
(2014) 11 BOM CK 0193
In the Bombay High Court
Case No : Criminal Appeal No. 450 of 2012

Ganpati and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 17-11-2014

Acts Referred:

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 302 304 34 452

Citation : (2015) ALLMR(Cri) 2519

Hon'ble Judges : B.R. Gavai, J; V.M. Deshpande, J

Bench : Division Bench

Advocate : R.M. Daga, Advocate for the Appellant; T.H. Udeshi, A.P.P., Advocate for the Respondent;

Final Decision : Partly Allowed

Judgement

B.R. Gavai, J.

1. The appellants have approached this Court being aggrieved by the judgment and order passed by learned Sessions Judge, Gadchiroli in Sessions Case No. 43/2011 thereby convicting the appellants for the offence punishable under Section 452 read with 34 of the Indian Penal Code and sentencing them to suffer R.I. for 3 years and to pay fine of Rs. 250/- each and in default of payment of fine, to further suffer S.I. for one month each and for Section 302 read with 34 of the Indian Penal Code and sentencing them to suffer imprisonment for life and to pay fine of Rs. 1,000/- each. The prosecution story as could be gathered from the material placed on record is thus:--

"The deceased Muttayya was living in Rangadhampetha, tahsil Sironcha, district Gadchiroli. On 17.12.2010 he was sleeping in his courtyard. His son-in-law Mallesh-PW1 was giving fodder to the animals and at around 2.30 p.m., the accused persons came to the house of the deceased, caught Muttayya and took him inside the room of house. Thereafter the accused No. 1 gave a blow of axe on the head of the deceased Muttayya and killed him. On the basis of the oral

report given by P.W. 1 Mallesh, Crime No. 33/2010 came to be registered for the offence under Section 302 of the Indian Penal Code against three accused persons, i.e. the appellants and one Sinu @ Shriniwas, the nephew of the appellant No. 1. The Investigating machinery was set into motion. At the conclusion of the investigation, the charge sheet came to be filed in the Court of the learned Judicial Magistrate First Class, Sironcha. However, as the case was exclusively triable by the Court of Session, the same came to be committed to the Court of learned Sessions Judge, Gadchiroli."

2. The learned trial Judge framed the charge for the offence punishable under Sections 452 and 302 read with 34 of the Indian Penal Code. The accused pleaded not guilty and claimed to be tried. At the conclusion of the trial, the learned trial Judge acquitted the accused No. 3 and convicted the appellants/accused Nos. 1 and 2 as aforesaid. Being aggrieved thereby, the present appeal is filed.

3. Mr. Daga, learned counsel appearing on behalf of the appellants submits that perusal of the evidence of eye-witnesses, would create a great doubt as to whether the eye-witnesses have really witnessed the incident or not. He submits that in any event all the witnesses are relatives of the deceased and as such interested witnesses. It is submitted that conviction cannot be based on the testimony of these witnesses. It is, therefore, submitted that the appeal deserves to be allowed and the accused/appellants are entitled to be acquitted.

4. The learned APP on the contrary submits that merely because the witnesses are interested witnesses, cannot be a ground for discarding their testimony. It is submitted that the evidence of all the eyewitnesses is cogent, trustworthy and reliable and as such no interference is warranted with the findings of the learned trial Judge.

5. With the assistance of the learned APP so also the learned counsel for the appellants, we have scrutinised the entire evidence on the record. The prosecution mainly relies on the evidence of P.W. 1 Mallesh, PW2 Gattakka- wife of the deceased and PW3 Keta-the daughter of the deceased.

6. P.W. 1 Mallesh states in his evidence that son of the accused Ganpati was ill at the time of Pushkar Mela. He states that his father-in-law was sleeping in the courtyard of his house. The accused Ganpati and his son came and they caught hold of him through hands and legs. Ganpati had caught his father-in-law from the side of head and his son caught him from the leg side. They took him inside the house of Muttayya- the deceased. Ganpati then gave a blow of axe on the head of his father-in-law. He further states that they had killed his father-in-law on the suspicion that his father-in-law had played black magic on the son of Ganpati and, therefore, son of Ganpati always remained ill. He further states that the accused persons were also threatening to kill him if he comes near them. Though this witness is thoroughly cross-examined, nothing damaging has come in his cross-examination. The testimony of P.W. 1 is corroborated from the first

information report lodged by him within half an hour from the incident taking place.

7. PW2 Gattakka is the wife of the deceased. She states in her evidence that her one daughter and son had gone to see Pushkar. Her husband was taking rest in the courtyard below Mandap. She herself and her other daughter were in the house and were doing household matter. They heard the voice. In order to know who is making noise, they came outside the house. When she came out, she saw Ganpati, his son Pradip and Shriniwas. She asked them why they have come. They said that her husband had played black magic on the son of Ganpati. She further states that when she reached towards them, Shriniwas beat her on her face. She fell down. When she got up, her husband was taken inside the house and there Shriniwas and Pradip caught hold of her husband from the two sides and Ganpati gave blow of axe. Her husband died. She further states that the accused searched her. Thereafter the accused ran away. This witness has also been thoroughly cross-examined. However, nothing damaging has come in her evidence.

8. Insofar as PW3 is concerned, it is doubtful from her evidence as to whether she had really witnessed the incident or not.

9. From the testimony of P.W. 1 and PW2, it could thus be seen that their evidence is consistent insofar as role of assaulting the deceased with an axe is concerned. Their evidence is sought to be attacked on the ground that they being relatives of the deceased, their evidence is that of interested witnesses and as such their evidence should not be believed. Merely because the witnesses are interested, cannot be a ground for discarding their testimony. The learned trial Judge had an occasion to witness the demeanour of these witnesses and he has found their evidence to be trustworthy. We, therefore, find no reason to discard the evidence of these witnesses. Apart from that the investigating officer has proved the seizure of the weapon used in the crime vide seizure memo below Exh. 48, on a memorandum under Section 27 of the Evidence Act below Exh. 47 the axe used has been seized from the heap of dung of she-goats which was actually concealed beneath the said heap. In that view of the matter, we find that the prosecution has proved beyond reasonable doubt that it is the present appellants who have assaulted the deceased with an axe which has resulted into the death of the deceased.

10. That leaves us with the question as to whether the conviction under Section 302 of the Indian Penal Code needs to be maintained or altered to some other offence. From the perusal of the post mortem report below Exh. 69 and the evidence of PW9 Dr. Sumit, it would reveal that the deceased had sustained only one external injury as under:--

"Big fresh lacerated wound over right temporal parietal region of size 10 x 4 x 2 cm."

It is further to be seen that he has admitted in his cross-examination that the

injury in column No. 17 is not from the sharp side of the axe but is from the blunt side of the axe. Taking into consideration the fact that only one injury is sustained by the deceased and that though the appellants could have assaulted the deceased with sharp side of the axe, the assault is with blunt side of the axe, we find that the conviction would rather be under Part I of Section 304 of the Indian Penal Code than under section 302 of the Indian Penal Code.

In the result, the Criminal Appeal is partly allowed. The order of conviction passed by learned Sessions Judge, Gadchiroli dated 20.09.2012 in Sessions Trial No. 43/2011 against the appellants under Section 302 of the Indian Penal Code is altered to one under Section 304 Part I of the Indian Penal Code. The sentence of life imprisonment is reduced to rigorous imprisonment for a period of ten years. The rest of the order is maintained.