

(2013) 09 BOM CK 0137

In the Bombay High Court

Case No : Criminal Appeal No. 1525 of 2004

Babbu alias Ramesh Khaildas Bhatia and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 25-09-2013

Acts Referred:

Citation : (2013) 6 ABR 273

Hon'ble Judges : P.V. Hardas, J;P.N. Deshmukh, J

Bench : Division Bench

Advocate : Gulestan Dubash with Ganesh Gole, Shirish Gupte with Prakash Naik and Ganesh Bhujbal, Nitin Pradhan with Ms. S.D. Khot and Ms. Ameeta Kuttikrishnan, for the Appellant; U.V. Kejriwal, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

P.V. Hardas, J.—The appellants who stand convicted for offence punishable u/s 302 read with 34 of the Indian Penal Code and each of them sentenced to imprisonment for life and to pay fine of Rs. 2,000/- in default to undergo simple imprisonment for 3 months by the 2nd Additional Sessions Judge, Kalyan by judgment dated 22nd November, 2004, in Sessions case No. 44/02, by this appeal challenge the correctness of their conviction and sentence. Facts in brief as are necessary for the decision of this appeal may be stated that:--

2. P.W. 11 PI Bhupal Rawat who was on duty at Ulhasnagar police station on 12th September, 2001 was entrusted with the investigation in Crime No. 144/01 u/s 302 of the Indian Penal Code. The aforesaid offence had been registered on the basis of the report lodged by P.W. 1 Ramesh at Exhibit-55. The aforesaid report was in respect of murder of one Raju, brother of P.W. 1 Ramesh. On being entrusted with the investigation, P.W. 11 P.I. Rawat received documents which has been drawn by PI Shivulkar. The documents were scene of the offence panchanama at Exhibit-58 and inquest panchanama of the dead body of deceased Raju at Exhibit-51. P.W. 11 Rawat recorded statements of 12 witnesses

on 13th September, 2001. Interestingly, the statement of PW2 Paresh, an eye-witness to the incident was also recorded on 13th September, 2001. Prior to that, PW2 Paresh had figured as a panch witness to the scene of offence as well as inquest panchanama, which were drawn on 12th September, 2001.

3. On 14th September, 2001 a search was launched for the accused but accused were not found. On the next day i.e. on 15th September, 2001 one head constable Chaudhari arrested three accused under arrest panchanamas at Exhibits 77, 78 & 79. Since injuries were noticed on hands of accused Naresh and Kumar, they were referred for medical examination under requisition Exhibit-80. On 16th September, 2001, accused Ramesh was arrested under arrest panchanama Exhibit-81. Accused Ramesh who had also sustained injury was referred for medical examination under requisition at Exhibit-82. The seized articles were thereafter referred for analysis to Chemical Analyser under requisition Exhibit-83. The reports of the Chemical Analyser are at Exhibits 84, 86, 87 & 88. Further on the completion of investigation, a charge-sheet against the appellants was submitted.

4. The post-mortem on the dead body of the deceased Raju was conducted by P.W. 10 Dr. Jagtap. PW 10 Dr. Jagtap noticed following external injuries:--

- (i) 1" x 1/3" above right ear oblique vertical on head.
- (ii) IW 1 1/2" x 1/3" x 1/4" on right upper eyelid.
- (iii) IW 1" x 1/3" x 1/2" over left eyebrow horizontally medially.
- (iv) IW 1" x 1/3" x 1/2" over left eyebrow iird injury laterally.
- (v) IW 1/2" x 1/3" x 1/2" over left eyebrow above injury No. iv laterally.
- (vi) IW 1" x 1/2" x 1/4" right hand 1" x 1/4" right hand 5th space vertical.
- (vii) Abrasion right 4th phalanx 1" x 1/4" palm.
- (viii) IW right palm, 1st space 1" x 1/2" x 1/4".
- (ix) Abrasion right wrist, back laterally 1" x 1/2".
- (x) Abrasion left elbow 2" x 1/2" laterally.
- (xi) IW left thumb base 1" x 1/3" x 1/3".
- (xii) Abrasion left index finger 1/2" x 1/3".
- (xiii) Abrasion left thigh lateral 2" x 1/2".
- (xiv) IW left thigh anteriorly 1 1/2" x 1/2" x 1/2".
- (xv) Abrasion left knee 1" x 1/2".
- (xvi) IW left leg anteriorly horizontal 1" x 1/3" x 1/3".
- (xvii) Abrasion right ankle 1/2" x 1/2" laterally.

(xviii) Abrasion right foot 1/2" x 1/2" proximal lateral.

(xix) Abrasion right foot near toes, laterally 1/2" x 1/2."

On internal examination, fracture of mandible bone of both sides was noticed. Fracture of frontal bone was noticed. Fracture of occipital bone was noticed and blood was oozing from both ears. He, therefore, opined that all the injuries were ante mortem and internal injuries corresponded to the external injuries mentioned in column No. 17.

PW10 Jagtap, therefore, opined that cause of death was injury to brain. Post-mortem report is at Exhibit-53. He had received a query from the police in respect of injuries being caused by the weapon. The said communication is at Exhibit-74 and the answer is at Exhibit-75.

5. On committal of the case, the trial Court vide Exhibit-23, framed charge against the appellants for offence u/s 302 read with 34 of the Indian Penal Code. The appellants denied their guilt and claimed to be tried. The prosecution in support of its case examined 12 witnesses. The defence of the appellants was of denial. The trial Court upon appreciation of the evidence led by prosecution, convicted and sentenced the appellants as aforestated.

6. In order to effectively deal with the submissions advanced before us by Mrs. Shirish Gupte, learned senior counsel, Mr. Nitin Pradhan and Ms. Dubhash, learned counsel representing appellants and the learned A.P.P., it would be useful to refer to the evidence of the prosecution witnesses.

7. The prosecution revolves around the solitary testimony PW2 Paresh. PW2 Paresh states that on 12th September, 2001 police officer of Ulhasnagar police station had called him for a panchanama. He had accordingly gone to the police station and from police station he had gone to the scene of incident. He had noticed the dead body of deceased Raju at the scene of incident. Police had accordingly drawn a scene of offence panchanama at Exhibit-58 and from the scene of incident certain articles as well as samples came to be seized. PW2 Paresh further states that he was a witness to the inquest panchanama of the dead body of deceased Raju which was drawn at Exhibit-51. He then states that on the next day he was called by police when his statement as an eye-witness was recorded. In respect of the incident, PW2 Paresh states that on 12th September, 2001 at about 7.30 p.m. he along with Raju had started from Netaji to Nehru Chowk in a rickshaw. He had accordingly paid the rickshaw driver an amount of Rs. 100/- but since the auto-rickshaw driver did not have the change, PW2 Paresh had gone to a nearby Pan Shop. Deceased Raju had informed PW2 Paresh that he was waiting near the laundry. After paying the auto driver, PW2 Paresh went towards the place where deceased Raju was standing. He noticed that accused had fallen deceased Raju on the ground and were assaulting deceased Raju with chopper, etc. Raju tried to escape and ran away. The accused chased deceased Raju and caught him and thereafter assaulted him by fists and kick blows. He has further stated that one Timki and Dinesh were attempting to

separate the quarrel. Accused Kumar then lifted one stone slab and threw it at the head of deceased Raju. Accused were talking in Sindhi language and were telling each other not to leave deceased Raju alive. Deceased Raju was mercilessly assaulted by a stone slab. Since PW2 Paresh was frightened on seeing the assault, he, therefore, returned to Nehru Chowk, Ulhasnagar. There he saw wife of deceased Raju and some ladies and informed them about the incident and took them to the scene of incident. By that time, police had arrived at the scene of the incident.

8. In cross-examination, he has admitted that deceased Raju was his friend and he and Raju reside in the same area. He has admitted that he and deceased Raju are reporters and, therefore, they were friends. He has admitted that the incident lasted for 45 minutes. He further admitted that the dead body was lying near the house of Jaikumar Lalwani. He has further admitted in his cross-examination that police had recorded his statement on 13th September, 2001 while inquest panchanama was drawn on 12th September, 2001. He has admitted that the scene of incident was shown by brother of deceased Raju. PW2 Paresh has admitted that at that time, he was present at the scene of incident.

9. We may briefly make a reference to the evidence of P.W. 1 Ramesh, brother of deceased Raju, who had lodged F.I.R. at Exhibit- 55. P.W. 1 Ramesh states that on the day of the incident PW5 Dilip came to his house at about 8.15 p.m. and informed him that deceased Raju had been murdered by his friends. P.W. 1 Ramesh accordingly went to the scene of incident in auto-rickshaw. There he noticed his brother deceased Raju lying in a pool of blood. He also noticed broken pieces of stone slab. He, therefore, went to the police station and lodged his report Exhibit-55. Incidentally, prosecution has examined PW5 Dilip, who was said to be the eye-witness to the incident. PW5 Dilip did not support the prosecution and was declared hostile. Consequently, the information communicated by PW5 Dilip to P.W. 1 Ramesh as is reflected in F.I.R. Exhibit-55 would be hearsay and inadmissible in evidence. Reference at this juncture may usefully made to the judgment of the Supreme Court in the case of Yasin Gulam Haider Vs. State of Maharashtra, . The Supreme Court in the said judgment had held that a witness alleged to have informed material fact to another witness, having resiled from having stated so, the information would become hearsay and hence inadmissible in evidence. The evidence of P.W. 1 Ramesh, therefore, is in the nature of hearsay and would not assist the prosecution case at all.

10. Prosecution has also examined PW8 Meena, wife of deceased Raju. PW8 Meena states that on the day of the incident, she had received a telephone call from her sister-in-law who had informed her that accused had assaulted deceased Raju and had left Raju lying in the lane. PW8 Meena, therefore, accordingly came to Nehru Chowk in an auto-rickshaw and met PW2 Paresh in the Chowk. PW2 Paresh then informed her about the incident. She accordingly went to the scene of incident and noticed that police had already reached there. In cross-examination, she has admitted police were inquiring with PW2 Paresh

and police had also enquired with her. She stated that on the next day, she had gone to police station where her statement was recorded. She has admitted that Sulochana (her sister-in-law) and PW2 Paresh had accompanied her. She has admitted that their statements were also recorded by the police.

11. We thus find that the fact that PW2 Paresh told PW8 Meena about the incident cannot be relied upon either. Though PW8 Meena admits that when she had gone to the place of incident, she was informed about the incident by PW2 Paresh, yet no disclosure was made to the police either by PW8 Meena or PW2 Paresh at the scene of incident. It is inexplicable as to why police did not record statement of PW2 Paresh if he had really witnessed the incident and statement of PW8 Meena, if she had been informed about the incident by PW2 Paresh.

12. We thus find that implicit reliance cannot be placed on the testimony of PW2, Paresh. Firstly, PW2 Paresh is a solitary witness and evidence of a solitary witness before it can be relied upon should be of sterling quality. The testimony of PW2 is riddled with unnatural behaviour as PW2 Paresh has associated himself as a panch witness, a day prior to his Statement being recorded as an eye-witness.

13. A reference can be made to the judgment of the Supreme Court in the case of State of Orissa Vs. Mr. Brahmananda Nanda, . The Supreme Court in that case found that no reliance could be placed on the testimony of a sole eye-witness who has not disclosed the name of the murderer for a day and a half after the occurrence. The Supreme Court held that such a conduct affects the credibility of such witness.

14. We find that since PW2 Paresh had associated himself as a panch witness to the scene of offence panchanama as well as inquest panchanama on 12th September, 2001 and had not disclosed the incident to the police, his belated disclosure about the incident to the police on the next day would affect his credibility as an eye-witness. We have also noted the evidence of PW2 Paresh is not of such quality as to impel the Court to implicitly rely on his testimony. The conduct and behaviour of PW2 Paresh is highly unnatural and, therefore, belies his claim at having witnessed the incident. No reliance whatsoever can be placed on the testimony of PW2 Paresh, Unfortunately, he is the sole eye-witness as PW 5 Dilip did not support the prosecution and was declared hostile. Be that as it may, the evidence of PW2 Paresh does not inspire confidence of the Court and according to us, conviction of the appellants cannot be sustained on the basis of the testimony of PW2 Paresh.

15. Having thus considered the rival submissions as well as having considered evidence of witnesses examined by the prosecution, according to us, conviction of the appellants is unsustainable and appeal, therefore, deserves to be allowed.

16. Accordingly, Criminal Appeal Nos. 1525 of 2004 and 34 of 2010 are allowed and the conviction and sentence of the appellants are hereby quashed and set aside and appellants are acquitted of the offence with which they are charged

and convicted. Fine, if paid, be refunded to the appellants. Since the appellants are in jail, they be released forthwith if not required in any other case.