
(2007) 08 BOM CK 0091
In the Bombay High Court
Case No : Criminal Appeal No. 98 of 2003

Ganesh and Another	Vs	APPELLANT
State of Maharashtra		RESPONDENT

Date of Decision : 21-08-2007

Acts Referred:

Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2007) 08 BOM CK 0091

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

Bench : Division Bench

Advocate : Smita Deshpande, for the Appellant; S.S. Wandile, APP, for the Respondent

Final Decision : Allowed

Judgement

D.D. Sinha, J.—Heard Smt. Smita Deshpande, Adv. (appointed) for the Appellants and Smt. S.S. Wandile, A.P.P. for the respondent State.

2. This Criminal appeal is directed against the judgment and order passed by the 2nd Ad-hoc Assistant Sessions Judge, Nagpur dated 01.10.2002 in Sessions Trial No.31 of 2002 whereby both the appellants were convicted for the offence punishable u/s 302 read with Section 34 of the Indian Penal Code and were sentenced to suffer rigorous imprisonment for life. Both the appellants were also convicted for the offence punishable u/s 201 read with Section 34 of the Indian Penal Code and were sentenced to suffer rigorous imprisonment for one year and fine of Rs.500 each was imposed on them, in default to suffer rigorous imprisonment for three months.

2A. The prosecution case, in the nutshell, is as follows:

On 18.05.2001, at about 11.00 A.M., Yeshwantrao Punyaji Uike PW1 (brother of the deceased) lodged report in the Police Station, Narkhed that dead body of his brother Tukaram (deceased) was noticed floating on the water of the tank of

village Gowargondi. On the basis of the said report, A.D. was registered and investigation was commenced. Investigating Officer prepared spot panchanama and inquest panchanama in presence of panchas. The dead body was forwarded for postmortem examination. Wife of the deceased Tukaram namely Jaiwantabai wd/o. Tukaram Uike PW3 lodged report in the Police Station on 26.05.2001, which was reduced into writing, wherein she had alleged that her husband Tukaram used to do the work of illegal distillation of liquor with the appellants and on occasions, used to work continuously for 2 to 3 days without returning home. Fifteen days prior to the incident, appellant Ganesh Uike met the complainant Jaiwantabai PW3 and asked her husband deceased Tukaram to accompany him for doing the work of distillation of liquor. Complainant Jaiwantabai prevented him from going with appellant Ganesh and also told appellant Ganesh that her husband would not do the work of illegal distillation of liquor. At that time, appellant Ganesh threatened her.

3. It is the case of the prosecution that, on 12.05.2001, complainant Jaiwantabai went to attend the marriage of her maternal brother along with her son Shrikrishna. Her daughter and husband Tukaram were in the house. She came back from marriage on 16.05.2001. Deceased Tukaram was not present in the house. She made inquiry with her child and came to know that her husband did not come back home since last Tuesday. She made efforts to trace him. However, her efforts did not yield any fruits. On 18.05.2001, at about 11.00 A.M., she was in her own house. Mahadeo s/o. Laxman Uike PW4 came to her house and informed her that dead body of her husband Tukaram was floating on the water of the tank. She went along with brother of her deceased husband and saw that dead body of her husband was floating on the water of the tank. She identified the dead body as that of her husband.

4. It is the case of prosecution that, on 23.05.2001, Sitaram Sakruji Kokarde PW5 visited the complainant and told her that on last Tuesday the appellants beat Tukaram on account of theft of liquor. The complainant was also informed that both the appellants beat Tukaram and after beating him, they threw him in the tank. The complainant was also informed by Sitaram that her husband, at the relevant time, had consumed alcohol. Jaiwantabai went to the Police Station and lodged report on 26.05.2001. On the basis thereof, offence u/s 302 of the Indian Penal Code came to be registered against the appellant and the Investigating Officer, on completion of formal investigation, filed charge-sheet in the Court. The trial Court framed charge against the appellants for the offence punishable u/s 302 read with Section 34 of the Indian Penal Code as well as u/s 201 read with Section 34 of the Indian Penal Code. Same was explained to them, to which both of them pleaded not guilty and claimed to be tried.

5. Smt. Smita Deshpande, Counsel for the appellants has contended that, in the instant case, the brother of the deceased namely Yeshwant PW1, who lodged the First Information Report (Exh.18), on the basis thereof A.D. came to be registered, did not support prosecution and therefore, was declared hostile.

Similarly, Mahadeo PW4 (nephew of the deceased) also failed to support prosecution in the Court and was, therefore, declared hostile. Counsel for the appellants further contended that, though prosecution has examined Munna Ramkripal Mishra PW6 for the purpose of proving memorandum (Exh.28) u/s 27 of the Evidence Act as well as seizure panchanama (Exh.29), however, the articles discovered i.e. stick and dupatia did not have human blood and therefore, the evidence of Munna (PW6) does not further the case of prosecution.

6. Counsel for the appellants has contended that the entire case of prosecution rests on the evidence of Sitaram PW5 (solitary eye-witness) as well as evidence of Jaiwantabai PW3. The evidence of other witnesses i.e. Asuraj Shankarrao Bagade PW2 (panch on the spot panchanama) and Avinash Vishnupant Karmarkar PW7 (Investigating Officer) is of formal nature. Similarly, the medical evidence is also of no help to prosecution since, due to decomposition, the doctor could not notice any injury nor could give his opinion regarding cause of death.

7. Learned counsel for the appellants further contended that though Sitaram PW5 claimed to have witnessed the incident of assault alleged to have been committed by the appellants on the deceased by stick, however, the evidence of this witness suffers from omissions which are of material nature, which renders the testimony of this witness doubtful. Similarly, this witness has deposed that appellant Ganesh, at the relevant time, asked deceased to lift bundle of Mhowra flowers and since the deceased could not lift it, accused beat the deceased as well as this witness Sitaram with the stick. It is contended that this witness Sitaram has not specifically attributed any overt act to the appellant No.2 Naresh, though there is a general statement made in the deposition that both the accused beat the deceased with the stick. It is, therefore, contended that the testimony of this witness is not cogent and is also not corroborated by the medical evidence and therefore the conviction of the appellants based on the unreliable testimony of solitary eye witness which is without corroboration is liable to be set aside.

8. Counsel for the appellants further contended that the evidence of Jaiwantabai PW3 is also doubtful on account of delay in lodging report in the Police Station and therefore, the same is also liable to be rejected.

9. Smt. S.S. Wandile, Additional Public prosecutor for the respondent State, on the other hand, has contended that the evidence of eye witness Sitaram PW5 coupled with the evidence of Jaiwantabai PW3 as well as other attaining circumstances brought on record by the prosecution prove the charge of murder against the appellants and therefore, the conviction awarded by the trial Court for the offence punishable u/s 302 of the Indian Penal Code with the aid of Section 34 of the Indian Penal Code is sustainable in law.

10. The Additional Public Prosecutor has further contended that the evidence of eye witness Sitaram PW5 clearly shows that both the accused beat deceased with the stick; after beating, they tied deceased Tukaram by cloth (dupatta),

took him towards the water tank and threw him in the pit which was on the bank of the tank. It is contended that this witness has deposed that, after the incident appellant Ganesh came to this witness and threatened him with dire consequences if he would disclose the incident to anybody and therefore, this witness did not disclose the incident to anybody except the wife of deceased namely Jaiwantabai on 23.05.2001. It is contended that the admission in the cross-examination of Sitaram reaffirms the case of prosecution and therefore, the testimony of this witness coupled with the evidence of Jaiwantabai PW3 as well as the Post-mortem report proves the case of prosecution against the appellants for the offences charged.

11. We have given our anxious thought to the various contentions canvassed by the respective counsel. Scrutinized the evidence of prosecution. In the instant case, the entire prosecution case is based on the testimony of Sitaram PW5 (eye-witness) and Jaiwantabai PW3 since the evidence of Yeshwant PW1 [who lodged the First Information Report (Exh. 18)], PW2 Asuraj (panch on spot), PW4 Mahadeo and PW7 Avinash (Police Inspector) is of formal nature and they also did not support the prosecution. Similarly, so far as discovery is concerned, the evidence of Munna PW6 does not further the case of the prosecution since the articles discovered i.e. sticks and dupatta did not have any blood stains on it and were commonly found with the villagers. Similarly, the medical evidence only shows that the cause of death of the deceased was due to drowning which does not lend any corroboration to the material particulars of the prosecution case.

12. Sitaram Sakruji Kokarde PW5 though claimed to have witnessed the incident of assault and deposed that both the appellants beat deceased with the stick and thereafter, took him towards the water tank and threw him in the pit which was near the water tank, however, the subsequent conduct of this witness rendered his testimony doubtful. As per the prosecution case disclosed by Jaiwantabai PW3, she has seen the dead body of her husband deceased Tukaram floating on the water of the tank on 18.05.2001 and the medical evidence shows that the same was highly decomposed. That means deceased Tukaram died a couple of days prior to 18.05.2001 and though witness Sitaram was resident of the same village and was also knowing the accused as well as the deceased including Jaiwantabai, the widow of the deceased; and though this witness Sitaram claimed to have witnessed the incident which had taken place sometime prior to 18.05.2001, he did not disclose the incident to anybody including the police till 23.05.2001 and for the first time, on 23.05.2001 he disclosed the incident of assault to Jaiwantabai, widow of the deceased and the statement of this witness was recorded by the police on 26.05.2001. Avinash PW7, the investigating officer has not given any reason or explanation for the inordinate delay caused in recording the statement of this witness. Similarly, the subsequent conduct of witness Sitaram PW5 in keeping mum and failed to disclose the incident to anybody in the village for so many days, in our view, is not only abnormal conduct but it also creates serious doubt about the authenticity and truthfulness of the testimony of this witness Sitaram PW5.

13. It is no doubt true that, in the examination-in-chief of witness Sitaram, it has come that appellant Ganesh warned Sitaram not to disclose the incident to anybody. However, it is the case of the prosecution disclosed by Jaiwantabai PW3 that Sitaram in fact has told her about the incident on 23.05.2001. In the facts and circumstances of the present case, it is, therefore, difficult to hold that threats were given to witness Sitaram by appellant Ganesh not to tell the incident to the people at large were not all that serious, otherwise he would not have told the incident till his statement was recorded by the police on 26.05.2001. Similarly, the inordinate and unexplained delay caused in recording the statement of Sitaram, in our considered view, in the instant case, is fatal to prosecution and renders the testimony of this witness unreliable and untrustworthy.

14. Similar is the case with the testimony of Jaiwantabai PW3. It has come in her evidence that, when she came back to her house after attending the marriage on 16.05.2001, she came to know that her husband deceased Tukaram did not come home from his work. On 18.05.2001 Jaiwantabai came to know that dead body of her husband was floating on the water of the tank and therefore, she went to the tank and identified the dead body of her husband which was floating on the tank. Even then, she did not go to the Police Station to lodge the report. It is the case of prosecution that witness Sitaram told Jaiwantabai PW3 on 23.05.2001 that the appellants assaulted her husband Tukaram and after the assault, carried him towards the water tank and threw him in the pit which was on the bank of the tank. Even then, Jaiwantabai did not go to the Police Station for lodging report and for the first time, lodged the report in the Police Station on 26.05.2001. The entire conduct of Jaiwantabai in not lodging the report immediately or at least on 23.05.2001 when she came to know about the occurrence creates serious doubt about authenticity of the testimony of this witness. Jaiwantabai who is widow of deceased Tukaram was expected to approach the police forthwith at least on 23.05.2001 when she came to know that the appellants have murdered her husband Tukaram. However, her conduct in not approaching the police till 26.05.2001, in our view is not only abnormal, but it renders her testimony unreliable as well as doubtful.

15. In the instant case, the story of assault disclosed by the alleged eye-witness Sitaram is not corroborated by the medical evidence since the cause of death of the deceased given by the doctor was drowning and because of decomposition, the Medical Officer could not give any opinion about the injuries, if any sustained by the deceased. It is, therefore, evident that the evidence of eye-witness Sitaram, which is also riot free from doubt as well as the evidence of Jaiwantabai, which also suffers from the same vice, as well as same is also not corroborated by the medical evidence, therefore, in our considered view, prosecution has failed to prove the charge of murder against the appellants beyond all reasonable doubts. The evidence of other prosecution witnesses such as Yeshwant PW1 and Mahadeo PW4 is of no consequence since both these witnesses have turned hostile and nothing worthwhile has been brought in their

cross-examination by the Additional Public Prosecutor. Similarly, the evidence of Asuraj PW2 (panch on spot), Munna PW6 (panch on discovery) and Avinash PW7 (Investigating Officer) is hopelessly inadequate to bring home the guilt of the appellants.

16. For the reasons stated hereinabove, the appeal is allowed. The impugned judgment and order dated 01.10.2002 passed by the 2nd Ad-hoc Assistant Sessions Judge, Nagpur is hereby quashed and set aside. Appellants are acquitted by giving benefit of doubt. They be released, if not required in any other criminal case.