

(1999) 05 BOM CK 0019

In the Bombay High Court

Case No : Criminal Appeal No. 328 of 1995

Kashinath Vishnu Jagtap and another

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 06-05-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 377(1), 378(1)

Evidence Act, 1872 — Section 134

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

Citation : (1999) 05 BOM CK 0019

Hon'ble Judges : Vishnu Sahai, J;Ranjana Desai, J

Bench : Division Bench

Advocate : Pramod Patil holding for V. M. Thorat, for the Appellant; I. S. Thakur, Additional Public Prosecutor For State, for the Respondent

Judgement

Vishnu Sahai, J.—Through this appeal, the appellants challenge the Judgment and Order dated 30-6-1995 passed by the IIIrd Additional Sessions Judge, Solapur, in Sessions Case No. 45 of 1995, convicting and sentencing them to undergo imprisonment for life for the offence u/s 302 read with 34, Indian Penal Code.

2. In short, the prosecution case runs as under :-

The appellants, PW6 Balbhim and the deceased Ashok were real brothers. At the time of the incident, all of them, with their parents, were residing in the adjacent rooms in their residential house bearing Gram Panchayat No. 185, within the limits of village Begumpur, Taluka Mohol, District Solapur. 7 acres of land in the name of the father of the appellants, had been orally partitioned between the appellants, Balbhim and Ashok and each of them were cultivating their 1/4th share separately. No partition however, was effected in respect of 7/12 extract land. Two days prior to the incident, Ashok had cut off a babool tree in his share of land for preparing agricultural implements and had brought some pieces of wood in the house. The appellants and Balbhim asked him as to why he had cut

the said babool tree without their permission. The appellant-Kashinath had threatened to kill Ashok. However, the said dispute was settled by the ladies of the family.

On 25-10-1994, sometimes between 10 a.m. to 11 a.m. after returning seeds to one Teli, Ashok went towards the backyard of the house. At that time, a quarrel between him, appellants and Balbhim ensued. The appellants felled Ashok on the ground and Balbhim went to call police Patil. Thereafter, the appellants tied the hands and legs of Ashok. Ashok's wife Mangal P.W.5, the first informant requested them not to do so. In the meantime, Ameer Patel. PW4 entered in the house and also asked the appellants not to do so on which the appellants told him that he should mind his own business. Hence, he went away. Thereafter, the appellants took Ashok in the room of the appellant-Kashinath and did not allow Mangal to enter the said room. Then, the appellant-Gangadhar caught hold of Ashok and the appellant-Kashinath inflicted four axe blows on his neck and face. The appellants thereafter ran away. As a consequence of the assault, launched by Kashinath, blood smeared from the injuries of Ashok and not only fell on the ground but, also on the walls of the room.

Ashok died on the spot.

2A. For an hour, Mangal was weeping and crying at the door of her house but, no "Good Samaritan" came forward. This was understandable for the only persons inside the house were family members and for them it was Hobson's choice whether or not to lodge an FIR in respect of an incident, in which the deceased and accused real brothers, inter se were involved.

An hour thereafter, Mangal went alone to S.T. stand, Begumpur, waited for about 1/2 hour there; and thereafter proceeded to police station, Mohol.

3. The FIR of the incident was lodged by Mangal same day at 3 p.m. at police station, Mohol. On its basis API Ravindra Rasal PW9 registered C.R. No. 176 of 1994.

4. The investigation was conducted in the usual manner by API Ravindera Rasal PW9. Within 1/2 hour he reached the place of the incident; sent a constable to call a photographer; and when the photographer PWI Rajendra Jathar PWI came, asked him to take the photographs of the corpse of the deceased. Thereafter, he prepared the panchnama of the scene of the offence and performed the inquest on the corpse of the deceased. From the place of the incident, he recovered a rope with which the hands and legs of the deceased were tied and the blood-stained axe with which the deceased had been assaulted. In the meantime, some policemen, whom he had sent to apprehend the appellants, brought the appellants before him. He saw blood on their clothes and recovered their clothes under a panchnama in the presence of public panch Shahjahan Patel PW7. From the person of the appellant-Kashinath, he recovered a shirt and white trouser and from that of appellant-Gangadhar, a white coloured shirt and white trouser. He sent the four clothes to the Chemical Analyst who found on them blood of

"AB" group, the blood-group of the deceased. During the course of interrogation, next day (26-10-1994) he recorded the statements of some relations of the deceased. API Rasal interrogated some witnesses, including Ameer Patel PW4 and Balbhim PW6 the same day. Next day, he interrogated some other witnesses. Finally, after completing the investigation, on 3-12-1994, API Rajendra Rasal submitted the charge-sheet against the appellants.

5. Going backwards, the autopsy on the corpse of the deceased Ashok was conducted on 26-10-1994 by Dr. Dhanpal Ayanapure PW2 was found on it, the following ante-mortem injuries :-

- "1. Ligature mark on Rt. Leg 10 cm x 1 cm laterally 9 cm above lateral malleolus;
2. Ligature mark on left leg 10 cm x 1 cm laterally 9 cm above lateral malleolus;
3. Ligature mark on forearm 5 cm x 1 cm, 6 cm above wrist jt. dorsally;
4. Ligature mark on left forearm 5 cm x 1 cm, 6 cm above wrist jt dorsally;
5. Incised wound 17 cm x 3 cm x 5 cm starting from left auxiliary area, parietal area, trigus (Lt. midpinna, downward, obliquely on it) post triangle of the neck, bones muscles, great vessels are cut, gaping present, fracture of auxilla 2.
6. Incised wound on neck on left side on submandibular triangle area, 9 cm x 3 cm x 5 cm great vessels, larynx cut, fracture of mandible, gaping present.
7. Incised wound on left side of neck on ant and post triangle, oblique in direction at larynx level 8 cm x 3 cm x vertebrae deep, muscles great vessels and vertebrae are cut gaping present;
8. Incised wound on triangle of neck on left side, below the level of larynx, transeverse in direction 9 cm x 1 cm x 2 cm muscles and great vessels are cut, gaping present."

On internal examination Dr. Ayanapure found spinal cord cut through and through at C-3 and C-4 level.

In the opinion of Dr. Ayanapure, the deceased died on account of the injuries to great vessels of neck and spinal cord. He also opined that the ante-mortem injuries suffered by the deceased were possible by the rope and an axe, shown to him and were sufficient in the ordinary course of nature to cause death.

6. The case was committed to the Court of Sessions where the appellants were charged for an offence punishable u/s 302 read with 34, Indian Penal Code. They pleaded not guilty to the charge and claimed to be tried. Their defence was that of denial. They claimed that it was Balbhim PW6 who was responsible for the murder of the deceased. During the trial, in all, the prosecution examined nine witnesses. Out of them, the informant Mangal (the wife of the deceased) the solitary eye-witness of the entire incident furnished complete ocular account of the incident. Ocular account in respect of a part of the incident was furnished by Ameer Patel PW4. In defence, no witness was examined. The learned trial Judge

believed the evidence adduced by the prosecution and convicted and sentenced the appellants in the manner stated above. Hence, this appeal.

7. When this appeal was called out yesterday, Mr. Pramod Patil holding for Mr. V. M. Thorat learned counsel for the appellants, prayed for adjournment on the pretext that the clients had taken away the papers but, we rejected his request on the grounds that the appeal was on the board for a fairly long time; that Vakalatnama of Mr. V. M. Thorat was on record; and the appellants were in jail, since 25-10-1994 i.e. over 4 1/2 years and hence, it was imperative to decide their appeal forthwith. We directed Mr. Patil to proceed with the matter. He took a third set of the Paper Book and argued the appeal not only yesterday but, also today. We have heard Mr. Pramod Patil for the appellants and Mr. I. S. Thakur, Additional Public Prosecutor for the State of Maharashtra-Respondent. We have also perused the depositions of the prosecution witnesses; the material Exhibits tendered and proved by the prosecution; the statements of the appellants-recorded u/s 313, Criminal Procedure Code; and the impugned Judgment. After the utmost circumspection, we are constrained to observe that we do not find any merit in this appeal.

8. The main plank of the prosecution evidence on which the conviction of the appellants rests is the ocular account furnished by Mangal PW5, the wife of the deceased. It is on the basis of the averments contained in her examination-in-chief that we have set out the prosecution story in para 2 and hence, we do not intend reiterating it. In short, she stated that a day prior to the incident, her husband Ashok had cut a babool tree which was taken offence to by the appellants and Balbhim. A quarrel between them on one hand and Ashok on the other had ensued which was pacified by the female members of the family. On the following day, at about 10 to 11 a.m. while Ashok was returning from handing over the seeds to Teli and was in his house, a quarrel between him and the appellants, connected with the incident of cutting of babool tree which was cut the previous day, ensued between him and the appellants. Balbhim PW6 who was present, went to call the police Patil. During the course of the quarrel, the appellants tied the hands and legs of Ashok with a rope and spurned the appeal of Mangal not to do so. Thereafter, they took Ashok inside the room of appellant-Kashinath where appellant-Gangadhar caught hold of Ashok and appellant-Kashinath inflicted four axe blows on his neck and face. Thereafter, the appellants ran away. Evidence of Mangal further shows that she waited for an hour and when none from the family came to her help, she proceeded for police station, Mohol and lodged her FIR there.

9. We have gone through the evidence of Mangal and we are implicitly satisfied that it inspires confidence.

10. The manner of assault furnished by Mangal PW5 is corroborated by the medical evidence. Her statement that the appellants tied the hands and legs of deceased Ashok with a rope is corroborated by the circumstance that the Autopsy Surgeon Dr. Ayanapure PW2 found four ligature marks, two on legs and

two on the arms on the corpse of the deceased. Her statement that the appellant-Kashinath inflicted four axe blows on the neck and face of the deceased is corroborated by one incised wound on the face of the deceased and three incised wounds on the neck of the deceased.

11. Apart from the medical examination, there are a large number of other circumstances which lend assurance to the evidence of Mangal. The place of the incident namely inside the room of the appellant-Kashinath given out by Mangal is established by the recovery of blood, rope and blood-stained axe from the said room.

The motive for the incident which we have referred to earlier also lends assurance to Mangal's ocular testimony and lest the bulk of our Judgment swells, we are not adverting to it. Finally. Mangal's claim that the appellants tied the hands and legs of Ashok is corroborated by the evidence of Ameer Patel PW4 who candidly stated that when he entered inside the house, he saw the appellants tying the hands and legs of Ashok.

It is pertinent to point out that Ameer Patel PW4 is a wholly independent witness who had no rancour or axe to grind against the appellants, and in our view, unless he would have seen the appellants tying the hands and legs of the deceased, he would not have falsely deposed about it.

12. It is true that with respect to the entire incident, Mangal is the solitary eye-witness of the incident but, the time-honoured rule of appreciation of evidence is that evidence has to be weighed and not counted and it is this rule which is incorporated in section 134 of the Indian Evidence Act which reads thus :-

"No particular number of witnesses shall in any case, be required for the proof of any fact." We have weighed Mangal's statement on the crucible of truth and we find it to be wholly truthful.

In our view, it by itself is both a sufficient and safe basis for sustaining the conviction of the appellants. The assurance which is forthcoming to it is a bonus.

13. It is pertinent to point out that the FIR of the incident was lodged within two hours of the incident i.e. at 3 p.m. on the date of the incident and in it the appellants have been nominated and the broad features of the prosecution case spelt out, by the informant Mangal.

Criminal courts attach great importance to the prompt lodging of an FIR because, the same substantially eliminates chances of embellishments creeping in the prosecution story and that of false nomination of the accused therein.

The reason why courts look upon a belated FIR with a needle of suspicion is because, once there is a time-lag then the informant's imagination and instinct of vendetta, more than often, starts running riot and friendly advice from self-professed well-wishers starts pouring in. The same results in false nomination of accused persons in the FIR.

In our view, this prompt FIR lends a seal of assurance to the veracity of Mangal PW5 and speaks volumes about the bona fides of the prosecution case.

14. Finally, a very incriminating circumstance against the appellants is that pursuant to their arrest on the date of the incident, the Investigating Officer Rajendra Rasal PW9 in the presence of public panch Shajahan Patel PW7 recovered blood-stained shirt and white trouser which each of the appellants were putting on under a panchanama. The said clothes were sent to the Chemical Analyst who found on them blood of "AB" group, the blood group of the deceased.

We have gone through the evidence of API Rajendra Rasal and Shahjahan Patel and we find that although, they were cross-examined but, nothing could be extracted therefrom which would shatter the aforesaid recovery. Both these witnesses are wholly independent witnesses who had no axe to grind against the appellants and in our view, unless the blood stained clothes were recovered from the appellants, they would not have falsely stated about their recovery.

In our view, this is a very clinching circumstance which lends a seal of certainty to the involvement of the appellants in the crime.

15. For the said reasons, we feel that the learned trial Judge was wholly justified in convicting the appellants for the offence punishable u/s 302 read with 34, Indian Penal Code. There can be no manner of doubt that the appellants acted in pursuance of their common intention to kill the deceased. This is demonstrated by the circumstances that they tied the hands and legs of the deceased with a rope; thereafter took him inside the appellant- Kashinath's room; and thereafter while appellant-Gangadhar caught him, the appellant-Kashinath inflicted four axe blows on his neck and face of the deceased, which were not only accompanied by massive internal damage but, rightly in the opinion of the Autopsy Surgeon, were capable of causing death in the ordinary course of nature. Coming to the question of sentence, we find that the appellants have been awarded lesser of the two sentences contained in section 302, Indian Penal Code, namely life imprisonment. Hence, there can be no question of reducing their sentence.

In fact, the appellant-Kashinath who inflicted four axe blows on the deceased (three on the neck and one on face) should thank his stars that he was not awarded death sentence by the trial Court and for the inertia shown by the State of Maharashtra in not preferring an appeal for enhancement of sentence u/s 377(1), Criminal Procedure Code. And when the State of Maharashtra is sleeping, we feel it would be improper and grossly unfair on our part, nearly 4 1/2 years after the incident, to issue a suo motu notice for enhancement of sentence to the said appellant.

16. Of late, we find the State crying hoarse that law Courts are unduly lenient in the matter of sentence. Before raising such a bogey, the State should do some soul-searching and ensure that in cases where enhancement of sentence is imperative an appeal is preferred by it u/s 377(1), Criminal Procedure Code. The

grievance of the State not only is that Courts are unduly lenient in the matter of sentence but, also they are unduly liberal in the matter of acquittal. Here again, our traumatic experience, more than often is that in acquittals recorded from the Sessions Court, which appear to be per se erroneous, the State Government does not prefer an appeal against acquittal u/s 378(1), Criminal Procedure Code.

17. We should not be understood to mean that we are condoning justifying undue leniency in the matter of sentence or unreasonable acquittals. The truth is opposite. But, we are expressing our indignation and shock that in the event of the former, an appeal for enhancement of sentence is not filed and in that of the latter, an appeal against acquittal is not preferred. To us, it appears that often the State is shedding crocodile tears.

18. We would be failing in our fairness, if we do not refer to the main-fold submissions canvassed by Mr. Pramod Patil learned counsel for the appellants who (at our behest) has argued this appeal and with great tenacity.

Mr. Patil firstly urged that it would be hazardous to sustain the conviction on the solitary testimony of Mangal, the wife of the deceased. We regret that we are not prepared to accede to it. If Mangal was the wife of the deceased, she was also the real sister-in-law of the appellants and we are not prepared to believe that she would have foisted a false accusation of murder on her brother's-in-law.

Mr. Patil secondly urged that the parents of the deceased and appellants would have been dispassionate witnesses in the sense that if the deceased was their son, so were the appellants and their non-examination is fatal to the prosecution case. The submission is misconceived for there is no evidence to show that they were present inside the house when the incident took place. Even assuming they were present, the said submission only appears to be attractive on the first blush. On analysing it deeper, we find it oblivious to the grim realities of life. Had they been examined, their predicament would have been having lost a son, should they lose two more (appellants) by giving evidence against them. In all probability, they would have turned hostile. In our view, the prosecution, in the said circumstances, cannot be blamed for not examining them.

Thirdly, Mr. Patil urged that at any rate, the appellant-Gangadhar who has only been assigned the role of catching hold deserves benefit of doubt because, since a quarrel between him and the deceased had taken place, a day earlier, the possibility of his false implication cannot be excluded. Again, we find the submission to be untenable for two reasons :-

(a) the informant Mangal who was the sister-in-law of the said appellant, would not have falsely assigned the said role to him; and

(b) catching hold is not the only role assigned to him by Mangal. She has also assigned the role of tying hands and legs of the deceased to him and the opinion of the Autopsy Surgeon is that the ligature marks on the corpse were possible by tying of a rope.

Finally, Mr. Patil contended that the appellant-Gangadhar did not share the common intention with appellant-Kashinath to commit the murder of the deceased. We regret that we cannot accede to this contention either.

Section 34. Indian Penal Code provides that "when a criminal act is done by several persons in furtherance of the common intention of all, each of such person is liable for the act in the same manner as if it were done by him alone."

A perusal of section 34. Indian Penal Code would show that the following prerequisites have to be fulfilled before it would have application :-

(i) A criminal act should be done by several persons or by persons more than one; and (ii) the said criminal act must be committed by them in furtherance of their common intention.

It is only where (i) and (ii) co-exist, would it be deemed in law that the criminal act committed, was committed by each of the said persons as if it was committed by him alone.

In the instant case, circumstances enumerated hereinafter show that the appellant-Gangadhar shared the common intention with the appellant-Kashinath to commit the murder of the deceased :-

(a) He along with the appellant-Kashinath first tied the hands and legs of the deceased with a rope;

(b) Then he along with him, took him to Kashinath's room; and

(c) Thereafter, while he caught hold of the deceased, appellant-Kashinath inflicted four axe blows, three on the neck and one on face of the deceased.

The said circumstances would show that elements (i) and (ii) enumerated earlier, which are essential for the application of section 34, Indian Penal Code, are present and consequently, the appellant-Gangadhar shared the common intention with the appellant-Kashinath to commit the murder of the deceased.

19. No other point was canvassed before us by Mr. Patil.

20. In the result, we confirm the convictions of the appellants for the offence punishable u/s 302, read with 34, Indian Penal Code and the sentence of life imprisonment awarded to them thereunder and dismiss this appeal. The appellants are in jail and shall serve out their sentences.

Before parting with the judgment, we would like to record our appreciation for the assistance rendered to us by the learned counsel for the parties in the disposal of this appeal.

In view of the anguish expressed by us in paras 15, 16 and 17, we direct that a copy of the Judgment be sent to :-

(i) the Chief Secretary to the Government of Maharashtra;

(ii) the Advocate General, Maharashtra State;
(iii) the Principal Secretary, Department of Home. Government of Maharashtra; (iv) the Principal Secretary, Law and Judiciary Department, Government of Maharashtra; and (v) Director General of Police, Maharashtra. We do this with hope and trust that in future in deserving cases, appeals for enhancement of sentence and appeals against acquittals would be preferred by the State of Maharashtra. The State should always remember that it owes a duty to the citizens to prefer such appeals in suitable cases.