
(2016) 02 BOM CK 0016
In the Bombay High Court
Case No : Criminal Appeal No. 297 of 2013

Aakash @ Golu S/o Shailendra Dhargawe	APPELLANT
Vs	
State of Maharashtra	RESPONDENT

Date of Decision : 01-02-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 302

Citation : (2016) 3 AIRBomRCri 194 : (2016) ALLMRCri 4994 : (2017) 2 BomCR(Cri) 386 : (2016) 3 MhLJCrI 292

Hon'ble Judges : B.P. Dharmadhikari and V.M. Deshpande, JJ.

Bench : Division Bench

Advocate : Shri C.R. Thakur, Counsel, for the Appellant; Shri S.B. Ahirkar, Addl. Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

V.M. Deshpande, J.(Oral) - The appellants suffered conviction for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and they are ordered to suffer sentence for life imprisonment and to pay a fine of Rs. 1,000/- each and, in default, to suffer rigorous imprisonment for six months by learned Ad hoc Additional Sessions Judge, Nagpur in Sessions Trial No. 5 of 2012 on 7.2.2013, is the reason for these appellants to be before this Court in the present appeal.

A. Prosecution Case :

2. Deceased is Shatrughna. First informant Yograj Dayaram Jambhulkar (PW 4), is the father of the deceased. Yograj Jambhulkar lodged a oral report on 23.8.2011 at Police Station Kalmeshwar (Exh.28). The said oral report was reduced into writing by prosecution witness No. 11 Shri Sambhaji Khandu Mhetre who at the relevant time was discharging duties as police inspector.

The oral report was disclosing commission of a cognisable offence. Resultantly, Sambhaji Mhetre (PW 11) registered a crime against the appellants vide Crime

No. 182 of 2011 for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. The printed FIR is at Exh.29.

3. It was reported in the first information report by the first informant that he runs a Tea Shop at Sonba Nagar. Shatrughna, the deceased, was his eldest son and was engaged in painting work. His one daughter Sanghamitra was married and she resides at Sai Nagar, Wadi. He is having twin daughters by name Vaishali and Madhuri aged about 17 years. Daughter Madhuri eloped with somebody about 5 months prior to lodging of the report. Other daughter Vaishali after her failure in 9th Std., used to stay in the house.

Appellant No. 1 Aakash @ Golu Dhargawe used to visit his maternal aunt who resides in the neighbourhood of the first informant. At that time, he used to tease Vaishali. On that count, about 3 months of the incident, deceased Shatrughna asked Aakash not to indulge in the same, resulting into quarrel in between them and in that deceased Shatrughna assaulted appellant No. 1 Aakash and from the said incident Aakash nurturing grudge against the deceased.

4. It is further reported in the first information report that on 23.8.2011, at about 1:45 pm, Sanjay Khobragade, the friend of Shatrughna, came and disclosed to him that on account of the previous quarrel, on account of Vaishali, appellant No. 1 Aakash along with other co-accused Gagan Radhekant Mishra (appellant No. 2) assaulted by means of hammer. On getting such intimation, first informant along with Sanjay Khobragade came to the spot to notice that deceased was lying on the ground in injured condition. However, that time, he was alive. Therefore, he was sent to the doctor along with Sanjay Khobragade and Sangharatna Rangari (PW 8). He was ultimately taken to the Medical College and Hospital at Nagpur where he was declared brought dead.

5. Prior to lodging of the first information report, when Sambhaji Mhetre (PW 11) was discharging his duties at police station, he received intimation from Assistant Sub Inspector Somkuwar of Medical Booth at Nagpur about the assault by means of hammer on Shatrughna. It was also informed to him that initially injured was brought to Bharadwaj Hospital and then to Gajanan Hospital at Wadi. From there, he was taken to Dande's Hospital and ultimately he was brought to the Medical College and Hospital at Nagpur whereat he was declared dead.

On receiving this information, Sambhaji Mhetre took the entry (Exh.63) of the same in the station diary. Thereafter, he along with staff reached to the area Sonba Nagar and came in front of Aditya Pan Stall. There he received information that father of the injured and witnesses are present in the Medical Hospital, Nagpur, and, therefore, he went to medical college. There he met Yograj Jambhulkar, the first informant, and then after reaching to the police station along with him, he reduced into writing the oral report of Yograj Jambhulkar (Exh.28) and the offence was registered by him.

6. After registration of the offence, at 08:20 pm, on the same day, the investigating officer reached to the spot and the spot punchnama was drawn in

the presence of panchas. Robin Shelare (PW 3) was panch for the said punchnama. The said is at Exh.23. From the spot, the hammer was seized. Also, the investigating officer seized pair of chappal of the deceased, blood mixed earth and simple earth from the spot and these facts are mentioned in the spot punchnama itself.

The investigating officer also called photographer Vikas Pande (PW 2) who took various photographs.

7. During the investigation, the investigating officer got the knowledge that both the appellants after commission of the offence ran away towards Tekewadi jungle and, therefore, a search was made and they were arrested and they were brought to the police station. They were arrested on 24.8.2011 under arrest memo Exhs.67 and 68 respectively.

The investigating officer then also visited mortuary of the Medical Hospital, Nagpur along with two panch witnesses and inquest was done in their presence. One of such witness is Prakash Mandpe (PW 1) and he has proved inquest punchnama (Exh.16). While conducting inquest punchnama, it was noticed that there are deep head injuries and also it was noticed that the left hand of the deceased was fractured.

After the inquest, the dead body was sent for postmortem examination with police constable Shri Kambdi. After the postmortem was done, the dead body was handed to the relatives for performing last rites.

The investigating officer also recorded the statements of eyewitnesses Sangharatna Rangari (PW 8) and Sanjay Khobragade. He also seized clothes from them, which were stained with blood as these two witnesses took injured Shatrughna to the hospital. The seizure punchnama of the clothes of the witnesses is at Exh.30. The clothes of the deceased were seized under seizure punchnama Exh.34. Also, the clothes of both the accused were seized under seizure memo Exhs.36 and 37. The seizure punchnama Exhs.36 and 37 shows that after the seizure, the clothes were "sealed". The investigating officer also recorded the statement of other witnesses. He obtained the postmortem report (Exh.45).

On receipt of the postmortem report on 9.9.2011, he gave a requisition letter to the medical officer (Exh.47). Along with said requisition, weapon hammer was sent in a sealed condition for obtaining his opinion as to whether the injuries mentioned in postmortem report are possible by the said weapon. The doctor gave his opinion (Exh.46) and opined that the injuries appearing on the dead body are possible by hammer, which was sent for examination. Thereafter, the investigating officer received the hammer from the doctor in a sealed condition.

The investigating officer, thereafter, sent all seized articles to the chemical analyzer at Nagpur under requisition (Exh.70).

After completion of the investigation, the investigating officer filed the charge-

sheet before the Court of law.

8. The offence being exclusive triable by the Court of Sessions, the case reaches to the Sessions Court at Nagpur and the said was allotted on the file of learned Ad hoc Additional Sessions Judge-2, Nagpur. It was registered as Sessions Trial No. 5 of 2012. Learned Judge framed the charge against both the accused persons under Exh.5 for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. Both of them denied the charge and claimed for their trial.

9. The prosecution agency examined 11 witnesses to bring home the guilt of the accused persons. After recording of the prosecution evidence, learned Judge of the Court below also examined both the accused under Section 313 of the Code of Criminal Procedure. The accused also examined 2 witnesses as defence witnesses.

10. Learned Judge after appreciation of the prosecution case and defence version found that the prosecution has successfully established the guilt of the accused persons beyond reasonable doubt and, therefore, convicted them and consequently they were sentenced.

Hence, this appeal.

B. Submissions :

11. We have heard Shri C.R. Thakur, learned counsel for the appellants and Shri S.B. Ahirkar, learned Additional Public Prosecutor for the respondent/State. With their able assistance, we have gone through the record and proceedings.

12. Following are the only 3 submissions which were made before this Court during the course of the arguments:

(a) Sanjay Khobragade, who gave information to Yograj Jambhulkar, the father of the deceased, and who is also the eyewitness as claimed in the first information report is not examined by the prosecution. Therefore, adverse inference requires to be drawn.

(b) The evidence of two eyewitnesses viz. Sangharatna Rangari (PW 8) and Ashok Natthuji Nandurkar (PW 9) shows inconsistency on the material aspect and, therefore, they cannot be the eyewitnesses. According to learned counsel for the appellants, at the most they are chance witnesses. In that view of the matter, it is his submission that reliance should not be placed on their testimony.

(c) Another submission of learned counsel for the appellants is alternative submission. According to him, the appellants can be punished at the most for the offence punishable under Section 304 Part-2 of the Indian Penal Code and in any case, therefore, the conviction for the offence punishable under Section 302 is bad in law.

13. Per contra, learned Additional Public Prosecutor vehemently submits that the

prosecution case has fully established by the eyewitnesses about the actual assault on deceased Shatrughna. He further submits that accused persons were having motive to eliminate the deceased. He submits that prior quarrel, on account of Vaishali, in between appellant No. 1 Aakash Dhargawe and deceased in which Aakash was beaten by the deceased is the reason and motive for committing the murder. He submits that appellant No. 2 Gagan, being a friend of appellant No. 1 Aakash, was not only present on the spot at the time of occurrence but also he actually participated in the assault and overt acts on the part of appellant No. 2 which clearly established by eyewitnesses. He further submits that there is corroboration to the prosecution case by scientific evidence. He, therefore, submits that the appeal be dismissed.

C. Evaluation Of Evidence Brought On Record :

(I) Whether Shatrughna met with homicidal death?

14. Dr. Abhijit Wasudeo Bharadwaj (PW 7) is a private medical practitioner. He was having clinic situated at Khadgaon Road, Nagpur at the relevant time. He used to stay at his clinic from 10:00 am to 04:00 pm and, thereafter, from 06:00 pm in the night. One nurse by name Amrapali Gadge was also working with him in his hospital.

The hospital/clinic of Dr. Abhijit Bharadwaj (PW 7) was situated on the first floor. On 23.8.2011, his clinic was open. That time, sister Amrapali Gadge informed him that one serious patient is brought to his hospital and the patient is on the ground floor. Therefore, Dr. Abhijeet Bharadwaj rushed to the ground floor. Near the gate of hospital, he saw 3 persons sitting on the motorcycle. The injured one was in between two persons. Dr. Abhijeet Bharadwaj noticed severe head injuries and found that the patient was unconscious. Since the injuries were serious and his hospital was not having medical facilities to admit to such persons, he directed to the persons, who brought the injured on motorcycle, that he should be admitted to Gajanan hospital whereat surgical facility and better treatment is available. Thereafter, according to Dr. Abhijit Bharadwaj, they left for Gajanan Hospital.

15. Sangharatna Rangari (PW 8) was one of the person who took Shatrughna to Dr. Abhijit Bharadwaj. After getting advice from Dr. Abhijit Bharadwaj, he along with Sanjay Khobragade, his other friend, took Shatrughna to Gajanan Hospital. However, there the doctor was not available and the compounder present there informed him that injured should be taken to Dr. Dande's Hospital and accordingly, injured Shatrughna was taken to Dr. Dande's Hospital. There Dr. Dande informed that the patient should be taken to the Medical College and Hospital, Nagpur. Therefore, Sangharatna Rangari, and his other friends, brought Shatrughna to the Government Medical College and Hospital. There the doctor declared him dead.

16. Dr. Ashitosh Yashwant Deshmukh (PW 10) on 24.8.2011 was present on his duty in Government Medical College, Nagpur. This prosecution witness is an

Assistant Lecturer and was in the Department of Forensic Medical Science and Toxicology. On 24.8.2011, the police constable of Police Station Kalmeshwar brought the dead body of Shatrughna for postmortem. Dr. Ashitosh Deshmukh conducted autopsy over the dead body and noticed the following external injuries :

"(i) Lacerated wound present over left parietal area of head. This injury was 5 cm away from mid line of head and it was measuring 3 cm x 1 cm x bone deep and there was fracture to the skull.

(ii) Lacerated wound present over mid line parietal area obliquely place of size 4 cm X 1 cm X bone deep.

(iii) Lacerated wound present over left mastoid area (the area of head which is just behind left ear pinna, obliquely placed of size 5 cm X 1 cm X muscle deep.

(iv) Abrasion present over mid line forehead 2 cm. Above glabella (the middle portion of forehead), of size 2 cm X 2 cm Reddish.

(v) Abrasion present over left forehead, 3 cm above left eye brow of size 2 cm X 1.5 cm Reddish.

(vi) Contusion present over anterior aspect upper 3rd left arm of size 4 cm X 4 cm reddish.

(vii) Abrasion present over dorsum object, left great toe of left foot of size 3 cm X 1.5 cm reddish."

Dr. Ashitosh Deshmukh noticed that all injuries were ante mortem and fresh and were caused by hard and blunt object.

He also noticed following internal injuries :

"Under scalp haematoma over right fronto parieto temporal region of head of size 9 cm X 7 cm and left parieto temporal area of size 7 cm X 5 cm each reddish in colour. Linear fracture present on left parietal region. Vault of skull with fracture line extending into left middle cranial fossa oblique of length 9 cm. Corresponding to injury no. 1 of col.no. 17 above said. Sutural fracture along coronal suture on right parietal area, vault of skull of 6 cm dura intact congested . Under this dura, subdural haematoma was over both parietal area of about 100 CC, blood and clots present dark reddish colour, brain congested, oedematous (swelling), sub-arachnoid haemorrhage present all over brain surface in the form of thin red film."

He proved the postmortem report (Exh.45).

In view of the injuries noticed by the purchaser at the time of inquest as mentioned in inquest punchnama (Exh.16) and in view of the specific evidence of Dr. Ashitosh Deshmukh who has conducted the postmortem and opined as cause of death as head injury, it is clear that the unnatural death of Shatrughna was in the nature of homicidal death.

(II) Authorship of injuries suffered by deceased :

17. In order to prove that the appellants are the authors for the injuries suffered by deceased Shatrughna, the prosecution has examined two eyewitnesses they are, (1) Sangharatna Rangari (PW 8), and (2) Ashok Nandurkar (PW 9).

First informant Yograj Jambhulkar (PW 4), the father of the deceased, is not an eyewitness. His report Exh.28 and substantive evidence reveal that Sanjay Khobragade, friend of deceased, came to him and informed about the assault on Shatrughna in his presence by the appellants by means of hammer resulting into serious head injuries.

Learned counsel for the appellants submitted that person Sanjay Khobragade, who has informed the fact of assault by the present appellants to the first informant who was also witness to the incident as claimed in the first information, is not examined by the prosecution. Therefore, the prosecution case cannot be relied upon.

The fate of the prosecution case is not to be decided on the basis of number of eyewitnesses. However, the fate of the prosecution case has to be decided by the Court by evaluation of the evidence of eyewitnesses who are examined. Even the conviction can be based on the testimony of solitary eyewitness. If the Court, after critical examination of such eyewitnesses, is of the view that the evidence of such eyewitnesses inspires confidence and is free from all blemishes, it is well within the jurisdiction of the Court to record conviction. In such event, at the appellate stage, it is not open for the accused persons to attack the judgment of conviction on the ground that the prosecution has failed to put other eyewitnesses in the witness box and, therefore, the prosecution case be disbelieved.

18. It is another submission of learned counsel for the appellants that on the material aspect there is inconsistency in between the evidence of Sangharatna Rangari (PW 8) and Ashok Nandurkar (PW 9). He pointed out that Sangharatna Rangari (PW 8) claims that accused No. 1 Aakash @ Golu Dhargawe inflicted two blows of hammer on the head of deceased Shatrughna and, thereafter, the hammer was snatched by accused No. 2 Gagan from the hand of Aakash and he also inflicted two blows on the head of the deceased. Whereas, according to Ashok Nandurkar (PW9), is completely silent about the assault by accused No. 1 Aakash. He, therefore, submitted that this shows none of these two eyewitnesses were not present on the spot nor they have seen the occurrence.

19. Sangharatna Rangari (PW 8) was familiar to both deceased as well as the accused persons. This prosecution witness is having his welding shop at Sonba Nagar. On the day of the incident, his fabrication work was going on in a shop situated at Khadgaon. That time, he required hammer and, therefore, he and Sanjay Khobragade came to the shop situated at Sonba Nagar by 01:00 pm. He opened the shop and took the hammer and, thereafter, closed the shop. At that time, he noticed quarrel was going on in between deceased Shatrughna and the

appellants. At the time of quarrel, appellant No. 1 Aakash snatched the hammer from Sanjay Khobragade and appellant No. 2 Gagan fell down Shatrughna and, thereafter, accused No. 1 gave two blows of hammer on the head of Shatrughna. It is further version from the witness box by this prosecution witness that, thereafter, appellant No. 2 Gagan took hammer from the hands of appellant No. 1 Aakash and he also gave two blows on the head of Shatrughna. Thereafter, they ran away from the spot by throwing hammer on the spot itself.

The evidence of Sangharatna ((PW 8), in respect of the actual assault by these two appellants, has remained unshaken during lengthy cross examination of the said witness. Further, the presence of this prosecution witness it is established since the clothes of this eyewitness were stained with blood. This eyewitness is very specific in his evidence that after the assault, he and Sanjay Khobragade, took Shatrughna on motorcycle to the hospitals. This fact is established on record through Dr. Abhijet Bharadwaj that one injured was brought to his hospital by two persons on motorcycle. These facts clearly establish that this eyewitness was present on the spot who not only witness the actual occurrence of the assault but also extended immediate help to the deceased. In view of consistent evidence of this witness, there is no doubt in our mind that this witness is witness to the truth and has seen the assault by these two appellants on the head by means of hammer.

20. Merely because eyewitness Ashok Nandurkar (PW 9) is not stating about assault by appellant No. 1 Aakash that does not render the entire prosecution case as untrustworthy. It is always possible that one eyewitness may have occasion to witness the entire incident whereas another eyewitness may witness the part of entire incident. According to us, the present case falls in the later category. The evidence of Ashok has stood to the test of cross examination. Further, independently, appellant No. 2 Gagan was not having any motive to kill Shatrughna though he has inflicted hammer blows. It is Aakash who was nurturing grudge against the deceased. Therefore, merely because Ashok is not stating about the assault by Aakash that does not render his testimony as untruthful.

21. In view of the clinching evidence of Sangharatna, it is clear to this Court that the appellants are the perpetrators of the crime and they are responsible to cut short the life of Shatrughna.

D. Corroboration To The Prosecution Case :

22. After registration of the crime, Sambhaji Mhetre (PW 11) visited the spot and in the presence of punchas, spot punchnama was drawn. One of such punch Robin Shelare is examined by the prosecution as prosecution witness No. 3. he has proved the spot punchnama (Exh.23). His substantive evidence also contemporaneous document Exh.23, the spot punchnama shows that the investigating officer seized weapon i.e. hammer from the spot. Perusal of Exh.23 shows that the articles which were seized from the spot including the weapon

was seized and sealed on the spot itself by the investigating officer.

23. Further, the clothes of Shatrughna and Sanjay Khobragade who brought deceased to the hospital from the spot, are seized under seizure memo Exh.30 and the punchnama is duly proved by Chandrashekhar @ Chandu Mohan Talmale (PW 5). His substantive evidence as well as Exh.30 show that the clothes of the witnesses, having blood stains, were properly sealed by the investigating officer.

24. During the investigating, all seized articles were sent to chemical analyzer by the investigating officer under requisition Exh.70. The chemical analyzer's reports are available on record from Exhs.10 to 14. Exh.12, the chemical analyzer's report, shows that Blood Group of deceased was "B" . The human blood was detected on hammer, clothes of both the appellants and also on the clothes of witnesses Sangharatna Rangari and Sanjay Khobragade who was not examined. Further, the Blood Group appearing on the full pant of appellant No. 1 and on the full pant of appellant No. 2 was found to be of Blood Group "B" which belongs to the deceased whereas blood appearing on the shirts of these two appellants were found to be of human blood. It is to be mentioned that Blood Group of these two appellants was also "B".

25. During the course of hearing of the appeal, it was noticed by this Court that the circumstance of blood stains on the clothes of the appellants was not put to them under Section 313 of the Code of Criminal Procedure. Therefore, this Court on 20.1.2016 adjourned the matter and directed that the appellants be brought before this Court for recording of their further statements under Section 313 of the Code of Criminal Procedure. At that time, it was noticed by this Court that appellant No. 1 Aakash was released from prison on furlough and was also present in the Court on 20.1.2016. Therefore, this Court placed the matter on 25.1.2016 with a direction that appellant No. 2 be produced before this Court.

Accordingly, on 25.1.2016 further statement under Section 313 was recorded by this Court. The questions were put to both of them in respect of chemical analyzer's report Exh.11 showing human Blood of Group "B" on their full pants. Their replies to the question was "false". Both of them did not offer any explanation as to under what circumstances the blood is appearing on their clothes.

26. Therefore, in our view even the scientific evidence unerringly corroborates the finger of guilt towards accused/appellants.

E. About Defence Version :

27. The appellants examined two persons Farukh Khan S/o Jaibullah Khan and Chhotu Dhanraj Shende as defence witnesses. Farukh runs a chicken centre known as Madine Chicken Centre. Appellant No. 2 Gagan, according to this witness, used to work at his shop. According to this witness, deceased Shatrughna, Sanjay Khobragade and Janglya came to his chicken centre to set it on fire and at that time Gagan obstructed them. According to this witness, at the

time of incident, Gagan was present in the chicken centre

28. Learned Judge of the Court below has disbelieved this witness. We see no reason to depart from the said finding. This witness is, obviously, an interested witness. He could not show anything on record to establish that deceased Shatrughna along with others had been to his shop to set it on fire and Gagan obstructed at that time. Further, Gagan's presence on the spot is fully established by chemical analyzer's report. There is nothing helpful to the defence from the evidence of Chhotu Shende (DW 2). His evidence is, therefore, not helpful in any way to the defence.

F. Alternative Submissions :

29. Lastly, it was submitted by learned counsel for the appellants that this incident has happened in a spur of movement and there was no intention on the part of the appellants to kill Shatrughna. He further submitted that initially when quarrel was going on in between the appellants and the deceased, that time they were not armed with any weapon. This shows that they were not having any intention to kill Shatrughna.

30. Though, initially, the appellants were not armed with weapon, that by itself is not sufficient to jump to the conclusion about the intention. The intention has to be gathered from surrounding circumstances and other events.

31. From the evidence of Sangharatna Rangari, it is clear that accused No. 1 Aakash snatched the hammer from Sanjay Khobragade and accused No. 2 Gagan fell down Shatrughna on the ground. When Shatrughna was fallen down on the ground, thereafter, Aakash inflicted two blows of hammer on the head of Shatrughna. Thereafter, when this prosecution witness tried to intervene, Aakash also tried to give hammer blow to this witness. His evidence further discloses that, thereafter, accused No. 2 Gagan took weapon from the hands of accused No. 1 Aakash and also gave two blows on the head of deceased Shatrughna.

The aforesaid conduct shows that both the appellants took disadvantage of the situation. They acted in a cruel manner. Further, the autopsy surgeon noticed as many as 8 external injuries on the person of the deceased. In that view of the matter, we are not ready to accept the submission of learned counsel for the appellants for conviction of the lesser offence.

G. Conclusion :

32. The aforesaid evaluation and on re-appreciation of the entire prosecution case lead us to pass the order of dismissal of the appeal and consequent confirmation of the judgment and order passed by learned trial court.

The appeal is dismissed.