
(1995) 06 BOM CK 0040

In the Bombay High Court

Case No : Criminal Appeal No. 591 of 1993

Kashinath Baban Palkar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 09-06-1995

Acts Referred:

Evidence Act, 1872 — Section 3, 59, 61
Penal Code, 1860 (IPC) — Section 201, 302

Citation : (1996) 1 BomCR 33

Hon'ble Judges : Vishnu Sahai, J;G.R. Majithia, J

Bench : Division Bench

Advocate : Razia Sultana, for the Appellant; B.R. Patil, for the Respondent

Final Decision : Allowed

Judgement

Vishnu Sahai, J.—The appellant aggrieved by the judgment and order dated 30-7-1993, passed by the Additional Sessions Judge, Greater Bombay in Sessions Case No. 405 of 1989 convicting and sentencing him to undergo imprisonment of life and to pay a fine of Rs. 1,000/- in default of payment of fine, to further undergo 6 months imprisonment, u/s 302 I.P.C., has come up in appeal before us. Along with the appellant, his real brother Balkrishna Baban Palkar was also tried. The learned Trial Judge convicted him u/s 201 I.P.C. and instead of sentencing him at once directed that he be released u/s 4 of the Probation of Offenders Act, 1958, on his entering into a bond in the sum of Rs. 5,000/- with one surety to appear and receive sentence when called for during the next three years and in the meantime, to keep peace and be of good behaviour. He however, has not chosen to file any appeal.

2. The prosecution case in brief as it emerges from the recitals contained in the F.I.R. lodged by Usman Kutty P.W. 1 and from the statements of two eye witnesses namely Jayshree P.W. 5 and her daughter Jaymala (Jyoti) P.W. 8 runs as follows : The appellant was the landlord of Jayshree P.W. 5. He had damaged her residential premises. He had asked her to vacate the house and take away

her belongings but, she did not accede to his request. The appellant had a feeling that the deceased Anil Ganpat Pandit was supporting Jayshree P.W. 5. Consequently, he bore grudge against Anil. Jayshree's husband had lodged a complaint at Andheri Police Station and pursuant to it, co-accused Balkrishna, brother of the appellant, was arrested.

On 1-12-1988, at about 3.00 p.m. Jayshree returned to her house after doing the job of washing clothes and cleaning utensils in some houses. She found that the appellant was in search of her husband and the deceased Anil Pandit. The appellant saw Anil in the house of Ganpat Pandit and threatened to kill him. He returned to his house and brought a knife. In the meantime, Anil came out of his house for washing his mouth. The appellant caught hold of the collar of his shirt by one hand and from the other hand, in which he was holding a knife, gave knife blows to Anil. He is also alleged to have dragged him towards the latrine. The deceased Anil shouted for Balkrishna, the brother of appellant. Balkrishna came and followed Anil and appellant. Thereafter, Jaymala saw Balkrishna returning followed by appellant. While returning, the appellant showed her a weapon and brandishing it towards her told her "in the evening, it would be turn of her husband". Thereafter, Jaymala saw Anil lying outside Usman Kutty's P.W. "1"s shop in a pool of blood.

3. At about 4.30 p.m. Usman Kutty P.W. 1 noticed in front of his grocery shop, situated at Jai Bajrang Chawl, Mograpada, Andheri (East), that Anil was lying in a pool of blood, with stab injuries on his person. Accordingly, he immediately informed one Badshah Baba about the incident. Both he and Badshah Baba tried to remove Anil to hospital for treatment but noticed that he was already dead. Thereupon, Usman Kutty informed Police Station Andheri (East). After sometime, Police from Police Station, Andheri rushed on the spot. Police called one Dr. Suryanath Dubey P.W. 9 who pronounced Anil to be dead. The Police took charge of the dead body of Anil under a panchanama.

4. P.S.I. Paranjape recorded statement of Usman Kutty P.W. 1 and this statement has been treated by the prosecution as F.I.R. On its basis, the same day (1-12-1988) at 5.25 p.m. C.R. 577 of 1988 was registered at Andheri Police Station.

5. Practically, all the investigation in the instant case was done by P.I. Rajaram Singh P.W. 12. He performed inquest panchanama of the dead body. He prepared panchanama of the place of offence Exh. 19. He then recorded statements of various witnesses, including P.W. 5 Jayshree and P.W. 8 Jaymala. On 2-12-1988, the appellant was arrested. He made a confessional statement, u/s 27 of the Evidence Act, to the effect that he could get the knife used for committing murder recovered. On that statement P.W. 12 Rajaram Singh along with public panchas and the appellant left in a jeep and from the bushes near a Tad tree, situated near platform number 4 of Jogeshwari Railway Station a knife was recovered at the pointing out of the appellant. It is alleged that on 10-12-1988, the appellant made a statement that he could get the blood stained clothes

which he was wearing at the time of the incident recovered. In the presence of panchas, and police personnel, one pink shirt and grey trousers, both having blood stains, were recovered, on the pointing out of the appellant from Patkar Chawl, Mograpada West, Andheri (East). The articles seized during investigation, including clothes of the appellant and the deceased, were sent to the Chemical Analyst. Vide his report, Exhibit 41, the Chemical Analyst found human blood on them. The site plan (Exhibit 16) in the instant case, was prepared on 30-3-1993.

After completing the investigation, P.I. Rajaram Singh filed the charge sheet in the Court of the Metropolitan Magistrate, 10th Court, Andheri. In the usual course, the case was committed to the Court of Sessions.

6. Going backwards, the autopsy on the dead body of the deceased was conducted on 2-12-1988 between 1.10 p.m. and 2.30 p.m. by P.W. 11 Dr. Rajaram Marathe. On the dead body of the deceased, the doctor found the following antemortem injuries :-

On internal examination, the doctor found an hole of the dimensions of 3.5 c.m. x 1 c.m. in the 4th left intercostal space near nipple line. He also found pericardium, haemothorax and heart ruptured.

In the opinion of Dr. Marathe, the deceased died on account of shock and haemorrhage resulting from rupture of heart. In the trial Court, a charge u/s 302 I.P.C. read with 34 I.P.C. was framed against the appellant to which he pleaded not guilty and claimed to be tried. During the trial, the prosecution adduced evidence of as many as 12 witnesses. It also tendered voluminous documentary evidence. Out of these, twelve witnesses, two namely Jayshree P.W. 5 and Jaymala P.W. 8 was examined as the eye witnesses. In defence, no witness was examined by the appellant. The learned trial Judge believed the evidence adduced by the prosecution and convicted and sentenced the appellant, as well as co-accused Balkrishna, in the manner stated above.

7. We have heard Ms. Razia Sultana for appellant at considerable length. We cannot refrain from observing that she has argued the matter with great thoroughness, competence and tenacity. We have also heard Mr. Patil, Additional Public Prosecutor, who has argued the matter with a rare combination of tenacity and fairness. We are greatly indebted for the assistance, the learned Counsel on either sides, gave us.

The learned Counsel for the appellant strenuously contended that evidence of two eye witnesses examined by the prosecution namely Jayshree P.W. 5 and Jaymala P.W. 8 does not inspire confidence and the same should be rejected by us. She also contended that the incident took place at some other place and the dead body was subsequently shifted to front of Usman's grocery shop because eye witnesses for reasons not far to see were only available on that spot (near Usman Kutty's grocery shop). She also urged that evidence of recovery of blood stained knife and that of blood-stained clothes belonging to the appellant, ostensibly made at the pointing of the appellant, does not inspire confidence.

8. We have given our anxious consideration to the contentions raised by Ms. Razia Sultana, the learned Counsel for the appellant, and we find considerable merit in them.

9. We would first like to deal with the submission that the incident did not actually take place, at the place alleged by the prosecution, but, at some other place. Ms. Sultana invited our attention to the autopsy report of the deceased emphasising that its perusal showed that his heart, haemothorax and pericardium were punctured. She contended, and with ample justification in our view, that on account of rupture of heart, there must have been instant gushing of blood from body of the deceased. She invited our attention to the averments contained in the statement of Jaymala P.W. 5 and in the complaint lodged by Usman Kutty P.W. 1 to the effect that the dead body of the deceased was lying in a pool of blood. She contended that the circumstance that not a drop of blood has been recovered by the Investigating Officer P.I. Rajaram Singh falsifies both the place of incident and the claim of the two eye witnesses of having witnessed the incident. In our view, there is considerable substance in the aforesaid contention.

In the instant case, not a drop of blood has been recovered, by the Investigating Officer. In the spot panchanama Exh. 19, there is no mention about any blood. P.W. 12 P.I. Rajaram Singh, the Investigating Officer, during the course of his cross-examination in the Trial Court, fairly admitted that "I agree that I did not notice any trail of blood from the spot near latrine till the place where injured victim was lying. The place near the latrine and the place where injured was found is a zig-zag lane. I agree that I did not notice any blood near the place where Anil Pandit was residing so also I did not notice any stains of blood between the place where Anil Pandit was residing and near the latrine". In our judgment, had the incident taken place on the place and in the manner, alleged by the prosecution, there should have been blood near the latrine trail of blood between the latrine and Usman Kutty's shop (the distance is about 184 feet); and in front of Usman Kutty's grocery shop, where the dead body of the deceased was found lying. The complete absence of blood at any of the aforesaid places creates grave doubts in our minds about the genuineness of the prosecution claim pertaining to the place of the incident and truthfulness of the prosecution story.

10. In our judgment, in a criminal case, the failure of the prosecution to prove the place of the incident knocks out the very bottom of the prosecution case. Once the Court feels convinced that the incident did not take place at the purported place of the incident, the evidence of the witnesses who depose that the incident did take place there, is obviously rendered untruthful and unreliable. In our view, in some cases, and the present case is certainly one of them, failure to prove the place of the incident, by itself can be a sufficient ground, to throw out the prosecution case.

11. It is in the background of the infirmity detailed in paragraph 10, that we have

to adjudicate upon the second contention of Ms. Razia Sultana namely that the statements of both the eye witnesses Jayshree, P.W. 5 and Jaymala P.W. 8, mother and daughter, interse, do not inspire confidence and hence, should be rejected by us. In the first place, we should keep in mind that both these witnesses are inimical witnesses and hence their testimony should only be accepted after it has been scrutinised with caution and has withstood the test of scrutiny. P.W. 5 Jayshree admitted in her statement in the trial Court that pursuant to the complaint, which her husband Satywan Mardelkar P.W. 6 had lodged, at Andheri Police Station, the real brother of the appellant, co-accused Balkrishna was arrested. She also admitted that the appellant wanted her to vacate the premises which were in her occupation. On account of the aforesaid facts, it would be very reasonable, in our view, to infer that she and her daughter Jaymala (Jyoti) P.W. 8 were acutely inimical to the appellant. In our judgment, it would be extremely hazardous to sustain the conviction of the appellant on their testimony. For the reasons mentioned in paragraph 10, we are not prepared to believe these witnesses when they depose that the incident took place near the latrine in Bholaychi Chawl and the deceased was dragged from there to the grocery shop of Usman Kutty P.W. 1, which was situated at a distance of about 184 feet from the said latrine.

12. If the place of incident is falsified then, it would follow as a logical corollary that the claim of these eye-witnesses that they saw the incident because they reside at the place of the incident, is false.

We may also mention that P.W. 5 Jayshree in her statement has not stated that her daughter Jaymala P.W. 8 saw the incident. Hence, there may be truth in the suggestion given by the defence counsel in cross-examination to Jaymala that when the incident took place, she was attending her tuition classes. It is significant to point out that Jayshree admitted in her statement in the Trial Court that Jaymala (Jyoti) used to attend tuition classes between 4.00 p.m. to 5.00 p.m. In the aforesaid state of evidence, it would not be safe to believe Jaymala's statement to the effect that her tuition classes took place between 3.00 p.m. to 4.00 p.m. and that on the date of the incident, she did not attend them.

13. It is amazing that although the incidence took place in broad daylight and around the place of the incidence, a large number of people were living, as it transpires, from the evidence of both the eye-witnesses, no independent evidence is forthcoming in support of the prosecution case. P.W. 12 P.I. Rajaram Singh in his statement admitted that one Shahjan Saitu Mohammed did witness the incident but, he could not be traced out inspite of his best efforts. We take this with a pinch of salt. We find it rather queer and amusing that in this case, he is not the only witness who could not be traced out. Similar has been the fate of both the panchas of the recovery of knife made at the pointing out of the appellant, and also of the two men of the Railway Protection Force who are said to have been present at the time of the recovery of the aforesaid knife. In our judgment, had the incident really occurred, at the place alleged by the

prosecution, there should have been no dearth of independent witnesses and their complete absence creates grave doubts in our minds regarding the genuineness of the prosecution story.

14. In our judgment, examination of independent witnesses would have lent considerable reassurance to the ocular account of the incident furnished by Jayshree P.W. 5 and Jyoti P.W. 8. In the circumstances of this case, prudence demands that the conviction of the appellant should not be sustained in the absence of independent evidence. We may mention that the desire of the courts to seek corroboration by independent evidence is only a rule of prudence and not an inflexible requirement of law, having universal application in all cases. It would all depend on the facts of each case. We should not be understood to mean that unless there is independent evidence, no conviction can be recorded or sustained in a criminal case.

15. This leaves us with the evidence pertaining to the recovery of a blood-stained knife and blood-stained clothes at the pointing out of the appellant.

16. Taking up the recovery of blood-stained knife first, we find in the first place that it has been effected from an open place namely bushes near a Tad tree, adjoining platform number 4 of Jogeshwari Railway Station. Such a place, in our view, was accessible to all and sundry and the Apex Court has repeatedly held that no credence can be attached to recovery which has taken place from an open place (See Trimbak Vs. The State of Madhya Pradesh,). We also find that although there were two panchas of the recovery and two persons of the Railway Protection Force were also present at the time of the recovery, neither any of the panchas nor any of the persons of the Railway Protection Force have been examined by the prosecution. We take with a pinch of salt the statement of P.I. Rajaram Singh to the effect that inspite of his best efforts, he could not trace them out. In the light of the flaws mentioned above, we find it extremely unsafe to accept the evidence of recovery of blood-stained knife at the pointing out of the appellant, on the solitary statement of P.I. Rajaram Singh.

17. The evidence pertaining to the recovery of blood-stained shirt and pant at the pointing out of the appellant fares hardly better. P.W. 4 Mahesh Kumbhar who is the solitary public witness in respect of recovery in his cross-examination, first admitted in para 7 that "accused did not say anything in our presence". Thereafter, he took a somersault and stated that the accused (appellant) had made a statement to the effect that he could get the clothes recovered. We are not prepared to believe the evidence of such a witness who on a crucial point says one thing in one breath and something diametrically opposite in the next in a criminal case; more so in a case u/s 302 I.P.C., where the minimum sentence is of imprisonment for life. Apart from Mahesh Kumbhar, the only other witness who deposed about the recovery is P.I. Rajaram Singh and in our view, on his solitary statement, it would not be safe to accept this piece of evidence.

18. We may also mention that the time-lag of 8 days between recovery of knife

and blood-stained clothes at the pointing out of the appellant, clearly suggests that the recovery was not in furtherance of a voluntary disclosure made by the appellant to the police, but instead was the result of duress and third degree methods of the police. Had the recovery of blood-stained clothes been in consequence of a voluntary disclosure made by the appellant, the same in our judgment would have been in close proximity of the recovery of knife.

We wish to emphasise that the recoveries which are not the result of voluntary disclosure made by the accused but, are a consequence of the duress and third degree methods of the police, deserve no credence and reliance in law. The recovery evidence would only be an incriminating circumstance if the Court is satisfied beyond any shadow of doubt that the recovery has been effected voluntarily at the instance of the accused, and is not the result of duress and third degree methods of the police. This, regrettably does not appear to be the case here.

19. We may also mention that a perusal of paragraph 22 of the judgment of the learned trial Judge, shows that the Judge himself was not much convinced about this recovery evidence. In the said paragraph, the learned trial Judge has observed :

"This part of the evidence therefore, cannot be totally discarded but has a corroborative and probative value in support of the oral testimony of the eye witnesses".

As we have mentioned earlier, there can be no question of recovery evidence corroborating the ocular account because the latter find to be incredible, improbable and untrustworthy in the instant case.

20. The irresistible inference from the aforesaid discussion, in our judgment is that, the prosecution has lamentably failed to prove its case beyond reasonable doubt. The result is that not only would the appellant have to be acquitted but, in exercise of our inherent powers u/s 482 Cr. P.C. we deem it expedient in the interests of justice to acquit co-accused Balkrishna also, even though he has not chosen to file an appeal against his conviction and sentence in this Court. In our judgment, in the interests of justice, this Court has ample powers to do so, u/s 482 Cr. P.C. In our judgment, the present case certainly warrants the exercise of that power by us.

21. In the result this appeal is allowed. The appellant is acquitted u/s 302 I.P.C. and his sentence of life imprisonment and a fine of Rs. 1,000/- awarded thereunder, is set aside. In case he has paid the fine, the same shall be refunded to him. Co-accused Balkrishna is also acquitted of the offence u/s 201 I.P.C. and his sentence on that count is set aside.

The appellant Kashinath Baban Palkar is in jail. He shall be released forthwith unless wanted in some other case. Office shall communicate the operative part of our order forthwith, to the Superintendent of the Jail, in which the appellant is

confined.