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# Ajaykumar Sunilkumar Sharma Vs The State of Maharashtra

**Court:** Bombay High Court

**Date of Decision:** March 1, 2013

**Acts Referred:** Penal Code, 1860 (IPC) â€" Section 302, 304, 391, 395, 396

**Citation:** (2013) 3 ABR 138 : (2014) ALLMR(Cri) 2534 : (2013) 3 BomCR(Cri) 467

**Hon'ble Judges:** V.K. Tahilramani, J; Sadhana S. Jadhav, J

**Bench:** Division Bench

**Advocate:** Rohan Vijay Nahar assisted with Mr. Dashrath Gaikwad, holding for Mr. Yug Mohit Choudhary, for the Appellant; P.S. Hingorani, APP, for the Respondent

## Judgement

V.K. Tahilramani, J.
Being aggrieved by the judgment and order dated 28.11.2005 passed by the learned 11th Adhoc Addl. Sessions

Judge, Dewree, Greater Bombay, in Sessions Case No. 690 of 2001, the appellant-original accused has preferred the present appeal. By the said

judgment and order, the appellant-original accused No. 1 herein is convicted for the offences punishable under Sections 395, 396, 302 and 397 of

IPC. For the offence u/s 395 of IPC, the appellant is sentenced to imprisonment for five years and to pay fine of Rs. 3000/- in default to suffer R.I.

for six months. For the offence punishable under Sections 396 and 302 of IPC, the appellant was sentenced to life imprisonment and fine of Rs.

3,000/- in default R.I. for six months and for the offence punishable u/s 397 of IPC, the appellant was sentenced for R.I. for five years and fine of

Rs. 3,000/- in default R.I. for six months. The prosecution case, briefly stated, is as under:-

PW-1 Nadeema is the complainant in the present case. She knew deceased Raju Nambiyar. Both of them were on friendly terms. On 25.3.2001,

at about 7.00 p.m. both Nadeema and Raju went to Juhu Beach. While they were sitting on the beach, at about 8.45 to 9.00 p.m., five persons,

including the appellant came there and asked Nadeema and Raju to give them whatever they had. One person came and covered Nadeema''s

mouth. The other person snatched her purse. Two persons caught Raju and one more showed chopper to Raju and said that whatever Nadeema

and Raju had they should hand over to those persons. Raju resisted, whereupon the appellant stabbed Raju with chopper on his stomach and both

thighs. Nadeema shouted for help. Two persons from the slums came to help them. They put Raju and Nadeema in a rickshaw. Nadeema then

took Raju to Cooper Hospital. There was blood all over the body of Raju. On taking Raju to Cooper Hospital, the doctor examined him and

declared him to be dead. Nadeema then lodged a FIR. Thereafter investigation commenced. The dead body of Raju was sent for postmortem.

PW-6 Dr. Bangale performed the post-mortem on the dead body of Raju. During post-mortem the following injuries were seen on the dead body

of Raju.:

1. Longitudinal incised penetrating wound of 6 cms x 2.5 cms. X coils of intestines protruding on lest lateral abdomen 20 cms below axillary pit

(Fossa). On dissection, coils of intestines perforated with mesenteric perforation at places. Evidence of splenic tears.

2. Three incised wounds of 3 cms x 1.5 cm. x muscle deep on left thigh on lateral aspect.

3. Incised wound of 2 cms x 1 cm x muscle deep one each on medial aspect of both thighs.

4. Incise wound of 3 cms x 1 cm x muscle deep on lateral aspect of right thigh.

It was found that peritoneal cavity contained about one litre of blood and the small intestine was perforated at places. Mesentery showed tears.

The cause of death was given as hemorrhagic shock with mesenteric tears and splenic rupture (unnatural).

The appellant and two co-accused came to be arrested. Thereafter, test identification parade was held. In the test identification parade, PW-1

Nadeema, PW-7 Kenny and PW-8 Almeda identified the appellant. PW-1 Nadeema identified the appellant as the person who stabbed Raju.

PW-8 Almeda identified the appellant as the person who was holding knife. He has identified the knife (Art. H) as the same which was held by the

appellant. PW-7 Kenny identified the appellant as having taken part in the incident. After completion of investigation, charge sheet came to be

filed.

2. Charge came to be framed against the appellant and two other accused who were traced under Sections 395, 396, 302 and 397 of IPC. The

appellant pleaded not guilty to the said charge and claimed to be tried. The defence is 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 in para 1 above, hence this appeal.

3. We have heard the learned Advocate appointed for the appellant and the learned APP for the State. We have carefully perused the judgment

and order passed by the learned Sessions Judge and the evidence in this case. After carefully going through the record, we are of the opinion that

the appellant committed dacoity on 25.3.2001 and in the course of the incident, caused injuries to Raju with chopper due to which Raju died.

4. The conviction is mainly founded on the evidence of PW-1 Nadeema, who is the complainant and an eye-witness in the present case. Nadeema

has stated that she knew deceased Raju very well. Hence, on 25.3.2001 at about 7.00 p.m. both Nadeema and Raju went to Juhu Beach. While

they were sitting on the beach, at about 8.45 to 9.00 p.m. five persons, including the appellant came there and asked Nadeema and Raju to give

them whatever they had. One person covered her mouth. The other person snatched her purse. Two persons caught Raju and one more showed

chopper to Raju and said that whatever Nadeema and Raju had they should hand over to those persons. Raju resisted, whereupon the appellant

stabbed Raju with chopper on his stomach and both thighs. Nadeema shouted for help. Two persons from the slums came to help them. They put

Raju and Nadeema in a rickshaw. Nadeema then took Raju to Cooper Hospital. There was blood all over the body of Raju. On taking Raju to

Cooper Hospital, the doctor examined him and declared him to be dead. Thereafter Nadeema lodged FIR. Nadeema was thereafter called for test

identification parade in which she identified the appellant as the very same person who assaulted Raju with chopper.

5. Besides the evidence of the complainant Nadeema, the prosecution has relied on two other eye-witnesses i.e. PW-7 Kenny and PW-8 Almeda.

PW-7 Kenny stated that on 25.3.2001 at about 8.30 p.m., he saw one couple sitting. He heard the noise of shouting. He saw one person was

pulling the purse of the lady and one person caught hold the hand of the person who died. The third person gave a blow with knife on the thighs

and stomach of that boy. This witness also identified the appellant in the test identification parade as well as in the Court.

6. PW-8 Almeda is another eye-witness to the incident. He stated that between 7.30 p.m. to 8.00 p.m., he went to the sea-face to answer call of

nature. He was sitting in a pit. One couple was sitting near the wall of Ruia Building. After some time, he saw 4-5 persons going near the couple.

Some talk took place between the couple and these persons. One of them caught the girl. The other person was pulling the purse of the girl.

Meanwhile, one of them stabbed the boy with knife. This witness was also called for test identification parade and he has identified the appellant as

the one holding the knife. Thus, the evidence of three eye-witnesses i.e. PW-1 Nadeema, PW-7 Kenny and PW-8 Almeda cumulatively shows

that the appellant along with others went near Nadeema and Raju and asked them to hand over whatever valuables they had. One person caught

hold of the mouth of Nadeema and the other person i.e. the appellant assaulted Raju on his stomach and thighs.

7. The appellant has been convicted u/s 396 as well as under Sections 395 of IPC and 302 of IPC. Section 396 deals with an offence of dacoity

accompanied with murder. Sections 395 of IPC deals with an offence of dacoity and Sec. 302 deals with offence of murder. When the appellant

had been convicted u/s 302 of IPC as well as under Sec. 395 of IPC, he could not have been convicted u/s 396 of IPC because Section 396 of

IPC is the combination of Sections 395 and 302 of IPC. Thus, the appellant could not have been convicted twice for the same offence. In this

view of the matter, the conviction of the appellant u/s 396 of IPC will have to be set aside.

8. Mr. Nahar the learned Advocate for the appellant submitted that the evidence of the complainant PW-1 shows that though her purse was

snatched, nothing was taken from her purse. The complainant has also admitted that it is true that on that day she has not witnessed any robbery of

herself or of Raju. Thus, Mr. Nahar pointed out that the evidence of complainant shows that nothing was robbed either from the complainant or

from Raju. Mr. Nahar submitted that in such case offence u/s 395 of IPC cannot be said to be made out.

9. Section 395 of IPC deals with punishment for dacoity. Section 391 defines what is ''dacoity''. It reads as under:-

391. Dacoity-When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly

committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person

so committing, attempting or aiding, is said to commit ""dacoity.

From Section 391 of IPC, it is clear that even an attempt to commit robbery is covered by the definition of ''dacoity''. In such case, looking to the

evidence of the complainant, it can clearly be said that an attempt to commit dacoity was made by the appellant and his co-accused. The evidence

of complainant shows that total number of five persons were there. Therefore, the case would clearly be covered by the term ""dacoity"" and would

thus be covered by Section 395 of IPC. Thus we find no merit in this submission.

10. The appellant has been convicted u/s 397 of IPC. The evidence of complainant Nadeema shows that the appellant was armed with a chopper

and he assaulted Raju with the said chopper i.e. big knife on the thighs and in the abdomen. The evidence of PW-8 Almeda also shows that the

appellant was the one who was holding the knife. In this view of the matter, Section 397 of IPC is clearly made out.

11. The learned Advocate for the appellant has placed reliance on a decision of the Supreme Court in the case of Vadla Chandraiah Vs. State of

Andhra Pradesh, , wherein according to him, the Supreme Court converted the conviction u/s 302 of IPC to Section 304 Part II of IPC based on

the fact that the doctor had not opined that the injuries were sufficient in the ordinary course of nature to cause death. We have carefully perused

the said decision. The conviction is not converted into Section 304 Part II based only on the fact that the doctor had not opined that the injuries

were sufficient in the ordinary course of nature to cause death, but in the said case, the assault was preceded by quarrel. This fact was also taken

into account by the supreme Court. This is clear from the question which fell for consideration, which is referred to in para 10 of that Judgment.

The said para reads as under:-

10. The question which was thus required to be posed and answered was whether in the absence of any motive and in particular the fact that the

appellant was not even known to the deceased, the fight which took place was a sudden one and the injuries were inflicted in the heat of passion

and thus a case u/s 304 Part II IPC was made out or not.

(emphasis supplied)

Therefore, on going through the Judgment it is quite clear that mainly on the ground that the incident took place during a sudden quarrel, the

conviction has been converted to Section 304 Part II of IPC.

12. The appellant has been convicted u/s 302 of IPC. The learned Advocate for the appellant submitted that the case would not be covered u/s

302 of IPC, but it would, at the most, fall u/s 304 Part II of IPC. In order to base his contention, he has pointed out that PW-6 Dr. Bangale, who

has conducted post-mortem, has not stated anywhere in his evidence that the injuries sustained by Raju were sufficient in the ordinary course of

nature to cause death. He has relied on a decision of this Court in the case of Vinod s/o. Bapuna Kolhe vs. State of Maharashtra reported in 2009

ALL MR. (Cri) 350. In the said case, it was observed that when the medical evidence is absent as to whether the injuries sustained were sufficient

to cause death in the ordinary course of nature, it would not be safe to hold that the appellant was guilty of murder punishable u/s 302 of IPC. The

learned Advocate pointed out that in the said case also there was stab injury in the abdomen. In the said case, the doctor in his cross-examination,

had stated that had the hemorrhage due to the injuries been controlled, then patient would have survived. It was in this situation that these

observations were made. He pointed out that in the present case also, the doctor has stated that if proper and prompt treatment was given, there

may have been chances of survival. The submission of the learned Advocate is that as the doctor has not stated that the injuries were sufficient in

the ordinary course of nature to cause death, hence, the case would not fall u/s 302 of IPC.

13. The learned APP has relied on a decision of the Supreme Court in the case of Brij Bhukhan and Others Vs. The State of Uttar Pradesh, . He

relied on the said decision to contend that the Court can infer on the basis of the injuries which have been brought on record by the prosecution

that the injuries were cumulatively sufficient in the ordinary course of nature to cause death. In the said case also, the doctor had not stated that any

of the injuries were sufficient to cause death. However, the Supreme Court looked into the nature of the injuries found on the body of the deceased

and inferred from the injuries that the assailants intended to cause the death of the deceased. The Supreme Court further observed that deceased

died within short time of assault on him and it is difficult to imagine how any human being could have survived the ferocity of the assault. The

Supreme Court further observed that if the numerous injuries found on the body of Ram Prasad had been inflicted in the manner deposed to by the

prosecution witnesses, there can be little doubt that the assailants intended to cause his death. Furthermore, even if none of the injuries by

themselves was sufficient in the ordinary course of nature to cause death, cumulatively they were certainly sufficient in the ordinary course of nature

to cause his death which, in fact, took place soon after the assault. Observing thus, the Supreme Court opined that the offence was clearly one of

murder.

14. The learned Advocate for the appellant submitted that the case of Brij Bhukhan has been considered in the decision of this Court in the case of

Vinod Kolhe (supra) and the decision in the case of Brij Bhukhan has been distinguished. On careful perusal of the decision in the case of Vinod

Kolhe, we do not find that the decision in the case of Brij Bhukhan rendered by the Supreme Court has been distinguished in the decision in the

case of Vinod Kolhe but in the peculiar facts and circumstances of that case it was held that the case fell u/s 304 II of IPC. In connection with the

submission of the learned Advocate for the appellant, we would also like to refer to a decision of the Supreme Court in the case of Virsa Singh Vs.

The State of Punjab, . This is a decision by three Judges of the Supreme Court, whereas the decision in the case of Vadla Chandraiah (supra) is a

decision by two Judges of this Court. The decision in the case of Brij Bhukan (supra) is by two judges, thus we would have to obviously follow the

decision in the case of Virsa Singh (supra) it being a decision by a larger Bench of the Supreme Court. In the case of Virsa Singh also the doctor

had not stated that the injuries were sufficient in the ordinary course of nature to cause death. The Supreme Court observed ""Whether it was

sufficient to cause death in the ordinary course of nature is a matter of inference or deduction from the proved facts about the nature of the injury

and has nothing to do with the question of intention."" Thus, it is clear that on the basis of the number of facts i.e. evidence of eye-witnesses and

medical evidence which shows the injuries sustained by the deceased, inference can certainly be drawn that the injuries were sufficient in the

ordinary course of nature to cause death. In the present case, it is true that the doctor has not said that the injuries were sufficient to cause death in

the ordinary course of nature. However, on looking at the nature of injuries found on the body of Raju we can certainly infer therefrom that the

appellant intended to cause death of Raju. It is significant that Raju died within short time of the assault by him. The incident has taken place at Juhu

Beach. Immediately after the incident, the deceased was rushed to Cooper Hospital in an autorickshaw by the complainant Nadeema. On reaching

the hospital, the doctor declared Raju to be dead. It is a matter of public knowledge that Cooper Hospital is situated very close to Juhu Beach.

Hence, the victim was rushed to the hospital in the shortest time possible. Thus, the evidence of the doctor that if proper and prompt treatment had

been given to Raju, there were chances of survival has no meaning because the victim was rushed to the hospital as promptly as possible and he

died before any treatment could be given to him. Looking to the nature of injuries which are on vital parts like stomach and the extent of the injury

i.e. coils of intestines were protruding on left lateral abdomen. Not only the coils of intestines were protruding but they were perforated with

mesenteric perforation at places but in addition to this the spleen was also found to be cut. It is difficult to imagine how a human being could have

survived the ferocity of the assault and injury No. 1 which was on the abdomen must have largely contributed to the death of Raju. In our opinion,

cumulatively, the injuries which were sustained by Raju were certainly sufficient in the ordinary course of nature to cause his death which in fact

took place soon after the assault. Thus, in our opinion, if the evidence of the complainant Nadeema and other eye-witnesses is accepted and the

injuries sustained by Raju are taken into consideration, the offence was clearly one of murder. The intention to cause death can be gathered

generally from a combination of a few or several of the following among other circumstances:

(i) nature of the weapon used;

(ii) whether the weapon was carried by the accused or was picked up from the spot;

(iii) whether the blow is aimed at a vital part of the body;

(iv) the amount of force employed in causing injury;

(v) whether the act was in the course of sudden quarrel;

(vi) whether the incident occurred by chance or whether there was any pre-meditation;

(vii) whether there was any prior enmity or whether the deceased was a stranger;

(viii) whether there was any grave and sudden provocation and if so, the cause of such provocation;

(ix) whether the accused dealt a single blow or several blows;

(x) whether the accused inflicting injury has taken undue advantage or has acted in a cruel and unusual manner;

The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual

cases which may throw light on the question of intention. In the present case, there is no material to show that any sudden quarrel took place

between the appellant and the deceased. This is also not a case of grave and sudden provocation. It is clear that there was pre-meditation as the

appellant had come armed to the spot with a deadly weapon like knife. The blow is aimed at a vital part. The force of the injuries was such that the

coils of intestine protruded out. The appellant had dealt not one blow but several blows with knife. The weapon used was a deadly weapon.

Looking to all these facts and the injuries as deposed to by P.W. 6 Dr. Bangale, it can safely be said that the appellant had intended to cause death

of Raju.

15. Thereafter the learned Advocate for the appellant submitted that identification of the appellant in the test identification parade cannot be relied

upon as dummies in the test identification parade were not similar to the appellant. As far as this aspect is concerned, it is noticed that almost 20

dummies were put in the test identification parade. Normally, about 7 dummies are put in each parade for each accused in a test identification

parade. In the present case, 20 dummies were put in the parade. In such case, obviously, 20 persons would not be exactly identical to the

appellant and definitely there would be some difference in the looks of the appellant and the dummies in the parade. If the contention is that the test

identification was held in an irregular manner, the Magistrate who had held the identification parade and the Police Officer who conducted the

investigation should have been cross-examined in that behalf, but this had not been done in the present case. In this connection, we may usefully

refer to a decision of the Supreme Court in Bharat Singh Vs. State of U.P., . Thus, we find no merit in this submission. Looking to the evidence on

record, we are of the opinion that there is sufficient evidence to connect the appellant with the crime of committing dacoity and causing death of

Raju with the intention to cause his death. Thus, the appellant has been rightly convicted u/s 395, 302 and 397 of IPC. Hence, we pass the

following order:-

(1) The conviction and sentence under Sections 395, 302 and 397 of IPC is maintained.

(2) The conviction of the appellant u/s 396 of IPC is set aside.

Appeal is partly allowed in above terms.