
(2016) 08 BOM CK 0098

In the Bombay High Court

Case No : Criminal Appeal No. 368 of 2014 with Criminal Appeal No. 459 of 2014

Gurmitsingh

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 08-08-2016

Acts Referred:

Evidence Act, 1872 — Section 106

Penal Code, 1860 (IPC) — Section 302

Citation : (2016) 3 AIRBomRCri 674 : (2017) ALLMRCri 442 : (2017) 2 MhLJCri 86

Hon'ble Judges : B.R. Gavai and V.M. Deshpande, JJ.

Bench : Division Bench

Advocate : Mr. R.M. Daga, Advocate, for the Appellant; Mrs. G.R. Tiwari, A.P.P, for the Respondent/State; Mr. E.W. Nawab, Advocate, for the Appellant; Mrs. G.R. Tiwari, A.P.P, for the Respondent/State

Final Decision : Dismissed

Judgement

B.R. Gavai, J.(Oral)—The present Criminal Appeals challenge the Judgment and Order passed by the learned Additional Sessions Judge, Nagpur in Sessions Trial Nos.355 of 2011, 46 of 2012 and 381 of 2011 thereby convicting the present appellants for the offence punishable under Section 302 r/w. 34 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for life and to pay a fine of each and in default to undergo further rigorous imprisonment for six months. The learned trial Judge has also convicted the appellants for the offence punishable under Section 364 r/w. 34 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for three years and to pay a fine of each and in default to undergo further rigorous imprisonment for three months.

2. The prosecution case, in brief, as could be gathered from the material placed on record, is thus :

Deceased Kashmirasingh Bhatti was residing on 5th floor of Laxmi Height

Building, Sonbanagar, Kalamna, Nagpur along with his son Satpalsingh Bhatti (PW-1), aged about 16 years and wife Sukhwinder Kaur (PW-4). He was running a garage on the ground floor of the said building. His brother-in-law Baxisingh Gil (PW-5) also used to work in his garage as a labourer. Accused no.1 Gurmeetsingh @ Hirasingh had done the work of his truck in the garage of deceased and an amount of was outstanding against him. About three days before the incident, accused no.1 Hirasingh had abused the deceased on telephone on account of payment and therefore, the deceased had been to police station for lodging report against accused no.1.

3. On 29.4.2011, at about 2.30 p.m., Satpalsingh Bhatti (PW-1) and his mother Sukhwinder Kaur (PW-4) were at home. Some residents of his building came to his house and informed that some persons were beating the deceased and Baxisingh Gil (PW-5) outside the garage. On hearing this, Satpalsingh (PW-1) rushed to his garage and saw that the accused persons were beating his father with an iron rod, bat, wheel spanner and sword and when he went to the rescue of his father, accused nos. 1 and 2 beat on his leg and back with the iron rod. After beating the deceased, the accused persons dragged him to White Hyundai Car bearing registration No. MH-31/PN-1208 and abducted him. Immediately thereafter, Satpalsingh (PW-1) went to Police Station, Kalamna. Kalamna Police took the entry in Station diary and proceeded towards the house of accused persons, but they were not found there. At about 5.15 p.m., Satpalsingh (PW-1) returned home. At about 5.45 p.m. accused nos. 1 and 2 brought Hyundai Car to police station and informed police that they had beaten the deceased and his body was in the car. Both the accused were detained in the Police Station. On opening the car, the deceased was found inside having received serious injuries. On receipt of the information, Satpalsingh (PW-1) and his mother went to Police Station. PSI Ganesh Shankar Kolekar (PW-15) called the Ambulance and referred the deceased to Mayo Hospital. On examination, the Medical Officer declared him dead. Satpalsingh (PW-1) came back to Police Station and at about 8.45 p.m., he lodged report Exh.117 against the accused persons. On the basis of the same, printed F.I.R. came to be registered below Exh.118. On the basis of oral report, investigation was set in motion. The accused persons came to be arrested on the same day. The seizure panchanama of the car was prepared. The further investigation was carried out by the Investigating Officer PSI Kolekar (PW-15). At the conclusion of investigation, a charge sheet came to be filed in the Court of Judicial Magistrate, First Class. Since the case was exclusively triable by the learned Sessions Judge, the learned J.M.F.C. committed the case to the learned Sessions Judge. Charges came to be framed for the offences punishable under Sections 143, 144, 147, 148, 323, 324, 364 and 302 r/w. 149 of the Indian Penal Code; under Section 4 r/w. 25 of the Arms Act and under Section 135 of the Bombay Police Act against six accused persons. The accused pleaded not guilty and claimed to be tried. At the conclusion of the trial, the learned trial Judge convicted the present appellants for the offences punishable under Sections 302 and 364 r/w. 34 of the Indian Penal Code as aforesaid. He, however, acquitted

the other four accused of the charges so framed and also acquitted the present appellants for rest of the offences. Being aggrieved thereby, the present appeal.

4. Mr. R.M. Daga, learned Counsel and Mr. E.W. Nawab, learned Counsel submit that the statement of alleged eye witnesses i.e. Baxisingh Gill (PW-5), Sukhwinder Kaur (PW-4) and Ashish Solanki (PW-13) are recorded after 15 to 16 days and 2? months respectively. The learned Counsel submitted that recording of the statements at such a belated point of time creates a serious doubt regarding truthfulness of the prosecution case. The learned Counsel submits that possibility of such witnesses being got up witnesses and falsely implicating the present appellants cannot be ruled out. It is submitted that even evidence of Satpalsingh Bhatti (PW-1) is not consistent. It is submitted that there are various discrepancies in his testimony. The learned Counsel, therefore, submitted that conviction on the basis of such shaky evidence would not be appropriate.

5. Mrs. G.R. Tiwari, learned A.P.P., on the contrary, submitted that the prosecution case is duly established by the testimony of Satpalsingh Bhatti (PW-1). She submitted that the evidence of Satpalsingh (PW-1) is truthful, cogent and reliable. It is submitted that the evidence of Satpalsingh (PW-1) is also supported by the evidence of other eye witnesses i.e. Sukhwinder Kaur (PW-4), Baxisingh Gill (PW-5) and Ashish Solanki (PW-13). She, therefore, submitted that no interference is warranted with the order of conviction and the appeals deserve to be dismissed.

6. With the assistance of learned A.P.P. and the learned Counsel for the appellants, we have scrutinised the entire evidence.

7. At the outset, we must place on record our agreement with the learned trial Judge that the investigation in the present matter has been done in a totally faulty manner. The statements of eye witnesses i.e. Sukhwinder Kaur (PW-4), Baxisingh Gill (PW-5) and Ashish Solanki (PW-13) have been recorded much belatedly, though the said witnesses were very much available for recording of their statements. Both the Investigating Officers i.e. P.S.I. Ganesh Kolekar (PW-15) and P.S.I. Balwant Krushnaji Marape (PW-16) have failed to give explanation as to why the statements of witnesses were not recorded immediately, though the witnesses were very much available. We are, therefore, in total agreement with the learned trial Judge that, in view of the law laid down by Their Lordships in the case of State of Gujarat v. Kishanbhai etc. reported in 2014 (1) Scale 177, appropriate action needs to be taken against the Investigating Officers on account of whose faulty investigation, the accused were required to be acquitted by the learned trial Judge. However, the Apex Court in various cases has held that, merely because the investigation is faulty, cannot be a ground to acquit the accused if evidence placed on record otherwise is found to be sufficient to convict the accused.

8. In the present case, we find that even if we do not take into consideration the evidence of three eye witnesses i.e. Sukhwinder Kaur (PW-4), Baxisingh Gill

(PW-5) and Ashish Solanki (PW-13), the other evidence which has come on record is sufficient to uphold the order of conviction.

9. It is not disputed by the appellants that death of deceased is homicidal and as such, it will not be necessary to scrutinise the evidence on record in that regard.

10. In the present case, we find that the evidence of Satpalsingh Bhatti (PW-1) is an important piece of evidence. Satpalsingh Bhatti (PW-1), who is son of the deceased, has stated in his evidence that accused no.1 Hirasingh @ Gurmitsingh had got done some work from his father and there was an outstanding of his father of towards Hirasingh. He states that, two days prior to the incident, accused Hirasingh had abused his father on phone over the amount of. His father had lodged report to Police Station. On 29.4.2011, he was at home. Some people came to him and informed him that some people are beating his father. Therefore, he rushed to the garage. He saw that accused Hirasingh, Lakhansingh, Jassasingh, Chima, Ratansing and one person wearing cap and accused Kawaljitsingh were beating his father by means of sword, iron rod, iron pipe, wheel pana, base ball stick and bat. He states that he tried to save his father, but Hirasingh assaulted on his right leg by means of rod and accused Jassasingh assaulted him by means of pipe on his back. They had assaulted his father on his chest and legs. His father pushed him and told them not to beat him. He went back. They pulled his father and put him in the back seat of Hyundai Accent White car. Accused Chima Singh, Ratansingh and the person wearing cap sat over the body of his father inside the car. Accused Nilesh was sitting on the driver seat and Kawaljitsingh and Hirasingh were sitting on front seat of the car. They started the car and ran away towards Wardhaman Nagar Railway crossing. Accused Jassasingh sat on the pillion seat of Discover motor cycle which was being driven by accused Jagdipsingh. They followed the Hyundai Accent car. His maternal uncle Baxisingh was sitting on the chair and he was also having injury on his leg. He along with his tenant Ashish Solanki went to Police Station, Kalamna for help.

11. Satpalsingh Bhatti (PW-1) further states that police accompanied with him to the house of accused at Wardhaman Nagar, Fukat Nagar and Vaishalinagar in search of his father. But, they could not find them. They returned to their houses. At about 5.15 p.m., he received message from the Police Station that the person who were beating his father have brought his father to Police Station. He along with his mother went to the Police Station. His father was lying in the rear seat of Accent Car in pool of blood. Accused Hirasingh and Jaswantsingh were standing behind the car along with police. They took his father to Mayo Hospital in Ambulance. In Mayo Hospital, his father was declared dead. He went back to the Police Station and lodged complaint.

12. This witness Satpalsingh (PW-1) has been thoroughly cross-examined. Nodoubt that there are certain minor omissions and contradictions in his evidence like assault taking place outside the garage, the motor car used, being a Hyundai Accent Car etc. However, his testimony regarding material aspect has

gone unshaken. It is further to be noted that Ganesh Kolekar (PW-15) has also stated in his evidence that, on the day of incident, Satpalsingh (PW-1) had come to the Police Station and told him that his father was being beaten by Hirasingh and his associates and he was taken away in one White Coloured car. It is further to be noted that, in his cross-examination, entry no.39, dated 29.4.2011 of 15.35 hours has been exhibited. The entry shows that Satpalsingh (PW-1) had given oral information that his father Kashmirasingh was kidnapped by Hirasingh and Jassasingh in a White car. That the entry further shows that, on receipt of information P.S.I. Kolekar (PW-15) and other members of the staff had left for the spot. The evidence of P.S.I. Kolekar (PW-15) would further show that, after taking entry, they searched the accused at Rani Durgawati chowk and Wardhaman Nagar. They did not find them. They also inquired about white car but did not get information. He states that thereafter he received a call from Police Station informing that Hirasingh and Jassasingh had brought one injured in a white coloured car in front of Police Station. Therefore, he returned to Police Station. He saw in the Police Station that the deceased was lying in the white coloured car in injured condition. Accused Hirasingh and Jassasingh were sitting in the Police Station.

13. It is further to be noted that the oral report below Exh.117 is lodged immediately. In the said F.I.R., there is reference to the entire incident regarding abduction as well as assault by the accused persons to the deceased. Much attack is made on the ground that, in the entry below Exh.176, reference is only to abduction and not to the assault. It is to be noted that the first informant was a teenager of 16 years at the relevant time. Response to situation would differ from person to person. At 3.30 p.m., Satpalsingh (PW- 1) would be more concerned with safety of his father and therefore, he must have given information only regarding abduction without giving details of the entire incident. It is natural that, in such a situation, a young boy would be more concerned about finding his abducted father alive. In any case, the said oral report is not required to be encyclopedia of the entire incident. As such, we find that the attack on that ground is without substance.

14. In any case, even assuming that in Exh.176, there is no mention with regard to assault by the accused on the deceased, there is specific mention regarding both the appellants abducting the deceased. From the evidence of Satpalsingh (PW-1), PSI Kodekar (PW-15) and Station diary entry below Exh.176 and oral report Exh.117 and FIR below Exh.118, it can safely be said that prosecution has proved beyond reasonable doubt that the accused had abducted the deceased in a white car and the accused had brought the deceased to the Police Station in a seriously injured condition.

15. It is further to be noted that, in the present case, the statement given by accused under section 313 of the Code of Criminal Procedure would also be relevant. It will be appropriate to reproduce the same. It is as under :

"vkjksih dzekad 2 tloarflax dk vfrfjDr c;ku Hkkjrh; QkStnkjh laghrk dye 313 ds

rgr0

eSa mijksDr vkjksih dzekad 2 esjk vfrfjDr c;ku fuEufyf[kr nsrk gWwa dh

1- ?kVuk rkjh[k 29-04-2011 e`rd df"ejkflag ;g jkLrs esa t[eh gkyr esa fn[kk bl otg ls iksfyl LVs"ku esa mls esfMdy oSn;fd; mipkj feyuk pkfg;s o iksfyl dsl gksus ls mls iksfyl LVs"ku esa yk;s Fks0 ml oDr og cksyus ds gkyr esa Fkk0

2- ;gh gekjk vfrfjDr c;ku gS iksfyl us geus e`rd dks bykt okLrs iksfyl LVs"ku esa tkus dh otg ls dsl esa >wBk Qlk;k gS0 ,oa ge funksZ"k gS0 e`rd dks mldh tku cpkus gsrq iksfyl LVs"ku ykus fd otg ls gh bl dsl esa ges vkjksih cuk;k gS0 vxj ge dsl esa xqukgxkj gksrs rks mls cpkus o mipkj gsrq isfyl LVs"ku drbZ ugh ykrs0

3- fon~;eku U;k;kf/k"k egksn; ges dsl ls cjh djus dh d`ik djus dh ge izkFkZuk djrs gS0"

16. It could thus be seen that the accused have also admitted that they have brought the deceased to the Police Station. However, they have stated that they found the deceased in seriously injured condition and to save his life, they have brought him to the Police Station.

17. It will be appropriate to refer to the following observations of the Apex Court in the case of Mohan Singh v. Prem Singh and another reported in 2003 Cri.L.J. 11. They are thus:

" The statement made in defence by accused under Section 313, Cr.P.C. can certainly be taken aid of to lend credence to the evidence led by the prosecution, but only a part of such statement under Section 313 of the Code of Criminal Procedure cannot be made the sole basis of his conviction. The law on the subject is almost settled that statement under Section 313, Cr.P.C. of the accused can either be relied in whole or in part. "

18. It could thus be seen that Their Lordships of the Apex Court have clearly held that though the conviction cannot be solely made on the basis of statement of accused under Section 313 of the Code of Criminal Procedure, it can certainly be taken aid of to lend credence to the evidence led by the prosecution.

19. In the present case, the accused clearly admitted that they had brought the deceased in injured condition to the Police Station. As already discussed herein above, prosecution has unclinchingly proved from the evidence of Satpalsingh (PW-1), P.S.I. Kolekar (PW-15) and Station diary entry below Exh.176 that it is the present appellants who had abducted the deceased. P.S.I. Kolekar (PW-15) further states that the accused had brought the deceased to the Police Station in a white car. We find that the statement made by the accused under section 313 of the Code of Criminal Procedure to the effect that they had brought the deceased to the Police Station corroborates the prosecution case that the deceased was brought to Police Station in seriously injured condition by the present appellants.

20. If that be so, then it is proved beyond reasonable doubt that it is the accused

who had abducted the deceased at around 3 to 3.30 p.m. in a white car and it is the accused who brought the deceased to Police Station at around 5.30 p.m. in a seriously injured condition. In that situation, what happened between those two hours is exclusively within the special knowledge of the present appellants. In view of the provisions of Section 106 of the Indian Evidence Act, it is for the present appellants to have explained as to what happened in those two hours. Undisputely, the accused have utterly failed to discharge the burden which lies on them under section 106 of the Indian Evidence Act.

21. In that view of the matter, we find that the present Criminal appeals are without merits and as such, they are dismissed. No order as to costs.