
(2013) 10 BOM CK 0263

In the Bombay High Court

Case No : Cri. Appeal Nos. 1164, 1168 of 2005 with Cri. Appeal Nos. 78 and 111 of 2013

Marling Barnappa Saibanna

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 11-10-2013

Acts Referred:

Citation : (2015) 1 MhLJCrI 634

Hon'ble Judges : P. V. Hardas and P. N. Deshmukh, JJ.

Bench : Division Bench

Advocate : S. R. Pasbola along with Rahul Arote, Advocates, for the Appellant Nos. 1, 3 and 4 in Cri. A. No. 1164 of 2005; S. R. Pasbola along with Rahul Arote, Advocates, for the Appellant in Cri. A. No. 1168 of 2005; Amin Solkar, Advocate, for the Appellant No. 2 in Cri. A. No. 1164 of 2005; Mrs. V. V. Thorat, Advocate, for the Appellant in Cri. A. No. 78 of 2013; S.V. Marwadi, Advocate, for the Appellant (in Cri. A. No. 111 of 2013); Mrs. U. V. Kejariwal, APP, for the State in all the Appeals

Final Decision : Dismissed

Judgement

P. V. Hardas, J. (Oral)—The appellants, Original Accused Nos. 1, 2, 4, 5, 6, 7 and 8, who stands convicted for offence punishable under section 302 read with section 120-B and sentenced to imprisonment for life with no separate sentence being awarded for offence punishable under section 120-B of the Indian Penal Code and accused nos.4 and 4, who, in addition, stand convicted for offence punishable under section 427 read with section 34 of the Indian Penal Code and sentenced to each pay fine of Rs. 5000/- in default to undergo RI for one year, by the 1st Ad hoc Additional Sessions Judge, Sewree, Bombay, by judgment dated 17-11-2005, in Sessions Case No. 223 of 2003, by these appeals question the correctness of their conviction and sentence.

2. Facts in brief as are necessary for the decision of these appeals may briefly be stated thus :-

PW 17 - API Bhagwat Karande, who, on 11-11-2002 was attached to the Versova Police Station registered an offence on the basis of the report of PSI Haribhau Marathe at Exh. 23. On the basis of the said complaint, he registered an offence against unknown persons under section 302 of the Indian Penal Code and under sections 3/25 and 27 of the Indian Arms Act. Upon registration of the offence, the scene of the incident panchanama was carried out at Exh. 25. The inquest panchanama of the dead body of deceased Ali Hasan Nanjani was drawn at Exh. 34. Further investigation of the case was handed over to PW 25 - PI Shankar Mahadik.

PW 25 - PI Shankar Mahadik, who, in 2002, was also attached to the Versova Police Station, was entrusted with the investigation of Crime No. 222 of 2002 in respect of the death of deceased Ali Hasan Nanjani. The dead body was referred for post-mortem examination. He recorded the statements of witnesses and accordingly the viscera was referred to the Chemical Analyzer under requisition at Exh. 82. The clothes and other articles were found at the scene of the incident were also referred to the Chemical Analyzer under requisition at Exh. 39. He collected the printouts regarding the telephone calls and the details are at Exhs. 83 and 84. Accused Nos. 8 and 9 were arrested on transfer warrant on 18-1-2003.

PW 22 - API Shewale, who was attached to the Oshiwara Police Station and was on duty on 18-1-2003, arrested two suspects, whose names were Alias and Juned i.e. accused nos. 8 and 9. The aforesaid accused had been arrested in Crime No. 635 of 2002 registered at the Oshiwara Police Station. During custodial interrogation, accused - Juned expressed his willingness to point out the place where a box had been concealed. Accordingly, a memorandum of accused No.8 was recorded in the presence of panchas at Exh. 71. The accused led the police and the panchas to his residential house and produced a box. The box, on being opened in the presence of panchas, was found to contain two pistols and nine live cartridges. The said box along with its contents, were seized in the presence of panchas under panchanama at Exh. 71A. During investigation, the pistols and the live cartridges were sent to the C.A. for the opinion of the Ballistic Expert.

PW 23 - PI Baburao Mahadik, who, in the year 2002, was attached to the Versova Police Station, interrogated accused No.5 and during interrogation, accused No.5 expressed his willingness to point out the place where a motorcycle had been concealed. Accordingly, a memorandum at Exh. 30 was drawn in the presence of panchas. The accused thereafter led the police and the panchas and pointed out the motorcycle which had been parked in front of the Dena Bhavan Building at Jogeshwari. The said motorcycle was accordingly seized under panchanama at Exh. 30A. During custodial interrogation, accused No. 2 - Firoz expressed his willingness to point out the STD Booth and accordingly a memorandum in the presence of panchas was drawn at Exh.28. The accused thereafter led the police and the panchas to Alanksha Tower, Versova. A panchanama was accordingly

drawn. The accused thereafter led the police and the panchas at Four Bungalows and pointed out a telephone booth. Accused then led the police and the panchas to the Good Shepherd's Church and pointed out a telephone booth. The panchanama of the entire sequence was drawn at Exh. 28A. During custodial interrogation, accused No. 7 - Ramesh expressed his willingness to point out the place where the SIM card had been concealed. Accordingly, a memorandum was drawn in the presence of panchas at Exh. 32. The accused led the police and the panchas at Ramadhar Chawl, Room No. 23, where his brother Dhanraj was residing. The accused produced a SIM card from a cupboard which was seized under seizure memo at Exh. 32A. During custodial interrogation, accused No. 6 expressed his willingness to point out the place where a SIM card had been kept and accordingly a memorandum was drawn in the presence of panchas at Exh. 51. The accused led the police and the panchas to a slum near the Khadi Machine and entered one of the huts and produced a SIM card which was seized in the presence of panchas under panchanama at Exh. 51A. During custodial interrogation, accused No.1 expressed his willingness to point out a telephone booth and accordingly a memorandum was drawn in the presence of panchas at Exh. 36. Accused No.1 led the police and the panchas at Jogeshwari and pointed out the telephone booth. A panchanama was accordingly drawn in the presence of panchas at Exh. 36A. During custodial interrogation, accused No. 4 expressed his willingness to point out the scene of the incident and accordingly a memorandum was drawn in the presence of the panchas at Exh. 55 on 18-12-2002. The accused thereafter led the police and the panchas at Avinash Building near the Seven Bungalows, Andheri and pointed out the scene of the incident. Accordingly, panchanama at Exh. 55A was drawn in the presence of panchas. On 24-12-2002, Test Identification Parade of seven accused have been arranged at the Arthur Road Jail and five witnesses had been called for identification. The memorandum of Test Identification Parade is at Exh. 57.

PW 24 - API Arun More, who was attached to the Versova Police Station, during custodial interrogation of accused No. 6 - Abdul Salam, drew the memorandum of accused - Abdul Salam in the presence of panchas at Exh. 63, wherein accused No.6 - Abdul Salam had expressed his willingness to point out a telephone booth. The accused then led the police and the panchas to Hasnabad Apartment, Behram Baug, Jogeshwari and pointed out a telephone booth. Accordingly, a panchanama at Exh. 63A was drawn. Further to the completion of the investigation, a charge-sheet against the accused was submitted.

Post-mortem on the dead body of deceased Ali had been conducted by PW 18 - Dr. Vinod Agarwal. PW 18 - Dr. Agarwal had noticed a wound of entry, right side, 4 cm. above medial third part of clavicle, oval shaped 1.5 by 1 cm edges inverted, abrasion ring 0.1 cm, no evidence of tattooing or singeing, directed to left and downwards. Bullet entered the mediastinum and passed through upper part of left lung to strike third rib over left mid axillary line. It changed course entered left axillary fold posteriorly. It entered left arm posteriorly and got struck in middle portion from where it was retrieved sealed labelled and handed over to

police constable on duty.

He had also noticed fractured rib left third in middle axillary line infiltration of blood seen. He, therefore, opined that the injuries were antemortem and, therefore, opined that cause of death was haemorrhage and shock due to fire arm injury (unnatural). The post-mortem report is at Exh. 67.

3. On committal of the case to Court of Sessions, trial court vide Exh. 7 framed charge against the accused for offence punishable under sections 120-B, 302 read with section 120-B, 427 read with section 120-B and against accused nos. 4 and 5 for offence punishable under sections 201, 109 of the Indian Penal Code and under the Arms Act. The accused denied their guilt and claimed to be tried. Prosecution, in support of its case, examined 26 witnesses. The defence of the accused was of denial. The trial court, upon appreciation of the evidence, convicted and sentenced the appellants as afore-stated.

4. In order to effectively deal with the submissions advanced before us by Mr. S. R. Pasbola, Mr. Amin Solkar, Mrs. V. V. Thorat and Mr. S. V. Marwadi, learned counsel on behalf of the appellants and the learned APP, it would be useful to refer to the evidence of the prosecution witnesses.

5. At the out-set, the discovery memorandums relating to the discovery of the telephone booths, discovery of SIM cards by itself is not an incriminating circumstance against the accused. The prosecution has not examined the officials from the telephone companies. The Investigating Officer has merely produced on record the printouts. The aforesaid printouts have not been proved. The contents of the printouts have certainly not been proved and therefore, the contents of the printouts cannot be read in evidence. Mere discovery of the telephone booths by themselves, without there being any incriminating material, would not in any manner connect the accused with the commission of the crime. Similarly, the discovery of the SIM cards, without there being any linked evidence cannot establish a nexus of the accused with the commission of the crime. The aforesaid evidence, therefore, will have to be left out of consideration. Similarly, the discovery memorandum relating to the scene of the incident, by which time the scene of the incident was known to all, would not connect the accused with the commission of the crime. No inference about the conduct of the accused under section 8 of the Evidence Act can be drawn on the basis of the said information. The aforesaid information about the scene of the crime was available and consequently no exclusive knowledge could be attributed to the accused. In any way, pursuant tot he said disclosure memorandum, nothing incriminating was found at the scene of the incident. The said evidence, therefore, being inconsequential, will have to be left out of consideration.

6. The entire evidence of the prosecution revolves around the testimony of the eye witness PW 20 - Mohd. Hussain Shaikh Farid. PW 20 - Mohd. Hussain deposes that he was working as a CDC Holder Sub Agent on commission basis from Maritime Training Center. He deposes that he used to supply workers for the

said center. In order to search and locate the workers, he used to visit several places in Mumbai. In respect of the incident, he states that on 11-11-2002, he had gone to Seven Bungalows and thereafter was proceeding to Sony House, which is at Model Town Road at Andheri. He had accordingly hired an auto-rickshaw at about 2.15 p.m. for proceeding to Oshiwara. The auto-rickshaw approached near the RTO. In front of the auto-rickshaw, there was one Honda City Car and at the same time one two wheelers came from the rear side of the autorickshaw and was parallel to the auto-rickshaw. As there was a speed breaker, the speed of the autorickshaw was slowed and PW 20 - Mohd. Hussain noticed two persons on the motorcycle. He states that he heard the sound of firing. The person, who was sitting on the pillion seat of the motorcycle, fired towards the person who was driving the Honda City Car. The driver of the motorcycle took the motorcycle in front of the Honda City Car and thereafter the person on the pillion seat had fired at the person who was in the Honda City Car. Thereafter, those two assailants fled away from the scene of the incident on the motorcycle. The person, who had sustained the bullet injury lost control of the vehicle and dashed one cyclist. One fiat car which was coming from the opposite direction was also dashed by the driver of the Honda City Car. After crossing about 50 to 60 ft., the Honda City Car thereafter came to a halt in front of a small heap of mud. PW 20 - Mohd. Hussain states that he was frightened and, therefore, did not stop there and went away in his rickshaw. On the next day, he read in the newspapers about the murder of the owner of Tehalka Samachar and, therefore, approached the Versova Police Station and narrated the incident to the police. According to PW 20 - Mohd. Hussain, the person, who was driving the vehicle was in the age group of 25 to 26 years and was darkened in complexion, while the person who was on the pillion seat may be in the age group of 25 to 26 years. The pillion rider was of wheatish complexion. According to PW 20 - Mohd. Hussain his statement was recorded by the police and on 24-12-2002 he was taken to the Aruthur Road Jail by the police and identified accused nos.5 - Marling and accused No. 4 - Gulam to be the same persons.

7. In cross-examination, he has admitted that he had identified both the accused from amongst 30 to 40 dummies, who had participated in the Test Identification Parade. He has also admitted that the dummies were not similar in appearance as well as in complexion. He has admitted that he had hired the autorickshaw at Juhu Versova Link Road and the place where he wanted to go i.e. Model Town may be about 5 to 7 minutes by walk. He has also admitted as true that when he had seen Honda City Car, he had noticed that the motorcycle was following the Honda City Car. He has also admitted as correct that there was no special occasion for him to pay attention at that time towards the Honda City Car or the motorcycle. He states that when he heard the sound of firing, he had looked towards the Honda City Car. He then states, "at that time, the distance between the auto-rickshaw in which I was travelling and the Honda City Car may be about 50 to 60 ft.". He admits as true that on hearing the sound of firing, the auto-rickshaw driver had braked the auto-rickshaw and the speed was slowed. He

further states that when the first shot was fired, the motorcycle was parallel to the car and was proceeding ahead. He further states that at the time of the second shot, the motorcycle was about 5 to 6 ft. away from the car. At that time, the auto-rickshaw was stationary and "the distance between our auto-rickshaw and the motor bike at the time of the second shot may be about 100 ft.". He further admits, "because of the distance between auto-rickshaw and the motor bike I could not locate the registration number of motor bike". He further states that till approaching the police on the next day, he had not discussed about the incident with anyone.

8. In respect of this witness, learned counsel for the appellants have urged before us that PW 20 - Mohd. Hussain is primarily a chance witness. It is unbelievable that in order to cover a distance, which normally could be covered by walking in 5 to 7 minutes, he had hired an autorickshaw. It is further stated before us that the motorcycle had proceeded ahead of the auto-rickshaw and, therefore, the features of the persons/assailants on the motorcycle were not visible to PW 20 - Mohd. Hussain, who was travelling in the auto-rickshaw and, therefore, the identification of the accused is extremely doubtful. The learned APP has supported the findings arrived at by the trial court.

9. The admission given by this witness, in the cross-examination, are extremely significant. He has clearly admitted that the Honda City Car was ahead of the auto-rickshaw. He has further admitted that the motorcycle had overtaken the auto-rickshaw and was parallel to the Honda City Car when the shouts were fired. PW 20 - Mohd. Hussain has further admitted that the distance between the auto-rickshaw and the Honda City Car, when the first shot was fired, may be about 50 to 60 ft. This would clearly indicates, in our opinion, that the motorcycle had already overtaken the auto-rickshaw and was at a distance of about 50 to 60 ft. This would, therefore, mean that all that PW 20 - Mohd. Hussain could see of the assailants who were riding motorcycle was their back. PW 20 - Mohd. Hussain, therefore, did not have any opportunity whatsoever of noticing the features/face of the assailants. PW 20 - Mohd. Hussain then admits that the distance between the auto-rickshaw and the motorcycle at the time of the second shot may be about 100 ft. This would further indicates that PW 20 - Mohd. Hussain at the most had seen the back of the assailants. At no point of time, according to us, PW 20 - Mohd. Hussain had any opportunity of seeing the features of the accused. The incident had occurred in the twinkling of the eye. There was hardly any time for PW 20 - Mohd. Hussain to observe the features of the assailants. His entire concentration was on the Honda City Car. In any event, even if he had meant to, he could not have noticed the features of the assailants. Resultantly, PW 20 - Mohd. Hussain did not have any opportunity of observing the features of the assailants. The discovery of the motorcycle, in the absence of its identification, as the same motorcycle on which the assailants were riding, by itself would be insignificant. We, therefore, find that there is hardly any credible evidence, which would establish with unerring certainty the identity of the assailants as accused nos. 4 and 5. Even if it is assumed that PW 20 - Mohd.

Hussain had, indeed, seen the incident and was present at the scene of the incident and on realizing the implication of what he had seen, had reported the incident to the police on the next day, yet the fact remains that he did not have adequate opportunity of observing the features of the accused. The identification of accused nos.4 and 5 in the court as the assailants, who were riding the motorcycle and who had fired the shots at the deceased, has not been established by the prosecution. According to us, therefore, no reliance whatsoever can be placed on the testimony of PW 20 - Mohd. Hussain.

10. In respect of accused No.6, the prosecution has examined PW 7 - Mehboob Hussain, brother of deceased. PW 7 - Mehboob states that deceased Ali had taken the rights of Tehalka Samachar News Chanel somewhere in 2002 and his office was located at Andheri near the RTO Office. About 30 to 40 persons were employed and were working in the office of the News Chanel. PW 7 - Mehboob states that he used to frequently visit the office. He states that on 24-12-2002, he had been called by the police at the Arthur Road Jail for identification parade and was asked to identify the accused. He states that he had identified one accused, who, about 8 to 10 days prior to the incident had visited the office with one Rizwan. He has accordingly identified accused No.6 - Abdul Salam as the said person. Prosecution curiously has not examined said Rizwan, who, it is alleged, had accompanied accused No.6 to the office of deceased. PW 7 - Mehboob also does not give details about the exact date when the accused No.6 is alleged to have visited the office of deceased Ali. He does not state for how long the accused was present in the office and for what purpose he had come. He also could not give the description of accused No. 6 when he had visited the office. Admittedly, several persons must be visiting the office and PW 7 - Mehboob does not state the special occasion regarding the visit of accused No.6 which would make him remember the features of accused No. 6. According to us, therefore, no reliance whatsoever can be placed on the testimony of PW 7 - Mehboob regarding the presence of accused No.6 in the office of deceased Ali about 8 to 10 days prior to the incident. In any event, merely because accused No. 6 had visited the office of the deceased by itself would not lead the prosecution case any further.

11. As pointed out by us earlier, the discovery memorandum of the SIM cards as well as the discovery memorandum relating to the telephone booths by themselves do not establish a nexus with the accused with the crime. The prosecution has not examined the officials from the telephone companies, who had produced the call details. In the absence of the entries in the call details being proved by the officials from the telephone companies, the call details cannot be read in evidence. There is no evidence on record to indicate that the call details represent the true extract of the call details in the master computer of the telephone companies. The pointing out of the telephone booths in the absence of any further linked evidence and in the absence of any evidence relating to the user of the telephone booth by the accused around the time when the offence was committed and the details of the conversation between one

accused and the other, by itself is a insignificant piece of evidence.

12. In respect of original accused No.1, prosecution has examined PW 14 - Nahid Mohammed Nanjiali. PW 14 - Nahid is the daughter of deceased Ali. PW 14 - Nahid deposes that on 11-11-2002 she had left her house at about 1.30 p.m. and had directed the watchman to bring one autorickshaw for her. The watchman had accordingly brought an auto-rickshaw and while she was about to cross the gate to reach towards the autorickshaw, she had noticed one boy, aged about 25 to 27 years standing in front of the gate. She states that she had boarded the autorickshaw and the moment she saw towards the boy, the boy had averted his face. PW 14 - Nahid accordingly proceeded in the auto-rickshaw. She further deposes that about 4 p.m. she had received a message on her mobile about the admission of her father at the Cooper Hospital. She deposes that she had gone to the Cooper Hospital and learnt that her father had been shot dead. She further states that on 24-12-2002 she had been called at the Arthur Road Jail for the Test Identification Parade and had identified the accused No.1.

13. In cross-examination, she has admitted that when she had glanced towards accused No.1, who was standing there, the presence of accused No.1 did not create any suspicion. She has admitted that she just casually glanced at him. She has admitted that she had not seen the accused prior to the incident.

14. According to us, this evidence is extremely weak and is riddled with infirmities. She had noticed accused No.1 standing on the road in front of the house of PW 14. She states that she had casually glanced at him. There was no reason for her to suspect any foul play and consequently on the basis of a mere casual glance, it would be difficult to believe that she could identify this accused in the Test Identification Parade, held after more than one and half months of the incident. There was nothing incriminating, even if it is assumed that the accused No.1 was standing, in the presence of PW 14 - Nahid, in front of the house of PW 14 - Nahid. The evidence in respect of the disclosure memorandum relating to the accused pointing out a telephone booth, as held by us, is completely insignificant in the absence of any linked evidence. Mere pointing out the telephone booths by itself would not mean to discovery within the meaning of section 27 of the Evidence Act. There has to be strong and reliable evidence in respect of the conspiracy in order to link the discovery of the telephone booths to the commission of the crime. Such evidence is wanting in the present case and, therefore, according to us, the prosecution case does not advance any further on the basis of the evidence of PW 14 - Nahid.

15. In respect of the evidence against accused No.8, the prosecution has examined PW 22 - API Shewale. PW 22 - API Shewale states that, " on 8-1- 2003 while accused Juned was in police custody, made a statement leading to discovery of box given to him by Illias and Warkari and he was ready to produce the same". In cross-examination, he has admitted that he could not state as to for how many times prior to 8-1-2003, he had interrogated the accused. He has further admitted that when they had reached the room, pointed out by the

accused, they had noticed that the room was open. The statement of the person, who was present in the room, was not recorded. The box, which was recovered, was found beneath the wooden cot, which had a drawer.

16. Prosecution has also examined PW 19 - Mulchand Pande, panch witness, to the discovery of two pistols and the cartridges at the behest of accused No. 8 - Juned. According to the disclosure memorandum, the box had been given to him by accused No. 9 - Eliyaj. Accused No.9 - Eliyaj has been acquitted. Neither in the discovery memorandum nor in the evidence of PW 22 - API Shewale is there any evidence in respect of the knowledge of accused No.8 regarding the contents of the box. There is no evidence in respect the authorship of concealment. The accused have been acquitted for offence punishable under the Arms Act. According to us, therefore, merely pointing out the place by accused No. 8, where two pistols and live cartridges were found in a room which was occupied by someone else, would not establish the involvement of accused No. 8 in the commission of the offence. It is no doubt true that the report of the Ballistic Expert at Exh. 69 indicates that the deformed cuprojacketed bullet was fired from a 9 mm pistol, would still not involve the accused in the commission of the offence. Admittedly, accused No.8 was not one of the assailants, according to PW 20 - Mohd. Hussain, who had fired the bullet at deceased Ali. In such circumstances, according to us, the discovery memorandum would not assist the prosecution in establishing the threads of conspiracy. There is no evidence whatsoever in respect of the offence punishable under section 120-B of the Indian Penal Code. Merely pointing out various telephone booths or producing two SIM cards by itself would not establish conspiracy. It is no doubt true that in order to establish conspiracy, direct evidence of conspiracy is rarely to be collected. A conspiracy can certainly be proved on the basis of circumstantial evidence, however, the circumstantial evidence must establish unerringly that the accused had conspired to commit an illegal act by illegal means. Such evidence, in the present case, according to us, is wholly wanting.

17. The trial court has relied upon the printouts at Exhs. 83 and 84 and on the basis of the contents of the printouts, has come to the conclusion that on the day of the incident, there was communication between the accused. The trial court has observed, at paragraph 107, that there was no certificate that two printouts were correct. This obviously means that there is no evidence that the printouts are the printouts of the call details which the telephone companies have in their master computer. In the absence of such a certificate and in the absence of any evidence in respect of the authenticity of the printouts and particularly in the absence of examination of the officials from the telephone companies, according to us, the printouts cannot be read in evidence. If that is so, then there is no evidence in respect of any conversation between the accused inter se on the day of the incident. Thus, there is no evidence at all that the accused had conspired with each other and pursuant to the conspiracy had killed the deceased Ali.

18. Thus, having considered the evidence and the submissions of the learned

counsel for the parties, according to us, the prosecution has failed to prove the offence against the accused beyond reasonable doubt and the accused, in our opinion, therefore, are entitled to be given the benefit of doubt.

19. Accordingly, Criminal Appeals are allowed and the 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. The Appellants/Original Accused No. 4 - Gulam Haider Maruf Shah, Original Accused No. 5 - Marling Sarnappa Saibanna and Original Accused No. 6 - Abdul Salam Mohd. Yusuf Kazi and Original Accused No. 7 - Ramesh Sonaji Varkari be released forthwith, if not required in any other case. Bail bonds of appellants/Original Accused No. 1 - Mohamad Arif Jafar Khan, Original Accused No.2 - Firoz Gulab Khan and Original Accused No. 8 - Juned Abrar Ahmed Khan stand cancelled.