
(2002) 12 BOM CK 0057
In the Bombay High Court
Case No : Criminal Appeal No. 91 of 1990

Pramod Jivtode, Manik Durugwar and Rajukumar Lokhande	APPELLANT
Vs	
State of Maharashtra	RESPONDENT

Date of Decision : 05-12-2002

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 149, 302

Citation : (2003) BomCR(Cri) 1164

Hon'ble Judges : S.T. Kharche, J;D.D. Sinha, J

Bench : Division Bench

Advocate : K.V. Sirpurkar, for the Appellant; Dhote, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

1. This Appeal is filed by the Appellants against the judgment and order dated 21.2.1990, whereby the appellants are convicted for the offence punishable u/s 302 of Indian Penal Code and are sentenced to suffer imprisonment for life. Initially, another eight accused along with the present appellants were prosecuted for the offences punishable under Sections 148 and 302 read with Section 149 of Indian Penal Code. However, the other eight accused have been acquitted of the offences charged and there is no appeal filed by the State against the order of acquittal.

2.The prosecution case in nut shell can be summarized as follows :

All the appellants as well as other co-accused were residents of village Wagholi. The deceased Rajaram Jyotiram Gote was also resident of the same village. On 4.8.1985 there was some programme of music called Powada in the village. All the accused were present in the said programme. There was a pole having electric bulb at the corner of the shop of Dada Khodankar and the bulb on the said pole was on. There was another pole having electric bulb in the pendal of the programme which was also on at the relevant time. Deceased Rajaram was

sitting in the lane in front of the house of Gopal Marwadi which was at a distance of 15-20 feet away from the pendal. All the accused except appellant no.1 Pramod were sitting ahead of Sukhdeo (P.W.6), Suresh and deceased Rajaram. Since appellant no.1 Pramod got up and started watching the programme while standing in the pendal, deceased Rajaram asked him to sit down since he could not see the artists on the stage. Appellant no.1 Pramod did not listen to deceased Rajaram. Therefore, deceased Rajaram caught hold of the hands of appellant Pramod and made him sit down. In the meanwhile, one Trimbak Sontakke came near Rajaram and took him towards the house of one Barber. Appellant no.1 Pramod (original accused no.1), appellant Manik (original accused no.4) and appellant Rajkumar (original accused no.10) followed Rajaram. Within five to ten minutes, deceased Rajaram returned back in the pendal. It is the prosecution case that all the appellants came there and stood near deceased Rajaram. Appellant Pramod and other co-accused Keshav had axes in their hands while rest of the accused had sticks in their hands. Appellant Manik dealt a blow by means of stick on the head of deceased Rajaram as a result of which he received head injury. Thereafter, appellant no.1 Pramod and other co-accused Keshav dealt a blow by means of an axe on the person of deceased Rajkumar. Rajkumar sustained bleeding injuries on his head, right hand and chest etc. The incident of assault was witnessed by Motiram (P.W.1), Meerabai (P.W.2), Arvind Wasekar (P.W.3), Sukhdeo Wasekar (P.W.6) and Vishranti Gote (P.W.7). The condition of deceased Rajaram was serious. At the relevant time, deceased Rajaram disclosed to Motiram (P.W.1), Meerabai (P.W.2) as well as Vishranti (P.W.7) that appellant no. 1 Pramod, Manik and Rajkumar assaulted him. One Premdas Mahadeo Gote then telephoned the police station Hinganghat about the incident. Deceased Rajaram succumbed to the injuries on the spot. The Investigating Officer after completing the investigation filed a charge-sheet. A charge u/s 148 and 302 read with Section 149 of Indian Penal Code was framed against the accused persons and was read over and explained to them. The appellants as well as other co-accused pleaded not guilty to the charge and claimed to be tried. Their defence is that they are falsely implicated in the case.

3.Mrs.Sirpurkar, learned counsel, for the appellants contended that the evidence adduced by the prosecution is one and the same as against the present appellants as well as other co-accused. It is contended that the trial Court disbelieved the evidence of the prosecution witnesses as far as other co-accused are concerned and, therefore, they are acquitted for the offences charged. It is contended that in the instant case Motiram (P.W.1), Meerabai (P.W.2), Arvind (P.W.3), Sukhdeo (P.W.6) and Vishranti (P.W.7) are the alleged eye witnesses to the incident of assault by the accused. It is submitted that the trial Court rejected the evidence of Motiram (P.W.1) in respect of the assault alleged to have been committed by the appellants in view of the material omissions in his oral report (Ex.43). Similarly, the trial Court has specifically recorded a finding that Meerabai (P.W.2) did not see the accused persons assaulting Rajaram with the axe, spear, sticks etc. Similarly, the evidence of last eye witness Vishranti (P.W.7)

has also been rejected on the ground of material omissions found in her testimony. However, the trial Court accepted the oral dying declaration given by deceased Rajaram to Meerabai (P.W.2), Arvind (P.W.3) and Vishranti (P.W.7) coupled with the evidence of Sukhdeo (P.W.6) and convicted the appellants for the offence of murder of deceased Rajaram. It is contended that since the trial Court virtually rejected the testimony of these witnesses on the point of assault witnessed by them in view of the material omissions, the trial Court ought not to have relied on the oral dying declaration given by deceased Rajaram to these witnesses. It is contended that in the instant case, all these witnesses cannot be believed even on the point of oral dying declaration because these witnesses have made unnatural improvement in their ocular testimony before the Court and, therefore, the reliance placed by the trial Court on part of the testimony of the witnesses is improper and the findings of conviction recorded by the trial Court are not sustainable in law.

4.It is contended that in the instant case Ramrao (P.W.11) and Gopal (P.W.12) are the panch witnesses examined by the prosecution to prove the discovery memorandum (Ex.68) as well as discovery of weapon, seizure of clothes, spot panchanama and inquest. Similarly, Narayan (P.W.8) is examined to prove Ex.60, i.e. seizure of clothes of Rajkumar. Though this witness has not been declared hostile, however in his examination-in-chief he has stated that he does not recollect the names of the persons from whom the relevant clothes were seized and, therefore, the evidence of this witness is also of no consequence. The learned counsel for the appellants further contended that Ambadas (P.W.5) is the panch witness who is examined by the prosecution to prove the spot panchanama (Ex.53) as well as inquest panchanama, seizure of clothes of the deceased (Ex.54) and, therefore, the evidence of this panch witness is not of much help to the prosecution.

5.The learned counsel for the appellants contended that taking into consideration the evidence, adduced by the prosecution, which has been partly disbelieved by the trial Court, is insufficient to prove the offence of murder of Rajaram and, therefore, the finding of conviction recorded by the trial Court is unsustainable in law. In order to substantiate her contention, she placed reliance on a decision in *Balaka Singh and Others Vs. The State of Punjab*, .

6.Mr.Dhote, learned Addl. Public Prosecutor, contended that the evidence of eye witness Motiram (P.W.1) is consistent with the material particulars of the prosecution case in respect of the assault on deceased by the appellants. Similar is the case of eye witness Sukhdev (P.W.6). It is submitted that there are material omissions in the evidence of eye witnesses Meerabai (P.W.2), Arvind (P.W.3) and Vishranti (P.W.7) and, therefore, the trial Court has not placed reliance on the testimony of these witnesses in respect of the factual assault claimed to have been seen by these witnesses, committed by the appellants on the deceased. However, the trial Court has accepted the evidence of these witnesses on the ground of oral dying declaration made by deceased Rajaram to

the witnesses Meerabai (P.W.2), Arvind (P.W.3) and Vishranti (P.W.7). The learned Addl. Public Prosecutor contended that the oral dying declaration if accepted coupled with the ocular testimony of Motiram (P.W.1) and Sukhdeo (P.W.6), the prosecution has succeeded in proving the case against the appellants for the offence punishable u/s 302 of Indian Penal Code and the trial Court was justified in convicting the appellants for the said offence.

7.The learned Addl. Public Prosecutor argued that the evidence of these witnesses is also corroborated by the medical evidence adduced by the prosecution, that is of Dr.Martand (P.W.4) who conducted post mortem examination on the dead body of deceased Rajaram and found one lacerated wound and four incised wounds on the person of the deceased and opined that the probable cause of death was due to shock as a result of haemorrhage and wound on the skull and head.

8.The learned Addl. Public Prosecutor contended that in the oral dying declaration deceased Rajaram has specifically stated that the appellants Pramod, Manik and Rajkumar assaulted him. This dying declaration was made by the deceased to the aforesaid witnesses immediately after the assault and, therefore, the trial Court was justified in accepting the evidence of these witnesses on this point and further justified in recording a finding of conviction, since the said dying declaration is corroborated by the medical evidence. It is contended that the evidence in respect of the material particulars of the prosecution case disclosed in the oral dying declaration by deceased Rajaram is consistent and, therefore, conviction can be based on oral dying declaration made by deceased Rajaram coupled with the medical evidence. The learned Additional Public Prosecutor, therefore, contended that the findings of conviction are sustainable in law.

9.We have considered the various contentions canvassed by the respective counsel and perused and reappraised the evidence adduced by the prosecution. In the instant case, though the prosecution has examined 14 witnesses to prove the charge of murder against the appellants, however the important and relevant witnesses are Motiram (P.W.1), Meerabai (P.W.2), Arvind (P.W.3), Dr.Martand (P.W.4), Sukhdev (P.W.6) and Vishranti (P.W.7). It is not in dispute that the trial Court rejected the ocular testimony of Motiram (P.W.1), Meerabai (P.W.2) and Vishranti (P.W.7) in respect of the alleged assault committed by the appellants on deceased Rajaram on the ground that their testimonies suffer from material omissions and, therefore, cannot be relied on. The learned Addl. Public Prosecutor has not disputed before us that the testimony of these witnesses, i.e. Motiram (P.W.1), Meerabai (P.W.2) and Vishranti (P.W.7) suffers from material omissions and the trial Court, therefore, did not place reliance on their testimony in respect of the factual assault alleged to have been committed by the appellants on the deceased and claimed to have been seen by them. We have also considered the evidence of these witnesses and after going through their evidence, in our considered view the omissions

which are brought on record by the prosecution in their respective testimonies are of material nature and creates a serious doubt as to whether these witnesses, i.e. Motiram (P.W.1), Meerabai (P.W.2) and Vishranti (P.W.7) really could have seen the assault alleged to have been committed by the appellants on deceased Rajaram.

10. Similarly, the evidence of these prosecution witnesses is also rejected by the trial Court in respect of other co-accused and, therefore, the other co-accused are acquitted by the trial Court. On the backdrop of these undisputed facts, it is evident that the evidence of Motiram (P.W.1), Meerabai (P.W.2) and Vishranti (P.W.7) is not reliable in respect of the factual assault alleged to have been committed by the appellants as well as other co-accused and, therefore, the testimony of these witnesses to that extent is untrustworthy and cannot be relied on. If that is so, then it will have to be seen whether the testimony of these witnesses can partly be accepted in respect of the oral dying declaration alleged to have been made by deceased Rajaram to these witnesses as well as other witness Arvind (P.W.3).

11. Meerabai (P.W.2) in her examination-in-chief has stated that after the assault all the accused persons ran away from the spot except original accused no.7 Rama, who remained on the spot and did not allow her to come near deceased Rajaram and has also stated that deceased Rajaram received bleeding injuries on his head and on other parts of body, such as right hand, abdomen and left chest etc. and he was in a pool of blood. It needs to be noted that even on the basis of the above version of this witness in the examination-in-chief itself, it is clear that after the deadly assault on deceased Rajaram, who fell down on the ground in view of the serious injuries caused to him and was in a pool of blood, accused no.7 Rama did not allow this witness Meerabai (P.W.2) to come near deceased Rajaram. It has also come on record that deceased Rajaram succumbed to the injuries on the spot itself. In a situation like this, it is difficult for us to hold that deceased Rajaram could have made such a dying declaration to Meerabai (P.W.2) at the relevant time. We cannot lose sight of the fact that the evidence of this witness in respect of direct assault is not trustworthy. This witness has failed to state before police that appellant no.1 Pramod had an axe and appellant no.2 Manik had a stick and also failed to state the specific role played by accused Rajkumar. These omissions, in our view, are material to discard her testimony in respect of the assault alleged to have been committed by the appellants on the deceased. However, her testimony also has a positive bearing in respect of the so-called dying declaration alleged to have been made by the deceased to her. If deceased Rajaram had really made such dying declaration implicating all the appellants then in that event this witness was expected to mention these facts in her statement before police. However, the above referred material omissions, in our view, make her testimony in respect of the dying declaration untrustworthy. Therefore, in our considered view, we are unable to reach the conclusion that deceased Rajaram, at the relevant time, could have made such oral dying declaration to this witness, particularly keeping in view the fact that this witness

was prevented by accused no.7 Rama from going near deceased Rajaram and who succumbed to the injuries within no time on the spot itself.

12.Arvind (P.W.3) is examined by the prosecution to prove the oral dying declaration made by deceased Rajaram to him. This witness has stated in his examination-in-chief that he has seen Rajaram lying facing upward in front of the door of Gopal Marwadi. Rajaram had injuries on his head and chest. Those were bleeding injuries. This witness has further stated in the examination-in-chief that deceased Rajaram disclosed to him that appellants Pramod, Manik and Rajkumar assaulted him with axe and immediately thereafter the health of deceased started deteriorating and Rajaram succumbed to the injuries on the spot. In the cross-examination of this witness, it has come that he did not state before the police that he was sitting near the house of Shende and that Meerabai (P.W.2) was sitting just near him. This witness has further admitted that he did not state before police that Motiram (P.W.1), Vishranti (P.W.7) and his father Sukhdev (P.W.6) had already reached the spot when he went there. He has contradicted his version before the police and admitted in the cross-examination that he did not state before the police that while deceased Rajaram was lying on the spot he brought Motiram (P.W.1) to the spot. He was confronted with the portion marked B in the police statement and according to this witness the same is incorrect. The above referred omissions in the evidence of this witness Arvind creates a serious doubt about the authenticity of version of this witness in respect of the alleged assault on the deceased by the appellants particularly when the witness is not sure about the presence of Motiram (P.W.1), Meerabai (P.W.2), and Vishranti (P.W.7) at the relevant time. It is pertinent to note that these are the only witnesses who were alleged to have been present on the spot at the relevant time in whose presence the deceased Rajaram made the alleged dying declaration. However, the omissions and contradictions in this regard appearing in the testimony of this witness creates a serious doubt about this part of the evidence of this witness.

13.So far as the evidence of Vishranti (P.W.7) is concerned, she has stated in her examination-in-chief that at the relevant time deceased Rajaram recognized her as his brothers wife and disclosed to her that accused nos. 1, 4 and 10 assaulted him. The deceased further disclosed to this witness that appellant Pramod had an axe, Manik and Rajkumar had sticks. She has specifically stated that while the deceased was disclosing these facts to her he was not in a position to speak properly and immediately thereafter he died. The evidence of this witness also suffers from material omissions. This witness failed to state before the police in her police statement that she had seen appellant Pramod, Manik and Rajkumar assaulting Rajaram with axe and sticks. She also did not state before police that appellant Pramod dealt a blow by means of an axe on Rajaram while appellants Manik and Rajkumar assaulted deceased with sticks. In view of these material omissions, her evidence is not trustworthy in respect of the fact that the alleged assault was committed by the appellants on the deceased. These omissions, in our view, are also material to evaluate her testimony vis-a-vis the alleged oral

dying declaration made by Rajaram. If deceased Rajaram really would have made an oral dying declaration, as alleged by this witness, then this witness, in our view, would not have forgotten to state the role played by the appellants, as disclosed by the deceased, in her police statement. The very fact that this witness omitted to state anything in this regard in her police statement not only amounted to material omissions, making her testimony untrustworthy in respect of the assault committed by the appellants on the deceased but also renders her testimony difficult to believe even in respect of the so-called oral dying declaration alleged to have been made by deceased Rajaram. It is, therefore, difficult for us to place reliance on this part of her ocular testimony.

14. So far as the testimony of Sukhdeo (P.W.6) is concerned, he has stated in his examination-in-chief that he was sitting near the corner of the house of Dada Khodankar and was watching the programme from there. The deceased was sitting along with Suresh Wasekar. All the accused except appellant Pramod were sitting ahead of them and were watching the programme. Appellant Pramod stood up and started watching the programme which had obstructed the view of deceased Rajaram and, therefore, he asked appellant Pramod to sit down. Since appellant Pramod did not pay any heed to the request of deceased Rajaram, he caught hold the hands of Pramod and made him sit down. It has come in the examination-in-chief of this witness that one Trimbak Sontakke came near deceased Rajaram and took him towards the house of Khushab Mhali (Barber). Appellants Pramod, Manik and Rajkumar followed deceased Rajaram and after five to ten minutes Rajaram came back to the place where he was sitting and immediately thereafter appellants came there and surrounded Rajaram. Appellant Pramod had an axe while Manik and Rajkumar had sticks with them. All the appellants started assaulting Rajaram with their respective weapons. Rajaram fell down. In the cross-examination, this witness has admitted that he did not state before police that accused persons were sitting ahead of him in the programme. He also did not state before the police that after deceased Rajaram asked appellant Pramod to sit down, appellant Pramod sat down. He also failed to state before police that appellants Pramod, Manik and Rajkumar had encircled deceased Rajaram in the programme. It is pertinent to note that apart from the omissions, according to this witness the incident took place in the pendal itself where deceased Rajaram was sitting. However, as per the evidence of other witnesses and as per the spot panchanama, the place of incident is in the lane. Even otherwise the version of this witness appears to be unnatural particularly in respect of the fact that if Trimbak Sontakke took Rajaram from the pendal towards the house of Khushab Mhali (barber) and the appellants also followed him as stated by this witness in his examination-in-chief then the appellants had an opportunity to assault the deceased then and there only and such assault would also have been away from the public those were sitting in the pendal. However, it is difficult to believe that the appellants would wait till deceased Rajaram comes back to pendal and would commit such an assault in the pendal in presence of all the villagers who were present in the pendal. In view of these

shortcomings, the testimony of this witness creates a serious doubt about the authenticity of the ocular testimony of this witness and, in our considered view, cannot be relied on.

15. We have already observed that the testimony of Motiram (P.W.1) is rejected by the trial Court in view of the material omissions occurred in Ex.43. According to us, similar analogy will have to be applied while reappreciating the evidence of this witness which has been applied in the case of other eye witnesses whose evidence is rejected by the trial Court in respect of the factual assault committed by the appellants on the deceased and, therefore, the evidence of Motiram (P.W.1) is not free from doubt.

16. In the instant case, Ramrao (P.W.11) and Gopal (P.W.12) are the panch witnesses examined by the prosecution to prove spot panchanama, inquest panchanama, seizure of clothes, memorandum of accused (Ex.68), discovery of weapon (Ex.69), Ex.70 and Ex.71. However, these witnesses have not supported the prosecution and, therefore, the circumstantial evidence in this regard is of no help to the prosecution. So far as Narayan (P.W.8) is concerned, he is a panch witness examined by the prosecution to prove Ex.60, i.e. seizure of clothes of appellant Rajkumar. However, this witness has stated in his examination-in-chief that he did not recollect the name of the person from whom the clothes were seized and, therefore, though not declared hostile, has not supported the prosecution and his evidence is of no consequence. Ambadas (P.W.5) is examined by the prosecution to prove Ex.54, i.e. seizure of clothes of deceased Rajaram, Ex.53 spot panchanama as well as inquest panchanama. However, the evidence of this witness by itself and the circumstances brought on record by the prosecution, in our view, did not lead the prosecution case any further.

17. It is no doubt true that Dr. Martand (P.W.4) conducted post mortem examination on the dead body of the deceased and found lacerated as well as incised wounds. However, the medical evidence by itself is not sufficient to establish the identity of the author of the injuries and can only be used as a corroborative piece of evidence in order to corroborate the material particulars of the prosecution case. When the evidence of material witnesses is disbelieved on the ground that they are untrustworthy, the medical evidence, in our view, is not sufficient to hold the appellants guilty.

18. For the reasons stated herein above, the findings of conviction recorded by the trial Court are unsustainable in law. Hence, the impugned judgment and order dated 21.2.1990 passed by the learned 2nd Additional Sessions Judge, Wardha, (in S.T.No.4/86) is hereby quashed and set aside. The Appeal is allowed.