

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.914 OF 2014

Dashrath Vitthal Gire.	]	
Age – 30 years, Occ. - Service,	]	
Residint at Jay Malhar Vasahat,	]	
56/2, Sant Nagar, Aranyeshwar, Pune.	]	
(At present in Yerawada Jail).	]	... Appellant

Versus

The State of Maharashtra.	]	
through Sahakarnagar Police Station, Pune.	]	... Respondent

Mr. Satyavrat Joshi for Appellant.
Mr. H. J. Dedhia, APP for State.

CORAM :- A. A. SAYED &
SARANG V. KOTWAL, JJ.
DATE :- 08 AUGUST, 2017

JUDGMENT (PER : SARANG V. KOTWAL, J.) :-

1. The present Appeal is filed by the Appellant who was the sole accused in Sessions Case No.503 of 2013 before the learned Extra Joint Ad-Hoc Additional Sessions Judge-1, Pune. The learned trial Judge passed Judgment and Order dated 18/08/2014 and was pleased to convict the Appellant for commission of an offence punishable under Section 302 of the IPC and he was sentenced to undergo imprisonment for life and to pay a fine of Rs.2,000/- and in default of payment of fine, to suffer further S.I. for one month. The

Appellant was given set off for the period of imprisonment undergone by him during the pendency of the trial. The Appellant was charged for commission of an offence punishable under Section 37 (1) r/w Section 135 of the Bombay Police Act; but he was acquitted from this charge. The Appellant has preferred an Appeal challenging the Judgment and Order of conviction and sentence passed in the said Sessions Case.

2. The Appellant was facing the said criminal case for commission of murder of one Vaibhav Dilip Pandhare. The incident had taken place on 13/01/2013. The FIR was lodged by one Sooraj Pawar who was knowing the deceased as well as the Appellant. The Appellant was arrested on the same day. The investigation was carried out and the charge-sheet was filed on 28/01/2013 in the Court of JMFC, 4th Court, Pune. After filing of the charge-sheet, the case was committed to the Court of Sessions for trial and was numbered as Sessions Case No.503 of 2013.

3. The charges were framed on 03/12/2013 and the Appellant denied the charges against him.

4. In support of its case, the prosecution examined 7 witnesses and has relied heavily on the statements of 2 eye witnesses i.e. PW 1 Sooraj Pawarj and PW 2 Sonu Bhagat. PW 3 Vijay Bibve was the panch who was present when the arrest panchanama was carried out and the knife was seized from the pocket of the pant which the

Appellant was wearing at that time. PW 4 Ankush Humbre was examined as the panch who was present during the conduct of the spot panchanama. PW 5 Samir Shaikh was a panch for inquest panchanama. PW 6 Dr. Amol Shinde had conducted the post-mortem on the dead body of the deceased and PW 7 PI Rajendra Todkar was the Investigating Officer.

5. With the assistance of Mr. Satyavrat Joshi, learned Counsel for the Appellant and Mr. H. J. Dedhia, learned APP for the State, we have gone through the evidence and other record of the case.

6. PW 1 Sooraj Pawar had lodged his FIR at 10.30 p.m. on 13/01/2013. The incident had taken place at around 7.45 p.m. near Jai Malhar Vasahat, Aranyeshwar, Pune. The said witness PW 1 Sooraj Pawar has given some history of altercations between the Appellant and the deceased throughout the day on 13/01/2013. The deceased was his friend and was working as a delivery boy with a private firm. On 13/01/2013, PW 1 Sooraj Pawar, deceased Vaibhav Pandhare and their friends were playing cricket in the afternoon and at around 4.00 p.m. went to have lunch at Nala Garden. At that time, the Appellant, along with his friend, was consuming liquor nearby. At that time, the Appellant was staring at the deceased. The incident did not escalate any further, though the deceased Vaibhav had got annoyed. In the evening at around 7.30 p.m. when PW 1 Sooraj Pawar, deceased Vaibhav and their friends were sitting in their

locality, the Appellant was passing by from near them. The Appellant was uttering abuses loudly and this time, there was a scuffle between the Appellant and the deceased Vaibhav. At that time, PW 1 and others intervened in the quarrel and the Appellant went away. After some time, the Appellant came back and was saying loudly that his mobile phone and an amount of Rs.2,500/- were stolen and he was going to lodge a complaint. After saying so loudly, the Appellant returned to his house. At that time, the deceased Vaibhav followed him and went towards the house of the Appellant to confront him as to why he was making wild allegations. At about 7.30 p.m., PW 1 Sooraj Pawar and others heard shouts and therefore they rushed towards the house of the Appellant. At that time, they saw that there was a scuffle between the Appellant and the deceased Vaibhav and that the Appellant gave a blow of knife on the chest of Vaibhav. The PW 1 and others carried Vaibhav to a small hospital nearby but were advised to go to a better equipped hospital and therefore he was taken to Poona Hospital but Vaibhav succumbed to his injuries and thereafter PW 1 Sooraj Pawar lodged the FIR vide C.R.No.13 of 2013 at Sahakarnagar Police Station, Pune.

7. PW 2 Sonu Bhagat was present throughout with PW 1 Sooraj Pawar and the deceased Vaibhav on 13/01/2013 and he has deposed on the same lines as those of PW 1 Sooraj Pawar and has corroborated him on all material particulars. The spot panchanama and the evidence of PW 4 Ankush Humbre support the case of these two eye witnesses as far as the location of the spot of incident is

concerned. The police collected the sample of blood which was spread on the spot.

8. PW 6 Dr. Amol Shinde conducted the post-mortem examination between 9.00 a.m. to 10.00 a.m. on 14/01/2013 and on external examination, he found the following external injuries on the dead body of Vaibhav :-

- (i) Stab wound present over left pectoral region, 8cm medial and inferior to nipple, 2 x 1 cm. into cavity deep, oblique upwards medially 5 cm. from midline, Margins clean cut reddish.
- (ii) Stitched wound present over left lateral side of chest - 4 x 1 cm. into cavity deep, horizontal 9 cm. from nipple, one stitch in situ, - reddish (therapenti).
- (iii) Multiple abrasions present over left infraclavicular region, 0.5 x 0.5 cm. to 0.25 x 0.25 cm. irregular, reddish,
- (iv) Injection mark present over right antecubital fossa reddish.

On internal examination, PW 6 Dr. Amol Shinde found the following injuries on the dead body of Vaibhav :-

- (i) In thorax, he found Injury Nos.1 and 2 as mentioned in Col. No.17 as the corresponding injuries.
- (ii) Stab wound present over 4th intercostal space, 2 x 1 cm. into cavity deep, margins clean cut reddish, about 1000 ml fluid blood present within thorasic cavity on

left side.

- (iii) Plura intact, pale on right side, cut present corresponding to injury no.2, under Col.No.17.
- (iv) Cut present over pericardium anteriorly 1 x 1 cm. reddish corresponding to stab injury.
- (v) Stab wound present over left ventricle anteriorly, 1 x 1 cm. into cavity deep, margins clean cut, reddish, corresponding to Injury No.1, under Col.No.17.
- (vi) On dissection cavity empty.
- (vii) In stomach, he found 150 cc. thin semi solid, semi digested food material present, rice particles identified, no abnormal smell perceived, mucosa pale.

According to PW 6 Dr. Amol Shinde, Injury No.1 mentioned in the column for external injuries along with its corresponding internal injury was sufficient to cause death in an ordinary course of nature, individually as well as collectively. PW 6 Dr. Amol Shinde has further deposed that the stab injury was possible by the knife which was seized from the Appellant and was produced before the Court as Article No.6.

9. PW 7 PI Rajendra Todkar had investigated the offence. Apart from recording statements of witnesses and carrying out various panchanamas, he had sent the seized articles for analysis to the Chamilal Analyzer. The CA report was not received by him till his evidence was recorded and therefore he did not tender the same in the Court.

10. After the deposition of PW 7 PI Todkar was recorded, the prosecution gave a pursis for closure of the prosecution evidence on 10/08/2014. The learned trial Judge recorded the statement of the Appellant under Section 313 of the Cr.P.C. on 13/08/2014. On 14/08/2014, the prosecution tendered an application along with the CA reports which was received by them, praying for exhibiting those documents. The learned Judge did not allow exhibition of the CA reports. The learned Judge merely allowed production of those reports but there was no clear order on the said Exh.38 whereby the prosecution had prayed for exhibiting those CA reports. The impugned Judgment mentions that the CA reports were not allowed to be admitted in evidence because that would have caused prejudice to the accused - Appellant, as, by then, the statement of the Appellant under Section 313 of the Cr.P.C. was already recorded.

11. The production of the CA reports at such belated stage was not proper. The order of the learned trial Judge for not allowing exhibition of those CA reports, was not proper either. It is a sorry state of affairs that the CA reports which are such important pieces of evidence, could not be brought before the Court even at the time when the trial had almost reached its conclusion. In all such cases where the trial has started and the CA reports are not available, the I.O. is expected to make special endeavour to procure the same from the Forensic Science Laboratory and produce them before the Court at the earliest. Ideally, the CA reports should always accompany the other documents when the charge-sheet is filed but for some reason if

there is a delay; such delay cannot be allowed to be extended to such a period that the trial could get over without the CA reports. This will definitely cause miscarriage of justice in many cases. The CA reports may not always favour the prosecution in many cases and the accused can get affected adversely. It is not desirable to leave these matters for drawing presumption either in favour or against the accused.

12. In this case, we fail to understand the approach of the learned trial Judge for not allowing admission of those CA reports in evidence. Section 311 of the Cr.P.C. gives ample powers to the trial Judge to call or recall any witness. The main guiding principle in such cases should be that the accused should not be unfairly prejudiced by such late introduction of evidence. The Hon'ble Supreme Court, in the case of **Rajendra Prasad Vs. Narcotic Cell**¹, has observed thus :-

“7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act by saying that the Court could not 'fill the lacuna in the prosecution case'. A lacuna in prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistakes to which humans are proved. A corollary of any such lapses or mistakes during the conducting of a case cannot be understood as the lacuna which a court cannot fill up.

8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the

¹ (1999) 6 Supreme Court Cases 110

prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

9. *The very same decision Mohanlal Shamji Soni v. Union of India² which cautioned against filling up lacuna has also laid down the ratio thus : (AIR Headnote)*

“It is therefore clear that the Criminal Court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the Court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case”.

10. *Dealing with Corresponding Section in the old Code Section 540 Hidayatullah J. (as the learned Chief Justice then was) speaking for a three-judge bench of this Court had said in Jamatraj Kewalji Govani v. The State of Maharashtra³ as follows :*

“It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage or the trial to summon a witness or examine one present in Court or to recall a witness already examined, and makes this the duty and obligation of the

² 1991 Supp (1) SCC 271 : 1991 SCC (Cri) 595 : AIR 1991 SC 1346

³ AIR 1968 SC 178 : (1967) 3 SCR 415

Court provided the just decision of the case demands it. In other words, where the court exercise the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case.”

11. Chinnappa Reddy, J. has also observed in the same tone in *Ram Chander v. State of Haryana*⁴.

12. We cannot therefore accept the contention of the appellant as a legal proposition that the Court cannot exercise power of re-summoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that prosecution discovered latches only when the defence highlighted them during final arguments. The power of the court is plenary to summon or even recall any witness at any stage of the case if the court considers it necessary for a just decision. The steps which the trial court permitted in this case for re-summoning certain witnesses cannot therefore be spurned down nor frowned at.”

In the present case, we find that in the interest of justice, the trial Judge should have allowed exhibiting the CA reports. Be that as it may, we are not inclined to take this issue any further because, firstly, the accused had not insisted on exhibiting such document and secondly, the prosecution evidence, *sans* CA reports, is strong enough to stand on its own legs.

13. We find that the evidence of PW 1 Sooraj Pawar and PW 2 Sonu Bhagat is wholly reliable. Both these witnesses are natural witnesses and there is nothing in their entire evidence which could

⁴ (1981) 3 SCC 191 : 1981 SCC (Cri) 683 : AIR 1981 SC 1086

raise doubt about the veracity of the versions given by them. Both these witnesses corroborate each other and all the other circumstances discussed above corroborate the evidence of these two eye witnesses. Therefore, we are satisfied that the Appellant himself had inflicted a fatal blow on the deceased due to which he succumbed to the injuries.

14. Though we find that the Appellant was responsible for the homicidal death of the deceased; the question still remains as to whether the said act of the Appellant would fall within the four corners of the definition of 'murder' given under Section 300 of the IPC. Mr. Satyavrat Joshi, learned Counsel for the Appellant, submitted that the present case would fall under Exception 4 provided under Section 300 of the IPC. The Exception 4 reads thus :-

“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 having taken undue advantage or acted in a cruel or unusual manner.”

15. While it is true that when an accused seeks protection of any of the Exceptions, the burden to prove that his case falls within one of the Exceptions shifts on him as per Section 105 of the Evidence Act; however, such burden of proof can be discharged based on the attending circumstances which can be seen from the evidence led by the prosecution itself. In support of his contention, Mr. Joshi has relied on the observations in para 78 in the case of ***Bishna alias Bhiswadeb Mahato and Others Vs. State of W.B.***⁵, which reads thus :

⁵ (2005) 12 Supreme Court Cases 657

“78. Section 105 of the Indian Evidence Act casts the burden of proof on the accused who sets up the plea of self-defence and in the absence of proof, it may not be possible for the court to presume the correctness or otherwise of the said plea. No positive evidence although is required to be adduced by the accused; it is possible for him to prove the said fact by eliciting the necessary materials from the witnesses examined by the prosecution. He can establish his plea also from the attending circumstances, as may transpire from the evidence led by the prosecution itself.”

16. We find merit in the submission of Mr. Joshi that the case will fall within the Exception 4. We find that on three previous occasions on the same day after 4.00 p.m., there was a possibility that some serious incident could have taken place. However on all these three occasions, we find that the Appellant has not acted in a manner which would suggest that he wanted to inflict serious injuries on the deceased. In fact, the cross-examination of PW 1 Sooraj Pawar shows that on the third occasion, the Appellant had not blamed the deceased for the theft of amount of Rs.2,500/- and his mobile phone. The deceased himself had got annoyed and had followed the Appellant to his house. Thus, there was no premeditation and there was no preparation to commit murder on the part of the present Appellant. The main incident of assault had taken place only because the deceased himself had followed the Appellant to his house. What exactly transpired and how the incident started at the house of the Appellant, is not deposed to by either PW 1 Sooraj Pawar or PW 2 Sonu Bhagat. However when they reached to see what had happened, they could see that the scuffle was already going on between the

Appellant and the deceased and at that stage, the Appellant had inflicted the fatal blow on the chest of the deceased. Though the post-mortem notes and the medical evidence indicate that there were two injuries, one of the injuries was simple and had not caused any damage. However, the fatal injury was the blow of knife given on chest which had caused a cut over pericardium and left ventricle and it was the cause of death. We find that the incident had taken place without there being any premeditation on the part of the Appellant. It had taken place in the sudden fight, in the heat of passion, upon a sudden quarrel and since the scuffle was already going on, we cannot record a finding that the Appellant had taken undue advantage or had acted in a cruel or unusual manner. We find that there was one serious blow which had caused the death of the deceased. There was no attempt on the part of the Appellant to inflict more blows on other vital organs of the deceased. There was no repeated attempt to cause more injuries with knife. The case remains as that of one single fatal blow though the Appellant had opportunity to cause more damage. Since the genesis of the incident is not clear and since we find that there is a strong possibility that the deceased himself could be the aggressor; we are inclined to give benefit of doubt to the Appellant to that extent.

17. Since the fatal blow was given on chest which has caused a cut over pericardium and left ventricle and was the cause of death, we hold that the act was done by Appellant by which the death was caused, was done with the intention of causing such bodily injury as is

likely to cause death and therefore, the offence will fall under the first category of Section 304 of the IPC. Therefore, we hold that the Appellant has committed the offence punishable under Section 304 Part I of the IPC.

18. On the question of sentence, Mr. Joshi submitted that since there were no criminal antecedents against the present Appellant and since he was of a young age at the time of commission of the offence, some leniency should be shown to him. Looking at the nature of injury, we are not inclined to sentence the Appellant for less than 10 years of imprisonment. Hence, the following order :

ORDER

- (I) The Appeal is partly allowed
- (ii) The conviction of the Appellant under Section 302 of the IPC and the sentence of life imprisonment are set aside.
- (iii) The Appellant is convicted under Section 304 Part I of the IPC.
- (iv) The Appellant is directed to undergo R.I. for 10 years. He is also directed to pay a fine of Rs.2,000/- (Rupees Two Thousand Only) and in default of payment of fine, he is directed to undergo S.I. for one month.
- (v) The period already undergone by the Appellant in jail during the investigation and trial, shall be given as set off under Section 428 of the Cr.P.C.

(SARANG V. KOTWAL, J.)

(A. A. SAYED, J.)