

(2011) 02 BOM CK 0153

In the Bombay High Court

Case No : Criminal Appeal No. 578 of 2004

Miya Khan Bhure Khan , Tasleem Khan Bhure Khan and
Sayed Israil Sayed Faiyyaz Khan

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 18-02-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2011) 2 Crimes 746

Hon'ble Judges : A.H. Joshi, J;A.B. Chaudhari, J

Bench : Division Bench

**Advocate : J.B. Kast, for the Appellant; M.J. Khan, Additional Public Prosecutor,
for the Respondent**

Final Decision : Dismissed

Judgement

A.B. Choudhari, J.—Being aggrieved by the judgment and order dated 15.7.2004 passed by the Additional Sessions Judge, Amravati, in Session Trial No. 15 of 2003, convicting the Appellants/accused for the offence punishable u/s 302 read with Section 34 of Indian Penal Code and sentencing them to imprisonment for life and pay fine of Rs. 500/-each, in default to suffer rigorous imprisonment for six month, the present appeal came to be filed by the Appellants

2. SUBMISSIONS :

In support of appeal, Mr. Kasat, learned Counsel for the Appellants, made the following submissions:

(a) the trial Court committed serious error of law in applying the last seen theory contrary to the law laid down by the Supreme Court in the following decisions ?

(I) State of U.P. v. Shyam Behari and Anr. (2009) SCC 548.

(ii) Jaswant Gir v. State of Punjab (2005) 12 SCC 483.

(iii) K. Sukumaran v. State of Kerala, (2000) 10 SCC 365 .

(iv) Ashok Yadav and Others Vs. State of M.P., .

(v) Shera Singh v. State of Punjab - (1996) SCC 330.

(vi)Uttam Sadda and Anr. v. State of Punjab 3 - 1993 Cri. L.J. 2597 (vii) Inderjit Singh and another Vs. State of Punjab, .

(viii) Nirranjan Panja v. State of West Bengal - (2010)3 SCC 177.

(b) the trial court further committed a grave error in believing the testimony of alleged eyewitness P.W.4 Mirza Khan when admittedly his statement u/s 161 of Code of Criminal Procedure was recorded after one month and three days of the incident and the prosecution nor the said witness came out with any plausible explanation.

(c) Apart from that, the evidence of P.W.4Mirza Khan was liable to be rejected in view of material infirmities in his evidence and his abnormal conduct throughout. Cross-examination of this witness shows that he had attended the burial of the deceased and also went on the third day, and though he felt that grave offence was committed by the accused persons and they should be punished, still he did not disclose the incident to any body.

(d) Inviting our attention to the cross examination on the point of this witness becoming an eye witness, though he was not, the counsel took us 4 through para 4 of cross-examination of this witness and argued that when this witness flashed his torch, he saw deceased Vali Khan lying in the ditch by the side of the road, and did not disclose the incident to anybody.

(e) The only evidence available to the prosecution is in the form of last seen theory propounded through P.W.3 Parvinbi, wife of deceased Vali Khan, and in the absence of any other evidence it was not legal and proper to convict the Appellants for a serious offence of murder.

(f) Deceased Vali Khan was a criminal and was facing several prosecutions in the Court. He had number of enemies and it is possible that his murder was committed by somebody else, and, therefore, benefit of doubt should be extended to the Appellants.

Learned Counsel for the Appellants prayed for acquittal of the Appellants.

3. Per contra, learned A.P.P. opposed the appeal and argued that the evidence of P.W.3 Parveen and P.W.6 Mohammad Khan clearly established the last seen theory brought forth by the prosecution through the evidence before the Court. He then argued that the evidence of P.W.4 Mirza Khan could 5 not be rejected since he is the most natural witness and was knowing the accused persons as well as the deceased and was working as a guard in the field, i.e. a labourer. There is no reason why this witness would depose against the accused persons. Evidence of this witness inspires confidence and cannot be rejected. Thus, the

prosecution has led ample evidence in the form of ocular testimony of the witnesses and last seen theory. In support of his submissions, learned A.P.P. relied on the following decisions ?

- (i) Yakub Ismailbhai Patel Vs. State of Gujarat, .
- (ii) Abuthagir and Others Vs. State rep. by Inspector of Police, Madurai,
- (iii) Banti @ Guddu Vs. State of Madhya Pradesh, .
- (iv) Rammi @ Rameshwar etc. Vs. State of Madhya Pradesh, .

As to the delay in recording the statement, learned A.P.P. argued that each person would behave in a different manner and there is no hard and fast rule that every offence must be reported promptly. The prosecution has proved its case beyond reasonable doubt and therefore appeal deserves to be dismissed.

4. CONSIDERATION:

We have heard learned Counsel for the rival parties at length and we have also gone through the entire evidence that was adduced by the prosecution before the trial Court. We have also gone through the record and proceedings. The prosecution rests on the testimony of P.W.3 Parveen bi wife of deceased Vali Khan. P.W.4 Mirza Khan is an eye witness and P.W.6 Mohammad Khan has supported the last seen theory.

5. Reading of the evidence of P.W.3 Parveen bi with the evidence of P.W.6 Mohammad Khan would show that Vali Khan had sold 15 kgs. of wheat to accused No. 1 and accusedno.2 for Rs. 150/-and the balance amount of Rs. 50/-whendemanded by Vali Khan, he was abused and threatened by them. She had gone to Amravati to collect the amount of Rs. 3,000/?from the bank and when she returned in the village she told her husband about receipt of Rs. 3000/-. Her husband - Vali Khan went to the house of accused persons and told them that he has received Rs. 3,000/-. Hearing this, the accused persons asked him to host a party but Vali Khan refused to do so and he came back to his house.

6. At about 7-30 p.m. when Vali Khan was taking meals, accused No. 1 and 2 came and asked him to offer liquor to them. Vali Khan said that there was no liquor in his house. Thereupon the accused persons reminded him of receipt of Rs. 3000/-by his wife. Thereafter Vali Khan demanded some money from his wife Parveen bi (P.W.3) and she gave him Rs. 150/-. Thereafter Vali Khan and the accused persons left the house. Parveen bi deposed that her husband did not return till 10 p.m. and, as such, she and her children slept without meals. In the morning she was told by Ahmed Khan that her husband was lying in a pool of blood on the spot of incident with injuries on his body. Her evidence on material particulars, namely going of her husband with accused persons for enjoying liquor withRs.150/-given by her as last seen is not shaken in any manner in the cross-examination. She has admitted in her cross-examination that her husband was addicted to liquor and was not taking her care and of his children and had

also quarrelled with the accused persons. Her evidence that her husband left the house with the accused persons and the fact that on the next day morning his dead body was found has not been challenged, and we have absolutely no reason to discard her evidence. We prefer to believe whatever has been deposed by P.W.3 Parveen bi.

7. P.W.6 Mohammad Khan appears to be a person regularly selling liquor in his village Par soda, which is said to be at a distance of 1 1/2 kms. from village Ghatkheda. It appears that two prohibition cases are pending against him. But that by itself is no reason to discard his testimony. His statement was recorded late and he did not inform the police that accused persons and the deceased had come to him. It is in the examination-in-chief he stated that in the same night, i.e. the night on which the deceased left with Rs. 150/-taken from his wife along with the accused, the deceased and the accused persons had come to him and enquired about the liquor and then they went away. Thus, this witness P.W.6 Mohammad Khan also supports the theory of last seen. He is the witness to whom liquor was demanded by the accused persons and the deceased. This testimony of this witness has again been not shaken and there is no reason for us to reject his testimony on the last seen theory since the dead body with injuries was found immediately on the next day morning.

8. P.W.4 Mirza Khan is the eye witness. Prosecution is not merely relying on the last seen circumstance but also relying on the sole testimony of this witness P.W.4 Mirza Khan. P.W.4 Mirza Khan is a labourer guarding the field in the night. In the night, at about 12 O" clock, he proceeded on a bicycle with a torch. He heard Vali Khan shouting "Bachao Bachao". He, therefore, flashed the light of torch and saw accused No. 1 to 3 assaulting deceased Vali Khan. Miya Khan had a knife and Taslim Khan and Israil Khan were armed with stones and were assaulting Vali Khan. After seeing this witness, Miya Khan threatened this witness to run away else they would kill him and he ran away. After one month he narrated the incident to police.

9. We have carefully scrutinized the evidence of P.W.4 Mirza Khan. In our opinion, as has been held by the trial Court, this witness is trustworthy, natural witness and is believable. His evidence about the role of the accused persons in assaulting the deceased and the threat given to him by the accused persons has not at all been shaken in the cross-examination. His evidence that he used to guard the field of Sheikh is also not shaken. The conduct of this witness came under severe criticism but, according to us, looking to the status of this witness, who is a labourer and guards the field in the night to earn his livelihood and further the threats given to him after the crime was committed, we feel that the delay in recording the statement or his conduct in not going himself to the police to tell the incident for one month and three days, would not be sufficient to discard his testimony. No enmity has been alleged against this witness. There is no reason for this witness to depose against the accused persons, if really the accused persons had not committed any offence. At any rate, his evidence

inspires confidence. Merely because his statement was recorded late and he did not report the incident to police immediately, we are not inclined to reject his testimony.

10. In *Rammi @ Rameshwar etc. Vs. State of Madhya Pradesh*, the apex court observed thus:

" The post event conduct of a witness varies from person to person. It cannot be a cast-iron reaction to be followed as a model by everyone witnessing such event. Different persons would react differently on seeing any violence and their behaviour and conduct would, therefore, be different. Therefore the conduct of a person who witnesses the murderous attack in not informing the members of the family of the deceased or not bringing this matter to the notice of the police cannot be said to be abnormal."

11. In *Banti @ Guddu Vs. State of Madhya Pradesh*, , on the question of delayed examination of witness, in para 17 the apex court observed thus:

"As regards delayed examination of certain witnesses, this Court in several decisions has held that unless the Investigating Officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage therefrom. It cannot be said down as a rule of universal application that if there is any delay in examination of a particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the Court accepts the same as plausible there is no reason to interfere with the conclusion (see *Ranbir and Others Vs. State of Punjab*, and *Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir*,). Consequently, we find no justifying reason or ground substantiated on behalf of the Appellants to interfere with the concurrent findings recorded by both the courts based on relevant, cogent and trustworthy evidence adduced by the prosecution to prove the guilt of the Appellants beyond reasonable doubt."

12. Since the prosecution has proved its case beyond reasonable doubt, for the above reasons recorded, we reject the submission that benefit of doubt should be extended to the Appellants/accused persons.

13. For all the above reasons, we find no merit in the present appeal. Criminal Appeal No. 578 of 2004 is dismissed.