
(2011) 03 BOM CK 0006

In the Bombay High Court

Case No : Criminal Writ Petition No. 114 of 2004

Jayram Laxman Baswat

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 24-03-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 282
Evidence Act, 1872 — Section 119, 60
Oaths Act, 1969 — Section 4
Penal Code, 1860 (IPC) — Section 109, 302, 34, 452

Citation : (2011) 03 BOM CK 0006

Hon'ble Judges : Hardas P.V., J; Gilani M.N., J

Bench : Division Bench

Advocate : Y.M. Chaudhary, for the Appellant; J.P. Yagnik, for the Respondent

Final Decision : Dismissed

Judgement

Gilani M.N., J.—This appeal is directed against the judgment and order of conviction and sentence recorded by Ad hoc Additional Sessions Judge, Palghar in Sessions Case No. 121 of 2002, whereby the accused No. 1-appellant herein, was convicted for the offence punishable u/s 302 of I.P.Code and sentenced to suffer imprisonment for life and to pay fine of Rs. 5,000/- in default to suffer further R.I. for two years. He was also convicted for the offence punishable u/s 452 of I.P.Code and was sentenced to suffer R.I. for 5 years and to pay fine of Rs. 1,000/- in default to suffer R.I. for one year. Both substantive sentences were ordered to run concurrent. The accused No. 2 who was tried for the same offence, with the aid of section 109 of I.P.Code was acquitted. Briefly stated, the prosecution case is: The complainant-Ramu Ganpat Narle has two brothers namely, Damu (original accused No. 2) and Ladka the deceased. Their place of residence is village Narlipada, Palghar, District Thane. They work as labourers. They stay in the same locality. The deceased had applied for Government assistance to purchase bullock cart. Same was sanctioned. However, Damu completed formalities, like paying part of the amount and received delivery of

the bullock cart. At that time, Ladka had gone to brick kiln to work as labourer. After about four months, the deceased Ladka returned to his hamlet-Narlipada. The deceased made necessary payments to Damu and obtained possession of the bullock cart. It happened that Damu was in need of the bullock cart for temporary period. Ladka refused to oblige him and because of this their relations became strained. The accused-1 is the brother in law of Damu. On 3/6/2002 the accused-1 and accused-2 had assaulted the deceased, his wife and daughter and therefore, deceased had lodged report in the Police Station, Boisar. On 4/6/2002, the Police Patil, Shirgaon received memo from the Police Station, Boisar that accused-1 and accused-2 be kept present in the Police Station on 5/6/2002.

2. Incident occurred on 4/6/2002. It was about 10 p.m. The deceased had come to the house of the complainant and they were sitting together. The wife of the complainant and his deaf and dumb son, Prakash were also there. At that time, the accused No. 1 armed with sickle entered the house. He gave forcible blow of the said weapon on the neck of the deceased and caused serious injuries. The deceased fell down in a pool of blood. The complainant, his wife and son went to one Gaurya Patil to inform about the incident. Thereafter, they came to the Police Station, Boisar and lodged FIR. On that basis offence vide Crime No. 1-60/2002, u/s 302 r/w 34 was registered, on 5/6/2002 at 5 a.m.

3. Mr. M.S. Nikam, ASI/PSI visited the spot on 5/6/2002. He saw the dead body of deceased in the house of the complainant. The samples of blood stained earth, controlled earth, one match box etc. were seized. Thereafter inquest over the dead body was held. He noticed deep cut injury at the base of the skull. After holding inquest dead body was dispatched for post-mortem examination to Primary Health Centre, Tarapur. He then recorded statements of witnesses and arrested the accused on 5/6/2002 before panchas. Clothes on the person of the accused and slippers were seized. On the next day, the accused No. 1 made disclosure statement that he would point out the weapon which he had concealed behind the house. In presence of panchas, the accused No. 1 showed place. It was hay-stack. He took out the sickle from the hay-stack. It was seized and sealed on the spot. Dr. Prakash Himgire conducted autopsy over the dead body on 5/6/2002 in between 4 p.m. to 5 p.m. According to him, cause of death was due to cardio respiratory arrest due to hypovolumic shock due to amputation of full neck. According to him, the injury was possible by sharp object and sufficient in the ordinary course of nature to cause death.

4. The articles like weapon, clothes, slippers on the person of the deceased and accused No. 1, were dispatched for Chemical Analysis. After completing investigation, charge-sheet was submitted to Court of JMFC, Palghar. On committal of the case to the Court of Additional Sessions Judge, charge was framed vide Exh. 4. Alongwith accused No. 1, accused-2 was charge-sheeted with the aid of section 109.

5. The prosecution examined 10 witnesses in support of its case. After examining the evidence brought on record, the learned Additional Sessions Judge held the

accused No. 1 guilty of the offence punishable under sections 302 and 452 of I.P.Code and imposed sentence as stated above. The accused No. 2 came to be acquitted. Being aggrieved by the judgment and order of conviction and sentence, this appeal has been filed by the accused No. 1.

6. The learned Counsel for the appellant took us through the entire evidence brought on record. The points urged by the learned Counsel for the appellant are that there is considerable delay in lodging FIR. It seems to have been lodged after due deliberation. There is serious infirmity in the evidence of P.W. 1 Ramu about time of reaching to Police Station, scribing of FIR and preparing a typed copy. The evidence of other witnesses on this point makes prosecution case inconsistent. There being no explanation of delay in lodging FIR, the learned trial Court should have given benefit of doubt to the appellant. Sequence of events narrated by the eyewitnesses makes the prosecution case improbable. The story of deceased lodging report on 4/6/2002 at 10 am is not free from doubt. Serious infirmity has crept in about description of the weapon. This should have made learned trial Court to disbelieve the prosecution case. Other corroborative evidence in the form of seizer of clothes from the person of deceased and accused, seizure of weapon is also not free from doubt. Recovery of weapon u/s 27 of the Act has not at all been proved and as such, it ought not to have been used as corroborative evidence. In a nutshell, it is the contention of the learned Counsel for the appellant that the learned trial Court ought to have disbelieved the prosecution case, in view of the fact that the evidence suffers from serious infirmities.

7. Learned APP relied upon the ocular account of P.W. 1 Ramu and P.W. 2 Shevantibai. According to him, the story narrated by both these eye witnesses is natural and probable and the learned trial Court was right in believing the same. He, therefore, prayed for dismissal of the Appeal.

8. The points arise for our consideration are:

i. Whether the prosecution has succeeded in proving that the accused-1 had committed an offence of house trespass with preparation to assault the deceased ?

ii. Whether accused-1 is guilty of committing murder of the deceased?

iii. Whether any interference is called for in the order of acquittal of accused-2

9. Homicidal death of the deceased Ladka is not disputed. Therefore, brief reference to the evidence on this point will suffice the purpose. After registration of the offence, PW-10 API Nikam visited the spot in the presence of panchas he held inquest over the dead body. Spot panchanama Exh. 29 was drawn and the dead body was dispatched to the Primary Health Centre at Tarapur for postmortem examination. On the same day in between 4 pm. to 5 p.m. autopsy was conducted by PW-7 Dr. Himgire and following ante mortem injuries were noticed by him :

1. Amputation of neck from base of skull from back side.

-Extent of the above amputation:

1) From 3 cm below external occipital protuberance to downwards forwards towards base of neck anteriorly.

-Edges : Edges are sharp

-Length : It is 39 cm. in length

-Depth : Depth of wound is such that its amputates whole of spinal cord carotid arteries of both sides and vertebrol column."

PW-7 Dr. Himgire opined that the said injuries were sufficient in the ordinary course of nature to cause death.

10. Before adverting to the prosecution evidence on the actual incident of assault, a brief reference to the evidence on the point of genesis of the incident is necessary. PW-1 Ramu, PW-2 Shevanti and PW-3 Yashodi consistently deposed about the deceased having applied to the government agency for financial assistance to purchase a bullock cart. However, at the time of taking actual delivery, the deceased had gone to work as labourer at the brick-kiln. Therefore, accused-2, being brother of the deceased, completed the formalities and also deposited requisite amount. He thus got the delivery of the bullock cart. After the deceased returned from the work, the accused-2 handed over possession of the bullock cart to the former. Few days prior to the incident, accused-2 needed bullock cart for a short period. The deceased refused to oblige. For this reason, the accused-2 was annoyed and picked up quarrel one day prior to the incident i.e. 3.6.2002 with the deceased. In the quarrel between accused-2 and the deceased, the accused-1 intervened and assaulted the deceased, PW-3 Yashodi and the daughter of the deceased. On the next day, i.e. the day of incident, the deceased went to Police Station and lodged a complaint. All the three witnesses consistently narrated the above events. There is no denial to the fact that there was dispute between the deceased and accused 2 on the point of use of bullock cart.

11. PW-4 Madhukar, Police Patil of the village had received memo from the Police Station Bhoisar stating that accused-1 and accused-2 be kept present in the Police Station on 5.6.2006. PW-11 Police Constable-Mohan was examined to prove the entry in the N.C. Register at serial No. 48283. This entry is marked at Exh. 51. Thus, a good deal of evidence was adduced by the prosecution to prove that on earlier day of the incident, accused-1 and accused-2 had quarreled with the deceased and this has made deceased to lodge the report in the Police Station.

12. Apart from the proof of motive, there is overwhelming evidence in the form of eye witness account to prove prosecution case against accused-1. Incident occurred in the house of PW-1 Ramu at about 10 p.m. The prosecution case that

the deceased had gone to the house of PW-Ramu and was sitting with PW-Ramu and his family members, appears natural. There is a consistent evidence of PW-1 Ramu and PW-2 Shevanti that the accused had entered the house armed with sickle. They saw the accused-1 giving blow of sickle on the neck of the deceased. Their evidence further shows that the deceased fell down and there was pool of blood. PW-3 Yashodi, the wife of the deceased heard screams and got up from the bed. Although, she deposed that she saw the accused-1 running away with the weapon in his hands, this part of her testimony appears doubtful. However, the eye witness account rendered by PW-1 Ramu and PW-2 Shevanti is wholly reliable and the learned Additional Sessions Judge was right in accepting the same.

13. Both these witnesses deposed about going to PW-8 Govind Kamadi. This has corroborated by none other than PW-8 Govind Kamadi. According to this witness, PW-1 Ramu had come to him on that night and narrated the incident. Then in a six seater Rickshaw, he accompanied PW-1 Ramu to Bhoisar Police Station. The first information report Exh. 12 shows that the offence was registered on 5.6.2002 at about 5 a.m.

14. Dr. Choudhari, learned Counsel for the appellant accused has pointed out from the evidence of PW-1 Ramu, PW-2 Shevanti and PW-8 Govind Kamadi that their evidence on the point of they proceeding to Police Station is at variance. He is correct in contending that evidence PW-1 Ramu and PW-2 Shavanti points out their visit to the Police Station on the next morning. Whereas, it is in the evidence of PW-8 Govind that on the same night they proceeded to Police Station in a six seater Rickshaw. This infirmity, according to us does not go to the root of the matter. To begin with, the house of PW-8 Govind is at some distance from the place of occurrence. The Police Station Bhoisar is about 15 to 16 kilometers from the said village. It is thus natural that substantial time must have been consumed by the witnesses in visiting the place of residence of PW-8 Govind. This must have been followed by the witnesses, narrating the incident to him and thereafter they deciding to go to the Police Station. Finding a conveyance at such an odd hours was again a difficult task. It is pertinent to note that offence was registered at 5 a.m. This is not a time of reaching of the witnesses to the Bhoisar Police Station but it is the time of registration of the offence. That means, well before 5 a.m. the witnesses had reached there. The sequence of the events would therefore, eliminate the possibility of the witnesses deliberating and falsely naming the accused.

15. The next point urged by Dr. Choudhari, learned Counsel for the appellant is about infirmity crept-in in the evidence of PW-1 Ramu about the manner of writing of FIR. In cross-examination PW-1 Ramu admitted that it was hand written and on that he put his thumb impression. The fir Exh. 12 before the Court is a typed document. It is pertinent to note that PW-1 Ramu is a rustic villager. He might not been able to recollect as to whether his complaint was typed or was hand written. In our considered view, such an infirmity has to be

ignored when there exists a cogent and consistent evidence in the form of eye witness account.

16. Dr. Choudhari, learned counsel for the defence, then invited our attention to the last portion of the FIR at Exh. 12, wherein there is a mention of promulgation of the prohibitory order by the District Magistrate and also reference to the provisions of the Bombay Police Act. Certainly, this could not have been stated by PW-1 Ramu. Admittedly, such reference never comes from the mouth of common person. This is an obvious flaw committed by the Police Station Officer who scribed the FIR and same cannot be used to dislodge the prosecution case.

17. As regards the weapon of offence whether it was a Koita - scythe or sickle-tila, the witnesses have been cross-examined. According to the learned Counsel for the appellant this is a serious infirmity which goes to the root of the matter. Judged in the light of the attending circumstances, we are not in agreement with him. It may be noted that the incident occurred at 10 p.m. A kerosene lamp was the source of light. Inmates in the house were sitting on the ground. Unexpectedly, the accused-1 entered the house and dealt blow of weapon on the neck of the deceased. The deceased fell down in a pool of blood. This sequence of events would show that witnesses had little time to observe the nature of the instrument. After such a ghastly incident, the witnesses must have been shocked and stunned. In view of this much capital of, the witnesses erring in correctly describing the weapon, cannot be made. In fact the Koita and sickle has wooden handle and curve blade. Difference is in the length of the blade and the degree of curve.

18. The prosecution relied upon the circumstantial evidence in the nature of the discovery of the weapon at the instance of the accused-1. Accused-1 was arrested on 5.6.2002. PW-Kashinath is panch witness who deposed about the accused making disclosure statement vide Exh. 22. After making the disclosure statement, accused led the ponchos and police to the place called Vanai, where his house is situated. He showed haystack which was in the back-yard of the house. From the hay-stack he removed weapon i.e. sickle which is Article 11 before the Court. Alongwith other articles this was sent to the chemical analyst. Exh. 41 is the report of the chemical analyst which reveals detection of human blood of group-A on the weapon. The learned Additional Sessions Judge dealt with this evidence in para 22 of his judgment and has rightly relied upon the same.

19. Considering eye witnesses account of PW-1 Ramu and PW-2 Shevanti, we have no hesitation in coming to the conclusion that the accused-1 has committed offence of house trespass with preparation to cause hurt by entering in the house of the PW-1 Ramu and then gave fatal blow of sickle on the neck of the deceased on the night of 4.6.2002. Evidence of PW-3 Yoshodi, PW-8 Govind has corroborated the testimony of these eye witnesses. Further, the medical evidence, their conduct in promptly lodging of FIR, seizure of weapon, finding of blood group-A on the weapon, lend additional corroboration to the prosecution

case. In this view of the matter, the learned Additional Sessions Judge was right in convicting the accused No. 1 for the offence punishable under sections 452 and 302 of the IPC.

20. Before parting with the judgment, we may make mention of the serious error committed by the learned Additional Sessions Judge in accepting the testimony of PW-9 Chandrakant. It is the prosecution case that Prakash, son of PW-1 Ramu, who is deaf and dumb, had witnessed the incident. To record his statement services of, PW-9 Chandrakant who is a teacher in deaf and dumb school, were availed of, and correctly so. However, without examining Prakash and straightway putting PW-9 Chandrakant in a witness box and then relying upon his testimony by the Additional Sessions Judge he is against the fundamental rule of "exclusion of hearsay evidence". In paras 18, 19 and 21 of his judgment, the learned Additional Sessions Judge extensively dealt with the evidence of PW-9 Chandtakant and he has used his testimony to find corroboration to the prosecution case.

21. Section 119 of the Evidence Act deals with the evidence of dumb witnesses. A deaf and dumb person can be a competent witness. According to this provision, a witness who is unable to speak may give his or her evidence in any other manner. He or she can make such an evidence intelligible. It would be either by writing or by signs and such signs or writing should be made in open Court. It is the Rule of prudence that the Court in order to understand and appreciate the evidence of such witnesses should necessarily seek assistance of an expert so as to safely rely on such evidence. Section 282 of the Cr.P.C. enables the Criminal Court to take services of the interpreter for interpreting any evidence or a statement. Section 4 of the Oaths Act, 1969 provides for oaths or affirmation to be made by witnesses, interpreters and jurors. In the present case, the learned Additional Sessions Judge recorded the evidence of an interpreter without recording the evidence of Prakash who is deaf and dumb. Such evidence is hit by Rule of "exclusion of hear-say evidence. Section 60 of the Evidence Act provides that oral evidence has to be direct. That being so, the learned Additional Sessions Judge has committed an error in making use of the testimony of PW-9 Chandrakant to derive corroboration to the prosecution case. Be that as it may.

22. On a careful consideration of the evidence, we are of the view that the Appeal lacks merit and is liable to be dismissed.

23. Lastly, the learned Counsel for the appellant-accused pointed out that the sentence imposed in default of payment of fine may be reduced considering that the accused is a labourer. For the offence punishable u/s 452 of the IPC, the learned Additional Sessions Judge imposed substantive sentence and directed the appellant to pay fine of Rs. 1000/- and in default sentenced him to suffer R.I. for one year. For the offence punishable u/s 302, the accused was directed to pay fine of Rs. 5000/- and in default to suffer R.I. for two years. We find merit in the submission of the learned Counsel for the appellant-accused and modify the

period of sentence/imprisonment awarded in default of the payment of fine on both the counts. The sentence of R.I. for one year, in default of payment of fine of Rs. 1,000/- and sentence of R.I. for two years, in default of payment of fine of Rs. 5,000/- are substituted by R.I. for 3 months on each count. With this modification, the appeal is dismissed.