
(2013) 09 BOM CK 0186
In the Bombay High Court
Case No : Criminal Appeal No. 532 of 2010

Rafiq Hayachand Role

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 24-09-2013

Acts Referred:

Citation : (2014) 1 BomCR(Cri) 377

Hon'ble Judges : V.K. Tahilramani, J;A.R. Joshi, J

Bench : Division Bench

Advocate : Yug Mohit Choudhary and Mr. Dashrath Gaikwad, for the Appellant;
V.R. Bhonsale, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

A.R. Joshi, J.—Heard rival arguments on this criminal appeal preferred by the appellant-sole accused challenging the judgment and order of conviction passed in Sessions Case No. 72 of 2008. The impugned judgment and order was passed by Sessions Judge, Kolhapur vide order dated 10th March, 2010; wherein present appellant accused was convicted for offence punishable u/s 302 read with section 201 of IPC. For the offence of murder he was sentenced to suffer life imprisonment and to pay a fine of Rs. 1000/-, in default to suffer RI for three months. For the offence u/s 201 of the IPC he was sentenced to suffer RI for one year and to pay Rs. 1000/- in default to suffer RI for three months The substantive sentences were directed to run concurrently.

2. Apparently, from the date of the arrest till date the appellant-accused is in custody. He is represented by Advocate Dr. Yug Mohit Chaudhary.

3. The case of the prosecution in nut-shell, is as under;

Victim Amar Laxman Mangutti and the present appellant-accused Rafiq Role were working with one Akash Jadhav PW No. 5. Said Akash Jadhav is wholesale dealer in bananas at Kolhapur. He has a godown situated behind Rankala area at Kolhapur. His job was to give on credit the stock of banana goods to various

persons for retail sale in the market. He own about 14 handcarts and had deployed various persons including the present appellant-accused and also the victim for such retail sale of bananas. Usually, in the morning the stock of bananas is given to such persons and in the evening the empty handcarts are to be stored near the godown. In case, if the entire stock of bananas is not sold then handcarts are to be kept inside the godown. Apparently, the victim was staying in the said godown at night time and at day time he used to sell bananas on the handcart after getting the stock from PW No. 5. Apparently, it is the case of the prosecution as spelt out by other prosecution witnesses i.e. PW Nos. 7 and 8 that said victim used to work as a coolie with PW No. 5. However, this fact has been specifically denied by PW No. 5 and according to him, he himself was doing loading and unloading banana stock, to and fro to the godown and he used to give the said stock to different persons including victim and the accused for retail sale.

4. According to the case of the prosecution, on 30th October, 2007, the appellant-accused as usual took the banana stock from PW No. 5 and went for retail sale by using handcart belonging to PW No. 5. Apparently, the victim and the appellant-accused were friends and used to deal with the bananas and very often used to roam around in the company of each other. They often used to drink liquor and also used to chitchat and very often they used to fight with each other. This routine fight and quarrel between the victim and the appellant has been stated by prosecution witnesses PW Nos. 5, 6 and 7.

5. According to the case of the prosecution, on 30th October, 2007 the appellant-accused and the victim were seen quarreling with each other at the rickshaw stand on Tarabai road. Said quarrel was resolved by PW No. 5 Akash Jadhav. Again on that day in the evening there was some quarrel and both were seen together by PW No. 7 Uttam Vetale and PW No. 8 Dilip Savant. In fact, said PW No. 7 Uttam and PW No. 8 Dilip Savant are also the persons who use to sell bananas on the handcart of PW No. 5 and as such they were also acquainted with the victim and the appellant-accused. According to the case of the prosecution on the night of 30th October, 2007, the appellant-accused did not come back to PW No. 5 to return the handcart and for paying the money out of the retail sale of bananas given in that morning on credit. According to PW Nos. 7 and 8 accused and victim were seen together in drunken condition and quarreling with each other and they were seen in the area of Rankala water reservoir. On the next day morning also the appellant-accused did not report PW No. 5 Akash Jadhav for resuming his work. On that day i.e. on 31st October, 2007 accused did not come for work, however was arrested by the police on that night.

6. On 31st October, 2007 dead body of a unknown person was found lying in the sugarcane field near Shivaji bridge and information was given to Karwir Police Station. Police arrived on the spot and noticed that there was major throat cut injury. So also there were various incised wounds on the body mainly on the

neck and other portions, buttocks and thigh. The clothes of the victim were soaked with blood. Pair of plastic shoes and wrist watch were found near the spot. As such a complaint was lodged by PHC Anna Kamble PW No. 1 for the offence of murder against unknown persons and investigation was commenced. Inquest panchnama was drawn, dead body was sent for postmortem. During investigation it was revealed that the name of the deceased was Amar Laxman Mangutti. As such enquiries were made and police reached to PW No. 5 Akash Jadhav and revealed the involvement of the present appellant-accused in the offence and as such on the night on 31st October, 2007 appellant-accused came to be arrested under the panchnama wherein one shirt with blood stains on the front portion near the button and one pant, were found on his person. Said clothes were taken charge of under the panchnama wherein PW No. 3 panch Ravindra Borgaonkar was one of the panchas.

7. According to the case of the prosecution, on 1st November, 2007, the appellant-accused made voluntarily statement to produce the banian and it was accordingly seized from the house of brother of the accused under the panchnama and PW No. 6 Santosh Dodamani was one of the panchas. Thereafter, on 2nd November, 2007 again the appellant-accused made a voluntary statement to produce the sickle and same was recovered under the panchnama in which panch PW No. 4 Shrikant Patil was one of the panchas. Said sickle was recovered from under the grass grown on the ground near the vicinity of the place where earlier dead body was found. Apparently, according to the case of the prosecution, the banian and the sickle and also the shirt which was found on the person of the accused at the time of his arrest had blood stains. During the investigation, the seized articles were sent for chemical analysis, postmortem report was obtained, cause of death was ascertained as to hemorrhagic shock due to cut throat injury. After completion of investigation, charge-sheet was filed before the concerned Judicial Magistrate and matter was committed to the Court of Session and it ended in conviction which is challenged in the present appeal.

8. At the threshold, it must be mentioned that the entire case of the prosecution is based only on circumstantial evidence and there is no direct eye-witness to the actual incident of murder. According to the prosecution there are three circumstances which establish guilt of the accused and they are firstly "Motive", secondly "Recovery" and thirdly "Last seen together".

9. During the trial, total 12 prosecution witnesses were examined. Out of them PW No. 1 is Kamble PHC who lodged the FIR. PW No. 2 is the panch for the spot panchnama where the blood stained shoes and wrist watch were also found. PW No. 3 is Ravindra Kumar Borgaonkar, one of the panchas regarding arrest of the accused on 31st October, 2007; wherein the shirt and pant of accused were seized. Apparently, that time no banian was on the person of the accused, however, it was subsequently recovered u/s 27 of the Evidence Act on 1st November, 2007. Fourth witness is PW No. 4, another panch Shrikant Patil

regarding recovery of sickle on 2nd November, 2007. PW No. 5 is important witness, one Akash Jadhav the wholesale dealer of bananas and who happened to have seen the appellant-accused and victim lastly on 30th October, 2007 in the morning and according to him on that evening none of them returned back to his godown for clearing the day's account. PW No. 6 is panch Santosh Dodamani regarding seizure of banian at the instance of accused u/s 27 of Evidence Act on 1st November, 2007. PW No. 7 is one Uttam Yetale, again a vegetable retail seller and employed by PW No. 5 Akash Jadhav and using handcart of Akash Jadhav for selling bananas and according to him, the victim was working with Akash Jadhav as coolie for loading and unloading of banana stock and according to him the appellant-accused was also working with PW No. 5 as retail seller of bananas on the handcart of PW No. 5. PW No. 8 is also a retail banana seller but working with one Ramchandra Patil. However, he was acquainted with the appellant-accused and the victim as both were also retail banana sellers and engaged in banana vending business. According to these PW Nos. 7 and 8, the appellant-accused and victim were well known to each other and at times they used to quarrel and fight and both were addicted to consume liquor.

10. PW No. 9 is Dr. Dattatraya Pavle who examined the dead body and found various injuries, almost nine incised wounds on the dead body. At this juncture, it must be mentioned that there is no dispute as to the homicidal death of victim Amar and as such it is not necessary to discuss in detail the said injuries sustained by the victim. Suffice it to say that according to PW No. 9, the injuries which were found on the dead body could have been possible by any weapon like sickle which is muddemal article 11 and which was allegedly recovered at the instance of the appellant-accused u/s 27 of the Evidence Act. According to the case of the prosecution, this is the important evidence by way of expert opinion and that the weapon of offence seized at the instance of the accused is linked with the injuries sustained by the victim. This evidence is required to be dealt with in detail in order to find out whether it is an incriminating circumstance against the appellant-accused and whether the said recovery of sickle at the instance of the accused has been established beyond reasonable doubt. PW No. 10 is the Police Officer who recorded the FIR. PW No. 11 is the Nandkumar, a police constable who carried muddemal articles to the Chemical Analyser and PW No. 12 Amrut Vasantrao Deshmukh is the Investigating officer.

11. Important prosecution witnesses are the recovery panchas i.e. PW No. 3 on arrest panchnama of the accused, PW No. 4 regarding recovery of sickle and PW No. 6 regarding recovery of banian/underwear. Apart from these panch witnesses, another important witnesses are the witnesses on the point of last seen and these witnesses are PW Nos. 5, 7 and 8.

12. Now, coming to the first circumstance as to the motive there is evidence of PW No. 5 who states that he had resolved many quarrels between the accused and the victim and he had seen them quarreling in the morning of 30th October, 2007. According to PW No. 7 he had seen them quarreling at Kapiltirth market at

about 8:30 p.m. on 30th October, 2007. Whereas, according to PW No. 8 they were seen together at Rankala Lake at 9:00 p.m. but that time they were not quarreling. As such apparently it is the case of the prosecution that very often the appellant-accused and the victim used to quarrel with each other on various counts and also both were addicted to drinking liquor. However, the quarrels used to be pacified either by intervention of outsiders or by themselves interse. As such this is not a clinching circumstance so as to kill the victim on the night of 30th October, 2007.

13. So far as recovery is concerned, it has come in the evidence of panch witnesses regarding recovery of sickle and recovery of banian that the appellant accused was handcuffed when he took the police party and panchas to respective places and when at his instance the said respective articles were seized under panchnamas. There is no specific mention in the substantive evidence of PW No. 4 that sealing and labelling was done for the recovery of sickle at the instance of the accused. Again, on this aspect it is curious to note that according to the case of the prosecution when appellant-accused was arrested on 31st October, 2007 at night at about 11:30 p.m. or so shirt and pant were on his person and apparently they were on his persons since the time of the incident of murder. This is more so, as according to the case of the prosecution there were blood stains on the front part of the shirt near the buttons and said shirt was taken charge of by the police and was sent for analysis, but blood group confirmed, could not be determined but it was the blood of human origin as per the CA report Exh. 41. As against this, according to the case of the prosecution, the banian which was having blood stains on the chest portion, was recovered at the instance of the accused on 1st November, 2007 and it is the recovery u/s 27 of the Evidence Act. If these recoveries of shirt on 31st October, 2007 and banian on 1st November, 2007 are accepted, then it does not sound to reason and logic that the appellant-accused tried to dispose of the banian and hide it in the house of his brother but put on the same shirt having blood stains and which was used at the time of commission of offence and which was recovered from his person on 31st October, 2007 at the time of his arrest. This circumstance itself lead us to doubt the recovery of bloodstained banian at the instance of the appellant-accused u/s 27 of the Evidence Act. More so when apparently according to the specific evidence of panch witnesses the accused was hand-cuffed. On this aspect as to sealing and labeling of the articles seized at the instance of the accused the following authority was taken shelter of: State of Maharashtra Vs. Prabhu Barku Gade,

14. Our attention is drawn towards the contents of paragraph No. 12 of the said authority and it was emphasized that the necessity of sealing the articles is of much importance, more so when the case is based on circumstantial evidence and the prosecution canvassed the recovery of any weapon of offence or any other article as the incriminating circumstances against the accused. In our considered view, considering the substantive evidence of panch witnesses the said recoveries do not inspire confidence, more so when almost all the panch

witnesses i.e. panchas for arrest of the accused, panchas for recovery of sickle, panchas for recovery of banian are in the same business of banana selling and apparently knowing PW No. 5 Akash Jadhav being the whole seller in the said business. By pointing this factual position it is strongly argued by learned advocate on behalf of the appellant-accused that there is something unnatural in taking all these panchas apparently from the same line of business and more so when PW No. 5 came in picture by way of his statement recorded by the police. On this aspect our attention is drawn towards substantive evidence of the IO to the effect that said PW No. 5 Akash Jadhav, the whole sale dealer in banana business was in the police station on 31st October, 2007 from 7:30 p.m. till about 1:30 p.m. on the next day. This was the entire period during which the present appellant accused was arrested and his clothes were taken charge of under the panchnama and on the next day allegedly a banian was recovered at his instance as against such presence of PW No. 5 in the police station for more than six hours on the relevant night and when the investigation was at the crucial stage, according to PW No. 5 he remained at the police station only for about half an hour on that evening and not for any more time much less till 1:30 am on the next day. By pointing out this, it is submitted that definitely a doubt has been created as to the manner in which the investigation took place. This is more so when earlier spot panchnama and inquest panchnamas were drawn, panchas therein were from different avocations and not at all from business of banana selling. Though choosing any particular person as a pancha is for the police machinery, however, still considering the present admitted position as to the avocation of panchas, there is a room to entertain a doubt as to the authenticity of recoveries at the instance of the appellant-accused. In that event, in our considered view this circumstance of recovery is also not so clinching, pointing towards the accused as perpetrator of crime.

15. Lastly, coming to the circumstance as to last seen together, we have carefully gone through the substantive evidence of PW Nos. 5, 7 and 8. According to PW No. 8, he saw the accused and the victim at Rankala Lake at about 9:00 to 9:15 p.m. when he was on his way home but had stopped at Rankala Lake. His presence at Rankala Lake has been doubted by learned advocate for the appellant for the reason that said PW No. 8 is resident of Mangalwarpeth which is entirely at the opposite direction of Rankala Lake when he has to go to his house from his work place. As against this, according to PW No. 5 said PW No. 8 was with him probably till about 10:30 p.m. or so on the night of 30th October, 2007. Though allowance can be given to these witnesses regarding timings and though approximation on time can be considered, still it will only lead to the conclusion that on the night at about 9:30 p.m. or so the appellant accused and the victim were in company of each other. However, thereafter where they went was not noticed by anybody. On this aspect according to the case of the prosecution the dead body of the victim was found on the next day morning in the sugarcane field where water pumps were installed and as such there could have been possibility of various farmers visiting the place for the purpose of watering the

field.

In any event, considering the substantive evidence of PW Nos. 5, 7 and 8 in our considered view this is also not a clinching evidence being the circumstance as to last seen together so as to rule out any other possibility of any other person doing away with the victim. In other words, it cannot be said that the prosecution has reached that the standard of proof which is required to establish the guilt of the accused beyond reasonable doubt when the entire case of the prosecution is based on circumstantial evidence. Considering the circumstances not so consistent with the hypothesis of guilt of the accused, the benefit of doubt must be given to the appellant-accused and in that event it must be said that the prosecution has failed to prove guilt of the accused beyond reasonable doubt. Consequently, the present appeal is allowed with the following order:

ORDER.

(1) Criminal Appeal No. 532 of 2010 is allowed.

(2) The Judgment and order of conviction in Sessions Case No. 72 of 2008 dated 10th March, 2010 is quashed and set aside. The appellant-accused shall be released from jail if not required in any other case or crime. If the fine amount is deposited by the appellant accused, the same shall be returned to him.