
(2016) 03 BOM CK 0232

In the Bombay High Court

Case No : Criminal Appeal No. 1082 of 2009.

Dilbahadur Mansing Khadaka and Other

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 09-03-2016

Acts Referred:

Evidence Act, 1872 — Section 27, 3
Penal Code, 1860 (IPC) — Section 302

Citation : (2016) 2 AIRBomRCri 342 : (2016) ALLMRCri 3231 : (2016) 4 BomCR(Cri) 397

Hon'ble Judges : V.K. Tahilramani;Anuja Prabhudessai, JJ.

Bench : Division Bench

Advocate : A.G. Toraskar, Advocate, for the Appellant; V.R. Bhonsale, APP, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Tahilramani, J. (Oral) - Appellants i.e original accused No. 1 - Dilbahadur Mansing Khadaka and original accused No. 3 - Jaharsing Harising Badela have preferred Criminal Appeal No. 1082 of 2009 against the Judgment and Order dated 31.8.2009 passed by 2nd Ad-hoc Additional Sessions Judge, Greater Mumbai in Sessions Case No. 389 of 2007. Appellant i.e original accused No. 2 - Shankar Mahendra Gogati has preferred Criminal Appeal No. 355 of 2010 against the very same Judgment and Order. By the said judgment and order, the learned Session Judge convicted the appellants for the offence punishable under Section 302 r/w 34 of IPC and sentenced each of them to suffer imprisonment for life and fine of Rs. 500/- each, in default S.I. for one month.

As both the appeals are directed against the very same Judgment and Order, we are deciding both the appeals together. For the sake of convenience, we shall refer to the appellants as they were referred before the trial Court i.e appellant - Dilbahadur Mansing Khadaka will be referred as accused No. 1, appellant - Shankar Mahendra Gogati will be referred as accused No. 2 and Jaharsing

Harising Badela will be referred as accused No. 3.

2. The prosecution case briefly stated, is as under:

(a) There was illicit relationship between the deceased Chandrabahadur and the wife of accused No. 3 Jaharsing. Because of this, quarrel was going on between accused No. 3 and the deceased. On the day of the incident, the deceased was at the house of accused No. 3 the whole day. Thereafter, accused No. 3 asked for blue colour Maruti Esteem Car from PW 6 Ramesh to go to the airport. Accused No. 3 then took the vehicle of Ramesh and went away. Accused Nos. 1 and 2 are the friends of accused No. 3.

(b) It is the prosecution case that all the three accused then took the deceased with them in the Maruti Esteem car bearing No. MH-01/M-8450. It is the prosecution case that all the three accused caused the death of Chandrabahadur by assaulting and thereafter strangulating Chandrabahadur with a nylon rope. PW 1 Police Naik Chavan and PW 4 Police constable Kamble were on night patrolling duty from 8.00 p.m. on 5.2.2007 till the morning of 6.2.2007. While patrolling, at about 2.30 a.m. near Parsi Bungalow, they saw one blue colour Maruti Esteem car standing on the road. The registration number of the car was MH-01/M-8450. Some suspicion arose in the minds of PW 1 Police Naik Chavan and PW 4 Police Constable Kamble, hence, they stopped near the car.

(c) They noticed one person was sitting in the driver seat and another person was sitting on the rear seat of the car. These persons were accused No. 1 Dilbahadur and accused No. 2. Shankar. PW 1 Chavan and PW 4 Kamble asked accused Nos. 1 and 2 to come out of the car. At that time, they noticed one person sitting beneath the rear side seat of the car behind the driver. They made inquiry with the accused persons whereupon the accused persons told them that the person is sitting there under the influence of drink. PW 1 Police Naik Chavan then asked the accused persons to awaken the person. They noticed that the said person was not in a position to stand, due to this, their suspicion increased. Hence, accused Nos. 1 and 2 were brought to the police station. PSI Sapkal (PW 17) was at the Police Station. He was apprised of the facts. Then PW 1 Chavan, PW 4 Kamble, PW 17 PSI Sapkal along with accused Nos. 1 and 2 came back to the spot where the vehicle was parked. PSI Sapkal tried to awaken the person sitting in the car but he could not succeed. PSI Sapkal then sent the said person to the hospital. Thereafter, they all came back to the police station. PW 1 Police Naik Chavan received a telephonic message at the Police Station at about 3.30 a.m. that the person who was taken to the hospital was already dead. Thereafter, accused Nos. 1 and 2 were interrogated. On the basis of the information received, PW 1 Police Naik Chavan lodged F.I.R. on behalf of the State. The said F.I.R. was against the present three accused persons and it was under Section 302 r/w 34 of IPC.

(d) After lodging of the F.I.R., investigation commenced. The dead body of the person who was identified as Chandrabahadur was sent for postmortem. PW 12

Dr. Jawale performed the postmortem on the dead body of Chandrabahadur. On examination, he found 10 injuries on the person of Chandrabahadur. These injuries were mainly in the nature of abrasions and contusions. In addition, ligature marks were found on the neck. According to Dr. Jawale, the cause of death was due to strangulation with multiple contusions. After completion of investigation, charge sheet came to be filed.

3. Charge came to be framed against the appellants under Section 302 r/w 34 of IPC. The appellants pleaded not guilty to the said charge and claimed to be tried. Their defence was that of total denial and false implication. After going through the evidence adduced in this case, the learned Sessions Judge convicted and sentenced the appellants as stated in paragraph 1 above, hence, this appeal preferred by the appellants against their conviction and sentence.

4. We have heard the learned Advocate for the appellants and the learned APP for the State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned Advocates for the parties, the judgment delivered by the learned Sessions Judge and the evidence on record, for the reasons stated below, we are of the opinion that there is no merit in the appeal.

5. As far as accused No. 1 - Dilbahadur and accused No. 2 Shankar are concerned, the material evidence is that of PW 1 Police Naik Chavan, PW 4 Police Constable Kamble, PW 7 ASI Shinde and PW 17 PSI Sapkal.

PW 1 Police Naik Chavan has stated that on 5.2.2007, he was on patrolling duty. PW 4 police constable Kamble was with him. Kamble was rider of bike for night patrolling and Police Naik Chavan was the pillion rider. At about 2.20 a.m., when they were near Parsi Bungalow, they saw one blue colour Maruti Esteem car standing on the road. The registration number of the car was MH-01/M-8450. Some suspicion arose in the minds of PW 1 Chavan and PW 4 Kamble, hence, they stopped near the car.

PW 1 Police Naik Chavan further stated that they noticed one person was sitting in the driver seat and another person was sitting on the rear side of the car. These persons were accused No. 1 Dilbahadur and accused No. 2. Shankar. PW 1 Chavan and PW 4 Kamble asked accused Nos. 1 and 2 to come out of the car. At that time, they noticed one person sitting beneath the rear side seat of the car behind the driver. They made inquiry with the accused persons whereupon the accused persons told them that the person is sitting there under the influence of drink. PW 1 Police Naik Chavan then asked the accused persons to awaken the person. They noticed that the said person was not in a position to stand, hence, their suspicion increased. The accused persons were then taken to the Police Station in a rickshaw. They narrated the incident to PW 17 PSI Sapkal and PI Patil. Then PW 4 Kamble and PW 1 Chavan along with PW 17 PSI Sapkal came back to the spot where the car was parked. They tried to make the person in the car stand but the person was not responding. The person who was later

identified as Chandrabahadur was taken to the hospital. The Doctor declared him as dead before admission. On the basis of the information received, PW 1 Police Naik Chavan lodged F.I.R. on behalf of the State.

Thus, the evidence of PW 1 Police Naik Chavan establishes that accused Nos. 1 and 2 were in the car in which the dead body of Chandrabahadur was found in a sitting position beneath the rear seat of the car.

6. PW 4 Police Constable Kamble was on patrolling duty with PW 1 Police Naik Chavan. PW 4 Kamble has stated that his night patrolling duty commenced at 8.00 p.m. from 5.2.2007 till 9.00 a.m. the next day. Kamble has stated that at about 2.20 a.m. when they were near Parsi Bungalow at Pawai, they noticed one Maruti Esteem Car on the road. They got some doubt about the said car, hence, they parked their bike and told the persons sitting in the car to come out. Two persons came out of the car. They were accused Nos. 1 and 2. Kamble noticed that both the accused were frightened. The accused persons told them that the engine of the car had stopped. They checked the car with the help of torch. They noticed on the back side of the driver's seat in the gap, one person was sitting in bent position. They made inquiry with the accused persons about that man. Both the accused said that person is under the influence of liquor. They told the accused persons to make that person stand, however, the person was not responding, hence, there was further doubt in the minds of PW 4 Kamble and PW 1 Chavan. The accused persons were then taken to the Police Station in a rickshaw. They narrated the incident to PW 17 PSI Sapkal and PI Patil. Then PW 4 Kamble, PW 1 Chavan, PW 17 PSI Sapkal along with accused Nos. 1 and 2 came back to the spot where the car was parked. They tried to make the person in the car stand but the person was not responding. Meanwhile, police mobile van of Powai-1 was called by giving a call on the phone. PW 7 ASI Shinde was on duty on the mobile van. The person sitting beneath the rear seat who was later identified as Chandrabahadur was taken to the hospital. The Doctor declared him as dead before admission. On inquiry with the accused persons, they disclosed that the person was known to them as he was residing in their area.

7. PW 17 PSI Sapkal was on night duty in the night between 5.2.2007 and 6.2.2007. He has stated that at about 2.30 a.m., two constables brought two persons to the police station. They were informed that two persons were travelling in a Maruti car. The number of the Maruti car was MH-01/M-8450. PSI Sapkal immediately went to the spot where the Maruti car was parked. He saw one person sitting under the seat in the vehicle. He tried to wake up that man who was found sitting below the seat in the vehicle but the person did not wake up. On inquiry with accused Nos. 1 and 2, they told PSI Sapkal that person had consumed liquor. He then sent that person in a mobile van to Rajawadi Hospital.

8. PW 7 ASI Shinde was attached to Pawai Police Station at the relevant time. He was on night duty in the night between 5.2.2007 and 6.2.2007. ASI Shinde has stated that on 6.2.2007 at about 2.40 a.m., a message was received in the control room. Pursuant to the message, ASI Shinde along with wireless staff

went to the spot where the Maruti vehicle bearing No. MH-01/8450 was found parked. On the backside of the driver seat, they saw one person lying there without any movement. Two persons were standing outside the vehicle. Those two persons were apprehended by the police. These two persons were accused Nos. 1 and 2. With the help of staff, they took out the person from the vehicle and kept him on the stretcher. Then they took him to Rajawadi Hospital. Doctor examined the person and declared him as dead before admission. PW 7 ASI Shinde has stated that he saw mark of injuries around the neck of the deceased.

9. Thus, the evidence of PW 1 Police Naik Chavan, PW 4 Police Constable Kamble, PW 7 ASI Shinde and PW 17 PSI Sapkal establishes that accused Nos. 1 and 2 were found in the same car in which the dead body of Chandrabahadur was found. Both the accused gave false explanation in relation to the deceased. They stated that the deceased was found sitting below the rear seat of the car because he was in heavily intoxicated state. They further stated that the deceased was not making any movement because he was under the influence of drink. Thus, though Chandrabahadur was dead, the accused persons tried to give a false explanation about Chandrabahadur. They tried to project that Chandrabahadur was alive whereas in fact Chandrabahadur was already dead on account of strangulation. The sequence of events coupled with the false explanation given by accused Nos. 1 and 2 clearly shows the complicity of accused Nos. 1 and 2 in the offence.

10. In addition to the evidence of PW 1 Police Naik Chavan, PW 4 Police Constable Kamble, PW 7 ASI Shinde and PW 17 PSI Sapkal, the prosecution is relying on the evidence of PW 10 panch witness Sonkamble in relation to accused Nos. 1 and 2. PW 10 panch witness Sonkamble has stated that on 6.2.2007 at about 5.00 a.m., he was called to the police station. The clothes of accused Nos. 1 and 2 came to be seized under panchnama Exh. 28. These clothes were sent to C.A. As per C.A. report Exh. 44, the clothes of accused No. 1 i.e Tee shirt and pant were found stained with blood of "B" group. The shirt of the deceased was also found stained with blood of "B" group. From this, it can safely be inferred that the blood group of the deceased was "B". Thus, finding of blood of "B" group on the clothes of accused No. 1 is a further incriminating factor against accused No. 1. As far as accused No. 2 is concerned, his clothes were found stained with human blood. In this connection, we may usefully refer to the decision of the Supreme Court in the case Gura Singh v. State of Rajasthan (2001) 2 SCC 205, wherein it has been observed as under :

" In view of the authoritative pronouncement of this Court in Teja Ram Case (1999) 3 SCC 507) we do not find any substance in the submissions of the learned Counsel for the appellant that in the absence of the report regarding the "origin of the blood, the trial Court could not have convicted the accused. The Serologist and Chemical Examiner has found that the chadar seized in consequence of the disclosure statement made by the appellant was stained with human blood. As with lapse of time the classification of the blood could not be

determined, no bonus is conferred upon the accused to claim any benefit on the strength of such a belated and stale argument. The trial Court as well as the High Court were, therefore, justified in holding the circumstance as proved beyond doubt against the appellant."

Similar view has been taken by the Supreme Court in the cases of *R. Shaji v. State of Kerala* (2013) 14 SCC 266 and *Molai and Anr. v. State of Madhya Pradesh* 1999(9) SCC 581.

11. It is pertinent to note that both the accused have not given any explanation for the presence of blood on their clothes. It is pertinent to note that none of the accused persons had any injury on their person at the time of arrest to claim that the blood on the clothes belonged to them. Nor any explanation was furnished by any of these two accused persons for presence of blood stains on their clothes. Thus, unexplained presence of bloodstains on the clothes of accused Nos. 1 and 2 is a strong incriminating circumstance against them.

12. As far as accused No. 3 is concerned, the prosecution has relied on the circumstances of motive, recovery of rope and the evidence of PW 6 Ramesh which shows that he took the car i.e Maruti Esteem car bearing No. 8450 from him on the day of the incident. On the aspect of motive, the prosecution has examined PW 18 Ganga. Ganga has stated that accused No. 3 Jaharsing was residing adjacent to her house along with his wife Laxmibai and children. Ganga also knew accused Nos. 1 and 2 as they used to frequently visit the house of accused No. 3. The wife of accused No. 3 was involved in illicit relationship with some other person. Ganga has specifically stated that there was illicit relationship between the deceased Chandrabahadur and the wife of accused No. 3 and because of that, quarrel was going on between accused No.3 and the deceased. On 5.2.2007, quarrel was going on between accused No. 3 and his wife. The deceased was at the house of accused No. 3 that day. This shows the motive for accused No. 3 to commit the crime.

13. Thereafter, Accused No. 3 asked PW 6 Ramesh for his vehicle which was Maruti Esteem car bearing No. 8450. PW 6 Ramesh gave him the vehicle. PW 6 Ramesh has categorically stated that on 5.2.2007, accused No. 3 had taken his Maruti Esteem car bearing No. 8450. Accused No. 3 told him that he wanted the vehicle for just 1-2 hours as he wanted to go to the airport, however, accused No. 3 did not come back with the vehicle. It is pertinent to note that the dead body of Chandrabahadur was found in the very same vehicle. According to the prosecution, accused No. 3 was also in the vehicle but as there was some problem with the engine of the vehicle, the vehicle stalled near Parsi bungalow at Pawai. Accused No. 3 then went to get another vehicle. This part of the prosecution case is borne out by the evidence of PW 14 Kadam and PW 16 Agarwal. PW 14 Kadam is a car mechanic. He has stated that he checked Maruti vehicle bearing No. MH-01/M-8450 and he found that there was problem in Delco, hence, the vehicle could not ply. PW 16 Gaurav was the director of Larsons India. He had white colour motor car bearing No. MH-06/T-4054.

Accused No. 3 was the driver of the car. Accused No. 3 was working with him since last 7-8 years. PW 16 Gaurav has stated that on 6.2.2007 at about 12 midnight, the accused had taken the above car with him and brought it back at about 4.00 a.m.

14. In addition to the above evidence, the prosecution has relied on the evidence of recovery of nylon rope at the instance of accused No. 3. PW 2 panch witness Baburao has deposed about it. The said nylon rope is at Article 15. This rope was recovered at the instance of accused No.3 from his house. The rope was sent to C.A. As per C.A. report, human blood was found on the nylon rope. It is pertinent to note that Dr. Jawale has stated that injury No. 6 which was sustained by the deceased is possible due to the rope Article 15 and this injury was sufficient to cause the death of the deceased in ordinary course of nature.

15. One more circumstance against accused No.3 is that the clothes on his person were seized at the time of his arrest. PW 13 Rajesh has deposed about this. These clothes were sent to C.A. As per C.A. report Exh. 44, the clothes of accused No. 3 were found stained with blood of "B" group. As stated earlier, the shirt of the deceased was found stained with blood of "B" group from which it can be inferred that the blood group of the deceased was "B". Hence, finding of blood of "B" group on the clothes of accused No. 3 is a strong incriminating circumstance especially in view of the fact that no explanation has been furnished by accused No. 3 for presence of blood of "B" group on his clothes.

16. It is the prosecution case that the accused persons with common intention caused the death of Chandrabahadur by assaulting him and then strangulating him. This is corroborated to some extent by the medical evidence. PW 12 Dr. Jawale performed the postmortem on the dead body of Chandrabahadur. On external examination, he found 10 injuries which are as under:-

1. Abraded contusion left maxilla 3 x 2 c.m.;
2. Abraded contusion left forehead 5 x 3 c.m.;
3. Contusion right forehead 4 x 3 c.m.;
4. Contusion right cheek 4 x 3 c.m.;
5. Linear contusion lacerated wound Rt. maxilla, 3 in Nos. 2 x 1 x ? each linear, horizontal E/o. dried blood stains over surface and periphery.
6. Neck shows abraded contusion type linear mark over neck situated above thyroid cartilage, horizontal. On anterior, left lateral and posterior aspects, there appears single ligature mark but on right anterior lateral and right posterior lateral area, three ligature marks seen but in continuation with rest part of ligature. Total neck circumference 37 cm and breadth 1 c.m. On cut section, parchment paper appearance of sub-cutaneous tissue and contusion of neck muscle, vessels beneath ligature mark reddish oedematous irregular associated with contusion at right upper neck above ligature 3 x 7 cm. reddish

irregular;

7. Abrasion right knee 2 x 2 c.m.

8. Abrasion right knee (just below 2 x 3 cm)

9. Abrasion contusion right shoulder superior aspects 3 x 7;

10. Abrasion left iliac crest 3 x 5 c.m.

On internal examination, Dr. Jawale found contusion at left frontal portion of the head and right forehead. He also found mes enteric contusions. According to Dr. Jawale, the cause of death was due to strangulation with multiple contusions.

17. On going through the evidence adduced in this case, we are of the opinion that the prosecution has proved beyond reasonable doubt that all the three accused persons are involved in the murder of Chandrabahadur. Thus, we find no merit in the appeals. The appeals are dismissed.

18. We quantify legal fees to be paid by the High Court Legal Services Committee to the appointed Advocate Mr. A.G. Toraskar in each appeal at Rs. 5000/-.