
(2021) 10 BOM CK 0124

In the Bombay High Court

Case No : Criminal Appeal No.894 Of 2004

Shankar Sayaji Handore And Other

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 26-10-2021

Acts Referred:

Indian Penal Code, 1860 — Section 34, 201, 302, 379
Code Of Criminal Procedure, 1973 — Section 313

Citation : (2021) 10 BOM CK 0124

Hon'ble Judges : Sadhana S. Jadhav, J; Prithviraj K. Chavan, J

Bench : Division Bench

Advocate : Aniket Ujjwal Nikam, Piyush Toshnival, Vivek N. Arote, Amit Icham, Aashish Satpute, Geeta Mulekar

Final Decision : Allowed

Judgement

Prithviraj K. Chavan, J

1. By this appeal, the appellants have challenged the judgment and order dated 7th July, 2004 of their conviction for allegedly committing murder of one Hiran More around midnight of 19th February, 2003.

2. Facts germane for disposal of the appeal can be summarized as follows.

3. Hiran More (deceased) was a poor fisherman residing with his family at Village Vihitgaon, Taluka, District Nashik. In the midnight of 19th February, 2003, he went for fishing. He did not return till the next morning. However, around 8.00 am., accused No.2-Digambar Handore came to Hiran's house and asked his wife to accompany him to his grape orchard.

4. No sooner did she reach in front of the house of Accused No.2-Digambar Handore, she noticed her husband in an injured condition with his hands and legs tied to a scrap wood of the body of a truck. A rope was also tied around his neck. He was bleeding but was alive. It is alleged that Accused No.1-Shankar Handore, Accused No.2-Digambar Handore and Accused No.3-Chandu Handore along with

their workers and some lady members of the family of accused No.2 were present surrounding a brick kiln, nearby.

5. Accused No.1-Shankar Handore in the presence of Accused No.2-Digambar Handore and Accused No.3-Chandrakant Handore as well as the workers and lady members, informed Hirabai that he had assaulted her husband presuming him to be a thief.

6. Around 9.00 a.m on the same day, Hirabai returned to the village to hire rickshaw in order to shift her husband to home. Accordingly, she brought a rickshaw. She informed the rickshaw Driver that her husband was lying in the grape orchard to whom she wanted to bring back home. With the help of some persons, Hirabai lifted her husband and brought him home. She offered water to her husband. A few neighbors advised Hirabai to take her husband to the Hospital for treatment. They also requested Rickshaw Driver to take P.W.1-Hirabai and her injured husband for treatment to Bytco Hospital. Hirabai had admitted her husband in Bytco Hospital on 20th February, 2003 at 10.00 am. He was examined and treated by the Doctors.

7. On the same day, around 11.30 a.m, son of the deceased informed the Police Inspector of Nashik Road Police Station who was on duty about an assault upon his father and his admission in Bytco Hospital. The Police Inspector came to the Hospital around 11.45 a.m to record statement of the deceased. However, he was informed by the Doctors that Hiranman was not in a position to make any statement.

8. Around 2.40 p.m, a Nurse from the hospital informed the Police Inspector that Hiranman had died. P.W.1-Hirabai thereafter lodged a report on the same day at 2.30 p.m with Nashik Road Police Station against the aforesaid accused which came to be registered as C.R.No.53 of 2003 under sections 302, 201 r/w 34 of Indian Penal Code (for short 'I.P.C').

9. Some trustees of Madari Baba Dargah had also filed a criminal case with Nashik Road Police Station against two unknown persons for allegedly stealing a donation box containing gift money, which, according to them, was lying near the body of the deceased.

10. As usual, accused were arrested. The Investigating Officer visited the spot of incident. Statement of the witnesses came to be recorded. Panchanamas were drawn. Corpse of the Hiranman was sent for autopsy. Undisputedly, deceased died a homicidal death.

11. After investigation, a charge-sheet came to be filed in the Court of Judicial Magistrate First Class which ultimately committed the case to the Court of Session bearing Case No.88 of 2003.

12. A charge was framed in terms of Exhibit 8 under section 302, 201 r/w Section 34 of I.P.C against all the accused. They pleaded not guilty and claimed to be tried. Their defence was total denial of the offence alleged and false

implication.

13. In order to substantiate its case, the prosecution examined as many as 12 witnesses.

14. After recording the evidence of prosecution witnesses and hearing the respective sides, the learned Additional Sessions Judge, Nashik by the impugned judgment convicted and sentenced all the accused of offences under section 302 r/w section 34 I.P.C to undergo rigorous imprisonment for life and to pay a fine of Rs.500/-, in default of payment of fine, rigorous imprisonment for three months.

15. We heard Mr. Aniket Nikam, learned Counsel for the appellants and Ms. Mulekar, learned A.P.P, for respondent-State at length.

16. To substantiate the guilt of the accused, prosecution had examined 12 witnesses. P.W.3-Madhukar Shinde, P.W.6- Sanjay Sathe, P.W.9-Jagan and P.W.11- Vinayak Rao had resiled from their statement, in the sense, they turned hostile. Their evidence is hardly of any use to the prosecution.

17. Material witnesses are P.W.1- Hirabai More, P.W.5-Sanjay Vadnere and P.W.12-Kashinath Bharte coupled with testimony of an expert namely P.W.4-Dr. Yuvraj Pawar.

18. Admittedly, deceased Hiranman died a homicidal death as autopsy reveals that he had as many as thirteen injuries. Even another deceased Sukhdeo Pawar had succumbed to the injuries noticed on his corpse during autopsy.

19. P.W.4-Dr. Yuvraj Pawar testified that he conducted autopsy on the corpse of the deceased from 3.30 pm to 4.30 p.m. on 20th February, 2003. P.W.4-Dr. Yuvraj Pawar opined that the probable cause of death of deceased Hiranman was haemorrhagic shock due to multiple injuries. The injuries noticed by this witness can be described as follows;

"1. C.L.W. on left parietal region vertical in direction admeasuring 2 cm x 1 cm by bone deep with a clotted blood surrounding hair is cut;

2. Linear abrasion on left side of neck in posterior triangle 7 x ½ c.m., reddish in colour,

3. Abrasion on left mastoid 2 c.m x 1 c.m;

4. Two contusions on the left arm on the lateral aspect 6 cm x 8 cm x 10 cm reddish bluish in colour;

5. Two abrasions over right wrist extensor surface 2 cm x 1 cm and 1 cm x 1 cm;

6. Closed fracture of right radio-ulna in lower 1/3rd;

7. Abrasion over right elbow 2 cm x 2 cm;

8. Contusion over right thigh in middle 1/3 rd on anterior aspect 5 cm x 4 cm;

9. Two abrasions over right knee 1 cm x 1 cm and ½ cm;
10. Linear abrasion over right ankle anterior aspect 3 cm x ½ cm;
11. Three small abrasions over right foot on extensor surface 1 cm x ½ cm, 1 cm x ½ cm and 1 cm x 1 cm;
12. Abrasion on left infra-patellar region 1.5 cm x 1 cm;
13. Contusion over left buttock 10 cm x 8 cm

Age of the injuries was within 24 hours.

20. P.W.4-Dr. Yuvraj Pawar further testified that main injuries were fracture of proximal phalanx of left ring finger. Fracture of shaft of left finger in upper 1/3 rd with fracture neck femur. All injuries were ante mortem and were caused within 24 hours. After opening of the skull, he noticed diffused haematoma under the scalp on left parietal region measuring 5 cm x 4 cm. Meninges were pale and brain matter was normal. Autopsy report is proved at Exhibit 32.

21. Similarly, he conducted postmortem on the corpse of deceased Sukhdeo Valu Pawar on the same day between 4.50 pm and 5.55 p.m and noticed following wounds;

- 1) Lacerated wound in right frontal region. Vertical just above the right eyebrow measuring 3 cm x 1 1/1 cm by bone deep with clotted blood;
- 2) Three abrasions seen over right side of back infra-scapular region 3 cm x 3 cm, 2 cm x ½ cm and 2 cm x ½ cm;

Those injuries were also ante-mortem and were caused with hard and blunt object like the articles seized by the Investigating Officer which were shown to him.

22. During cross-examination by the defence, suggestions were given that injuries on the person of the deceased Hiranman could have been caused due to fall on pointed and sharp stones which have been clearly denied. According to this witness, if there are multiple falls on the rock while running, such injuries might cause but they could be in the form of abrasions and contusions. Contused lacerated wounds are also possible by fall on projected stones. However, witness could not notice weal marks on the dead bodies. He also admits that comminuted and compound fractures are possible in the process of running and hit against a hard object with a sufficient force. As can be seen, there is no effective cross of P.W.4-Dr. Yuvraj Pawar and, therefore, we have no second thought that death of deceased Hiranman was homicidal.

23. This takes us through next important aspect as to whether the prosecution has adduced cogent and believable evidence to indicate that it were the accused who were responsible for causing homicidal death of deceased Hiranman and Sukhdeo? In other words, whether there is sufficient evidence to link the accused to the death of deceased Hiranman and Sukhdeo?

24. In that regard, the important evidence would be that of P.W.1-Hirabai widow of Hiranman. There is no eye witness to the incident of assault. The brick kiln owners and workers i.e P.W.3-Madhukar Shinde, P.W.9- Jagan, and P.W.11-Vinayak Rao chose not to support the prosecution case. They have even gone to the extent in denying their presence on the spot. However, evidence of P.W.1-Hirabai reveals that her husband had gone for fishing during night at around 3.00 a.m with his relatives. He did not return till 8.00 in the next morning. However, accused No.2-Digambar Handore came to her house and asked her to accompany him to his grape orchard. He first took her from the grass in the field and then took a round of the grape orchard and thereafter took her in front of his house.

25. P.W.1-Hirabai saw her husband whose both hands and legs were tied to a wooden plank of the body of a truck i.e scrap material of a truck. He had injuries. Those injuries were bleeding. Accused No.1 to 3 along with a few lady members of their family were present. According to P.W.1-Hirabai, Accused No.2-Digambar Handore told her that they had assaulted her husband presuming him to be a thief and that she should take him to her house. She further testified that Accused No.2-Digambar Handore had also shown one more person who was tied in the gunny bag and kept at some distance in front of his house. P.W.1-Hirabai could not see the person tied inside the gunny bag. According to her, accused had said that they would do anything with the man in the gunny bag but she should take her husband to her house.

26. Accordingly, P.W.1-Hirabai returned home requesting P.W.2-Dadasaheb Khatikumar-rickshawala who was from their area to take her home. Hiranman was brought to home from the field. He was unconscious. He was unable to speak. At the request of neighbours, P.W.1-Hirabai took her husband to the hospital immediately in the same rickshaw at about 10.30 a.m. Hiranman was taken to Bytco Hospital at Nashik Road where he was declared dead after examination by the Doctor. A report came to be lodged at the Police Station by her son immediately after Hiranman was admitted in the hospital. Her evidence further reveals that when she had gone to the field of the accused for the second time, she found another person who was tied in the gunny bag was removed from the spot and later his dead body was found near Dargah. Police had brought dead body of the second person to the hospital. He was Sukhdeo Pawar. However, P.W.1-Hirabai knew nothing about the said Sukhdeo Pawar.

27. The learned Additional Sessions Judge has based the conviction of the accused mainly on the following two features; firstly, evidence of P.W.1-Hirabai and extra judicial confession of accused No.2 to her, and, secondly spot panchanama.

28. It would be interesting to scan the evidence of P.W.2-Dadasaheb Khatikumar-the Rickshaw Driver who took deceased Hiranman to the hospital. The sum and substance of his evidence is that he accompanied P.W.1-Hirabai, at her request, to bring injured Hiranman from the field of accused No.1 to 3. This witness had

brought Hiranman to his house. He knew the accused. According to this witness, Hiranman was found lying beneath a tree. With the help of some persons, he was placed in the Rickshaw.

29. Interestingly, P.W.2-Dadasaheb Khatikumar nowhere testified that P.W.1-Hirabai had disclosed him about the extra judicial confession made by accused No.2, who had been to her house and informed her that presuming Hiranman as a thief, they had assaulted him and, therefore, she should accompany him and take Hiranman to home.

30. The natural conduct of P.W.1-Hirabai could have been, at least, immediately share the said extra judicial confession with P.W.2-Dadasaheb which she did not. She even could have disclosed this fact to her son or neighbours who gathered after noticing injured Hiranman. The silence of P.W.1-Hirabai is shrouded with suspicion. It is unfathomable as to why P.W.1- Hirabai did not share what had been confessed by accused No.2-Digamber Handore, at least to her son. It is not the case that she was threatened or pressurized for not disclosing the said extra judicial confession to anyone. There is no whisper in the evidence of P.W2-Dadasaheb also that P.W.1-Hirabai had given him some hint. Assuming for a moment that any such extra judicial confession was made by accused No.2-Digamber Handore, the same had been retracted, rather it is the contention of accused No.2-Digamber Handore in his statement under section 313 of the Cr. P.C. that no such extra judicial confession was made by him to P.W1- Hirabai.

31. The spot of incident has been proved by P.W.5-Sanjay Wadnere. The spot was shown by P.W.1-Hirabai in the presence of this witness. It was the place where she noticed Hiranman tied to a scrapwood of body of the truck and another person tied in a gunny bag. The panchanama also reveals an iron rod and pair of shoes on the spot along with wooden sticks. Those articles were seized and sealed by the Investigating Officer. Those articles also appear to have been seized from considerable distance in front of the house of the accused which is an open space after the grape orchard. It is apparent from the spot panchanama that the house of the accused was at a distance of around 10 to 15 feet from the spot.

32. It can be seen that the spot was not far away from the road. It is the case of the prosecution that both deceased Hiranman and Sukhdeo had jointly gone to commit theft in the grape orchard and that they were caught by the accused and then assaulted them brutally. According to the prosecution, motive behind the assault was theft of grapes by the deceased. As a matter of fact, there is no shred of evidence indicating that Hiranman and Sukhdeo had stolen grapes from the orchard of the accused. Rather, the evidence is quite short in establishing the fact that, in fact, there were grapes.

33. Be that as it may. If all the accused had assaulted the deceased along with brick kiln owners, it is surprising as to why there is no evidence to indicate that deceased Hiranman and deceased Sukhdeo were joint in their venture to commit

theft of grapes in the light of the fact that deceased Sukhdeo was found lying near Dargah and donation box of Dargah was found lying near him which necessarily meant that they were not joint in their venture. Perhaps Sukhdeo might have gone to steal the donation box. However, it is not the case of the prosecution. The learned Additional Sessions Judge had already found that there is no evidence connecting the accused with the death of deceased Sukhdeo and, therefore, it is needless to go into that aspect. Nevertheless, if both were assaulted simultaneously then the prosecution should have produced on record convincing and cogent evidence to show that the accused were the authors of the injuries inflicted upon the person of deceased Hiranman resulting into his death.

34. Thus, there is no acceptable and convincing evidence in regard to assault either on deceased Hiranman or on deceased Sukhdeo. Evidence of P.W.1-Hirabai is quiet shaky, ambiguous and weak.

35. There is no evidence brought forth on record by the prosecution to indicate that even Sukhdeo had been to the grape orchard of the accused for committing theft. Deceased Sukhdeo was not even known to P.W.1-Hirabai. Her evidence reveals that she had seen a person tied in the gunny bag. However, she had no occasion to see as to in fact who was in the gunny bag, and, therefore, the identity of Sukhdeo is also a mystery.

36. It is not the case of the prosecution that deceased Sukhdeo was either related or was the friend of deceased Hiranman. No efforts have been made by the investigating agency to collect the evidence to show that the body of Sukhdeo was removed by the accused after 9.00 pm on the same day and was thrown at the place where it was found. It is also surprising that no attempts have been made to find out the relatives of deceased Sukhdeo nor any of his relatives or friends have been examined by the prosecution. There was nobody to identify the dead body of Sukhdeo. However, it is alleged that it was subsequently identified by his sister.

37. There is one more important aspect. Except P.W.1-Hirabai, there is absolutely no evidence to corroborate her version that accused No.2-Digambar Handore had been to her house, especially during broad day light. Even if it is presumed for a moment that accused No.2-Digambar Handore had been to house of P.W.1-Hirabai, that in itself would not ipso facto prove the factum of assault or in other words, that the accused were authors of the injuries on the person of deceased Hiranman. Evidence is quite scanty to establish complicity of the accused in the alleged crime.

38. This is significant in the light of the fact that as per the panchanama, there is a road at a short distance from the spot where Hiranman was found in an injured condition. There is one more angle to this case as to why accused No.2-Digambar Handore would go to Hirabai's house only to inform and to make an extra judicial confession that he himself and other accused had assaulted

Hiraman whom they thought to be a thief by incurring a risk of reporting the matter to the Police.

39. Secondly, why they would keep Hiranman tied knowing well that P.W.1-Hirabai would definitely suspect some foul play on their part and spill the beans. If both deceased had been to steal grapes, then why one would steal donation box of Dargah which has not been clarified by the prosecution. This necessarily means that there was no sharing of common intention between the deceased Hiranman and Sukhdeo to commit theft of grapes.

40. Even if it is assumed for the sake of arguments that accused No.2-Digambar Handore had been to the house of Hiranman where he alleged to have made an extra judicial confession, why none of the accused had been to the house of Sukhdeo? Extra judicial confession is indeed a weak type of evidence. In this case, accused No.2-Digambar Handore is said to have denied any such statement made to P.W.1-Hirabai and, therefore, in the absence of any corroboration to the same, it would be unsafe to accept and rely upon the same.

41. If it is the case of the prosecution that the owner of the field and the owners of the brick kilns had assaulted deceased Hiranman then why they were not arraigned as accused along with these accused and why no role had been attributed or any evidence is produced as to the nature of assault alleged to have been made by the brick kiln owners. The owners of the brick kilns had not supported the prosecution case who are cited as witnesses.

42. There is a material contradiction in the evidence of P.W.1-Hirabai that in the complaint she had stated that her husband was assaulted by the accused and the owners of the brick kilns. However, when her attention was drawn to her complaint, she denied to have so stated before the Police. Even in the report, P.W.1-Hirabai did not narrate that Hiranman was tied to a wooden plank. Hirabai did not inform the Doctor who had treated Hiranman as to how he had sustained the injuries.

43. C.A. Report Exhibit 17 reveals that no blood was detected on the following articles;

- (a) Wooden Stick; - wrapped in paper labelled- A-1;
- (b) Wooden sticks
- (c) Iron rod;
- (d) Bamboo stick wrapped in paper, labelled - A-2;
- (e) Pair of shoes wrapped in paper labelled - A-3;
- (f) Earth in a polythene bag wrapped in
paper labelled - A-4
- (g) Kardora wrapped in paper labelled - C-4;

- (h) Pair of shoes wrapped in paper labelled - C-5;
- (i) Full pant wrapped in paper labelled - D-2;
- (j) Manila wrapped in paper labelled - E-2;
- (k) Full pant wrapped in paper labelled - E-2;
- (l) Manila (torn) wrapped in paper labelled - E-1,
- (m) Full pant wrapped in paper labelled - E-2.

44. P.W.3- Madhukar Shinde is the owner of the brick kiln. He turned hostile. The learned A.P.P, during the cross-examination could not elicit anything from his mouth which would indicate that he has deliberately given false evidence. His evidence is of no use to the prosecution in connecting the accused as the authors of the injuries inflicted upon deceased Hiranman.

45. There is no investigation with regard to recovery of any valuables from the donation box alleged to have been stolen by deceased Sukhdeo. It is apparent from the record that subsequently C.R. No.54 of 2003 under section 379 came to be registered. If both were caught red handed committing the offence of theft, then why there were two C.R. Nos. registered namely, first C.R. No.53 of 2003 qua death of deceased Hiranman and secondly qua death of deceased Sukhdeo? If deceased Hiranman was known to the accused persons then why the report was lodged against an unknown person in respect of theft of grapes from the grape orchard.

46. So far as the evidence of Dog Squad is concerned, handler of the dog had not given any clue.

47. The impugned judgment is full of surmises and conjectures, in the sense, the learned Additional Sessions Judge has erred in observing that P.W.1-Hirabai did not immediately disclose the fact of alleged extra judicial confession either to the Police or to P.W.2-Dadasaheb, perhaps because she had hopes that her husband would not die. A grave error has been committed in placing implicit reliance only upon the evidence of P.W.1-Hirabai in respect of the alleged extra judicial confession made by accused No.2-Digambar Handore, that too, only of his assault and not for committing the murder of deceased Hiranman.

48. Before parting with the judgment, we would like to educe some anomalies and flawed investigation of this case. At the cost of repetition, it is evident that there is no shred of evidence of whatsoever nature indicating that Hiranman and Sukhdeo had stolen grapes from the orchard of the accused. It would be far-fetched to construe that both the deceased, in tandem, committed theft of grapes from the orchard of the accused. It is significant in the light of the fact that deceased Sukhdeo was found lying near Dargah and donation box of Dargah was found lying near him, which aspect confirms the fact that perhaps, Sukhdeo was not hand in gloves with deceased Hiranman. There is no proper investigation in that regard. The Investigating Officer had not made any attempt to find out

the whereabouts of deceased Sukhdeo nor any attempt appears to have been made to trace his relatives or friends, at least to identify his dead body. It appears that subsequently, sister of deceased Sukhdeo identified the deceased. Another glaring anomaly is not arraigning the brick kiln owners or workers as accused though it is the prosecution case that they too assaulted the deceased. The investigation is thus quite casual and perfunctory.

49. Having considered the entire circumstances, evidence and facts of the prosecution case, we are of the view that the learned Additional Sessions Judge had committed a grave error in holding the accused guilty for having committed the murder of deceased Hiranman. The evidence is quite inconsistent, shaky and does not at all inspire confidence. Consequently, the impugned judgment warrants interference in the appeal. We, therefore, proceed to pass the following order;

:ORDER:

[a] The appeal is allowed;

[b] The impugned judgment and order in Sessions Case No.88 of 2003 dated 7th July, 2004 is quashed and set aside;

[c] The appellant-accused are acquitted of the offence punishable under section 302 r/w section 34 of I.P.C.

[d] Their bail bonds stand cancelled.

[e] Muddemal property being worthless, be destroyed;