
(2000) 08 BOM CK 0023

In the Bombay High Court

Case No : Criminal Appeal No's. 368 and 382 of 1994

Ramesh Alone and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 18-08-2000

Acts Referred:

Evidence Act, 1872 — Section 27, 45
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2001) 5 BomCR 426

Hon'ble Judges : R.K. Batta, J;P.S. Brahme, J

Bench : Division Bench

Advocate : A.V. Gupta, in Cri. A. No. 368/1994 and M.B. Naidu, in Cri. A. No. 382/1994, for the Appellant; S.G. Loney, Assistant Public Prosecutor in Cri. A. Nos. 368 and 382/1994, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Batta, J.—Both these appeals arise out of the same judgment dated 24-10-1994 by which the appellants have been convicted for the murder of Satyawar u/s 302 read with section 34 of I.P.C. In addition two of the appellants have also been sentenced u/s 323 read with section 34 of I.P.C. for assault on P.W. 1 Ganga. The appellants have challenged their conviction in these appeals.

2. The prosecution case, in brief, is that on 21-5-1990 deceased Satyawar and his family members were invited at the house of Digambar Wani for meals. While deceased Satyawar was coming towards the house of Digambar Wani, his legs and clothes were entangled in barbed wire near the cattle shed of the accused. At this state some altercation took place between the deceased and Nandu Bahadur, servant of the accused. It appears that the deceased Satyawar, returned back to his house and was once again coming from his house towards the house of Digambar Wani, when the accused Charandas and Vilas assaulted him with iron rod (Sabbal) on his head, as a result of which deceased Satyanwan fell near the otta. At this stage his sister Ganga P.W. 1, came to the spot and

covered Satyawar by lying over him to save him from any further attack by the accused. It is the prosecution's case that the accused Kamalakar and Ramesh assaulted Ganga P.W. 1 with stick and rafter. Thus, according to the prosecution, the accused had come well prepared with iron sabbals and stick as well as rafter to assault the deceased Satyawar. After Ganga was assaulted, she went and reported the matter to Police Patil P.W. 14, who went along with Ganga to the Police Station and lodged the First Information Report. The incident in question took place at 9.30 p.m. and the F.I.R. was lodged with the police at 10.30 p.m. in which the names of all the four accused were mentioned as assailants. According to the prosecution case recoveries of the weapon of offence were made u/s 27 of the Evidence Act at the instance of the accused. The clothes of the accused were attached as also that of the deceased. The postmortem was conducted by doctor P.W. 18 who found one external injury on the head of Satyawar as well as the corresponding internal injury to brain due to which Satyawar had died instantaneously. Ganga P.W. 1 was also examined by Doctor P.W. 19 who found one injury on the backside of the shoulder of Ganga.

3. The prosecution had examined 20 witnesses including eye-witnesses of the incident. The incident was reported to have been seen by the brothers of the deceased Satyawar who are P.W. 8 Prakash, P.W. 7 Premdas, P.W. 5 Manohar who is friend of deceased Satyawar; but these eye-witnesses did not support the prosecution case. These witnesses were declared hostile, but nothing could be elicited by the A.P.P. conducting the prosecution during their cross-examination. P.W. 1 Ganga who is the sister of deceased also did not support the prosecution case and on the contrary stated that deceased Satyawar had fallen and that deceased who brought a sabbal/crow-bar when he came towards the house of accused Charandas. She denied that she was assaulted by Kamalakar and Ramesh and according to her she had received injuries on her wrist due to fall over the deceased. The prosecution case thus mostly rests upon the evidence of child witness Jyoti P.W. 9 who was 10 years old, on the date of incident. The prosecution sought support from testimony of other evidence on record. The trial Court, accepting the testimony of Jyoti P.W. 9 and corroboration from other evidence on record, found appellants guilty of the charges.

4. We have heard the learned Advocate for the appellants and learned A.P.P. at length, who took us through the evidence on record. Learned Advocate for the appellants pointed out that on the evidence of Jyoti P.W. 9, no implicit reliance can be placed and once the evidence of Jyoti is discarded then nothing is left in the prosecution case. They have pointed out various discrepancies, improbabilities in the evidence of Jyoti P.W. 9 and we shall deal with this aspect while scrutinizing the testimony of Jyoti P.W. 9. It was also pointed out by the learned Advocate for the appellants that though Jyoti P.W. 9 states that accused Charandas and Vilas had given Sabbal blows on the head of the deceased Satyawar, yet only one external injury was found by the Doctor conducting postmortem on the person of the deceased Satyawar and as such the testimony of Jyoti P.W. 9 that accused Charandas and accused Vilas had assaulted deceased

Satyawan on his head with sabbal is false and the same cannot be relied upon. Alternatively, it was argued by the learned Advocates for the appellants that there is no sufficient evidence to bring home the guilt of accused Kamlakar and Ramesh and taking into consideration that only one blow was given, the offence in question would fall within the ambit of section 304 of I.P.C. It was also urged that the assault on Ganga P.W. 1 has not been established and that Ganga herself does not say that she was assaulted by accused Kamlakar, and Ramesh.

5. Learned A.P.P., on the other hand argued that the F.I.R. was promptly lodged within one hour of the incident, wherein the names of the assailants were given. According to him, minor discrepancies and variations are bound to be there in all prosecution cases and in fact such minor variations and discrepancies are hallmark of the truth of the prosecution case. According to him, the external injury in question, was possible as a result of two blows as alleged by Jyoti P.W. 9 and in this connection the learned A.P.P. placed reliance on the judgment of Apex Court in State of Haryana Vs. Bhagirath and Others, . He further pointed out that the ocular evidence of Jyoti P.W. 9 that more than one blow was given has to be given credence and the medical opinion after all is an opinion which is not binding on the Court. He also pointed out that if the statement of Jyoti P.W. 9 is scrutinized, the prosecution case as against accused Charandas and Vilas is established beyond any reasonable doubt. It was next urged by him that the participation of the other two accused namely Kamlakar and Ramesh, as also common intention entertained by them, is duly established by the prosecution, since there is evidence on record that all the accused had came prepared armed with weapons to assault the deceased Satyawar. The learned A.P.P., therefore, submitted that the conviction of the appellants is well founded and does not call for interference. In support of his submission, he has also placed reliance on judgment of the Apex Court reported in Mohan Singh and Another Vs. State of M.P., .

6. In the light of the averments made on either side, we have closely scrutinized the evidence on record. As already pointed out above, except for Jyoti P.W. 9, other eye-witnesses have not supported the prosecution case. These eye-witnesses are : (1) P.W. 7 Ramdas; (2) P.W. 8 Prakash; who are brothers of deceased Satyawar; (3) P.W. 5 Manohar who is stated to be close friend of the deceased Satyawar; (4) P.W. 6 Siddhartha another eye-witnesses as also (5) P.W. 1 Ganga, who is sister of the deceased Satyawar. It is rather surprising that the brothers and sister of the deceased Satyawar have not supported the prosecution case.

7. Ganga, P.W. 1 has stated that she was watching T.V. at the house of accused Charandas. She does speak of altercations between the deceased Satyawar and Nana Bahadur, servant of accused No. 1 and then she states that the deceased had brought a sabbal/iron crow bar, and he came towards the house of accused Charandas. Accused Charandas tried to snatch the crow bar from the deceased Satyawar and the scuffle took place between the two as a result of which

Satyawan fell on the dressed stone on the otta due to which he received injury on his head. She then fell on his person and account of that, her bangles were broken due to which she received injuries on the wrist. According to her, the other accused were not present at the time of incident. She was cross-examined by A.P.P., but as we have already pointed out that nothing material could be elicited during her cross-examination. She identified muddemal Article No. 25 as Sabbal brought by her brother deceased Satyawan. She stated that she had tied the injury of her brother by a cloth of banian and Muddemal Article 3 before the Court is the same banian. She admitted that the deceased Satyawan was drunk on that day to some extent. She also admitted that Satyawan's wife had come with her, when she brought cloth of banian. Thus, Ganga, P.W. 1 far from supporting the prosecution case had deposed that the deceased Satyawan had fallen during the scuffle for snatching of the crow bar which was brought by deceased Satyawan and suffered head injury due to fall on stone.

8. At this stage, it is necessary to examine the statement of Chandrakala P.W. 2 who is the wife of deceased. She states that her husband had told her about the thorny wire placed in front of the cattle shed of accused and after hearing shouts of Ganga, she had rushed to the spot. At that time she saw Ganga lying over her husband and accused Kamlakar and Ramesh inflicting stick blows to Ganga. We have already pointed out that Ganga has denied this part of the prosecution case. Chandrakala P.W. 2 also states that her husband was beaten by iron Sabbal by accused Charandas. She then stated that this fact was told to her by Ganga P.W. 1 and that she had not seen Charandas actually inflicting blow on her husband. She states that Jyoti and Ganga went to the Police Patil. Jyoti also states that she had gone to the Police Patil alongwith Ganga and then to Police Station-P.W. 14 Police Patil does not state that Jyoti had come alongwith Ganga. In the cross-examination P.W. 2 admitted that Ganga had come home for taking piece of cloth and then she had accompanied her for going to the spot of incident. We have already pointed out that Ganga P.W. 1 had also stated that she had gone to her house to bring the piece of cloth. If Chandrakala P.W. 2 had accompanied Ganga, when she came to take the cloth piece, then the question of Chandrakala P.W. 2 having seen the assault by accused Kamlakar and Ramesh on Ganga P.W. 1 would not at all arise. Therefore, the evidence of Chandrakala P.W. 2 is not of much assistance to the prosecution.

9. The fate of the prosecution case in fact hangs on the testimony of the child witness Jyoti P.W. 9. The defence had tried to allege that the presence of Jyoti in the room of the house of the accused Charandas for the purpose of viewing T.V. had not been established and that Jyoti P.W. 9 could not have witnessed the incident in question, since the place of incident was dark and there was no sufficient light. In order to buttress their argument it was pointed out that the Police Patil had to bring the torch on account of darkness in order to see the spot as well as the injuries on the person of deceased. This aspect should not detain us for long, since there is ample evidence on record that there was some light around the scene of offence. There was one electric pole at the distance of about

50-60 feet as also light coming from the bulb from the house of accused Charandas and in fact Ganga P.W. 1 has also categorically stated that there was electric pole so also the light of television available there. In any event accused were known persons and identification is possible even if the light is otherwise not sufficient to identify strangers. In so far as the presence of Jyoti in the T.V. room is concerned, the defence had itself given a suggestion to Jyoti P.W. 9 that she was watching T.V. in the room of the house of Charandas, but the door of the said room was closed. The important question which requires to be considered is whether Jyoti had actually seen the incident in question and from where. For this purpose and to appreciate the testimony of Jyoti P.W. 9, it is necessary at this stage to refer in detail to her testimony. Her competency as child witnesses has been determined by the trial Court.

10. According to Jyoti P.W. 9 she was watching T.V. while sitting in the room; and at that time she heard talk, going in between her father Satyawar and Charandas. According to Jyoti, she came out hearing the talks going on. It is pertinent to note that Jyoti P.W. 9 admitted that she had not stated to the police that she had come out of house on hearing the talks. Initially she had stated that she was seeing television sitting inside the room; but at a later stage she stated that she was seeing T.V. by sitting near the door. The Investigating Officer P.W. 2 has also categorically stated that, Jyoti had not stated to him that Jyoti had seen the incident from about a distance of 10 feet. In fact, in order to believe the testimony of Jyoti P.W. 9 the first thing which has to be decided is from where Jyoti had seen the incident. This was a very relevant aspect and this fact should have figured in her statement before the police and the Investigating Officer should have in fact specifically questioned her on this aspect. Neither Jyoti P.W. 9 stated in her statement before the police the exact spot from where she saw the incident or the distance from the place of incident; nor the same was ascertained by the Investigating Officer. In case Jyoti was sitting inside the room and watching T.V., it does not sound to reason that the child of 10 years who would be engrossed in watching T.V. would hear some sound outside. Be that as it may, Jyoti P.W. 9 has categorically stated in her deposition before the Court that accused Charandas and accused Vilas had given Sabbal blows on the head of her father Satyawar. Her statement reads thus : "Charandas and Vilas then inflicted blows of sabbal on head of her father". Dr. P.W. 18 who conducted the postmortem on the dead body of Satyawar had found only one external injury on the head of deceased Satyawar namely lacerated wound over the frontal region of head of size 3" x 1" bone was exposed. Depressed fracture seen from outside. He found corresponding internal fracture on frontal bone, and hematoma on frontal and parietal region of brain and brain matter was crashed at frontal region and congested. According to him, the injury found on the person of deceased could be caused by weapons Articles 25 and 26 namely iron bars (sabbal). He further stated that the weapons could cause injury by their separate use by either weapon. Learned A.P.P. has strenuously argued before us that in view of the ocular evidence of Jyoti P.W. 9 single injury in question, could be caused by

two blows landing on the same site. Doctor P.W. 18 was not at all questioned on this aspect and in the absence of any questioning of the Medical Officer regarding the cause of the injury, on this aspect, we found it rather difficult to accept the contention of the learned A.P.P. that the single injury in question could be caused as a result of two blows on the same site. Of course, except for bald statement of Jyoti P.W. 9, that accused Charandas and Vilas gave sabbal blows on the head of deceased Satyawar; no further details of assault were brought on record by the prosecution. What was the position of the assailants, how many blows were given; are left to be imagined. If two persons assault from different angles, the possibility of their blows falling on the same site is very remote. Even if both the assailants assault from the front side, even then the possibility of two blows falling on the same site is very remote. But in order to establish this theory, there should be some evidence on record and in absence of any such evidence, it is difficult to agree with the A.P.P.

11. P.W. 18 had stated that it is true that there was only one wound, which categorically shows that there was only one injury. He also stated that injury was possible by fall on dressed stone. Ganga P.W. 1 who is sister of deceased had also come with the same theory of fall. The Doctor in cross-examination had stated that the injury was possible by fall. The A.P.P. conducting the trial should have re-examined the witness on this aspect, but unfortunately no re-examination of this witness was undertaken. Be that as it may, the deposition of Jyoti P.W. 9 that accused Charandas and accused Vilas had both given sabbal blows on the head of the deceased Satyawar, cannot be accepted. Who out of the two gave fatal blow is not known; nor there is any evidence on record to establish who had given the said blow. In fact Jyoti P.W. 9 had not stated anything regarding any sabbal blow being given by Vilas in her police statement, though in her deposition, she attributed sabbal blow to Vilas as well which goes to show that the witness has been tutored to attribute sabbal blow to Vilas. She also likewise did not state of assault by Kamalakar and Ramesh on Ganga P.W. 1 before the police though in her statement before the Court she has stated so. It is therefore, not possible to place implicit reliance on the testimony of P. W. 9 regarding the details of incidence related by her.

12. The weapons were recovered by the police u/s 27 of the Evidence Act, but the panchas have not supported the prosecution case. The sabbal Article 25 which was recovered at the instance of accused Charandas did not have any blood stains over it. Besides this, there is evidence of Ganga P.W. 1 who states that sabbal Article 25 had been brought by the deceased and it is during the scuffle for snatching the same between accused Charandas and deceased Satyawar that the deceased had fallen. The police had also attached the banian of accused Charandas, though according to police there were blood stains in the front portion of the banian yet the C.A. report does not show any blood stains at that place; but what was found is the blood on the backside of the banian. The blood group of the blood stains found on the backside of banian could not be determined. Moreover, the prosecution has not been able to explain us as to how

the blood would fall on the backside portion of the banian of accused Charandas, when admittedly according to prosecution, only one blow was given on the head of deceased. In whatever position, the assailant was at the time of inflicting the said alleged blow; there is very very remote possibility of the blood falling on the backside of the banian and even for this remote possibility no explanation whatsoever has been offered by the prosecution. A close scrutiny of the evidence gives rise to suspicion regarding the involvement of the accused in the crime. It is well settled that suspicion however, so grave can not take the place of proof. The involvement of the accused in the crime is not established by the prosecution and the evidence lead by the prosecution on this aspect is deficient. The prosecution story is not only not supported by Ganga P.W. 1 but it also did not get any support from Manohar P.W. 5 who according to the prosecution was accompanying the deceased Satyawar at the time of incident. There are many grey areas left open in the prosecution case and on scrutiny of the totality of the evidence on record, we are of the opinion that the prosecution has not been able to establish the charges against the accused beyond reasonable doubt. Accordingly the benefit of doubt has to be given to the appellants-accused.

13. For the aforesaid reasons the appeals are allowed. The conviction and sentence of the appellants by the impugned judgment dated 24-10-1994 in Sessions Trial No. 169/1990 (passed by Additional Sessions Judge, Wardha) is hereby set aside. The appellants are acquitted. The appellants are ordered to be set at liberty, in case they are not required in any other case.