

(2012) 08 BOM CK 0194
In the Bombay High Court
Case No : Criminal Appeal No. 42 of 2011

Nanasaheb alias Sharad Madhav Varade	APPELLANT
Vs	
The State of Maharashtra	RESPONDENT

Date of Decision : 16-08-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 302

Citation : (2013) BomCR(Cri) 202

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

Bench : Division Bench

Advocate : V.N. Damle, holding for Mr. R.B. Ade, for the Appellant; V.A. Shinde, Assistant Public Prosecutor, State, for the Respondent

Final Decision : Dismissed

Judgement

A.V. Nirgude, J.—In this appeal, the appellant is challenging the judgment and order dated 18th December, 2010, passed by the learned Additional Sessions Judge, Kopargaon, in Sessions Case No. 07 of 2010. The learned Judge convicted the appellant for the offence punishable u/s 302 of the Indian Penal Code and sentenced him to suffer life imprisonment and to pay a fine of Rs.1,000/- with a default clause.

Facts leading to the prosecution case, in short, can be stated as under:-

(a) Appellant, aged about 28 years. Deceased Maya and appellant were not spouses. They were living in relation, in one room tenement, since five years prior to the incident. The room was taken on rental basis from one Shri Wikhe, at village Loni (Bk.), Taluka Rahata, District Ahmednagar. There were few more adjoining tenements. A few days prior to the date of incident (27th November, 2009) roof of the room collapsed due to rain and they went to stay elsewhere.

(b) On 27th November, 2009, at about 12.00 noon, appellant and Maya went near their dilapidated room for searching some of their household belongings.

They then went to a neighbour's room. There they had a quarrel. The appellant picked up an axe lying in the room and delivered several blows on Maya's head killing her instantly. He did this in presence of witnesses. Soon thereafter, Maya's brother arrived. He lodged a report (F.I.R.) to the police. Police registered offence and arrested the appellant. His clothes were seized and were sent to chemical analyzer. After completion of investigation, charge-sheet was filed.

(c) The prosecution examined in all 15 witnesses and relied on several documents such as postmortem notes and chemical analyser's report.

(d) The appellant took a defence of total denial.

2. We would first give a brief account of the evidence and circumstances that have come on record.

3. The prosecution placed reliance on depositions of PW8 father and PW5 brother of Maya. They are not eye witnesses.

4. PW 5 Santosh, the brother of Maya stated that; Maya was staying at Loni with the appellant (without getting married to him) for more than eight years. Only for last two years his family members arrived at visiting terms with Maya and the appellant. On 25th November, 2009, appellant and Maya had come to their house at village Songaon. On the next day before Maya could leave, she told her mother that the appellant was not treating her properly. On 27th November, 2009, when he came home from work, his mother insisted that he should go to village Loni. He and his brother hired an auto-rikshaw and went to Maya's house at Loni. He saw Maya lying in a room with head injury. She was dead. Thereafter, he lodged complaint of the incident to the police on that day at about 03.00 p.m.

5. Maya's father Jagannath PW 8 deposed that a day prior to the incident, Maya and the appellant had been to his house and that they stayed there overnight. He stated further that on the next day i.e. on the date of incident while he was walking on a road, he received a phone call from the appellant. The appellant told him that he(appellant) had quarrel with Maya and had delivered blows of axe on her head and that Maya was lying unconscious and that he (PW 8) should come there immediately. Accordingly PW 8 had reached the spot and found Maya lying dead in the pool of blood.

6. Nandkishor (P.W.7) deposed he has a grocery shop near the place where the incident took place. He even indicated in his deposition that he knew the deceased. He has kept a public phone call box in his shop since last 6 to 7 years having telephone No. 322683.

7. PW 11 was an officer of Idea Cellular Ltd.

He said that as per the information required by the police in this case, he sent call details of two telephone numbers, viz; 9921248028 and 9763690138 to the I.O. The report which he has filed and which has gone uncontested on record mentions that the first mentioned telephone connection belonged to Jagannath

Pingle PW 8, whereas the other telephone belonged to one Pratibha Mhaske of Loni (Bk.). The call details has a relevant entry of 27th November, 2009. It is seen from the report that a call was made from telephone No. 9763690138 to telephone No. 9921248028 and the same continued for about 90 seconds. Apparently, the prosecution placed reliance on this record to support their case.

8. PW 1 Yelanbai, PW 6 Kumar and PW 3 Baburao are either eye witnesses or witnesses who had seen the appellant and Maya at the relevant time near the scene of occurrence.

9. PW 3 Baburao deposed that on that day at about 12.30 noon, he came home for taking meal. While he was taking his meal, he saw the appellant and Maya in the vicinity of his house. He saw them near their dilapidated room. They were searching for left over household articles at the site. After taking meal, he left the house but before he could go very far he saw his wife running. He asked her what had happened. She told him that there was quarrel between appellant and Maya. He came back and saw Maya lying in pool of blood on the floor in his house and by that time many people had gathered to see her dead-body.

10. PW 6 Kumar is a child witness, aged about 13 years. He initially deposed that he came home at about 10.00 p.m. and learnt about the incident. He did not even see the dead body.

11. The trial court allowed prosecution to cross examine him. In the cross-examination he stated that on that day in the afternoon he had come for lunch at his house. In front of his house, the house of PW 1 and PW 3 was situated. He heard quarrel between the appellant and his wife. He heard the noise coming from the house of PW 1 and PW 3. PW 1 was trying to separate the appellant and his wife, but could not control them. He then saw Maya assaulting the appellant. He saw PW 3 and the appellant coming out of the house and that they were trembling. He saw them going towards grocery shop from where he saw the appellant making phone call to Maya's family members. He even heard him telling them that Maya was quarreling with him.

12. During his cross-examination, the learned Judge of the trial Court noticed and noted that the witness started crying and started telling that he did not see anything at all and that he was not present at the spot and that he told this to the police but they did not listen to him. He also said that he did not come to his house for lunch at noon.

13. The third witness and in our view the most important one is PW 1 Yelanbai. She is wife of PW 3, gist of whose testimony is given above. She too initially deposed that she did not know about the incident and that she had not seen it. With this, she clearly indicated that she would not support the prosecution case.

14. But, thereafter, she was shown the appellant who was sitting in the Court, and she identified him having seen him in her village.

15. This witness was then allowed to be cross- examined by the prosecution and

she then volunteered to state that the appellant and Maya were staying in her neighbourhood. Their room got destroyed due to rain so, they went to stay elsewhere. During that afternoon the appellant and Maya came to her room.

16. She again changed her line of narration and came to her house, she went to her daughter's house, and when she returned, she saw crowd gathered at her house.

17. But, she again changed her version saying that while the appellant and Maya were in her house, Maya asked the appellant to go and get a chicken for lunch. She admitted the suggestion of the prosecution that there was quarrel between Maya and appellant. But she again changed her version saying that thereafter she went away from there.

18. Again she changed her version saying that she advised the appellant and Maya not to quarrel. She then deposed that in her room there were pieces fuel wood and an axe. The appellant gave axe blows on the back side of Maya's head. Maya fell down on the ground. She got frightened and ran away from the room.

19. At the time of recording of her deposition, the learned Judge of the trial Court took following note in respect of this witness's demeanour. We would quote the note which is self explanatory:-

NOTE:- While recording the examination in chief she frightened and she was avoiding to give answers. She was saying that the accused be taken out. It appeared that she was frightened to the accused. Even while deposing the main portion in the dock she was hiding her face. The witness is aged. She is sitting in the dock while giving evidence. When she was asked to stand while stating the important portions she refused and she looked taking care that the accused does not see her.

20. In the cross-examination by the appellant, she again supported the appellant. She said that at the time of incident, she had gone to hospital and that she did not know what had happened in her house. She also admitted that the police took her to Taluka giving threats. She also said that the axe which was muddemal article did not belong to her.

21. The next important witness is PW 12 Dr. Farooqui, who examined dead-body of Maya for autopsy. He mentioned that there were as many as seven crush injuries on the head of Maya; all of them were caused by hard and blunt object.

22. The next relevant circumstance is the scene of offence panchanama and its contents. The place of occurrence is the room in occupation and use of PW 1 and PW 3. Besides personal belongings of the deceased and her blood was found scattered over the room. The police also found the murder weapon there. It was an axe which was found soiled with blood as well as victim's hair.

23. The next and equally important circumstance is the arrest panchnama of the

appellant. This panchnama is proved by PW 15, the Investigation Officer. He deposed that: on 27th November, 2009, PW 5 Santosh came to police station and lodged his complaint. He recorded the same as per his narration and registered the offence. He then went to scene of offence with his staff, panchas and the complainant. He drew inquest panchnama and scene of offence panchnama. He sent the dead-body for autopsy.

24. He said, he then arrested the appellant/accused and recorded a panchnama of seizure of his clothes. He also identified the clothes of the appellant and brown paper wrappers in which the same were wrapped. He sent those clothes and that of the deceased to chemical analyzer.

25. In the cross-examination, he admitted that in arrest panchnama there is no mention of crime number though by that time he had registered the offence. The appellant's cross-examiner suggested to this witness that he had planted the articles and recorded a false panchnama.

26. In addition to this, Investigation Officer also mentioned that he sent the clothes of the appellant and other muddemal articles to Chemical Analyzer with a forwarding letter dated 3rd December, 2009 (Exh.49). This letter clearly mentions how the muddemal articles were parceled with seals. This letter clearly mentioned that the clothes of the appellant were sealed separately bearing Article Nos. C-1, C-2. In turn, the C.A. report which has gone unchallenged on record (Exh.51) shows that all the articles sent were found intact when they were received. The Chemical Analyzer then unwrapped the articles and then gave separate numbers to them. The clothes of the appellant were given Exh.6 and 7 and the Chemical Analyzer clearly mentioned that they were found stained with blood group "A".

27. The learned judge of the trial Court on the basis of above material held that the prosecution proved their case. The main reasons for coming to such conclusion can be stated as under:-

28. The deposition of PW 1 Yelanbai is believable though she did not support the prosecution case fully. The learned judge held that her deposition is corroborated by PW 3 Baburao (her husband) and PW 5 Santosh, the child witness. He discussed details of the depositions of these three witnesses and other circumstances like scene of offence panchnama to come to conclusion that PW 1-Yelanbai who is the eye witness has to be believed when she deposed that the appellant crushed Maya's head with an axe.

29. The learned judge also placed strong reliance on the prosecution case that the clothes of the appellant were found soiled with Maya's blood.

30 The learned Advocate for the appellant mainly attacked these two findings and we should therefore discuss the evidence of the so-called eye witnesses and record our observations.

31. PW 5 Maya's brother and PW 8 her father have proved some relevant but

peripheral fact. These two witnesses rather unintentionally supported the prosecution and their support appears quite significant. We are inclined to believe the deposition of PW 5-Santosh and we hold that through his deposition the prosecution proved that Maya and appellant lived like a couple and they had visited house of these witness a few days prior to the incident. We are not giving importance to the disclosure of these witnesses that appellant was not treating Maya well etc. This could be an improvement, because Maya despite the alleged unkind behaviour, continued to reside with the appellant and was quite happy.

32. PW 7 Grocery shop keeper proved that his shop has coin box telephone and it is situated in the vicinity of the place of occurrence.

33. PW 8-Jagannath father of the victim said he received a phone call from the appellant, and he said that the appellant confessed to him that he had assaulted Maya with an axe etc. The learned judge of the trial Court did not give importance to this part of the testimony mainly because there is no evidence on record to show that the appellant made a phone call to this witness who had mobile phone bearing No. 9921248028. The prosecution at the most could establish that there occurred a call between this witness's telephone number and telephone bearing No. 9763690138. The prosecution however could not prove that the appellant used this telephone for contacting this witness. The record shows that this telephone belongs to one Pratibha Mhaske, who is not related to this case. It is not proved that this telephone is the one which is installed at the grocery shop of PW

7. PW 7 mentioned in his deposition that the telephone number of the coin box installed at his shop is 322683. Thus, we agree with the learned judge of the trial Court while appreciating this circumstance of extra judicial confession sought to be proved against the appellant.

34. The fact that on 27 November, 2009, PW 5 and 7 visited the scene of offence and found Maya's dead-body in the house of PW1 and 3 has gone unchallenged is proved.

35. Through the deposition of PW 12-Dr. Farooqui, who had examined the dead-body of Maya for autopsy, it is established that Maya died due to seven crush injuries on her head. These injuries were possible by hard and blunt object like an axe. Besides, the nature of injuries clearly established that the assailant without any compunction and with utmost cruelty delivered those blows on the victim's head. While doing so, the assailant intended to cause death of the victim. The blows on the head of Maya were eminently dangerous and the they in all probability could cause her death. We also held that this witness (PW 5) then lodged his complaint against the appellant and named him as the assailant.

36. We would now deal with deposition of PW 3 Baburao. Despite cross-examination, his version remained undisturbed. The defence did not probably perceive any threat from this rather lukewarm deposition. This witness has amply proved the fact that the appellant and Maya had come in the vicinity of his house

at the relevant time in search of some valuables that could have been left back at the damaged and un-habitable house. This also proves that the appellant and Maya were not quarreling then. This would also mean that when they had come there they were in good mood. He could further prove that his wife Yelan bai rushed out of their house and told him that the appellant and Maya had quarrel.

37. We would now go to the deposition of PW 6 Kumar. As indicated, he did not support the prosecution case in respect of appellant's allegedly assaulting Maya with axe etc.

38. During his cross-examination, the learned Judge of the trial Court noticed and noted that the witness started crying and started telling that he did not see anything at all and that he was not present at the spot, and that he told this to the police but they did not listen to him. He also said that he did not come to his house for lunch at noon.

39. On the face of it, this witness, at the time of recording of his deposition, was in disturbed and frightened condition. He initially avoided to depose in favour of the prosecution, but with very little effort, he narrated about what he saw in the afternoon on that day. But, he firmly refused to accept the suggestion of the prosecution that he had seen the incident etc. He thus partly supported the prosecution case that in the afternoon he had come to his house and that he had seen the appellant, Maya and PW 1 in the house and that there was quarrel between them etc.

40. The question is, whether this witness (PW 6) should be believed to the extent of the deposition which we narrated above. Our answer to this is in affirmative. This is a child witness and obviously he was under pressure from both the sides. Both sides cross-examined him and despite cross-examination and despite hesitation he narrated as to what had happened during the afternoon on that day. No doubt, in the cross-examination by the appellant, he again changed his version and said that he had not come to his house in the afternoon, but we still are inclined to believe the testimony of this witness mainly because being a child he was pressurized by both the sides and despite pressure he narrated such facts which were within his knowledge. He neither supported the prosecution nor the appellant. Whatever he has stated in favour of the prosecution thus inspires confidence. We therefore believe him to that extent. This witness thus proved that at the relevant time the appellant and Maya were in the house of Yelanbai and there occurred quarrel between them. Appellant thereafter rushed to the grocers and made phone calls to Maya's relatives.

41. The most important witness is PW 1 Yelanbai. It is clear from her deposition narrated above that she was reluctant to support the prosecution, but after some persuasion, she stated that she had witnessed the incident and that the appellant had delivered a blow of axe on Maya's head.

42. This apparently ambivalent and vacillating witness, according to the learned counsel for the appellant should be disbelieved. He asserted that this witness is

untrustworthy because she made contradictory statements time and again during her deposition. He said, this witness is a hostile witness and had not supported the prosecution case and whatever she had stated against the appellant was her admissions during the prosecutor's cross-examination. He asserted that this evidence of this witness should be discarded.

43. We do not accept this argument.. We are inclined to believe this witness to the extent she supported the prosecution case. Even the learned Judge of the trial Court who recorded her deposition and observed her very closely, very clearly held that he would rather believe this so called hostile witness. He observed in the Judgment that her conduct clearly revealed that she was not able to state truth because of fear of the appellant.

44. Unlike the learned judge of trial court we are not inclined to give much importance to her statement recorded u/s 164 of Cr.P.C. because she did not fully support the same and that same was useful only for contradictions and omissions. But, as said above, on the face of it, if this witness is truthful and is believed, then there is no reason for us to examine as to what she had stated in her statement u/s 164 of Cr.P.C.

45. The law of appreciation of evidence of a witness who resiles from his/her previous statement is quite well settled. The Hon''ble Supreme Court has held and reiterated in number of judgments that the evidence of hostile witness need not be rejected in its entirety, but may be relied on either for corroboration and above that if it is found credible it can form basis for conviction. In the matter of appreciation of evidence of witnesses it is not number of witnesses, but the quality that is important. (Reliance on the judgment in the case of *Mrinal Das v. State of Tripura* (2011 (9) S.C.C. 479).

46. In the case of *Rajendra v. State of U.P.* (2009 (30) S.C.C. 480), the Supreme Court held that testimony of a hostile witness may not be totally rejected but should be subjected to close scrutiny. It is held that after close scrutiny if a portion of a testimony is found consistent to the case of prosecution or defence, the same can be accepted by the Court.

47. So, we have discussed the evidence of PW 1 Yelanbai after scrutinizing it thoroughly. The learned judge of the trial Court also scrutinized the same quite thoroughly and held that she should be believed when she said that she had seen appellant giving axe blows on the head of the victim. She is corroborated by P.W.3 her husband and P.W.5 the child witness. They proved that the appellant had come to the her house with the victim. He had a quarrel with her. After the incident, the appellant came out of the house and went up to the grocery shop.

48. In addition to this the scene of offence panchanama and its contents are also supporting the prosecution case. The place of occurrence is the room in occupation and use of PW 1 and PW 3. Besides personal belongings of the deceased, her blood was found scattered over the room. The police also found the murder weapon there. It was an axe which was found soiled with blood as

well as victim's hair.

49. The next and equally important circumstance is the arrest panchnama of the appellant and the blood stained clothes of the appellant.

50. The learned Advocate for the appellant asserted that the prosecution could not prove beyond reasonable doubt that at the time of appellant's arrest on the date of incident, his clothes were found soiled with victim's blood. He said that the panchnama did not mention that after seizure of clothes of the appellant, they were wrapped separately in rappers and were sealed. Indeed, this is not mentioned in the panchnama. He therefore suggested that the clothes were not separated from those of the deceased which were extensively stained with her blood. He said there strong possibility of accidental or intentional staining of the appellant's clothes. He thus sought benefit of doubt. We reject this submission for following reasons.

51. Firstly, during the cross-examination, the Investigation Officer was not asked as to whether he had securely wrapped the clothes of the appellant at the time of panchnama. The cross-examination by no stretch of imagination suggested even by implication that the clothes of the appellant were not separately wrapped and securely sealed for sending them for chemical analysis etc. During the cross examination this witness was asked as to whether he had put "labels" on the clothes. We carefully went through the cross-examination on this aspect and found that the cross-examiner did not point out to this witness that he did not wrap and seal the clothes really touch this important aspect of the case. He ought to have pointed out to the Investigation Officer during cross-examination that he had not wrapped the clothes separately and sealed them. In absence of such suggestion or questions, the Investigation Officer cannot be blamed for not mentioning that the clothes of the appellant were separately wrapped and sealed, though this fact has not been mentioned in the panchnama.

52. What is pertinent on this point is already mentioned above while giving details of the deposition of the Investigation Officer. The Investigation Officer very specifically said that he could identify the clothes of the appellant as well as the wrappers used with them. He thereby implied that the clothes were wrapped in the wrappers and they too came back from the C.A. with other articles.

53. In addition to this, Investigation Officer also mentioned that he sent the clothes of the appellant and other muddemal articles to Chemical Analyzer with a forwarding letter dated 3rd December, 2009 (Exh.49). This letter clearly mentions how the muddemal articles were parceled with seals. This letter clearly mentioned that the clothes of the appellant were sealed separately bearing Article Nos. C-1, C-2. In turn, the C.A. report which has gone unchallenged on record (Exh.51) shows that all the articles sent were found intact when they were received. The Chemical Analyzer then unwrapped the articles and then gave separate numbers to them. The clothes of the appellant were given Exh.6 and 7 and the Chemical Analyzer clearly mentioned that they were found stained with

blood group "A". In view of this strong evidence, the submission that the clothes of the appellant were not properly sealed etc. fades into insignificance.

54. It is thus proved that the appellant's clothes were seized soon after the incident and were found stained with same blood which was found on the victims clothes. This circumstance really clinches the case for the prosecution. In view of above discussion, we have no hesitation to come to conclusion that the appeal should fail. This appeal stands dismissed.