

(2017) 04 BOM CK 0103
In the Bombay High Court
Case No : 380 of 2002

Rajendra Manikchand Badar and Anr.

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 17-04-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#) - Power to examine the accused

[Indian Penal Code, 1860](#), [Section 34](#), [Section 307](#), [Section 436](#)

Citation : (2017) 04 BOM CK 0103

Hon'ble Judges : V.L. Achliya

Bench : SINGLE BENCH

Advocate : S.D. Munde, Vaishali Jadhav Patil

Judgement

1. Being aggrieved by the Judgment & Order dated 09.07.2002 passed in Sessions Case No. 40 of 2000 by IInd Additional Sessions Judge, Ambajogai, Dist. Beed, whereby the deceased/appellant was convicted u/s 436 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for five years and pay fine of Rs. 1,000/- in default, to undergo rigorous imprisonment for six months, the appellant has preferred this appeal. Pending disposal of appeal, the appellant died on 17.01.2010. Upon death of the deceased/appellant, Criminal Application No. 370 of 2017 came to be filed by appellant No. 1A & 1B i.e. son & wife of the appellant u/s 394 of the Code of Criminal procedure seeking leave to continue the Appeal. The application moved by son and the wife of the appellant was allowed by order dated 17.03.2017. Hence, the appeal is prosecuted by the son & wife of the deceased-appellant. 2. Before adverting to appreciate the submissions advanced, it is necessary to consider few facts leading to filing of appeal. (a) On 30.01.2000, Ganesh Manikchand Baddar (PW1) - the Complainant and the brother of deceased-appellant accused visited Police Station, Parli and lodged complaint to the effect that on 29.01.2000, while his wife Bharti had gone to purchase milk, wife of the accused met her in the way and when she

attempted to persuade her to ask her husband not to abuse them on phone, wife of accused got annoyed and assaulted her. She lodged complaint in respect of said incident. Thereafter, phone call was received at his residence, which was picked up by his daughter Shraddha (PW3). The accused gave threat that he will put on fire the house of the complainant and also kill their family. At about 10:30 p.m., as he noticed the flames of fire at the door of his house, he opened the door and saw the accused along with two unknown persons running away. He was holding can in his hand. On noticing fire caused to the door of his house, he raised shouts. Upon hearing his shouts, his neighbours viz. Balaji Jagannath, Anthoni Thomas, Ravan Munde and Kondiba Phad and other persons residing in the vicinity rushed to his house and put off the fire caused to the door of his house. In that incident, half of the portion of door frame was damaged due to fire. On the basis of complaint lodged by the complainant, the offence u/s 307, 436 r/w 34 of the Indian Penal Code came to be registered against the accused.

(b) PW 10P. S.I. Kolhe conducted the investigation and during the course of investigation, he recorded the statements of various witnesses which includes Shraddha (PW3), Bharti (PW2), Suman (PW5), Balaji Munde (PW6), Vishnu Gawali (PW7), Vaijnath Chate (PW9). He also visited the spot of incident and made panchanama vide Exh. 18. The accused was found to be absconding. Later on the investigation was handed over to PSI - Ranjankar (PW11), who conducted the further investigation. On 25.04.2000, the accused was arrested. After securing the police custody of accused, the further investigation was conducted. During the investigation, the accused made voluntary disclosure to produce the can used in commission of offence. The accused took police and panchas to his house and produced one can which was of kerosene. Can was seized in presence of panchas. On conclusion of investigation, charge-sheet was prepared and filed in the court of JMFC, Parli. Subsequently, the case was committed to Sessions Court at Ambajogai, Dist. Beed. (c) Charge was framed u/s 436 of IPC against the accused. Accused pleaded not guilty and claimed to be tried. In order to prove its case, the prosecution has examined 11 witnesses and further proved certain documents. The accused has not entered into the defence. On the basis of cross-examination of the prosecution witnesses and the statement recorded u/s 313 of Cr.P.C., the defence of the accused appears to be of total denial and false implication at the instance of the complainant and his family members on account of family dispute. 3. On due consideration of the evidence adduced, the learned Additional Sessions Judge has reached to a conclusion that the prosecution has proved its case beyond reasonable doubt and convicted the appellant for committing offence u/s 436 of the IPC and awarded sentence as stated above. Being aggrieved, the appellant has preferred this appeal. During the pendency of the appeal, the appellant expired on 17.10.2010. Now the appeal is prosecuted by his wife & son. 4. Heard Mr. Sandeep D. Munde, learned counsel for the appellant and Mrs. Vaishali Jadhav Patil, learned APP for respondent/State and further perused the record & proceedings of the trial Court. 5. Mr. Munde, learned counsel for the appellants assailed the reasons & findings recorded by the trial Court with contention that same are perverse and

based upon improper appreciation of evidence. He submits that, the trial Court has failed to take into consideration the unexplained delay of 12 hours in lodging the complaint. He submits that, under the facts and circumstances of the case and particularly the evidence brought on record that the complainant and accused were on inimical terms with each other and complainant had lodged large number of complaints, the delay becomes significant. He submits that, in the FIR lodged the complainant has not assigned any reason for delay in lodging the FIR. However, while deposing before the court the complainant has first time put forth the explanation that, as he was apprehending danger from the accused he could not lodge the complaint immediately after the incident. Learned counsel submits that looking to status of complainant as a Senior Clerk working with Thermal Power Station & wife of accused working as active member of political party, it is difficult to accept the explanation as put forth. He submits that, if really the incident had taken place in a manner stated by the complainant, then in natural course, the complaint ought to have been lodged immediately after the incident. He has further pointed out that, the evidence on record reflects that there was telephone installed in the house of the complainant and same was working. Therefore complaint could have been lodged on telephone. He, therefore, submits that unexplained delay of 11 to 12 hours in lodging the complaint raises serious doubt as to over all case of the prosecution and the credibility of testimony of the witnesses examined by prosecution & it is unsafe to base conviction upon such evidence. In support of submissions advanced, learned counsel referred and relied upon the decision of Hon"ble Apex Court in the case of Thulia Kali v. The State of T.N. reported in AIR 1973 SC 501. 6. On the other hand, learned APP submits that the delay was not deliberate and intentional. She submits that, the delay has been properly explained. By referring the evidence, the learned APP submits that the accused was addicted to liquor and several times abused and assaulted the complainant. Before incident of fire, the accused had made phone call and abused the complainant & his family and also threatened to set their house on fire & kill them. In this background & looking to criminal antecedents, the delay cannot be termed as unusual, deliberate & with a view to implicate the accused in false case. 7. Admittedly, there is a delay of about 1011 hours in lodging the complaint. The complainant (P.W.1) has testified before the trial Court as per Exh. 19. He has deposed that, he could not lodge the complaint immediately after the incident as the incident was occurred during odd hours as well as due to fear of accused. He went to Police Station immediately in the morning and lodged the complaint at 8:30 AM. In cross-examination, the complainant has admitted that he has not mentioned in the complaint the reasons as stated before the court as to delay in lodging complaint. The trial Court has found the explanation given by the complainant as proper explanation as to delay caused in lodging report. It is observed that nothing has been brought in the cross-examination of complainant to infer that in the intervening period the complainant had held deliberation to give shape to the complaint and to lodge false complaint against the accused. 8. In the case of Thulia Kali v. The State of T.N. (supra) relied by learned counsel

for appellant, the Hon'ble Apex Court has explained the importance of F.I.R. In para 12, the Court has observed as under : "12. It is in the evidence of Valanjiaraju that the house of Muthuswami is at a distance of three furlongs from the village of Valanjiaraju. Police station Valavanthi is also at a distance of three furlongs from the house of Muthuswami. Assuming that Muthuswami PW was not found at his house till 10.30 p.m. on March 12, 1970 by Valanjiaraju, it is not clear as to why no report was lodged by Valanjiaraju at the police station. It is, in our opinion, most difficult to believe that even though the accused had been seen at 2 p.m. committing the murder of Madhandi deceased and a large number of villagers had been told about it soon thereafter, no report about the occurrence could be lodged till the following day. The police station was less than two miles from the village of Valanjiaraju and Kopia and their failure to make a report to the police till the following day would tend to show that none of them had witnessed the occurrence. It seems likely, as has been stated on behalf of the accused, that the villagers came to know of the death of Madhandi deceased on the evening of March 12, 1970. They did not then know about the actual assailant of the deceased, and on the following day, their suspicion fell on the accused and accordingly they involved him in this case. First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained. In the present case, Kopia, daughter-in-law of Madhandi deceased, according to the prosecution case, was present when the accused made murderous assault on the deceased. Valanjiaraju, stepson of the deceased, is also alleged to have arrived near the scene of occurrence on being told by Kopia. Neither of them, nor any other villager, who is stated to have been told about the occurrence by Valanjiaraju and Kopia, made any report at the police station for more than 20 hours after the occurrence, even though the police station is only two miles from the place of occurrence. The said circumstance, in our opinion, would raise considerable doubt regarding the veracity of the evidence of those two witnesses and point to an infirmity in that evidence as would render it unsafe to base the conviction of the accused-appellant upon it."

9. In my view in the instant case the delay caused in lodging F.I.R. assumes no significance. In the present case, it cannot be said that the delay has not been properly explained. It is to be appreciated that accused in the case is no one else

than the real brother of the complainant. Both were residing in same locality. There used to be intermittent quarrel between the complainant and the accused. It is brought on record that, large number of cases were registered against the accused with Police Station, Parli. Even there was a proposal to extern the accused submitted by police to competent authority. The fact deposed to this effect by Investigating Officer was not challenged. Only suggestion given to him that the cases were filed just to harass the accused. Registration of number of cases against and submission of proposal to extern the accused itself sufficient to infer as to antecedents & character of the accused. In the background of criminal antecedents of the accused, the reasons & findings recorded by the trial Court that due to incident, the complainant & his family members were under fear and therefore the complaint could not lodge immediately after the incident, cannot be said to be perverse and contrary to the evidence on record. While dealing with an appeal, the appellate court is not expected to interfere with the reasons & findings recorded by trial Court & to substitute those findings with its own reasonings unless such findings are found to be erroneous and not in consonance with the evidence on record. There is nothing to accept the contention that the delay was intentional and deliberate and made with a view to give shape to complaint to be lodged against the accused. 10. Learned counsel for the appellant/accused further assailed the reasons & findings recorded by trial Court & submits that there is no corroboration to the testimony of complainant (P.W.1) from independent witnesses. The conviction of appellant was wholly based upon testimony of P.W.1, P.W.2 & P.W.3, who are related to each other & interested witnesses. He submits that, seizure of plastic can after the period of 2 to 3 months after the incident neither relevant nor provides corroboration to testimony of complainant/P.W.1 & so also can not be treated as incriminating circumstance to connect the accused with the commission of offence. He submits that though it is the case of the prosecution that the accused had made phone call soon before the incident and threatened to set the house on fire & kill the complainant and his family members, still no evidence to that effect i.e. call details of telephonic call produced before the court. Although it is case of prosecution that door of house was burnt, but no seizure of coal pieces made by Investigating Officer. He submits that, though it is the case of the prosecution that crime in question was committed by the accused and two unknown persons, charge sheet was filed only against appellant-accused. He, therefore, submits that the entire case of the prosecution based upon suspicion and there is no cogent, convincing and reliable evidence to prove the guilt of the accused beyond reasonable doubt. The conviction is based mainly on the testimony of interested witnesses i.e. complainant, his wife & daughter. There is no independent witness to support their testimony & conviction is based upon suspicion. He further submits that there appears to be no motive on the part of the accused to commit such offence. 11. On the other hand, learned A.P.P. submits that it is quite settled position in law that the testimony of witnesses can not be discarded merely for the reason that such witnesses are related with each other. She submits that in a case based upon the testimony of interested witnesses, at the most, the rule of

caution can be pressed into service to seek corroboration. In support of the submissions advanced, learned A.P.P. has placed reliance on the decision of the Apex Court in the case of *Seeman Veeranam v. State*, By Inspector of Police reported in (2005) 11 SCC 142. Learned A.P.P. submits that there is no reason to discard the testimony of prosecution witnesses whose testimony remained unshaken unshattered during cross-examination. By referring the reasons and findings recorded by the trial Court, learned A.P.P. submits that there is absolutely no perversity in the Judgment and Order passed by the trial Court. 12. It is well settled position in law that the evidence of close relatives as well as interested witnesses can not be discarded merely on the ground that he is related witness if otherwise testimony of such witness found to be credible. However, the court is expected to adopt careful approach while evaluating and analysing the evidence of such interested witnesses for the reason that the possibility can not be ruled out that such witness may make exaggeration and implicate an innocent person. 13. Keeping in mind the broad principles to be followed in appreciating the evidence of closely related witnesses, I have scrutinized the evidence of complainant Ganesh Manikchand Baddar (P.W.1). He deposed that the incident took place on 29/01/2000. Prior to that incident in the evening quarrel had taken place in between his wife & wife of accused. At about 10.30 p.m. he was watching T.V. At that time, other members of his family were also present in the house. The accused made phone call which was received by his daughter. Accused gave threat to kill his family members by setting his house on fire. Shortly thereafter, he noticed smoke coming from the door of his house. He, therefore, opened the door and witnessed fire caused to the door of his house and noticed the accused and two unknown persons running from that place. At that time the accused was holding white colour plastic can in his hand. He raised alarm. Listening his call the people from neighbourhood rushed to the spot and extinguished the fire. 14. In the cross examination, P.W.1 has admitted that his relations with accused were not cordial. The wife of accused elected as Councilor from Shiv Sena party and the wife of the complainant was also working as active member of Congress party. It is further brought on record that there was watchman cabin in the colony and watchman was deputed on 24 hours duty. Further it is brought on record that the premises belongs to Thermal Power Station and the complainant intimated them about the damage caused to the house by fire, Chief Engineer visited the spot. 15. If we consider the overall cross examination of P.W.1, then there is nothing to discard or disbelieve the testimony of complainant. The incident as deposed by P.W.1 has not been disputed. If we consider the cross-examination, then it appears that an attempt has been made to establish that the act of putting fire to the door of house of the complainant was committed by someone else and due to enmity between the complainant and accused, the accused has been falsely involved in the case. If we scrutinize the testimony of complainant in the light of spot panchanama (Exh.10), then it provides due corroboration to the testimony of complainant that such incident of fire had taken place and the door of the house of the accused was damaged by causing fire. It is pertinent to note that panchanama (Exh.10) was admitted in

evidence with the consent of defence counsel. The contents of the panchanama fully corroborates the testimony of complainant that the incident of fire had taken place in the manner stated by the complainant. Small pieces of coal were also found on the spot. The fact to this effect noted in the panchanama. The testimony of complainant is duly corroborated by his wife Bharati (P.W.2). 16. Bharati (P.W.2) deposed that on 29/01/2000 at about 5.30 p.m. when she had gone to purchase the packet of milk, the wife of the accused met her. She told her about the acts of accused to abuse her & tried to persuade her to advise her husband not to do such act. However, the wife of the accused assaulted her. She lodged complaint in respect of said incident. She further deposed that at the time of incident she was present in the house along with her husband. Her children were studying in gallery. Before the incident, 2 to 3 telephonic calls were received from accused, which were picked up by her daughter Shraddha (P.W.3) & told them the threat given by the accused to burn their house. She further deposed that some time thereafter they noticed smoke coming inside the room from the door of their house & therefore her husband opened the door and saw flames of fire to door of their house. She further deposed that the accused and two unknown persons found running away from that place. Later-on the neighbours reached there and extinguished the fire. In her cross-examination, nothing has been brought so as to discard or disbelieve her testimony. In fact, the material facts deposed by her about the quarrel which has taken place in the evening as well as the threats received on phone from accused and incident of fire not at all challenged during her cross examination. It appears that the cross-examination confines to establish that accused has not caused fire to the door of the house of complainant. 17. On the same line, the prosecution has examined Shraddha d/o Ganesh Baddar (P.W.3) whose testimony is at Exh. 22. She deposed that on 29/01/2000 at about 10.00 p.m. she was studying in the gallery and her parents were watching T.V. At that time phone call received from the accused. She deposed that on phone accused gave abuses in filthy language and also gave threat to burn their house and finish their lives. Thereafter, she heard the voice of her father raising alarm. After opening the door of the house, her parents raised shouts, "fire fire". She noticed from the gallery the accused along with two unknown persons running and the accused was carrying white colour plastic can. She further deposed that the neighbours rushed to the spot and extinguished the fire caused to door of their house. It has been brought through her cross-examination that in all three calls were received in the interval of 5 to 10 minutes. She deposed that she informed her father about the telephonic calls received. It is also brought through her cross-examination that Suman w/o Kondiba Phad (P.W.5) and Balaji s/o Jagannath Munde (P.W.6) rushed to the spot to extinguish the fire. She denied the suggestion that she did not see accused running with white colour plastic can. If we consider the cross examination, then nothing has been elicited in her cross examination to discard or disbelieve the testimony of this witness & find favour to defence of accused. Thus, the testimonies of P.W. 1 to P.W. 3 are consistent on the point of incident and involvement of accused in the incident of causing fire. 18. Prosecution has

examined Suman w/o Kondiba Phad (P.W.5), the independent witness. She has deposed that at the time of incident she was residing in the same building on the ground floor. The complainant was residing on the first floor. She deposed that she was knowing the complainant and accused and the incident in question was occurred at about 10.30 p.m. She deposed that while she was talking with Vaijinath Chate (P.W.9) and one another boy, she heard noise from the first floor. On opening the door of her house by Vaijinath, she saw three persons running away. However, she could not see their faces. She thereafter went to first floor and witnessed the flames from the door of house of Ganesh Manikchand Baddar (P.W.1). She deposed that Bharati (P.W.2) was present there. In her cross-examination, it has been brought on record that she saw those three persons running at a distance of 15 feet. Before she reached on the first floor, no one from the locality reached there. Thus, if we consider the evidence of Suman (P.W.5) then though she has not specifically identified the appellant/accused as person seen amongst those three persons running away but certainly she corroborated the testimony of P.W.1, P.W.2 & P.W.3 to the extent of seen three persons running away immediately after setting the fire to the door of the house of the complainant & one amongst them was appellant/accused. Thus, the testimony of P.W.5 duly corroborates the testimony of P.W.1 to P.W.3 as to incident of fire as well as involvement of three persons in causing fire. It is pertinent to note that, P.W.5 was residing on ground floor. Shraddha (P.W.3) has categorically deposed that Suman Phad (P.W.5) & Balaji (P.W.6) immediately came to spot. 19. Thus, on due consideration of the evidence in its totality, though there is evidence to show that there was strained relations in between the complainant with the accused, still there is no reason to discard and disbelieve their testimony. The testimony of the witness found due corroboration from the evidence of Suman w/o Kondiba Phad (P.W.5) and the panchanama which proves the incident & involvement of three persons in the incident. So far as complicity of the accused in the commission of offence is concerned, there is no reason to discard the testimony of P.W. 1 to P.W.3. Only for the reason that his relations with the accused were strained, it is difficult to believe that complainant had falsely implicated his brother i.e. appellant/accused. 20. The antecedents of the accused have been duly brought on record through the evidence of Gopal Govindrao Ranjankar (P.W.11), who has deposed that proposal for externment of accused was submitted to the higher authority. Threat given by the accused to set on fire the house of complainant followed by the incident of fire establishes the complicity of the accused in the commission of offence. Only for the reason that call details of phone calls were not collected during the course of investigation, is not sufficient to discard the testimony of P.W.1 to P.W.3. It is pertinent to note that the incident was occurred on 29/01/2000. Subrao Raghunath Kolhe, P.S.I. (P.W.10) and Gopal Govindrao Ranjankar (P.W.11) deposed that accused was found absconding immediately after the incident. The accused was arrested on 25/04/2000. Abscondence of accused itself operates as one of strong circumstance to infer the involvement of the accused in the commission of offence. The accused was an employee of Thermal Power Station. If he has not

committed offence, then there was no reason for him to abscond for such a long period. 21. Thus, on due consideration of the evidence in its totality, I am of the view that the reasons and findings recorded by the trial Court are in consonance with the evidence on record. The view taken by the trial court is possible view in the matter. There is no perversity in any of the reason & finding recorded by trial Court. No case is made out in appeal to interfere with the Judgment & Order passed by trial Court. I found no merit in the appeal. In the result, I am inclined to dismiss the Appeal. Accordingly, the Appeal is dismissed. 22. In view of dismissal of the Appeal, Criminal Application No. 3195 of 2009 filed seeking compromise of offence stands disposed of in terms of the decision in the Appeal. Appeal dismissed.