
(1998) 03 BOM CK 0046
In the Bombay High Court
Case No : Criminal Appeal No. 239 of 1996

Shankar Shridhar Kavale and Others APPELLANT
Vs
State of Maharashtra RESPONDENT

Date of Decision : 20-03-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 106
Penal Code, 1860 (IPC) — Section 302, 323, 324, 34

Citation : (1998) CriLJ 4491

Hon'ble Judges : Vishnu Sahai, J; A.A. Desai, J

Bench : Division Bench

Advocate : A.V. Bajaj and Pravesh Bhatia and Kamal Jain, for the Appellant; V.K. Tahilramani, Public Prosecutor, for the Respondent

Judgement

Vishnu Sahai, J.—Through this appeal, the appellants have challenged the Judgment and order dated 8-3-1996, passed by the IIIrd Additional Sessions Judge, Thane, in Sessions Case No. 620 of 1994, whereby they have been convicted and sentenced in the manner stated below :-

- (i) u/s 302 read with 34 of IPC to suffer imprisonment for life and to pay a fine of Rs. 2000/- each, in default to undergo six months RI; and
- (ii) u/s 323 read with 34 of IPC to three months RI and to pay a fine of Rs. 200/- each, in default to suffer RI for one month.

The substantive sentences of the appellants were ordered to run concurrently.

In short, the prosecution case runs as under:-

The three appellants are real brothers inter se and the deceased Sadashiv was also their real brother. The informant Pundlik Kavale PW 1 and Sanjay Kavale, PW 3 were the sons of the deceased and Saraswati was wife of the deceased. It is said that the appellants and the deceased lived in contiguous houses.

There was an Chemical strain between the deceased, informant and others on one side and the appellants on the other. It is said that sometime prior to the incident, father of the appellants and the deceased had sold some land for Rs. 8000/-and out of the proceeds, Rs. 6000/- was given to the appellants and Rs. 2000/- to the deceased. It is also said that the appellants had a feeling that they had got less.

On 4-9-1994, at 8 p.m. the deceased came to his house situated in village Waghote, Taluka Wada, District Thane. At that time, the appellant Shankar came there and started abusing him. The deceased went to the house of appellant Shankar who followed him there. He explained to Shankar and Ors. that if they had got a raw deal, the distribution of money could be redone. It is said that at that time, appellants Ananta and Pandhari were also in the appellant Shankar's house. It is said thereafter appellants Shankar and Ananta with axe and Pandhari with a spear assaulted the deceased who, fell down as a result thereof. The deceased raised cries hearing which, Pandurang Lohar Pundalik, Sanjay and Saraswati rushed to the place of the incident. They asked the appellants not to assault the deceased. But they kept on assaulting him. It is further said that Ananta inflicted two blows with an axe on the head of Sanjay and one blow with an axe on the head of complainant. It is also said that appellant Pandhari assaulted Saraswati with a spear and appellant Ananta assaulted her with the handle of axe.

2. It is alleged that the deceased succumbed to his injuries on the spot. After the incident, Pundlik rushed to the place of Sarpanch of the village who in turn, telephoned Wada police station.

Thereafter, the victims proceeded to the Rural Hospital Wada, where the injuries were medically examined by Dr. Balkrishna Kamble PW 4 from 2 a.m. onwards on 5-9-1994.

On the person of Pundlik, the doctor found two contused lacerated wounds which have been described in the injury report thus :-

1. Contused lacerated would $1\frac{1}{2}$ ''' x $1\frac{1}{2}$ x $1\frac{1}{2}$ cm. left parietal region.
2. Contusion 2x2 cms on right suprascapular region.

In the opinion of the doctor, these injuries were caused by a hard and blunt object which also included the blunt portion of an axe.

On the person of Sanjay, the doctor found an incised would on left parietal region measuring $4 \times 1\frac{1}{2} \times 1\frac{1}{2}$ cms which in his opinion, was caused by a sharp weapon like axe, knife etc.

On the person of Saraswati, the doctor found three blunt weapon injuries which are enumerated below :-

- 1) Abrasion on mid part of right clavicle $1\frac{1}{4} \times 1\frac{1}{4}$ cm.

2) Contusion around injury No. 1-1 x 1 cm.

3) Contusion on superior aspect of right shoulder 1 x 1 cm.

In the opinion of the doctor, her injuries were attributable to blows by back side of an axe.

3. The FIR of the incident was lodged the next morning i.e. morning of 5-9-1994, at 6 a.m. at Wada Police Station by Pundlik PW 1. On its basis, API Vasant Satpute PW 8 registered an offence under Sections 302 and 324 IPC read with 34 IPC against the appellants.

4. The post mortem examination on the corpse of the deceased Sadashiv was conducted on 5-9-1994 between 2-15 p.m. to 3.15 p.m. by Dr. Balkrishna Kamble PW 4 who found the following injuries on the dead body :-

1) Incised wound on left side of the head, extending from middle of left eye brow up to left ear, 2 cm. above the root of the ear and 1 cm. above the eye brow. Size 12 x 1 1/2 cm x 1/2 cm. Skull bone is fractured and brain tissue is lacerated which can be seen through it.

2. Incised wound measuring 7 x 1 1/2 x 1 1/2 cm. On left side of the forehead, placed transversely 2 cm above injury No. 1., The skull bone is fractured and brain tissue is lacerated which can be seen through it.

3. Incised wound measuring 2 x 1 1/2 cm x 1/2 cm 1 cm behind left ear.

On internal examination, the doctor found fracture of left side of frontal bone, beneath injury No. 1 and fracture of left parietal bone beneath injury No. 2.

In the opinion of Dr. Kamble, the injuries of the deceased were possible by blows with a sharp and heavy weapon like an axe.

Dr. Kamble stated that the deceased died on account of fracture of skull and laceration of brain and his injuries were sufficient in the ordinary course of nature to cause death.

5. The investigation was conducted in the usual manner by API Vasant Satpute PW 8. After registering the case on the basis of the FIR he proceeded to place of the incident; prepared a panchanama of the scene of the offence, collected therefrom plain and blood stained earth, interrogated some witnesses and arrested the appellants Pandhari and Shankar.

On 10-9-1994, during the course of interrogation, appellant Shankar stated that he could get the axe (weapon of assault) recovered. This information was recorded under a panchanama Exhibit 30 and thereafter in presence, of public panchas, appellant Shankar produced the axe from his house. Blood stained clothes were also recovered from Shankar. The recovered articles were sent to the Chemical Analyst.

After completing the investigation, the appellants were charge sheeted.

6. The case was committed to the Court of Session in the usual manner. The appellants were charged on two counts namely under Sections 302 read with 34 IPC and 324 read with 34 IPC. They pleaded not guilty to the said charges and claimed to be tried.

During trial, in all the prosecution examined as many as 8 witnesses, 4 of them namely Pundlik, Pandurang Lohar, Sanjay and Saraswati PWs 1, 2, 3 and 7 respectively were examined as eyewitnesses.

In defence, no witness was examined. The learned trial Judge believed the evidence adduced by the prosecution and convicted and sentenced the appellants in the manner stated above.

Hence, this appeal.

7. We have heard Mr. A.V. Bajaj with Mr. Pravesh Bhatia and Ms Kamal Jain for the appellants and Mrs. V.K. Tahitramani, Public Prosecutor for the State of Maharashtra-Respondent. We have also perused the depositions of the prosecution witnesses; the material exhibits tendered and proved by the prosecution; the statement of the appellants recorded u/s 313 Cr.P.C. and the impugned Judgment. After thoughtfully reflecting over the matter, we are satisfied that this appeal deserves to be partly allowed. In our view, the appellant Pandhari Kavale deserves the benefit of doubt.

8. The controversy in this appeal lies in a very narrow ambit.

So far as the place of incident is concerned, according to the prosecution, the incident took place inside the house of the appellant Shankar. This claim of the three injured witnesses appears to be tenable because on the morning following the date of the incident i.e. morning of 5-9-1994, from the place of the incident, the Investigating Officer API Vasant Satpute, recovered plain and blood-stained earth. The said earth was sent to the Chemical Analyst who found human blood on it. This makes it crystal clear that the deceased Sadashiv was assaulted inside the house of the appellant Shankar.

9. Once the place of incident is proved, then presence of the three injured witnesses namely Pundlik PW 1, Sanjay PW 3 and Saraswati PW 7, the first two being the sons of the deceased Sadashiv and the third being his wife, becomes ipso facto probable on the place of the incident because, their house was contiguous to that of Shankar. Evidence of the said witnesses is that on 4-9-1994 at about 8 p.m. when the three appellants were belabouring Sadashiv with their respective weapons, inside the house of appellant Shankar, they rushed to the house of Shankar from wherein cries of the deceased were coming and they saw appellants Shankar and Ananta assaulting Sadashiv with an axe and appellant Pandhari assaulting him with a spear. They stated that they tried to intervene but the appellants also assaulted them.

9-A. We make no bones in observing that we have grave doubts whether Pandurang Lohar PW 3 saw the incident. We feel that in spite of this the

convictions and sentences of the appellants can be confirmed if the evidence of the injured witnesses inspires confidence in relation to them.

10. The question is whether the manner of assault deposed to by the three injured witnesses is credible in relation to all the three appellants or not ? Our answer is in the negative. We feel that the account furnished by them is credible vis-a-vis appellants Shankar Kavale and Ananta Kavale and this is borne out from the ante-mortem injuries suffered by the deceased and the injuries sustained by these witnesses. In paragraphs 2 and 4, we have reproduced the injuries suffered by the deceased and these three witnesses. Their perusal shows that they were attributable to axe and handle of axe. It is significant to point out that all the three injured witnesses have assigned the use of axe to appellants Shankar and Ananta.

11. We however, feel that the account of the injured witnesses vis-a-vis appellant Pandhari is not free from doubt. We find that in the FIR the informant Pundlik has stated that the appellant Pandhari assaulted the deceased Sadashiv with spear. We also find that in their statements, Pundlik and Saraswati have deposed that appellant Pandhari assaulted them with spears. However, a perusal of the injuries suffered by the deceased and these witnesses, belies the story of assault by spears. Dr. Kamble, PW 4, to whose evidence we have referred to in paras 2 and 4, did not mention that he found any spear injury on any of the victims. In our view, the complete absence of any spear injury on any of the victims renders participation of this appellant doubtful.

12. We wish to emphasise that in a criminal case the medical evidence is a very safe yardstick for measuring the veracity of ocular account. If it corroborates the same, unless it suffers from some inherent improbabilities or intrinsic infirmities it would ordinarily be accepted by the Court. On the converse, if it is belied by the medical evidence, in the absence of some in-built guarantees which demonstrate the truthfulness of the prosecution case, like spot arrest of accused persons, the Court normally would be loath to accept it. Such an approach is founded on the trite that whereas witnesses may lie, circumstances do not.

13. It should always be remembered that injuries only ensure the presence of a witnesses and do not guarantee his/her credibility and even in cases resting on the testimony of injured witnesses, the Court does not convict if it does not find their evidence to be truthful in respect of the substratum of the prosecution case.

14. We feel that the possibility of false implication of appellant Pandhari is also probablised by the fact that the FIR was lodged after 10 hours although the evidence shows that the police station was situated at a distance which could be covered on foot within half an hour.

We may also mention that from the appellant Pandhari Kavale, neither any recovery of bloodstained clothes nor of any weapon of assault namely spear was effected.

It should also be borne in mind that even according to the prosecution, the relations between the informant Pundlik and his mother Saraswati on the one hand and appellant Pandhari Kavale on the other hand, were strained and therefore, the possibility of false implication of appellant Pandhari Kavale in the, instant case cannot be ruled out

15. In our view, considering the totality of circumstances, prudence demands that appellants Pandhari Kavale may be given the benefit of doubt. We make it clear that we are only extending the said appellant the benefit of doubt.

16. It is well-settled that the principle *falsus uno falsus omnibus* is not a rule applicable in Our country. Since the proposition is well-settled by a catena of decisions of the Apex Court, we are not advertng to any authorities.

We may mention that as far as appellants Shankar Kavale and Ananta Kavale are concerned, not only is their participation clinched by medical evidence but also by some other circumstances. These appellants had plausible motive to commit the crime. According to the prosecution, they had a feeling that they got less than their legitimate share in the lands sold by their father and the informant and others got more. On this score, they were irked with the informant Pundlik, his father Sadashiv, his brother Sanjay and Saraswati, his mother. Again so far as the appellant Shankar is concerned, we have against him the additional circumstance of the recovery of blood stained axe from his house, on his pointing out. The axe was sent to the Chemical Analyst who found human blood on it. It is true that the evidence of public panchas in respect of this recovery is not very reliable but, we have the credible evidence of API Vasant Satpute to prove it. This witness had no animosity against the appellant Shankar.

It may also be mentioned that on 11-9-1994, blood-stained Shirt and blood-stained banian was recovered from appellant Shankar by API Vasant Satpute PW 8 under a panchnama. the said shirt and banian were sent to the Chemical Analyst who found human blood on them.

It should also be borne in mind that the dead body of the deceased was recovered from the house of the appellant Shankar and he has failed to offer an explanation within the terms of Section 106 of the Indian Evidence Act as to how it was found in his house. The said section mandates thus :-

Section 106

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

In our view, this is a very strong circumstance against appellant Shankar.

17. We may also mention that although the witnesses have referred to no source of light, but as they were known to the appellants being their very close relations, they could have recognised them by the timbre of their voice, gait etc. The Supreme Court in para 4 in Kirpal Singh Vs. State of Uttar Pradesh, has held

that known people could be recognised by their gait, timbre of voice etc.

18. For the said reasons, we feel that the learned trial Judge acted correctly in accepting the prosecution case against appellants Shankar Shridhar Kavale and Ananta Shridhar Kavale:

19. Accordingly, this appeal is partly allowed.

We acquit the appellant Pandhari Shridhar Kavale, for offences under Sections 302 r/w 34 IPC and 323 r/w, 34 IPC and set aside his convictions and sentences on the said counts. In case he has paid the fine, it shall stand refunded to him, He is in jail and shall be released forthwith unless wanted, in some other case.

We dismiss the appeal of appellants Shankar Shridhar Kavale and Ananta Shridhar Kavale. We confirm their convictions and sentences for offences under Sections 302 r/w 34 IPC and 323 r/w 34 IPC. They are in jail and shall be detained there till they have served out their sentences.

Before parting with the judgment, we would be failing in our fairness, if we do not record our appreciation for the assistance rendered to us by learned counsel for the parties, in the disposal of this appeal.