
(2018) 02 BOM CK 0103
In the Bombay High Court
Case No : 8 of 2017

Shankar Babarao Agaldare

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 28-02-2018

Acts Referred:

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

[Indian Penal Code, 1860](#), [Section 302](#) - Punishment for murder

Citation : (2018) 02 BOM CK 0103

Hon'ble Judges : R. K. Deshpande, M. G. Giratkar

Bench : Single Bench

Advocate : Mahesh V. Rai, H. N. Jaipurkar

Final Decision : Allowed

Judgement

1. Appellant challenged the judgment of conviction awarded by learned Additional Sessions Judge, Darwha for the offence punishable under Section 302 of the Indian Penal Code by which he is sentenced to suffer imprisonment for life and to pay fine of Rs. 1000/in default to suffer simple imprisonment for three months.

2. The case of the prosecution against appellant in short is as under. (i) Appellant is cousin nephew of the complainant. Complainant and his family members were not on talking terms with the appellant one year before the incident. Appellant assaulted complainant Balaji six months before the incident. On 24/12/2015, deceased aged about 80 years had gone to grocery shop along with his grandchildren at about 5.30 p.m. He did not return and, therefore, P. W. 2 Sunita came out of the house to see him. At that time she saw appellant assaulting her fatherinlaw/ deceased by means of stick. She raised alarm. Therefore, Sudhakar Agaldare and Shivaji Marshetwar rushed to the spot. They rescued her fatherinlaw from the accused. Her fatherinlaw sustained injuries over his head,

hands and legs. They took him to the hospital at Digras. He was referred to the Government Hospital, Yavatmal. However, Doctor declared him dead. He narrated incident to her husband P.W. 1 Balaji. He lodged report in Police Station, Arni on 26/12/2015.

(ii) Investigation was started by PSI Khandare. He prepared inquest panchanama and sent the dead body for postmortem. Spot panchanama, Exhibit 19 was prepared by other Investigating Officer, namely, PI Gaikwad. Accused was arrested. Accused had shown the weapon - stick. It was seized as per seizure panchanama, Exhibit 38. He collected postmortem report and seized clothes of deceased and appellant. All the seized property sent to C.A. Statements of witnesses were recorded. After complete investigation, chargesheet was filed before the Judicial Magistrate First Class, Arni which in turn committed to the Court of Additional Sessions Judge, Darwaha for trial.

(iii) Charge was framed at Exhibit 3. Same was read over and explained to the appellant. He pleaded not guilty and claimed to be tried. Defence appears to be of total denial. It is the defence of the appellant that due to old age, deceased lost his balance, fell down on stone and sustained injuries to his head and, therefore, he died.

(iv) The prosecution has examined following witnesses.

- (1) P.W. 1 Balaji Laxman Agaldare (Exhibit 14)
- (2) P.W. 2 Sunita Balaji Agaldare (Exhibit 17)
- (3) P.W. 3 Kailash Bapurao Shinde (Exhibit 18)
- (4) P.W. 4 Shri Sachin Nagorao Bonde (Exhibit 20)
- (5) P.W. 5 Sudhakar Vitthal Agaldare (Exhibit 21)
- (6) P.W. 6 Shivaji Ukandrao Marshetwar (Exhibit 22)
- (7) P.W. 7 Khandu Mahadeo Wanjare (Exhibit 24)
- (8) P.W. 8 Nandini Balaji Agaldare (Exhibit 29)
- (9) P.W. 9 Hanumant Amrutrao Gaikwad (Exhibit 32)
- (10) P.W. 10 Dr. Vinod Patiram Bhalerao (Exhibit 47) and
- (11) P.W. 11 Shri Sanjeev Baburao Khandare (Exhibit 51)

(v) Learned trial Court recorded statement of accused under Section 313 of Code of Criminal Procedure. He has denied material incriminating evidence against him. After hearing the prosecution and defence, learned trial Court convicted the appellant for the offence punishable under Section 302 of the Indian Penal Code, hence, the present appeal.

3. Heard learned counsel Shri Rai for the appellant. He has pointed out

cross-examination of the material witnesses. Learned counsel has submitted that P.W. 2 is interested witness. Her evidence is not reliable. Evidence of P.W. 8 is also not reliable because she was tutored.

4. Learned counsel has pointed out admission of P.W. 1 and P.W. 2. They have stated that there is a cement road in front of their house. There are drains by the side of road constructed by stones.

5. Learned counsel has submitted that deceased fell down on the stone and, therefore, he sustained injury. This defence is probabalised by the admission of Doctor. Medical Officer (P.W. 10) has stated in his cross-examination that injury no. 1 is possible by fall on stone. Material independent witnesses i.e. P.W. 5 and P.W. 6 not supported the case of prosecution. It is submitted that deceased died accidental death.

6. Learned counsel for appellant submitted that P.W. 5 Sudhakar Agaldare has admitted in his cross-examination that when he went on the spot, Laxman was lying on the ground. His head was on stone. P.W. 6 Shivaji Marshetwar has stated in his evidence that when he reached to the spot, deceased was lying on the ground. He has specifically stated that it did not happen that accused had assaulted him (deceased) by means of a stick over his head.

7. Learned counsel has submitted that the prosecution has failed to prove the guilt of appellant beyond reasonable doubt. In support of his submissions pointed out decision in the case of Yogesh Singh Vs. Mahabeer Singh and others reported in (2017) 11 SCC 195

8. Heard Ms. Jaipurkar, learned Additional Public Prosecutor for the respondent. She has submitted that evidence of P.W. 2 is well supported by P.W. 8. There is no reason to disbelieve their versions. Learned trial Court rightly convicted the appellant, hence, appeal is devoid of merit and liable to be dismissed.

9. Evidence of P.W. 1 shows that he was not present at the time of incident. He was at Digras. His wife informed him about the incident. Thereafter he had taken his father to the hospital at Yavatmal.

10. P.W. 2 Sunita has stated in her evidence that appellant is her nephew. They were not on talking terms. Incident took place in the evening at about 5.30 p.m. Her fatherinlaw and her three children had gone to grocery shop. Her fatherinlaw not returned, therefore, she came out of the house to see him. At that time, she saw appellant assaulting her fatherinlaw by means of stick. She therefore raised alarm. Sudhakar Agaldare and Shivaji Marshetwar rushed to the spot. They rescued her fatherinlaw from the accused/appellant. Her fatherinlaw sustained injuries over his head, hands and legs. They taken him to the hospital at Digras. He was referred to hospital at Yavatmal. However, Medical Officer declared him brought dead.

11. P.W. 8 a child witness, aged about 8 years, has stated in her evidence that at the time of incident, she was with her grandfather to the grocery shop. They

were returning to the house. At that time, appellant assaulted her grandfather by means of stick on his head. Thereafter she raised alarm. Her grandfather fell down on the ground. Again appellant gave 23 blows of stick on the person of her grandfather/deceased. On her raising alarm, her mother and uncle came on the spot. Her uncle gave two slaps. Appellant ran away with the stick.

12. The case of prosecution is based on the evidence of P.W. 2 and P.W. 8. Evidence of P.W. 2 and P.W. 8 is not corroborating each other. P.W. 2 has stated in her examination in chief that her father in law had gone along with her children to the grocery shop. He did not return within time, therefore, she came out of the house and saw the appellant assaulting her father in law by means of stick, therefore, she raised alarm. Sudhakar Agaldare and Shivaji Marshetwar rushed to the spot. They rescued her father in law.

13. P.W. 8 has stated in her evidence that when deceased was returning with his grandchildren (including P.W. 8) appellant beat deceased by means of stick. Deceased fell down. Appellant again gave 23 blows of stick on the person of deceased. On raising alarm by P.W. 8, her mother and uncle reached to the spot. From the evidence, it is clear that P.W. 8 raised alarm and thereafter P.W. 2 reached to the spot. As per the evidence of P.W. 8, that time, her grandfather was lying on the spot whereas P.W. 2 has stated that she saw the appellant while beating deceased.

14. There was strained relations between the complainant and appellant and, therefore, their evidence are to be scrutinized very carefully. The material evidence of P.W. 2 and P.W. 8 is contradictory. P.W. 8 was a tutored witness. She has admitted in her cross examination that she attended the Court for 34 occasions along with her parents. Prosecutor read over her statement for 23 occasions to her. This itself shows that minor child was tutored to give evidence against the appellant.

15. As per the evidence of P.W. 2 and P.W. 8, P.W. 5 who is nearest relative of the complainant reached to the spot with P.W. 6. P.W. 5 has stated in his evidence that there were cordial relations between accused and deceased Laxman. He returned back from the forest at about 3.00 p.m. His daughter Vaishali was preparing meal. He heard noise of quarrel and, therefore, he went out of the house. He saw deceased Laxman lying on the ground. He had taken him to the hospital at Digras in the auto rickshaw. It did not happen that Laxman sustained injuries as he was assaulted by accused by stick. P.W. 6 also not stated anything against the appellant. He has stated that during evening time, he was proceeding to his house. He saw deceased Laxman lying on the ground. It did not happen that accused had assaulted him by means of a stick.

16. Both the witnesses i.e. P.W. 5 and P.W. 6 are independent witnesses. Moreover, P.W. 5 is related to the complainant, deceased and accused. He had taken deceased to the hospital. But he has not stated that appellant beat deceased. Evidence of P.W. 2 and P.W. 8 show that P.W. 5 and P.W. 6 reached to

the spot of incident. P.W. 5 slapped the appellant and rescued the deceased. Evidence of P.W. 2 and P.W. 8 is falsified by the evidence of P.W. 5 and P.W. 6.

17. Evidence of Medical Officer Dr. Vinod Bhalerao (P.W. 10) shows that he found injury to scalp and other injuries like contusions. As per the opinion of Doctor, deceased died due to head injury. In the crossexamination, he has admitted that injury no. 1 head injury is possible by fall on a stone.

18. Crossexamination of P.W. 1, P.W. 2 and other witnesses clearly show that there was a cement road. The drains were constructed by the stones. Evidence of P.W. 5 in the crossexamination shows that head of deceased was lying on the stone. As per the opinion of Doctor, head injury can be caused by falling on the stone. Deceased was aged about 80 years. As per the admission of P.W. 2, he was unable to walk properly due to old age. There is one cow in their village which rush on people.

19. It is the defence of appellant that cow dashed to the appellant. He lost his balance and fell down on the stone. This possibility cannot be ruled out. Deceased was aged about 80 years and he was not walking properly. As per the evidence of P.W. 5, there was talk in their vicinity that deceased Laxman was given dash by a cow with its horn. When he went to the spot, Laxman was lying on the ground with his head on a stone. Probable defence appears to be established. Recovery of weapon stick is not proved as panch witness not supported to the prosecution.

20. It is admitted by P.W. 2 that her fatherinlaw/ deceased was aged about 80 years. He was unable to walk properly. There are stones near the spot of incident. As per the evidence of P.W. 5, deceased might have been dashed by cow and he fell down on the stone. Medical Officer P.W. 10 has admitted in crossexamination that if a person fell down on the stone, injury no. 1 (head injury) can be caused. Evidence of P.W. 2 and P.W. 8 is not reliable because they are not corroborating to each other. P.W. 8 is a tutored witness. P.W. 2 was having enmity with the appellant. Material witnesses who were having cordial relations with the complainant and deceased not stated anything against the appellant. On the other hand they have supported the defence of appellant.

21. In the case of Yogesh Singh Vs. Mahabeer Singh and others (cited supra), Hon''ble Apex Court has observed as under. Criminal Trial - Proof - Presumptions - Presumption of innocence - If two views possible on evidence adduced, one pointing to guilt of accused and other to his innocence - Which view should be adopted - Held, the golden thread which runs through the web of administration of justice in criminal cases is, that in aforementioned situation, view which is favourable to accused, should be adopted.

22. Prosecution has failed to prove the guilt of accused beyond reasonable doubt. On the other hand evidence of P.W. 2 and P.W. 8 creates doubt. As per the evidence of P.W. 2 and P.W. 8, P.W. 5 is nearest relative. As per his evidence, he had taken deceased to hospital. This itself shows that he was having cordial

relations with deceased. But this witness not supported to the case of prosecution. P.W. 6 who is an independent witness also not supported the case of prosecution. On the other hand, P.W. 5 and P.W. 6 have specifically stated that it did not happen that appellant/accused beat deceased." Prosecution has failed to prove the guilt of accused/appellant beyond reasonable doubt. Therefore, benefit of doubt should be given to the appellant/accused in view of the judgment of the Hon"ble Apex Court cited supra. Hence, we pass the following order. ORDER

(i) The appeal is allowed.

(ii) Impugned judgment is hereby quashed and set aside. Appellant is acquitted of the offence punishable under Section 302 of the Indian Penal Code.

(iii) Appellant/accused is in jail. He be released forthwith, if not required in any other offence/crime.

(iv) Fine amount, if paid, be refunded to the appellant.

(v) R & P be sent back to the trial Court.