
(2014) 12 BOM CK 0237

In the Bombay High Court

Case No : Criminal Appeal No. 410 of 1992

Ganapati Laxman Waghmode and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 04-12-2014

Acts Referred:

Bombay Police Act, 1951 — Section 135, 37(1) — Penal Code, 1860 (IPC) - Section 147, 148, 149, 302, 34

Citation : (2015) ALLMR(Cri) 1605

Hon'ble Judges : P.V. Hardas, J;G.S. Kulkarni, J.

Bench : Division Bench

Advocate : Jaydeep Mane, Advocate, for the Appellant; H.J. Dedhia, APP, for the Respondent

Final Decision : Partly Allowed

Judgement

P.V. Hardas, J.?The Appellants-Original Accused Nos. 1, 3, 4 and 5, who stand convicted for offence punishable under Sections 147, 148, 302 r/w. 149 and sentenced to R.I. for 2 years and each accused to pay fine of Rs. 500/- in default of which to undergo R.I. for 6 months, R.I. for 2 years and each accused to pay fine of Rs. 500/- in default of which to undergo further R.I. for 6 months and imprisonment for life and each accused to pay fine of Rs. 1000/- in default of which to undergo further R.I. for 2 years, with a direction that the substantive sentences shall run concurrently, by the II Additional Sessions Judge, Solapur, by Judgment dated 18.7.1992, in Sessions Case No. 54 of 1992, by this Appeal challenge their conviction and sentence. Since Appellant No. 2/Original Accused No. 2 had expired, the Appeal filed by him was dismissed as abated. This Appeal therefore is restricted to the challenge to the conviction and sentence of Accused No. 1 Ganapati, Accused No. 3 Kalappa, Accused No. 4 Bhimashankar and Accused No. 5 Ramesh. Facts as are necessary for the decision of this Appeal may briefly be stated thus.

PW-20 Head Constable Baburao Dige, who on 18.10.1991 was on duty at the

Civil Hospital at Solapur from 8.00 p.m. to 8.00 a.m., learnt about the admission of one injured in the hospital at about 9.00 p.m. The Medical Officer on examining the injured declared him as dead and the information was communicated to the Sadar Bazar Police Station. The P.S.O. of Sadar Bazar Police Station, PW-21 ASI Ajij Attar issued a letter at Exhibit 51 in the name of PW-20 Head Constable Dige for taking further action. He accordingly took PW-4 Shivanna to the Sadar Bazar Police Station and recorded his statement at Exhibit 19. He then handed over the complaint/statement of PW-4 Shivanna to PW-21 ASI Attar. According to him, the complaint was scribed between 10.00 p.m. to 11.00 p.m. On the next day between 7.00 a.m. to 8.00 a.m. an inquest panchnama of the dead body was drawn and was sent to the Sadar Bazar Police Station.

PW-21 ASI Ajij Attar, who was attached to the Sadar Bazar Police Station and was on duty on 18.10.1991, received information about death of injured in the Civil Hospital at Solapur. He accordingly instructed Police Constable Dige to take further action. Police Constable Dige brought the complaint lodged by PW-4 Shivanna to the Police Station and on the basis of the said complaint, PW-21 ASI Attar registered an offence under Sections 147 and 302 of the Indian Penal Code. He also then sent a message to the Valsang Police Station about the incident and requested them to take further steps.

2. PW-19 PHC Kashinath Fulari, who on 18.10.1991 was attached to the Valsang Police Station, received message from the control room about a person resident of Village Yatnal succumbing to his injuries in the hospital and also that a complaint had been recorded. The said message was received at about 1.00 a.m. on 19.10.1991. PW-19 Head Constable Fulari was also instructed to take precaution at village Yatnal. PW-19 PHC Fulari immediately deputed one Head Constable and one Constable to village Yatnal for maintaining the peace. PSI came to the Police station at about 4.30 a.m. and was informed about the message. PW-22 PSI Wagh thereafter went to village Yatnal. Meanwhile, the FIR, inquest panchnama and other papers were received at Police Station Valsang from the Sadar Bazar Police Station. Accordingly, an offence was registered. PW-18 PC Naikwadi produced Accused No. 5 Ramesh and Accused Bhimashankar, who were arrested and the clothes on their person were seized under panchnama.

PW-22 PSF Prabhakar Wagh, who was attached to the Valsang Police Station and was on patrolling duty on 18.10.1991, on his return to the Police Station at about 4.30 a.m. was informed about the incident at Yatnal in which Genappa had died. He accordingly went to village at 6.30 a.m. alongwith the police staff and from the Police Patil learnt that PW-4 Shivanna had disclosed about the incident to the Police Patil at 7.00 p.m. on 18.10.1991. PW-4 Shivanna had also disclosed the names of the assailants. The Police Patil further expressed that he was about to go to the Police Station for lodging a report. PW-22 Prabhakar Wagh thereafter proceeded to the scene of the incident and noticed a pair of chappals and stick and some stains of blood. In the presence of panchas he drew the scene of the

incident panchnama at Exhibit 16. Under the said panchnama, the aforesaid articles were seized. Statements of witnesses were recorded and on 19.10.1991, accused Tipanna and accused Kalappa were arrested at about 4.30 p.m. under an arrest panchnama. Their clothes were seized under the said panchnama. A request was made to the Tahasildar's Office for drawing the sketch of the scene of the incident. On 20.10.1991. Accused No. 1 Ganapati was arrested at Valsang at about 11.00 a.m. and clothes on his person were seized under seizure memorandum at Exhibit 28.

3. On 21.10.1991, during custodial interrogation, Accused No. 5 Ramesh expressed his willingness to point out the place where the chopper (Sattur) was concealed. A memorandum was accordingly drawn at Exhibit 32 in the presence of PW-11 Racheti. Accused No. 5 Ramesh led the police and the panch and produced a chopper which was seized. On 22.10.1991, Accused No. 1 Ganapati expressed his willingness to point out the place where a chopper had been concealed. A memorandum was accordingly, drawn in the presence of PW-10 Mallesha at Exhibit 31. Accused No. 1 Ganapati led the police and the panch and produced a chopper which was seized under the seizure memorandum. The seized articles were referred to the Chemical Analyzer through PW-17 Police Constable Ibrahim Shaikh. Further to the completion of investigation, a charge-sheet against the accused was submitted.

4. Postmortem on the dead body of deceased Genappa was performed by PW-16 Dr. Sardar. PW-16 Dr. Sardar noticed the following external injuries :--

"(1) Incised wound behind ear 1/2" away from ear 4" x 1/2" verbeal margin clear-cut regular gapping present slop deep.

(2) Incised wound on right painfal above injury No. (1) 3" x 1/2" verbeal margin clear cut regular gapping present scalp deep.

(3) 1/4" above injury No. (2) incised wound 3" x 1/2 " oblique margin clear out regular gapping present scalp deep.

(4) Incised wound on occipital region 3" x 1/2" margin clear cut regular gapping present bone deep brain matter coming out horizontal.

(5) Incised wound on left side of gaintal region 4" x 1/2" horizontal margin clear cut regular gapping present brain matter coming out.

(6) Incised wound behind Right ear 5" x 1/2" verbal margin clear cut regular gapping present.

(7) Incised wound horizontal on Lt. Cheek & continue on Lt. ear and behind 6" x 1/2" muscle deep margin clear cut regular gapping present.

(8) Incised wound on back at base of neck 3" x 1/2" verbeal, 2" x 1" oblique.

(9) Incised wound on Ltd. Upper liule latral as present margin clear cut regular gapping present.

(10) Incised wound on back both scapula 1" x 1" verbeal margin clear cut regular gapping present muscle deep."

He opined that the injuries were ante mortem and the probable cause of death was shock and hemorrhage due to head injury. The postmortem report is at Exhibit 43. He has further opined that the injuries sustained by deceased Genappa were sufficient in ordinary course of nature to cause his death.

5. On committal of the case to Court of Sessions, Trial Court vide Exhibit 2 framed charge against the accused for offence punishable under Sections 302 r/w. 34, 147, 148. 302 r/w. 149 and under Section 37(1) r/w. 135 of the Bombay Police Act. The defence of the accused was of denial. The trial court upon appreciation of the evidence convicted and sentenced the Appellants and Original Accused No. 2 as afore-stated.

6. We have heard Mr. Mane, learned Counsel for the Appellants and the learned APP and in order to effectively deal with the submissions advanced before us by the learned Counsel for the parties, it would be useful to refer to the evidence of the prosecution witnesses.

7. The case against the Appellants revolves round the testimony of solitary witness namely PW-4 Shivanna, brother of deceased Genappa as well as brother of Accused No. 1 Ganapati. PW-4 Shivanna deposes that the relations between Accused No. 1 Ganapati and deceased Genappa as well as with him were strained on account of a dispute over a tamarind tree. Shivanna states that deceased Genappa and he were residing separately. According to him, on the day of the incident he alongwith deceased Genappa had gone to the house of PW-14 Shantabai for giving milk. According to him, the distance between the village and the house of Shivanna was about 500 ft. After giving milk to PW-14 Shantabai, they were returning home. When they had reached near the Temple/Math, Accused Nos. 1 to 5 came out from the bushes where they were hiding and assaulted deceased Genappa. Accused No. 1 Ganapati and Accused No. 5 Ramesh were armed with choppers while the other accused were armed with sticks. The accused had questioned deceased and PW-4 Shivanna as to why they were quarreling on account of the tamarind tree and thereafter, had commenced the assault. Shivanna deposes that Accused Ganapati gave blow of chopper on the head of Genappa while Accused Ramesh dealt blow of chopper on the neck of Genappa. The other accused, who were armed with sticks stated that they would assault Shivanna and therefore, Shivanna fled from the scene of the incident and returned to the village. He informed his mother, PW-12 Ambawwa, his father and his wife. He thereafter alongwith the other relatives rushed to the scene of the incident and it was only after they had reached the scene of the incident that the accused fled from the scene of the incident. He deposes that thereafter he alongwith Hanmant had removed Genappa to the Civil Hospital at Solapur where Genappa was declared dead. He remained in the hospital for the night and at 2.00 a.m. his FIR was recorded at the Sadar Bazar Police Station. He claims to have seen the incident in the illumination of the tube light which was near the

Math. According to him the Math was at a distance of about 20 feet.

8. In cross-examination he has admitted as true that the relations with Accused No. 1 Ganapati were strained. He has further admitted that his parents and his sisters were residing with him and were supporting him. He has further admitted that immediately after giving milk, he left the house of his sister. He has denied the suggestion that they had waited at the house of his sister for some time. It is further elicited in the cross-examination that they suspected someone was sitting in the bushes of besharam plant. According to him, the persons who had concealed themselves immediately came out and rushed towards Shivanna and deceased Genappa. According to him, the assailants immediately started assaulting his brother Genappa. He has admitted that he did not attempt to run away while they were assaulting Genappa. He has admitted that all the assailants were assaulting his brother deceased Genappa.

9. Prosecution has examined PW-12 Ambawwa, mother of deceased Genappa and PW-4 Shivanna. She deposes that on the day of the incident Shivanna had returned home and had disclosed to her that deceased Genappa was assaulted by the accused. According to her, Shivanna had disclosed the names of the assailants. She further deposes that thereafter she had gone to the scene of the incident and had seen the assailants assaulting deceased Genappa. According to her, the assailants thereafter fled from the scene of the incident. In cross-examination it has been elicited that on account of advanced age her eye sight was affected and she was able to see only from a distance of about 3 to 4 feet. The learned Counsel for the Appellants has urged before us that in the light of the fact that her eye sight was impaired, no reliance can be placed on her evidence. In our opinion, even if no reliance is placed on the testimony of PW-12 Ambawwa, there is other evidence to which we shall allude to.

10. Prosecution has examined PW-13 Sunderawwa, wife of PW-4 Shivanna, who deposes about Shivanna and Genappa going to the house of their sister for giving milk. She further deposes that PW-4 Shivanna returned home and disclosed that deceased Genappa had been assaulted by the accused and had disclosed the names of the assailants. She has admitted that since she had recently delivered a child, she did not go to the scene of the incident.

11. Prosecution has examined PW-14 Shantabai, sister of PW-4 Shivanna, who deposes that Shivappa and deceased Genappa coming to her house for providing the milk to her children and they used to come together. According to her, on the day of the incident, deceased Genappa and Shivanna had come to her house and had given her 1 litre of milk and after waiting for some time they had gone. Thereafter, she learnt that the deceased had been assaulted and therefore, rushed to the scene of the incident. She was informed by PW-12 Ambawwa that it was the accused who had assaulted Genappa.

12. PW-15 Shrishaila, the Police Patil also deposed about being informed by PW-4 Shivanna about the assault on Genappa and about the disclosure of the

names of the assailants. According to him, he was to go to the Police Station on the next day for lodging a report but since P.S.I. PW-22 Wagh had arrived at the village, he had orally intimated him about the information received from PW-4 Shivanna.

13. Learned Counsel for the Appellants has urged before us that no reliance can be placed on the testimony of PW-4 Shivanna as (1) the evidence of motive is extremely weak; (2) the tube light which is referred to by PW-4 Shivanna was at a distance of about 1 furlong from the scene of the incident; (3) the FIR is anti time as the crime number is not reflected in the inquest panchnama; and (4) though independent witnesses were available, they have not been examined. The learned APP has supported the findings arrived at by the Trial Court.

14. In cases resting on circumstantial evidence, motive as a circumstance assumes great importance and in some cases failure of the prosecution to establish motive may result in snapping of the chain of circumstances. However, in cases resting on testimony of eye witness, motive as a circumstance poles into insignificance. Reliable evidence of eye-witnesses cannot be discarded because the evidence of motive is weak. In the present case, the witnesses had categorically stated particularly PW-13 Sunderawwa and PW-4 Shivanna that at about 15 days prior to the incident, there was a quarrel between the accused and deceased Genappa on account of the chopping of the branches of the tamarind tree. PW-4 Shivanna has deposed about a long standing dispute between deceased Genappa and Accused No. 1 Ganapati due to the tamarind tree. The evidence in respect of motive therefore, in our opinion cannot be called as weak evidence. The evidence certainly establishes that the relations between deceased Genappa and the accused were strained on account of the dispute relating to sharing of the fruits of the tamarind tree. It is true that in the scene of the incident panchnama, the temple is referred to at a distance of 1 furlong. Panch witness has admitted that the temple is known as Math which is at a distance of 1 furlong. It is to be remembered that the accused and PW-4 Shivanna are relatives at least Accused No. 1 Ganapati and Accused No. 5 Ramesh. The other accused were residents of the same village and therefore, were acquainted with PW-4 Shivanna. The incident had occurred at about 7.00 p.m. in the month of October. It therefore cannot be said that it was pitch dark as would make identification of the assailants an impossibility. The assailants were relatives and were persons of acquaintance of PW-4 Shivanna and the assailants had rushed towards deceased Genappa and Shivanna and therefore, Shivanna had observed the assailants from close quarters. Moreover, the names of the assailants are immediately disclosed by Shivanna to PW-14 Shantabai, PW-12 Ambawwa, PW-15 Shrishaila, the Police Patil. There is no cross-examination worth the name in respect of this aspect of the evidence. Thus, PW-4 Shivanna had adequate opportunity of observing the accused and has accordingly identified them. Therefore, there cannot be any difficulty in the identification of the assailants on account of absence of adequate illumination. It is also not elicited in the cross-examination that it was pitch dark which made identification difficult. We also do

not find any merit in the contention that the FIR is anti time. PW-4 Shivanna has no doubt stated that his report was scribed at 2.00 a.m. while PW-20 Head Constable Bajrang deposes that the report was scribed between 10.00 to 11.00 p.m. The witnesses were deposing after a gap of nearly one year and failure to mention the exact time would not render the report as anti time. The report was scribed at Sadar Bazar Police Station from where it was sent to the concerned Police Station. The offence was registered and mere slight delay of few hours in the registration of the offence would not merit a submission for discarding the otherwise reliable evidence of the eye witness. It is true that in the inquest panchnama the crime number is not mentioned. Obviously, the drawing of the inquest panchnama and the registration of the offence was more or less simultaneous and therefore, failure to mention the crime number in the inquest panchnama would not lead to an irresistible conclusion that the FIR was anti time. Similar failure of the prosecution to examine independent witnesses would not weaken the testimony of the sole witness who has been examined.

15. It is true that a conviction can be based on the testimony of a sole witness. What is required is quality and not quantity. The evidence of PW-4 Shivanna appears to us to be implicitly reliable and we do not find any grounds whatsoever for discarding the evidence of PW-4 Shivanna. Shivanna is corroborated by the testimony of the other witnesses, who have been examined by the prosecution. Thus, failure to examine other independent witnesses though available would not merit rejection of the testimony of PW-4 Shivanna, whom we find to be a reliable witness.

16. It is noticed by us that the postmortem report reveals that there were 10 stab injuries which were caused by the 2 choppers which were possessed by Accused No. 1 Ganapati and Accused No. 5 Ramesh. The other accused are alleged to be armed with sticks. The postmortem report does not reveal that any injuries were caused by stick. PW-4 Shivanna was also not assaulted by the other accused who were armed with sticks. Shivanna claims that all the accused had assaulted deceased Genappa. This part of the evidence of Shivanna is not corroborated by the medical evidence. In the light of the said discrepancy, in our opinion, the possibility that PW-4 Shivanna has falsely implicated the other accused namely Accused Nos. 2,3 and 4 cannot be ruled out. If the accused were present and hiding in the bushes waiting for the arrival of the deceased Genappa, we find it inexplicable that these accused would not participate in the assault. Therefore, in our opinion, the possibility of false implication of these accused i.e. Accused Nos. 2,3 and 4 cannot be ruled out. However, mere false implication of these accused would not mean that the entire prosecution case has to be jettisoned. It is the duty of the Court when faced with falsehood and truth, to separate the grain from the chaff that is the truth from the falsehood. If upon separation of the grain from the chaff, the Court finds that the residue is reliable and sufficient for conviction, the Court may record the conviction despite a finding that some of the accused may have been falsely implicated. In the present case therefore, we find that Accused No. 1 Ganapati and Accused No. 5

Ramesh, who were armed with choppers had inflicted the injuries sustained by the deceased. The other accused i.e. Accused Nos. 2,3 and 4, who were armed with sticks had not either participated in the incident or had inflicted any injuries. In our opinion, these accused therefore would be entitled to be given the benefit of doubt. A reference may usefully be made to the judgment of the Supreme Court in Gangadhar Behera and Others Vs. State of Orissa, . Accordingly, Criminal Appeal No. 410 of 1992 is partly allowed and the conviction and sentence of Accused No. 1 Ganapati and Accused No. 5 Ramesh for offence punishable under Section 147 and 148 is hereby quashed and set aside and they are acquitted of the offence under Section 147 and 148 of the Indian Penal Code. Fine if paid by them be refunded to them.

The conviction of Accused No. 1 Ganapati and Accused No. 5 Ramesh for offence punishable under Section 302 r/w. 149 is altered to 302 r/w. 34 of the Indian Penal Code while maintaining the sentence of imprisonment and fine. The Bail bonds of Accused No. 1 Ganapati and Accused No. 5 Ramesh is cancelled. They are granted 12 weeks" time to surrender.

The conviction and sentence of Accused No. 3 Kalappa Basavant Kaulgi and Accused No. 4 Bhimashankar Parmeshwar Dindore is hereby quashed and set aside and they are acquitted of the offence with which they were charged and convicted. Fine, if paid by them be refunded to them. Since they are on bail, their bail bonds stand cancelled.

Criminal Appeal is thus partly allowed.