
(2011) 05 BOM CK 0055
In the Bombay High Court
Case No : Criminal Appeal No. 158 of 1998

Murlidhar Suryawanshi and Ramesh Mohurle	APPELLANT
Vs	
The State of Maharashtra	RESPONDENT

Date of Decision : 03-05-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 428
Penal Code, 1860 (IPC) — Section 201, 302, 34, 364, 394

Citation : (2012) 1 Crimes 56

Hon'ble Judges : U.V. Bakre, J;A.H. Joshi, J

Bench : Division Bench

Advocate : R.M. Daga, for the Appellant; R.S. Nayak, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

U.V. Bakre, J.—This appeal is filed by the accused Nos. 1 and 3 of Sessions Case No. 128 of 1996 against their conviction for offence punishable under Sections 302, 364, 394 and 201 read with Section 34 of the Indian Penal Code (for short, "I.P.C.").

2. The Appellants along with one Sheikh Shabbir (accused No. 2) were tried for the said offences alleging that they all in furtherance of their common intention kidnapped Dilip Vithalrao Domade and Ashok Hemsingh Mohare in order that they could be robbed and murdered and accordingly robbed them of the amount of Rs. 1,25,000/- and committed their murder and thereafter knowingly caused the evidence of the said offence to disappear by burying and disposing of the dead bodies of Dilip and Ashok with intent to screen themselves from the legal punishment.

3. The prosecution examined in all 22 witnesses. But the witnesses who are relevant are as follows.:

A. P.W.-1 Sharad Lokhande acted as panch witness for following:

(i) Memorandum of statement (Exh.28) and panchanama of recovery (Exh.29) of cash of Rs. 44,000/- at the instance of accused No. 1.

(ii) Memorandum of statement (Exh.30) and panchanama of recovery (Exh.31) of cash of Rs. 900/- at the instance of accused No. 1.

(iii) Seizure memo (Exh.32) regarding cash of Rs. 10, 000/- from the house of Mrs. G. B. Bayanabai, the step mother of accused No. 1.

(iv) Memorandum of statement (Exh.33) and panchanama of recovery (Exh.34) of one iron axe blade at the instance of accused No. 3.

(v) Memorandum of statement (Exh.35) and panchanama or recovery (Exh.36) of pair of slippers at the instance of accused No. 3.

B. P.W.-2 Raju Ramteke is panch witness for memorandum of statement (Exh.38) of accused No. 3 and panchanama of recovery (Exh.39) of cash of Rs. 1,000/- at the instance of accused No. 3.

C. P.W.-3 Bhaiya Meshram is panch witness for seizure memo (Exh.41) in respect of M-80 motorcycle.

D. P.W.-8 Madan Ambhore, Police Head Constable and others searched for Dilip and Ashok, saw the dead bodies and P.W.-8 lodged report (Exh. 54) .

E. P.W.-9 Ravindra Karemore is a panch witness for panchanma of spot of occurrence (Exh.57).

F. P.W.-10 Vitthalrao Dhome, father of the deceased Dilip. P.W.-10 lodged the report which is at Exh.60.

G. P.W.-11 Suresh Mohare is the brother of the deceased Ashok.

H. P.W.-12 Ramesh Panjalwar, took P.W.-10 to house of accused No. 1.

I. P.W.-15 Dr. Lokchand Bajaj conducted post mortem examination of the dead bodies.

J. P.W.-17 Parashar Muni, the owner of M-80 motorcycle.

K. P.W.-21 Lingdas Humne, panch witness for seizure of ash of burnt bag, chain, hoot, ribs and a "kanas".

L. P.W.-16 Maroti Shinde, A.P.I. and P.W.-22 Vasant Gaikwad, A.P.I, are both Investigating Officers.

4. Case of the accused persons was that they were falsely implicated in the case. The accused Nos. 1 and 2 gave certain explanations about the possession of cash that was seized from them saying that the same has nothing to do with the crime. The accused No. 3 denied that any amount was seized from his house. The accused No. 2 examined his mother Jubeda Begum as D.W.-1, in support of his explanation about the cash.

5. The learned Sessions Judge, Chandrapur, vide the impugned judgment has held that the accused Nos. 1 and 3 have been proved to have committed the offence of abduction of Dilip and Ashok, their murder, robbery of cash and disappearance of evidence by burying the dead bodies and by burning the bag which was used for carrying money and other articles. The accused No. 2 has been acquitted of all the charges.

6. The accused Nos. 1 and 3 have been sentenced as follows:

(a) For offence u/s 302 read with Section 34 I.P.C. to undergo life imprisonment and to pay fine of Rs. 5,000/- each, in default to undergo further rigorous imprisonment for one year, each.

(b) For offence u/s 364 read with Section 34 I.P.C. to undergo imprisonment for life and to pay fine of Rs. 1, 000/- each, in default to undergo rigorous imprisonment for six months.

(c) For offence u/s 394 read with Section 34 I.P.C. to undergo imprisonment for life.

(d) For offence u/s 201 read with Section 34 I.P.C., to undergo rigorous imprisonment for seven years.

Substantive sentences of imprisonment have been ordered to run concurrently and set-off u/s 428 of the Code of Criminal Procedure has been given.

Amount of Rs. 9,100/- seized from the accused No. 2 has been ordered to be returned to him whereas the amount of Rs. 55,900/- has been ordered to be returned to P.W.-10 Vithalrao.

7. Admittedly, there was no direct evidence in the case and the case wholly rested on circumstantial evidence.

8. Heard arguments. Learned Advocate Shri R.M. Daga argued on behalf of the Appellants whereas learned A.P.P. Shri R.S. Nayak argued on behalf of the State.

9. Perused the entire material on record.

10. The evidence of P.W.-10, who has been considered as a star witness by the learned Trial Judge, inter alia, reveals as under.:

(a) On Ramnavami day of the year 1996, P.W.-10 had gone to the house of his son Dilip (deceased) where he saw Dilip, Ashok Khemsingh and the accused No. 1 sitting in the house.

(b) Ashok invited all to his house for cup of tea and all went and at the time of taking tea, P.W.-10 asked the accused No. 1 as to who he is and the accused No. 1 gave his name as Manohar Thakur, resident of Mendki.

(c) Dilip paid Rs. 1,500/- to the accused No. 1.

(d) From 29/3/1996, Dilip started demanding money from P.W.-10 for purchasing

gold. P.W.-10 had Rs. 50,000/- with him and on 4/4/1996, he withdrew Rs. 50,000/- from the Bank account of his wife.

(e) On 6/4/1996, P.W.-10 gave Rs. 1,00,000/- to his son Dilip in a green cloth bag.

(f) Dilip told P.W.-10 that he will go along with Ashok on M-80 motorcycle towards Gaimukh Temple and will come back after 3 or 4 hours.

(g) Dilip left the house on 6/4/1996 and was wearing blue pant, cream shirt and blue slippers and was having a dupatta.

(h) Dilip did not return till 1.30 p.m. and hence P.W.-10 along with Santosh went to Gaimukh temple and searched for Dilip but could not trace him.

(i) Then they went to Mendki in search of Manohar Thakur, the accused No. 1, but could not find him.

(j) On 7/4/1996 P.W.-10 went to the house of Ramesh Panjalwar of Bhiwapur as Santosh Gupta had told him that Ramesh knows about accused No. 1.

(k) Ramesh Panjalwar told P.W.-10 that the person whom he had seen at the house of Dilip is not Manohar Thakur, but is Murlidhar Ishwar Suryawanshi of Mendki.

(l) P.W.-10 along with Santosh Gupta, Ramesh Panjalwar and one or two others went to Mendki to the house of accused No. 1, but he was not at home and the brother of accused No. 1 told them that the accused No. 1 had left the house with a suitcase.

(m) P.W.-10 and others went to a hotel for tea where the Hotelwala told them that two persons had come there on M-80 motorcycle.

(n) On 11/4/1996 P.W.-10 lodged report against the accused No. 1 at Brahamapuri Police Station which is at Exh.60.

(o) On 13/4/1996, while searching for Dilip and Ashok again in Gaimukh jungle, they found the dead bodies of Dilip and Ashok.

(p) The dead bodies were highly decomposed but P.W.-10 identified the dead body of Dilip on the basis of clothes.

11. In the oral report (Exh.60) of P.W.-10, following is noticed:

(i) It is not mentioned that the son of P.W.-10, on the day of Ramnavami in the year 1996, had paid Rs. 1,500/- to the accused No. 1.

(ii) It is also not mentioned that on 6/4/1996, while leaving the house, Dilip was wearing blue pant, cream shirt, blue slippers and a dupatta.

(iii) The purpose for which Dilip asked money, and P.W.-10 paid Rs. 1,00,000/- to Dilip is specifically stated in the oral report as for purchase of one kilogram of

gold which was with the accused No. 1. But, this purpose is conspicuously absent in the deposition of P.W.-10.

(iv) In the report (Exh.60), it is nowhere stated that the accused No. 1 on the Ramnavami day told to P.W.-1- that his name is Manohar Thakur and that on 7/4/1996, Ramesh Panjalwar told him that the said man is not Manohar Thakur but is Murlidhar Ishwar Suryasanshi.

12. In his cross-examination, P.W.-10 has stated that on Ramnavami day, he did not know from his son Dilip that the name of accused No. 1 is Murlidhar. P.W.-10 has stated that he had not stated so to the police in his report (Exh.60). But, the report (Exh.60) shows that P.W.-10 has stated so to the police.

13. On account of the above improvements made in the deposition and the omissions and contradiction vis-a-vis the oral report (Exh.60), the evidence of P.W.-10 becomes weak. Besides, the above, the said evidence does not prove any circumstances except that the son of P.W.-10, namely Dilip had left the house on 6/4/1996 along with cash of Rs. 1,00,000/-.

14. P.W.-10 had not seen his son Dilip going with Ashok. Therefore, P.W.-10 cannot know as to what type of clothes Ashok was wearing. Since in the oral report, P.W.-10 had not described the clothes and slippers worn by his son Dilip and since the dead bodies were highly decomposed, the identification of dead bodies done by P.W.-10 is not wholly reliable, as has been rightly argued by learned Advocate Shri R.M. Daga.

15. P.W.-11 Suresh Mohare is the brother of deceased Ashok. His cross-examination also reveals that he had not stated to the police that Ashok went with Dilip by wearing particular clothes and particular type of shoes or that he was wearing black thread on right wrist and a cap. P.W.-11, just like P.W.-10 says that he identified the dead bodies on the basis of their clothes. The dead bodies were fully decomposed. The identification of dead body done by P.W.-11 is also not beyond suspicion.

16. P.W.-15 Dr. Lokchand Bajaj conducted post mortem examination of both the dead bodies.

On the dead body alleged to be of Ashok, P.W.-15 found following injuries.:

(1) The whole body was decomposed, eaten, viscera absent, muscles and fascias absent except right upper and lower extremities.

(2) Piece of frontal bone detached from skull - fracture of skull - size 31/2 x 4 c.m. Detached part - obviously fits into the corresponding area of skull with regular margins of pieces of bone corresponding frontal area just above nasal bridge seen - horizontal.

(3) Mandible detached - intact.

(4) Left forearm and hand absent,

(5) Lateral part of all ribs absent.

(6) P.W.-1 Rahul states that: He arranged for vehicle i.e. Maruti Car of his friend and took his mother in the Hospital.

(Quoted from page Nos. 178 and 179 of the appeal paper book).

On the dead body alleged to be of Dilip, P.W.-15 found following injuries.:

(1) Body decomposed, eaten, viscera absent, skeleton visible except external genitals, muscles of right thigh skin over pelvis, skin over hands and feet - skin decomposed.

(2) Scalp - decomposed state over skull. A vertical 5 c.m. Wound in scalp over top of skull 2 c.m. Lateral to left to midline seen, margins regular, averted.

(3) Fracture of skull 1.5 c.m. In length in fronto parietal region in semicircular fashion towards left extending to upper border of orbital fossa left towards left temporal part of skull. The fracture was corresponding to the injury No. 1 and it was about 5 c.m. With regular margin.

(4) Fracture of mandible right ramus 2 c.m. Below right temporomandibular joint - a piece of about 2 x 1 c.m. Detached from mandible.

(5) Fracture of right temporal bone just lateral to right orbital fossa 4 c.m. Horizontal,

(6) Anterior part of ribs absent.

(Quoted from page Nos. 178 and 179 of the appeal paper book).

17. According to P.W.-15, no definite opinion could be given about the cause of death, in respect of both the deceased. In view of the above, the statement of P.W.-15 that the injuries found on the dead bodies could be caused by an instrument like axe (Article-53) is inconsistent with his statement that cause of death cannot be given.

18. The learned Trial Judge, in paragraph 14 of the impugned judgment has admitted that it was not possible from the skeletons to identify the dead bodies. Therefore, the observation of Trial Judge that P.W.-10 must have seen the clothes of his son and that P.W.-11 was expected to know the clothes which were generally worn by him and therefore identification of dead bodies by P.W.-10 and P.W.-11 is good, is based on conjecture and surmises and is risky to accept.

19. Therefore, identification of the dead bodies to be of Dilip Domade and Ashok Mohare, is not beyond reasonable doubt.

20. As per the evidence of P.W.-22, A.P.I., Vasant Gaikwad, he along with the accused No. 3 Ramesh, police party and panchas had been to the spot of incident in Gaimukh jungle for discovery of the facts on information given by the accused

No. 3. P.W.-22 has stated that ash of burnt bag with its hook, a chain, metal ribbit with 6.5 inches long "kanas", an instrument used for testing purity of gold were found and were seized under the panchanama Exh.98. The panch witness namely P.W.-1 Sharad has supported the said panchanama.

21. From the said evidence of P.W.-1 and P.W.-22, the learned Trial Judge has presumed that possibly in the said burnt bag, there was "kanas" generally used by goldsmith or saraf for the purpose of testing purity of gold.

22. According to the Trial Judge as per the evidence of P.W.-10, Vithalrao, his son Dilip had taken the amount in one cloth bag. The Trial Judge has therefore presumed that it is possible that in the same bag "kanas" must have been kept by Dilip as he was going there to purchase gold and that "kanas" was taken to test purity of gold because Dilip was a goldsmith by profession.

23. The Trial Judge has held that finding of "kanas" at that place along with burnt pieces of cloth and other parts of bag also provide corroboration to the prosecution story that Dilip and his friend Ashok were both killed, their dead bodies were buried and the cash in the bag must have been taken away by the culprits.

24. From the above, it is again seen that the conclusions of the Trial Judge about Dilip going there to purchase gold, about taking of "kanas" in the bag and about killing of Dilip and Ashok and taking away cash, are all presumptions based on surmises and conjectures. The alleged circumstances cannot be proved by surmises.

25. There is absolutely no evidence on record to believe that Dilip and Ashok were robbed for an amount of Rs. 1,25,000/-. But the trial Judge has held so.

26. Even if it is taken for granted for the time being that the evidence of P.W.-10 and documentary evidence on record proves that P.W.-10 had handed over an amount of Rs. 1,00,000/- to his son Dilip and Dilip left the house with that sum kept in the green coloured bag and further even if it is taken for granted that the evidence of P.W.-1 Sharad (panch witness) and P.W.-2 Raju (panch witness) and P.W.-22 Vasant Gaikwad (Investigating Officer) read with the memorandum of statements of accused Nos. 1 and 3 and recovery panchanamas (Exhs. 28, 29, 30, 31, 38 and 39), prove that cash of Rs. 65,000/- was recovered at the instance of accused Nos. 1 and 3, the above evidence is not sufficient to hold the accused Nos. 1 and 3 guilty of murder of Dilip and Ashok, robbery and destruction of evidence, for the simple reason that there is no proof of the fact that the cash given by P.W.-10 to Dilip and the cash recovered from accused Nos. 1 and 3 is the same. Money cannot be identified unless the numbers and denominations of the currency notes are previously noted down and subsequently proved to be the same.

27. Besides the above, the accused persons have explained about the possession of cash with them which was seized and the accused Nos. 2 has even examined

his mother as D.W.-1, in this regard.

28. The accused persons are not required to prove their defence beyond reasonable doubt. It is enough if the accused persons succeed in creating reasonable doubt in the case of the prosecution.

29. There is no direct or circumstantial evidence to prove that the deceased Dilip and Ashok had gone to Gaimukh jungle on M-80 motorcycle bearing No. ETB-5479 belonging to Udasi Math. Hence, mere proof of the fact through P.W.-17, that the said motorcycle was taken by Ashok and through P.W.-3 that the said M-80 motorcycle was found in Parsodi Jungle and was seized does not create a circumstance which can prove anything against the accused persons.

30. The learned Trial Judge, in paragraph 11 of the impugned judgment has observed that as per the information with P.W.-8 Madan Ambhore, P.W.-10 Vitthalrao and P.W.-11 Suresh Mohare, Dilip Domade and Ashok Mohare had been towards Gaimukh temple for purchase of gold and Dilip Domade had carried amount of Rs. 1,25,000/- along with him for that purpose. However, none of the above witnesses have deposed about any such information, as above, given to them. Only P.W.-10 has stated that Dilip was given Rs. 1,00,000/- by him and Dilip told him that he will go along with Ashok on M-80 motorcycle towards Gaimukh temple and they will come back after 3 or 4 days. Thus, links have been joined to the circumstances stated by witnesses without they being existing in evidence.

31. Merely because the accused No. 1 could not be found at his house since 7/4/1996 till the date of his arrest, such absence cannot be said to be sufficient for holding that he was absconding.

32. It is well settled that before a conviction can be based on circumstantial evidence, the circumstances in question must be satisfactorily established and they should form a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused. It must be shown that in all human probabilities the act must have been done by the accused.

33. In the present case, the learned Judge is seen to have added links to the proved circumstances, which links however, are not proved but which are very material. The circumstances which have been proved cannot create a complete chain to hold the accused guilty.

34. The impugned judgment and order is therefore not in accordance with the settled principles of law. The prosecution has failed to prove the guilt of accused Nos. 1 and 3 also just like that of the accused No. 2. The accused Nos. 1 and 3 are entitled for acquittal.

35. In the result:

(a) The appeal is allowed.

- (b) The impugned judgment and order is quashed and set aside.
- (c) The Appellants (Accused Nos. 1 and 3 of Sessions Case No. 128/1996) are acquitted of the offences punishable under Sections 302, 364, 394 and 201 read with Section 34 of the I.P.C.
- (d) The cash seized from the persons shall be returned to each of them respectively.
- (e) The remaining property shall be destroyed, after the period of appeal is over.