
(2015) 06 BOM CK 0210
In the Bombay High Court
Case No : Criminal Appeal No. 84 of 2001

State of Maharashtra

APPELLANT

Vs

Hari and Others

RESPONDENT

Date of Decision : 11-06-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 302, 307, 34

Citation : (2015) 06 BOM CK 0210

Hon'ble Judges : B.P. Dharmadhikari, J;P.N. Deshmukh, J

Bench : Division Bench

Advocate : T.A. Mirza, A.P.P., for the Appellant

Final Decision : Dismissed

Judgement

P.N. Deshmukh, J—State of Maharashtra being aggrieved by the judgment and order dated 11th of January, 2001 passed in Sessions Case No. 38 of 1993 by the learned Additional Sessions Judge, Achalpur, thereby acquitting the respondents/accused of the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, has preferred this appeal.

2. In brief, it is the case of prosecution that both the accused, who are sons of sister of deceased Balaram, are resident of Achalpur. On 11th of March, 1993 at about 8 p.m. PW 5 Bhimrao was assaulted by both the accused at his house and when deceased Balaram intervened he was also subjected to assault by accused No. 1 Hari by stick and accused No. 2 Madhu by stone due to which he sustained bleeding injuries on his head and face and became unconscious. It is the case of prosecution that PW 2 Anusaya - wife of deceased, PW 2 Geeta and PW 10 Gajanan have witnessed the incident of assault and that PW 10 Gajanan lifted Balaram on his shoulder and proceeded towards hospital. However, he could not reach since got tired and left him on the ground near the Kartik Swami Gajanan temple and from there visited Achalpur Police Station and gave information upon which PW 12 Pundlik Pise, PSI, reached at the temple and by Police vehicle

shifted Balaram in Cottage Hospital, Achalpur.

3. On returning from the hospital, PW 10 Gajanan lodged his report on the basis of which offence came to be registered vide Crime No. 21 of 1993 for the offence punishable under Section 307 read with Section 34 of the Indian Penal. On 12th of March, 1993 Balaram succumbed to his injuries upon which offence came to be altered to Section 302 of the Indian Penal Code and was investigated by PW 12 Pise, PSI, during the course of which on the same day he visited the spot and drew spot panchanama as per Exh. 12 and seized articles including two blood stained stones and tooth under seizure panchanama (Exh. 13) and upon carrying inquest panchanama (Exh. 15) forwarded dead body for Post Mortem which was carried out on the same day by PW 11 Dr.Dilip Pande at Cottage Hospital, Achalpur and issued Post mortem note as per Exh. 43.

On the same day both the accused came to be arrested and their blood stained clothes came to be seized under seizure panchanamas Exhs. 30 and 31, respectively.

4. On 14th of March, 1993, memorandum statement of accused No. 2 Madhu came to be recorded as per Exh. 24 and of accused No. 1 Hari came to be recorded as per Exh. 26 and pursuant to their statements one stone and stick came to be recovered at their instance and seized under seizure panchanamas Exhs. 25 and 27, respectively. After recording statements of witnesses and on forwarding seized articles for analysis to Chemical Analyzer, Nagpur the investigation is complete and charge-sheet came to be filed before the learned Judicial Magistrate (F.C.), Achalpur. In the course of time, case came to be committed to the court of Sessions for trial.

5. Charge is framed against both the accused vide Exh. 2 for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code to which he pleaded not guilty and claimed to be tried. The learned Trial Court, on considering the evidence and documents on record, held that no charges levelled against the accused are proved and accordingly acquitted both the accused of the offences for which they were charged. Hence, this appeal by the State.

6. Heard Shri T.A. Mirza learned Additional Public Prosecutor for the appellant/ State. Nobody appears for the respondents.

7. We have perused the entire evidence and documents on record. Prosecution to prove the charge levelled against the respondents/accused examined as many as twelve witnesses and has relied upon the ocular evidence of PW 2 Anusaya, PW 3 Geeta, PW 4 Harishankar and PW 10 Gajanan. PW 6 Omprakash is examined to establish recovery of stone and stick at the instance of accused. PW 1 Sunil has proved spot panchanama and seizure panchanama of blood stained stones from the spot. PW 5 Bhimrao is examined in corroboration to the evidence of eye witnesses while PW 7 Pralhad and PW 8 Ganesh have proved seizure panchanamas of blood stained clothes of accused and PW 9 as a panch on seizure panchanama of blood stained clothes of PW 10 Gajanan. PW 11 Dr. Dilip

Pande, Medical Officer, performed autopsy.

8. In view of the case of prosecution which is mainly based on ocular evidence of eye witnesses, as above, we have carefully scrutinized the evidence of these witnesses who admittedly are interested witnesses being PW 2 Anusaya as wife of deceased, PW 3 Geeta as niece, PW 10 Gajanan is son-in-law of deceased and PW 5 Bhimrao being brother of deceased along with evidence of PW 4 Harishankar, an independent witness. PW 10 Gajanan has stated that on 11th of March, 1993 after 7.30 p.m. when he was in the house, PW 2 Anusaya came to him and informed about assault on Balaram due to which he accompanied her near Flour Mill of Daulatrao and found both the accused beating Balaram with stone and stick. He further stated that seeing him both the accused rushed towards him to beat him due to which he went behind the wall to hide himself. He further stated that the accused also attempted to chase PW 2 Anusaya and PW 3 Geeta and that thereafter he rushed to his father-in-law Balaram and found him having sustained bleeding injuries on his head and on reaching Achalpur Police Station, lodged report (Exh. 38).

9. On the point of incident evidence of PW 3 Geeta when perused reveals that the incident took place at about 8.30 p.m. When she was present in the house she noted both the accused abusing her father Bhimrao and after assaulting him, deceased Balaram arrived and intervened in that quarrel when he too was subjected to assault by dragging him towards Flour Mill of one Daulatrao. She stated that at that spot accused No. 1 Hari assaulted Balaram by stone and accused No. 2 Madhu assaulted him by stick which was witnessed by her along with PW 2 Anusaya by standing near the Flour Mill. She further stated that both the accused then rushed towards them due to which they went in the nearby lane and after some time went to PW 10 Gajanan and informed him about the incident, who accompanied them to the spot and all of them noted that Balaram was lying unconscious having bleeding injuries to his head and face and was lifted by Gajanan and thereafter Gajanan lodged report.

10. When evidence of both these eye witnesses is considered, we find that PW 10 Gajanan is very specific that at about 7 to 7.30 p.m. PW 2 Anusaya came to him while according to PW 3 Geeta incident of assault on Bhimrao took place at about 8.30 p.m. which was intervened by deceased Balaram, while according to the case of prosecution incident took place between 9 and 9.30 p.m. in the circumstances and in the absence of any explanation on this count we do not find it safe to rely upon the evidence of PW 10 Gajanan when he has stated that at about 7 to 7.30 p.m. PW 2 Anusaya by visiting him informed about the incident of assault on deceased by accused since said evidence is not in tune with the case of prosecution.

11. PW 2 Anusaya has stated that at the time of incident she was in her house and on hearing noise from the Flour Mill side she went there and saw accused beating her husband Balaram. She has also stated that PW 3 Geeta accompanied her and they went to intervene when both the accused pelted stones upon them

and therefore went to PW 10 Gajanan and narrated him the incident who within short time accompanied them to the spot of incident.

12. Having considering the evidence as above together with evidence of PW 3 Geeta, it is noted that PW 10 Gajanan arrived at the spot after the incident and thus his claim of witnessing the incident does not appear to be truthful. Neither PW 2 Anusaya or PW 3 Geeta after returning to the spot along with PW 10 Gajanan found accused persons on the spot.

13. So far as evidence of PW 3 Geeta is concerned, though she has stated about the assault on deceased by accused, she appears to have materially improved the case as PW 12 Pundlik Pise, Investigating Officer, who has recorded statement has specifically admitted that PW 3 Geeta in her statement under Section 161 of Cr.P.Code has not stated that accused had initially assaulted her father Bhimrao and when Balaram intervened he was also subjected to assault near Flour Mill of one Daulatrao Gawande where accused No. 1 Hari assaulted deceased by stone and accused No. 2 Madhu by stick on his head. Even otherwise this evidence in respect of committing assault by accused on deceased with weapons, as aforesaid, is not in consonance with the case of prosecution, as according to its case accused No. 1 Hari has committed assault by stick and accused No. 2 Madhu has committed assault by stone. No explanation is putforth by the prosecution on this aspect also. Similarly, PW 10 Gajanan has materially improved his case to establish his presence on the spot at the time of incident by stating that he was informed by PW 2 Anusaya at about 7 to 7.30 p.m. and had accompanied her and witnessed the incident. However, he is unable to putforth any reason as to why said material fact is not mentioned in his statement recorded by police which material omission is got proved by the defence from the Investigating Officer. Similarly, he has also not putforth any reason for not stating in his report that accused had rushed towards PW 3 Geeta and PW 2 Anusaya, though he claims to have stated as such in his report.

Similarly, PW 2 Anusaya has admitted to have not stated in her statement under Section 161 of the Code of Criminal Procedure that at the time of incident she was present in the house and that accused No. 1 Hari committed assault on deceased by stone. Having considering above discussed evidence, the evidence of none of the above witnesses appears to be convincing to be acted upon.

14. We have further considered evidence of PW 4 Harishankar who is termed to be an independent witness and has deposed that on the day of incident at about 8 to 8.30 p.m. on hearing noise he came out of the house and witnessed incident of assault on Bhimrao by accused and has further stated about arrival of deceased Balaram and about his intervening in the assault who was also subjected to assault by accused. He has further stated that accused dragged deceased Balaram towards flour Mill of Gawande and was assaulted by accused No. 2 Madhu by stone and on back side accused No. 1 Hari gave 2-3 blows by stick. However, again this witness also appears to have materially improved his case when he claims to have stated all said facts to the police in his statement

under Section 161 of the Cr.P.Code. However, defence have got such material omissions proved by Investigating Officer on record which fact, therefore, render evidence of this witness on the point of assault by accused on deceased Balaram to be doubtful.

15. Having considering above material omissions from the evidence of PW 2 Anusaya, PW 3 Geeta, PW 4 Harishankar and PW 5 Gajanan, we are, therefore, not at all inclined to rely upon their evidence as even otherwise statement of PW 4 Harishankar is recorded after lapse of seven days and no satisfactory explanation is on record for not recording it immediately after the incident. More so, though PW 4 Harishankar claims to be an eye witness, he has nowhere stated that before his statement was recorded he has narrated incident to anyone. There is nothing on record which prevents said witness to inform about the incident to the police who were apparently visiting the spot during the course of investigation till belated statement of PW 4 Harishankar came to be recorded. In that view of the matter also, evidence of PW 4 Harishankar cannot be accepted which is even otherwise by way of improvement.

16. Prosecution could not achieved anything by examining PW 5 Bhimrao upon whom accused alleged to have committed assault which was intervened by Balaram, as he has admitted that on sustaining assault he fell down on the ground and became unconscious and as such is unaware of any of the facts which took place thereafter. In that view of the matter, it is difficult to rely upon evidence of this witness witnessing the deceased on the spot. Similarly, from the evidence of PW 4 Harishankar it has come on record that due to assault Bhimrao fell down and 5 to 7 minutes thereafter Balaram arrived. In that view of the matter, there is no substantive evidence to establish that PW 5 Bhimrao had witnessed presence of Balaram on the spot.

17. In view of above evidence, we find that the Trial Court has rightly disbelieved the evidence of all above witnesses relied by prosecution on the point of assault by accused on deceased Balaram.

18. Coming to further evidence of PW 6 Omprakash who is examined to establish the discovery of blood stained stones from the drain and stick from the house of accused No. 2 at the instance of accused No. 2 Madhu and accused No. 1 Hari, respectively in pursuant to their memorandum statements Exh. 24, 26 respectively, and seizure panchanamas Exh. 25 and 27, respectively. It is noted that in the cross examination PW 6 Omprakash has admitted that police have shown him one stone and is not aware where from it was recovered. He has further admitted to have not seen the house of accused persons and has stated that police had informed him that they have seized stick and he accordingly gave his signature on the seizure panchanama. In view of admissions as aforesaid, evidence of PW 6 Omprakash in respect of accused giving disclosure statement and Investigating Officer effecting recovery at the instance of accused does not appear to be convincing at all. We even otherwise find that alleged recovery of stone was from a drain which is a place accessible to public at large and thus

creates doubt, as possibility of someone else putting stone in the drain also cannot be ruled out. Even otherwise, we do not find signatures of accused obtained on either of these documents (Exh. 24 to 27). In that view of the matter, we find no substance in the case of prosecution so far as discovery of weapons as above involved in this case alleged to be recovered at the instance of accused. So also, having considering the doubtful evidence of eye witnesses and settled legal principles that the evidence of eye witnesses if found totally unacceptable, then recovery of blood stained clothes and weapon at the instance of accused is solely insufficient for sustaining the charge of murder. We find no substance in the case of prosecution in respect of recovery of weapons as above as it is too short to connect the accused with the present crime, in the absence of substantive evidence to establish their involvement.

19. Having considering above discussed evidence and considering the fact that scope of interference in an appeal against the acquittal is very limited, we are inclined to dismiss the appeal as we find that the view taken by the Trial Court is neither impossible or perverse to justify the acquittal. We did not notice any impossibility or perverseness in the judgment and order of the learned Trial Judge warranting interference. Appeal is, therefore, dismissed. Bail bonds executed by the respondents stand cancelled.