
(2019) 07 BOM CK 0118
In the Bombay High Court
Case No : Criminal Appeal No. 459 Of 2016

Kishor Shamrao Bhoyar

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 23-07-2019

Acts Referred:

Indian Penal Code, 1860 — Section 302
Arms Act, 1959 — Section 4, 25
Bombay Police Act, 1951 — Section 135

Citation : (2019) 07 BOM CK 0118

Hon'ble Judges : P.N. Deshmukh, J; Pushpa V. Ganediwala, J

Bench : Division Bench

Advocate : Mir Nagman Ali, S.D. Sirpurkar

Final Decision : Allowed

Judgement

P.N. Deshmukh, J

1. This appeal is preferred against the Judgment passed by learned Additional Sessions Judge, Nagpur in Sessions Trial No.323 of 2014 on 21st

July, 2016 by which the appellant is convicted for the offence punishable under Section 302 of the Indian Penal Code and is sentenced to suffer

rigorous imprisonment for life and to pay a fine of Rs.10,000/—, in default to undergo rigorous imprisonment for one year. The appellant is acquitted of

the offence punishable under Section 4 r/w. 25 of the Arms Act and under Section 135 of the Bombay Police Act.

2. In brief, it is the case of prosecution that, on the day of incident which has occurred on 5.4.2014, at 9.30 p.m., PW Radhika Arun Kshirsagar,

Complainant, sister of deceased, was in her house along with her mother, law and sister, law when sister namely Dipali Bobhate of landlord of

deceased Amol namely Sudhakar Bobhate, by coming to their house, informed that quarrel was going on between the accused and deceased at the adjoining place. Before Complainant Radhika could start to proceed to the place of quarrel, deceased Amol along with PWÂ4 Guruprasad Maraskolhe and PWÂ5 Lokesh Nannaware came to the house of Complainant. They were followed by accused, who raised quarrel with deceased which was intervened by PWÂ2 Radhika, PWÂ4 Guruprasad, PWÂ5 Lokesh as well as sister-in-law of Complainant. The appellant dragged the deceased in front of house of Complainant and gave blows by knife on his abdomen and chest due to which he sustained grievous injuries and was shifted to hospital where he was declared dead before admission.

3. In the midnight on 6.4.2014, PWÂ2 Radhika lodged report (Exh.21) which was recorded by PWÂ9 Mahendrasingh Thakur, P.S.I. and on the basis of same, offence was registered vide Crime No.127 of 2014 at Exh.22. Further investigation was carried out by PWÂ10 Yogesh Ingle, P.S.I. who visited Radhakrishna hospital at Wardhaman Nagar where he learnt of death of deceased Amol. He, therefore, arranged for drawing of Inquest panchanama. It was drawn by PWÂ11 Arvind Ghodke, A.P.I. The dead body was forwarded for autopsy by PWÂ10 Yogesh, who visited the spot situated behind Kohinoor Lawns which was shown by PWÂ2 Radhika, who also informed of assault by appellant on deceased. He prepared Spot Panchanama vide Exh.18. On 6.4.2014, PWÂ12 Ghansham Sonawane, P.S.I. effected arrest of accused (vide Exh.44). On 7.4.2014, Memorandum Statement of appellant is recorded by PWÂ10 Yogesh Ingle, P.S.I. vide Exh.36 and in pursuance to same, seizure of one knife was effected at the instance of appellant, which was produced by him from one dumping yard in Suraj Nagar near his house, which came to be seized under Seizure Panchanama (Exh.37).

4. Clothes of deceased, as produced by P.C. Ajay, are seized under Seizure Panchanama (Exh.24). During investigation, the Investigating Officer made query with the Medical Officer vide communication (Exh.41) and by referring knife seized at the instance of appellant, sought medical opinion as per Exh.42. After recording statements of witnesses, muddemal property came to be forwarded for its analysis to Chemical Analyser vide Requisition memo (Exh.51). On receipt of C.A. reports (Exh.56 to Exh.58) and on

completion of investigation, charge sheet is filed before the Judicial Magistrate, First Class, Court No.1, Nagpur.

5. In due course of time, the case came to be committed for trial before the learned Sessions Judge. Charge was framed against the appellant for the offence punishable under Section 302 of the Indian Penal Code, Section 4 r/w 25 of the Arms Act and Section 135 of the Bombay Police Act, which he denied and claimed to be tried. To establish charge levelled against the appellant, prosecution in all examined twelve witnesses and had commenced its evidence by examining PW¹ Ramesh Shinde, spot panch who has proved Spot Panchanama at Exh.18, PW² Radhika Kshirsagar, sister of deceased and eye witness/complainant who has proved her report (Exh.21), PW³ Yogesh Kadukar, panch on seizure of clothes of appellant vide Seizure Panchanama (Exh.24), PW⁴ Guruprasad Maraskolhe and PW⁵ Lokesh Nannaware, both eye witnesses and friends of deceased, PW⁶ Govind Meshram who has proved Memorandum statement of appellant (Exh.36) and Seizure panchanama of knife (Exh.37), PW⁷ Dr.Rishikesh Pathak, who has performed Post Mortem, PW⁸ Shalini Gahukar who did not support the case of prosecution, PW⁹ Mahendrasingh Thakur, P.S.I., PW¹⁰ Yogesh Ingle, P.S.I., P.W.11 Arvind Ghodke, A.P.I. and PW¹² Ghansham Sonawane, A.P.I., all Investigating Officers. Appellant did not examine himself on oath nor examined any defence witness in support of his case. Learned trial Judge, after considering evidence and documents on record, convicted the appellant as aforesaid. Hence, the appeal.

6. Mr.Mir Nagman Ali, learned Counsel for the appellant submitted that though it is the case of prosecution that PW² Radhika, PW⁴ Guruprasad and PW⁵ Lokesh are witnesses to the incident of assault on deceased by appellant, their evidence is not consistent to each other and therefore, they are not reliable. It is also contended that though PW⁴ Guruprasad and PW⁵ Lokesh are projected as eye witnesses, their statements are recorded three days after the incident and in their evidence, they do not establish presence of each other at the time of incident. It is further contended that, from the evidence of PW⁴ Guruprasad and PW⁵ Lokesh, it is their case that they carried deceased on their motor cycle, who had sustained bleeding injuries on his abdomen and chest and though PW⁴ Guruprasad has admitted that his clothes were stained with blood, the same are not

seized during the course of investigation nor the motor cycle upon which the injured was carried was seized. It is, therefore, submitted that neither of these witnesses had witnessed the incident and they being friends of deceased, are planted as eye witnesses.

7. With reference to recovery of knife and blood stained clothes of appellant at his instance, by referring to evidence of PWÂ6 Govind Meshram, it is submitted that though his evidence establishes said aspect, there is possibility of tampering of these articles as, inÂ spite of seizure of clothes of appellant having blood stains on it on 6.4.2014 and on that of knife on 7.4.2014, same are received by the Chemical Analyser for analysis on 22.4.2014 and no evidence is led by prosecution with regard to its safe custody. It is, thus, contended that possibility of tampering of above articles cannot be ruled out, thus, by keeping C.A. reports out of consideration.

8. Lastly, to establish doubt on the evidence of eye witnesses, it is pointed out from the evidence of PWÂ7 Dr.Rishikesh Pathak that the ocular version of these witnesses is falsified as, according to evidence of PWÂ2 Radhika, Complainant and PWÂ5 Lokesh, deceased was subjected to assault at two places over his person by way of one knife blow on stomach and another on the chest; while, according to evidence of PWÂ4 Guruprasad, he sustained only one stab blow on chest. As such, at the most, three injuries could be possible on the person of deceased. However, according to medical evidence, deceased is said to have sustained as many as nine injuries. It is contended by the learned Counsel for appellant that prosecution has not explained as to how deceased sustained such number of injuries and has, therefore, submitted that there is every possibility of involvement of more than one assailant in the incident of assault. It is, therefore, contended that, for above reasons, the appellant is entitled for benefit of doubt.

9. Mr.S.D.Sirpurkar, learned Additional Public Prosecutor, on the other hand, heavily relied upon evidence of eye witnesses and submitted that there are no material inconsistencies in their evidence. It is, thus, contended that evidence of PWÂ2 Radhika, PWÂ4 Guruprasad and PWÂ5 Lokesh in clear terms establish grievous assault by knife on stomach and chest of deceased which injuries, according to medical evidence, proved to be fatal. It is, therefore, contended that when evidence of all the eye witnesses is relied,

which materially corroborate with the medical evidence, appellant's involvement in the crime is established. It is further contended that, evidence of PW³ Yogesh Kadukar, the seizure panch of clothes of appellant having blood stains as well as knife at his instance, which were seized and are certified by the Chemical Analyser to be stained with blood of deceased, for which no explanation is putforth by appellant is another circumstance which establish appellant's involvement in the present crime. In the light of above evidence, it is, therefore, prayed that the appeal be dismissed.

10. In the background of submissions advanced as aforesaid, we have considered evidence of Complainant PW² Radhika along with evidence of PW⁴ Guruprasad and PW⁵ Lokesh, eye witnesses to the incident to satisfy ourselves if they can be relied upon.

11. From the evidence of PW² Radhika, it has come on record that deceased was her younger brother and was residing 2³ houses away from her house. On the day of incident, at 9.00 p.m. one Dipali Bobhate (not examined) visited Complainant Radhika and informed her that deceased was quarrelling with Sudhakar Bobhate, brother of Dipali and was under the influence of alcohol. Therefore, PW² Radhika, accompanied by her mother in law and sister in law, brought deceased to their house and he was standing in the courtyard. According to her evidence, at that time, when all of them were standing in the courtyard along with PW⁴ Guruprasad and PW⁵ Lokesh, appellant came on the spot armed with knife which he had concealed at his waist and delivered blows by the same on the stomach and chest of deceased and ran away from the spot. PW⁴ Guruprasad and PW⁵ Lokesh, friends of deceased took him to hospital. PW² Radhika stated that the incident took place at around 9.30 p.m. which she could witness in the source of street light. Thereafter, she lodged report (Exh.21).

12. Before considering cross examination of PW² Radhika, it is to be noted that neither Dipali Bobhate nor her mother in law or sister in law, who had accompanied her to bring deceased to their courtyard and who were present at the time of incident, are examined by prosecution nor prosecution has putforth any reason for non examining them. Above aspect is significant in view of evidence of Complainant Radhika when she claims to have stated in her statement to police that when deceased was abusing Sudhakar Bobhate, he was under the influence of liquor and that she,

along with her mother and sister. had brought deceased to their house when they all were standing in the Courtyard where PW?

Lokesh and PW?Guruprasad were present. However, she cannot assign any reason as to why said fact is not mentioned.

13. Evidence of PW4 Guruprasad would reveal that he knows deceased as they were residing in one room since two months prior to incident. On

5.4.2014, PW5 Lokesh visited their room to meet them. They took dinner together. One boy by name Pramod was residing in the adjoining room,

who was called by deceased to have dinner with them. However, he did not come and therefore, there was quarrel between deceased and Pramod.

Hearing the quarrelling sound, Neeta Bobhate came on the upper floor where their room was situated. Deceased asked her to go back. In the

meantime, appellant came on the upper floor and scuffle took place between deceased and accused. Neeta took appellant Kishor back to her house,

while PW4 Guruprasad and PW5 Lokesh took deceased Amol to house of PW2 Radhika which was situated nearby. Evidence of PW4

Guruprasad, as such, is contrary to the evidence of PW2 Radhika when she has deposed that, on learning of quarrel between appellant and

deceased as informed by Rita Bobhate, she along with her mother and sister went to his house and brought deceased to their house

and while they were all present in the courtyard of their house, the deceased was assaulted. Though this aspect since is not on the point of assault is

not given much weightage, needs to be considered in view of fact of prosecution projecting PW2 Radhika and PW4 Guruprasad to be eye

witnesses to incident who, admittedly, are sister and friend of deceased.

14. On the point of assault, evidence of PW4 Guruprasad is that, while he was proceeding along with PW5 Lokesh and deceased Amol to the

house of PW2 Radhika, deceased sat down near Nagoba temple saying that his mobile had fallen down. Therefore, PW Guruprasad and PW?

Lokesh were searching for said mobile by going at the distance of 20 to 25 ft. from deceased. According to his evidence, at that time appellant arrived

on the spot and gave blow by knife on stomach of deceased due to which he fell down. PW Guruprasad further deposed that the appellant gave

another blow of knife on deceased and when he and PWLokesh went to deceased, the appellant ran away. Then they shifted deceased to

Radhakrishna hospital on motor cycle since he had sustained serious injuries. From above evidence on the point of assault, thus, PW4 Guruprasad is silent on the point of assault by knife on the chest of deceased.

Though he claims that the appellant had given second blow on the person of deceased, he has not deposed about the part of body of deceased where second blow is inflicted. Similarly, the evidence of this witness in respect of spot of incident also does not corroborate the evidence of PW Radhika

as, according to her, assault took place in the courtyard of her house while, according to PW Guruprasad, even before reaching the house of Radhika

as deceased sat on the way to house of Radhika at Nagoba temple, he was subjected to assault. Moreover, as per his version, at the time of assault,

PW Guruprasad along with PW Lokesh were indulged in search of mobile of deceased which, according to him, had fallen down and were at the distance of 20-25 ft. from the deceased.

15. Apart from above contradictory version of eye witnesses, evidence of PW4 Guruprasad is with material omissions when he claims to have

stated in his statement recorded by police that when he along with PW Lokesh were searching for mobile phone of deceased, at the distance of 20-25

ft. from the spot where deceased was sitting, the appellant had arrived and assaulted him. He is unable to state why these facts are not mentioned

in his statement. Above material omissions on the point of assault is got duly proved by defence from evidence of PW10 Yogesh Ingle, Investigating

Officer.

16. In fact, with reference to evidence of PW Guruprasad of his searching mobile phone of deceased, he admits that, for knowing location of phone,

he had given a phone call on the mobile phone of deceased as his mobile phone had fallen down near Nagoba temple and had heard ring tone of phone

of deceased from his room and therefore, had been to the room by keeping deceased alone near Nagoba temple. In that view of the matter, there is

also possibility of his not witnessing the incident of assault on deceased since, according to his evidence, he had been to his room to locate mobile

phone of deceased. Moreover, no investigation is carried out with reference to Call Detail Records (CDRs) to establish if PW4 Guruprasad had

really given any phone call on the phone of deceased at the time of incident to find out its location as deposed by him. Evidence as aforesaid,

therefore, does not inspire confidence at all.

17. Another witness who is relied as eye witness by prosecution is PW⁵ Lokesh who has deposed of the incident dt. 5.4.2014 when he claims to

have been to the room of PW⁴ Guruprasad to meet him and to have dinner with him and deceased. He further deposed of quarrel between

deceased and Pramod since Pramod, in spite of invitation, refused to come for dinner and also deposed of Neeta arriving on the spot listening to

quarrel. He further deposed that she was asked by deceased to leave the spot and in the meantime, appellant arrived on the upper floor and asked the

deceased as to why he was abusing Neeta, his sister, upon which quarrel took place between them. He further claims to have given understanding to

deceased and also claims to have taken deceased on the ground floor where appellant Kishor arrived and scuffle took place between them. At this

juncture, it is to be noted that evidence of PW⁴ Guruprasad is totally silent on this aspect as has been deposed by PW⁵ Lokesh, though, according

to case of prosecution, prior to incident of assault and even prior to PW⁴ Guruprasad and PW⁵ Lokesh taking deceased to house of Radhika, they

were together through out.

18. PW⁵ Lokesh has further deposed that while he and PW⁴ Guruprasad took deceased to house of Radhika, mobile phone of deceased had fallen

down near Nagoba temple which, he along with Guruprasad, were searching. While deceased was standing by side when appellant came running and

gave blows by knife on his stomach and chest and immediately on his arrival near deceased Amol, appellant ran away from the spot. According to his

further evidence, he along with PW⁴ Guruprasad took deceased on their motor cycle to Radhakrishna hospital and that deceased had sustained

bleeding injuries. Evidence of this witness is also with material omissions when he claims to have stated to police of scuffle which had taken place

between the deceased and appellant and also claims to be present on the spot along with PW⁴ Guruprasad. He is, however, unable to assign any

reason why said fact is not recorded in his statement. Said omissions are duly proved by PW¹⁰ Yogesh Ingle, P.S.I., Investigating Officer. Evidence

of this witness as such also do not inspire confidence to rely him to have witnessed the incident.

19. In the background of above ocular evidence, evidence of PW⁷ Dr.Rishikesh

Vinayak Pathak when perused believes eye witnesses account as, according to their evidence, assault by knife is on stomach and chest of deceased as stated by PW Radhika and PW Lokesh, while, as per evidence of PW Guruprasad, he alleges a single blow by knife on the stomach of deceased. As against this, evidence of PW Dr. Rishikesh would reveal that, while performing autopsy, he noted as many as eighteen external injuries on the person of deceased, out of which five were stab wounds, three incise wounds and rest are certified to be lacerations and abrasions. No explanation is put forth by prosecution as to how such number of injuries are sustained by deceased when it is specific case of eye witnesses that the deceased was assaulted by knife on his chest and abdomen only. This aspect also thus needs to be considered in favour of appellant as it belies the ocular evidence. Medical Officer has admitted that, out of eighteen injuries, injuries at serial nos. 7 to 12, 16 and 17 are possible by knife. In that view of the matter, there is every possibility of involvement of more than one assailants in the present case. However, no such investigation is carried out.

20. Similarly, above ocular evidence is doubtful since prosecution has failed to examine either mother-in-law, sister-in-law of Complainant or Dipali Bobhate, though, according to Complainant, Dipali Bobhate had informed her of quarrel alleged to be in progress between deceased Amol and appellant Kishor, for the reasons best known to prosecution.

Another aspect which requires to be considered in favour of appellant is delay in recording statements of eye witnesses. It is admitted by PW 10 Yogesh Ingle, Investigating Officer that though he was investigating this crime on 6.4.2014 and 7.4.2014, he has not recorded statements of any of the eye witnesses on any of these two days. PW 4 Guruprasad, however, admitted that his statement is recorded by police in the night on 5.4.2014 itself and further admitted that after that day he was never called by police. It is material to note that no such statement of PW 4 Guruprasad dt. 5.4.2014 is on record. In fact, according to PW 10 Yogesh Ingle, I.O. till 7.4.2014 he did not record statement of any of the eye witnesses.

Another circumstance which goes against prosecution is that the eye witnesses do not attribute presence of each other. It is also material to note that, in spite of PW Guruprasad and PW Lokesh deposing of carrying injured, who had sustained bleeding injuries, on motor cycle to hospital, clothes of

these witnesses is not seized. Had this investigation been on record, it could have materially established their presence at the time of incident. In the circumstances, there is sufficient reason to believe that eye witnesses are got up witnesses and in fact, were not present on the spot at the time of assault.

21. All these facts create doubt in the case of prosecution to establish guilt of appellant. In that view of the matter, merely because blood of group

'AB', which is blood group of deceased, was found on the clothes of appellant, that by itself is too short to connect the appellant with the present

crime. More particularly when, in spite of seizure of his clothes on his arrest on 6.4.2014, were forwarded for its analysis to C.A. on 22.4.2014 and

there is no link evidence brought on record with reference to safe custody of these articles nor there is reference to sealing of same at the time of its

seizure on 6.4.2014. Above aspect thus leaves no room to doubt about tampering of clothes of appellant, more particularly in absence of any

satisfactory explanation on record to dislodge above suspicion.

22. In the case of State of Rajasthan .vs. Teja Singh and Others reported in 2001 ALL MR (Cri) 994 (S.C.), the Hon'ble Apex Court did not rely upon

eye witnesses because of the fact that though they were available in village, their statements were recorded after five days of the crime, for which

explanation given by Investigating Officer was not at all satisfactory. As against this, in the appeal in hand, there is absolutely no explanation by the

Investigating Officer for not recording statements of eye witnesses for three days after the incident. In fact, there is specific admission of

Investigating Officer to have not recorded statement of any of the eye witnesses on 6.4.2014 or 7.4.2014 and in fact, PWÂGuruprasad claims to have

made his statement to police 5.4.2014 and no such statement is on record.

23. In the same Authority, Hon'ble Apex Court also did not rely upon evidence of alleged eye witnesses finding it to be doubtful because of fact that

even though said witness stated that she lifted body of deceased which was bleeding and her clothes had become blood stained, the Investigating

Officer failed to recover said clothes and as such, it was held that presence of eye witnesses was doubtful. Similar are the facts in the appeal in hand

as, according to evidence of PWÂGuruprasad and PWÂLokesh, deceased had sustained bleeding injuries to whom they carried on their motor cycle

to hospital and in spite of same, neither their clothes nor motor cycle is seized nor any explanation is on record to that effect.

24. In the given set of circumstances, we also find it necessary to mention that even otherwise prosecution has not examined any independent witness

and as such, has failed to produce available independent corroborative evidence to support the evidence of interested witnesses and as such, we find it

necessary to draw adverse inference against prosecution on this count also.

25. In the case of Khima Vikamshi .vs. State of Gujarat reported in 2003 AIR (SC) 1326, the Hon'ble Apex Court found that the case of prosecution

was that PW⁴ actually fell on the body of victim to prevent further assault and later on, she along with PW⁵ lifted the victim to put him in the

bullock cart and travelled with the victim till he breathed last. The Apex Court observed that if really PW⁴ and PW⁵ were at the place of incident

as stated by prosecution, then their clothes would have been blood stained. Failure on the part of the Investigating agency to recover any such blood

stained clothes from PW⁴ and PW⁵ creates serious doubt as to presence of these witnesses at the time of incident.

26. Similarly, the Division Bench of this Court in the cases of Kailash Raghunath Ambekar and another vs. State of Maharashtra reported in 2004

ALLMR (Cri) 3257 and Kiran Ashok Jadhav .vs State of Maharashtra reported in 2014 ALLMR (Cri) 3850 has observed that when there is no

evidence establishing sealing of muddemal articles brought on record from the time of sealing of articles till they were sent for its examination to C.A.,

possibility of tampering of articles cannot be ruled out.

27. For the reasons mentioned above and in the absence of such evidence on record, case of prosecution fails on this count also. In the result,

prosecution is found to have not established involvement of appellant in the crime beyond reasonable doubt. Appellant is, therefore, entitled for grant of

benefit of doubt. We are, therefore, inclined to allow the appeal. Hence, the following order.

The Criminal Appeal is allowed.

The Judgment and Order of conviction passed by the learned Additional Sessions Judge⁷, Nagpur in Sessions Trial No.323 of 2014 is hereby

quashed and set aside. The appellant is acquitted of the offence punishable under Section 302 of the Indian Penal Code.

The appellant shall be set at liberty forthwith if not required in any other case.
The amount of fine, if paid, be returned to appellant.