

(2011) 03 BOM CK 0219
In the Bombay High Court
Case No : Criminal Appeal No. 894 of 2003

Pramod Baban Sonawale

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 08-03-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374, 428
Evidence Act, 1872 — Section 145, 157, 21
Penal Code, 1860 (IPC) — Section 300, 302, 304

Citation : (2011) 03 BOM CK 0219

Hon'ble Judges : Ranjit More, J; B.H. Marlapalle, J

Bench : Division Bench

Advocate : Murtaza Najmi, for the Appellant; H.J. Dedhia, APP, for the Respondent

Judgement

B.H. Marlapalle, J.—This appeal filed u/s 374 of Cr.P.C., is directed against the order of conviction and sentence passed in Sessions Case No. 254 of 2000, on 31st July 2002 by the learned Additional Sessions Judge (the learned Assistant Sessions Judge came to be appointed as Addl. Sessions Judge as per the High Court notification dated 4th February, 2002). The Appellant-accused has been convicted for the offence punishable u/s 302 and sentenced to suffer R.I. for life and to pay fine of Rs. 1,000/-. It appears that the accused-Appellant was not on bail during the trial and on admission of this appeal he was released on bail as per order dated 4th August, 2003. As the appeal was dismissed for default pursuant to the conditional order dated 8th September, 2009, he came to be arrested so as to undergo the life sentence. Criminal Application No. 698 of 2009 was allowed and the appeal came to be restored. The Appellant remained in custody on account of dismissal of the appeal for default.

2. As per the prosecution case, Nivrutti Bhiva Sonawale is the original resident of village Wing in Taluka Karad in Satara district. He begot four sons by name Baban, Namdeo, Simesh and Vinod. Baban and his wife Laxmi with two sons and two daughters (Pramod, Yeshwant, Kalpana and Acharna) resided separately at

Nalasopara, Mumbai. Baban is alleged to be addicted to liquor. Nivrutti came to Mumbai in May, 1961 and started working with Voltas. He retired in 1992 and received more than one and half lakhs by way of retirement benefits, but he did not return to the village and started residing with Baban and his family. That his wife Gayabai continued to reside at village Wing along with her son Simesh. Their younger son was also residing at village Wing and he was engaged in painting work. As per Vinod his father Nivrutti was involved with Laxmi, wife of Baban and mother of Pramod, in an illicit relationship.

3. On 27th November, 1999 Vinod went to village Wing to attend some function in his maternal uncle's house. He did not return to Mumbai till 27th December, 1999 and in stead he stayed along with his uncle and grand mother Gayabai. On 1st January, 2000 in the afternoon hours Pramod was playing cards along with Anna Kale and Taty Kale and other boys. At that time uncle Vinod arrived at the scene and started scolding Pramod on account of filling in drinking water. In the night he did not take his meal and went to Laxmi temple.. Raju Kale, Sharad Sonawane also reached the temple to sleep there. Vinod also reached the temple to sleep there. There was some altercation between Vinod and Pramod and Vinod caught hold of Pramod's shirt and insulted him by saying that his mother Laxmi was sleeping with Nivrutti. Pramod tried to rescue himself and in that his shirt got torn. All four of them slept in the temple. Past midnight Pramod saw that the other three were asleep. He went outside the temple, lifted a big stone, came inside and dropped the stone on the head of Vinod. The two boys who were sleeping by the side of Vinod got up and ran away. After this incident Pramod went to the house of Sudhir Sonawane and borrowed his shirt. He went to Karad by foot and reached the Karad City Police Station where Ananda Ishwara Sawant, Police Station Officer was on duty. He narrated to him the incident, but Ananda Sawant realised that the incident had taken place in the jurisdiction of Karad Taluka Police Station and, therefore, Ashok Ram Chandra Phadtare, A.S.I., deputed Police Constable Shri More to Karad Police Station to pick up the accused. Police Constable Shri More produced the accused before Shri Ashok Ram Chandra Phadtare, A.S.I., and his statement was recorded, on the basis of which C.R. No. 1 of 2002 came to be registered for the offence punishable u/s 302 of I.P.C.

4. Ashok Ram Chandra Phadtare along with accused and other police staff went to village Wing and noticed that Vinod was dead. He called two pinches and prepared the inquest panchnama at Exhibit "15". He sent the dead body for postmortem along with police constable Shri More and thereafter prepared the spot panchnama in the presence of two pinches at Exhibit "24". From the spot he seized quilt, slipper-pair, pillow, blanket and sample of blood spread over the wall. He arrested the accused and recorded the statement of witnesses. On 5th January, 2000 he obtained the death extract. After completion of the investigation he submitted the charge sheet on 31st March, 2000 in the Court of Judicial Magistrate, First Class at Karad and the case came to be committed to the Sessions Court. The charge was framed by the learned Additional Sessions

Judge at Exhibit

5. The prosecution examined in all 9 witnesses. P.W.6-Ananda Ishwara Sawant was the Police Head Constable at Karad City Police Station. P.W.7-Ashok Ramchandra Phadtare was attached to Karad Taluka Police Station. P.W.2 Prakash Pandurang Dhone was the police constable attached to the Karad Police Station. He had carried the muddemal articles to Forensic office at Pune, whereas P.W.9-Manohar Yeshwant Phadtare was the P.S.I. At Karad Taluka Police Station till 19th December, 2001. He was the Investigating Officer. P.W.5-Dr. Dhondiram Dattu Jadhav was the Medical Officer at Cottage Hospital, Karad and he had conducted the postmortem and signed the postmortem report at Exhibit "18". The prosecution case is based on the evidence of P.W.3-Tarachand alias Raju Shivaji Kale as an eye witness read with the evidence of P.W.4-Sudhir Vishwanath Sonawale, P.W.1-Shankar Raghunath Khable and P.W.2-Prakash Pandurang Dhone as the panch witnesses.

6. P.W.5-Dr. Jadhav stated before the Court that on 2nd January, 2000 he along with Dr. S.GT. Chiwate had conducted the postmortem on the dead body of Vinod and the dead body was brought by police constable Shri More from the Karad Taluka Police Station. At the time of postmortem P.W.5-Dr. Jadhav had noted the following external injuries:

1. CLW over forehead in between two eye brows 1 1/4th " x 1/4th x bone deep.
- 2 CLW later to injury No. 1 on left medially 1/3rd of left eye brow, 1 1/4" x 1/2 " x bone deep.
- 3 Contusion over nose right side 1 cm. x 1/2 cm. reddish colour.
- 4 Contusion over left maxilla 5 cm. x 2.5 cm. red in colour.
- 5 Contusion over right side of face in between right ear and right eye 6 cm x 3 cm reddish brown colour.
- 6 CLW over right eye brow lateral 1/3rd 1 cm. x 1/2 cm. x bone deep, with bone fragment coming out.
- 7 Swelling over right temporal frontal fracture 5 cm. x 4 cm. fracture fontal bone fracture right temporal on palpation fracture upper maxilla left side.

The above injuries were caused by hard and blunt object and the age of the injury is within 24 hours. After internal examination, the following injuries were noticed:

- 1 Large hematoma seen over right frontal temporal parietal region also extending towards left parietal area.
- 2 Fracture left parietal to left pine extending upwards towards right side anterior to right pine in temporal bone and it depress fracture fragment of temporal bone fracture over right orbital ridge.

Teared/rupured durra seen in left parietal region sub duriel hematoma in both parietals sub arachnoids bleed in frontal and parietal area seen.

As per Dr. Jadhav the cause of death of Vinod was "comma due to head injury". Advanced death certificate at Exhibit 17 was issued by Dr. Chiwate. He stated that if a person was sleeping having a pillow under his head and if the muddemal article stone (Article No. 6) is thrown on the head, death was possible. In his cross examination he stated that he had conducted about 2500 postmortems. He admitted that injury Nos. 1 and 2 mentioned in column No. 17 of postmortem notes were simple in nature whereas injury No. 6 was grievous injury. As per him on account of injury Nos. 1,2 and 6, 2/3rd of total volume of blood might have drained down from the body. He denied the suggestion that injury Nos. 3 to 5 were minor injuries. He also denied that if a person consumed intoxicant, he might go in coma. He also stated that injuries 3 to 5 could not be possible by first and kick blows. He also admitted that at the time of postmortem report, police had given the alleged cause of death by the stone. He denied the suggestion that injury Nos. 1 to 7 were possible by more than one stroke. The evidence of this witness proved that Vinod died a homicidal death and because of the injuries sustained by the fall of stone on his head while he was asleep in the temple.

7. From the evidence of P.W.1-Shankar Raghunath Khable, the inquest panchnama at Exhibit 24 was proved. He stated that the right hand of the dead body was under the head and one stone with blood marks was near the dead body. The stone weighed 20 Kgs. In the evidence of P.W.2-Prakash Pandurang Dhone the arrest panchnama at Exhibit 27 was proved. P.W.3-Tarachand alias Raju Shivaji Kale is the main eye witness in support of the prosecution case. He stated that on the date of the incident i.e. on 1st January, 2000 he had returned from work at 6.45 p.m., and at 9.00 p.m. he went to the Laxmi temple to sleep there. He used to sleep there with Sharad, Vinod and Pramod. On the date of the incident Pramod and Vinod abused each other and Vinod (deceased) had assaulted Pramod (accused) and Pramod had torn his own shirt. The witness and Sharad rescued the quarrel and all of them went to sleep. At about 00.30 hours he heard noise of a stone and, therefore, he and Sharad woke up. They saw a stone had fallen on the head of Vinod and Pramod was standing on the side. Thereafter the witness and Sharad ran away and the witness narrated the incident to his parents. In the morning between 4.00 to 4.30 a.m., he was woken up by the police. He identified the stone Article No. 6 before the Court. In his cross examination he stated that during the last 5-6 years he was doing painting work and deceased Vinod was also engaged in the same work along with Sharad Sonawale. He denied the suggestion that there cri-appeal-894-03-judgment was any dispute between Vinod and Sharad. He also admitted that there were some cases filed against Vinod when he was residing at Mumbai. He further stated that during the last 3 years Vinod had started staying at village Wing. He also admitted that Vinod was a known criminal and his wife was not residing with him. He further stated that next to him Vinod was sleeping, Sharad was in

between and thereafter Promod was sleeping. He woke up Sharad after hearing the noise of stone and Vinod did not cry loudly.

8. P.W.4-Sudhir Vishwanath Sonawale stated that he was in service in Cotramatic Pvt. Limited and his shift hours were from 7.00 a.m. to 4.00 p.m., and he was residing at village Wing. On the date of the incident, he had returned from work at about 5.00 p.m. At about 1.00 a.m. , some-one called him and, therefore, he woke up and opened the door. He saw Pramod was standing in front of the door. At that time he had worn only a pant. He asked for a shirt. He informed him that during the quarrel his shirt was torn. Pramod insisted to have a new shirt and, therefore, as advised by his mother he gave his new shirt (rose/pink colour having embroidery on it) to Pramod. Pramod also demanded money, but he could not give him. At about 7.00 a.m., he woke up and noticed that villagers were running towards the temple. Pramod was standing with the police at the spot and he was in the custody of the police. He had seen Pramod with the pink colour shirt given to him in the midnight. The dead body of Vinod was in the trolley and there were wounds on his face.

P.W.7-Ashok Ramchandra Phadtare was the A.S.I., attached to Karad Taluka Police Station on 1st January, 2000. He had taken charge in the noon. He received telephone call from police constable Shri Sawant of Karad City Police Station that accused Pramod had murdered his uncle by pelting a stone on his head and the offence had taken place within his jurisdiction. He, therefore, deputed police constable Shri More to take the custody of Pramod and accordingly the custody of Pramod was taken and he was brought to the Karad Taluka Police Station. On enquiry the accused told his name as Pramod Baban Sonawale, resident of Wing. He further stated that on account of quarrel between him and his uncle Vinod he had dropped a stone on his head. His statement was reduced in writing by P.S.I. Phadtare.

P.W.9-Manohar Yeshwant Phadtare was the P.S.I. He stated before the trial Court that after Pramod was produced before him, he recorded his statement and it was read over to him (Exhibit 46). C.R. No. 1/2000 for the offence punishable u/s 302 of I.P.C. was registered. He stated that the inquest panchnama was recorded at 4.00 a.m., but he had not taken the photographs of the dead body. He denied the suggestion that he had collected false evidence of recording F.I.R. given by the accused.

9. During the course of arguments a question was raised as to whether on the basis of the complaint of the accused himself an FIR., could be registered. However, this issue is no more res integral in view of the decisions in the case of Nisar Ali Vs. The State of Uttar Pradesh, and Faddi Vs. The State of Madhya Pradesh, . In the case of Bheru Singh s/o. Kalyan Singh v. State of Rajasthan AIR 1995 S.C.W. 2126, the FIR at Exhibit 42 was admittedly lodged by the accused himself at the police station and was recorded by Shri Durga Shankar Sharma, P.W.17. A perusal of the report went to show that it was confessional in nature. A question arose as to whether the same could be admitted wholly or in part into

the evidence against the Appellant. In paragraphs 17 and 19 of the said judgment the Supreme Court stated as under:

17. In Nisar Ali Vs. The State of Uttar Pradesh, Kapur, J., who spoke for the Court said, after narrating the facts: "An objection has been taken to the admissibility of this report as it was made by a person who was a co-accused. A first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker u/s 157, Evidence Act, or to contradict it u/s 145 of that Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, not to corroborate or contradict other witnesses. In this case, therefore, it is not evidence."

It is on these observations that it has been contended for the Appellant that this report was inadmissible in evidence. Ostensibly, the expression "it cannot be used as evidence against the maker at the trial if he himself becomes an accused" supports the Appellant's contention. But it appears to us that in the context in which the observation is made in the circumstances, which we have verified from the record of that case, that the Sessions Judge had definitely held the first information report lodged by the co-accused who was acquitted to be inadmissible against Nisar Ali, and that the High Court did not refer to it at all in its judgment, this observation really refers to a first information report cannot be used against the maker when he be an accused and necessarily cannot be used against a co-accused. Further, the last sentence of the above-quoted observation is significant and indicates what the Court meant was that the first information report lodged by Qudratullah, the co-accused, was not evidence against Nisar Ali. This Court did not mean-as it had not to determine in that case that a first information report which is not a confession cannot be used as an admission u/s 21 of the Evidence Act or as a relevant statement under any other provisions criminal procedure-894-03-judgment of that Act. We find also that this observation has been understood in this way by the Rajasthan High Court in The State Vs. Balchand, and in State of Rajasthan Vs. Shiv Singh, and by the Allahabad High Court in Allahdia v. State 1959 ALL LJ 340.

19. The circumstances held established by the High Court are sufficient, in our opinion, to reach the conclusion that Gulab was murdered by the Appellant who was the 3 last person in whose company the deceased was seen alive and who knew where the dead body lay and who gave untrue explanation about his knowing it in the report lodged by him and gave no explanation in Court as to how he separated from the deceased.

10. In the instant case, the statement of the accused at Exh. 46 was rightly treated as the FIR, but its inculcators portion could not be treated as evidence against him. The evidence placed before the trial Court by the prosecution unerringly proved that a quarrel had taken place between the accused and the deceased at 9.00 p.m., and the shirt of the accused was torn. In the said quarrel the deceased had stated that the mother of the accused was sleeping with his grand father Nivrutti (father of the deceased). The accused could not sleep on

this count and he had also not taken meals. He was restless and was angry because of the allegations of cri-appeal-894-03-judgment the deceased that his mother was sleeping with his grand father. There was a grave provocation on account of the utterances of Vinod and in that anger he could not sleep and past midnight the accused noticed that all the other three were sleeping, he went outside the temple, picked up a stone and dropped it on the face of Vinod. Vinod sustained bleeding injuries on his face and went in coma and died. In our considered opinion the trial Court was in error in holding that the accused was guilty of an offence punishable u/s 302 of I.P.C. There was no intention to cause death of Vinod and it was not a premeditated offence. The incident took place out of sheer anger and grave provocation because of the allegations of the deceased regarding the illicit relationship between the mother and grand father of the accused, during the course of the quarrel, at about 9 p.m. Hence the order of conviction for the offence u/s 302 of I.P.C., passed by the trial Court is unsustainable and the same is required to be quashed and set aside as the offence would be covered under Exception 4 below Section 300 of IPC. However, the prosecution case for the offence punishable u/s 304 (Part I) of I.P.C. has been proved beyond a reasonable doubt. Mr. Najmi rightly relied upon the decision of the Delhi High Court (DB) in the case of Santa Singh v. The State 1987 Cri. L.J. 342.

11. Hence this appeal succeeds partly. The impugned order of conviction cri-appeal-894-03-judgment and sentence for the offence punishable u/s 302 of I.P.C. passed against the accused in Sessions Case No. 254 of 2000 is hereby quashed and set aside. Instead the accused is convicted for the offence punishable u/s 304 (Part I) of I.P.C. He is sentenced to suffer R.I. for 10 years and to pay a fine of Rs. 1,000/-, in default of payment of fine he shall suffer R.I. for three months.

12. The accused is entitled for set-off u/s 428 of Cr.P.C., for the period he was in jail during the trial.

13. The appointed Advocate's fees is quantified at Rs. 2,000/-.