
(2013) 09 BOM CK 0128
In the Bombay High Court
Case No : Criminal Appeal No. 168 of 2008

Machis Tukaram Pawar and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 23-09-2013

Acts Referred:

Citation : (2013) 6 ABR 461 : (2014) ALLMR(Cri) 883

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

Bench : Division Bench

Advocate : P.G. Jagdale, for the Appellant; F.R. Shaikh, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

P.V. Hardas, J.—The appellants/original accused Nos. 1, 4 and 5, who stand convicted for an offence punishable u/s 302 of the Indian Penal Code and sentenced to imprisonment for life and to pay a fine of Rs. 1000/- each, by the Ad hoc District Judge-1 and Additional Sessions Judge, Sangli, by judgment dated 13/02/2008 in Sessions Case No. 144 of 2007, by this appeal question the correctness of their conviction and sentence. Facts in brief, as are necessary for the decision of this Appeal, may briefly be stated thus:--

PW 15-Police Head Constable Shivaji Mane, who, on 7/4/2007, was attached to the Atpadi Police Station, recorded the report of PW 4-Aditi at Exh. 25. On the basis of the said report, he registered an offence vide Crime No. 23 of 2007 under Sections 147, 148, 149, 307 of the Indian Penal Code. After registration of the offence, he was informed by P.S.I. Nadaf that injured Vijay had been declared dead and accordingly, entry was made in the station diary and Section 302 of the I.P.C. was added. On 8/4/2007, Police Head Constable Pawar produced the clothes of the deceased, which were seized under a seizure memo at Exh. 55 in the presence of panchas.

PW 16-P.S.I. Mohammed Khatib, who in April, 2007, was attached to the Atpadi

Police Station as a P.S.I. was entrusted with the investigation of Crime No. 23 of 2007. Accordingly, an inquest panchanama was drawn. A scene of the offence panchanama, in the presence of the panchas, was drawn at Exh. 33. From the scene of the incident, sample of ordinary mud, blood mixed mud, two small stones and one big stone weighing about 15 Kgs. was seized. On 8/4/2007, accused Nos. 1, 2 and 6 were arrested under arrest panchanama at Exh. 29. Thereafter, the clothes on the person of accused No. 6 were seized under seizure memo at Exh. 27. Further investigation was thereafter entrusted to P.S.I. Shevale.

PW 17-P.S.I. Shevale, who in April, 2007 was attached to the Atpadi Police Station, was entrusted with the investigation of the said crime on 8/4/2007. He accordingly recorded the statements of nine witnesses. The clothes of accused Nos. 1 and 2 were seized under seizure memo at Exh. 44. On the next day, i.e. on 9/4/2007, statements of three other witnesses were recorded. During custodial interrogation, accused No. 2-Jitendra expressed his willingness to produce an axe and accordingly a memorandum was drawn in the presence of panchas at Exh. 58. Accused No. 2-Jitendra led the police and the panch and produced an axe which came to be seized under panchanama at Exh. 59. On 13/4/2007 during custodial interrogation, accused No. 1-Machis expressed his willingness to produce sickle. Accordingly, memorandum at Exh. 30 came to be drawn in the presence of panchas. The accused No. 1 led the police and the panch and produced two sickles, which came to be seized in the presence of panchas under seizure memo at Exh. 31. On 13/4/2007 motorcycles were seized under seizure memo at Exh. 60. On 14/4/2007, clothes of original accused Nos. 3, 4 and 5 were seized under seizure memo at Exh. 37. The seized property was thereafter referred to the Chemical Analyzer under requisition at Exh. 17. Further to the completion of the investigation, a charge-sheet against the appellants and other accused was filed.

Post-mortem on the dead body of deceased Vijay was performed by PW 12-Dr. Sharvani Jayant Deshpande. PW 12-Dr. Deshpande noticed the following external injuries:--

- (i) Cut incised wound, admeasuring 4 x 15 x 2 cm on right frontal bone region, verticle about 3 cm. above right eyelid. On palpation, fracture frontal bone. Bleeding present. Tapering edge.
- (ii) Cut incised wound, admeasuring 3 x 1 x 1 cm. on left parieto occipital region, bleeding present.
- (iii) Cut incised wound, admeasuring 10 x 3 x 2 cm on right cheek. On palpation, fracture zygomatic fracture base of temporal bone and multiple fracture. Bleeding present through right ear.
- (iv) Incised wound on superior surface of left shoulder (oblique) admeasuring 5 x 0.5 x 0.75 cm. tampering at both edges.

(v) Cut incised wound admeasuring 4 x 1 x 1 cm on left leg.

(vi) Injury to left ear pinna at upper part i.e. also cut incised wound, admeasuring 3 x 0.5 x 0.5 cm.

He opined that all the injuries were ante mortem and on internal examination, he noticed cut incised wound on the scalp 3 x 1 x 1 cm. on left parieto occipital region. He also noticed fracture at the base of skull and fracture at the base of the temporal bone. He also noticed laceration of the brain.

He accordingly opined that cause of death was due to vasovagal and hemorrhagic shock due to fracture of skull due to multiple incised wounds. The post-mortem report is at Exh. 39.

On the same day, he had examined PW 7-Daulusha. He had noticed the following external injuries:

(i) Small C.L.W. over left side of forehead, admeasuring 3 x 0.5 cm.

(ii) C.L.W. over right palm admeasuring 1.5 x 0.5 x 0.5 cm. at a base of right thumb.

(iii) C.L.W. over left thigh, admeasuring 4 x 0.5 x 0.5 cm. just above left joint.

(iv) Abrasion over left thigh, admeasuring 8 x 0.5 cm.

(v) Abrasion over back, admeasuring 9 x 1 cm.

According to PW 12 the aforesaid injuries were simple injuries. The injury certificate of PW 7-Daulusha is at Exh. 41.

2. On committal of the case to Court of Sessions, trial Court vide Exh. 6 framed charge against the appellants and other accused for offence punishable under Sections 143, 147, 148, 149, 307 read with 149, 302 read with 149, 504 read with 149 and 506 read with 149 of the Indian Penal Code. The accused denied their guilt and claimed to be tried. Prosecution, in support of its case, examined 17 witnesses. The defence of the accused was of denial. The trial Court, upon appreciation of the evidence of the prosecution, acquitted all the accused for offence punishable under Sections 143, 147, 148, 149, 307, 504 and 506 of the I.P.C. The trial Court also acquitted original accused No. 3 and original accused No. 6 for offence punishable u/s 302 of the I.P.C. The trial Court, however, convicted the present appellants i.e. original accused No. 1, original accused No. 4 and original accused No. 5 for offence punishable u/s 302 of the I.P.C. as aforestated.

3. In order to effectively deal with the submissions advanced before us by the learned counsel for the appellants and the learned APP, it would be useful to refer to the evidence of the prosecution witnesses.

The circumstance of finding of human blood on the clothes of the accused and finding of blood of "B" group on one of the sickles and the axe as well as finding

of human blood on the other sickle, according to us, is a circumstance which would not assist the prosecution case. The Investigating Officers, in their cross-examination, have clearly admitted that the weapons i.e. axe and two sickles were not sealed before they were sent to the Chemical Analyzer. Thus, there was no evidence before the trial Court that the weapons, on their seizure, were sealed and were, in that condition till examined by the Chemical Analyzer. In the light of the aforesaid infirmity, according to us, no reliance can be placed on the aforesaid circumstance. The circumstances in respect of finding of human blood on the clothes of the appellants, according to us, also cannot be relied upon by the prosecution. The accused were arrested on 8/4/2007, but their clothes were seized belatedly. There was no evidence regarding the sealing of the clothes before the clothes were sent to Chemical Analyzer. The finding of the Chemical Analyzer that the clothes of the appellants were stained with, human blood is a circumstance which does not assist the prosecution case any further.

4. Thus, the only evidence against the appellants comprises of the ocular testimony of PW 4-Aditi, wife of deceased Vijay and the first informant and the evidence of PW 7-Daulusha, brother of deceased Vijay as well as injured witness. PW 4-Aditi, wife of deceased Vijay states that she was residing at Atpadi along with her husband deceased Vijay as well as the second wife of deceased Vijay along with the children. She has admitted that injured PW 7-Daulusha is the brother of her husband deceased Vijay. In respect of the incident, she states that on the day of the incident at about 3 p.m. she had brought vegetables and when she came near the market ground, she noticed her husband, PW 7-Daulusha and others playing cards. According to Aditi, accused No. 6-Majanu came there and pelted stones at Daulusha and his wife Chameli. The stones hit another wife of Daulusha by name Rajabai as well as Daulusha. Accused No. 6 thereafter fled away. Soon thereafter all the accused i.e. accused Nos. 1 to 6 came to the scene of the incident on two motorcycles. Three accused were riding one motorcycle while two accused were riding other motorcycle. Accused No. 5-Bharat abused deceased Vijay and all the accused alighted from the motorcycle. Accused No. 1-Machis and accused No. 5-Bharat were armed with sickles, while accused No. 2-Jitendra was armed with Jambiya. Accused No. 4-Sanjya was armed with an axe, while accused No. 6-Majanu was carrying stone with him. All the accused assaulted deceased Vijay. Accused No. 5-Bharat dealt a blow of sickle on the right leg of deceased Vijay. Accused No. 4-Sanjya gave an axe blow on the head of Vijay. Accused No. 4 thereafter lifted a big stone weighing about 10 to 15 Kgs. and threw it at the head of Vijay. On seeing the incident, PW 7-Daulusha ran away as he was frightened. Thereafter all the accused left the scene of the incident on their motorcycles. Aditi states that she took her husband to the Government Hospital at Atpadi, where he was declared dead. Aditi thereafter went to the police station and lodged her report at Exh. 25.

In cross-examination, she has admitted that she had lodged her report at 6 p.m. She has, however, denied the suggestion that the report was an outcome of the discussion between her, PW 7-Daulusha and others. She has, however, admitted

that PW 7-Daulusha was on visiting terms at the police station. She has also admitted that Daulusha was well acquainted with lawyers. She has denied the suggestion that Daulusha had consulted lawyers before filing of the F.I.R. She has, however, admitted as true that there was a discussion between Daulusha and the police before the F.I.R. was lodged.

5. Omission has been elicited that she had not stated in her report about accused No. 6 pelting stones at Daulusha and his wife Chameli. Omission has also been elicited that the stone had hit Rajabai, wife of Daulusha and accused No. 6 had thereafter fled away. Omission has also been elicited that she had not stated in her report that the accused had arrived on two motorcycles. Omission has also been elicited that she had not stated that accused No. 5-Bharat abused deceased Vijay. Omission has also been elicited that accused No. 5 dealt a blow on the right leg of deceased Vijay. Omission has also been elicited that accused No. 1 had dealt a blow on the right ear of Vijay. Omission has also been elicited about accused No. 4 giving an axe blow on the head of deceased Vijay. Similarly, omission has also been elicited that she had not stated in her report that accused No. 4 lifted a big stone and threw it at the head of deceased Vijay.

6. PW 7-Daulusha states that his daughter Mandakini was married to accused No. 2-Jitendra, but since she was suffering from some skin ailment, she was treated at the house of PW 7-Daulusha. After his daughter Mandakini had recovered from the skin ailment, Mandakini was taken back to her matrimonial home and a hand loan of Rs. 20,000/- was advanced to accused No. 2-Jitendra. After some time, when Daulusha had gone to ask for refund of the hand loan, accused No. 2-Jitendra had refused to return the hand loan on the ground that PW 7-Daulusha had maintained illicit relations with his own daughter Mandakini. It appears that thereafter on account of the refund of the hand loan, there was some bickering between Daulusha and accused No. 2. On the day of the incident at about 3 p.m. while Daulusha was playing cards along with deceased Vijay and others, accused No. 6 came there and informed Daulusha that since he had kept illicit relations with his own daughter, accused No. 6 would not pay the amount of the hand loan to Daulusha. According to Daulusha, accused No. 6 also state that he would kill Daulusha. Suddenly, two motorcycles arrived there and all the accused, on reaching the scene of the incident, started assaulting Daulusha first. According to Daulusha, he was assaulted by sickles and axe. Daulusha states that he was also assaulted by a dagger. Accused No. 6 had pelted stones at him which had hit him on his forehead. Thereafter deceased Vijay was assaulted by the accused by the weapons with which they were armed. Daulusha states that thereafter the accused fled on motorcycles. After the arrival of police, report was accordingly lodged at Atpadi Police Station.

In cross-examination, omission has been elicited that he had not stated about advancing hand loan of Rs. 20,000/- to accused No. 2. Omission has also been elicited that he had not stated that he had gone demanding refund of hand loan to accused No. 2. Omission has also been elicited that he had not stated that the

deceased settled the matter amicably and requested accused No. 2 to pay the amount in instalments.

7. The learned counsel for the appellants has urged before us that implicit reliance cannot be placed on the evidence of PW 4-Aditi as well as PW 7-Daulusha in the light of the several contradictions and omissions which appear in their evidence. The learned A.P.P. has supported the findings arrived at by the trial Court.

8. A careful perusal of the evidence of PW 4-Aditi indicates that she does not make any reference to any assault on PW 7-Daulusha. Daulusha states that he was assaulted first and thereafter deceased Vijay was assaulted. The evidence of Aditi is that immediately after arrival of the accused at the scene of the incident, deceased Vijay was assaulted and seeing the assault, PW 7-Daulusha fled from the scene of the incident. Omissions on vital aspects have been elicited in the evidence of PW 4-Aditi. In fact, PW 4-Aditi was an eye-witness to the incident. We find it inexplicable that several omissions, meaning to contradictions, have been elicited her cross-examination. The omissions, which has been so elicited, affect the core of her testimony. In that light of the matter, according to us, implicit reliance cannot be placed on the testimony of PW 4-Aditi.

9. In respect of the evidence of PW 7-Daulusha, we find that his evidence is also at variance to the evidence of PW 4-Aditi. Daulusha claims that he was mercilessly assaulted by all the accused with the weapons with which they were armed. The medical certificate at Exh. 41 belies the version of PW 7-Daulusha that he was mercilessly assaulted by the accused. In fact, both PW 4-Aditi and PW 7-Daulusha has been disbelieved in respect of the assault by the acquitted accused. The State has chosen not to file any appeal challenging their acquittal. This two witnesses have, therefore, been partly disbelieved. We find that the evidence in respect of assault is so intermingled and intertwined that the truth cannot be separated from the falsehood. In other words, it is virtually impossible to separate the grain from the chaff and according to us, therefore, the entire evidence of both these witnesses is required to be discarded. Since the evidence of PW 4-Aditi and PW 7-Daulusha is so intertwined and inseparable in respect of the accused, the acquittal of the acquitted accused, according to us, weakened their evidence tremendously. A reference in this behalf may usefully be made to the judgment of the Supreme Court in Kanbi Nanji Virji and Others Vs. The State of Gujarat, .

10. Thus, considering the submissions of the learned counsel for the parties, according to us, the prosecution has miserably failed to prove the offence against the appellants beyond reasonable doubt. We find that the reliance placed by the trial Court on the testimony of PW 4-Aditi and PW 7-Daulusha is completely misplaced. Both these witnesses have been established to be unreliable witnesses on whom implicit reliance cannot be placed. For the aforesaid reasons, therefore, we allow the appeal. Accordingly, Criminal Appeal No. 168 of 2008 is allowed and conviction and sentence of the appellants is hereby quashed and set

aside and the appellants are acquitted of the offence with which they were charged and convicted. Fine, if paid by the appellants, be refunded to them. Since the appellants are in jail, they be released forthwith, if not required in any other case.