. This clearly establishes that accused have assaulted Rakesh and eye-witnesses. There is no reason to disbelieve these eye-witnesses, therefore, we confirm the conviction of the accused. However, the submissions of learned senior counsel on the point of lesser sentence in view of the circumstances and nature of attack are worth to consider. We take into account two important factors on the point of quantum. Firstly, it was a sudden fight and there was no intention of the accused to kill Rakesh; secondly, deceased Rakesh died 7 days after the incident, i.e., on 27th August, 2003. Emergency surgery of craniotomy was performed on him. Thus, we pass the following order:

- (i) Conviction under section 302 r/w. 34 against accused nos. 1 to 3 is set aside.
- (ii) Accused nos. 1 and 2 are hereby convicted for the offence punishable under section 304 Part II for 5 years with fine of Rs.500/- each and in default, to suffer R.I. for 3 months.
- (iii) Accused no. 3 is hereby convicted for the offence punishable under

section 304 Part II for 2 years with fine of Rs.500/- and in default, to suffer R.I. for 3 months.

- (iv) Accused Nos. 1 to 3 are also convicted for the offences punishable under section 324 r/w. 34 of Indian Penal Code and are sentenced to suffer R.I. for 1 year and to pay of Rs.250/- each, in default, to suffer R.I for 1 month.

11. Appeal is partly allowed.

(MRIDULA BHATKAR, J.)

(V.K. TAHILRAMANI, J.)