

(2018) 03 BOM CK 0142
In the Bombay High Court
Case No : CRIMINAL APPEAL NO. 569 OF 2004

SONU @ KHUSHAL @ TUSHAR ASHOK PASWAN.	APPELLANT
Vs	
STATE OF MAH.THR.P.S.O.GITTIKHADAN.NGP.	RESPONDENT

Date of Decision : 26-03-2018

Acts Referred:

Indian Penal Code, 1860 — Section 302, 323, 324, 325

Citation : (2018) 03 BOM CK 0142

Hon'ble Judges : V. M. DESHPANDE, J

Bench : Single Bench

Advocate : Nikhil R. Tekade, Amit A. Madiwale

Final Decision : Allowed

Judgement

V. M. DESHPANDE, J.

1.The present appeal is directed against the judgment and order of conviction passed by the learned 2nd Ad-hoc Additional Sessions Judge, Nagpur,

dated 29.7.2004 in Sessions Trial No. 327/2003. By the impugned judgment, the appellant stands convicted for the offence punishable under Section

325 of the Indian Penal Code and for that he is directed to suffer rigorous imprisonment for four years and to pay fine of Rs.5000/-, in default of

payment of fine he is directed to undergo simple imprisonment for six months. The appellant is also convicted for the offence punishable under Section

323 of the Indian Penal Code and for that he is directed to pay fine of Rs.300/- and in default to undergo simple imprisonment for three month.

2. In nut shell, the prosecution case is as under :

A.On 01.3.2003, PW2 Satish Lokhande approached to Police Station, Gittikhadan, Nagpur at 7.15 O'clock in the morning and he reported that on

25.2.2003, the appellant assaulted his mother Indubai, who was admitted in the hospital and expired on 01.3.2003 at 4.15 a.m. The report lodged by

PW2 Satish is at Exh.12. That time, PW9 Premanand Sabade was attached to said police station and he reduced into writing the report and registered

the offence punishable under Section 302 of the Indian Penal Code against the appellant vide Crime No. 42/2003. Thereafter, PW9 Premanand

Sabade went to the spot of occurrence situated at Dashrath Nagar, Nagpur and drew spot panchanama (Exh.19). Further investigation was handed

over to PW10 Balasaheb Deolkar.

B.On 02.3.2003, PW10 Balasaheb Deolkar received the case diary of Crime No. 42/2003. By that time, the appellant was already arrested. He was

sent for his medical examination. He seized his blood sample and clothes under seizure memos Exh.31 and 22, respectively. On 03.3.2003, the

appellant, in presence of panch witnesses PW3 Ganpat Nanhe and PW6 Naresh Lonkhade, gave his memorandum statement and thereby agreed to

show the place where he concealed the weapon that is the stick used in the crime. The admissible portion of the statement of the appellant is at

Exh.20. Thereafter, the police party was led by the appellant towards Sheela Nagar and he shown the bushes whereat the stick was thrown and it

was seized under recovery panchanama (Exh.21). The Investigating Officer PW10 Deolkar also seized the clothes of deceased Indubai in presence

of the panchas on 03.3.2013 under seizure memo (Exh.32). He also recorded the statements of the witnesses. He sent the seized property and

weapon for chemical analysis to the Forensic Science Laboratory, Nagpur along with his forwarding letter dated 29.3.2003 (Exh.44). After completion

of the other usual investigation, the charge-sheet was filed before the Court of law.

C.The Court, before whom the charge-sheet was presented, found that the offence is exclusively triable by the Court of Sessions. Therefore, the said

Court passed the committal order and thereafter, the case was registered as Sessions Trial No. 327/2003. The learned 2nd Ad-hoc Additional

Sessions Judge, Nagpur framed the Charge against the appellant below Exh.2 in the said Sessions Trial for the offence punishable under Sections 302

of the Indian Penal Code. The appellant abjured his guilt and claimed that he be tried. In order to bring home the guilt of the appellant, the prosecution

has examined in all 12 witnesses and also relied upon the various documents, which were proved during the course of the trial.

D. After appreciation of the entire prosecution case, the learned Judge of the Court below, vide impugned judgment, acquitted the appellant of the

offence punishable under Section 302 of the Indian Penal Code, however, convicted him for the offences punishable under Sections 324 and 323 of

the Indian Penal Code. Hence, this appeal.

3. First of all, it is to be noted that though, the appellant is acquitted of the offence punishable under Sections 302 of the Indian Penal Code, no appeal

is filed by the State challenging the said verdict.

4. I have heard Shri N. R. Tekade, the learned counsel for the appellant and Shri Amit A. Madiwale, the learned Additional Public Prosecutor for the

State in extenso. Both the learned counsel took me through, in detail, the record and proceedings.

5. According to Mr. Tekade, the learned counsel for the appellant, the appellant is falsely implicated in the crime. He submitted that the prosecution

has utterly failed to prove the authorship of the injuries on the person of deceased Indubai. For that, he submitted that the prosecution has not proved,

by legal evidence, the recovery of weapon that is alleged to have been used by the appellant. He also submitted that though, the prosecution claims

that Satish Lokhande (PW2) was also assaulted by the appellant, the said prosecution witness was not referred for his medical examination and there

is no medical report on record in the prosecution case in respect of the injuries sustained by him. He submits that from the suggestions given to the

Doctor, it is quite possible that deceased Indubai might have suffered the injuries due to fall on the ground. He submitted that the evidence of PW2

Satish cannot be accepted. He submitted that the prosecution has willfully suppressed the first report lodged by PW2 Satish on 25.2.2003. He,

therefore, submitted that the appeal be allowed.

6. Per contra, Mr. Madiwale, the learned Additional Public Prosecutor for the State submits that the statement of Indubai (Exh.61), which can be

termed as dying declaration, clearly attributes the role against the present appellant as the person, who made assault on her. He also submitted that

there is no reason for PW2 Satish to falsely implicate the appellant. He submitted that the trial Court has correctly appreciated the evidence and has

rightly convicted the appellant and therefore, prayed for dismissal of the appeal.

7. While acquitting the appellant from the offence punishable under Sections 302 of the Indian Penal Code, the learned Judge of the Court below has

observed that death of deceased Indubai is not resulted due to assault by the appellant/accused though it may accelerate her death. Therefore, the

short question that this Court has to answer is, as to whether the prosecution has proved beyond reasonable doubt that it is the

appellant, who has given stick blow on the head and deceased Indubai, which has accelerated her death.

8. Existence of injury on the head of Indubai is duly proved by the prosecution. The only question remains about the authorship. According to the

prosecution, it is the appellant, who has authored the said injury, whereas according to the learned counsel for the appellant, the appellant is falsely

implicated in the crime and also the possibility of sufferance of the said injury by Indubai accidentally by falling on the ground, is not ruled out.

9. According to the first information report (Exh.12), on 25.2.2003 at 8.30 pm, the first informant PW2 Satish and his mother deceased Indubai were

sitting in their courtyard. At that time, a quarrel was going on in between Gangabai and her husband Prakash. That time, the appellant, came there and

he started abusing all of them. When the first informant PW2 Satish tried to pacify the appellant, he went to his house, brought wooden stick and

assaulted on him. Satish took the said assault on his left hand, due to which he received injury on his left hand. Thereafter, the appellant gave another

blow which landed on the head of his mother Indubai, resulting into the bleeding injury. Therefore, he took his mother to Mayo Hospital, where she

was admitted in Ward No.23 and during the treatment, on 01.3.2003 at about 4.15 in the morning, Indubai expired. With this assertion, PW2 Satish

lodged his first information report, which was culminated into registration of crime against the appellant.

10. Though, the prosecution has examined PW4 Bhanudas Pagare, PW5 Pushpa Pagare and PW7 Pushpa Thapa, the neighbours as eye-witnesses to

the assault, none of them supported the prosecution.

11. Insofar as assault by the appellant on Indubai is concerned, the prosecution case revolves around the first information report (Exh.12), testimony of

PW2 Satish and statement of deceased Indubai (Exh.61), which was recorded

when she was admitted in the hospital. Let us scrutinize first whether

Exh.61, the statement of Indubai, is a legal piece of evidence and can be admitted for recording conviction of the appellant.

12. From the record, it is clear that Indubai was admitted in Ward No.23 at Mayo Hospital, Nagpur on 25.2.2003. PW12 is Bhagwandin Gujar. He is

police Head Constable. On 25.2.2003, he was on his duty at Police Booth at Mayo Hospital, Nagpur. On the said day, he received intimation in

between 9.45 to 10.00 O'clock in the night from the Medical Officer about admission of Indubai and for recording of her statement. Accordingly, he

went to Indubai in casualty ward. There, he noticed that she was having bleeding injury on her head. He made enquiry with Indubai. On that, it was

disclosed to him by Indubai that the appellant was giving abuses to her and when she tried to resist not to give abuses, he assaulted by means of stick

on her head in front of her house. He took thumb impression thereon and the statement is at Exh.61. Perusal of Exh.61 shows that Indubai disclosed

that it is the appellant, who gave stick blow on her head. The question is whether Exh.61 is legally admissible document.

13. In the entire prosecution case, there is no evidence that prior to recording the statement Exh.61, PW12 Bhagwandin Gujar obtained medical

certificate of the doctor regarding her fitness to give statement. On the contrary, in his cross-examination, he admitted that the Medical Officer did not

give him anything in writing for recording statement of the patient. It is also admitted by him that at the time of recording of statement of Indubai,

Doctor was sitting in his chair, however, he did not obtain his signature to show his presence so also in order to show that while recording the statement

of Indubai, she was conscious and was fit to give her statement. Thus, there is nothing to show that before recording the statement of Indubai, PW12

Bhagwandin approached to the doctor attending her and asked about her fitness and only after such certification, he has recorded the statement of

Indubai.

The law is now well crystallized by the Constitution Bench of the Hon'ble Apex Court in the case of Laxman .vs. State of Maharashtra reported in

AIR 2002 SC 2973. As per the said reported judgment, merely because certificate from the Doctor is not available or is not produced by the scribe,

that by itself is not sufficient to discard the evidence or truthfulness of the

contents of the dying declaration.

14. However, it is the mandate of the Hon'ble Apex Court in the said reported case, cited supra, that in such situation, before recording the statement

of the declarant, the scribe himself should be satisfied about the fact that the declarant was conscious and was fit to give his or her statement. Exh.61

does not have any endorsement by PW12 Bhagwandin to that effect. Not only that, when Bhagwandin was examined as prosecution witness, even

from the witness box he did not state on oath that before recording the statement of Indubai, he himself was satisfied about the physical and mental

state of Indubai that she was in a condition to give her statement. Even PW2 Satish, in his cross-examination has admitted that his mother was not in a

position to talk. He further stated that her statement was not recorded in his presence, though, he was present in the hospital. In that view of the

matter, the statement Exh.61, on which the learned Additional Public Prosecutor for the State heavily relied, does not pass the primary test as laid

down by the Hon'ble Apex Court and by various other High Courts. Therefore, I have no hesitation in my mind to keep aside the said piece of

evidence to attribute the authorship on the part of the appellant that he has caused the injury to Indubai.

15. Other than this, it leaves the ocular evidence. As observed above, three independent witnesses have already turned hostile. The entire case of the

prosecution rest on the testimony of PW2 Satish. The learned counsel for the appellant submits that he is an interested person and therefore, his

evidence is required to be discarded. I am afraid that this submission can be accepted. Merely because witness is closely related witness or interested

one in the prosecution, that by itself does not earn any disqualification to discard his evidence. In such situation, the Court has to be on guard and has

to see whether the evidence of such witness inspires confidence and also search for other attending corroborative piece of evidence, which

corroborates his version and supports the prosecution case.

16. As per oral report (Exh.12) as well as from the evidence of PW2 Satish, initially, the appellant gave blow of stick on him. He resisted with his

hand and as per the oral report, that blow landed on his left hand resulting into injury. Even the Charge was framed against the appellant for causing

hurt to Satish. Though, PW2 Satish claims that he suffered injuries on his left

hand, he was not referred for his medical examination. Therefore, it remains in dark as to whether really Satish suffered any injury or only bodily pain. This is important because according to the first information report and the evidence of PW2 Satish, after the assault on him when his mother tried to intervene, that time the appellant gave another blow and that landed on her head resulting into injury.

17. Further, there is really doubt about the truthfulness of the first information report itself. According to the prosecution case, Exh.12 , the oral report, is lodged on 01.3.2003. The printed first information report (Exh.13) shows that on the said day, an information was received at about 7.15 hours in the morning. In that behalf, if the evidence of PW2 Satish is scrutinized minutely, then some other facts are surfacing on record. In the cross-examination, PW2 Satish has admitted as under :

I have reported to the police on the very same day of the incident i.e. 25.2.2003. After 25.2.2003, police did not make any enquiry with me nor recorded my statement.

Further, according to the evidence of PW9 Premanand Sabade, who has recorded the first information report, PW2 Satish approached to Police Station, Gittikhadan on 01.3.2003 at 7.15 am and reported the matter about the death. Interestingly, PW2 Satish in his cross- examination states as under :

Correct that after post mortem, I received dead body of my mother at 4.00 or 5.00 pm. My mother died at 4.15 hours in early morning. Correct that since death till receiving dead body of my mother, I did not go anywhere outside from the hospital

18. If PW2 Satish has to be believed then at 7.15 am his presence cannot be at Police Station, Gittikhadan. In this backdrop, the claim of Satish that he reported the matter on 25.2.2003 itself and thereafter police did not make any enquiry with him nor his report was recorded, assumes importance and it cast serious doubt about the truthfulness of the existence of report (Exh.12) itself. Further, though in very clear words PW2 Satish has stated about lodging of his report on 25.2.2003, the said report is not coming on record. Thus, it is clear that the prosecution has withhold that particular report and that piece of evidence from the Court. Necessarily the Court is required to draw an adverse inference against the prosecution and therefore, the Court

should not readily accept the version of PW2 Satish about the assault unless there is other corroborative piece of evidence to gather strength in favour of the prosecution.

19. As per the evidence of Investigating Officer PW10 Balasaheb Deolkar, on 03.3.2003 in presence of panchas, the appellant gave his memorandum statement and agreed to show the place where he has concealed the weapon. Both the panchas are also examined by the prosecution and they are

PW3 Ganpat Nanhe and PW4 Narayan Lokhande. Out of them, PW3 Ganpat turned hostile, whereas PW6 Naresh has supported the prosecution.

Exh.20 is the memorandum statement recorded by the Investigating Officer PW10 Balasaheb Deolkar in presence of panchas. Exh.20 shows that it is

recorded on 03.3.2003 and consequent recovery is also on 03.3.2003 under recovery panchanama (Exh.21). In that behalf, if the evidence of PW 6

Naresh is seen, then his evidence shows that on 02.3.2003, he was called at Police Station, Gittikhadan as pancha and in his presence memorandum

statement (Exh.20) was recorded. He never claims in his evidence that he attended police station on 03.3.2003. Further, he has stated in his evidence

as under :

Not correct to suggest that clothes of the accused and deceased were seized on the same day on which the stick was seized.

Further, the contemporaneous document shows that it is dated 03.3.2003. PW6 Naresh was not declared hostile. The prosecution could have re-

examined him, if there was any ambiguity, but no such thing has happened during trial in the present case.

20. Further, the recovery panchanama (Exh.21) shows that the stick was seized from the bushes and the place was accessible to everybody.

Therefore, no importance could be attached to this corroborative piece of evidence regarding seizure of the weapon at the behest of the appellant.

21. Further, though PW8 Dr. Rajesh Bardale, to whom the stick was sent for query report, claims that when the stick was sent to him under

requisition (Exh.36) and he gave his report (Exh.37), that time he noticed blood like stains on the stick.

As per the evidence of Investigating Officer PW10 Deolkar, the seized article namely the clothes of the appellant and stick were sent to chemical

analyzer for forensic examination. The report is available at Exh.27. The said

report clearly absolves the appellant since the Chemical Analyzer does not notice any stain of blood, much less human blood on the clothes or the appellant and the stick. Therefore, even the scientific evidence is also not corroborating the version of PW2 Satish and the prosecution case about assault.

22. When Indubai was brought to hospital on 25.2.2003, that time she was examined by Dr. Anil Sontakke (PW11), who has proved injury certificate on the basis of Bed Head Ticket (Exh.51). He has admitted in his evidence as under :

Lacerated wound shown in casualty ticket Exh.50 may be caused by falling a person with force on hard and blunt object. Similarly the mouth and nasal bleeding may be caused for the above reason. X-ray report is not with the bed head ticket.

Further, PW8 Dr. Rajesh Bardale, who has conducted post mortem states that ""such injuries are possible if a person is rushed and fell in force due to

the tumble of some object and head dashed against the iron poll"". PW2 Satish has admitted in his evidence that there exists electric pole in front of

entrance door of his house and the distance between the electric pole and entrance door is 1½ feet. He also admitted that there is a platform, though

small, of bricks in front of the door, which is 5 feet in height. Though, he has denied the suggestion given to him that there was a quarrel between

Gangubai and accused and himself, on hearing the said quarrel, his mother rushed from inside the house and due to brick plinth in front of road she fell

on the electric pole and sustained injury on hear head. However, in my view, looking to the fact that the prosecution has utterly failed to prove that the

appellant was holding stick at the relevant time and in view of the evidence of the doctors, the defence of the appellant gets probabalized. Therefore,

in my view, the appellant cannot be convicted even for the offence punishable under Section 325 of the Indian Penal Code when the prosecution could

not prove his guilt beyond reasonable doubt. Consequently, I pass the following order :

ORDER

1. The criminal appeal is allowed.

2. The judgment and order of conviction passed by the learned 2nd Ad-hoc Additional Sessions Judge, Nagpur, dated 29.7.2004 in Sessions Trial No.

327/2003, is hereby quashed and set aside.

3. Appellant - Sonu @ Khushal @ Tushar S/o Ashok Paswan is acquitted of the offences punishable under Sections 325 and 323 of the Indian Penal Code.
4. The bail bonds of the appellant shall stand cancelled.
5. The appeal is allowed and disposed of.