

(1996) 04 BOM CK 0040
In the Bombay High Court
Case No : Criminal Appeal No. 209 of 1994

Pandharinath Bhikaji Vinde and Another	APPELLANT
Vs	
The State of Maharashtra	RESPONDENT

Date of Decision : 23-04-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 161, 165
Evidence Act, 1872 — Section 134, 3, 45, 59
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (1997) 1 BomCR 10 : (1997) BomCR(Cri) 72

Hon'ble Judges : Vishnu Sahai, J; R.G. Vaidyanatha, J

Bench : Division Bench

Advocate : Adhik Shirodkar and Rajendra Shirodkar, for the Appellant; D.T. Palekar, for the Respondent

Final Decision : Dismissed

Judgement

Vishnu Sahai, J.—Vide Judgment and order dated 2-3-1994, passed in Sessions Case No. 199 of 1993, the 3rd Additional Sessions Judge, Thane convicted and sentenced the appellants in the manner stated hereinafter:---

i. Pandharinath Bhikaji Vinde:---

a. u/s 302 r/w 34 I.P.C. to life imprisonment and to pay a fine of Rs. 1000/- in default to further undergo six months R.I.

b. u/s 135 of the Bombay Police Act but, awarding no separate sentence; and

ii. Narendra @ Nalad Kashinath Marde:---

a. u/s 302 r/w 34 I.P.C. to life imprisonment and to pay a fine of Rs. 1000/- and in default to undergo six months R.I;

b. u/s 506 I.P.C. but, awarding no separate sentence;

c. u/s 135 of the Bombay Police Act but, awarding no separate sentence.

Hence, this appeal.

2. The prosecution case in brief is that Kalpana P.W. 1 is the wife of the deceased Ashok Motiram Bari. At the time of the incident, she along with her husband Ashok and her children was residing in Gungwada. On 1-9-1992, Ashok was at home since morning. At about 5 p.m. there was immersion of Lord Ganpati in the village, including Ganpati idol of Atmaram Damu Bari, maternal brother of Ashok. In the procession, Kalpana along with Ashok had gone to the seashore. However, they did not go to the place of immersion as they were in a hurry to return home. Hence, they started walking back. At about 6 p.m. while they were on the way to their home, and had reached near the shop of Ajit Tandel behind Ambamata temple the appellants met them. Appellant Pandharinath asked her to proceed further. He asked Ashok to enquire into the frequent failure of electricity in the village. Ashok replied that he would look into the matter after Ganpati festival was over. While the conversation between Pandharinath and Ashok was going on, Kalpana was standing at a distance of 5 to 6 foot-steps. She saw in the meantime, that appellant Pandharinath caught hold of her husband from the backside and pressed his mouth and appellant Narendra assaulted him with a knife on his chest, stomach, nose and other parts of his body. As a consequence of the assault by Narendra, Ashok sustained bleeding injuries. Understandably, Kalpana rushed to him and started embracing him. On that point of time, the appellant Narendra threatened to assault her with a knife and also kill her in case she disclosed their names to the police. Kalpana started raising cries whereupon her maternal aunt Shantabai, Chhaya daughter of maternal uncle and son of her maternal uncle Ravindra Mansoor who, lived nearby came. Thinking that Ashok might still be alive, they lifted him and brought him to his house. Then, Kalpana's maternal uncle Pandurang Khari Bari P.W. 7 and his son Jagdish took the deceased on a motor-cycle to Dahanu Khadi where Kalpana's parents-in-law were residing. Her mother-in-law came with the jeep and in the way met them and on the same, Ashok was put and thereafter taken to Dahanu Khadi.

In Dahanu Khadi, at the house of the in-laws of Kalpana, Doctor Desale P.W. 2 of the same village, on receiving information through one Prakash Bari, came and medically examined Ashok. At that time, he found him to be dead. Immediately after the incident, Kalpana informed her maternal uncle Pandurang Bari that the two appellants had assaulted her husband Ashok and asked him to lodge the F.I.R. Information was sent by Pandurang to Vangaon Police Station at about 10 p.m. through Vasudev Bari, Bhagwan Bari along with jeep owner Ganesh Narayan Hambire. On the information given by Hambire, an entry Exhibit 48 was made in the Station Diary that Ashok had been murdered and that his wife would give her complaint. At about 1.30 a.m. the Police arrived at the house of Kalpana's in-laws in Dahanu Khadi. There, at 2 a.m. Kalpana lodged her F.I.R. which was recorded by P.W. 20 P.S.I. Hanumant Khamkar.

3. The investigation of the case was conducted by P.S.I. Khamkar. On 2-9-1992, in the morning time, he prepared the inquest panchanama. Thereafter, along

with the complainant Kalpana, he went to the place of the incident and prepared the spot panchanama Exhibit 25. He then, recorded statements of eight witnesses. He took into possession the blood-stained sari and blouse of complainant Kalpana under a panchanama Exhibit. 17. He, thereafter, started searching for the accused persons. The same day, i.e. 2-9-1992, he arrested the appellant Pandharinath and took into possession one kafani and brown full pant which he was wearing at the time of the incident under a panchanama Exhibit 39. The kafani was stained with blood. On 3-9-1992, he recorded statement of some witnesses. Same day, he arrested the appellant Narendra. On 7-9-1992, the appellant Narendra showed his willingness to get the weapon of assault and clothes recovered. Consequently, the public panchas P.W. 17 Jitendra and P.W. 18 Vasudeo Pagdhare were called. Thereafter, on a jeep along with the panchas, police personnel and the appellant, they proceeded towards the rest house of village Tadiyal. When they reached Bhimacha Dagad, the appellant Narendra asked that the jeep be stopped. After walking for about 8 to 10 minutes, they reached a place where some stones were scattered. The appellant Narendra lifted one of those stones and from beneath it, took out a full pant and a knife. There were blood stains on the knife. After recovery, the articles were sealed. The articles recovered during investigation were sent to the Chemical Analyst. After completing the investigation, a charge-sheet was submitted against the appellants.

4. Going backwards, the post mortem examination of the dead body of the deceased was conducted by Dr. Ramnath Dighule P.W. 4 on 2-9-1992 between 10.45 a.m. to 12 noon. The doctor found seven incised wounds and four penetrating incised wounds on the dead body; whereas the incised wounds were spindle shaped the penetrating incised wounds were elliptical in shape. On internal examination, the doctor noticed extensive internal damage. Pleura and peritoneum was cut, heart and small intestine were perforated.

In the opinion of Dr. Dighule, the deceased died on account of shock due to vital organ i.e. heart.

In his statement in the trial Court, Dr. Dighule deposed that these injuries could be caused by the knife shown to him (Article No. 11) and were sufficient in the ordinary course of nature to cause death.

5. The case was committed to the Court of Sessions in the usual manner. In the trial Court, the appellants were charged under sections 302 r/w 34 I.P.C. and section 135 of the Bombay Police Act. Appellant Narendra was further charged u/s 506 I.P.C. An alternative charge u/s 302 I.P.C. was also framed against him.

In the trial Court, apart from tendering voluminous documentary evidence, the prosecution examined as many as 20 witnesses. They included Kalpana Bari, the solitary eye witness, whose evidence has been relied upon by the trial Judge.

In defence, no witness was examined by the appellants.

The learned trial Judge believed the evidence adduced by the prosecution and convicted and sentenced the appellants in the manner stated above.

6. We have heard Mr. Adhik Shirodkar along with Mr. Rajendra Shirodkar for the appellants and Mr. D.T. Palekar for the respondent. We have also perused the depositions of the witnesses, the material exhibits and the impugned judgment. After giving our anxious consideration to the matter, we are firmly of the opinion that there is no substance in this appeal and it deserves to be dismissed.

7. The crucial question in this appeal is whether the evidence of Kalpana Bari corroborated by attending circumstances, is sufficient for sustaining the conviction of the appellants. Our answer to the same is in the affirmative. In paragraph 2, we have set out the prosecution story on the basis of the averments contained in the examination-in-chief of Kalpana Bari. Hence, in our view, no useful purpose would be served by reiterating the same, graphically. Broadly stated, Kalpana's evidence is that on 1-9-1992, at about 6 p.m. while she and her husband Ashok were returning home, from Ganpati immersion, the two appellants met them on the way. The appellant Pandharinath asked her to proceed further. Thereafter, he caught hold of Ashok from the backside and pressed his mouth and appellant Narendra assaulted him with a knife on the chest, stomach, and nose. She further stated that after Ashok had been assaulted, she rushed to him and embraced him and in that process, her clothes became stained with blood.

We may mention that although Kalpana has been subject to a very searching and lengthy cross-examination but, curiously enough, we find that hardly any questions have been put to her pertaining to the main incident itself. We virtually find that the manner of assault has gone un-challenged in the cross-examination. After going through her statement, we find the same to be perfectly natural and inspiring confidence. In our view she is a wholly reliable witness.

8. Assurance is lent to the statement of Kalpana by a large number of circumstances. The manner of assault deposed to by her, is corroborated by the medical evidence. As mentioned earlier, the autopsy report of the deceased shows that in all he sustained eleven ante-mortem injuries out of which seven were incised wounds and four were incised penetrating wounds. Evidence of Dr. Ramnath Dighule P.W. 4 who had performed the post mortem examination of the (corpse) deceased is that the aforesaid injuries can be caused by the knife shown to him. (Article No. 11)

Another circumstance which lends assurance to the testimony of Kalpana is the recovery of her blood-stained sari and blouse under a panchanama by the Investigating Agency. That panchanama Exhibit 17 has been admitted in evidence u/s 294 Cr.P.C. These clothes in trial were identified by her as Article 7 and 8. The aforesaid recovery corroborates her claim of witnessing the incident and of rushing to and embracing her husband after the assault. These clothes were sent to the Chemical Analyst who found human blood on them.

Corroboration is also lent to the claim of Kalpana of having seen the incident by the circumstance that immediately after the incident, at her house, she mentioned the names of the two appellants as being the assailants of her husband to her maternal uncle P.W. 7 Pandurang Bari. We have gone through the statement of Pandurang Bari and we find the same to be implicitly reliable.

That she witnessed the incident is also corroborated by the circumstance that P.W. 5 Maltibai Bari who resided in Ambamata temple which was very near the place of the incident deposed that on the day of incident (Tuesday) at about 6 p.m. on hearing the cries of Kalpana, she rushed to the place of the incident and found her weeping and Ashok lying in a pool of blood. We have gone through the statement of Maltibai Bari and we find that she is an independent witness and her evidence inspires confidence.

Again, corroboration is lent to the testimony of Kalpana by the fact that the knife with which the appellant Narendra assaulted the deceased was recovered under a panchanama at his pointing out. As mentioned earlier, apart from the Investigating Officer, two public panchas were examined. It is true that one of them namely P.W. 18 Vasudeo Pagdhare turned hostile but, we have the evidence of other public panch Jitendra Akre P.W. 17 and the Investigating Officer P.W. 20 P.S.I. Khamkar. We have been taken through their evidence and we find the same to be impeachable. The recovered knife was also sent to the Chemical Analyst who found human blood on it. The presence of blood on the kafani recovered at the instance of appellant Pandharinath under a panchanama Exhibit 39 also lends assurance to Kalpana's evidence that he participated in the incident. The Chemical Analyst found human blood on the kafani. Although the two public panchas of this recovery have turned hostile, but, we have the statement of P.S.I. Khamkar in whose evidence we find no infirmity.

Finally, corroboration is forthcoming to Kalpana's statement by the circumstance that there was plausible motive for the two appellants to have committed murder of the deceased. The motive which has been established in the instant case is that appellant Narendra was annoyed with the deceased on account of the fact that he was having illicit relations with his wife. Not only on this motive do we have the evidence of Kalpana but, it would be pertinent to mention that the appellant Narendra in his statement u/s 313 Cr.P.C. has admitted this illicit relationship. Naturally, appellant Narendra must have been sore with the deceased on account of it. It may be mentioned that appellant Pandharinath is the cousin father-in-law of appellant Narendra and also his friend. Hence, there was also reason for him to join hands with Narendra in committing the murder of the deceased.

9. In our view, the statement of Kalpana corroborated by the aforesaid circumstances is a very sufficient and safe basis for sustaining the conviction of the appellants. The time honoured rule is that evidence has to be weighed and not counted. On it is based the provision contained in section 134 of the Evidence Act which reads thus:---

"No particular number of witnesses shall in any case be required for the proof of any fact."

It is well-settled that a conviction can be recorded on the testimony of a solitary witness provided the same inspires confidence. In a recent case decided by a Single Judge of the Court (Vishnu Sahai, J.), reported in 1997 Bom.C.R. 1:1996(1) Crimes 460, Dinkar Deoram Kamble ... appellant v. State of Maharashtra..respondent, it was observed in para 13 thus:---

"Plurality of evidence is only a rule of prudence; necessary in a given case because of its peculiar features and not an inflexible requirement of law having universal application."

In our view, there is no such infirmity in the evidence of Kalpana on account of which it can be rejected. Accordingly, we accept her testimony and the circumstances corroborating it.

10. Mr. Adhik Shirodkar, learned Counsel for the appellants made a number of submissions before us. His first submission is that although the incident took place on a immersion day, it does not appeal to reason as to why no witness excepting Kalpana is coming forward to depose in the instant case. He contended that there must have been other witnesses of the incident and the failure on the part of the prosecution to examine them, should make us draw an adverse inference against the prosecution. In the instant case, we find that nowhere in the evidence it has come that apart from Kalpana and one Namdeo Keshav Tandel, P.W. 12, some others had seen the incident.

On the principle that blood is dearer than truth, Namdeo Tandel who is a relation of appellant Narendra turned hostile and when confronted with portions of his statement u/s 161 Cr.P.C. wherein he gave ocular account of the incident denied having made those statements.

If some others had seen the incident, and their names would have been disclosed during investigation, the prosecution was duty bound to examine some of them. Mr. Palekar learned Additional Public Prosecutor vehemently contended that there may have been houses around, the place of the incident but, since it was a immersion day, people with their families would have gone to the seashore to witness the immersion and none may have been present in their houses. He contends that in this view of the matter, it is not surprising that no other person saw the incident.

11. Mr. Shirodkar next contended that a perusal of the ante-mortem injuries sustained by the deceased, shows that he was assaulted by at least two persons. In this context, he drew our attention to the dual nature of injuries sustained by the deceased namely seven incised wounds and four penetrating incised wounds. He contended that whereas as the former were spindle shaped the latter were elliptical in shape. This in his contention showed that the deceased was assaulted by two persons. To back his submission, Mr. Shirodkar relied on the admission

made by the autopsy surgeon Dr. Ramnath Dighule P.W. 4 in his cross-examination to the effect that the injuries of both the types may or may not have been caused by the same weapon. He urged that there was a greater possibility of two different weapons being used. This submission only appears to be attractive on the first blush. However, a deeper scrutiny reveals that it is not pregnant with merit.

P.W. 4 Dr. Ramnath Dighule in his examination-in-chief stated that all the injuries suffered by the deceased could be caused by the knife shown to him (Article No. 11). Apart from it, it is common knowledge that knife can cause both incised wounds as well as penetrating incised wounds. It would depend on the manner in which it is used. If used in a thrusting manner, incised penetrating wounds would be caused and in a cutting manner, only incised wounds would be caused. During the trial, the learned defence Counsel did not question Kalpana regarding the manner in which the assault by knife was made on the deceased. In the absence of any suggestion, being made to her on this aspect and on the face of the categorical statement of Dr. Dighule in his examination-in-chief, that all the injuries could be caused by the knife, shown to him (Article 11) and bearing in mind, our experience, we find no merit in the aforesaid submission of Mr. Shirodkar and we accordingly reject it.

12. Mr. Shirodkar next contended that no reliance can be placed on the evidence of recovery of knife because, the same was affected from an open place. To substantiate his submission, he invited our attention to the testimony of Jitendra P.W. 17 who, in paragraph 5 of his statement stated that the place of recovery was an open site having a general access. The evidence, including the recovery panchanama pertaining to knife, shows that although in layman's language the place of recovery may have been an open place, but, the recovered knife was concealed between stones and was also covered by a stone. The evidence also shows that the appellant Narendra pointed out the place and after removing the stones, the knife was recovered. On the face of such evidence, the recovery of knife, in our judgement, cannot be stigmatised as recovery from an open place. The concept of an open place is a place which is in the knowledge of all and sundry. In the manner in which the knife had been concealed by appellant Narendra and the way in which it was covered, the place of recovery in our view cannot be said to be an open place.

13. Mr. Shirodkar next contended that in the absence of blood of the group of deceased being found on the kafani recovered at instance of appellant Pandharinath and knife at that of appellant Narendra, the recovery evidence cannot be said to be incriminating. We regret that we do not find any merit in it. On both the articles the Chemical Analyst found human blood. If the group of the blood could not be determined that does not mean that there is no weight in the recovery evidence, although, presence of blood of the group of the deceased on those articles would certainly have been more clinching evidence.

14. Mr. Shirodkar vehemently contended that the circumstance that the F.I.R. in

the instant case was lodged after an inordinate delay of nearly eight hours and till then Kalpana did not disclose the names of the assailants to anyone shows that she did not see the incident. We regret that we do not find any merit in this submission either. The evidence of P.W. 7 Pandurang Bari the maternal uncle of Kalpana is that immediately after the incident she disclosed to him the names of the appellants as the assailants of her husband. Hence the learned Counsel is not correct in saying that till the lodging of the F.I.R. the names of the appellants had not seen the light of the day. As observed earlier, we find the evidence of Pandurang Bari to be implicitly reliable.

Mr. Shirodkar urged that we should not accept this claim of Kalpana for the following reason. After Kalpana had disclosed to Pandurang the names of the assailants of the deceased she also asked him to lodge the F.I.R. He in turn, sent his friends Vasudeo Bari, Bhagwan Bari along with the jeep owner Ganesh Narian Hambire for informing the police at about 10.30 p.m. In his cross-examination Pandurang admitted that he had informed them that the appellants had murdered the deceased. Mr. Shirodkar urged that since this was so in the Station Diary entry of Vadgaon Police Station, Exhibit 48 which was made on information given by Ganesh Narian Hambire the names of the appellants should have been mentioned but the same does not contain their names. In Mr. Shirodkar's contention, this shows that Kalpana had not seen the incident; had not told her maternal uncle Pandurang Bari the names of the assailants; and Pandurang Bari had also not mentioned names of the assailants to the aforesaid three persons.

We regret that we are not able to find any merit in this contention. In our view, it would be far too fetched to hold on this solitary circumstance that Kalpana did not see the incident. It appears that though Pandurang Bari mentioned the names of the appellants to the aforesaid three persons but either on account of extreme tension or inadvertence or because he did not want to come on the wrong side of the appellants Hambire may not have disclosed their names in the Station Diary Entry and only mentioned therein about Ashok's murder and that Kalpana would lodge the F.I.R. In our view the total weight of Kalpana's evidence corroborated by the circumstances mentioned earlier cannot be washed off by this solitary circumstance. She cannot be condemned for a lapse committed by a third person.

Coming to the delay in the lodging of F.I.R., we find that the same had been plausibly explained. The evidence is that after the assault, Ashok who was still alive was first taken to his house. Thereafter, he was taken to the house of his in-laws in Dahanu Khadi. There Dr. Desale was called and he declared him dead. The evidence further is and it is also natural to assume, that after the death of the deceased, Kalpana and the relations started weeping and wailing. This has come in the statement of P.W. 7 Pandurang Bari. Naturally sometime must have been lost in all this. If in such a situation Pandurang to whom Kalpana had asked to convey information to the police, did not send some person to Police Station Vadgaon before 10.30 p.m. in our view, no capital could be made from it. In

situations like this there cannot be a mathematical calculation of the time taken in the lodging of F.I.R. While faced with such situations no one thinks that a delay of couple of hours in sending information to police would prove fatal.

Mr. Shirodkar also contended that even after the information was conveyed to Vadgaon Police Station, through persons sent by Pandurang P.W. 7, there has been a time lag of 31/2 hours before the F.I.R. was lodged. We find that the reason for this delay has been furnished in the evidence of P.S.I. Hanumant Khamkar, the Investigating Officer. He deposed that after the band bust duty, he returned to the police-station at about 10.50 p.m. On his return he learnt from Head Constable Mahale about the murder of Ashok and that his wife wanted to lodge a complaint in respect of it. Hence, he started in a jeep. At that time, it was raining. Naturally the jeep must not have been driven with speed. He understandably first went to the place of the incident where he reached at about 11.50 p.m. There, he learnt that the dead body of Ashok was at the place of his in-laws at Dhakti Dahanu. Hence, he went there and took down the F.I.R. In such a situation, if the F.I.R. was lodged at 2 a.m., in our view, it cannot be faulted as belated. In our view, whatever delay has occasioned in the lodging of the F.I.R. has been plausibly explained by the prosecution. Hence, we reject the aforesaid contention of Mr. Shirodkar also.

Before parting with this submission of Mr. Shirodkar, we would like to emphasise that the F.I.R. is not a substantive piece of evidence. It can only be used to contradict or corroborate the maker. The question of delay in the lodging of F.I.R. only assumes importance if the same is inordinate and no convincing explanation is forthcoming for the same. Whether the delay in the lodging of F.I.R. is inordinate or not, in a given case, would depend on its peculiar facts. It has to be determined in each and every case, on the basis of the explanation furnished by the prosecution. We are fortified in our view by a decision of the Apex Court reported in *Apren Joseph alias Current Kunjukunju and Others Vs. The State of Kerala, ... respondent*, wherein in para 11, Their Lordships have observed thus :---

"First information report u/s 154 is not even considered a substantive piece of evidence. It can only be used to corroborate or contradict the informant's evidence in Court. But this information when recorded is the basis of the case set up by the informant. It is very useful if recorded before there is time and opportunity to embellish or before the informant's memory fades. Undue unreasonable delay in lodging the F.I.R. therefore, inevitably gives rise to suspicion which puts the Court on guard to look for the possible motive and the explanation for the delay and consider its effect on the trust-worthiness or otherwise of the prosecution version. In our opinion, no duration of time in the abstract can be fixed as reasonable for giving information of a crime to the police, the question of reasonable time being a matter for determination by the Court in each case. Mere delay in lodging the first information report with the police, is therefore, not necessarily, as a matter of law, fatal to the prosecution.

The effect of delay in doing so in the light of the plausibility of the explanation forthcoming for such delay accordingly must fall for consideration on all the facts and circumstances of a given case."

15. Finally, Mr. Shirodkar contended that in view of the infirmities pointed out by him, it would not be proper and prudent for us to sustain the conviction of the appellants on the solitary testimony of Kalpana Bari wife of the deceased. In paras 10, 11, 12, 13 and 14 of this Judgment, we have given our reasons for rejecting the infirmities pointed out by Mr. Shirodkar. We wish to emphasise that we are not sustaining the conviction of the appellants only on the ocular account furnished by Kalpana Bari but, also by the attending circumstances which corroborate the same and have been referred to by us in para 8 of this Judgment. There is no requirement in law that corroboration of ocular account should only be forthcoming in the form of ocular account. If that was so, it would be making nugatory provisions contained in section 134 of the Evidence Act which reads thus :---

"No particular number of witnesses shall in any case be required for the proof of any fact."

Corroboration can also be furnished by circumstantial evidence. In para 8, we have already referred to and also accepted the circumstances which corroborate the prosecution case.

16. Pursuant to the above discussion, we find that this appeal is devoid of substance and consequently, has to be dismissed.

17. In the result, we dismiss the appeal and confirm the convictions and sentences of the appellants who, we are informed are in jail. They shall remain there till they serve out their sentences.