

(2013) 04 BOM CK 0125

In the Bombay High Court

Case No : Criminal Appeal No's. 656 and 979 of 2007

Rudhirkumar Kashinath Panda

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 01-04-2013

Acts Referred:

Banking Regulation Act, 1949 — Section 5(b), 6, 6(1), 6(1)(a), 6(1)(b)
Income Tax Act, 1961 — Section 40A(3), 80P, 80P(1), 80P(2)(a)(i), 81
Penal Code, 1860 (IPC) — Section 120B, 302, 392, 394, 414

Citation : (2013) 4 ABR 879 : (2013) ALLMR(Cri) 2128

Hon'ble Judges : V.K. Tahilramani, J;P.D. Kode, J

Bench : Division Bench

Advocate : Ameeta Kuttikrishnan in Criminal Appeal No. 656/2007 and Ms. Pooja Bhojne in Criminal Appeal No. 979/2007, for the Appellant; V.B. Konde-Deshmukh, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

V.K. Tahilramani, J.—Criminal Appeal No. 979 of 2007 has been preferred by the original accused No. 1 Sunil Kavichandra Rana and Criminal Appeal No. 656 of 2007 has been preferred by original accused no. 2 Rudhirkumar Kashinath Panda. For the convenience, the appellants shall be referred to as they were referred to before the trial Court i.e. appellant Sunil Rana will be referred to as accused no. 1 and appellant Rudhirkumar Panda will be referred to as accused no. 2. Both the appeals are directed against the very same judgment and order dated 4.12.2006 passed by the learned Additional Sessions Judge, Greater Bombay in Sessions Case No. 414 of 2004 and Sessions Case No. 992 of 2004. By the said judgment and order, the learned Judge convicted the accused nos. 1 and 2 under Sections 302, 392 and 394 all read with Section 120-B of IPC. For the offence u/s 302 read with Section 120-B of IPC, each of them is sentenced to life imprisonment and pay a fine of Rs. 5000/- each i/d RI for three months. For the offence u/s 392 read with Section 120-B of IPC, each of them is sentenced to RI for seven years and fine of Rs. 2000/- each i/d RI for one month. For the

offence u/s 394 read with Section 120-B of IPC, each of them is sentenced to RI for seven years and a fine of Rs. 3000/- each i/d RI for two months. The learned Judge directed that all the substantive sentences of imprisonment shall run concurrently. As both the appeals have been preferred against the very same judgment and order, both these appeals are being disposed of by this common judgment and order. The prosecution case briefly stated, is as under:

The first informant PW-1 Kashi was residing along with his parents at Rizvi Complex, Bandra, Mumbai. Both the accused nos. 1 and 2 were working in the house of PW-1 Kashi. On the day of the incident at about 7.30 p.m. both the accused were present in the house of PW-1 Kashi. The mother of PW-1 Kashi by name Begum was also in the house. Thereafter, PW-1 Kashi left the house to meet his friends. He returned home at 11.30 p.m. When he came home, he saw that various things were scattered in the hall. He noticed that mouth and nose of his mother were tied with "Dupatta". She was not conscious. Hence, he called his father PW-2 Bharatkumar from his mobile phone. PW-1 Kashi then took his mother to the hospital where she was declared dead. PW-1 Kashi then lodged F.I.R. at Khar Police Station. Thereafter investigation commenced. The dead body of Begum was sent for post-mortem. PW-9 Dr. Shivsharan conducted the post-mortem on the dead body of Begum. In his opinion, the cause of death was "asphyxia due to throttling and smothering". Both the accused came to be arrested along with original accused no. 3. After completion of investigation, the charge sheet came to be filed against the three accused and the case was committed to the Court of sessions. The case was numbered as Sessions Case No. 414 of 2004. Thereafter original accused no. 4 Prakash was arrested. After completion of investigation in his case, the case was committed to the Court of Sessions and it was numbered as Sessions Case No. 992 of 2004.

2. Charge came to be framed against accused nos. 1 and 2 under sections 392 r.w. 120-B, 394 r.w. 120-B. 302 r.w. 120-B and 394 simplicitor of IPC. The charge also came to be framed against original accused nos. 3 and 4 u/s 414 of IPC. All the accused pleaded not guilty to the said charges and claimed to be tried. The defence of the accused is that of total denial and false implication. After going through the evidence adduced by the prosecution, the learned Judge acquitted original accused no. 4 of the offence with which he was charged and convicted the original accused No. 3 only u/s 414 of IPC. The learned Judge convicted and sentenced the original accused Nos. 1 and 2 as stated in para 1 above. Hence, these appeals.

3. We have heard the learned counsel for the original accused Nos. 1 and 2 and the learned A.P.P. for the State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned counsel for the parties, the judgment delivered by the learned Judge and the evidence on record, we are of the opinion that the prosecution failed to prove its case against the accused.

4. There is no eye witness in the present case and the prosecution is only relying

on circumstantial evidence. The circumstances are: recovery of articles belonging to the family of PW-1 Kashi at the instance of accused nos. 1 and 2, the accused nos. 1 and 2 were seen running away from the spot at 10 p.m. on the day of the incident i.e. on 8.2.2003, chance finger prints were found of the accused in the house of the first informant. As far as the last circumstance is concerned, as both the accused were working in the house of the first informant, finding of their finger prints on the door of the bathroom and on the mirror of the dressing table and on a cupboard is not a circumstance which can be said to be clinching one as both the accused were working in the house and their finger prints are bound to be found at various places in the house.

5. The next circumstance that prosecution is relying on is that PW-5 Sunder who is a watchman in the neighbouring building, had seen the accused nos. 1 and 2 running away at about 10.00 p.m. As far as this circumstance is concerned, it is noticed that the time was 10.00 p.m. PW-5 Sunder had seen both the accused from a distance. Moreover, he has admitted that when they were running away, they were facing the otherside. On account of this admission, it is clear that PW-5 Sunder did not have a proper opportunity to observe the identity of the persons who were running away.

6. It is to be noted that there is no recovery of any weapon at the instance of any of the accused in this case. The last circumstance on which the reliance is placed by the prosecution to connect the accused with the crime is recovery of articles belonging to the family of the first informant at the instance of both the accused nos. 1 and 2, As far as accused No. 1 is concerned, the prosecution is relying on the evidence of panch witness PW-3 Sawant who has deposed about the recoveries at the instance of accused No. 1 Sunil. This witness has deposed about the recovery of articles at the instance of accused No. 1 Sunil. However, we do not find the evidence of this witness to be reliable because, it is noticed that in the present case he has acted as panch eight times. On various dates, this very same panch witness has been taken in this case to act as a panch. Besides this fact, it is noticed that the panch witness has admitted that he had acted as a panch in 17 to 18 cases of the very same police station and he had given evidence in more than 5 to 6 cases as a panch witness in the Sessions Court. Looking to the fact that the same panch has been taken as a panch witness in eight panchnamas in the present case and his admission that he had acted as a panch in 17 to 18 cases, it becomes crystal clear that this witness is a habitual panch and he is very much under the thumb of the police. In such case, this panch cannot be considered as an independent witness and must be considered as a pliable witness in the hands of the police officers of Khar Police Station. In view of the evidence on record, the evidence of PW-3 Sawant has to be discarded on the ground that he was under the thumb of the police and a pliable witness. It does not mean that now the prosecution can contend that as the panch witness is not trustworthy, the evidence of police witnesses should be accepted if on scrutiny the same is found to be trustworthy. Normally, it is expected that Investigating Officer will take independent panch witnesses and if

he has taken a pliable witness as a panch witness, the entire raid would become suspect and in such case, it would not be possible to hold that the evidence of police witnesses by themselves would be sufficient to base a conviction. Therefore, as far as accused No. 1 is concerned, his conviction cannot be sustained based on the circumstance of the recovery of articles belonging to the family of the first informant to which recovery the panch witness is PW-3 Sawant.

7. Useful reference may be made to the decision of this Court in the case of Mohd. Hussain Babamiyan Ramzan Vs. State of Maharashtra, wherein similar facts arose and this Court held that the evidence of such panch witness and evidence of police witnesses, in such case, is not sufficient to base a conviction.

8. As far as the accused Nos. 1 and 2 is concerned, the prosecution is again relying on the circumstance of recovery of articles belonging to the family of PW-1 Kashi. This recovery has been deposed to by PW-7 Sohanlal. The memorandum and panchnamas are at Exhs. 43 and 43A. A disturbing factor as far as panchnamas Exhs. 43 and 43A are concerned is that the panch witness has clearly stated that both the accused Nos. 1 and 2 were handcuffed at the time when they made a statement in the presence of police and panchas and later on also they were handcuffed. The fact that both the accused persons were handcuffed at the time of making statement, shows that the statement made by the accused persons was not a voluntary one. The fact that both the accused persons were handcuffed at that time, shows that they were under pressure of the police and under duress, in such case, it cannot be said that the recovery was a voluntary one. This Court in the decision of Shankar Raju Banglorkar Vs. State Of Goa, has held that the evidence relating to recovery made at the instance of the accused person who was handcuffed at the relevant time is not admissible. Even otherwise we find that the evidence of PW-7 Sohanlal does not inspire confidence. In such circumstances, we are not inclined to place any reliance on the evidence of recovery at the instance of the accused nos. 1 and 2 as deposed to by the panch witness PW-7 Sohanlal. If the evidence on recoveries is excluded from consideration, there is no other credible and reliable material on record to sustain the conviction of both the accused Nos. 1 and 2. Hence, we pass the following order:

ORDER

- 1) The appellants-accused nos. 1 and 2 are acquitted of all the offences for which they were convicted and sentenced vide judgment and order dated 4.12.2006 passed by the learned Addl. Sessions Judge, Gr. Bombay in Sessions Case Nos. 414 of 2004 and 992 of 2004.
- 2) They be released forthwith if not required in any other case.
- 3) Appeals are allowed.
- 4) Writ of order is expedited.
- 5) Office to communicate this order to the concerned prison Authorities and to

the Appellants who are in jail.