

(2007) 09 BOM CK 0065
In the Bombay High Court
Case No : Criminal Appeal No. 635 of 2005

Gajju @ Gajanan Battulwar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 27-09-2007

Acts Referred:

Arms Act, 1959 — Section 25, 4
Penal Code, 1860 (IPC) — Section 120B, 148, 149

Citation : (2007) 09 BOM CK 0065

Hon'ble Judges : D.D. Sinha, J;B.P. Dharmadhikari, J

Bench : Division Bench

Advocate : C.R. Thakur, for the Appellant; S.Y. Deopujari, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

D.D. Sinha, J.—Heard Mr. C.R. Thakur, Adv. for the Appellant and Mr. S.Y. Deopujari, A.P.P. for the Respondent-State.

2. This Criminal Appeal is directed against the judgment and order dt. 8.11.2005 passed by the 2nd Ad-hoc Additional Sessions Judge, Nagpur whereby the appellant came to be convicted for the offence punishable u/s 302 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs. 3,000/-. In default of payment of fine, the appellant was directed to undergo rigorous imprisonment for three months. The appellant is acquitted of the offences punishable Under Sections 120-B, 148 r/w. Section 149 of the Indian Penal Code as well as u/s 4 r/w. Section 25 of the Arms Act. The trial Court acquitted other five co-accused for the offences punishable under Sections 120-B, 148, 302 r/w. Section 149 of the Indian Penal Code as well as u/s 4 r/w. Section 25 of the Arms Act. The State has not preferred appeal against the order of acquittal.

3. The prosecution case in the nutshell is as follows : It is the case of prosecution that on 6.7.2002, at about 9.45 P.M. Dinkar Uikey (elder brother of deceased

Ram Uikey) was watching Television Programs at his house. Deceased Ram was sitting in the tin shed (chhapari) of the house. Appellant Gajanan (Gajju) came to the house of Dinkar and gave a call to deceased Ram. Dinkar saw deceased Ram, who left the house along with the appellant and went towards the flour mill which was located in the same locality. They were accompanied by four to five boys. It is the case of prosecution that, after a lapse of some time, one Jitu (nephew of deceased) came to the house of Dinkar and informed him that the appellant and his associates were assaulting deceased Ram with knife and sword. Dinkar immediately rushed towards the flour mill and saw that the appellant and his associates were assaulting Ram by means of knife and Sword. Dinkar could witness the incident since there was a pole on which electric light was on. Deceased Ram was shouting Bachao Bachao Dinkar picked up one stone from the ground and wanted to pelt it towards them. However, when the appellant and other co-accused saw Dinkar, they ran away from the place of occurrence. Ram sustained bleeding injuries all over his body including stomach, chest etc. It is the case of prosecution that deceased Ram told Dinkar that he was assaulted by the appellant and his associates. Dinkar called his neighbour Papa Shahu and both of them took Ram to Mayo hospital for treatment in an auto-rickshaw. The doctor who examined Ram in the Mayo hospital declared him dead. Dinkar lodged First Information Report against the appellant on the same day without lapse of time and on the basis thereof, Crime No. 221 of 2002 was registered. Police visited the spot of incident, recorded spot panchanama, inquest panchanama of dead body of Ram at Mortuary of the Mayo hospital and forwarded dead body for post-mortem examination. Police also recorded statements of witnesses, arrested the appellant and other co-accused and on completion of formal investigation, filed charge sheet in the Court of Chief Judicial Magistrate, who committed the case to the Court of Sessions, Nagpur. The trial Court framed charge against the appellant as well as other co-accused. Same was read over and explained to them. The appellant pleaded not guilty and claimed to be tried.

4. Mr. C.R. Thakur, learned Counsel for the appellant has submitted that, in the instant case, though prosecution has examined number of witnesses, however, most of them have turned hostile and the case of prosecution depends upon the testimonies of three eye witnesses namely PW 4 Dinkar Ramkrushna Uke, PW 5 Laxman Ramkrushna Uke and PW6 Usha s/o. Dulichand Mandve. Witnesses Dinkar and Laxman are real brothers of deceased Ram and witness Usha is real sister of deceased Ram. It is contended that prosecution has examined only interested witnesses and therefore, their evidence needs to be scrutinized with due care and caution. It is further contended that so far as the panch witnesses examined by prosecution to prove the spot panchanama, panchanama in respect of discovery of weapons and seizure of clothes of the accused and deceased are concerned, all these prosecution witnesses have not supported prosecution and turned hostile and therefore, their evidence is of no consequence either to prosecution or the defence. Mr.Thakur, learned Counsel for the appellant has

submitted that PW 7 Papa @ Shantaprasad Shahu, who was examined by prosecution as an eye witness to the incident, also turned hostile.

5. It is contended by the counsel for the appellant that PW8 Dr. Rajesh Bardane was examined by prosecution only for the purpose of proving the fact that the injuries mentioned in col. No. 19 of the post-mortem report were possible due to sword. Since the post-mortem report has been admitted by the appellant, prosecution did not examine Dr. Rajesh, who conducted the postmortem examination, to prove the same. Mr. Thakur, learned Counsel for the appellant has submitted that, in the instant case, there are material omissions and contradictions in the evidence of the three so-called eye witnesses and from the tenor of evidence of these witnesses, the possibility that these witnesses reached on the spot of occurrence after the assault on deceased Ram was over cannot be ruled out; on the other hand, it creates doubt about truthfulness of the versions of these witnesses; apart from the fact that they are closely related to the deceased and vitally interested in prosecution of the appellant. It is contended that prosecution has also recorded their statements u/s 164 of the Code of Criminal Procedure which also indicates that even prosecution was apprehending that these witnesses may not support prosecution in the Court. Mr.Thakur, learned Counsel, therefore, contended that the evidence of prosecution adduced by these witnesses is doubtful. It is further submitted that merely because the post mortem report shows that deceased suffered multiple stab and incise wounds, that by itself is not sufficient to bring home the guilt of the appellant for the offence of murder unless the author of those injuries is established by prosecution and therefore, it is canvassed by the learned Counsel for the appellant that the judgment and order passed by the trial Court is liable to be quashed and set aside.

6. Mr. S.Y. Deopujari, Additional Public Prosecutor for the Respondent-State has vehemently argued that there are as many as three eye witnesses to the incident and there are no material contradictions and omissions in their testimonies. It is submitted that, though from the cross-examination of PW 4 Dinkar, defence wanted to demonstrate that this witness failed to mention in his police statement that the appellant assaulted deceased Ram by means of sword, however, the omission in this regard is only in respect of assault by both the hands only and there is no omission in respect of the assault by appellant with the sword. Similarly, though defence wanted to further demonstrate that there are material omissions in his police statement and this witness, for the first time, has stated entirely different prosecution case in the Court, is also not correct. The Additional Public Prosecutor has submitted that the evidence of Dinkar does not suffer from any material omission or contradiction.

7. The Additional Public Prosecutor further contended that the evidence of PW 5 Laxman and PW 6 Usha is also consistent with the prosecution case and there are no material contradictions and omissions in the evidence of these witnesses. It is denied that prosecution apprehended that these witnesses would not

support prosecution in the Court and therefore, their statements u/s 164 of the Code of Criminal Procedure came to be recorded. The Additional Public Prosecutor has contended that the testimonies of eye witnesses are completely corroborated by the medical evidence of PW 8 Dr. Rajesh as well as Chemical Analyser's report, which reveals that the blood detected on the clothes of deceased as well as the accused (appellant herein) was of "A" group and seizure of these clothes has been proved by PW 10 PSI Premanand. It is, therefore, contended that prosecution has succeeded in bringing home the guilt of the appellant for the offence of murder.

8. We have given our anxious thoughts to the various contentions canvassed by the learned Counsel for the appellant and State and scrutinized the evidence adduced by prosecution. In the instant case, though prosecution has examined in all twelve prosecution witnesses, however, out of them, PW 1 Raju Shahu (panch on spot), PW 2 Ashok Shahu (panch on spot), PW 3 Rajaram Kathote (panch on discovery and seizure of weapons) did not support prosecution and therefore, they were declared hostile. Similarly, PW 7 Papa Shahu, who was examined as eye witness to the incident, also did not support prosecution and was declared hostile. The prosecution case primarily depends upon the evidence of three eye witnesses namely PW 4 Dinkar, PW5 Laxman and PW6 Usha coupled with the evidence of PW 8 Dr. Rajesh and PW 10 PSI Premanand as well as report of the Chemical Analyser.

9. PW 4 Dinkar Ramkrushna Uke in his examination-in-chief has stated that, on the day of incident, at about 9.45 P.M., he was watching television program at his house. His brother deceased Ram was standing in front of his own house. Somebody called him. Therefore, he went along with the said person. Within five to ten minutes after Ram left, his nephew Jitu came to his house & told him that some people were quarreling with deceased Ram. This witness has further stated in his examination-in-chief that he thereafter rushed to the place where quarrel was going on and saw that the appellant was assaulting his brother Ram by means of Sword with both hands and the assault was going on in front of Dinesh Flour Mill. It has come in the examination-in-chief of this witness that other 6 to 7 persons were with the appellant. However, when he reached the spot of occurrence, they concealed themselves behind the shops which were located nearby. This witness has stated that he picked up stones from the ground for the purpose of throwing them in the direction where assault was going on; however, the appellant saw this witness and fled away from the spot of occurrence leaving the injured Ram on the spot, who had sustained bleeding injuries on his chest, abdomen and right arm. This witness has identified the appellant in the Court as well as proved the contents of the First Information Report (Exh.25). Defence though conducted lengthy cross-examination of this witness, however, on close scrutiny of the same, we are of the view that there are no material omissions or contradictions brought out by defence in the cross-examination of this witness. On the other hand, the tenor of lengthy cross-examination would show that defence has not seriously disputed presence of the appellant as well as the

quarrel which had taken place between the appellant and the deceased on the day of incident. It is important to note that witness Dinkar informed the police almost immediately and therefore, the possibility of concoction or fabrication, in our view, has been ruled out. Similarly, since the testimony of this witness is consistent with the material particulars of the prosecution case disclosed by him in the First Information Report, which was lodged without lapse of time, same is free from doubt as well as reliable and trustworthy.

10. PW5 Laxman Ramkrushna Uke in his examination-in-chief has stated that, on the day of incident, at about 9.45 P.M., he was present in the house; two unknown persons came to his house and gave a call to deceased Ram who went with them. His niece Nisha came and told him that some persons were assaulting her paternal uncle and therefore, this witness immediately rushed towards the place of occurrence. He saw the appellant assaulting deceased Ram by means of sword or knife and after giving blows by sword on the person of Ram, appellant along with his five to six associates ran away from the place of occurrence. This witness has further stated in his examination-in-chief that he along with others took deceased to Mayo hospital and on inquiry, deceased Ram disclosed to him that the appellant had assaulted him, however, he could not identify the other associates of appellant Gajju. This witness has also mentioned in the examination-in-chief about presence of PW 4 Dinkar and PW 6 Usha on the spot of occurrence. We have scrutinized the cross-examination of this witness and found that the defence failed to extract any material omission or contradiction. On the other hand, a suggestion given to this witness in the cross-examination would show that defence has not seriously disputed presence of the appellant as well as the quarrel which had taken place between the appellant and the deceased. The evidence of this witness, in our view, is consistent with the material particulars of the prosecution case as well as the evidence of PW 4 Dinkar.

11. So far as the evidence of PW 6 Usha is concerned, her evidence is also consistent with the testimonies of other two eye witnesses. It has come in the examination-in-chief of this witness that, at the relevant time, she was returning from the house of one Sonekar and when she came in front of her own house, she saw that her brother deceased Ram was going with two unknown persons. Immediately thereafter she heard shouts "mat maaro mat maaro. and therefore, she rushed in the direction from where the shouts were coming and on the way, gave a call to her brothers. This witness saw that the appellant was assaulting deceased Ram in front of house of Papa Shahu. She has stated that appellant assaulted Ram on his chest. She has also mentioned about presence of her brother Dinkar on the spot. Scrutiny of cross- examination of this witness does not show any material omission or contradiction. The evidence of this witness, in our view, is quite consistent with the prosecution case.

12. In the instant case, defence has accepted the post -mortem report and in para Nos. 17 and 19, PW 8 Dr.Rajesh has noticed that the following injuries were

sustained by the deceased: COLUMN NO.17:

1. Contused abrasion, right forehead, 3 cm x 1 cm, fresh.
2. Incised wound, right forehead, oblique, 1.5 cm lateral to Inj. No. 1, 2.5 cm x 1 cm x bone deep, margins clean with tailing at upper end, running posteriorly and laterally, fresh.
3. Incise wound, right parietal area, oblique, 2.5 cm x 1 cm x bone deep, margins clean, fresh.
4. Incise wound, right parietal area, oblique, lateral to injury No. 3 by 1 cm parallel to it, 2.5 cm x 1 cm x bone deep, margins clean, fresh.
5. Contused abrasion, right, Mandibular area, 4.5 cm x 1.5 cm, fresh.
6. Contused abrasion, left face, (Cheek bone), 0.5cm x 0.5cm, fresh.
7. Contused abrasion, inferior to injury No. 6 by 1 cm, left face, 5 cm x 0.5 cm, fresh.
8. Stab wound, right supramammary region, 2. 5 cm below the lateral 1/3 rd of clavicle, oblique, 3 cm x 1.5 cm x cavity deep, directed posteriorly, medially and downwards, margins are clean, both angles are sharp, fresh.
9. Stab wound, right anterior chest, 2nd intercostal space, 3 cm from midline, oblique, directed posteriorly, laterally and upwards, 3 cm x 1 cm x cavity deep, margins are clean, both angles are sharp, fresh.
10. Stab wound, right anterior chest, 4th intercostal space, 3 cm from the midline, oblique directed posteriorly, straight, 3cm x 1.5 cm x cavity deep, margins are clean, both angles are sharp, fresh.
11. Stab wound, right anterior chest, 6th intercostal space, 2.5 cm from midline, directed posteriorly, downwards and laterally, oblique, 2.5 cm x 1 cm x cavity deep, margins are clean, both angles are sharp, fresh.
12. Stab wound, left anterior chest, 4th intercostal space, 10 cm from midline, oblique, directed posteriorly, laterally and upwards, 1 cm x 0.5 cm x cavity deep. Margins are clean, both angles are sharp, fresh.
13. Stab wound left anterior chest, 6th intercostal space, 6.5 cm from midline, oblique, directed posteriorly, laterally and downwards, 3 cm x 1.5 cm x cavity deep. Margins are clean, both angles are sharp, fresh.
14. Stab wound, left forearm, ventral aspect, upper 1/3 oblique, 1 cm x 0.5 cm x muscle deep, directed downward and medially, angles are sharp, margins clean, fresh.
15. Stab wound, left cubital fossa, horizontal, directed posteriorly and medially, 1.2 cm x 0.5. cm x muscle deep, angles are sharp, margins clean, fresh.

16. Incised wound, left elbow joint, medial aspect, oblique, 2 cm x 0.5 cm x muscle deep, margins clean, fresh.
17. Incised wound, left forearm flexor aspect, lower 1/3rd, horizontal 2cm x 0.5 x muscle deep, margins clean, fresh.
18. Incised wound, right occipital area, oblique, 2.5 cm x 0.5 cm x subcutaneous deep, margins & floor clean, fresh.
19. Incised wound, over left occipital area and nape of neck, vertical 3.5 cm x 1 cm x muscle deep, margins clean, fresh.
20. Incised wound, posterior neck, lower 1/3rd, horizontal, 3 cm x 1 cm x muscle deep, margins clean, fresh.
21. Stab wound, right scapular area, at the level of T5, 5 cm from midline, horizontal, 2 cm x 0.5 cm x muscle deep, margins clean, angles sharp fresh.
22. Incise wound, left elbow, posterior, oblique, 3 cm x 0.5 cm x bone deep, margins clean, fresh.
23. Incise wound, left forearm, distal 1/3rd, dorsal aspect, horizontal, 2 cm x 0.5 cm x tendons deep, margins clean, fresh.
24. Contused abrasion, right buttock, lateral and inferior quadrant, 5 cm x 1 cm. fresh.
25. Contused abrasion, right popliteal fossa, 5 cm x 1 cm. fresh.
26. Incised wound, left thigh, upper 1/3rd, posterior aspect, horizontal, 3.5 cm x 1 cm x muscle deep, margins clean, fresh.
27. Incise wound, left leg, posterior, upper 1/3rd and middle 1/3rd, 7 cm x 1 cm x muscle deep, margins clean, fresh.

COLUMN NO.19:

1. Under scalp haematoma + Right Fronto Parietal region, 5 cm x 4 cm, fresh and right parieto-temporal region, 7 cm x 5 cm, fresh.
 2. Linear fracture, right parieto-occipital bone, vertical, parallel to sagittal suture, 8 cm blood and clots + fresh.
 3. Meninger -Intact, congested. Localised, sub-arachnoid hamorrhage present, Right parieto -occipital area, 2 cm x 2 cm, fresh. brain congested.
13. The medical evidence, in our view, completely corroborates the evidence of above three eye witnesses. Similarly, the blood detected on the clothes of the accused as well as the deceased was of "A" group as per the report of the Chemical Analyser and seizure of clothes is proved by PW 10 PSI Premanand Sabde and therefore, though the panch witness examined by prosecution to prove seizure of clothes has turned hostile, it has not affected the case of

prosecution in this regard.

14. It is nodoubt true that all the three eye witnesses are brothers and sister of the deceased; however, if the evidence is otherwise cogent, straight-forward and consistent, in such a situation merely because these witnesses are closely related to the deceased, that cannot be the ground to discard their testimonies, which is otherwise consistent with the material particulars of the prosecution case and is also corroborated by the medical evidence. The contention of the learned Counsel for the appellant in this regard, in view of the nature of evidence of these eye witnesses, suffers from lack of merits and is rejected.

15. For the reasons stated hereinabove, we are of the view that prosecution has succeeded in bringing home the guilt of the appellant for the offence of murder and therefore, the appeal suffers from lack of merits and hence, the same is dismissed.