

(2000) 01 BOM CK 0014
In the Bombay High Court
Case No : Criminal Appeal No. 585 of 1995

Shyamlal Rakeshkumar Shukla and others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 17-01-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313

Evidence Act, 1872 — Section 27, 3, 45, 8, 9

Penal Code, 1860 (IPC) — Section 148, 302, 34

Citation : (2000) 5 BomCR 638 : (2000) BomCR(Cri) 638

Hon'ble Judges : Vishnu Sahai, J; P.V. Kakade, J

Bench : Division Bench

Advocate : Adhik Shirodkar and Rajendra Shindkar, for the Appellant; A.M. Shringarpure, Addl. P.P., for the Respondent

Judgement

P.V. Kakade, J.—Four life convicts have preferred this Appeal against the judgment and order passed by the learned Additional Sessions Judge, Greater Bombay in Sessions Case No. 1364 of 1993 wherein they were convicted for offence punishable u/s 302 read with section 34 of the Indian Penal Code and were sentenced to life imprisonment and were also directed to pay a fine of Rs. 100/- each. They came to be acquitted of the charge u/s 148 of the Indian Penal Code.

2. The facts involved in the Appeal in nutshell are thus :

On 26th August, 1993, at about 9.45 a.m. the Goregaon Police Station received a message from the Control Room that a person by name Yadaya Kistya Pancham was murdered near N.K. Industries at Goregaon. After making the necessary diary entry, the officers, went to the spot and found the body on the first floor of a building under construction. At the site, the police came across one Babu Pancham, the brother of the deceased, who informed the police that the appellants had a quarrel with his brother and, therefore, suspected the appellants to be the culprits.

3. The statement given by Babu Pancham was treated as an F.I.R. and the investigation commenced on registration of the offence against the appellants at C.R. No. 415 of 1993 at the Goregaon Police Station u/s 302 read with section 34 of the Indian Penal Code.

The inquest was held. The police noticed as many as 20 incised wounds on the body. Blood and water mixed blood were collected from the spot. Cotton soaked in blood was also seized. Clothes on the person of the deceased were taken charge of and inquest-cum-seizure panchanama was drawn. The body was sent for autopsy to Cooper Hospital. Appellant Nos. 1 and 2 were arrested on 26th August, 1993. Their clothes also were seized by the police on 28-8-1993. While in police custody they volunteered to make a statement and consequently led the police to recover the alleged weapons of offence, viz. knife and an iron bar behind a public urinal near a petrol pump on Balbhat Road. Appellant Nos. 3 and 4 came to be arrested on 29-8-1993. They also made voluntary statements while in police custody. They consequently led the police to recover a sword and an iron pipe allegedly used in commission of the offence. Those were seized from a drum filled with water, lying behind a public urinal at N.K. Industrial Estate. All the said four articles of offence were duly seized, labelled and sealed under panchanama. They were in continuation of the memorandum earlier drawn by the police at the Police Station on 17-9-1993.

Appellant Nos. 3 and 4 had also volunteered to show the place where they had kept the clothes and consequently some clothes were recovered from the spot at their instance.

In the course of investigation three identification parades were conducted by the Special Executive Magistrate and in them the witnesses identified the accused persons.

All the items seized during the investigation were forwarded to the Chemical Analyser for scientific examination.

4. During the course of trial, as many as seven witnesses were examined by the prosecution to bring home the guilt.

P.W. 5 Prakash Sopan Kale (Ex. 13) is the sole eye witness. He stated that during August 1993 he was working as a watchman in Bombay Cabinet Building at Goregaon, Bombay. On 25th August, 1993 his duty was from 7.30 p.m. till the morning next day. At about 10.30 p.m. deceased Yadaya, who was working as a watchman in a building under construction was sitting on a chair outside that building. His four friends namely the appellants came after sometime. They insisted that Yadaya should accompany them to drink liquor, but he refused and all these four persons went away. After some time Yadaya went to the terrace of the first floor to sleep. Around 1.00 a.m. all the appellants came back near the gate of the building and asked him to open the gate. On his refusal they threatened him and, therefore, he opened the gate. The appellants then went upstairs where Yadaya was sleeping. The place was visible to him (witness Kale)

from the entrance gate as there was electric light on the spot where Yadaya was sleeping. After some time he heard some cries and looked up and saw the four appellants assaulting Yadaya. According to him, appellant No. 1 was holding sword, appellant No. 2 was holding knife, appellant No. 3 was holding iron pipe and appellant No. 4 was holding iron bar. He saw that the person holding an iron pipe assaulted Yadaya on his forehead, the person holding iron bar assaulted Yadaya on his shoulder; and the person holding the sword assaulted Yadaya on his stomach. He did not see the person holding a knife assaulting Yadaya. He was merely standing nearby. All the four assailants then jumped over the gate and ran away. The witness got scared and then went to his security officer who resided at Lalbaug and reported the incident to him.

P.W. 6 Mangesh Botle (Ex. 14) is the panch witness to all the recovery panchanamas which are at Exhibits 19, 19-A, 22 and 22-A. According to him, the Goregaon police summoned him to act as a panch on 26-8-1993, 28-8-1993 and 2-9-1993 respectively.

P.W. 1 Babu Pancham (Ex. 8) is the brother of the deceased Yadaya whose statement is treated as F.I.R. (Ex. 9).

P.W. 2 Gangabai Pradhan (Ex. 10), P.W. 3 Babasaheb Dabade (Ex. 11) and P.W. 4 Laxmibai Aagawane (Ex. 12) are the witnesses examined by the prosecution to prove the motive against the appellants. They deposed that there was a quarrel on the previous day between the appellants and the deceased due to which the murder took place.

Finally P.W. 7 Nandkumar Satay (Ex. 25) has narrated the progress of the investigation and has proved certain documents, like inquest panchanama (Ex. 27), was examined by the prosecution.

The appellants pleaded not guilty to the charge framed against them and claimed to be tried.

The learned trial Judge proceeded with the trial wherein the evidence of the said witnesses was recorded. On completion of the prosecution evidence, the learned trial Judge proceeded to record the statements of the appellants u/s 313 of the Criminal Procedure Code and then heard both the sides and came to the conclusion of guilt of the appellants as contemplated by section 302 read with section 34 of the Indian Penal Code and proceeded to convict and sentence them for the said offence. According to the learned trial Judge, the eye witness account of P.W. 5 supported by the evidence of recovery of articles at the instance of the appellants as contemplated u/s 27 of the Evidence Act alongwith the evidence regarding motive was sufficient to bring home the guilt of the appellants beyond reasonable doubt for the offence u/s 302 read with section 34 I.P.C. The learned Judge however felt that the offence u/s 148 I.P.C. was not established against the appellants.

5. Being aggrieved by the said judgment and Order, the appellants have

preferred this appeal on various grounds, inter alia, submitting that the reasoning adopted and findings recorded by the learned trial Judge are not tenable.

6. At the outset, it may be mentioned that the learned trial Judge, while convicting the appellants, has squarely relied upon the eye witness account with further observation that it is supported by the evidence of recovery of weapons of offence. Therefore, it would be proper on our part to assess the credibility of the testimony of P.W. 5 Prakash Kale in proper perspective.

Witness Prakash Kale has stated that he was working as a watchman in Bombay Cabinet Building at Goregaon in August 1993 and his duty was from 7.30 p.m. on 25-8-1993 till next morning. At about 10.30 p.m. on 25th August 1993 the deceased Yadaya was sitting on a chair outside the building where he worked. A little later the four appellants came and invited the deceased to come for a drink which he refused. Thereafter the appellants went away. At about 1.00 a.m. when the deceased Yadaya was sleeping on the terrace of the first floor the appellants came armed with weapons. Appellant No. 1 was holding a sword, appellant No. 2 was holding a knife, appellant No. 3 was holding an iron pipe and appellant No. 4 was holding an iron bar went upstairs where Yadaya was sleeping. After some time he heard shouts and saw in electric light Yadaya was being assaulted. The person holding the iron pipe assaulted Yadaya on the forehead, the person holding iron bar assaulted Yadaya on shoulders and the person holding sword assaulted Yadaya on his stomach. He did not see the person holding a knife assaulting Yadaya at all. According to him, the said person was merely standing nearby. After the assault all the assailants jumped over the gate and ran away. He became scared and thereafter went to the security officer, who resided at Lalbaug and reported the incident to him.

On the first blush this so called eye witness account appears to be attractive but it is crystal clear that it would not withstand close judicial scrutiny.

Let us first consider the injuries on the person of deceased Yadaya. There were as many as 24 wounds on his body. It is significant to note that all of them are incised wounds. In other words, if the version of P.W.5 Prakash is to be believed, then there is conflict between it and the medical evidence. According to witness Prakash, the person holding the iron pipe assaulted Yadaya on his forehead and the person holding the iron bar assaulted Yadaya on his shoulders, and the person holding knife was standing nearby and did not assault Yadaya. It was the person holding the sword who assaulted Yadaya in the stomach. If it is so, then majority of incised wounds which were found on the dead body of Yadaya cannot be explained at all. We find incised wounds on the corpse of the deceased on parts other than stomach. Further it is common knowledge that iron pipe and iron bar will not cause incised wounds and instead would cause contused lacerated wounds. The complete absence of such injuries belies the use of from bar and iron pipe. Again we find improbable that the person holding the knife was just observing the assault by standing nearby.

It is a pity that the entire evidence of Prakash cannot be reconciled with the medical evidence.

7. The position further damages the evidence of Prakash in the unexplained delay in recording his statement u/s 161 Cr.P.C. The record shows that recording of his statement under the said provisions was delayed by three days and the said delay has not been explained by the prosecution. The evidence of not only P.W.1 Babu Pancham, brother of the deceased Yadaya, but also of witnesses namely Gangabai, Laxmibai, Botle, etc., who knew Prakash quite well shows that Prakash Kale was available there and was attending his duty at the date of said site. It is not the prosecution case that witness Prakash Kale was absconding for three days as he was scared due to act of the appellants. In fact, it is the prosecution case that witness Prakash Kale witnessed the incident and immediately went to his security officer from Goregaon to Lalbaug to inform him about the incident.

It is pertinent to note that the said security officer has also not been examined for reasons best known to the prosecution, to support the version of witness Prakash Kale.

In the said factual matrix it cannot be brushed aside, as submitted by Mr. Shirodkar, learned Counsel for the appellants that the possibility that Prakash Kale is a got up witness cannot be ruled out.

8. The learned Additional Public Prosecutor tried to defend the version of P.W. 5. Prakash Kale on the ground that it has gone virtually unchallenged in the course of cross examination so far as the material aspect of assault and involvement of appellants is concerned. It appears that the learned Trial Judge has also taken a similar view. However, we do not agree with this approach.

8-A. It is fundamental rule of criminal jurisprudence that prosecution must stand on its own legs irrespective of the infirmities in the defence. In this case, let us assume that no cross-examination of Prakash was conducted. But the absence of the same does not cause the infirmities in his ocular account referred to as above.

9. The prosecution has further relied upon the recovery of articles at the instance of the appellants u/s 27 of the Evidence Act. P.W.6 Mangesh Botle is the public panch, who is a common witness to all the four, recovery panchanamas made on different dates and times. In our view, the very fact that only one public panch was used on all four different occasions in this case, by itself, casts a doubt regarding his independence and the genuineness of the said recoveries. Moreover, a perusal of all the panchanamas shows that the recovery of weapons was made from an open place. In case of appellant Nos. 1 and 2 recoveries were made from grass from behind public urinal. Similarly, in case of appellant Nos. 3 and 4 recovery was made from the same place in a drum containing water.

For the reasons the evidence of recovery of weapons on the pointing out of the appellants cannot be accepted.

10. If we eliminate the said two trump cards of the prosecution evidence from consideration, namely, evidence of sole eye witness Prakash Kale and the evidence regarding recovery of articles at the instance of the appellants, then nothing worthwhile remains in this case. The other witnesses, for instance, P.W. 2 Gangabai, P.W. 3 Babasaheb and P.W. 1 Babu Pancham, are on the point of alleged motive. However, evidence regarding motive per se cannot form basis for conviction.

11. For the reasons recorded above, we have no hesitation in holding that the entire prosecution evidence before us is too inadequate to bring home the guilt of the appellants beyond reasonable doubt.

12. In the result, we allow the appeal. The conviction and sentence of the appellants for the offence u/s 302 read with section 34 of the Indian Penal Code is set aside. In case the appellants have paid the fine it shall stand refunded to them. The appellants are in jail and shall be released forthwith unless wanted in some other case.

13. Appeal allowed.