
(2015) 06 BOM CK 0120
In the Bombay High Court
Case No : Criminal Appeal No. 349 of 1993

State of Maharashtra	Vs	APPELLANT
Dhondappa Malikarjun and Others		RESPONDENT

Date of Decision : 11-06-2015

Acts Referred:

Bombay Police Act, 1951 — Section 135, 37(1)
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302

Citation : (2015) 06 BOM CK 0120

Hon'ble Judges : V.K. Tahilramani, J; Shalini Phansalkar Joshi, J

Bench : Division Bench

Advocate : A.S. Shitole, A.P.P., for the Appellant; Sarang Kotwal, V.V. Purwant, Sachin Deokar and Amit Shetye, Advocates for the Respondent

Final Decision : Dismissed

Judgement

V.K. Tahilramani, J.—The appellant - State of Maharashtra has preferred this appeal against acquittal of respondents/original accused Nos. 1 to 13 by judgment and order dated 5.4.1993 passed by the learned 3rd Additional Sessions Judge, Solapur in Sessions Case No. 8 of 1992. By the said judgment and order, the learned Sessions Judge acquitted the respondents of the offence punishable under Sections 147, 148, 302 read with Section 149 of IPC and under Section 37(1) read with Section 135 of the Bombay Police Act.

Though the appeal has been preferred against acquittal of respondent Nos. 1 to 13, respondent No. 1 Dhondappa Malikarjun @ Makkanna Birajdar, respondent No. 4 Jalindar Yelappa Manjulkar, respondent No. 5 - Vishwanath Neelkanth Wale, respondent No. 8 - Bhimashankar Yallappa Manjulkar and respondent No. 11 Ambanna Pandit have expired, hence, appeal has abated against them. Thus, this appeal is being heard only in respect of acquittal of respondent Nos. 2, 3, 6, 7, 9, 10, 12 and 13. For the sake of convenience, all the accused will be referred to by us as they were referred before the trial Court, which is as under:-

2. The prosecution case briefly stated, is as under:

(a) The first informant in the present case is PW 18 Shankar. Shankar was originally resident of village Kumbhari. He knew all the accused as they all were the residents of village Kumbhari. The deceased in the present case is Balu Nikambe. He was a member of Khaja Pathan Party. There were two parties in village Kumbhari. One was party was of Khaja Pathan and second party was of accused No. 1 - Dhondappa Birajdar. Accused Nos. 1 to 13 were the members of the party of accused No. 1 - Dhondappa Birajdar. Accused No. 1 was the main person in his party.

(b) The incident occurred on 20.8.1991. At about 11.00 to 11.15 a.m., PW 18 Shankar was going towards the side of Market Committee to take a tea. On the way, he met deceased Balu Nikambe. Balu Nikambe asked PW 18 Shankar to give him lift on cycle upto Market Committee. Then both of them went on the cycle of Shankar towards Market Committee. On the way, the accused persons saw them. The accused persons were armed with knife and Jambiya. As soon as the accused persons saw PW 18 Shankar and Balu Nikambe, the accused persons ran towards them. Both Shankar and Balu Nikambe left the cycle and started running towards the side of Maruti Temple. Accused No. 1 Dhondappa Birajdar gave blow with knife on the back of Balu Nikambe and accused No. 2 Vijaykumar Shabase gave blow with knife on the chest of Balu Nikambe. Balu Nikambe sustained bleeding injuries. He ran away through a small lane in front of Maruti Temple. All the accused were running behind him. PW 18 Shankar then came near the octroi naka. He heard people saying that murder of one person was committed and the body was lying in Gandhinagar Zopadpatti. PW 18 Shankar then went to Jail Road Police Station and lodged complaint. Thereafter investigation commenced. The dead body of Balu Nikambe was sent for postmortem. All the accused persons came to be arrested. After completion of investigation, the charge sheet came to be filed. In due course, the case was committed to the Court of Sessions.

3. Charge came to be framed against the respondents - original accused under Sections 147, 148, 302 read with Section 149 of IPC and under Section 37(1) read with Section 135 of the Bombay Police Act. The accused persons pleaded not guilty to the said charge and claimed to be tried. Their defence was that of total denial and false implication. After going through the evidence adduced in this case, the learned Sessions Judge acquitted all the accused of the offences charged, hence, being aggrieved by the said acquittal, the State preferred this appeal.

4. We have heard the learned APP for the appellant-State of Maharashtra and the learned Advocate appearing for the respondents. We have perused the judgment and order passed by the learned Sessions Judge. We have also perused the evidence adduced in this case. After carefully considering the matter, for the reasons stated herein below, we are of the opinion that the judgment and order passed by the learned Sessions Judge does not call for any interference.

5. In order to support its case, the prosecution has relied on the evidence of five

eye witnesses. They are PW 3 Balraj, PW 4 Gangadhar, PW 18 Shankar, PW 22 Waman and PW 23 Chandrakant. As far as PW 3 Balraj and PW 4 Gangadhar are concerned, both of them have not identified any of the accused persons in Courts, thus, their evidence does not help the prosecution in any manner. The next witness on whom reliance is placed is PW 18 Shankar who is not only an eye witness but he is also the complainant in the present case.

6. PW 18 Shankar has stated that he was originally resident of village Kumbhari. He knew all the accused as they all were the residents of village Kumbhari. The deceased in the present case is Balu Nikambe. He was a member of Khaja Pathan Party. There were two parties in village Kumbhari. One party was of Khaja Pathan and second party was of accused No. 1 - Dhondappa Birajdar. Accused Nos. 1 to 13 were the members of the party of accused No. 1 - Dhondappa Birajdar. Accused No. 1 was the main person in his party.

Shankar has further stated that the incident occurred on 20.8.1991. At about 11.00 to 11.15 a.m., Shankar was going towards the side of Market Committee to take tea. On the way, he met deceased Balu Nikambe. Balu Nikambe asked Shankar to give him lift on cycle upto Market Committee. Then both of them went on the cycle of Shankar towards Market Committee. On the way, the accused persons saw them. The accused persons were armed with knife and Jambiya. As soon as the accused persons saw Shankar and Balu Nikambe, the accused persons ran towards them. Both Shankar and Balu Nikambe left the cycle and started running towards the side of Maruti Temple. Accused No. 1 Dhondappa Birajdar gave blow with knife on the back of Balu Nikambe and accused No. 2 Vijaykumar Shabase gave blow with knife on the chest of Balu Nikambe. Balu Nikambe sustained bleeding injuries and he ran away through a small lane in front of Maruti Temple. All the accused were running behind him. Shankar then came near the octroi naka. He heard people saying that murder of one person was committed and the body was lying in Gandhinagar Zopadpatti. Shankar then went to Jail Road Police Station and lodged complaint.

Shankar has further stated that one month thereafter, his supplementary statement was recorded. He gave the names of four more assailants including that of accused No. 13 Nagappa. The appeal has abated against remaining three accused whose names were disclosed by PW 18 Shankar in his supplementary statement recorded after one month after he lodged his F.I.R. Thus, out of the accused we are concerned with, Shankar has only deposed about accused No. 2 Vijaykumar and accused No. 13 Nagappa.

As far as accused No. 13 Nagappa Sutar is concerned, PW 18 Shankar has taken his name for the first time one month after the F.I.R. lodged by him. No explanation has been given by him for the delay in giving his statement wherein he has implicated accused No. 13 Nagappa. Thus, as far as accused No. 13 Nagappa is concerned, in view of the inordinate delay in naming him, we are not inclined to rely on the evidence of PW 18 Shankar in relation to accused No. 13 Nagappa.

As far as accused No. 2 Vijaykumar is concerned, PW 18 Shankar has stated that accused No. 2 gave a blow on the chest of Balu Nikambe. Prior to that Shankar has stated that all the accused persons armed with knife and Jambiya. According to Shankar, accused No. 2 Vijaykumar would have given a blow on the chest of Balu Nikambe with knife or Jambiya, however, the evidence of PW 25 Dr. Subhashandra who conducted the postmortem on the body of Balu Nikambe shows that there was no injury at all on the chest of Balu Nikambe. In this view of the matter, we are not inclined to place reliance on the evidence of PW 18 Shankar.

7. Thereafter, the prosecution has placed reliance on the evidence of PW 22 Waman. Waman has stated that he saw Balu Nikambe coming running from Zopadpatti and proceeding towards East. Balu had sustained injuries on his person. There were blood stains on his clothes. Waman saw approximately ten persons were running behind Balu Nikambe. They were holding knives in their hands. Out of those ten persons, Waman has named accused No. 1 Dhondappa Birajdar, accused No. 2 Vijaykumar Shabase, accused No. 7 Raja Shabase, accused No. 10 Basha Musalaman and accused No. 12 Genappa Manulkar. We are not concerned with accused No. 1 Dhondappa because the appeal against him has already abated.

PW 22 Waman has stated that accused No. 2 Vijaykumar gave a blow on the stomach of Balu Nikambe. He has not stated with what weapon accused No. 2 Vijaykumar had given blow on the stomach of Balu Nikambe. It is pertinent to note that in the cross-examination of this witness, he was confronted with a portion of his statement which was marked "A". He stated that he could not assign any reason as to why police had recorded his statement as per portion marked "A". The portion marked "A" which is at Exh. 146 shows that Waman has stated that he came to the Police Station. There he came to know that Balu Nikambe was assaulted with a knife by the accused persons and that the accused persons had committed the murder of Balu Nikambe by assaulting him with knife and his dead body was lying in Gandhinagar. Thus, looking to the portion marked "A", it becomes apparent that Waman had not actually witnessed the incident but Waman came to know about the incident later on. thus, we are not inclined to accept the submissions of the prosecution that PW 22 Waman witnessed the actual incident.

8. Lastly, the prosecution has placed reliance on the evidence of PW 23 Chandrakant. He has stated that on 20.8.1991 at about 11.15 a.m., he had come in front of Yeshwant Mill. At that time, his friend Waman (PW 22) met him. He and Waman were going towards Prabhakar Maharaj Nagar. At that time, he saw accused Nos. 1 to 13 beating Balu Nikambe near Maruti Temple. There was one small lane near the Maruti Temple. Balu Nikambe ran through the said lane. Chandrakant has further stated that accused No. 9 Basavraj gave blow over the left shoulder of Balu Nikambe and accused No. 2 Vijaykumar gave blow on the back side of Balu Nikambe. Balu Nikambe fell down as a result of the said

assault. We are not inclined to place any reliance on the evidence of this witness because in his cross-examination, it has been elicited that his averment that accused No. 9 Basavraj gave blow over the left shoulder of Balu Nikambe and accused No. 2 Vijaykumar gave blow on the back side of Balu Nikambe were proved to be omissions. Looking to the above facts, in our opinion, the evidence of none of the eye witnesses can be relied upon to support the prosecution.

9. Thereafter, the prosecution has relied on the evidence of panch witnesses to prove the circumstance of seizure or recovery of clothes and weapons from the accused persons. In this connection, reliance is placed on the evidence of panch witnesses i.e. PW 6 Mahamaud, PW 7 Somling, PW 9 Jayapal, PW 10 Ahmed, PW 14 Abdulkarim, PW 15 Mahamad and PW 17 Gajanan. Panch witness PW 6 Mahamaud has deposed about seizure of blood stained clothes at the instance of accused No. 3 Bhimashankar. Panch witness PW 7 Somling has deposed about recovery of knife at the instance of accused No. 3 Bhimashankar. Panch witness PW 9 Jayapal has deposed about seizure of blood stained clothes from accused No. 12 Gensidha. It is pertinent to note that none of these witnesses in their evidence have stated that the clothes or the weapons were sealed after they were seized by the police. The same is the case in respect of panch witnesses PW 10 Ahmed and PW 14 Abdulkarim. Panch witness PW 10 Ahmed has deposed about seizure of blood stained clothes at the instance of accused No. 2 Vijaykumar and accused No. 6 Annappa and the panch witness PW 14 Abdulkarim has deposed about recovery of blood stained clothes and blood stained Jambiya at the instance of accused No. 9 Basavraj. In this connection, useful reference may be made to a decision of the Supreme Court in the case of *Amarjit Singh Vs. State of Punjab*, (1995) CriLJ 3984 : (1995) 3 Crimes 409 : (1995) 5 JT 529 : (1995) 4 SCALE 555 : (1995) 3 SCC 390 Supp , wherein the Supreme Court has held that the non-sealing of the articles at the spot is a serious infirmity because the possibility of tampering with the said articles cannot be ruled out. The same view was followed in two decisions of the Division Bench of this Court in the case of *Ashok Premaji Nirbhawane Vs. State of Maharashtra Criminal Appeal No. 886 of 2012* decided on 11.04.2014 (Coram: P.V. Hardas and A.S. Gadkari, JJ.) and *Rajaram Limbaji Babar Vs. The State of Maharashtra Criminal Appeal No. 899 of 2005* decided on 27.01.2014 (Coram: P.V. Hardas and A.S. Gadkari, JJ.).

10. As far as accused No. 2 Vijaykumar is concerned, the panch witness PW 15 Mahamad has stated that a knife was recovered at the instance of accused No. 2 Vijaykumar, however, it is pertinent to note that it has been elicited in cross-examination of this witness that Aslam (PW 12) and Ismail Daud Shaikh (PW 13) are his real brothers and Aslam was an accused in the murder case of one Makkanna Bolkote. Khaja Pathan was also accused in the said case. The evidence of PW 18 Shankar shows that there were two groups in village Kumbhari. Deceased Balu Nikambe was the member of Khaja Pathan Party and all other accused were the members of party of accused No. 1 Dhondappa. This shows that PW 15 Mahamad is not an independent witness as he belongs to the

opposite party in the village, hence, no reliance can be placed on the evidence of PW 15 Mahamad.

11. Last panch witness on whose evidence reliance is placed by the prosecution is PW 17 Gajanan. His evidence is relied upon to show that there was seizure of blood stained clothes from accused No. 7 Rajshekhar, however, on perusal of the evidence of PW 17 Gajanan, it is seen that he has stated that he was called to the Police Station to act as panch. One accused was in the Police Station. The accused agreed to produce his clothes which were concealed by him in village Kumbhari. However, this witness has stated that he did not remember the name of the accused nor he could identify him in the Court. Thus, the evidence of the panch witness PW 17 Gajanan is of no assistance to the prosecution.

12. In view of above, there is no cogent and clinching evidence on record to connect any of the respondents to the crime. Looking to the evidence on record, we find that conclusion arrived at by the learned Sessions Judge is a reasonable and possible view.

13. The plenitude of power available to the Court hearing an appeal against acquittal is the same as that available to a court hearing an appeal against an order of conviction, but, however, the court hearing an appeal against acquittal, will not interfere solely because a different possible view may arise on the evidence. The Supreme Court in the case of C. Antony Vs. K.G. Raghavan Nair, AIR 2003 SC 182 : (2006) 4 BC 295 : (2002) 112 CompCas 611 : (2003) CriLJ 411 : (2003) 1 SCC 1 : (2003) 1 UJ 36 has observed that while hearing an appeal against an order of acquittal, if two reasonable conclusions can be reached on the basis of evidence on record, the appellate court should not disturb the finding of the trial court. We have already observed that the view taken by the learned Sessions Judge is a reasonable and possible view. In this view of the matter, we are not inclined to interfere in the judgment and order of acquittal. In view of the above, the appeal is dismissed.