

(1995) 09 KAR CK 0015
In the Karnataka High Court
Case No : Criminal Appeal No. 112 of 1994

M. Abbas, Dakshina Kannada

APPELLANT

Vs

The State of Karnataka, Dakshina Kannada

RESPONDENT

Date of Decision : 05-09-1995

Acts Referred:

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 302, 392, 394A

Citation : (1996) 2 ALT(Cri) 228 : (1996) CriLJ 317 : (1995) ILR (Kar) 2784 : (1995) 5 KarLJ 641

Hon'ble Judges : M.M. Mirdhe, J;M.B. Vishwanath, J

Bench : Division Bench

Advocate : P.M. Nawaz, for S.B. Pavin, for the Appellant; A.B. Patil, A.S.P.P., for the Respondent

Judgement

Mirdhe, J.—This appeal is preferred by the appellants - accused against the judgment dated 29th January, 1994 passed by the Sessions Judge, D. K. Mangalore, convicting the appellants-accused for the offences punishable under Sections 302, 392 and 394 read with S. 34 I.P.C. and sentencing them to R.I. for life for the offence u/s 302 read with S. 34 I.P.C. and sentencing them to seven years R.I. each for the offences under Sections 392 and 394 I.P.C. and also to pay a fine of Rs. 10,000/- each for each of the two counts for the offences punishable under Sections 392 and 394 read with S. 34 I.P.C. and in default of payment of fine amount sentenced them to undergo S.I. for six months each.

2. We have heard Sri P. M. Nawaz for Sri Pavin, learned counsel for the appellants - accused and the learned Additional State Public Prosecutor for the respondent - State fully and perused the records of the case.

3. The case of the prosecution is as follows :-

That the three appellants and the absconding accused Moosa were in financial difficulties and they planned to loot a loaded lorry to get relief from their financial

problems. On 23-12-1991 all of them joined near the check-post at about 6 p.m. They saw 2-3 lorries passing. At 7.45 p.m. the mini lorry bearing No. KA-25/1264 came with load covered with tarpaulin tied with a rope, to Makka check-post, and the driver of the said lorry in order to get an entry made in the documents got down from the said lorry. Then all the four accused persons made enquiries with the driver and they learnt that arecanuts, cashewnuts, black pepper, copra and coconut oil tins were loaded in the lorry from Mangalore to Belgaum. The three appellants and Moosa boarded the said lorry stating that they were the passengers to go to Naravanthe. The driver Gururaja and the cleaner Pramod Hangarki were the two occupants in that lorry. The three appellants and Moosa were armed with pistol and knives then. When the lorry came to Maravanthe, Moosa who is the absconding accused was sitting in the left side of the driver Gururaja and to his left side accused No. 2 and thereafter accused No. 3 and lastly the cleaner Pramod Hangarki was sitting in the cabin of the lorry. When the said lorry came near Maravanthe, Moosa directed the driver to stop the lorry. When the lorry was stopped, accused No. 1 Abbas and the absconding accused Moosa attacked Gururaja. Moosa shot Gururaja on his head with the pistol. Accused No. 1 Abbas dealt blows on the right side of his neck with the knife thrice. Accused Nos. 2 and 3 stabbed Gururaja with the knives on his stomach. The accused Nos. 2 and 3 also assaulted Pramod Hangarki with the knives which they had with them. The cleaner Pramod Hangarki escaped from the accused and ran away from the spot after jumping from the lorry. Due to the assault the clothes of the accused Nos. 1 to 3 and Moosa were blood stained. Gururaja fell on the seat in the lorry. Thereafter all the four accused dragged the driver Gururaja from the lorry and threw him on the road. They went away with the loaded lorry which was driven by Moosa. Thereafter accused Nos. 1 to 3 i.e. the appellants brought the lorry to the house of accused No. 1 and stored the goods in the house of accused No. 1. They brought the lorry to Ilanthila locality within the jurisdiction of Uppinangady police station and abandoned the said lorry. The accused no. 3 took the tape-recorder that was fitted in the lorry. Moosa took the tools, the rope and the tarpaulin. Accused No. 2 took two bags of black pepper out of the said booty and stored the same in the quarters of P.W. 14 wherein P.W. 14 had allowed the accused No. 2 to stay for a short period. Accused No. 1 attempted to dispose of the said booty by sale to some shopkeepers at Puttur. But P.W. 16 identified 10 bags of copra that were brought by the accused No. 1 for sale as P.W. 16's Anitha Oil Mills Company had transported the said bags to Belgaum through P.W. 8 on the night intervening 23-12-91 and 24-12-91. The said 10 bags of copra were brought by accused No. 1 to the shop of P.W. 16 on 27-12-91 at 4 p.m. and he offered them for sale. But P.W. 16 told A-1 that his father was not present then. Accused No. 1 left the said 10 bags of copra in his shop stating that he would come again. On 8-1-92 accused No. 1 came along with accused No. 2 to the shop of P.W. 16. Then immediately P.W. 16 informed the same to P.W. 31, the Police Inspector of Puttur Town Police Station and P.W. 31 rushed to the shop of P.W. 16 and arrested accused Nos. 1 and 2 who were present in the shop of P.W. 16. Accused Nos. 1 and 2 made voluntary

statements and in pursuance of the voluntary statements led before the police and panchas the incriminating blood-stained clothes and knives were recovered. Accused no. 3 came to be arrested in Bombay and in pursuance of his voluntary statement the tape-recorder was recovered. P.W. 2 the P.S.I. of Byndoor police station was proceeding to Aloor in Kundapura taluk on some work and when he came near Maravanthe he saw that a person had fallen on the National Highway. P.W. 2 stopped the tempo which was driven by P.W. 6 and he saw the person (Gururaja) lying with injuries in an unconscious state. At that time two cyclists came near the scene of offence. They stopped them and through their help they got water from the house of P.W. 1 to give it to the driver Gururaja. But he could not drink it as he was unconscious. P.W. 2 shifted and brought him to the Government Dispensary, Kundapur. After giving first-aid treatment, Gururaja was shifted to the K.M.C. Hospital at Manipal and Ex. P-6 the goods despatch memo giving the particulars of the goods despatched in the involved lorry and the name of the driver was found on the person of the said injured Gururaja. The names of the parties despatching the goods in that mini-truck were discovered and P.W. 8 the person who despatched the goods on behalf of Gajanana Roadlines was contacted. P.W. 2 came to the police station at Byndoor and filed his complaint as per Ex. P-1 and a case was registered and after investigation of the case the police filed charge-sheet against all the persons. The case against the absconding accused Moosa was split up. The three accused - appellants were tried and thereafter the trial Court convicted these appellants - accused believing the prosecution evidence.

4. It is the case of the prosecution that the deceased Gururaja died a homicidal death. The evidence of P.Ws 1 to 3, 6, 7, 13 and 36 proves beyond reasonable doubt that P.W. 2 found Gururaja with injuries on his person lying unconscious on the road when he came to Maravanthe and the tried to give water securing it from P.W. 1 and thereafter he took him to Government Dispensary at Kundapur and after first-aid he was shifted to K.M.C. Hospital at Manipal. The evidence of P.Ws 20 to 22 proves that there were injuries on the person of Gururaja. P.W. 22 the Medical Officer has stated that the deceased Gururaja was brought to the hospital at Manipal and he conducted the p.m. examination over the dead body. P.W. 21 has deposed that on 24-12-91 he examined the injured Gururaja in the K.M.C. hospital at Manipal at 1.45 a.m. brought by the police and on examination he noticed a punctured wound on his left temporal region. P.W. 22 has stated that he conducted the p.m. examination over the dead body of the deceased and he noticed the injuries as mentioned by him in his p.m. report Ex. P-27. The evidence of P.Ws 1, 3, 6, 7, 13, 20 to 22 and 30 to 36 proves beyond reasonable doubt that Gururaja, who was found with serious injuries on his person and lying unconscious at Maravanthe died subsequently due to the injuries sustained by him. The prosecution has been able to prove beyond reasonable doubt that the deceased died a homicidal death.

5. It is also the case of the prosecution that Pramod Hangarki - the cleaner of the truck was also injured due to the assault of accused Nos. 2 and 3 with knives.

C.W. 2 Pramod Hangarki was examined during investigation and his statement has also been recorded by the Investigating Officer concerned. From the case of the prosecution it is apparent that C.W. 2 Pramod Hangarki was an injured eye witness. According to the case of the prosecution, he not only saw the assault on the driver Gururaja but he himself suffered injuries at the hands of accused Nos. 1 to 3. But, C.W. 2 Pramod Hangarki has not been examined in this case. The trial Court has noted that the prosecution has made attempts by deputing the Process Server to serve the summons on C.W. 2. But the summons issued to C.W. 2 has been returned with an endorsement that the whereabouts of C.W. 2 Pramod Hangarki are not known. The trial Court has also said that inspite of its best efforts the prosecution was unable to examine the said Pramod Hangarki and no fault can be found with the prosecution for the non-examination of the witness. The trial Court relied on the ruling of the Delhi High Court, wherein it has been held that no fault can be found with the prosecution if it is disclosed from the reports of the Process Server that the witness had gone abroad. The trial Court relying on this ruling has held that non-examination of Pramod Hangarki is not fatal to the prosecution case. The evidence of P.Ws 4 and 5 in this case is to the effect that the injured Pramod Hangarki C.W. 2 came to Trasi village and met them and he stayed with P.W. 5 during night and next day morning he went away stating that he would go to the police station. It is neither the case of the prosecution nor the prosecution evidence that C.W. 2 reported to the police about this incident. The evidence of P.W. 36 is to the effect that he went to Hubli after contacting Pratap Shah - the owner of the involved lorry in the case on phone and he found C.W. 2 Pramod Hangarid in Hubli with the said Pratap Shah. He has also stated that he recorded the statement of C.W. 2. It is the evidence of P.W. 36 that he returned to Kundapur with Pratap Shah and Pramod Hangarki C.W. 2 and referred C.W. 2 to Government Medical Officer P.W. 20. The evidence of P.W. 20 is to the effect that he examined C.W. 2 and he found five injuries on his person and he has issued certificate as per Ex. P-24. So, the evidence of prosecution on record goes to show that Pramod Hangarki - C.W. 2 has also sustained injuries at that time and he was found with Pratap Shah - the owner of the lorry at Hubli by P.W. 36 and his statement was also recorded by the police. But, he has not been examined in this case. The explanation of the prosecution for not examining such an important witness is that his whereabouts were not known. We have gone through the records. There is a memo filed by the Prosecutor to the effect, that the whereabouts of C.W. 2 Pramod Hangarki are not known. The trial Court has referred to some reports of the process Server and also the evidence of P.W. 36 in this regard. From the evidence of P.W. 36 we are unable to find out as to what were the efforts made by P.W. 36 to trace C.W. 2 Pramod Hangarki. The process Servers whose reports have been referred to by the trial Court have not been examined in this case. They were material witnesses to be examined by the prosecution to show that the prosecution has taken all the reasonable steps to find out the whereabouts of C.W. 2 Pramod Hangarki. The filing of the memo by the Prosecutor cannot amount to the proof of the contention of the prosecution that the whereabouts of

Pramod Hangarki were not known. The prosecution was required to prove this aspect of its case as any other fact by leading substantial and acceptable evidence on this point by examining the Process Server who tried to serve the summons on C.W. 2 and also through the evidence of P.W. 36 to show as to what all the steps he took to secure C.W. 2 Pramod Hangarki as a witness in this case. But, there is no such evidence on record to show that the prosecution has made all efforts to secure such an important injured witness C.W. 2 Pramod Hangarki. Mere referring to the Process Server's report or the memo of the Public Prosecutor to the effect that whereabouts of Pramod Hangarki are not known will not amount to a substantial evidence to lead to the inference that the prosecution made sincere efforts to get C.W. 2 and failed in its efforts on account of non-availability of Pramod Hangarki. The trial Court has given a reason for the non-examination of Pramod Hangarki that Moosa - the absconding accused might have won over him. This reason is far-fetched proof. The trial Court was not justified in inferring that C.W.2 might have remained absent as he might have been over by the absconding accused Moosa. The prosecution has failed to show by substantial evidence in this case that it could not examine C.W. 2 Pramod Hangarki as his whereabouts were not known. Therefore, the trial Court was not justified in excusing the prosecution for not examining the C.W. 2 Pramod Hangarki Even the ruling of the Delhi High Court relied upon by the trial Court is distinguishable from the facts of this case on the ground that in that case there was a report which was on record that the witness had gone abroad. That is not a situation here. Therefore, the trial Court was not justified in over-looking the non-examination of such an important injured eye witness C.W. 2 Pramod Hangarki. We do not find any satisfactory reason given by the prosecution in its evidence for not examining C.W. 2 Pramod Hangarki. Non-examination of such an important witness is a ground for the Court to raise an adverse inference against the prosecution.

6. When the evidence of C.W. 2 Pramod Hangarki is not available to the prosecution and also an adverse inference will have to be raised against the prosecution for not examining C.W. 2 Pramod Hangarki the case of the prosecution that the appellants-accused committed the murder of Gururaja and also caused injuries to C.W. 2 Pramod Hangarki will have to be held not to have been proved at all.

7. The next piece of evidence relied upon by the prosecution is the recovery of certain incriminating articles, blood stained clothes and weapons in pursuance of the voluntary statements alleged to have been made by the three appellants. It is the case of the prosecution that accused Nos. 1 and 2 were arrested on 8-1-92 and they made voluntary statements as per Exs. P-29 and P-30. It is also the case of the prosecution that the accused No. 3 was arrested on 5-3-92 at Bombay and he gave his voluntary statement as per Ex. P-45 before the police. The trial Court has held in para 39 of its judgment that the said voluntary information is admissible in evidence u/s 27 of the Indian Evidence Act. P.W. 31 has stated that after he arrested A-1 and A-2 in this case they volunteered the

information regarding the properties involved in the case. His specific evidence is as follows :-

"A-1 volunteered the information marked at Ex. P-29."

He has further stated as follows :-

"A2 volunteered the information as per Ex. P-30."

But, this Court in the ruling reported in Vijayakumar Vs. State, has held as follows :-

"Section 27 says that so much of the information that distinctly leads to the discovery of a fact alone is admissible in evidence and it is exception to Secs. 25 and 26 of the Evidence Act. Therefore, so much of the information as leads to discovery of a fact must be proved like any other fact and recording in the deposition or the prosecution leading evidence of an Investigating Officer that he recorded a particular statement as per certain record made by him and exhibited cannot take place of substantive evidence."

This Court has further held as follows :-

"It may also sometimes happen that even if a witness states what exactly was recorded in his own words, the Sessions Judges may find it a short cut to take down only as stated as per certain exhibits without taking down what exactly was the information given by the accused which could fall u/s 27 of the Evidence Act. Such a practice is wholly depreciable as even evidence given by witnesses according to law might sometimes not be reduced to writing while taking depositions only as a matter of convenience. We impress upon Courts below that such a practice of not taking down in the evidence of material witnesses what they actually deposed to in such situations would come in the way of proper appreciation of evidence and even good cases may be seriously affected by such casual and perfunctory recording. Such practice should be discontinued. With these observations, we find that practically there was no evidence for the Trial Court to find accused guilty."

In this case also we are constrained to observe that the recording of the evidence regarding the voluntary statements by P.Ws 31 and 36 is not proper. P.W. 36 who states about the voluntary statement of accused No. 3 has stated as follows :-

"I arrested A-3 at 8 a.m. on 6-3-1992 and interrogated him. A-3 volunteered the information regarding the involved properties in this case. I reduced the same to writing as per Ex. P-45."

The alleged statements of the accused persons have been marked as per Exs. P-29, P-30 and P-45. But, they cannot be taken as substantive evidence as the concerned Investigating Officers have not stated as to what were the informations given by the accused. Therefore, the alleged voluntary statements of the accused persons recorded as per Exs. P-29, P-30 and P-45 cannot be

substantive evidence in this case.

8. It is the case of the prosecution that A-1 led the police and panchas and produced six bags of supari from the shop of P.W. 1 which came to be seized under Ex. P-12 and he produced 7 bags of supari from the shop of P.W. 11 which came to be seized under Ex. P-13 and 10 bags of copra from the shop of P.W. 16 which came to be seized under Ex. P-14 and he produced seven boxes of cashewnuts and 50 tins of coconut oil, and 13 bags of black pepper, tape-recorder, one pant, one shirt and one knife from this house which were seized under Ex. P-22. It is also the case of the prosecution that accused No. 2 produced the documents which are marked as Exs. P-7 to P-11 and some clothes from the house of P.W. 14 where he was temporarily residing which came to be seized under Ex. P-10. It is also the case of the prosecution that accused No. 3 produced the blood stained clothes and tape recorder which came to be seized by the police before the panchas under Ex. P-17. But, in view of the position of law which we have discussed above leading to the point that Exs. P-29, P-30 and P-45 the alleged volunteer statements of accused Nos. 1 to 3 cannot amount to substantive evidence even the recovery of the properties produced by the accused will not be covered by Section 27 of the Indian Evidence Act. At the most the recovery of these properties may lead to the inference that the accused had the knowledge that these properties were stored in particular places. That may raise a strong suspicion against the accused but no accused can be convicted merely on account of suspicion however grave it may be. The accused are entitled to benefit of doubt in view of the lacunae in the prosecution case. The trial Court had failed to look into these lacunae in the prosecution case and it was not justified in convicting the accused of the said offences. The appeal is required to be allowed. Hence, we proceed to pass the following order :-

The appeal is allowed. The judgment of the trial Court is set aside and the appellants are acquitted of the offences with which they have been charged and they are set at liberty forthwith, in this case.

9. Appeal allowed.