

(1996) 03 BOM CK 0022

In the Bombay High Court

Case No : Criminal Appeal No. 695 of 1993

Raja Sharnappa Zinge and others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 21-03-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 302, 34, 506

Citation : (1996) 4 BomCR 467 : (1997) CriLJ 450

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

Bench : Division Bench

Advocate : D.B. Bhosale, for the Appellant; Smt. S.J. Pingulkar, Assistant Public Prosecutor, for the Respondent

Judgement

Vishnu Sahai, J.—Vide Judgment and Order dated 22-11-1993 passed in Sessions Case No. 93 of 1993, the learned Additional Sessions Judge, Solapur, convicted and sentenced each of the Appellants in the manner stated hereinafter :-

- (i) Under Sec. 302 read with 34 I.P.C. to suffer life imprisonment and to pay a fine of Rs. 250/- each, in default to further undergo one month R.I. each; and
- (ii) u/s 506 read with Section 34 I.P.C. to suffer R.I. for 2 years and to pay a fine of Rs. 250/- each, in default, to further undergo one month R.I.

The sentences on both the counts were ordered to run concurrently.

Aggrieved by the aforesaid convictions and sentences, the Appellants have preferred the present Appeal.

2. The prosecution case in brief runs as follows :-

The informant Jagannath-P.W. 3 was the real younger brother of the deceased Prakash. On 25-12-1992 at about 3.00 p.m. while he and Prakash were present in Hannur Chowk, the three Appellants, all real brothers, came there and

demanded money from Prakash for consuming liquor. Prakash replied that he had no money. On that the Appellants threatening to see him went away. At about 8.00 p.m. he informant and Prakash were proceeding to bus stand. When they had reached Hannur Chowk Prakash asked the informant to purchase bidi and himself went to urinate. At that time the three Appellants came from the side of garden. Appellant Raja was armed with an axe; Appellant Sanjay with a knife; and Appellant Dilip was empty handed. At that very time, Prakash came out after urinating. Then Dilip caught hold of his hands and Raja and Sanjay started assaulting him with axe and knife. The allegation is that Raja gave two axe blows, one each on the ribs and head of Prakash and Sanjay gave 5 to 6 blows with knife on the stomach of Prakash. Blood started oozing out from the injuries of Prakash. He fell down as a consequence of receiving them. He is said to have succumbed to those injuries on the spot.

3. After the incident the assailants are said to have run away. The informant Jagannath went to his house and informed his sister and brother Ashok P.W. 4. Thereafter they went to police station, Akkalkot where they reached at about 8.15 p.m. At that time P.S.I. Anant Yeshwantrao Rajeshirke P.W. 21 was present at the police station. The informant informed him that his brother had been done to death as a consequence of the axe and knife blows inflicted by the Appellants. Head Constable Satpute who was incharge of the station diary made an entry in the station diary and reported the incident to him. Thereafter, he went to the spot along with police personnel and P.W. 3-Jagannath. On reaching the place of the incident, P.S.I. Anant Rajeshirke found that the body of Prakash was lying near the urinal. He arranged for a guard to look after the same and himself left with P.W. 3-Jagannath for the police station.

4. The same day i.e. on 25-12-1992 at 10.05 p.m. the F.I.R. of the incident was lodged by P.W. 3-Jagannath at Police Station Akkalkot. The F.I.R. is Exh. 22 and bears both signatures of the informant as well as those of P.S.I. Anant Rajeshirke. On the basis of the F.I.R. C.R. No. 70 of 1992 u/s 302 read with Section 34 of the Indian Penal Code and Section 135 of the Bombay Police Act was registered.

5. After the lodging of the F.I.R., P.S.I. Anant Rajeshirke went to the place of incident with panchas and prepared inquest panchanama of the dead body. He thereafter launched a search for the Appellants. On the morning of 26-12-1992 he went to the spot and prepared the spot panchanama Exh. 55. From the place of the incident he seized blood-stained earth, simple earth, slippers and broken wooden rod of an axe under panchanama. P.S.I. Gaikawad P.W. 15 who had arrested Appellant Sanjay while on patrol duty on 26-12-1992 at about 6.30 a.m. with a knife in the right side pocket of his pyjama and who was wearing blood stained clothes at that time produced the aforesaid Appellant with the aforesaid articles before him. The panchanama with respect of knife and blood stained clothes recovered from Appellant Sanjay was prepared at the police station and one of the panchas was Mallinath-P.W. 13. On 26-12-1992 P.W. 21-Anant Rajeshirke handed over the investigation to P.W. 20 S.D.P.O. Mutyal who in turn,

the following day handed over the investigation back to him. It appears that on 29-12-1992 Appellants Raja and Dilip were arrested. On 1-1-1993, the Appellant Raja showed willingness to produce the weapon of assault viz., the axe. Two panchas including P.W. 19-Babruwan Surwase were called. On a jeep, they, Appellant Raja and the police party pursuant to information given by Raja reached a public lavatory .Thereafter Appellant Raja took out an axe from the bushes of Babhul situated nearby. The axe was seized under a panchanama Exh. 56.

After completion of the investigation the chargesheet in the instant case was submitted.

6. Going backwards the autopsy of the dead body of the deceased Prakash was conducted on 26-12-1992 by P.W. 11-Dr. Manohar More. On the dead body the doctor found as many as 11 incised wounds. The bulk of them were situated on vital parts of the body and at many places the vital organs were ruptured. According to Dr. Manohar More, the deceased died on account of shock due to punctured wounds on vital organs i.e. heart and lungs.

7. The case was committed to the Court of Sessions in the usual manner.

In the trial Court, charges u/s 302 read with 34 I.P.C. and u/s 506 read with Section 34 I.P.C. were framed against the Appellants to which they pleaded not guilty and claimed to be tried.

In the trial Court apart from tendering some documentary evidence, the prosecution examined as many as 21 witnesses. Out of them four witnesses viz., Jagannath-P.W. 3, Babu Chikalge P.W. 9, Machhindra Dandawalkar-P.W. 10 and Raja alias Motilal-P.W. 12 were examined as eye-witnesses. The remaining witnesses included the Investigating Officers, the public panchas in support of recoveries and Dr. More-P.W. 11 who had performed the autopsy on the dead body of the deceased.

In defence no witness was examined by the appellants.

The learned Trial Judge believed the evidence produced by the prosecution, rejected the defence of the appellants and passed the impugned judgment. Hence this Appeal.

8. We have heard Mr. D. B. Bhosale, for the Appellants and Smt. S. J. Pingulkar, Additional Public Prosecutor for the State of Maharashtra at considerable length. We have also perused the material exhibits, the deposition of the witnesses and the impugned judgment. After giving our anxious consideration to the matter, we are of the view that this appeal deserves to be partly allowed. In our view, the Appellant Dilip Sharnappa Zinge deserves the benefit of doubt on all counts and although the conviction and sentence of Appellants Raja Sharnappa Zinge and Sanjay Sharnappa Zinge deserves to be confirmed u/s 302 read with 34 I.P.C. they deserve to be acquitted u/s 506 read with 34 I.P.C. The crucial question in this Appeal is whether the evidence of the four eye-witnesses examined by the

prosecution inspires confidence or not ? We now propose answering the same.

The informant Jagannath-P.W. 3 in his statement in the trial Court has described extensively as to why and how the incident took place. We do not propose repeating the aforesaid facts because it is on their basis that we have set out the prosecution story as contained in paragraph 2. The manner of assault deposed to by him viz., of Appellants Raja and Sanjay assaulting the deceased with axe and knife respectively is corroborated by the nature of the ante mortem injuries suffered by the deceased. P.W. 11-Dr. Manohar More who performed the autopsy on the dead body of the deceased clearly stated that these injuries could be caused by the knife and axe which were shown to him while he was deposing the trial Court.

So far as other witnesses are concerned, we find that P.W. 9-Babu Chikalgi only fixes the date, time, place of incident and the presence of Jagannath. He in a general manner stated that the accused persons assaulted Prakash. He does not even say that they are the same persons who are present in the Court. Thus, in our view, his evidence corroborates the presence of Jagannath on the date, time and place of incident and fixes the date, time and place of incident.

As regards P.W. 10-Machhindra we find that we cannot place any reliance on his testimony because in his cross-examination he admitted that he was deposing falsely at the instance of the police. For reasons best known to it, the prosecution has not chosen to get this witness declared hostile. In such a situation we are left with no other option but to eliminate his evidence.

This brings us to the statement of eye-witness P.W. 12-Raja alias Motilal. The version of assault as given out by him is same as that deposed to by Jagannath P.W. 3. He too like Jagannath stated that Appellant Dilip had caught hold of the hands of the deceased Prakash while Appellants Raja and Sanjay were assaulting him with axe and knife respectively.

Mr. Bhosale, learned Counsel for the Appellants urged that no reliance can be placed on the testimony of this witness because he was interrogated u/s 161 of the Code of Criminal Procedure as late as 22-2-1993 and no cogent explanation has been furnished by the prosecution for the aforesaid delay of two months in his interrogation. The witness tried to explain this delay in his interrogation by alleging that he had gone to Latur but there is no mention of this fact in his statement u/s 161 of the Code of Criminal Procedure and when he was confronted with this omission all what he could say was that he could not say as to why the police had not mentioned it in his statement u/s 161 of the Code of Criminal Procedure. In our view this inordinate delay in his interrogation during investigation is itself a sufficient ground for excluding his testimony in considering the question of involvement of the appellants in the instant crime. In this context it would be apposite to refer to the observations of Their Lordships of the Apex Court in paragraphs 15 and 18 in the case reported in Ganesh Bhavan Patel and Another Vs. State of Maharashtra, which are to the following effect :

"15. Delay of few hours, simpliciter, in recording the statements of eye-witnesses may not, by itself, amount to a serious infirmity, in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately making time with a view to decide about the shape to be given to the case and the eye-witnesses to be introduced."

"18. Normally, in a case where the commission of the crime is alleged to have been seen by witnesses who are easily available, a prudent investigator would give to the examination of such witnesses precedence over the evidence of other witnesses."

Mr. Bhosale also urged that this witness has tried to make improvements in his statement in the trial Court which erode his credibility. In this connection he invited our attention to the fact that although in his statement in the trial Court this witness has attributed the role of catching hold of the hands of the deceased to appellant Dilip but in his statement recorded u/s 161 of the Code of Criminal Procedure there is no mention of it. Mr. Bhosale invited our attention to that portion of the statement of this witness contained in para two of his cross-examination wherein he stated, when confronted with this omission, that he had mentioned it to the police and could not assign any reason for the aforesaid omission.

9. Mr. Bhosale urged that on account of the omission of Dilip's role of catching hold of the hands of the deceased while he was being assaulted by the two other appellants, in the statement recorded u/s 161 of the Code of Criminal Procedure of Raja alias Motilal it would not be safe to believe appellant Dilip Zinge's involvement in the instant crime only on the uncorroborated testimony of P.W. 3-Jagannath, who after all being the younger brother of the deceased, was an interested witness. He further urged that on the date of the incident itself there was a quarrel between this Appellant along with the other two Appellants and the deceased on the refusal of the latter to give money for liquor. He contended that it may be that Appellant Dilip might have been falsely implicated on this score. We find considerable merit in the aforesaid submission of Mr. Bhosale particularly because there is no other corroborative material to clinch participation of this appellant in the instant crime. We are also alive to the stark reality that often with the help of roles like catching hold and instigation prosecution endeavours to inflate the number of accused persons in a criminal case.

In a situation like this, in our view the dictates of prudence require that this Appellant should be accorded the benefit of doubt.

10. However, in our Judgment extending benefit of doubt to appellant Dilip Sharnappa Zinge would have no adverse impact on the evidence of the prosecution witnesses with respect to the participation of appellants Raja Sharnappa Zinge and Sanjay Sharnappa Zinge for the murder of Prakash in which they have been convicted u/s 302 read with Section 34 I.P.C. The Apex

Court in the decision reported in Balaka Singh and Others Vs. The State of Punjab, , has held in paragraph 8 that Courts should make every endeavour to separate the grain from the chaff and it is only where the two are so inextricably mixed that they are incapable of separation would the whole edifice of the prosecution fall. Fortunately, this is not the case here. Against appellants Raja Zinge and Sanjay Zinge there is not only the statement of Jagannath-P.W. 3 which is corroborated by medical evidence inasmuch as injuries attributable to axe and knife, the weapons wielded by these appellants, were found on the dead body of the deceased but there is also other corroborative evidence.

In respect of appellant-Sanjay we find that he was arrested on 26-12-1992 at about 6.30 a.m. by P.W. 15-P.S.I. Gaikawad along with the blood stained knife and blood stained clothes. The aforesaid articles were seized in the presence of a public panch-P.W. 13 Mallinath Gaikawad under a panchanama. The learned Counsel for the Appellants could not point out any convincing reason as to why the aforesaid corroborative evidence should not be relied upon against the Appellant Sanjay Zinge. We find the evidence of both these witnesses to be free from any blemish.

Similarly, against Appellant Raja Sharnappa Zinge we find corroborative evidence in the form of recovery of axe. It has been stated by P.W. 21-P.S.I. Rajeshirke that in the presence of a public panch Babruwan Surwase-P.W. 19 under a panchanama, at the pointing out of appellant Raja, he recovered the axe from babul bushes near the place of the incident. Again we find that the appellant's Counsel has not been able to assign any plausible reason for rejecting the testimony of the aforesaid two witnesses.

It would be pertinent to point out that the knife and axe were sent to the Chemical Analyst and he found human blood on them of blood group A, the blood group of the deceased. This is a very clinching piece of evidence which goes against these two appellants.

11. In our view, the ocular account furnished by P.W. 3-Jagannath corroborated by the medical evidence and the recovery of blood stained knife and clothes from the person of appellant Sanjay and the recovery of axe at the instance of Appellant Raja amply clinches the involvement of these two Appellants for the offence u/s 302 read with Section 34 of the I.P.C. In our view the learned trial Judge rightly convicted them on that count.

12. We, however feel that the learned Additional Sessions Judge having once convicted the appellants for the offence u/s 302 read with 34 I.P.C. should not have convicted them u/s 506 read with 34 I.P.C. particularly because the charge u/s 506 read with 34 I.P.C. is with respect to the appellants threatening the deceased. Consequently we acquit these appellants u/s 506 read with 34 I.P.C. and set aside their sentences on that count.

13. Before parting with the Judgment, it would be only fair to adjudicate upon the principal submission canvassed by Mr. Bhosale, the learned Counsel for the

Appellants namely, that on account of the highly tainted nature of the investigation, it would be extremely hazardous and unsafe for us to sustain the conviction of the Appellants Raja Zinge and Sanjay Zinge on the ocular account furnished by the informant Jagannath-P.W. 3 and the corroborative evidence referred to by us. He urged that in the instant case the case of the prosecution is that the F.I.R. was lodged on 25-12-1992 at 10.05 p.m. and the inquest was performed thereafter. That being so, Mr. Bhosale urged that the time of recording of the inquest report which is entered in it from 9.15 p.m. to 10.00 p.m. on 25-12-1992, makes the inquest report, which also bears C.R. No. highly suspicious and shows that the F.I.R. was not lodged at the purported time. It is well settled that if the ocular account and corroborative evidence inspires confidence, the same will not be washed out by tainted and perfunctory investigation. In this connection it would be appropriate to refer to the observations contained in paragraph 6 of the decision of the Apex Court reported in Karnel Singh Vs. State of M.P., The aforesaid paragraph reads thus :

"We much admit that the defective investigation gave us some anxious moments and we were at first blush inclined to think that the accused was prejudiced. But on closer scrutiny we have reason to think that the loopholes in the investigation were left to help the accused at the cost of the poor prosecutrix, a labourer. To acquit solely on that ground would be adding insult to injury."

For the same reason the other infirmities in the investigation pointed out by Mr. Bhosale pale into insignificance and would not have any bearing on the fate of the instant case.

For the reasons mentioned above we find no merit in the aforesaid submission of Mr. Bhosale and reject the same.

14. Pursuant to the above discussion, this Appeal is partly allowed and partly dismissed. The Appellant Dilip Sharnappa Zinge is given benefit of doubt and acquitted both u/s 302 read with 34 I.P.C. and u/s 506 read with 34 I.P.C. In case he has paid the fine, the same shall be refunded to him. He is in jail. He shall be released forthwith unless wanted in some other case. Appeal of Raja Sharnappa Zinge and Sanjay Sharnappa Zinge is partly allowed to the extent that we set aside the conviction of these Appellants u/s 506 read with Section 34 I.P.C. and their sentence of R.I. for two years and that of fine of Rs. 250/- each imposed on that count. In case the aforesaid Appellants have paid the fine, the same shall stand refunded to them. We however confirm the conviction and sentence of these Appellants u/s 302 read with 34 I.P.C. These Appellants are in jail. They shall remain in jail till they serve out their sentence and would be only released thereafter if not wanted in some other case.

Appeal partly allowed.