
(2016) 07 BOM CK 0035

In the Bombay High Court

Case No : Criminal Appeal No. 470 of 2014

Raju s/o Mahesh Dhruv

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 12-07-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 201, 300, 302

Citation : (2016) 3 AIRBomRCri 123 : (2017) ALLMRCri 496 : (2017) 2 MhLJCri 299

Hon'ble Judges : B.R. Gavai and V.M. Deshpande, JJ.

Bench : Division Bench

Advocate : None, for the Appellant; Mr. V.A. Thakare, A.P.P, for the Respondent

Final Decision : Allowed

Judgement

V.M. Deshpande, J.—Being aggrieved by judgment and order of conviction passed by learned 3rd Additional Sessions Judge, Nagpur in Sessions Trial No. 32/2012 dated 10.10.2012, by which the appellant is convicted for the offence punishable under Section 302 of the IPC and is directed to suffer imprisonment for life and to pay a fine of Rs. 500/- and in default of payment of fine to suffer simple imprisonment for one month. The appellant is further convicted for the offence punishable under Section 201 of the IPC and was directed to suffer rigorous imprisonment for two years and to pay a fine of Rs. 200/- and in default of payment of fine to suffer simple imprisonment for one month.

2. The appellant and co-accused Santoshkumar Sitaram Dhruv were jointly tried in Sessions Trial No. 32/2012 for the offence punishable under Section 302 read with Section 34, Section 201 read with Section 34 and Section 203 read with Section 34 of the IPC. By the impugned judgment, the learned Judge of the Court below acquitted the co-accused Santoshkumar Dhruv of all the charges. The appellant is also acquitted of the offence punishable under Section 203 of the IPC.

3. The prosecution case as it is unfurled during the course of trial is as under:

(a) The acquitted accused Santoshkumar approached to Police Station, Aaroli on 27.10.2011. That time, Anand Kaviraj (PW11) was incharge Police Station Officer. Santoshkumar gave his report that the deceased Santoshkumar @ Guddu Chavan was found dead, which fact he has informed to his supervisor one Mr. Sharma. The report of Santoshkumar is at Exh.73. On the basis of the said, AD No. 19/2011 was registered in the morning of 27.10.2011. The enquiry of the said accidental death was entrusted to one Head Constable, Moge. Though the enquiry was entrusted to Head Constable Moge, Anand Kaviraj, incharge Police Station Officer also proceeded on the spot of the incident along with Head Constable Moge. A detailed panchanama of the spot Exh.45, was prepared in presence of panchas. Anand Kaviraj also seized blood stained mat, blood stained tile as well as plain tile. He also conducted the inquest on the dead body. The inquest panchanama is at Exh.46. He, therefore, sent the dead body to the General Hospital, Bhandara for post mortem. He received the provisional post mortem report in which the cause of death is shown as head injury.

(b) In the meanwhile, brother of the deceased namely; Manoj Chavan (PW1) filed his report with police. The oral report is dated 27.10.2011 which is at Exh.18. On the basis of the said, crime was registered against the appellant and the acquitted accused for the offence punishable under Section 302 read with Section 34 of the IPC at 17.30 hrs. Both the accused were arrested by Mr. Kaviraj on 27.10.2011 itself under seizure memos Exh.57 and 58 respectively. Kaviraj also seized the blood samples of the deceased in presence of pancha Gajanan Madankar (PW10) vide seizure panchanama Exh.61. The police custody remand of the accused persons were also obtained.

(c) On 30.10.2011 Devidas Bhoyar (Police Inspector) resumed the duty at Police Station, Aaroli and took the charge of the investigation of Crime No. 41/2011. On the very same day, the appellant in presence of Gajanan Madankar (PW10) gave a discovery statement by which he agreed to show the place where he concealed the weapon he used for commission of the offence. Accordingly, Police party with pancha witness reached to the spot shown by the appellant. The spot is the same house where the appellant and deceased used to reside. From there, under the heap of wire the weapon i.e. "Tifer" (Iron pipe) was seized under the seizure panchanama Exh.63. Devidas Bhoyar also seized the clothes of the appellant under seizure memo Exh.64 on 30.11.2011 as well. He seized blood sample of the appellant on 31.10.2011 vide seizure memo Exh.65. After completion of other usual investigation, charge-sheet was filed in the Court of J.M.F.C. Aaroli who committed the case to the Court of Sessions.

4. When this appeal was called for final hearing, the learned counsel for the appellant chose to remain absent. We have heard Mr. V.A. Thakare, learned counsel appearing for the respondent-State. He took us through the record and proceedings in detail. He submitted that no error could be noticed in the impugned judgment. He submitted that the prosecution has successfully

demonstrated that the chain of circumstance is complete and, therefore, he submitted that the appeal be dismissed.

5. In the present case, though 12 witnesses are examined by the prosecution, the prosecution case is sans ocular account. The case is based on the circumstantial evidence.

6. In *Sharad Biradichand Sarda vs. State of Maharashtra*, 1984 (4) SCC 116, the Hon'ble Apex Court held that the onus is on the prosecution to prove that the chain is complete and falsity or untenability of the defence set up by the accused cannot be made basis for ignoring serious infirmity or lacuna in the prosecution case. The Hon'ble Apex Court in paragraph 153 of the said judgment indicate the conditions, which must be fully established before the conviction can be based on circumstantial evidence, those are as under:

1. The circumstances from which the conclusion of guilt is to be drawn should be fully established;
2. The facts so established should be consistent with the hypothesis of guilt and the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
3. The circumstances should be of a conclusive nature and tendency;
4. They should exclude every possible hypothesis except the one to be proved; and
5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

The Apex Court also in *State of U.P. v. Ashok Kumar Srivastava*; (1992) 2 SCC 86 ruled that great care must be taken in evaluating the circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It is also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

7. The prosecution is harping upon the following circumstances to bring home the guilt of the appellant, they are as under:

- (i) The deceased was lastly seen in the company of the accused no. 1 (appellant)
- (ii) The seizure of weapon (tifer) on the disclosure statement made by the appellant.
- (iii) Finding of blood stains on the clothes of the appellant having blood group "A" which is the blood group of deceased Santoshkumar @ Guddu.
- (iv) The finding of blood of group "A" on the weapon tifer and lastly,

(v) Motive."

8. Insofar as the motive is concerned, the prosecution is relying upon evidence of Yashoda Sahare (PW4) and Shobha Panchavate (PW5), these two ladies, on the date of incident i.e. on 26.10.2011 had been to the house of the deceased for demanding their wages. Incidentally, the said day was the day of Laxmi Poojan. Both these ladies stated that when they had been to the house of the deceased that time, the present appellant was also present there. According to the evidence of Yashoda (PW4), deceased told her that since he is under influence of liquor, he will not give money to her and she should come on the next day. According to the evidence of Shobha (PW5) though she was declared hostile, her evidence shows that the deceased has given Rs. 500/- to her. However, he did not give any money to the remaining ladies.

9. According to the prosecution, on that day, the deceased asked Raju, the present appellant to bring Kharra and since the appellant failed to bring Kharra, he abused to the appellant in presence of the workers. This is, according to the prosecution, the motive for commission of offence.

10. Insofar as the purchasing of Kharra is concerned, the prosecution has examined one Vinod Thakare (PW8), the pan shop owner. He states that on the said day, the appellant had been to him for purchase of Kharra. However, he did not give Kharra to him.

11. The prosecution has also examined Yogesh Lende (PW6) who is the nephew of the landlord of the deceased. As per his evidence, since Kharra was not brought, the deceased abused the appellant in presence of the employees.

12. Insofar as the motive part is concerned, it is to be noted that even Vinod Thakare (PW8) acknowledges that the appellant had been to his shop for purchasing Kharra. As per the evidence of Vinod, he did not give the said Kharra. This prosecution witness is completely silent as to why he refused to give Kharra as demanded by the appellant. There was no reason for this pan shop owner to refuse to give the article which a customer was intending to purchase without any reason.

Further, Yogesh Lende (PW6) resides adjacent to the tenanted premises. His evidence is completely silent that in his presence, the abuses were given to the appellant by the deceased. In fact, he has admitted in his evidence that nothing can be seen from his house if any incident has occurred in the tenanted premises. In view of this, the suggestion which he has denied that he was not present in his house when the incident has occurred, loses its importance.

13. Yashoda (PW4) and Shobha (PW5) respectively had been to the house of the deceased. They claim that in their presence the deceased asked the appellant to bring Kharra. However, he returned without Kharra. These two witnesses are completely silent on their evidence that any abuses were given by the deceased to the appellant. On the contrary, they claim that the deceased asked the

appellant that he could proceed towards his village. One cannot forget that the day which this has occurred was the day of Laxmi Poojan and, therefore, if the deceased has asked the appellant to proceed towards his village, in our opinion, was most natural and by that it cannot be inferred that since Kharra was not brought, the deceased was infuriated upon the appellant.

14. In view of the aforesaid, we reject the claim of the prosecution that the prosecution has established the motive on the part of the appellant to eliminate the deceased.

15. The other circumstance, which was harped by the learned A.P.P. is that the deceased was lastly seen in the company of the appellant.

16. The FIR is lodged by Manojkumar Chavan (PW1). As per the FIR, the deceased was residing along with the appellant and co-accused Santoshkumar in the same house. This fact is also corroborated by Yogesh Lende (PW6). Yogesh Lende is the nephew of the landlord of the appellant and deceased. His evidence also shows that the trio was residing in the house.

17. In the present case, time of death is not brought on record by the prosecution. Though the prosecution has examined Dr. Aparna Rangari (PW9) and proved the post mortem report (Exh.41), she has not stated either in the post mortem report or from the witness box about the time of death.

The prosecution, through the evidence of Yashoda (PW4) and Shobha (PW5) is trying to establish the last seen theory. Their evidence do not show the time at which they had been to the deceased for demanding money on 26.10.2011. However, both those witnesses disclose that in their presence, the appellant was sent by the deceased to bring Kharra. The evidence of Vinod Thakare (PW8) shows that when the appellant had been to the shop at 3.30 p.m. As observed in the earlier paragraph of this judgment that the said Kharra was not given to the appellant, therefore, he returned to the house. It also gets corroborates from the Yashoda (PW4) and Shobha (PW5) that when the appellant reached to the house, he could not give Kharra. Thus, the said incident of Kharra must have occurred in between 3.00 to 3.30 p.m. on 26.10.2011.

The FIR shows that on 26.10.2011 at 12 O" clock, the first informant received phone call from deceased and talked with him.

The FIR further states that on the same day, in between 6.00 to 6.30, a phone call was received by Kashiram (PW2), who is cousin of the deceased and the caller, disclosed his identity as Santoshkumar Dhruv. He informed Kashiram that the deceased had taken excessive drinks and, therefore, he has vomited blood and that now he is not there.

18. Thus, the prosecution case through the FIR shows that the time of death of the deceased was in between 6.00 to 6.30 p.m.

19. What happened in between 3.30 p.m. to 6.30 p.m. on 26.10.2011 is in dark.

There is no witness to show about the actual presence of appellant in the house during this period. On the contrary, the cross-examination of Yogesh Lende (PW6) reads as under:

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From the aforesaid position, it is crystal clear that the house of the deceased was visited by others also.

20. It is to be noted that Exh.73, the report lodged by the acquitted accused no. 2 shows that both the accused left the place for bringing sweets for the deceased. We cannot forget here one fact that the deceased was supervisor of the appellant as it could be seen from the FIR. Therefore, on the day of Diwali, if they are going out for bringing sweets for their superior, cannot be faulted.

Exh.73 further states that when they returned to the room at about 5.15, that time they noticed the deceased was sleeping and they noticed blood. This fact was immediately informed to another supervisor namely; Sharma on phone. The Investigating Officer Anand Kaviraj (PW11) has stated that he did not record the statement of said Sharma, who is referred in Exh.73. Further, he has admitted that he cannot tell that on the day of incident, any other male labour came to the deceased for taking wages.

21. In that view of the matter, with conviction, the prosecution cannot state that it was only the appellant who was in the company of the deceased especially when the Investigating Officer has not done any investigation in respect of report Exh.73.

22. There is also unexplained delay in lodging the FIR. The printed FIR, Exh.19 and on the basis of which the crime is registered is dated 27.10.2011 and time is 17.30 hrs. (5.30 p.m). In that behalf, we will have to scrutinise the evidence of Manojkumar (PW1) and Kashiram Chavan (PW2). These two witnesses are the real brother and cousin of the deceased. They were required to proceed to village Hatgaon since they received telephone call at 6.30 on 26.10.2011. Their evidence shows that they reached to the house at Hatgaon at 5.00 to 5.30 a.m. Their evidence shows that when they reached to the house, that time both the accused persons were present and police were also present there. In the FIR, it has been specifically submitted that it is the appellant and the acquitted accused, who are the culprits. From the evidence of these witnesses, it is clear that they learnt about the dispute between the deceased and both the accused on the earlier day on account of money. Though, the police were present, nothing was reported against the appellant or other accused by these two witnesses.

23. The evidence of Anand Kaviraj, who was the investigating the Marg on 19.11.2011, states that when he was drawing the spot panchanama he suspected of murder. The spot panchanama Exh.45 shows that it was drawn in between 9.30 to 10 O'clock on 27.10.2011. If this Investigating Officer was having suspicion that it was a case of murder, he could have registered the

offence against the unknown person. He has not done so for the reasons best known to him.

According to Kaviraj (PW11) he did not register offence in the morning as he was waiting for provisional post mortem report. Dr. Aparna Rangari has stated in her evidence that she issued provisional post mortem report on 27.10.2011. The same is at Exh.42. It shows that it was given at 4.30 p.m. Still, till 5.30 p.m. the FIR was not lodged.

Anand Kaviraj (PW11) is trying to give explanation for late lodging of the FIR by stating that it was informed to him by the complainant on the point of delay that they came from Chattisgarh. As observed in the earlier part of this judgment, it is established on record that when Manoj (PW1) and Kashiram (PW2) reached to the spot that time police were already there. They reached to the spot at about 5.00 to 5.30 a.m. Therefore, the delay of about 12 hours is remained to be unexplained.

24. Another circumstance i.e. pressed into service against the appellant is about the discovery of weapon at his instance and blood appearing on the clothes.

25. Exh.45 is the spot panchanama. The relevant portion of the spot panchanama is reproduced herein below for appreciating the claim of the prosecution that the weapon is discovered at the place shown by the accused:

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The recitals in spot panchanama shows that thorough examination of the spot must have been done by the Investigating Officer at that time. However, the spot panchanama is totally silent about noticing any objectionable article which could be termed as a weapon in the crime.

On 30.10.2011, Devidas Bhoyar, the another Investigating Officer took the charge and on the very same day, the appellate has made disclosure statement Exh.62 as claimed by the prosecution.

Now, the weapon (Tifer) is seized from the same room which is mentioned in the spot panchanama. Therefore, the place was already known to the police. Further, the accused persons were arrested on 27.10.2011. The recovery panchanam Exh.63 is completely silent that the house was locked. Therefore, planting of the weapon on the spot, which was already known to the police is not completely ruled out.

26. Another circumstance is the blood stains appearing on the clothes of the appellant. The appellant is arrested on 27.10.2011 under arrest memo Exh.58. He was produced before the learned Magistrate and the PCR was obtained till 02.11.2011.

The clothes of the accused are seized in presence of the pancha Gajanan (PW10) on 30.10.2011 by the Investigating Officer Devidas Bhoyar. Gajanan (PW10) states on oath that when they were returning from the house after seizure of the

weapon, police asked the appellant to pick up the clothes. Thereafter, they returned to the police station. Then police asked the appellant to change the clothes and those clothes were seized from the appellant. Thus, the clothes which were on the person of the appellant from 27.10.2011 were seized on 30.10.2011. The arrest panchanama Exh.58 does not show that any blood stains were noticed on the clothes which were on the person of the appellant. Further, the appellant was produced before the learned Magistrate and his PCR was obtained till 02.11.2011. The PCR was obtained for recovery of the clothes and the weapon, is the evidence of Devidas Bhoyar (PW12). Had there been blood stains on the clothes of the person of the appellant, it would have been noticed by the learned Magistrate while granting PCR till 02.11.2011. Therefore, it is crystal clear that the Investigating Officer is making mockery of seizure of the clothes of the appellant.

Sample of the blood of the appellant was seized on 31.10.2011 under seizure memo Exh.65. The muddemal articles were sent to the Chemical Analyser on 05.11.2011 under requisition Exh.82. The prosecution is completely silent where and in what condition muddemal articles were lying from the date of their seizure till its dispatch to the Chemical Analyser. No record in that behalf is produced before the Court.

27. The Chemical Analyser's report Exh.4 shows that the blood group of the deceased was "A". Exh.5 is the Chemical Analyser's report in respect of the blood group of the appellant. It also shows that the blood group is "A". In absence of any evidence that the clothes of the appellant were kept properly, much importance cannot be attached on appearance of blood stains of group "A" on his clothes.

The critical analysis of the prosecution case clearly shows that the prosecution has failed to establish the circumstance from which inference of guilt could be said to be firmly established. According to us presence of the appellant at the probable time of death of the deceased is not established by the prosecution and, therefore, we are of the view that the benefit of doubt has to be extended in favour of the appellant.

28. That leads us to pass the following order.

29. The appeal is allowed.

30. The judgment and order of conviction passed by the 3rd Additional Sessions Judge, Nagpur is hereby quashed and set aside. The appellant is acquitted of the offence punishable under Section 302 of the Indian Penal Code. The appellant shall be set at liberty forthwith, if not required in any other case. The amount of fine, if any paid, be returned to the appellant.