

(2015) 01 BOM CK 0204
In the Bombay High Court
Case No : Criminal Appeal No. 1181 of 2007

Mohan Daji Kadam and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 07-01-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2015) ALLMR(Cri) 1972

Hon'ble Judges : P.V. Hardas, J;Shalini Phansalkar Joshi, J

Bench : Division Bench

Advocate : Abhaykumar Apte, Appointed Advocate, for the Appellant; H.J. Dedhia, APP, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

P.V. Hardas, J.

1. The appellants/Original Accused Nos. 1 to 3, who stand convicted for offence punishable under Section 302 read with Section 34 of the Indian Penal Code and sentenced to imprisonment for life and each accused to pay a fine of Rs. 500/-, in default of which to undergo further RI for one month, by the I Ad hoc Additional Sessions Judge,. Thane, by judgment dated 19/07/2007, in Sessions Case No. 322 of 2005, by this appeal challenge their conviction and sentence. Facts as are necessary for the decision of this appeal may briefly be stated thus:--

"PW 9 - P1 Prashant Deshpande, who was attached to the Mumbra Police Station and was on duty on 30/4/2005, recorded the report of PW 3 - Sushilabai at Exh. 33. On the basis of the said report, he registered an offence vide Crime No. 134 of 2005. Injured Sachin who had been taken to the hospital had succumbed to his injuries and accordingly PSI Shirsat had drawn the inquest panchanama of the dead body of Sachin at Exh. 42. PSI Shirsat had arrested the accused and had seized their clothes under seizure memo at Exh. 21. The dead body of

deceased Sachin was referred for postmortem examination and clothes of deceased were seized under seizure memo at Exh. 20.

PW 9 - PI Deshpande visited the scene of the incident and in the presences of the panchas drew the scene of the incident panchanama at Exh. 26. From the scene of the incident, he seized sample of ordinary mud and blood mixed mud. Statements of witnesses were recorded and accused were referred for medical examination."

On 1/5/2005, during custodial interrogation, accused No. 2 - Sunil expressed his willingness to point out the place where a sword had been concealed by him. Accordingly, a memorandum was drawn in the presence of PW8 - Premshankar at Exh. 53. Accused No. 2 - Sunil led the police and the panchas and produced a sword, which was seized under seizure memo at Exh. 53 A. The seized articles were thereafter referred to the Chemical Analyzer under requisition at Exh. 61. The reports of the C.A. are at Exhs. 62, 63, 64, 65, 66 and 66A. Further to the completion of investigation, a charge-sheet against the accused was submitted.

Postmortem on the dead body of deceased Sachin was performed by PW 6 - Dr. Ghadge, who notice that Sachin had sustained the following external injuries:--

"(i) Incised chop wound over head, left parietal region, 8 cm x 1 cm x bone deep. Bone cut.

(ii) Incised wound over right ear pinna 1 cm x 0.2 cm.

(iii) Abrasion over chin 0.4 x 0.2 cm.

(iv) Abrasion over right side chest 4.0 cm. above neeple 5.0 cm. x 0.4 cm."

On internal examination, he noticed contusion on scalp over left parietal region corresponding to external injury. Mild sudural and subarachnoid hemorrhage over left parietal region. Brain was congested and oedematous. PW 6 - Dr. Ghadge, therefore, opined that Sachin had died due to head injury. The viscera was however preserved and was referred to the Chemical Analyzer. The postmortem report is at Exh. 51.

2. On the case being committed to the Court of Sessions, trial Court vide Exh. 3 framed charge against the appellants for offence punishable under Section 302 read with Section 34 of the IPC. The accused denied their guilt and claimed to be tried. Prosecution, in support of its case, examined 9 witnesses. The prosecution relied on the ocular account of PW 3 - Sushilabai, PW 4 - Honaji and PW7- Chindu. The trial court accepted the evidence of the eye witnesses and convicted and sentenced the appellants as afore-stated.

3. PW 3 - Sushilabi, mother of deceased Sachin, deposes that about a year, prior to the incident, there was quarrel between deceased Sachin and accused No. 1 - Mohan in respect of deceased Sachin not providing liquor to accused No. 1 - Mohan. Accused No. 1 - Mohan had abused Sachin and Sachin had thereafter kicked accused No. 1 - Mohan. On the day of the incident, i.e. on 29/4/2005 at

about 10.30 p.m. PW 3 - Sushilabai had gone to fetch water from the public water tap. Deceased Sachin, who was employed as a sweeper in the Bombay Municipal Corporation, had gone for attending his duty. Sachin returned from his duty at about 10.30 p.m. PW 3 - Sushilabai had heard the quarrel between deceased Sachin and the accused at the Kalikamata temple. On climbing the steps of the temple, she noticed a quarrel between deceased and accused No. 1 - Mohan. She also noticed accused No. 2 - Sunil assaulting deceased Sachin by fist and kicks. Due to the assault by accused No. 2 - Sunil, Sachin fell from the platform of the temple. Thereafter accused fled from the scene of the incident. PW 3 - Sushilabai was bringing Sachin home and all the three accused suddenly came towards Sachin. The accused started assaulting Sachin by fist and kicks. Sushilabai attempted to separate the quarrel, but the accused pushed her aside. According to Sushilabai, accused No. 1 - Mohan and accused No. 3 - Mangesh held Sachin, while accused No. 2 - Sunil dealt a blow of sword on the head of Sachin. On sustaining the injuries, Sachin fell on the ground, while all the three accused fled from the scene of the incident. Sachin was brought home. Sachin narrated the incident to his father PW 4 -Honaji. However, Sachin collapsed on the ground and was taken to the Shivaji Hospital, Kalwa, where he was pronounced dead. Sushilabai thereafter lodged her report at Exh. 33.

In cross-examination, she has admitted that the accused had lodged N.C. report about the incident which had taken place a year prior to the incident. She has also admitted that Sachin and accused were abusing each other. She has also admitted that in respect of the earlier incident, no report had been lodged.

4. The report at Exh. 33 clearly indicates that accused No. 2 - Sunil had dealt a blow of sword on the head of deceased Sachin. The FIR at Exh. 33 makes no reference to deceased Sachin being held by accused No. 1 - Mohan and accused No. 3 - Mangesh.

5. Prosecution has examined PW 4 - Honaji, father of deceased Sachin, who deposes that since Sushilabai had not returned home, he had gone towards the public water tap and had then heard the quarrel between accused and Sachin. According to him, the accused had assaulted Sachin by fist and kicks. Accused No. 2 - Sunil suddenly dealt a blow of sword on the head of Sachin due to which Sachin fell on the ground. According to Honaji, at that time, Ravindra, Santosh, PW 7 - Chindu and Sunita were present. The accused, however, fled from the scene of the incident. Injured Sachin was then taken to the hospital, where he was pronounced dead.

In cross-examination, he was confronted with portion marked "A" from his statement which he had denied to have stated. Omissions have been elicited in respect of the incident, particularly about the accused obstructing PW 3 - Sushilabai. Omission is also elicited that he had not stated in his previous statement that Sushilabai had gone to the public water tap and at that time deceased Sachin was present at the house. Incidentally, presence of PW 4 - Honaji at the scene of the incident is not referred to by PW 3 - Sushilabai.

Sushilabi also does not refer to the presence of PW 7 - Chindu.

6. PW 7 - Chindu, an eye witness to the incident, also deposes that on the day of the incident, he had accompanied deceased Sachin to the Kalikamata Mandir at about 8 p.m. Accused No. 2-Sunil came there and PW 7 Chindu told Sachin and accused No. 2 - Sunil not to quarrel since their earlier dispute had been settled. Chindu thereafter returned home and at about 10 p.m. he heard the noise of quarrel between Sachin and accused. Sachin was abusing the accused and he noticed the accused assaulting Sachin with fist and kicks. Meanwhile, PW3 - Sushilabai came at the scene of the incident. PW 4 - Honaji, father of Sachin, asked him to return home and while Sushilabai was taking Sachin home, the accused came from their house and started assaulting Sachin with fist and kicks. Thereafter, accused No. 2 - Sunil dealt a blow of sword on the head of Sachin. Sachin sustained bleeding injury, while the accused fled from the scene of the incident.

7. Mr. Abhaykumar Apte, learned counsel appointed for the appellants has urged before us that in the light of the variance in the evidence of the three eye witnesses, no reliance ought to have been placed by the trial Judge on the evidence of the eye witnesses. Alternatively, it is urged before us that there is no evidence that accused No. 1 - Mohan and accused No. 3 -Mangesh had shared the intention of accused No. 2 - Sunil in committing murder of deceased Sachin, as there is no evidence that Sachin had been held by accused No. 1 - Mohan and accused No. 3 - Mangesh in order to facilitate accused No. 2 - Sunil in inflicting the injury by a sword. The learned APP has supported the findings arrived at by the trial court.

8. Sushilabai has deposed about accused Nos. 1 and 3 holding deceased, while accused No. 2 - Sunil dealt a blow of sword. PW 4 - Honaji and PW 7 - Chindu do not refer to any overt act on the part of accused No. 1 - Mohan and accused No. 3 -Mangesh in holding Sachin. In our opinion, therefore, in the light of the variance in the evidence of these three eye witnesses to that extent, accused Nos. 1 and 3 would be entitled to be given the benefit of doubt. The evidence of the witnesses clearly establishes that accused No. 2 - Sunil dealt a blow of sword on the head of deceased Sachin. The blow of sword was delivered with such force that there was massive internal hemorrhage both subdural and sub-arachnoid. The brain matter was oedematous and the Medical Officer PW6 - Dr. Ghadge has opined that deceased Sachin had died due to head injury. In fact, deceased Sachin succumbed to the injuries immediately as he was pronounced dead when admitted in the hospital. The intention of the appellant i.e. accused No. 2 - Sunil is writ large, though a single injury had been inflicted. Accused No. 2 - Sunil had intentionally caused injury to deceased Sachin, which was sufficient in ordinary course of nature to cause death and deceased Sachin had, in fact, died on account of the said injury. In our opinion, therefore, offence against accused No. 2 - Sunil has clearly been established by the prosecution beyond reasonable doubt. The evidence of the eye witnesses is further fortified and strengthened by

the disclosure memorandum of the appellant/accused No. 2 at Exh. 53 and the consequent seizure of the sword under panchanama at Exh. 53 A. The report of the C.A. indicates that the sword discovered at the behest of the appellant/accused No. 2 - Sunil was found stained with human blood, though group could not be ascertained. Thus, the circumstantial evidence lends support to the testimony of the eye witnesses. However, in respect of accused Nos. 1 -Mohan and 3 - Mangesh, in our opinion, benefit of doubt deserves to be given to them. Accordingly, Criminal Appeal is partly allowed. The conviction and sentence of the appellants/Original Accused No. 1 - Mohan Daji Kadam and Original Accused No. 3 - Mangesh Mohan Kadam is hereby quashed and set aside and they are acquitted of the offence with which they were charged and convicted. Fine, if paid by them, be refunded to them. Since the appellants/Original Accused No. 1 Mohan Daji Kadam and Original Accused No. 3 -Mangesh Mohan Kadam are in jail, they be released forthwith, if not required in any other case.

The appeal filed by appellant/Original Accused No. 2 - Sunil Mohan Kadam is dismissed confirming his conviction, which is altered from Section 302 read with Section 34 to Section 302 of IPC simpliciter, confirming the sentence awarded by the trial court.

Fees payable to Mr. Abhaykumar Apte, learned counsel appointed for the appellants quantified at Rs. 5000/-.