Shaikh Mohd. Ali vs State Of Maharashtra on 25 August, 1972

Equivalent citations: AIR1973SC43, 1973CRILJ166, (1972)2SCC784, 1973(5)UJ299(SC), AIR 1973 SUPREME COURT 43

Bench: H.R. Khanna, I.D.Dua, J.M. Shelat

JUDGMENT

Shelat, J.

1. This appeal, by special leave, is directed against the dismissal in in limine by the High Court of Bombay of the appeal filed by the appellant against the order of conviction and sentence of life imprisonment passed under Section 302 of the Penal Code, by the Sessions Court, Greater Bombay. The special leave granted by this Court on September 25, 1969 was limited to the question whether the High Court was justified in dismissing the said appeal summarily with only ore word for its order, viz., 'dismissed'.

2. The appellant and his brother (orig. accd. 2) Tajuddin were tried by the Additional Sessions Judge, Greater Bombay on a charge under Section 323 read with Section 34 of the PC for causing injuries to PW Ibrahim. As part of the same transaction, the appellant was also charged with the offence of murder of one Kadar Shaikh under Section 302.

3. According to the prosecution, at about 8.30 p.m. on November 25, 1967 PW Dawood, who at the material time was living with the deceased Kadar and his brother, PW Ibrahim, was given first blows by the appellant near a cafe, called Cafe Zam Zam, situate near the Dongri market. The assault, it was said, was the result of a dispute amongst the children and some followers of the parties in their native village. Nothing further happened due to the intervention of the deceased Kadar and his having pacified Dawood.

4. The next morning, that is, at about 8.15 a.m., on November 26, 1967, Dawood, the deceased Kadar and his brother Ibrahim stopped near the said cafe on their way on Dongri market. Kadar was having a cup of tea sitting on a bench outside the cafe, Dawood was standing nearby and Ibrahim had gone for a pan at the pan shop outside the cafe. Ibrahim had just come back to where Kadar was having his tea when the appellant and his brother, the said Tajuddin came there and asked Ibrahim as to why he was taking the side of Dawood. Dawood interrupted the appellant saying that he could not understand what the appellant was saying, whereupon the appellant gave two first blows to Dawood. At this time Ibrahim saw Tajuddin with his three nephews. Apprehensive that they would attack him, Ibrahim rushed to the Pan shop to get some weapon. PW Jalil, who was making betal leaves ready by cutting them into proper shape, concealed the pair of scissors he had underneath the leaves. Ibrahim had, therefore, to return back to where Kadar and Dawood were without any

weapon. The two accused and their nephews thereafter fell upon Ibrahim giving him fist blows. As a result of the attack on him, Ibrahim fell down and Tajuddin set upon him and started giving him further fist blows. The deceased Kadar thereupon went up to where Ibrahim was being assaulted and pulled Tajuddin away from Ibrahim. As he was doing so, the appellant drew a knife from his pyjama pocket and struck Kadar with it in his back. Kadar got away from that place, but fell near the said cafe. The appellant and his brother left that place thereafter and PWs Dawood and Ibrahim removed the Injured Kadar to the J.J. Hospital in a taxi. A constable at the hospital questioned Ibrahim and noted down his statement in his register to the effect that the appellant had stabbed Kadar. Shortly after his admission in the hospital, Kadar succumbed to the injuries he had received and died. According to Dr. (Miss) Patel, who performed the post mortem examination, Kadar had two punctured injuries, one in the 5th intercostal space, cavity deep and the other in 9th intercostal space, also cavity deep, each of them being a fatal injury.

5. As aforesaid, the prosecution on these facts charged the appellant and his brother Tajuddin for assault on Ibrahim under Section 323 read with Section 34 and the appellant alone for the murder of Kadar under Section 302. The prosecution relied on the evidence of PWs Dawood, Ibrahim and two others from the pan shop, Jalil and Mahomed Salaru, the medical evidence, and lastly the evidence as to the discovery by the appellant of a knife from his room.

6. The defence admitted the incident of the night of November 25, 1967 and the assault by the appellant on Dawood. But as regards the incident of the morning of November 26, 1967, the appellant and Tajuddin alleged that when they two and their nephews came out of the cafe Zam Zam after they had their morning tea, the deceased Kadar, wits. Ibrahim and Dawood and seven or eight others fell upon them. A scuffle ensued during the course of which Ibrahim, who had in the meantime brought a pair of scissors from the pan shop, hit the appellant and Tajuddin with the said scissors causing injuries to both of them. They thereupon ran straight to the police station and complained to S.I. Mane of the assault on them. The police officer took them to the hospital where Dr Kalloorkar found both of them having simple injuries. In the opinion of the doctor, these injuries could be caused by scissors as well as by a blunt weapon, and even as a result of a fall. Both, the appellant and Tajuddin denied their guilt. They did not, however, explain the injuries received by Kadar in the course of the said incident. In their statement under Section 342 of the Criminal Procedure Code, they did not also expressly take the defence of the exercise of the right of private defence or there having been a sudden fight and the appellant having cause in the heat of passion the said injuries to Kadar.

7. The trial Judge did not rely on the testimony of Dawood and Ibrahim as regards the charge under Section 323 read with Section 34, but accepted their evidence as regards the stabbing of Kadar by the appellant. He also declined to rely on the evidence as regards the discovery of the knife by the appellant, firstly, because no blood, human or otherwise, was found on it, and secondly, because there was no evidence that knife was the weapon with which injuries were caused to Kadar.

8. The prosecution contended that the eyewitnesses were natural witnesses, and although they were interested witnesses, that fact alone could not preclude acceptance of their evidence as the incident during which Kadar received injuries was not disputed and there was corroboration of their

evidence emanating from an independent source, namely the evidence of wits. Jalil and Mahomed Salaru. The defence, on the other hand, contended; (1)that Dawood and Ibrahim were partisan witnesses, (2) that since their evidence as regards the assault on Ibrahim, which according to the prosecution was the incident from which the attack on Kadar resulted, was not acceptable, their evidence as regards the latter part of that very incident was suspected and ought not to have been accepted, (3) that the evidence of Mahomed Salaru could not be relied on as it was clear from his previous statement that he did not speak from personal knowledge, (4) that the evidence as to the discovery of the knife was fabricated, and that fact showed that the investigation was not only not impartial, but was tainted, (5) that in the alternative, the injuries on both the appellant and his brother indicated that Ibrahim had got hold of the scissors from the pan shop and then attacked them with those scissors causing to both of them with those scissors causing to both of them apprehension that either fatal or in any event grievous injuries would be caused to either of them, thus, justifying the attack on Kadar by the appellant, since both Kadar and Ibrahim had attacked them in concert. As a further alternative, the defence contended that the evidence suggested a sudden fight, in which without any premeditation and in a sudden passion, the appellant had struck Kadar, and therefore, the case fell within Exception (4) to Section 300. These contentions were, as aforesaid, rejected by the Trial Judge and conviction under Section 302 was imposed on the appellant.

9. Aggrieved by the order of conviction and sentence passed against him, the appellant filed an appeal in the High Court under Section 410 of the CrPC. Under Section 418 of the Code, the appellant in such an appeal was undoubtedly, entitled to raise points both of law and fact. A perusal of the memorandum of appeal filed by the appellant shows that almost all the contentions urged on his behalf during the Trial were raised once more by him. These contentions, it is clear, raise both questions of law as well as fact, particularly those with regard to the weight to be attached to the evidence of Dawood and Ibrahin by reason of (1) their being interested witnesses, and (2) their evidence regarding the first part of the incident having been found unacceptable, and the evidence with regard to the injuries received by the appellant and Tajuddin in the course of the very same incident, which injuries were not explained by any of the prosecution witnesses. Though these contentions raised questions of facts, the second contention involved also questions of law, namely, whether it could be said that the injuries caused to Kadar were caused in the exercise of the right of private defence, or in excess of that right, or whether they were caused in the course of a sudden fight in the heat of passion and without premedication as envisaged by Explanation (4) to Section 300.

10. As stated earlier, the appellant was entitled to raise questions both of fact and law, and the High Court in such an appeal had to go into and deal with those questions. It is true that under Section 421 of the CrPC the High Court can dismiss an appeal in limine if on a perusal of the petition of appeal and the judgment appealed from it were to be of the view that there was no sufficient reason for its inteference. But ever since the decision in Mushtak Hussein v. Bombay. 1953 SCR 809. It is settled law, repeatedly laid down in successive decisions of this Court that a High Court would not be justified in dismissing summarily, and without a speaking order, an appeal which raises arguable questions, either factual or legal. We need not cite several decision of this Court delivered since then except to mention a very recent one in Jeewan Prakash v. Maharashtra. Cr.A.No. 192 of 1969, dec.

on March 9, 1972.

11, It cannot be gainsaid that the appeal did raise, as earlier stated, questions of fact and law. Obviously, it could not be said that those questions were either insubstantial or not arguable questions. That being so, following the decisions of this Court and the orders passed therein we allow the appeal, set aside the order of dismissal of the appeal passed by the High Court and remand the case to the High Court for its disposal according to law and the observations made in the decisions referred to above.