

(1994) 07 BOM CK 0048

In the Bombay High Court

Case No : Criminal Appeal No. 166 of 1992

Ganpat Kisan Giri alias Nadiwala

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 18-07-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 302

Citation : (1995) 4 BomCR 128

Hon'ble Judges : Vishnu Sahai, J;M.S. Rane, J

Bench : Division Bench

Advocate : Rajiv Mane, appointed, for the Appellant; S.D. Rupawate, for the Respondent

Judgement

Vishnu Sahai, J.—The appellant aggrieved by the order dated 27-8-1991 passed by the Additional Session Judge, Pune in Sessions case No. 186 of 1991 convicting and sentencing him to imprisonment for life and further to pay a fine of Rs. 1,000/- or in default to suffer RI for two months u/s 302 of the Indian Penal Code has come up in appeal before this court.

2. The prosecution case in brief is that the informant Sahebrao Kisanrao Sawant (PW 1) was a business partner of the deceased Dilip Prabhakar Bhide. Both of them were jointly doing hosiery business. It is said that relations between the appellant and the deceased were strained for two reasons. Firstly because the appellant used to keep his business articles in front of the house of the deceased and since obstruction was caused to the deceased he used to object. In spite of the repeated requests of the deceased not to do so the appellant did not relent. Secondly it is alleged that the appellant had taken cigarettes on credit from the deceased and was not making payment.

On 13-12-1990 the deceased Bhide went to the appellant and asked him to give the money which was due to him and on that a quarrel between them took place culminating in the appellant stabbing the deceased with the knife. According to

the prosecution the actual assault was seen by Anand Jagannath Jadhav (PW 6). It is said that at about 5.15 to 5.30 p.m. a small boy came running to informant and told him that the appellant had stabbed the deceased with a knife. On that the informant ran towards the pan shop which was on cot and saw the deceased Bhide lying on the cot facing sky. There was a bleeding injury on the left side of Bhide's chest. It is said that Bhide gave an oral, dying declaration to the informant alleging that the appellant had stabbed him with a knife. Consequently on a rickshaw the informant brought Bhide to Sasoon Hospital where the doctor on duty on examining him found him to be dead. Thereafter, the informant went home, changed his clothes which had become stained with blood and returned to his business place.

3. The same day i.e. on 13-12-1990, the informant Sahebrao (PW 1) lodged the FIR at the police chowki Mandai and as the aforesaid chowki fell within the area of police station Vishrambag the FIR was transferred to that police station where Crime No. 388/90 u/s 302 IPC was registered against the appellant. In the aforesaid FIR the appellant is named.

PSI Prakash Sadashiv Sonawane (PW 7) of Police Station Vishrambag directed PSI Tanajirao Patil to Sasoon Hospital for carrying out the inquest panchanama, exhibit 10. Thereafter, PSI Sonawane (PW 7) himself went to the place of the incident and prepared the panchanama of the scene of offence, exhibit 11. At about 11.15 p.m. the appellant was arrested. It is alleged that the appellant promised to get the knife which he used in the commission of murder recovered and thereafter on 14-12-1990 between 12.25 to 1 a.m. in the presence of a public panch, PSI Sonawane (PW 7) at the pointing out of the appellant, in front of Shevani Selection Centre, recovered the knife under panchanama, exhibit 22. Thereafter PSI Sonawane (PW 7) interrogated some witnesses, including Anand Jagannath Jadhav (PW 6). Ultimately after completing the investigation he submitted the chargesheet he closed the investigation.

4. Going backwards the autopsy of the dead body of deceased Bhide was conducted on 13-12-90 between 10.20 p.m. to 11.45 p.m. and the autopsy surgeon found that the deceased had suffered the following ante mortem injuries :

"1. Stab wound on left side of chest 3 1/2" away from midline and 3" below Clavicle measuring 1" x 1/2" entering thoracic cavity, Angles and margin clean cut.

2. Stab wound lateral aspect of left thigh 6" above knee joint 1 1/2" x 1/2" x 1 1/4" oblique in direction. Angles and margin clean cut."

On internal examination the Doctor found the left pleura and the left lung to be severely damaged. In the opinion of the doctor the death of the deceased was on account of shock and haemorrhage as a result of stab injury on the chest.

5. In the trial court a charge u/s 302 IPC was framed against the appellant to

which he pleaded not guilty and claimed to be tried. During the trial in all seven witnesses were examined by the prosecution. Out of them one is alleged to be an eye-witness, namely, Anand Jagannath Jadhav (PW 6). The remaining witnesses, included the investigating officer PSI Sonawane (PW 7) and the informant Sahebrao (PW 1) who deposed about the oral dying declaration. Some witnesses deposed about the appellant running away from the place of the incident with the knife and two of them, including the Investigating Officer, about the recovery of the knife at the pointing out of the appellant. The learned trial judge believed the prosecution evidence and passed the impugned order.

6. We have heard Mr. Rajiv Mane for the appellant and Mr. Rupawate for the State of Maharashtra, at a considerable length. We have also perused the depositions of the witnesses examined in the trial court, the various exhibits tendered and proved by the prosecution during trial and the impugned judgment. After giving our anxious consideration to the matter we feel that this appeal must succeed.

The evidence adduced by the prosecution in the instant case can be classified under the below mentioned four heads :

- a) The ocular account furnished by the alleged eye-witness Anand Jagannath Jadhav (PW 6);
- b) The dying declaration deposed to by the informant Sahebrao Kisanrao Sawant (PW 1);
- c) The recovery of the knife at the pointing out of the appellant in front of Shevani Selection Centre, as deposed to by PSI Sonawane (PW 7) and a public panch Ashok Vishandas Punjabi (PW 4); and
- d) The account of witnesses Kumar Meghraj Nichani (PW 2) and Raju alias Anant Raghunath Jori (PW 3) who are alleged to have seen the appellant running away with a blood-stained knife.

7. We now propose examining the aforesaid evidence which has been adduced by the prosecution against the appellant.

8. We would first like to take up the ocular account furnished by the alleged eye-witness Anand Jagannath Jadhav (PW 6). The statement of this witness is that he had a shop at a distance of about 20 to 25 ft. from the place of the incident and at the time of the incident he was at the aforesaid shop. According to him after a scuffle between the appellant and the deceased had taken place the appellant took out a knife and inflicted a blow on the chest of the deceased resulting in the deceased falling down. Then the appellant is alleged to have run away from the place of incident. The claim of this witness that he saw the incident is rendered false by the medical evidence. In the earlier part of our judgment we have reproduced the ante-mortem injuries sustained by the deceased. The deceased sustained two massive injuries one on his chest and one on his thigh. About the thigh injury this witness is absolutely silent. In fact in the entire evidence

adduced by the prosecution in the instant case there is no explanation about the thigh injury of the deceased. We find considerable merit in the contention of Mr. Rajiv Mane that had this witness really seen this incident he would have explained the thigh injury suffered by the deceased and the absence of such an explanation falsifies his presence at the place of the incident. Assurance to his claim of having seen the incident could have been lent by the circumstances if his statement u/s 161, Cr. PC had been promptly recorded. In the instant case we find and it is not disputed by the learned Additional Public Prosecutor either that this witness was interrogated u/s 161, Cr. PC the next day i.e. on 14-12-1990. In the case reported in Ganesh Bhavan Patel and Another Vs. State of Maharashtra, the Apex Court has emphasised the value which is to be attached to the prompt interrogation of witnesses u/s 161, Cr. PC. In the aforesaid decision in paragraph 15 the Apex Court has said "Delay of a few hours, simpliciter, in recording the statements of eye-witnesses may not, by itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eye-witnesses to be introduced." In our view on account of the aforesaid two reasons it would not be safe to place reliance on the account furnished by the aforesaid witnesses.

9. We now propose taking up the circumstances of oral dying declaration deposed to by the informant Sahebrao (PW 1). As stated earlier when the informant reached the place of the incident, immediately, the deceased Bhide who was then alive told him that the appellant had stabbed him. Mr. Rajiv Mane for the appellants strenuously urged before us that we should not accept this evidence of oral dying declaration in view of the statement made by Raju alias Anant (PW 3) in the trial Court. In para 3 of his aforesaid statement he stated thus :

"There was profuse bleeding found on the person of Bhide and he was not in a position to talk. I was near the spot till deceased Bhide was taken in rickshaw to the hospital by PW 1 Sawant. Till I was there near the incident spot, neither injured Dilip said anything to anybody nor the people gathered there had a talk with him."

In view of the above statement of Raju alias Anant it would be unsafe to accept the evidence of oral dying declaration.

10. We now come to the evidence of recovery of a blood-stained knife at the pointing out of the appellant from front of Shevani Selection Centre. In this connection the evidence of Shivkumar Singh (PW 5) is relevant. In paragraph 3 of his statement in the trial court the aforesaid witness deposed "The knife was lying on the open space on the foot-path". Mr. Rajiv Mane rightly urged that the place of recovery was thus a place which was open to all and sundry. His submission is that in view of the decision reported in Trimbak Vs. The State of Madhya Pradesh, it would not be safe to accept the evidence of the aforesaid

recovery of knife. In the aforesaid decision Their Lordships of the Apex Court observed that if the place of recovery is easily accessible to all and sundry then no reliance should be placed on the recovery. Admittedly the aforesaid knife was recovered from an open place. Consequently we have no option but to reject this evidence.

11. The last item of evidence adduced by the prosecution in the instant case is the evidence of PW 2-Kumar Meghraj Nichani and Raju alias Anant (PW 3) who are alleged to have seen the appellant running away with a blood-stained knife from the place of the incident. In the first place we may point out that after eliminating the aforesaid evidence, on this solitary piece of circumstantial evidence, it would neither be legal nor prudent nor proper for us to sustain the conviction of the appellant. It is well settled that a conviction on circumstantial evidence should only be based if : the chain of circumstantial evidence adduced by the prosecution is complete; the chain only points to the inference of guilt of the accused; and that chain is wholly incompatible with the inference of innocence of the accused. We regret that the aforesaid item of circumstantial evidence at the most would create only a suspicion against the accused.

12. Gajendragadkar J. as he then was in a decision reported in Sarwan Singh Vs. The State of Punjab, observed that suspicion howsoever, strong can never take place of proof. Apart from all this after going through the statements of the aforesaid two witnesses, we do not find that they are worthy of reliance. Kumar Meghraj Nichani (PW 2) in paragraph 4 of his statement in the trial court admitted that it was true that for the first time in his statement in the trial court he was saying that he was the appellant running away with a blood stained knife. We are not inclined to accept such a statement made by him at such a late stage. Regarding Raju alias Anant (PW 3) the contention of Mr. Mane is that he is deposing at the instance of the police. Further, we find that there are some glaring contradictions between the statement of Raju alias Anant (PW 3) and the informant Sahebrao (PW 1) which make it difficult for us to place reliance on the statement of Raju " Anant (PW 3); whereas Sahebrao (PW 1) stated that a small boy informed him about the incident Raju " Anant (PW 3) stated that he had informed Sahebrao (PW 1) about the incident, and whereas Sahebrao stated that the deceased had given an oral dying declaration to him prior to his taking him on a rickshaw to Sasoon Hospital, PW 3 Raju " Anant candidly said that the deceased had given no such oral dying declaration.

13. Thus we find that the entire evidence adduced by the prosecution, referred to above, does not inspire confidence. In our opinion the conviction of the appellant for the aforesaid reasons cannot be safely sustained by us. We feel that this appeal should succeed for the appellant deserves benefit of doubt.

In the result the appeal is allowed. The conviction and sentence of the appellant u/s 302 IPC vide order dated 27-8-1991 passed by the Additional Sessions Judge, Pune in Sessions Case No. 186 of 1991 is set aside. In case the appellant has paid the fine the same shall stand refunded to him. The appellant is in jail.

He shall be released for with unless wanted in some other case. Office shall comply with our order forthwith.

14. Appeal allowed.