
(2018) 07 BOM CK 0114
In the Bombay High Court
Case No : Criminal Appeal No.488 Of 2017

Kishor s/o. Raghunath Gaikwad

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 27-07-2018

Acts Referred:

Indian Penal Code, 1860 — Section 302

Citation : (2018) 07 BOM CK 0114

Hon'ble Judges : P.N.DESHMUKH, J;M.G.GIRATKAR, J

Bench : Division Bench

Advocate : R.M.Daga, A.D.Sonak

Final Decision : Dismissed

Judgement

P.N.Deshmukh, J

1. This appeal takes exception to Judgment dated 1st February, 2017 passed in Sessions Trial No.89 of 2015 by Additional Sessions Judge, Achalpur,

by which appellant came to be convicted for the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer life

imprisonment and to pay fine of Rs.5,000/Â?, in default to suffer imprisonment for six months.

2. The case of prosecution, in brief, can be stated as under :

Rajesh Wankhede Â complainant is husband of deceased Anjali whose marriage was performed about 14 years prior to the date of incident.

Appellant Kishor Gaikwad is resident of same village as of complainant namely Shirajgaon Kasba and also belongs to the same caste as of

complainant. Appellant was on visiting terms to the house of complainant and used to talk with deceased Anjali. It is the case of prosecution that

appellant used to visit his house in his absence and used to meet his wife Anjali and has also provided one mobile handset to her. As such, according to prosecution, appellant and deceased were having love affair between them.

3. On 26.7.2015, when complainant was present in his house, at 5.30 p.m., his wife left for the handpump situated in the vicinity for washing clothes.

At about 6.00 p.m., complainant saw appellant at the handpump talking to Anjali asking her to return back mobile handset and money paid to her by

him and in the course of same transaction, he removed one knife from his pocket and gave knife blows on neck, left eye, back, left hand and right

hand of Anjali in presence of complainant, his father, neighbours PWÂ4 Dhanraj Wankhade, Vicky Wankhade, Nandu Wankhade and Dadarao

Tanorkar (none examined).

4. It is further case of prosecution that complainant thereafter caught hold of his injured wife who was stained with blood, while appellant ran away

from the spot. The persons who were present there chased the appellant and caught hold him in the nearby field. In the meantime, Maltabai Khandare

and Usha Wankhade arrived on the spot and took Anjali in injured condition to the SubÂDistrict hospital, Achalpur in auto rickshaw of Rajesh

Wankhade, where she was declared dead on admission.

5. On the basis of report lodged by Rajesh Â husband of deceased, offence came to be registered vide Crime No.243 of 2015 under Section 302 of

the Indian Penal Code against the appellant, of which initial investigation was carried out by P.I. Girish Bobade, who visited the spot and drew Spot

panchanama (Exh.15) and on the same day, effected arrest of accused under arrest panchanama. Further investigation was carried out by PWÂ8

API Mangesh Mohod, during the course of which he recorded statements of eye witnesses and collected blood sample of accused. On 29.7.2015,

during the course of interrogation, API Mohod recorded confessional statement of appellant (Exh.25) and in pursuance to same, effected seizure of

one knife under panchanama (Exh.26). On 1st August, 2015, PWÂ8 API Mohod, Investigating Officer sent a query to Medical Officer along with the

seized knife seeking his opinion if the injuries sustained by deceased are possible by same weapon. The communication is on record at Exh.38. He

effected seizure of clothes of accused under panchanama (Exh.16). On 9.8.2015, one mobile came to be seized from the shop of one Gufran Ahmed,

Shirajgaon under Seizure Panchanama (Exh.39). The seized muddemal articles were forwarded to the Chemical Analyser under requisition memo

(Exh.40), of which acknowledgement is issued by the Office of Chemical Analyser (Exh.41). A Blood sample of deceased was separately sent to the

Chemical Analyser under Exh.43. The C.A. reports are on record at Exh. Nos. 50, 51 and 52. The acknowledgments received are at Exh.44 and 45.

On 27.7.2015, the Investigating Officer got sketch of scene of offence prepared which is on record at Exh.48. On completion of investigation, charge

sheet is filed in the Court of Judicial Magistrate, First Class, Court No.1, Achalpur. In the course of time, the case came to be committed to the Court

of Session at Achalpur.

6. Charge is framed against the appellant at Exh.3 for the offence punishable under Section 302 of the Indian Penal Code, to which he pleaded not

guilty and claimed to be tried. Defence of accused is of total denial and false implication. It is specific case of appellant, as revealed from his Written

Statement (Exh.60), that complainant Rajesh A husband of deceased is his friend and therefore, he was visiting to the house of complainant.

Complainant was addicted to liquor, due to which his wife Anjali and children were fed up and since his wife wanted complainant to refer for rehab,

therefore, she used to meet appellant seeking his help for taking Rajesh to Rehabilitation Centre without disclosing to Rajesh her husband that she had

decided to take said recourse with the assistance of appellant. It is his further case that, for the purpose of visiting the Rehabilitation Centre at

Paratwada, he, along with Anjali had gone on his motor cycle when they were seen by the villagers, which fact was learnt by her husband and

suspecting that Anjali was having love affair with appellant, complainant Rajesh used to assault her.

7. It is the case of appellant that, on the day of incident i.e. on 26.7.2015, he was in his house at Shirajgaon. He returned back to his house at 4.30

p.m. and was in the house. At 9.00 p.m. after having dinner when he was watching Television, 7-8 persons all of a sudden arrived in his house in

auto rickshaw and knocked the door of his house On his opening the same, all of a sudden they assaulted him, due to which neighbours arrived on the

spot. However, before they could rescue appellant, the persons who had arrived in the house of appellant, forcibly put him in the auto rickshaw and

brought him to Paratwada Police Station. However, say of appellant nor of his parents or villagers was entertained by police and by not accepting his report, falsely implicated him in the crime of murder of deceased Anjali.

8. It is the case of appellant that, in fact, complainant Rajesh was in habit of assaulting Anjali, who committed her murder as he was suspecting her character and was under false belief that deceased Anjali and appellant were having extra-marital affair and having such misconception, caused her murder.

9. In order to prove guilt of accused, prosecution has in all examined eight witnesses and commenced its evidence by examining PW¹ Rajesh

Gaikwad - husband of deceased, the complainant; PW² Sudhir Ingle - panch witness on spot (Exh.15) and seizure of clothes of accused

(Exh.16); PW³ Leelabai Wankhade and PW⁴ Dhanraj Wankhade - both eye witnesses; PW⁵ Rajendra Dhade on Memorandum statement

(Exh.25) and recovery of knife under panchanama (Exh.26); PW⁶ Sahebrao Bhongade who has proved Inquest panchanama (Exh.28); PW⁷

Dr.Sarwat Varma, Medical Officer who has performed autopsy and proved Post Mortem report on record (Exh.34) and concluded its evidence on

examining PW⁸ PSI Mangesh Mohod - Investigating Officer. To establish his defence, appellant has examined DW¹ Amol Nirgude and DW²

Usha Gaikwad.

10. Learned trial Judge considering the evidence of witnesses as aforesaid convicted the appellant. Hence, this appeal.

11. Heard Mr.R.M.Daga, learned Counsel for the appellant and Mr.A.D.Sonak, learned Additional Public Prosecutor for respondent/State.

12. Mr.R.M.Daga, learned Counsel for the appellant submitted that though, according to the case of prosecution, PW¹ Rajesh Wankhade -

complainant and husband of deceased Anjali, PW³ Leelabai Wankhade and PW⁴ Dhanraj Wankhade are relied as eye witnesses, evidence of

neither of these witnesses is reliable to be considered, inasmuch as presence of PW¹ Rajesh on the spot as an eye witness is doubtful from the

evidence of PW³ Leelabai and PW⁴ Dhanraj. Evidence of these witnesses as eye witnesses is also submitted to be doubtful as the oral evidence

contradicts the medical evidence on the point of injuries to deceased.

13. It is further submitted that no witnesses who are named in the report

(Exh.12) are examined by prosecution; while prosecution chose to examine PW³ Leelabai as an eye witness who is not named in the F.I.R. as an eye witness. One of the grounds which is further canvassed on behalf of appellant is of the alleged eye witnesses admitting to have read over their statements before deposing before the Court. It is further submitted that prosecution before recording evidence of witnesses refreshed their memory by reading over their statements, which practice is said to be not to be accepted and therefore, it is contended that as evidence of alleged eye witnesses regarding their presence at the time of incident is doubtful being contrary to each other and to medical evidence and as prosecution has not examined all witnesses named in the report but chose to examine only one witness PW³ Leelabai and since the evidence of witnesses who are examined was recorded after they were read over their statements recorded by police, none of the witnesses are worthy to be relied upon. Learned Counsel for the appellant, therefore, contended that the appeal is, therefore, liable to be allowed as mere presence of blood of deceased on the clothes and knife alleged to be seized at the instance of appellant is not sufficient to nail him as an assailant in absence of corroborative evidence to above aspect.

14. Mr.A.D.Sonak, learned Additional Public Prosecutor for respondent/State had on the other hand submitted that the appeal is to be dismissed in view of fact that appellant's involvement is clearly established from the evidence of eye witnesses which is found to be duly corroborated by the medical evidence and other evidence in the form of recovery of knife at the instance of appellant having blood stains of blood group of deceased for which no explanation is putforth and has, therefore, contended that the appeal be dismissed.

15. In the background of submissions advanced as aforesaid, perusal of evidence of PW¹ Rajesh " the complainant would reveal that, on the day of incident when he was in the house, at around 6.00 p.m., he saw deceased Anjali, who happened to be his wife, at the borewell talking to appellant and has further deposed that appellant was asking for money and mobile from his wife and at the same time, took out knife from his pocket and committed assault on her neck, due to which she fell down, while appellant ran away. He has further deposed that, at that time, one Vicky Wankhade, Dadarao Tanorkar and Nandukumar Wankhade were present along with PW⁴

Dhanraj Wankhade and with the assistance of villagers, appellant was caught hold in the nearby field, while Anjali was referred to SubDistrict hospital, Achalpur by one Maltabai Khandare and Usha Wankhade, where she was declared dead on admission. PW¹ Rajesh thereafter lodged report (Exh.12).

16. From the evidence of PW¹ Rajesh thus he is found to be an eye witness to the incident and has deposed of the same, involving appellant to have caused assault on Anjali by knife on her neck. His evidence as such is of assailant causing one blow of knife to the deceased. While, according to the injuries as referred in the Post Mortem report (Exh.34) on record, it is noted that, apart from the injury on neck which is referred as injury no.1, injured is certified to have sustained in all eight injuries; out of which, injury nos. 2, 7 and 8 were on head and injury nos. 3, 4 and 5 were in the nature of lacerated wounds on the right palm, right thigh and left forearm. From the evidence of PW¹ Rajesh, therefore, it cannot be ascertained as to how other injuries are sustained by deceased as his evidence is silent on this aspect.

17. Admittedly, prosecution had not examined other witnesses who are named by PW¹ Rajesh to have witnessed the incident, except for examining

PW⁴ Dhanraj Wankhade. No reason is putforth for non¹examination of all the witnesses named by PW¹ Rajesh, though it not necessary for

prosecution to examine all the witnesses and can always examine witnesses whose evidence would be material. From the evidence of PW⁴

Dhanraj, he cannot said to be so material to examine without examining other witnesses who are named by PW¹ Rajesh as, from the evidence of

PW⁴ Dhanraj, it would reveal that he contradicts evidence of PW¹ Rajesh when he states that appellant committed assault on Anju on her throat,

backside, thigh and wrist and ran away from the spot. In fact, in his evidence, it has come on record that, at the time of incident, accused Rajesh

assaulted Anju. Admittedly, Rajesh is complainant, while name of accused is Kishor Gaikwad. As such, it is noted that this is a typographical error.

However, for removing the doubts, even on considering the Marathi version of evidence of PW⁴ Dhanraj, it is found that assault is claimed by this

witness by accused Rajesh on Anju. Even, in that case, we thus find that the Marathi version is written as per the evidence recorded in English;

however, as we have already held that such recording is typographical error, that

by itself is not sufficient to hold that assault is committed by PW¹

Rajesh on his wife. In the cross¹examination, PW⁴ Dhanraj admitted that his statement is recorded by police on the third day of incident. Name of

PW⁴ Dhanraj is mentioned in the report (Exh.12). In that view of the matter, if according to contents of report this witness was an eye witness to

the incident, there was no reason for the Investigating Officer to record his statement belatedly on the third day.

18. Evidence of PW³ Leelabai when perused reveals that, at the time of incident, she saw one person coming near Anjali, who was talking to her

and gave a blow by knife on her back and then, on holding Anjali's hairs, caused many blows to her by knife on her chest, neck, legs and thereafter,

she raised shouts loudly due to which persons gathered there and accused ran away in the forest. Evidence of PW³ Leelabai is as such very clear

of her witnessing one person who is appellant as identified by her at the time of recording her evidence to have committed blow by knife on the back

side of Anjali and thereafter, had committed many blows by knife. Her evidence is further very specific that thereafter she raised shouts loudly, upon

which many persons gathered and in the crossexamination, she has admitted that, on her raising shouts, other persons who had gathered there included

PW¹ Rajesh, PW⁴ Dhanraj along with others namely Vicky, Nandu, Umesh, Dipak, Mahendra, who admittedly are not examined. In view of her

evidence, therefore, presence of PW¹ Rajesh and PW⁴ Dhanraj at the time of incident thus creates doubt. In her cross¹examination, PW³

Leelabai had further admitted that Rajesh means husband of deceased and has further admitted that when the injured was being carried to hospital, at

that time she narrated to two ladies and PW¹ Rajesh as to how the incident took place and therefore, they came to know about such incident on her

narration. In view of evidence of PW³ Leelabai as aforesaid, presence of PW¹ Rajesh and PW⁴ Dhanraj at the time of incident is doubtful. In

fact, even on the count of number of blows alleged to be given by appellant, her evidence falsifies evidence of PW³ Rajesh and PW⁴ Dhanraj. In

that view of the matter, we find that, in the present case, evidence of eye witnesses is self¹destructive. If evidence of one witness is accepted,

necessarily it results in rejecting evidence of other two eye witnesses and therefore, it becomes extremely difficult to record finding as to who

amongst the eye witnesses relied by prosecution had in fact witnessed the incident. In the circumstances, we do not find it safe to place reliance upon the evidence of alleged eye witnesses to prove the charge levelled against the appellant as their evidence do not establish appellant's involvement beyond reasonable doubt as, from the above discussed evidence, presence of eye witnesses is falsified by each other and even their evidence is not corroborating to their oral version on the aspect of number of blows sustained by deceased by knife. In the result, we, therefore, do not find it safe to rely upon evidence of these witnesses.

19. Even otherwise, evidence of PW³ Leelabai and PW⁴ Dhanraj [^] eye witnesses when perused further would reveal that, before recording of their evidence in the Court, they were informed by police about their statements and according to said statements, they had given their evidence in the Court, which was stated by them in their statements recorded in Gram Panchayat in their village. As such, from the evidence of PW³ Leelabai and PW⁴ Dhanraj, they have deposed in the Court on the basis of statements shown to them on the day of recording of their evidence in the Court. The practice found to be adopted by the prosecution in the instant case is highly deprecated as there would indeed be nothing wrong if the witnesses' memory is refreshed, but it is necessary to be done before the Court and not outside the Court. In order to test the veracity of evidence of witness, he would be required to recollect the incident out of his own memory and would be allowed to refresh memory before the Court by referring to his earlier statement or with reference to the contemporaneous record of Investigating agency created during the course of investigation. However, refreshing memory before entering the Court and to depose accordingly in the entire evidence giving minute details etc. cannot be allowed at any cost. In that view of the matter, we, therefore, do not find it safe to rely on the evidence of eye witnesses even on this count and for this reason, we find much substance in the objection raised by the learned Counsel for the appellant to rely upon their evidence.

20. Having considering the evidence as aforesaid, though from the C.A. report (Exh.50) on record, blood group of deceased is 'A' and as per Exh.51, blood group of accused is 'B' and from the evidence of PW⁵ Rajendra Dhade, one knife came to be seized vide Seizure Panchanama (Exh.26) in

pursuance of Memorandum statement of appellant (Exh.25) and as per Exh.50, the knife is stated to be stained with human blood along with jeans of accused and shirt of accused, of deceased, this evidence by itself is too short to connect the appellant with the present crime in the absence of ample other corroborative evidence on record.

21. For the reasons as aforesaid thus, we hold that prosecution has failed to prove its case beyond reasonable doubt and therefore, the appellant is entitled for benefit of doubt and accordingly, we pass the following order.

The Criminal Appeal is allowed.

Conviction and sentence of appellant is hereby quashed and set aside.

Appellant is acquitted of the offence for which he was charged and convicted.

Fine amount, if paid by the appellant be refunded back to him.

Â His bail bonds shall stand cancelled.