
(1979) 08 BOM CK 0001
In the Bombay High Court
Case No : Criminal Appeal No. 365 of 1978

Genba Shankar and Others	Vs	APPELLANT
State of Maharashtra		RESPONDENT

Date of Decision : 17-08-1979

Acts Referred:

Evidence Act, 1872 — Section 3
Penal Code, 1860 (IPC) — Section 302, 34, 342

Citation : (1979) 08 BOM CK 0001

Hon'ble Judges : R.A. Jahagirdar, J;P.S. Shah, J

Bench : Division Bench

Advocate : V.A. Mohite and V.R. Bhonsale, Orig. Accused Nos. 1 to 3, for the Appellant; S.S. Parkar, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

P.S. Shah, J.—The appellant No. 1, and the appellant Nos. 2 and 3 who are the sons of appellant No. 1, were tried by the learned Sessions Judge, Pune, for the offences u/s 342 read with section 34 of the Indian Penal Code and section 302 read with section 34 of the Indian Penal Code. By his judgment and order dated April 29, 1978, the learned Judge found the accused guilty of the aforesaid offences and sentenced each one of them to suffer rigorous imprisonment for six months for the offence u/s 342 read with section 34 of the Indian Penal Code and to suffer rigorous imprisonment for life for the offence u/s 302 read with section 34 of the Indian Penal Code.

2. The three appellants, who are hereinafter referred to as "the accused", have challenged their convictions in this appeal. The facts leading to the prosecution case against the accused may be stated thus :---

3. The victim of the incident is Sambhaji, who was the son of accused No. 1 Genba Shankar Satav and the brother of accused Nos. 2 and 3. It appears that there were disputes between the deceased on one hand and the accused on the other with regard to the partition of the joint family properties. In the result, the

deceased stated residing separately in a hut at a distance from the family house where the three accused continued to reside. The locality where the deceased and the accused stayed is known as Satav Vasti at Baramati. The distance between Satav Vasti and Baramati is hardly 2/3 miles. It appears that the deceased was given 11/2 acres of land and also a separate residence in a shed, while the accused and the members of their family jointly cultivated the rest of the joint family land and also resided in the joint family house. The relations between the deceased and the accused were strained, may be, because he was demanding some more land than the one allotted in the partition or wanted a fresh partition, Babi (P.W. 5) is the wife of the deceased; while Dhansingh (P.W. 6) is his son. Babi's brother, Kashinath (P.W. 9) is a resident of Khandaji, a few miles away from Satav Vasti. It is a common ground that the deceased was addicted to liquor. On May 9, 1977, which was the date of the incident, the deceased had gone to Dhavan Vasti at Baramati to attend the wedding of the mother's sister of his wife. His son, Dhansingh, has also attended the wedding. However, his wife, Babi, for reasons which are not on record, did not accompany her husband to the wedding of her own mother's sister. The marriage was at 2.30 p.m. The deceased, however, returned to his Vasti at about 3 p.m. Without taking meals at the place of the marriage. On his return from Dhaven Vasti it was noticed that he had come in a drunken state. On his return he slept at his house for about 1/2an hour and then started quarrelling with his wife who was then working in the land and hurled a stone at her head causing her bleeding injury. Her mother-in-law, Jijabai, also come there hearing her shouts. The deceased hurled a stone at her also which hit her on her head. It is alleged that thereafter all the three accused came there and chased the deceased. They caught him on the road and took him towards the Babhul trees on the other side of the road and after tying both his hands and feet by a rope, both his hands and feet were then tied to two Babhul trees. Accused Nos. 1 and 2 then started assaulting him with sticks, while accused No. 3 assaulted him with a cycle chain for quite some till he became unconscious. The evidence with regard to both the incidents as well as the time when the deceased as well as the two injured were taken to the hospital at Baramati is not quite clear. However, the prosecution evidence itself shows that Jijabai was examined by Dr. Naigaonkar at the hospital at Baramati at 4.30 p.m., while Babi was examined at 5.15 p.m. It also appears from the prosecution evidence itself that the deceased was admitted to the hospital at 7 p.m. after he was brought in a taxi. Within a short time of his admission to the hospital, however, the deceased succumbed to his injuries. Head Constable, Sukhadare who happened to be present in the hospital for investigation in some other case noticed that the deceased was brought in one car at about 7 p.m. by his cousin with his hands and feet tied. He found that he was unconscious and also has some injuries on his person. The person who brought him told the Head Constable that he was drunk and he had to be examined. Then he was freed from the ropes and later on was examined by the doctor as mentioned above. Head Constable, Sukhadare, then informed the Police Station on telephone about the death of the injured. On receipt of the phone message P.S.I. Khatavakar

(P.W. 13) went to the hospital and made enquiries with Babi and the brother of the deceased. Having been convinced that he died as a result of beatings, he came back to the Police Station, prepared his own complaint (Exh. 36), registered an offence u/s 302 read with section 34 of the Indian Penal Code at 9 p.m. and took up the investigation. Accused No. 2, Vithal, who was present in the hospital was arrested on the same night. The other two accused were also arrested on the same night at Satav Vasti by P.S.I. Khatavakar. The statements of some witnesses including Babi were recorded on that night; while the statements of the other two eye-witnesses, Dhansingh and Kashinath, were recorded on 11th and 12th respectively. During the course of the investigation on 11th of May, 1977 one blood stained stick (Article No. 8) as recovered from the house of the accused at the instance of accused No. 1 and a cycle chain (Article No. 9) which was lying near the Babhul trees was also recorded. According to the prosecution, the cycle chain was recovered at the instance of accused No. 3.

4. At the trial, the prosecution principally relied on the testimonies of the three eye witnesses, Babi (P.W. 5), Dhansingh (P.W. 6) and Kashinath (P.W. 9). Reliance was also placed on the evidence of the taxi driver (P.W. 7) who had carried the injured, Sambhaji, to the hospital, and also on the evidence of Dr. Naigaonkar (P.W. 10) who had examined all the three injured and also carried out the postmortem examination over the dead body of the deceased, Sambhaji.

5. The defence of the accused was one of total denial. Accused No. 1 stated that he had gone to the field at 11 a.m. and returned at about 7 p.m. when he found one fiat car on the road and his son, Sambhaji, being put in it. Accused No. 2 stated that he returned home from the field at about 3 p.m. on hearing the shouts of his mother and found her bleeding from her head. He then took his mother in a bullock cart to the hospital and did not know what happened to his brother nor did he know how he died or how he suffered the injury. Accused No. 3's case was that he had gone to Baramati on that day and it was in the evening at Baramati itself he had learnt that his brother had died. Thus, all the three accused denied to have any connection with the assault on Sambhaji.

6. On consideration of the evidence the learned trial Judge held that the evidence of the three eye-witnesses was reliable and relying on their testimonies found the accused guilty for offences u/s 342 read with section 34 of the Indian Penal Code and 302 read with section 34 of the Indian Penal Code and sentence them as above.

7. Mr. Mohite appearing for the accused contended that the evidence of the prosecution witnesses who claimed to have witnessed the incident is consistent, contrary and unreliable. He submitted that it is impossible to reconcile with the versions given by each of the three eye witnesses. On the contrary, the prosecution evidence itself shows that none of them must have witnessed the incident of assault on the deceased. He further submitted that all the three eyes witnesses are interested and for the reasons best known to the prosecution it has failed to examine witnesses who were admittedly present and had witnessed the

incident. He submitted that in the absence of reliable and convictions evidence it is not possible to hold that any of the accused is responsible for the offence.

8. On consideration of the evidence led by the prosecution, we are inclined to accept the contentions of the learned Counsel.

9. In order to appreciate the evidence of the three eye-witnesses it is necessary to bear in mind some of the facts which are no longer in dispute before us. The deceased and his wife, Babi, had disputed with the accused about the share allotted to the deceased in partition of the joint family property. They had also a grievance about the house which was in a dilapidated condition and allotted to his share, while the accused persons continued to stay in the family house. The deceased was giving to drinking. On the date of the incident in the morning he had a quarrel with his wife, Babi. After attending the marriage ceremony he had come back in a drunken condition is not only deposed to by the witnesses, but is also apparent from the report of the Chemical Analyser. It is unthinkable that a person who had gone to the attend the marriage ceremony 2 p.m. would return without taking food. However, the deceased returned from the marriage within half an hour at about 3 p.m. At that time, while his wife, Babi, was working in the land the deceased called her from his house. As she did not respond to his call, the deceased came to the field and threw a mound of earth at her and then she returned home. Even after her return he threw a stone at her which hurt her on her head. Her mother-in-law who must have come there on hearing the shouts of Babi was also assaulted with a stone causing her injury on the head. The evidence of Dr. Naigaonkar shows that Jijabai, the mother-in-law was examined by him at 4.30 p.m. for her injuries. He noticed one injury viz. a contused lacerated wound 1" x 1/2" muscle deep over right side back of head upper part (temporal occipital region). This was an injury of simple nature. Similarly, he also examined Babi at 5.15 p.m. and noticed two injuries on her person viz. (1) Contused lacerated wound 2.5 cms. x 0.5 cm. skin deep over right temporal part of the head and (2) Abrasion 2 cms. x 0.5. cm. over right scapular region. These injuries were also found to be of simple nature. Having regard to the distance between the hospital and the residence of the injured persons, it would not have taken more than fifteen minutes for them to reach the hospital which would mean that Jijabai must have left her place for hospital by about 4 or 4.15 p.m., while Babi must have left the place for hospital by about 5 p.m. The evidence of the taxi driver, Rajkumar Nipase, who belonged to Baramati shows that he was approved by one Ramdas at about 6.45 p.m. and was requested to take the taxi to the Vasti of the accused, as he was told that some person was seriously injured and was to be brought to hospital. Thereafter, at about 7 p.m. he left Baramati for the Vasti. At that time he noticed one person tied to two trees by rope by the side of the field; the hands being tied to one tree and legs to the other tree. Several persons had then assembled there and after the deceased was untied he was put in his taxi and was brought to the hospital. Dr. Naigaonkar's evidence shows that the deceased was brought to the hospital at about 7 p.m. and while he was being examined, he died at 7.30 p.m. He noticed

in all fifteen injuries on his person. Some of the injuries were contused, some were abrasions and some were contused lacerated wounds. He pointed that injury Nos. 9 to 13 which were all contusions with regular margins could be caused by a cycle chain, while the injuries on the wrist could be caused by trying by a rope and the rest of the injuries could be caused by stick blows. The timings of the examination of the three injured persons given by Dr. Naigonkar in his examination-in-chief will have to be accepted as correct because nothing has been suggested to him to doubt that various timings of the examination of the three injured persons given by him in his evidence. The injuries on Babi and Jijabai obviously were of a simple nature and it is nobody's case that any one thought at that time that the injuries were of a serious nature so as to remove the injured immediately to hospital for treatment. As stated above, the incident started with the falling of mound of earth and stone at Babi and then falling of stone at Jijabai who had come there on hearing the shouts of her daughter-in-law. It was only thereafter that the accused came to be taken to the other side of the road and tied with a rope to the two Babhul trees.

10. It was urged by Mr. Mohite that it is inconsistent that Babi could have been taken to the hospital after the entire incident of attack on the deceased was over and he fell unconscious. In such a situation she would have insisted that her husband should be taken to the hospital along with her and would not have agreed to go to hospital leaving her husband in an unconscious state. It is on this basis that the learned Counsel argued before us that the very fact that the deceased was taken to the hospital at 7 p.m. would show that the incident of assault on him must have taken place after the departure of Babi and Jijabai to the hospital and if that is so, then Babi could not have witnessed the incident of assault on her husband. Turning to the evidence of Babi, it is not disputed her presence in the initial stages of the incident. We find that she has deposed to the entire episode relating to the assault on her husband. According to her, after her mother-in-law was hurt by the stone all the three accused came there and they took her husband and tied him by the top of Babul trees and after he was so tied, accused Nos. 1 and 2 started beating him with sticks, while accused No. 3 started assaulting him with a cycle chain. She has further deposed that her husband was beaten on the head, back and stomach. He was shouting for help and water, but the accused did not supply water and ultimately her husband become unconscious. Further, according to her, accused No. 2 then went and brought one taxi and her husband was taken in that taxi to hospital. After some time she also went to the hospital. According to her, she was not a silent spectator to the incident, but tried to go near her husband and intervene while he was being beaten. However, the accused prevented her from going near her husband. In her cross examination she has stated that she went on a motor cycle to the hospital after the taxi had left. This story obviously does not fit in with the evidence of Dr. Naigaonkar who has categorically stated that Babi was examined by him at 5.15 p.m., while the deceased was brought to the hospital at about 7 p.m. It is not the case of Babi that she returned to the place of the

incident after being treated by the doctor and then the incident of assault on her husband took place. If the incident of assault on her husband had taken place before Babi reached the hospital, ordinarily one would expect that the deceased also would have been brought to the hospital at the same time. It would have been unnatural for wife to proceed ahead to the hospital for treatment of her minor injuries leaving her husband in seriously injured condition and who had also become unconscious. It is also not the case of the prosecution that Babi had come back to her house after getting treatment from the doctor and thereafter the incident of assault took place. The prosecution has presented a case of continuous incident which, according to it, had lasted for about an hour only. There is, therefore, substance in the contention of the learned Counsel for the accused that the incident of tying of the deceased to the trees and assault on him must have occurred after Babi left for the hospital. It is not her case that arrangements were being made to take her husband in the taxi and as she could not be accommodated in the taxi she was removed on motor cycle to the hospital for treatment. According to her evidence, her husband was already admitted in the hospital, when she was taken there. This case is obviously not true, having regard to the evidence of Dr. Naigaonkar. In this state of evidence it is highly doubtful whether she had really witnessed the incident of assault on her husband. In this connection, it would be worthwhile to notice the evidence of Head Constable, Sukhadare and S.I. Khatavakar. The evidence of Head Constable, Sukhadare, shows that while he had gone to the hospital for investigation in some other case, the deceased was brought there in a taxi at about 7 p.m. According to him, the deceased was brought by his cousin, Ramdas, and his hands and feet were tied and he was in an unconscious state. According to him, the person who brought the deceased to the hospital told him that the deceased was drunk and was required to be examined. Thereafter, while he was being examined by the doctor he died. H.C. Sukhadare has further stated in his examination-in-chief that the wife of the accused i.e. Babi came there and told him that her husband was tied by a rope by his father and two brothers and was beaten. In the meantime, S.I. Khatavakar who was informed by the Head Constable on telephone that the deceased was brought to the hospital in an injured state and died, come there. S.I. Khatavakar who came to the hospital on receipt of the message from the Head Constable has stated in his evidence that he immediately came to the hospital and made enquiries with the wife and the brother of the deceased. In the first place, it shows that the brother of deceased i.e. accused No. 2 had come to the hospital along with the deceased. According to S.I. Khatavakar, after the enquiries made with the wife and the brother of the deceased, he was convinced that he died as the result of beating and therefore, he went to the Police Station and prepared his own complaint (Exhibit 36) and started the investigation of the case. Now, the complaint (Exhibit 36) indicates that the S.I. Khatavakar had received the message from Head Constable at about 8.25 p.m. which means he must have reached the hospital at about 8.30 p.m. and made enquiries with the wife and the brother of the deceased. It has been mentioned by S.I. Khatavakar in his complaint (Exhibit 36) that he received

the phone message at about 8.25 p.m. to the effect that the deceased was brought in a car by his brother, Vithal, accused No. 2 and by his cousin, Ramdas for treatment. According to him, he was also informed that the deceased who was in a drunken condition was brought in a car with his hands and feet tied by a rope. He was also informed that the deceased died while he was under the treatment and, therefore, he immediately rushed to the hospital and made enquiries with Babi and Jijabai. Then, it is further mentioned in the complaint that his enquiries revealed that the deceased who had disputes about the partition had resorted to beating after getting drunk was tied to Babhul trees by his father and his two sons viz. the two accused persons and was beaten by sticks. This is certainly an extra-ordinary procedure followed by the S.I. If he had actually received the information from the wife of the deceased, he should have straight-way recorded her first information report. Instead of that he chose to lodge a vague report at the Police Station about his having been convinced that the three accused persons being responsible for the offence, on the basis of the information revealed by the wife and the mother of the deceased. Having regard to these circumstances and the infirmity pointed out above, it is difficult to believe witness, Babi, when she says that she had witnessed the incident relating to the assault on the deceased. She is clearly an interested witness because it appears that her husband had dispute relating to the partition of the family lands. The evidence of her son, Dhansingh, show that the family of the deceased also had a grievance about the residence allotted to them. It appears that they were made to reside in a hut, while the other family members i.e. family of the accused continued to stay in the family house. Dhansingh admitting in the cross-examination that his family wanted good premises for their residence and, therefore, the relations between the family of the deceased on one hand and the accused on the other were strained. It is, therefore, quite possible that having regard to the fact that the deceased returned to the Vasti in a drunken condition and had also hurled stones at her and her mother-in-law she might have suspected that it is the accused and none else was responsible for the incident of the assault on the deceased. Moreover, it appears from the cross-examination of the Babi that several persons had gathered at the time of the assault on her husband. She then went to the length of saying that she had even requested the persons who were present there to rescue her husband, but the accused did not allow them to go near the accused. The evidence, shows that it was a bazar day and there was considerable traffic on the road. Even the buses ply every half an hour. Under these circumstances, it was quite possible for the prosecution to lead the evidence of some independent witnesses. We are aware that the evidence of Babi cannot be rejected solely on the ground that she is the close relation of the deceased and was interested, because, her presence near the place of the incident at some point of time during the period of the incident is proved, but as indicated above, there are several infirmities which remained unexplained in this case which render his testimony rather unsafe to act upon. It is true that her statement was recorded by the police on that very night, but having regard to the facts of this case, the possibility of her having concocted a false version

against the accused after collecting some information from others cannot be ruled out. As pointed out above, the evidence of Dr. Naigaonkar as to the point of time when he examined this witness for her injuries raises grave doubt about her being present at the time to time of the assault on her husband. In any event, having regard to the serious infirmities in her evidence, it was the duty of the prosecution to examine out independent witnesses who admittedly were present at the time of the assault on the deceased.

11. What remains is the evidence of Dhansingh, the son of the deceased, and Kashinath, the brother of Babi. Their presence at the time of the incident is doubtful. In the first place, Babi had not referred to any one of them in her evidence. Secondly, the statements of both these witnesses were recorded late. The statement of Dhansingh was admittedly recorded on 11th and Kashinath's statement was recorded on 12th. As far as Kashinath is concerned, he has admitted in his cross examination that he was present in the hospital on the date of the incident when the police came there. He went to the Vasti of the deceased on the next day morning when the P.S.I. Khatavakar and the police had come there. He also met the police on the 11th Still, his statement was not recorded till 12th. The delay in recording the statements of these two witnesses makes their evidence doubtful. The whole conduct of Dhansingh in not trying to intervene or requesting the passers by to help his father and not reporting the matter to the police or to anyone raises a grave doubt about his presence at the time of the incident. As far as Kashinath is concerned, in his examination-in-chief he has stated that Dhansingh had been to him at about 4.45 p.m. and told him that his father was tied to Babhul trees and was being beaten by the three accused persons. According to him, when he reached the spot he noticed all the three accused persons were present near the Babhul trees and that accused No. 1 and 2 were assaulting the deceased with sticks and accused No. 3 with cycle chain, as an eye witness to the incident. He admitted in the cross-examination that he did not approach the police to report the matter and although he knew some persons at Baramati he did not approach them for help. Further he had admitted that he was in the hospital on that night when the police had come there. His cross-examination shows that he had not stated before the police that accused Nos. 2 and 3 were seen by him on the spot. It would thus appear that the evidence of none of these witnesses inspires confidence.

12. The prosecution relied on the alleged discovery of the blood stained stick at the instance of accused No. 1. This stick was admittedly found in the house of the accused, but not in a concealed place. It cannot, therefore, be said to be in the exclusive possession of the accused nor could it be said that he had the knowledge that such a stick was in his house. The cycle chain was admittedly recovered from the front open place in the field of accused No. 3. The place was obviously accessible to anyone and it cannot be said that the chain was discovered at the instance of accused No. 3. Moreover the cycle chain was not found to be blood stained. The so called discovery of the cycle chain is not helpful to the prosecution. In any case the evidence of the so-called eye-

witnesses having been found not acceptable, the mere discovery of these articles, even if held to be true, would not be sufficient to base a conviction against the accused.

13. In the circumstances, it is not possible to agree with the view taken by the learned trial Judge. The accused are, therefore, entitled to acquittal.

14. The appeal is, therefore, allowed. The order of conviction and sentence dated April 29, 1978, passed by the learned Sessions Judge, Pune, is quashed and set aside and the accused are acquitted of both the offences.

15. The bail bond of accused No. 1 is cancelled and accused Nos. 2 and 3 are directed to be set at liberty forthwith.