

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO. 39 OF 2019

Maria @ Mariano Borges,
s/o Francisco Borges, 43
years, unemployed, Indian
National, r/o House
No.452, Podwalwado,
Corjuem, Aldona, Bardez,
Goa. ... Appellant

V e r s u s

State of Goa through the
Public Prosecutor ... Respondent

Mr. Anoop Gaonkar, Advocate U/LAS for the Appellant.

Mr. S. R. Rivankar, Public Prosecutor for the State-Respondent.

Coram :- M. S. SONAK &
M. S. JAWALKAR, JJ.

Date : 2nd January, 2020.

ORAL JUDGMENT (Per M. S. Sonak, J)

1. Heard Mr. Gaonkar, the learned Counsel for the
appellant appointed under the Legal Aid Scheme for the appellant

and Mr. Rivankar, the learned Public Prosecutor for the State-respondent.

2. This appeal is directed against the judgment and order dated 2nd May, 2015, made by the learned Additional Sessions Judge, Mapusa, convicting the appellant for offence punishable under Section 302 of the Indian Penal Code (IPC) and sentencing the appellant to undergo life imprisonment and payment of fine of Rs.10,000/- or in default six months simple imprisonment.

3. The appellant was charged of having committed murder of his father Francisco Borges on 16.02.2011 prior to 21.00 hours at house no,452, at Podwalvaddo, Khorjuem, Aldona, Bardez, Goa, by assaulting him with a soda bottle and wooden chair on his head causing the father injuries, which ultimately resulted in his death.

4. Consequent to the appellant pleading “not guilty”, the trial commenced in which the prosecution examined in all seven

witnesses. Thereafter, the appellant's statement under Section 313 Cr.P.C. was recorded. The appellant did not chose to lead any defence evidence. The learned Additional Sessions Judge thereafter, by the impugned judgment and order, convicted the appellant and sentenced him as aforesaid. Hence, the present appeal.

5. Mr. Gaonkar, the learned Counsel for the appellant submits that the material on record very clearly indicates that the appellant was suffering from schizophrenia and, consequently, was not fit to stand trial in the matter. He submits that the learned Additional Sessions Judge has failed to appreciate the evidence of Dr. Shilpa Waikar, IW.1 as well as the medical evidence on record in the proper prospective. He submits that IW.1 in her deposition recorded on 20.10.2012 had clearly stated that the appellant was not fit to stand trial. He submits that IW.1 in her deposition on 02.07.2013, has even stated that the appellant was fit to stand trial but without providing any proper

medical particulars. He submits that at that stage, even the lawyer appointed for the appellant under the Legal Aid Scheme was not present and the matter proceeded on the basis of cross examination by the appellant himself. He submits that the order dated 02.07.2013 by which trial was directed to proceed against the appellant is very bereft of any proper reasons. For all these grounds, Mr. Gaonkar, the learned Counsel, submits that the trial ought not to have proceeded against the appellant, since the appellant was not fit to stand trial.

6. Mr. Gaonkar, the learned Counsel, also handed medical case papers from the Institute of Psychiatry & Human Behaviour (IPHB), while conceding that all these case papers are not a part of the evidence on record. He, however submitted that in the interest of justice, these case papers are required to be looked into primarily because IPHB is a Government Institution and, secondly, these case papers indicate that the appellant was

suffering from schizophrenia much prior to his arrest and even at the time of the alleged incident which took place on 16.02.2011.

7. Mr. Gaonkar, the learned Counsel, without prejudice to the aforesaid submits that the entire case of the prosecution is based upon circumstantial evidence. He submits that the principles relating to appreciation of circumstantial evidence though stated correctly by the learned Additional Sessions Judge have not been correctly applied to the material on record.

8. Mr. Gaonkar, the learned Counsel, submits that the so-called extra judicial confessions made by the appellant to Pw.2 and Pw.3 were really not any confessions at all. In any case, he submits that these so-called confessions were required to be considered from the perspective of the other evidence on record which clearly points to schizophrenia in the applicant. He submits that in any case, there is no corroboration whatsoever as to material particulars and thereafter learned Additional Sessions

Judge should have discarded the so-called extra judicial confessions in their entirety.

9. Mr. Gaonkar submits that the inference from the conduct of the sniffer dog also needs to be considered in its entirety. He submits that in any case the evidence is weak type of evidence. Secondly he submits that the material on record establishes that the appellant was residing with his father in the house which the alleged incident took place. In these circumstances, it is quite natural to the sniffer dogs to come to the appellant and there was nothing incriminating.

10. Mr. Gaonkar, submits that in this case, both the deceased as well as the appellant had the blood group 'O'. Therefore, the traces of blood having blood group 'O' being found on the clothes of the appellant was not at all any incriminating circumstance. He submits that in this case, no DNA profiling was undertaken by the prosecution.

11. Mr. Gaonkar submits that if the aforesaid circumstances are excluded from consideration, then the chain of circumstances is far from complete.

12. Mr. Gaonkar then submits that by applying the various precedents referred to by the learned Additional Sessions Judge himself, this is a fit case to hold that the circumstances are far from sufficient to bring home the guilt to the appellant.

13. Finally, Mr. Gaonkar, submits, again, without prejudice, that the material on record at the highest makes out a case of culpable homicide not amounting to murder. He submits that there is ample evidence on record to indicate that the appellant and his deceased father used to have constant fights with one another. He submits that there is evidence on record that the deceased father used to take drinks and even fall to the ground. He points out that this is not a case where the deceased father was assaulted with any dangerous weapons. He pointed out that there is no case of any motive or pre-meditation made out by the

prosecution. He pointed out that this is a case where the appellant whilst deprived of self control by grave and sudden provocation, may have assaulted the deceased and the assault may have resulted in unfortunate demise of his own father. He pointed out that there is evidence on record that it is the appellant who called for the ambulance. He submits that at the highest, this is a case where the appellant, without any pre-meditation, in the sudden fight, in a heat of passion upon a sudden quarrel may have assaulted his father. He pointed out that there is no evidence that the appellant has taken undue advantage or acted in a cruel manner. On the basis of this evidence, Mr. Gaonkar submits that the appellant, at the highest could have been convicted under Section 304(ii) of the IPC. Mr. Gaonkar pointed out that the appellant has already undergone sentence of almost eight years or thereabouts. He, therefore, submits that this is a fit case where the appellant must be released forthwith.

14. Mr. Rivankar, the learned Public Prosecutor, pointed out that initially, IW.1 did depose that the appellant does not fit to stand trial and, accordingly, the trial was deferred by almost nine months or thereabouts. Mr. Rivankar pointed out that IW.1 was re-examined and on this occasion, after nine months, she deposed that the appellant was fit to stand trial. He also pointed out that at no stage did the appellant take up the defence of insanity in the course of the trial. He submits that in the light of such medical opinion, learned Additional Sessions Judge was quite justified in ordering the trial to proceed.

15. Mr. Rivankar pointed out that the circumstances which have been listed out by the learned Additional Sessions Judge at para 57 of the impugned judgment and the same have been established by the prosecution beyond reasonable doubt. He submits that such circumstances satisfy the tests laid down by the Hon'ble Supreme Court in the case of *Sharad Birdhi Chand Sarda vs State Of Maharashtra*, reported in *AIR 1984 SC*

1622 and there was nothing wrong in the learned Additional Sessions Judge basing the conviction on such circumstances. He submits that the circumstances are quite telling and they exclude every possible hypothesis except the one consistent with the guilt of the appellant. He, therefore, submits that there is absolutely no infirmity in the conviction of the appellant.

16. On as aspect of the act of the appellant not amounting to a murder, Mr. Rivankar, the learned Public Prosecutor, very fairly accepted that the material on record is sufficient to bring the case of the appellant on the explanation (iv) to Section 300 of the IPC. He however submits that this is a fit case where the appellant must be sentenced to imprisonment for a term of ten years. He also submits that before ordering the actual release of the appellant, necessary directions are required to be issued to have the appellant examined at the IPHB in order to determine whether the appellant is in a fit state to be released.

17. Rival contentions now fall for our determination.

18. Insofar as the first ground raised by Mr. Gaonkar, the learned Counsel for the appellant, is concerned, we must note that at no stage has the appellant ever raised the plea of insanity or urged that he was not fit to stand trial. However, we are conscious that by itself does not absolve the court of the responsibility of ascertaining whether indeed the appellant was fit to stand trial. In the present case, however, we find that the learned Additional Sessions Judge has been conscious of the aforesaid responsibility. IW.1, Dr. Shilpa Waikar, was therefore examined in order to find out whether the appellant was indeed fit to stand trial. In her deposition initially recorded on 20.10.2012, IW.1 did state that the appellant was not fit to stand trial. Accordingly, the learned Additional Sessions Judge made an order dated 20.10.2012 deferring the trial. In the same order, directions were issued to offer proper treatment to the appellant.

19. After a period of almost nine months or thereabouts, IW.1 was once again examined on 02.07.2013. On this occasion, the

Doctor clearly deposed that the appellant was now fit to stand trial. The appellant chose to cross examine this Doctor in person. Based on the medical evidence, the learned Additional Sessions Judge by order dated 02.07.2013, recorded satisfaction that the appellant was indeed capable of defending himself and only thereafter ordered the trial to proceed in terms of Section 332 of the Cr.P.C. Accordingly, it cannot be said that this was a case where the appellant was not fit to stand trial or that the learned Additional Sessions Judge was not conscious of his responsibilities of ascertaining whether the appellant was indeed fit to stand trial or not. The medical evidence coupled with the fact that at no stage the appellant raised the defence of insanity, is sufficient to reject Mr. Gaonkar's first contention in this appeal.

20. Insofar as the second contention of Mr. Gaonkar is concerned, it is necessary to advert to the chain of circumstances relied upon by the learned Additional Sessions Judge, which have

been incorporated in paragraph 57 of the impugned judgment and order. They read as follows :

“1. the accused was alone residing with his father in their house at Corjuem, Aldona on 16.02.2011 at the time of the incident at around 7.00 p.m.

2. The accused used to constantly fight with his father and used to assault his father.

3. The deceased was found dead in his house, with injuries on his head.

4. The death was caused due to these injuries, and was a homicidal death.

5. The accused made extra judicial confession through soda bottle and a wooden chair on his head.

6. There were blood stains on the clothes of the accused at the time of his arrest on the same night of 16.02.2011.

7. The sniffer dog who was brought to the house and given the smell of the front leg of the wooden chair, went and licked the accused and stopped near him.

8. The human blood, of blood group 'O; of the deceased was found on the clothes of the accused."

21. The evidence on record very clearly establishes that the appellant was residing along with his father in their house at Corjuem at Aldona. The evidence also establishes that that was the position as on 16.02.2011 when the incident took place at around 7.00 p.m. In particular, the evidence of Pw.5, who is the neighbour of the appellant establishes this position beyond any reasonable doubt.

22. Pw.5 has deposed that on 16.02.2011 in the evening time at about 7.00 p.m., when she was sitting in the verandah of her house or rather in her shop in the said verandah, she heard the sound of fighting in the house which the appellant and the deceased share, being son and father. She has deposed that she

thought that this was a routine fight since such fights would routinely take place between the father and the son. The evidence on record also bears that the house of Pw.5 is virtually adjacent to the house in which the incident took place on 16.02.2011. The evidence on record also bears out that the distance between the two houses is of hardly 25 metres.

23. The sisters of the appellant i.e. Pw.1 and Pw.2, the brother in law of the appellant i.e. Pw.6 and the nephew of the appellant, i.e. Pw.3, have also deposed that the appellant and his deceased father used to reside in the house in which the deceased was ultimately found to be murdered. They have deposed that the appellant was initially working in the Gulf but returned at around the time of the Gulf war. They have deposed that he was unemployed and was maintained by the deceased father who was a pensioner. They deposed that there used to be routine fights between the appellant and the deceased father. They have also

deposed that the father used to take drinks and at times would fall on the ground.

24. Pw.2, the sister of the appellant and the daughter of the deceased has in categorical terms deposed that at 7.30 p.m., she received a call from the appellant on the landline in which he told her that he has had a fight with the father and has even assaulted the father with a bottle and with a wooden chair. To the same effect, is the deposition of Pw.3, the nephew of the appellant.

25. Mr. Gaonkar has contended that Pw.3 was a minor. It is true that Pw.3 was 17 years of age at the time of his deposition in the year 2014 and therefore must have been around 14 years of age at the time of the incident. However, taking into consideration the deposition of Pw.3, there is no reason to really discard the same on the ground of his minority. In any case, the deposition of Pw.2 is to the same effect and there is no good ground to discard her deposition. In the peculiar facts of the present case, we do not see any error on the part of the Additional

Sessions Judge in treating the statements made by the appellant to Pw.2 and Pw.3 as extra judicial confessions.

26. This is not a case where the entire conviction is based only upon the extra judicial confession as aforesaid. There is corroboration on material particulars. It is well settled that corroboration is required only on material particulars and it is not necessary that there should be corroboration on every single aspect. Some explanation regards the finding of blood upon the clothes of the appellant was also due from the appellant. However, no such explanation was forthcoming even in the course of the appellant's 313 statement. The appellant cannot take any advantage of the fact that he himself refused to sign the 313 statement though opportunity was granted to the appellant to do the same. It is true, as urged by Mr. Gaonkar, that the evidence of the conduct of the sniffer dog is a weak type of a evidence. However, even upon exclusion of the said circumstance, the other circumstances are sufficient to bring the

case of the prosecution in the parameters prescribed by the Hon'ble Supreme Court in the case of *Sharad Sarda* (supra).

27. Accordingly, we are satisfied that though this is a case of circumstantial evidence, the prosecution has established the circumstances from which the conclusion of guilt has to be drawn, beyond reasonable doubt. The facts so established are consistent only with the hypothesis of the guilt of the appellant and they exclude every possible hypothesis except the one which has to be proved by the prosecution. In this case, the chain of evidence is also complete so as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused. The material on record as proved by the prosecution shows that in all human probabilities, the act has been committed by the appellant in the present case. Accordingly, this is a fit case where the appellant deserves to be convicted for the offence of culpable homicide.

28. However, at this stage, reference is necessary to the provisions of Section 300 of the IPC, which, inter alia, provide that 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 secondly, 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 thirdly 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 fourthly, if he 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.

29. Therefore, it is clear that if the case of the appellant falls under any of the exceptions to Section 300 of the IPC, the

appellant is not liable to be convicted for murder though he may be convicted for culpable homicide not amounting to murder.

30. The first exception deals with a situation where the accused whilst deprived of the power of self control by grave and sudden provocation, causes the death of person who gave the provocation or causes the death of any other person by mistake or accident. This explanation is subject to certain provisos. The first proviso is that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

31. The fourth exception deals with the situation where 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.

32. As noted earlier, the learned Public Prosecutor has quite frankly accepted that the material on record will perhaps bring

the case of the appellant under exception (iv) to Section 300 of IPC.

33. The evidence on record clearly brings about the circumstances in which the appellant and his deceased father were living in the house where the incident took place on 16.02.2011. Almost all the witnesses, most of whom being near relatives of both the parties have deposed to the fights between the appellant and the deceased father. They have also deposed to the history of the deceased father consuming liquor from time to time. One of the sister i.e. P.w.2 has also deposed that the deceased father was quite short tempered and he used to get angry quite soon. The medical records also show that the death was on account of injuries nos.1, 7 and 8 as a result of blunt force by object which is fatal in the ordinary course of nature.

34. From the nature of injuries brought on record by the prosecution, it does appear that the injuries were caused on account of the appellant hitting the bottle to the face of his

deceased father. There is absolutely no evidence that there was any motive or pre-meditation. The material on record suggest that the assault took place in the course of a sudden fight in the heat of passion upon a sudden quarrel. The evidence on record also does not suggest that the appellant took any undue advantage or acted in a very cruel or unusual manner in the matter. For all these reasons, we too are satisfied that the case of the appellant falls under exception (iv) to Section 300 of the IPC.

35. Accordingly, the appellant, ought not to have been convicted under Section 302 of IPC but rather conviction was called for under part (ii) of Section 304. This is because though the act of the appellant was done with the knowledge and it was likely to cause the death of his deceased father, the same was without any intention to cause death or to cause such bodily injury as to likely cause death. The conviction of the appellant under Section 302 of IPC is therefore liable to be set aside and substituted with the conviction under Section 304 (ii) of IPC.

36. Insofar as sentence is concerned, considering the evidence on record, we are satisfied that the appellant is required to suffer imprisonment for a term of ten years which is in fact the maximum prescribed under Section 304(ii) of the IPC. The deceased was appellant's father, 70 years of age. The deceased was in fact maintaining the appellant, who was unemployed. There is also no case made out to interfere with the order for payment of fine of Rs.10,000/- in default the sentence of six month of simple imprisonment.

37. Accordingly, we dispose off this appeal by making the following order :

ORDER

(a) This appeal is partly allowed;

(b) The conviction of the appellant under Section 302 of IPC is set aside and substituted by conviction under Section 304(ii) of IPC;

(c) The sentence imposed upon the appellant is modified. The appellant shall now suffer rigorous imprisonment of ten years and pay fine of Rs.10,000/-, or in default undergo six months of simple imprisonment;

(d) Before actual release of the appellant, however, the authorities must refer the appellant to the IPHB and obtain a report as to the state of the appellant's mental condition. The jail authorities to comply with the provisions of law as made to be applicable in this regard.

(e) The appellant will be entitled to benefits in terms of Section 428 of the Cr.P.C.

(f) The impugned judgment and order stands modified accordingly.

38. We place on record our appreciation and the efforts put in by Mr. Anoop Gaonkar, the learned Counsel appointed under the Legal Aid Scheme for the appellant and at the same time we also

record our appreciation for the fair approach adopted by Mr. Rivankar, the learned Public Prosecutor for the State.

M. S. JAWALKAR

M. S. SONAK, J.

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