
(2011) 02 BOM CK 0158
In the Bombay High Court
Case No : Criminal Appeal No. 312 of 1999

Ashok Bandu Kakade

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 28-02-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164(2)
Evidence Act, 1872 — Section 80
Penal Code, 1860 (IPC) — Section 324

Citation : (2011) 1 Crimes 738

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : A.N. Ansari, for the Appellant; V.G. Shelke, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

S.S. Shinde, J.—This appeal is directed against the judgment and order dated 11th June, 1999 passed by the Sessions Judge, Aurangabad in Sessions Case No. 285/98 thereby convicting the Appellant / accused for the offence punishable u/s 324 of I.P.C. and sentencing him to undergo R.I. for three years.

2. It is the case of the prosecution that Appellant / accused Ashok is real brother of the victim Prabhakar. Ashok was addicted to liquor and did nothing to earn his livelihood. As he was heavily indebted he sold his house to his brother Prabhakar. There used to be frequent quarrels between Ashok and Prabhakar on this count. On 9.5.1998 at about 3.30 p.m., accused Ashok and his friend accused No. 2 Narayan sat with Prabhakar in front of house of one Jaiswal. They beat up Prabhakar and after Prabhakar died, lifted the dead body and placed it in Prabhakar's house. On the next day village Kotval Narayan Dandge gave a report to police station Ajint haw here upon an offence was registered at about 11 a.m. Police came to the spot, performed inquest panchanama and sent the dead body for post mortem examination. They performed panchanama of spot. Statements

of witnesses were recorded and both the accused persons were arrested. Accused No. 1-Appellant was found wearing a shirt which was having stains of blood. It was seized. Property seized was sent to Forensic Science Laboratory. Statements of eye witnesses Bhagabai, Vandana and Rekha were caused to be recorded u/s 164 of Code of Criminal Procedure before a Magistrate. On completion of investigation, charge-sheet was filed.

3. After trial, the trial Court convicted the Appellant/ accused Ashok as aforesaid and acquitted the accused No. 2. Hence, this appeal by the Appellant.

4. At the outset, the learned Counsel for the Appellant submitted that the accused has already undergone period of about one year, three months and twenty days in jail. The learned Counsel for the Appellant had taken me through the evidence of the prosecution witnesses and submitted that none of the witnesses has supported the prosecution case. She invited my attention to the evidence of P.W.2 Bhikulal to contend that it has come in the evidence of P.W.2 that the Appellant herein sold his entire property including agricultural land and house and left his village. Therefore, according to the Counsel for the Appellant when the entire property was sold and it is stated by the witness that the Appellant had left the village, there was no question of having any enmity or quarrel or dispute between the accused and the deceased on account of property. She further submitted that so far as the circumstance of last seen together is concerned, there is no evidence brought on record by the prosecution to establish the fact that the deceased was last seen in the company of the Appellant / accused. Therefore, according to the learned Counsel for the Appellant if the entire evidence of the prosecution witnesses is minutely perused, it is clear that none of the witnesses support the prosecution case. Though the statements of p. Ws.5 to 7 were recorded u/s 164 of Code of Criminal Procedure before a Magistrate, according to Counsel for Appellant, evidentiary value of the said statements is only for corroboration to the substantial evidence before the Court. However, none of the witnesses have stated before the Court regarding commission of the offence by the accused. Therefore, the statements of P.W.5 to 7 recorded by the Magistrate u/s 164 of Code of Criminal Procedure cannot be relied upon. According to the Counsel for Appellant, if the statements of P.W.5 to 7 are perused minutely, in that case, it would reveal that the said statements are made either on the insistence of the police or P.W.5 to 7 were not made aware by the Magistrate about the sanctity of oath or the effect of said statements as stated by these witnesses in their evidence before the Court.

Therefore, according to the Counsel for the Appellant, conviction and sentence of the Appellant as awarded by the trial Court cannot sustain and the appeal deserves to be allowed.

5. On the other hand, the learned A.P.P.relying upon the reasons recorded by the trial Court in the impugned judgment and the provisions of Section 80 of the Evidence Act, would submit that the evidence of the P.W.5 Bhagabai, P.W.6Vandana and P.W.7 Rekha fully support the prosecution case. That apart,

the circumstances relied on by the trial Court that there was quarrel between the deceased and Appellant on account of property and secondly, Appellant was last seen in the company of the deceased and third one, that there was recovery of blood stained shirt from the Appellant / accused fully support the prosecution case. Therefore, he would submit that this Court may not interfere in the impugned judgment and order.

6. I have given due consideration to the submissions of the learned Counsel for the Appellant and the learned A.P.P. for the State.

7. Upon perusal of the evidence of the prosecution witnesses and more particularly, the evidence of P.W.1 Narayan, P.W.2 Bhikulal and P.W.3 Ratanlal, whom the prosecution claims to be the eye witnesses, it is seen that none of these witnesses support the prosecution case. In short, none of these witnesses stated before the Court of having seen the incident.

8. So far as evidence of P.W.5 Bhagabai, P.W.6 Vandana and P.W.7 Rekha is concerned, it also does not support the prosecution case. P.W.5 and p.w.7 were declared hostile and cross-examined by the Addl. Public Prosecutor.

P.W.5 Bhagabai w/o Umaji Ingle in her examination-in-chief stated that she knows the accused and Prabhakar and Prabhakar died a year ago. She specifically states that she had seen nothing and also did not see any quarrel or fight between the accused and deceased and she was busy with work of the marriage in the village. She was declared hostile. In her cross-examination by the A.P.P., she denied that statement was recorded before Magistrate at Aurangabad. She denied the contents of the statement recorded before the Magistrate as also her thumb mark given before the Magistrate.

P.W.6 Vandana is a child witness. She doesn't understand sanctity of oath, hence oath was not administered to her. In her examination-in-chief she stated that she knows the accused. She stated that in the crowd she and Rekha could not see anything and they went home. She did not know why crowd had gathered. She admitted her signature on the paper shown. She stated that she had come to Aurangabad along with Rekha and her mother. She stated that she does not remember if any Magistrate put any questions to her or recorded her statement. She admitted her statement recorded before the Magistrate. In her cross-examination, this witness stated that Magistrate did not ask her if she was deposing on her own or at the instance of some one. She had come with police and police told her as to what she was supposed to state before the Magistrate. She stated that the statement before the Magistrate was out of fear of police. In her further cross-examination on behalf of accused No. 2, she stated that she had not seen anything at the time of incident.

P.W.7 Rekha Umaji Ingle is also a child witness and she was declared hostile. In her examination-in-chief, she stated that she knows both the accused and also Prabhakar brother of Ashok. She saw crowd and went home. She did not see the accused persons beating Prabhakar. She admitted her signature on the paper

shown to her and stated that Magistrate asked her about the incident, recorded her statement and then she signed it. However, she denied the statement read over to her to have been stated before the Magistrate. In her cross-examination by A.P.P. , nothing material was elucidated to support the prosecution. She denied the statement recorded by the Magistrate to be correct. In her cross-examination on behalf of accused No. 1 / Appellant, she stated that Magistrate did not ask her if she was stating as per her own free will. He did not tell her that she was expected to tell truth on oath. She stated that she made statement before Magistrate as directed by police.

9. The learned Counsel for the Appellant also placed reliance on the reported judgment of this Court in case of Shri Shivaji Gaonkar v. State 2009 ALL MR 359) wherein, the view is taken by this Court that statements recorded u/s 164 of the Code of Criminal Procedure could not be considered as evidence but were corroborative of what was stated earlier in the committal court. That point is not in dispute since the trial Court in para 9 of the impugned judgment has concluded that such statements at the most can be used as corroborative piece of evidence and it cannot become substantive evidence.

10. Therefore, if the evidence of P.W.5 to 7 discussed herein above is taken into consideration, it does not inspire confidence. The witnesses have stated about non compliance of Section 164(2) of Code of Criminal Procedure since they were not made aware of the consequence of their statements. Even, the trial Court in para 9 of the impugned judgment has discussed the effect of the provisions of Section 80 of the Evidence Act and recorded observations that statement u/s 164 of Code of Criminal Procedure can at the most be used as corroborative piece of evidence. Therefore, in absence of any evidence in the nature of eyewitnesses or direct evidence and even in absence of proving the circumstances namely, there was quarrel or dispute on account of property between Appellant and deceased and that they were last seen together, in my opinion, the impugned judgment and order cannot sustain.

11. In the result, the appeal is allowed. The impugned judgment and order dated 11th June, 1999 passed by the Sessions Judge, Aurangabad in Sessions Case No. 285/98 thereby convicting the Appellant / accused for the offence punishable u/s 324 of I.P.C. and sentencing him to undergo R.I. for three years, is quashed and set aside and the Appellant is acquitted of the said offence. Bail bonds of the Appellant stands cancelled.