

Menino Peixote Vs. State

Menino Peixote Vs. State

SooperKanoon Citation : sooperkanoon.com/358205

Court : Mumbai

Decided On : Nov-09-1994

Reported in : 1996(2)BomCR617

Judge : E.S. Da Silva and ;A.P. Shah, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302; [Evidence Act, 1872](#) - Sections 3, 27, 58, 59 and 61

Appeal No. : Criminal Appeal No. 53 of 1993

Appellant : Menino Peixote

Respondent : State

Advocate for Def. : G.U. Bhobe, P.P.

Advocate for Pet/Ap. : S.S. Kantak, Adv.

Disposition : Appeal dismissed

Judgement :

E.S. Da Silva, J.

1. The appellant is the accused in Sessions Case No. 5/93, who has been convicted for an offence of murder of one Caetano Fernandes on 15th November, 1992 and sentenced to undergo life imprisonment.

2. It appears that on 15th November, 1992, at about 20.10 hours, at Dicapale, the appellant stabbed the said Caetano with the help of a knife, when he had been near his house for enrolling the names of illiterates in an Adult Literacy Drive as a result of which Caetano sustained grievous injuries which were the necessary cause of his death.

3. The prosecution case is that on the aforesaid day of 15th November, 1992, at about 7.30 p.m. the deceased alongwith one Carmino Carvalho, Rumaldo Carvalho and Agnelo Carvalho, had gone to the village of Dicapale to register the name of the illiterates. At about 8 p.m. they reached near the house of the appellant. On seeing them, the appellant started abusing the group calling them 'chor, chor' (thief, thief). In spite of this provocation the deceased and others did not care for the appellant and proceeded to the house of his brother, wherein the name of the brother's daughter was enrolled by them. While returning from his brother's house the appellant, who was at that time towards the back side of his house near the kitchen, started again calling names to the deceased and others and shouting at them saying 'chor, chor'. On account of this, it seems, the deceased went near the appellant and asked him as to why he was abusing them by calling them, 'chor, chor'. A scuffle followed and both were involved in a fight, during which the appellant tried to assault the deceased with a danda blow, which the deceased managed to avoid by catching hold of the danda and throwing it out. It appears that during the fight Caetano fell down on the ground, whereupon the appellant sat on his stomach and removed knife which he had on his waist and dealt a blow with it on the left side of the chest of the deceased. Due to this blow, the deceased sustained a bleeding injury and after he was taken home the doctor was called. When the doctor arrived at his residence and examined Caetano, he was declared dead.

4. The learned Sessions Judge framed on the basis of the material on record a charge against the appellant under section 302 Criminal Procedure Code, to which he pleaded not guilty. Thereafter, the evidence of the prosecution witnesses was recorded and the appellant was examined under section 313 Criminal Procedure Code. The learned Sessions Judge then, on the strength of the evidence recorded, found the appellant guilty for offence of murder of Caetano and

sentenced him accordingly.

5. On behalf of the prosecution, eleven witnesses were examined. P.W. 1 Anton Rocha, is the person who was informed about the incident at about 9.30 p.m. and immediately went to the house of the Sarpanch of the Village alongwith whom he proceeded to the Police Station and reported the matter to the Police, on the strength of which information a F. I. R. was recorded in connection with this case.

P. W. 2, Lawrence Carvalho, is the panch witness to the Inquest Panchanama and another panchanama of the deceased's clothes.

P.W. 3, Carmino Carvalho, is one of the eye-witnesses of the incident, who was accompanying the deceased and others at the relevant time. He has stated that on 15th November, 1992, when he had gone alongwith the deceased, Caetano, Rumaldo and Agnelo to that village in order to register the names of illiterates in an Adult Literacy Drive, when they reached near the house of the appellant Menino, the appellant on seeing them started shouting and saying, 'chor, chor'. They did not reply to the appellant and proceeded to the house of his brother which is adjoining to the house of the appellant, wherein the name of the daughter of the brother was recorded. Thereupon, they were returning home when the appellant again started shouting, 'chor, chor' to them, but this time from the backside of his house. To that the deceased asked the appellant what he had stolen from him. The appellant then replied that the deceased had stolen his 'colso' (pot for storing water). The deceased denied that he had stolen anything from him and a quarrel started. The appellant then/lifted a 'danda' which he was having with him and hit the deceased. The deceased parried the blow by catching the danda with both hands. Thereafter, the deceased removed the danda from the hands of the appellant and threw it away. Then there was a fight between the appellant and the deceased during which the deceased fell on the ground. During the course of the fight, both had reached near the kitchen of the appellant. The appellant then sat on the deceased's stomach and at that time he removed knife from his underwear from the right-hand side and gave a blow with it on the left side chest of the deceased. The knife blow was banged by the appellant with both the hands, due to which the deceased started bleeding. Thereupon the appellant ran

alongwith the knife towards the front side of his house. In the meantime, after receiving the blow, the deceased started screaming and saying, 'avoi morer chaku marlo' (mother, I was stabbed with a knife). Then they went close to the deceased and some people gathered there and helped to remove the deceased from his house. When a doctor was called and he examined Caetano, he was declared dead. He has further stated that when the appellant lifted the danda to hit the deceased, at that time Rumaldo, who was also nearby, left the scene in order to call some other people. The witness has stated that the knife used by the appellant was about 5 to 6 inches in length and he was able to identify it. When M.O.5, the knife, was shown to him, the witness said that was the knife with which the appellant had stabbed the deceased.

P.W. 4, Rumaldo Carvalho, another eye-witness who was present when the incident started, stated that when he alongwith the deceased, Agnelo and Carmino were passing through the house of the appellant on 15th November, 1992, at about 7.30 p.m., to do the work of registration of names of persons in the Adult Literacy Drive the appellant, who was in front of his house, started abusing them and calling them 'chor, chor'. They did not care for the appellant at that time and proceeded to the house of his brother where the name of the appellant's brother's daughter was registered. When they were returning again the appellant who was at that time at the backside of his house near his kitchen, started calling them, 'chor, chor'. The deceased then asked the appellant what he had stolen from him and thereupon a quarrel started followed by a physical fight between them. The appellant had a danda in his hand and he lifted the danda to assault him and the deceased. At that time the witness ran away and went to the house of the brother of the deceased to inform him about the incident. He did not return to the site till the deceased was brought after sometime to his house bleeding from his chest on the left side. When a doctor was brought he told that Caetano was already dead.

P.W. 5, Agnelo Carvalho, is one more witness who was also making part of the group accompanying the deceased on the day of the incident. He has also stated that on 15th November, 1992, at about 7.30 p.m., when he alongwith Rumaldo, Carmino and the deceased were doing the work of enrolling the names of persons in the Adult Literacy Drive, at about 7.30 p.m., they reached near the house of the

appellant as he wanted to come to the house of his brother which is nearby. At that time, the appellant started calling them 'chor, chor'. However, they did not pay heed to him and went to his brother's house and after enrolling the name of his brother's daughter, at about 8 to 8.30 p.m. they were returning when the appellant again started calling them 'chor, chor' and started saying that his clothes and 'colso' had been stolen. The deceased asked him when they had stolen his articles and there was a discussion between them during which the appellant lifted a danda to hit the deceased. At that time Rumaldo became frightened and ran away. A scuffle followed then between the deceased and the appellant during which the deceased fell down on the ground and the appellant sat on his stomach. The deceased managed to remove the danda from the hands of the appellant and threw it away. Then the appellant removed something from his pant and gave a blow with it on the left side of the deceased's chest. At that time the deceased shouted saying 'avoi maka marlo' (Mother, I was assaulted). The appellant then ran away towards the front side of his house. The incident occurred near the kitchen of the appellant's house and the deceased was bleeding and unable to utter words. He was then removed to his house and a doctor was brought. Thereafter, people started crying.

P.W. 6, Francisco Carvalho, is another witness who stood as panch in the panchanama of the scene of the offence during which chappals belonging to both the appellant and the deceased were attached by the police.

P.W. 7, Dr. Silvano Dias Sapeco, the Medico Legal Officer who has conducted the post-mortem examination on the dead body of the deceased Caetano, has described the external and internal injuries which were found by him on the deceased's body, namely injury No.1, which was according to him an oblique stab penetrating injury of $11\frac{1}{2}$ X $1\frac{1}{2}$ cms. with $1\frac{1}{4}$ cms. tailing effect at the axillary aspect seen on the left upper chest and in front of axillary region. It was a penetrating injury caused by thrusting effect of a sharp and pointed weapon. On internal examination of the chest he found that from the external wound No. 1 the sharp and pointed weapon had cut the pectoral bulk of muscles and pierced not only the lower border of upper lobe but also the pericardial sac with penetration to the left ventricular musculature of heart and came out 3 cms. away also through

the left ventricular musculature. Thus the total internal damage caused to his body was of the length of 14 cms. directed transversely from left to right of lung and heart. In his opinion, death was due to internal haemorrhage resulting from damage to left pectoral muscles, sixth rib, lung and heart. Vide injury No. 1, it was ante-mortem and fresh at the time of death and was fatal in the ordinary course of nature. He further added that from the nature of the injury No. 1 which was in perpendicular direction and from the depth of the said injury he could say that the blow given was forceful intensity and even immediate medical attention did not save the deceased on account of damage to the heart and lung caused by injury No. 1.

P.W. 8, Avelino Moraes, is a Panch witness who remained present when the appellant disclosed before him and other Panchas at Maina Curtorim Police Station his willingness to show where he had concealed the weapon of the offence. According to him, on 21st November, 1992, when he had gone to Dicarpale, he was called to the Maina Curtorim Police Station and asked to act as a Panch. There was another Panch witness present who was a lady. The appellant was then brought from the lock-up before them and the P.S.I. questioned him about the knife. At that time the appellant told that he had thrown the knife used on his house and was prepared to show it. Thereupon he led them to his house wherein the appellant climbed on the roof with the help of a ladder. However, as he was not able to locate the knife on the roof which was of country tiles, he climbed down and started searching for the knife on the ground by the side of the kitchen, wherein he ultimately found the knife which was pointed out on the ground lying among the bushes. When the knife was recovered, he had seen blood stains on it. Thereafter the police attached that knife under a Panchanama which was drawn on the spot. The witness said that was a kitchen knife having a handle and he identified M.O.5 as being the same knife which was discovered by the appellant.

P.W. 9, Savio Carvalho, is another Panch witness of the Panchanama of attachment of the appellant's clothes. According to him, on 19th November, 1992, when he was taken to the Maina Curtorim Police Station and asked by the police to act as a panch, the appellant was brought in his presence and the presence of

another Pancha and at that time he was wearing a bluish coloured T-Shirt and a black long pant and a blue collared nylon underwear. The underwear worn by the accused at the time was attached by the police as he said that it was the same underwear he was wearing on the day of the incident. On the underwear he had seen a blood stain which was slightly washed. The same was thereafter attached and wrapped in a plastic bag by the police under a panchanama which was drawn on the spot.

P.W. 10, Bossuet D'Silva, is the P.S.I. in charge of Maina Curtorim Police Station who has deposed to the fact of his having registered the offence against the appellant on information given by one Antonio Rocha he has lodged the F.I.R. stating that the appellant had knifed to death one Caetano Fernandes on 15th November, 1992, at about 8 p.m. He has described all the steps taken during the investigation and stated that a charge-sheet was filed by him on the strength of the evidence collected in the investigation.

P.W. 11, Ganadip Sheldekar, is the last witness examined by the prosecution. He is a photographer taken by the Investigating Officer to the scene of offence where some photographs were collected and produced on record.

6. It thus follows that the prosecution has placed reliance on the evidence of the eye-witnesses who were actually present at the time the incident occurred and had seen the appellant assaulting the deceased with a knife. We have gone through the evidence of those witnesses. We have no reason to disbelieve their testimony which appears to have been given in a simple and convincing manner. The learned trial Judge has accepted their evidence as truthful and we also are in agreement with him that nothing has been elicited by the appellant from these witnesses in order to discredit the genuineness of their depositions. It is true that the appellant has sought to say that the evidence given by them against him is because they were always against the appellant since the beginning but no explanation or reasons were given by the appellant when the witnesses were examined by the prosecution and allowed to be cross-examined by the appellant. Thus the deposition of P.W. 3, Carmino Carvalho, which is fully corroborated by the testimony of P.W. 5, Agnelo Carvalho, is, in our view, sufficient to establish the

case of the assault allegedly committed by the appellant against the deceased with the help of a knife and the infliction of injuries which have been the necessary cause of his death. The deposition of P.W. 4, Rinaldo Carvalho, also supports the case of the prosecution, namely, the case of assault attempted to be done by the appellant with the help of a danda at which time the witness seems to have run away in order to secure help from others in order to avoid this assault. Apart from this evidence, the prosecution has also relied on circumstantial evidence, namely, the discovery of the knife being the weapon of offence at the instance of the appellant, the report of the Chemical Analyser who has examined the items from both the appellant as well as from the deceased body and lastly the evidence of the doctor who has conducted the post-mortem examination on the dead body of Caetano.

7. Mr. Kantak's, learned Counsel for the appellant first grievance is that in the facts and circumstances of the case it would not be possible for the appellant to conceal the knife which is marked M.O. 5 under his underwear without causing hurt to him. In this regard it was urged by the learned Counsel that the story of the prosecution that the appellant has removed from his underwear the knife with which he allegedly stabbed the deceased, is not to be believed unless it was shown that due to its concealing below the underwear any injury had been caused to the appellant's body. It was submitted by the learned Counsel that there is no evidence that this happened and bearing in mind the nature and the size of the knife attached by the police and marked M.O. 5, it would be difficult to accept that such a knife concealed under the underwear could have remained therein without causing any hurt to the appellant himself.

8. We are not really impressed with this submission of the learned Counsel. To start with, the evidence of both P.W. 3 and P.W. 5 in this regard does not suggest that the knife used by the appellant to stab the deceased was concealed by him below his underwear. P.W. 3 has said only then, when the appellant sat on the stomach of the deceased after he fell down, the appellant removed the knife from the right hand side of his underwear and then gave a blow on the left side of the chest of the deceased with it. Similarly P.W. 5 has stated that when the deceased fell on the ground and the appellant sat on his stomach after the deceased

managed to remove the danda from hands the appellant removed something from his pant and gave a blow with it on the left side chest of the deceased. The learned trial Judge has dealt with this aspect in his judgement and accepting the explanation given by the Additional Public Prosecutor, who has stated that the appellant had removed the knife from the right hand side which means that it was on his waist over the leg. Therefore, the question of injuries near the private parts does not arise. In our opinion this explanation is quite acceptable and we have no reasons to reject the same in view of the other evidence available on record pointing out to the actual use of the knife by the appellant in order to stab the deceased. Further the evidence on record clearly suggests that, nowhere or at any time, the appellant suggested during the cross-examination of several witnesses examined by the prosecution that the knife which was purportedly discovered by him, even assuming that it was only recovered by the police as contended by the learned Counsel for the appellant, was not his knife or a knife belonging to him. Besides the cross-examination of P.W. 3 to the extent that the appellant himself has suggested to him that when the deceased was stabbed the witness was not there and also that the injuries sustained by the appellant were due to accidental hitting of the knife on the deceased which knife must have been carried or held by the deceased himself or by Rumaldo and Pedro Fernandes, who, according to him, came to assault the appellant, clearly show that the factual hitting of the deceased with a knife has been admitted by the appellant during the cross-examination of the said witnesses. Thus, in view of the evidence pointing out that it was the appellant has himself who assaulted the deceased with a knife, the question of the knife having caused injury on the appellant due to any accidental blow with it by somebody else, appears also to be ruled out by the deposition of P.W. 7 Dr. Silvano Sapeco, who has negated the case sought to be made by the appellant that such accidental blow would be the cause of injury No. 1, which, in his opinion, was forcefully inflicted on the body of the deceased with a weapon which would be the knife marked as M.O. 5.

9. It was next submitted by the learned defence Counsel that the so-called discovery of the knife, purportedly at the instance of the appellant is not a discovery under section 27 of the Evidence Act and, at the most, it could be held as a mere recovery of the knife by the police. It was urged in this regard that the

knife need not be said as discovered by the appellant or at his instance because, admittedly, the same was not found at the place where the appellant said that it had been kept by him. According to the learned Counsel, who has relied on the deposition of P.W. 8 Moraes, the appellant has expressed his willingness to show the knife which he had thrown on the roof of his house and when he went to the site the knife was not found on the roof and instead was recovered from the ground among the bushes at the side of the kitchen of the house. Therefore, the learned Counsel submitted, there was no question of the knife having been discovered by the appellant or at his instance since it could not be said that the knife was at a place which could not be traced by the police or somebody else without the help of the appellant/accused. Thus there was no concealment of the knife which was sought to be discovered.

10. It is difficult to appreciate the submission of the learned Counsel in this regard. Recovery panchanama drawn by the police clearly suggests that the appellant has expressed his willingness to show or to discover the knife which he had thrown on the kitchen roof of his house and that he had also said that the knife must be either on the roof of the kitchen or on the ground close to the kitchen wall. This shows that the appellant had contemplated a situation of the knife which he had thrown on the roof of the house having fallen on the ground at the site. It is therefore explained that when the appellant went to his house in order to discover the knife he first made a search for it on the roof and finding that the same was not there climbed down and started search on the ground around the wall of the house wherein it was found concealed among the bushes. Therefore the whole act of the appellant appears to be consistent not only with the willingness expressed by the appellant to discover the weapon of offence at the place wherein he had purportedly concealed it, may be either on the top of the house i.e. on the roof of the said house, without however excluding the possibility of the knife having fallen from the slanting roof on the side among the bushes near the same house. Section 27 of the Evidence Act clearly provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. In the facts and circumstances mentioned above we

are satisfied that the fact of the discovery of the knife by the appellant among the bushes on the ground of the house is to be deemed as proved in terms of section 27 of the Evidence Act. However, even assuming that the fact of this discovery could not be deemed as proved as contended by the learned Counsel, the fact remains that in view of the unmistakable evidence of the eye-witnesses who have established the fact of the assault of the deceased by the appellant with the help of a knife is more than sufficient to prove the said assault irrespective of the discovery of the knife by the appellant himself.

11. Mr. Kantak has also made another grievance that the knife purportedly discovered by the appellant and recovered by the police could not be said to be the same knife which the appellant had allegedly used for the commission of the offence because the said knife was not examined by any expert for finger prints. Besides the blood stains which are said to have been found on the blade of the knife had not been conclusively tested by the Chemical Analyser whose report shows that, although vestiges of human blood were found on the blade, the grouping of the said blood could not be done by him. It was also urged by the learned counsel that the prosecution has equally failed to prove that the knife marked as M.O. 5, is the knife used by the appellant for the commission of the offence. Being so, it could not be said that the prosecution case that the appellant had committed a murder of the deceased with the knife was proved in the absence of such evidence. The learned Counsel has also contended that the evidence of so-called eye-witnesses was not sufficient to identify the knife marked as M.O. 5 as being the same knife which had been actually used by the appellant to assault the deceased. It was urged that in this regard only P.W. 3 has spoken of the knife while P.W. 5 has not actually referred to the weapon purportedly used by the appellant as being a knife.

12. We do not think that such contentions have to be considered by us in order to appreciate the case of the prosecution bearing in mind that ocular evidence brought home by the prosecution is consistent enough to make out a case of assault actually committed by the appellant on the deceased with the knife which was recovered, allegedly at the instance of the appellant, during the purported discovery of the said weapon made by him. This being the position and once the

fact of the assault has been established by the eye-witnesses, firstly the attempt to assault with a danda and also the actual stabbing of the deceased with the knife, the question of the prosecution having not been able to link the injuries sustained by the deceased with the actual stabbing of Caetano by the appellant with the knife does not seem to arise at all. In this regard, the medical evidence of P.W. 7 Sapeco, amply suggests that the injuries sustained by the deceased could have been reasonably caused by the knife discovered by the appellant and recovered by police purportedly at his instance. Thus, the medical evidence supports the case of the prosecution that the injury No. 1 was consistent with a forceful thrust of the said knife on the chest region of the deceased. Further, the deposition of P.W. 9 shows that when the underwear of the appellant was attached by the police the same was showing some vestiges of blood which the Chemical Analyser found to be human blood. It is true that the grouping of that blood could not be established because the underwear in the meantime had been washed but the fact of the underwear of the appellant (M.O. 6) being stained with blood of human origin is to be deemed as a strong circumstance against him and which the appellant did not even attempt to explain, more so in view of the discovery of the knife at the instance of the appellant which knife is also shown to be stained with human blood.

13. Mr. Kantak has then contended that, even assuming that the death of Caetano could have been caused due to the assault committed by the appellant with the knife, the facts and circumstances of the case do not appear to justify his incrimination and conviction for an offence of murder under section 302 of the Indian Penal Code. The learned Counsel urged that at the most the offence committed by the appellant could be one of culpable homicide not amounting to murder within the purview of section 304 of the Indian Penal Code. In this respect it was contended by the appellant that the prosecution has not been able to establish premeditation on the part of the appellant to kill Caetano because, even accepting that he had provoked and abused him while passing by the side, he could not expect that there would be a quarrel or fight between him and deceased so as to enable him to finish Caetano with the help of a knife.

14. We find considerable difficulty in accepting the contention of the learned Counsel that the facts and circumstances of the case do not appear to justify that the appellant should be convicted for an offence of murder. The evidence on record shows that on the day of the incident the appellant started provoking the deceased and his friends who were doing the work of registering the names of adult illiterates by calling them 'chor, chor'. It appears also from the evidence that on that day the appellant had taken some liquor and was armed with a danda when he was giving such abuses. This by itself shows that the appellant could not be said as having caused the offence on the spur of the moment or under some emotional impact which might have totally clouded his mind, thus ruling out any intention to kill Caetano. Further the fact of the appellant having availed of the opportunity to stab the deceased when he had fallen on the ground with the help of a knife which he forcefully thrust on his chest is also one more indicator to point out that the question of the appellant disclosing no intention to finish with the deceased while hitting him on a vital region of his body does not seem to arise at all.

15. We are therefore firm in our mind that from whatever angle one may look at the incident the facts of the case strongly establish a clear case of murder of the unfortunate deceased by the appellant. Hence the submission of the learned Counsel with regard to the wrong incrimination of the offence is also to be rejected.

16. In the result, we see no merit in this appeal which is thus bound to fail and is hereby dismissed. The conviction of the petitioner and the sentence awarded by the learned Sessions Judge are accordingly affirmed.