
(2015) 09 BOM CK 0283
In the Bombay High Court
Case No : Criminal Appeal No. 540 of 2013

Sanjay and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 15-09-2015

Acts Referred:

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 201, 302, 307, 34

Citation : (2015) 09 BOM CK 0283

Hon'ble Judges : B.R. Gavai and P.B. Varale, JJ.

Bench : Division Bench

Advocate : S.P. Dharmadhikari, Learned Senior Counsel, R.K. Tiwari and Mahesh Rai, Advocates, for the Appellant; T.A. Mirza, A.P.P., for the Respondent

Final Decision : Allowed

Judgement

B.R. Gavai, J.—Being aggrieved by the Judgment and order passed by the learned Additional Sessions Judge, Nagpur, in Sessions Trial No. 67/2010, thereby convicting the appellants for the offence punishable under section 302 read with Section 34 of the Indian Penal Code and sentencing them to suffer imprisonment for life and to pay a fine of Rs. 1000/- each and in default to suffer rigorous imprisonment for further period of six months, the appellants have approached this Court.

2. The prosecution story, in brief, as could be gathered from the material placed on record is thus:-

On 30th October, 2009, deceased Dharma Nikose was sitting in his office in the evening at about 4.00 p.m., which was situated at Navin Bina Railway line, Khaparkheda. At that time, the accused Nos. 1 to 3, in conspiracy holding weapons, entered into the office of the deceased and threatened the witnesses sitting therein by the weapons and compelled them to run away. Thereafter, they assaulted deceased Dharma with sharp edged weapons. One of the witness informed the incident to the brother of the deceased (P.W. 9) Harshawardhan on

telephone. The cousin brother of the deceased P.W. 5 Vinod and P.W. 8 Kamlesh were also present on the spot. They saw the accused running along with the weapons from the office of the deceased. The deceased was lifted in a jeep and in the jeep he gave oral dying declaration implicating the accused 1 to 3 herein. The deceased was taken to the Kunal Hospital at Khaparkheda wherein he was declared brought dead. The report of the incident was lodged by one Tejsingh Thakur with the Police Station, Khaperkheda. On the basis of the said report, initially offence punishable under section 307 read with 34 of the Indian Penal Code was registered. On receiving information regarding the death of the deceased from the Police Chowky Medical College, the offence came to be altered to under section 302 read with section 34 of the Indian Penal Code. After completion of the investigation, charge sheet came to be filed in the Court of the learned Judicial Magistrate, First Class, Saoner. Since the case was exclusively triable by the learned Sessions Judge, the same came to be committed to the learned Sessions judge.

3. Charges came to be framed by the learned trial Judge against the three accused along with one more person Bhujang Namdeo Pendane for the offence punishable under section 302 read with section 34 and 201 read with section 34 of the Indian Penal Code, to which the appellants pleaded not guilty and claimed to be tried. At the conclusion of the trial, the learned trial Court passed the order of conviction and sentence as aforesaid. Being aggrieved thereby the present appeal.

4. Mr. S.P. Dharmadhikari, learned senior counsel appearing on behalf of the appellants submits that the learned trial court has grossly erred in convicting the appellants. He submits that in the present case almost all the witnesses had turned hostile. He further submits that the conviction, as recorded by the learned trial court, is recorded only on the basis of the evidence of P.W. 5 Vinod and P.W. 8 Kamlesh. He further submits that their evidence is full of omissions and contradictions. The learned counsel submits that if their evidence is appreciated in a correct perspective, it would reveal that they were not at all present on the spot when the incident occurred. The learned counsel further submits that the evidence of P.W. 9 Harshwardhan, the brother of the deceased is also not of any assistance to the prosecution case. He submits that his evidence is at the most hearsay evidence. The learned counsel further submits that from the material placed on record it would reveal that the so-called recoveries are also farcical. The learned counsel, therefore, submits that in any case the prosecution has failed to prove its case beyond reasonable doubt and as such the appeal deserves to be allowed and the order of conviction needs to be set aside.

5. Mr. T.A. Mirza, the learned APP and Mr. Mahesh Rai, the learned counsel appearing on behalf of the complainant, submit that the evidence of P.W. 5 Vinod and P.W. 8 Kamlesh is consistent. It is submitted that the learned trial judge has rightly based the order of conviction on their evidence. He further submits that the testimony of these witnesses is fully corroborated by P.W. 9 Harshwardhan.

The learned counsel further submits that the medical expert's evidence also supports the prosecution case. It is, therefore, submitted that the appeal deserves to be dismissed and no interference is warranted.

6. With the assistance of the learned counsel for the appellants and learned APP and the learned counsel appearing for the complainant, we have scrutinized the entire material placed on record. In the present case most of the witnesses including the alleged eye witnesses and the witness to whom oral dying declaration is alleged to have been made, so also the panch witnesses have turned hostile. Only P.W. 5 Vinod and P.W. 8 Kamlesh, both are the cousins of the deceased, apart from the medical experts and investigating officer, have supported the prosecution version. Even the first informant has turned hostile. In this back ground, we will have to appreciate the rival submissions.

7. The present case mainly rests around the oral testimony of P.W. 5 Vinod and P.W. 8 Kamlesh. If their testimony is found to be trustworthy, reliable and cogent, no interference would be warranted with the finding of the conviction. However, if their testimony is not found to be trustworthy, reliable and cogent, the result would be otherwise. Undisputedly both these witnesses are cousins of the deceased and as such they are interested witnesses. No doubt merely because the witnesses are interested, being relative of the deceased, cannot be a ground for discarding their testimony. However, the evidence of such witness is required to be scrutinized with greater caution and only if the testimony is found to be trustworthy, reliable and cogent, conviction can be based on the basis of the evidence of such witnesses. In this background, we have to examine the testimony of P.W. 5 Vinod and P.W. 8 Kamlesh.

8. P.W. 5 Vinod states in his evidence that the deceased was having a business of supplying building construction material. He states in his evidence that the accused No. 2 and accused No. 3 were working with the deceased. He further states that the accused Nos. 2 and 3 owned trucks. Deceased Dharma was also doing the business of preparing the bricks at village Shingori, Taluka Parsoeni. Ranjit Gajbhiye was the partner of the deceased Dharma in his business. Though initially the accused 2 and 3 and deceased were working together in partnership, they parted the company and started doing their work separately. He further states that he was doing the work with deceased Dharma in support of preparation of bricks and he knows accused Vilas also.

Insofar as the incident is concerned, P.W. 5 Vinod states that on 30.10.2009 in the morning he was present on the brick kiln. He further states that from there he went to his house. He took meal and went to Khaparkheda at 3.30 p.m. along with Kamlesh (P.W. 8). He states that after returning from Khaparkheda towards his village, he told Kamlesh that they will meet deceased Dharma. He states that he was returning on motorcycle and stopped at the pan shop at around 4.30 p.m.. In the evidence, he states that the pan shop was at a distance of about 25 meters from the office of the deceased Dharma. He saw three persons coming out of the office through gate. Their clothes were stained with blood. There were

weapons in their hands. He further states that they stopped at pan shop as were afraid. He states that those persons were left side of the office towards railway crossing. He has identified those persons to be the three appellants. He further states that he immediately went to the office of deceased Dharma. He was lying on the side of chair having sustained profused bleeding injuries. He states that Kamlesh made phone to Ranjit and they searched key of vehicle Bolero owned by deceased Dharma in the office. They found key. They put deceased Dharma in the back side of Bolero and that time he was conscious. Bhushan Harde was the driver on Bolero. He, Kamlesh and Ranjit were also present in the Bolero. Kamlesh was sitting on front side. He and Ranjit had caught deceased Dharma and were sitting on back seat. Ranjit made inquiry with deceased Dharma as to who had beaten him and how he was beaten. Deceased Dharma told him that he was beaten by Vilas, Akrosh and Sanjay. After some time, he became unconscious. He states that he took Dharma to Kunal Hospital, Mankapur, Nagpur where he was declared to be dead.

9. In the cross examination, P.W. 5 Vinod has admitted that his statement was recorded after three days i.e. on 2.11.2009 after the incident. He has admitted that police were coming to the place of incident on 2nd and 3rd day of the incident continuously. He has further admitted that there is a police booth on the gate of Medical College. He told the police about the incident. He has further admitted that the police made inquiry with him, Kamlesh and Ranjit about the incident. He admits that he did not tell police that he saw accused Vilas, Sanjay and Akrosh having sustained blood stains on their clothes and having weapons in their hand and coming out of office of deceased Dharma through gate. He has further admitted that he had told to Police who were present in gate of medical college that some unknown persons beaten deceased Dharma. He has further admitted in his cross examination that police did not seize his blood stained clothes. His statement in his examination-in-chief that he was knowing Vilas prior to the incident, is an omission which is duly proved.

10. In the cross examination by accused Nos. 2 and 3, this witness has also admitted that he was present at the time of inquest panchanama. Suggestion is given to him that he had received phone call on his cell when he was at village Dorli. He has admitted in his cross examination that he has informed the police that on Friday Dharma had went to brick kiln and made payment to the labourers and went away. He has further admitted that account of brick kiln on 30.10.2009 was known by deceased Dharma and that it was settled by him. In his cross examination he has stated that the distance between the pan shop and the office of the deceased is about 300 - 400 ft.

11. P.W. 8 Kamlesh is also cousin of the deceased. He states about the dispute between deceased Dharma and accused Nos. 2 and 3. He states that after the dispute, deceased Dharma had separated from the partnership of accused Nos. 2 and 3. He further states that he was doing office work and was looking after the brick kiln of deceased Dharma. He states that on 30.10.2009 at around 12 to

1.00 noon deceased Dharma went to his office and he and Vinod went to the house from brick kiln. At about 3.00 p.m. Vinod came to him and told him that he want to go to Khaparkheda. As such they went to Khaparkheda. At around 5.00 p.m. when they were coming from Khaparkheda to their house, he came near the office and saw that people were looking towards the office. That time he saw that the accused Nos. 1, 2 and 3 were coming out of the office of deceased Dharma and their clothes were stained with blood and two of them were holding weapons in their hand. Then three of them fled away from the back side of Railway line. He has identified the accused in the court. Rest of the evidence is similar that of P.W. 5 Vinod. He has admitted that his statement was recorded on 2.11.2009. However, he has justified that since on account of the incident he was under depression, his statement was not given earlier. He has also admitted that when deceased was taken to the Medical Hospital, there was police booth near casualty and the police interrogated them. He further states that he informed about the incident to the police. He has further admitted in his cross examination that his clothes were also blood stained. He has further admitted that police had seen his blood stained clothes. However, they had not seized the same. He has further stated that police interrogated him and noted in the pad on 31.10.2009. He has further stated that on 31.10.2009 he told the police about the incident in his statement. There are various omissions in his evidence. He has also admitted that Dharma was with them in the brick kiln since morning till 1.00 p.m.. At 1.00 p.m. Dharma went and he also went to his house. At about 3.00 p.m. he came to Khaparkheda for the work of truck and information to Dharma and, thereafter, they went to his office.

12. From the evidence of both these witnesses, it would reveal that the part of the evidence with regard to oral dying declaration is an omission, which is duly proved in the evidence of the investigating officer. From the evidence of these witnesses, it is also clear that they were looking after the work of brick kiln at their village on behalf of the deceased. It has also come in their evidence that deceased was there in the brick kiln in the morning and also taken account of the work. In this situation, their presence appears to be unnatural. Since the deceased has already visited the brick kiln in the morning and also taken account, there was no occasion for these witnesses to again visit the office of the deceased. Apart from that in the map placed on record there is no mention of pan shop. Even according to the P.W. 5 Vinod, the pan shop is situated at around 400 to 500 ft. from the office of deceased Dharma. It is difficult to believe that from the said distance they would identify the accused. Apart from that both the witnesses have admitted of giving information of the incident to the police at police booth in the Medical College. Not only that P.W. 5 Vinod specifically admits in his evidence that he told the police who were present in the gate of medical college and that some unknown persons had beaten deceased Dharma. Not only this, but the information which is given by the police at Medical College Booth to Khaparkheda Police Station, would reveal that the history given in the Medical College Police Booth was that deceased was assaulted at around 4.30 p.m. in the

office at S.R.S. Traders New Bhanegaon Railway Crossing Police Station Khaparkheda by unknown persons and that after he became unconscious he was initially brought to Kunal Hospital Mankapur from where he was referred to the Medical College where he was declared to be brought dead. It could, thus, be seen that the immediate information given by these witnesses is regarding the assault by unknown person. It should be noted that though both these witnesses were present at the time of inquest, they have not given names of the accused persons to the police and they have implicated the accused for the first time on 2.11.2009 when their statements were recorded. Both the witnesses are related to the deceased. As such their testimony will have to be scrutinized with greater caution.

13. From the discussion hereinabove, it cannot be said beyond reasonable doubt that these witnesses have really witnessed the incident.

14. Apart from that one more factor that needs to be taken into consideration, is that according to these witnesses their clothes were stained with blood. Not only that but P.W. 8 Kamlesh has admitted that the police have also seen his clothes stained with blood. The Hon'ble Apex Court in the case of State of Rajasthan Vs. Shri Chiranjilal, has held that if the blood stained clothes of the alleged witnesses whose clothes are said to have been soaked with blood are not seized, an adverse inference will have to be drawn against the prosecution case. In that view of the matter, we find that it would not be safe to rely on the testimony of these witnesses.

15. That leave us with the circumstance regarding recovery of the clothes of the accused persons and the recovery of the weapons alleged to have been used in the crime. Perusal of Exh. 204, which is a remand application by the investigating officer while seeking remand of the appellants, would reveal that the appellants were arrested on 31.10.2009 at 2.30 hours. The remand was sought between 31.10.2009 to 6.11.2009. In the remand application, one of the grounds for seeking remand, is that accused persons have kept the clothes used in the crime at some place. As such information is required to be obtained regarding the same for seizure of the same. However, seizure memos below Exhs. 140, 141, 142 would reveal that the clothes of the three accused are seized from their person on 1.11.2009 at 16.00, 16.15 and 16.30 hours respectively. The seizure memorandums state that the clothes on their person were worn by the accused persons while committing the crime. As such those clothes were removed from their person by giving them other clothes and seized for the purpose of investigation. We find that the trial Judge has rightly disbelieved the said seizure.

16. That leaves us with the recovery of the alleged weapons used in the crime at the instance of accused Sanjay on the basis of the memorandum under Section 27 of the Indian Evidence Act. Firstly, the panchs have not supported the prosecution case. Secondly, the seizure panchanama would reveal that on the memorandum of accused Sanjay, police party went to the house of accused

Sanjay. After going to his house, his brother was called by the accused and asked him to give the key of the vehicle. He further states that brother of Sanjay brought the key of the car from the house and gave it to the accused. The accused thereafter by remote got the door of the car opened and removed the knife from the place beneath the seat of the driver. It could, thus, be seen that the key of the vehicle was in the house and there was access to many, including the brother of the said accused. It, therefore, cannot be said that the recovery was from the place to only accused had an access. As such we find that the said recovery would also of no much assistance to the prosecution case.

17. In the totality of the circumstances, we find that the prosecution has failed to prove the case beyond reasonable doubt. The appellants/accused are entitled to the benefits of doubt. Hence, the following order.

The appeal is allowed. The order of conviction and sentence is set aside. The appellants are acquitted of the charges charged with. The appellants are directed to be released forthwith, if not required in any other case.