

(2017) 05 BOM CK 0169
In the Bombay High Court
Case No : 599 of 2004

Ashwin and others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 02-05-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 389](#) - Suspension of sentence pending the appeal; release of appellant on bail
[Indian Penal Code, 1860](#), [Section 302](#),
[1](#)

Citation : (2017) 05 BOM CK 0169

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

Bench : DIVISON BENCH

Advocate : R.M. Daga, A.S. Fulzele

Judgement

1. The present appeal is filed against judgment and order of conviction, passed by learned Additional Sessions Judge, Pusa dated 13.9.2004, in Sessions Trial No.67 of 1995, by which appellants were convicted for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and they were directed to suffer imprisonment for life and to pay a fine of Rs.1,000/-, in default, to suffer rigorous imprisonment for one year by each of them.

The appellants were also convicted for the offence punishable under Section 201 read with Section 34 of the Indian Penal Code and on that count they are directed to suffer rigorous imprisonment for three years and to pay a fine of Rs.500/-, in default, to suffer rigorous imprisonment for three months by each of them.

2. While admitting this appeal in the year 2004, this Court by its two separate orders dated 20.1.2005 and 2.3.2005 had allowed the applications filed on behalf of appellants under Section 389 of the Code of Criminal Procedure and they were released on bail.

3. The appellants were charged by learned Judge of the Court below for the

offences for which they are convicted.

4. Initially, an accidental death vide A.D. No.11 of 1995 was registered in respect of death of Mangilal s/o Sudam Rathod whose body was found to be floating in a canal adjacent to village Bansi (Tanda). Said accidental death Case No.11 of 1995 was investigated by PW7 Head Constable Mahadeo Gomaji Todasam at the relevant time. He, thereafter, handed over investigation to PW8 Gulabrao s/o Ramdas Choudhari, who completed entire investigation and filed the charge sheet in the Court of law.

5. We have heard learned counsel Shri R.M. Daga for the appellants and learned Additional Public Prosecutor Shri A.S. Fulzele for the respondent/State in extenso. With their able assistance, we have gone through the notes of evidence and also the record and proceedings.

6. According to submission of learned counsel for the appellants, the prosecution has utterly failed to prove the nature of death of Mangilal. His another submission is, that learned Judge of the Court below ought not to have relied upon the evidence of PW2 Waman s/o Hari Pawar as an eyewitness. He submits that since prosecution has utterly failed to prove nature of death, appeal needs to be allowed.

7. Per contra, learned Additional Public Prosecutor Shri A.S. Fulzele submits that postmortem report Exhibit 97 clearly shows that cause of death is cardiac arrest due to asphyxia secondary to drowning. He submits that learned Judge of the Court below has rightly relied on the evidence of PW2 Waman. He submits that on material aspect there is no contradiction or omission in the testimony of said eyewitness. He, therefore, submits that appeal be dismissed.

8. The dead body of Mangilal was found to be floating in a canal on 28.5.1995. It is not in dispute that he goes missing from the night of 26.5.1995. The death can be of homicidal, accidental, or suicidal one. It is not the case of the prosecution that deceased committed suicide nor from the tenor of cross examination it was suggested to that extent by the defence.

9. According to the prosecution, the death of Mangilal was homicidal one and the present appellants are responsible for such death, thereby the prosecution completely rules out the possibility of accidental death.

10. Since it is case of the prosecution that Mangilal met with homicidal death and the present appellants are responsible for such death, it is for the prosecution to prove the same. Even otherwise, entire burden rests on shoulder of the prosecution to prove the nature of death.

11. The postmortem report is available on record at Exhibit 97. The cause of death, as given by the autopsy surgeon, is "cardiac respiratory arrest due to asphyxia secondary to drowning."

12. What is important to note in respect of postmortem report is, that this report

is taken into evidence through evidence of PW8 investigating officer Gulabrao Choudhari. The prosecution has not examined the autopsy surgeon or any other medical expert. According to learned Judge of the Court below, the said document is admissible even though it is brought on record through the investigating officer.

13. Surely, investigating officer is not an expert who can comment on the niceties of anatomy or on any other aspect in the same matter. According to evidence of PW8 Gulabrao Choudhari, postmortem was conducted by Dr. Atiya Jamal and he is not aware about whereabouts of the said doctor. However, he heard that "she has gone abroad." The evidence of said witness shows that said postmortem report was exhibited as per the prayer made by learned Additional Public Prosecutor, incharge of the trial, in view of Section 32 of the Evidence Act as witness Dr. Atiya Jamal was not traceable. The same was strongly opposed by learned defence counsel. Therefore, learned Judge of the Court below exhibited the document subject to objection.

14. While dealing with this issue of admissibility of postmortem report in the evidence, learned Judge of the Court below, in paragraph No.25 of impugned judgment, observed that in view of the decision given by the Honourable Apex Court in case of Prithi Chand v. State of Himachal Pradesh, reported at AIR 1989 SCC 702 wherein the Honourable Apex Court had observed that when doctor's attendance is not possible without an amount of delay and, therefore, the Honourable Apex Court held that the carbon copy of document i.e. medical certificate was made admissible.

15. With the assistance of learned Additional Public Prosecutor, we have gone through the aforesaid reported case. In the said reported case, the medical certificate was issued by Dr. C.S. Vedwa who was unavailable for her examination. Therefore, the prosecution examined Dr. Kapila as PW2 and through her carbon copy of the medical certificate was duly proved.

16. In the present case, there is nothing available on record by which one could reach to the conclusion with certainty about unavailability of Dr. Atiya Jamal. The investigating officer, in his chief examination, states that he has heard about the fact that said doctor has gone abroad. In last paragraph of his cross examination he states as under: "I did not make any search for Dr. Atiya Jamal and I do not know her whereabouts. The police constable of Rural Police Station Pusad had told me that Dr. Atiya Jamal had gone abroad." From the aforesaid admission given by PW8 investigating officer Gulabrao Choudhari it is clear that he himself was not knowing that the doctor, who conducted postmortem, has gone abroad. Further, Police Constable, who has informed him about said fact, is also not examined by the prosecution.

17. We have gone through the original record. The original of postmortem report shows that postmortem was conducted on 28.5.1995, doctor, who conducted postmortem, has signed on 29.5.1995. Below the signature it appears that the

medical superintendent of Rural Hospital at Pusad has endorsed the same on 29.5.1995. It was open for the prosecution at least to examine the said medical superintendent who has endorsed the document and has put the endorsement as "seen" which has been used by learned Judge of the Court below to admit the document in the evidence.

18. In absence of examination of autopsy surgeon or any other person or medical superintendent, who has put endorsement as "seen" on postmortem report on 29.5.1995, or any other person who was aware about handwriting of autopsy surgeon, could have proved the said document. It is clear that basic document has remained to be proved. In that view of the matter, we have no hesitation in our mind to record a finding that the prosecution has not proved the fact that Mangilal died with homicidal death. The possibility of accidental death, therefore, cannot be ruled out. Perusal of postmortem report shows that there were no external or internal injuries on the body of Mangilal that is also one of pointer for ruling out the possibility of homicidal death.

19. Insofar as PW2 Waman Pawar is concerned, there is no slightest doubt in our mind to discard his evidence in view of fact that his police statement is recorded on 26.6.1995 i.e. after expiry of one month. His cross examination shows that in fact he has participated in the search of deceased along with other villagers. However, he did not find necessary to disclose fact about quarrel in between deceased and appellants that he claimed to have been heard on the date of incident. Belated recording of statement of PW2 Waman, in spite of fact that he was having an opportunity to disclose either to covillagers or police, casts serious doubt about his nature as an eyewitness and, therefore, submission made by learned counsel for the appellants that this witness is introduced, has force.

20. In view of aforesaid discussions, we have no hesitation in our mind to record the following order : ORDER 1. The criminal appeal is allowed.

2. Judgment and order of conviction, passed by learned Additional Sessions Judge, Pusad in Sessions Trial No.67 of 1995, is hereby quashed and set aside.

3. Conviction of the appellants for the offences punishable under Sections 302 and 201 read with Section 34 of the Indian Penal Code is hereby quashed and set aside.

4. Bail bonds of the appellants stand cancelled.