

(2015) 03 BOM CK 0281
In the Bombay High Court
Case No : Criminal Appeal No. 435 of 2014

State of Maharashtra

APPELLANT

Vs

Moja Soma Pawar

RESPONDENT

Date of Decision : 26-03-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 209, 390
Penal Code, 1860 (IPC) — Section 302, 352, 504, 506

Citation : (2015) 03 BOM CK 0281

Hon'ble Judges : S.S. Shinde, J;N.W. Sambre, J

Bench : Division Bench

Advocate : S.D. Kaldote, A.P.P., for the Appellant; M.A. Tandale, Advocates for the Respondent

Final Decision : Dismissed

Judgement

N.W. Sambre, J—Such of the facts, as are necessary for the decision of this appeal, may briefly be stated thus:--

2. Deceased Katthu Sota Thakre was married to Indirabai and they were residing at Motha - Dhanpur, Taluka Taloda, District Nandurbar. Said Katthu had elder brother by name Bharat.

3. Respondent/accused Moja was also residing at the same place and all the above referred persons, namely, deceased Katthu, his wife Indirabai, his elder brother Bharat and accused Moja were residing in the houses adjoining to each other.

4. It is alleged by the prosecution that deceased Katthu was holding certain agricultural land and was guarding Tur crop in the said field. On 29th January, 2010, at about 4.30 p.m., cattle belonging to accused Moja entered the field of deceased Katthu and started grazing. Katthu drove away the cattle out of the field and having noticed that the said cattle belonged to the accused, reached in front of the house of the accused and asked him to control his cattle.

5. The said incident had resulted into an altercation between the accused and Katthu because of which accused got enraged and started abusing the deceased in filthy language and brought "Badvani" from the house and gave a blow on the left side of the head of deceased, as a result, Katthu fell down and blood started oozing out from the said injury.

6. Indirabai, wife of Katthu, having witnessed the incident, rushed immediately to the spot and with the help of her sari tried to stop the flow of the blood, at which point the accused also threatened her.

7. It is alleged by the prosecution that the said incident was witnessed by one Hupsing Goma Padvi, Bajya Barku Padvi and Ginabai Damu Thakre, who intervened and separated the accused and deceased from each other.

8. The Police Patil of the said village, Dilip Tadv, who was present in his house, received the information regarding the alleged incident and rushed to the spot.

9. By the time, Bharat, elder brother of deceased Katthu, reached the place of occurrence and called a vehicle and shifted Katthu to Taloda police station. The police immediately referred the injured Katthu to the Rural Hospital, Taloda where he was administered preliminary treatment. Having regard to the nature of injury, Rural Hospital, Taloda referred the deceased to Civil Hospital, Nandurbar.

10. Deceased Katthu was admitted to Civil Hospital, Nandurbar and while he was under treatment, during the night of 29th January, 2010, he succumbed to the injuries.

11. At that time, Indirabai (P.W.1); the wife of the deceased was present in the hospital and, as such, police came to know about the death of Katthu on 30th January, 2010. Indirabai narrated entire incident leading to the death of Katthu to the police in the tribal language known to her and Bharat, brother of Katthu translated the same in Marathi, as such the same was reduced in writing and Indirabai put her thumb impression on the same, whereas Bharat put his signature on it, which was treated as first information report, resulting into registration of C.R. No. 9 of 2010, with police station Taloda, for offence punishable under sections 302, 352, 504 and 506 of the Indian Penal Code.

12. Police Inspector Lambate (P.W.13) started investigation and directed A.P.I. More to visit the Civil Hospital, Nandurbar and prepare inquest panchnama of the body of Katthu. After preparation of inquest panchnama (Exh. 20), the dead body of Katthu was referred to Dr. Jaimala Wasave (P.W.12) for conducting autopsy and autopsy was performed between 11.50 a.m. and 12.30 p.m. She prepared autopsy notes (Exh. 52). Thereafter the dead body of Katthu was handed over to relatives for performing last rituals.

13. On completion of investigation, Police Inspector Lambate submitted charge-sheet against the accused to the Court of Judicial Magistrate First Class, Taloda, who committed the same to the Court of Additional Sessions Judge, Shahada

under section 209 of the Code of Criminal Procedure. The learned Additional Sessions Judge framed charge against the accused vide Exh. 6 for offence punishable under sections 302, 352, 504 and 506 of the Indian Penal Code, which was explained to the accused in the language understandable by him through interpreter. The accused abjured the guilt and claimed to be tried. The defence of the accused is one of total denial.

14. After considering the relevant evidence, the learned Additional Sessions Judge, acquitted the respondent/accused by his judgment and order dated 7th July, 2012. Thus, the present appeal.

15. The learned Additional Public Prosecutor appearing on behalf of the appellant - State, would urge that the testimony of the eye-witnesses P.W.1 Indirabai, P.W.4 Bajya Tadvai and P.W.5 Ginabai, who were present and were instrumental in intervening the incident in question was incorrectly disbelieved. He would urge that the said evidence is incorrectly disbelieved as according to him, the same could be a cause for reversal of the impugned judgment of acquittal. Learned Addl. Public Prosecutor further urged that the medical evidence brought on record supports and corroborates the report of the Chemical Analyzer. According to the learned A.P.P., the said piece of evidence which is very material, was overlooked by the learned Trial Court. In addition to above, the learned A.P.P. has urged that the eye-witness account by P.W.1 Indirabai is discarded despite the same being natural, most probable and believable, particularly having regard to the fact that she was an eye-witness to the incident and residing adjoining to the house of the deceased. Her testimony is disbelieved without having regard to her tribal illiterate background.

16. Learned A.P.P. would urge that the contradictions and omissions in the evidence of P.Ws. 1 to 9, 12 and 13 should have been over-looked by the learned Trial Court being minor in nature and there is nothing serious on record to disbelieve the same. As such, he prayed for reversal of the judgment of acquittal rendered by the learned Trial Court.

17. While resisting the above referred submissions, Mr. Tandale, learned Counsel (appointed) on behalf of the respondent/accused would urge that the learned Trial Court has rightly acquitted the respondent/accused. He would further urge that there is a presumption of innocence and in case two views are possible, the view favourable to the accused is required to be accepted. He would further urge that the judgment rendered by the learned Trial Court is sound and does not contain any perversity or ambiguity. He would further urge that the learned Trial Court has rightly taken note of the fact that the other owners of the adjoining fields or the houses have not witnessed the incident. He further urged that though the prosecution has proved that it is a homicidal death, the delay in lodging the first information report and other relevant omissions are not explained. According to him, the appeal against acquittal, therefore, deserves to be dismissed.

18. Having considered the above referred contentions, it is noticed that the prosecution, in order to prove the guilt of the respondent/accused, has examined in all thirteen witnesses. In order to prove that the death of Katthu is homicidal, the prosecution has relied upon the evidence of P.W.3 Gulsing, inquest panchnama (Exh. 20), the evidence of P.W.12 Dr. Jaimala, who has performed autopsy, autopsy notes (Exh. 52) and the evidence of Investigating Officer - Police Inspector Lambate. The learned Trial Court has believed the evidence of Gulsing (P.W.3) in its entirety, who was called by police to act as a panch in the Civil Hospital, who deposed that along with one Abusing Pawar he saw the dead body of Katthu and noticed blood stains on the clothes of the deceased. He noticed left side of the head of the deceased having an injury, based on which a detailed panchnama was drawn at Exh. 20 and has admitted the contents thereof and his signature thereon.

19. In cross-examination, P.W.3 Gulsing has admitted that he was resident of Motha-Dhanapur and the dead body of Katthu was lying in the hospital. He denied the suggestion that he was not present when the panchnama (Exh. 20) was drawn. The learned Trial Court, after careful scrutiny of evidence of P.W.3 Gulsing along with contents of inquest panchnama which was prepared by A.P.I. More in his presence, noticed that the said testimony supports the contents of inquest panchnama and accepted the said evidence as trustworthy.

20. The evidence of P.W.12 Dr. Jaimala, who claimed that she was present in the hospital and performed autopsy on the dead body of Katthu, which was brought by police. She further claimed that autopsy was performed between 11.50 a.m. and 12.30 p.m. and noticed following external injuries:--

"(1) Abrasion over left shoulder, approximate size 1/2 cm;

(2) CLW left occipital temporal region, 1 x 1 x 1 cm."

Dr. Jaimala further deposed that upon internal examination of head, she noticed intra cerebral bleeding and fracture to skull of 1 x 1 x 1 cm. and intra cerebral bleeding was present in the brain also, which injury was ante mortem. After autopsy, she drew conclusion that the probable cause of death was, cardio respiratory arrest due to head injury. She further deposed that she collected blood sample at the time of autopsy and also admitted the autopsy notes (Exh. 52). According to her, the injuries mentioned in autopsy notes are sufficient to cause the death in the ordinary course of nature.

21. In cross-examination though she admitted about prior knowledge of the weapon used in causing injuries and also admitted that CLW remains irregular in size and shape, she denied the suggestion that the injuries were not ante mortem. She admitted that if the injury is caused by a wooden article, the wooden particles could be noticed on the injury.

22. Based on the evidence of P.W.12 Dr. Jaimala and the contents of the autopsy notes (Exh. 52), it could be concluded that after the inquest panchnama, the

body was referred for autopsy and the autopsy was performed in which, injuries as mentioned in detail herein above, were noticed. The testimony of P.W.12 Dr. Jaimala is worth believing. If the medical evidence is analyzed, in the light of the defence of the accused, who claimed that deceased Katthu had fallen from the tree and as such he might have received injuries out of such fall, it could be easily concluded that the death was homicidal one based on the nature of injuries received by deceased.

23. So far as the evidence of P.W.1 Indirabai, P.W.4 Bajya, P.W.5 Ginabai and P.W.6 Hupsing, it is seen that P.W.1 Indirabai in her evidence deposed that she was present in the house when her husband had gone to the field. She further deposed that her husband returned home along with cattle of the accused and narrated that he had told the accused that he should control his cattle. She further deposed that the accused hit deceased Katthu on head with a log of wood, resulting in an injury to deceased Katthu and his right eye was protruded. She further claimed that her husband immediately fell down. She cleaned blood from the head of her husband with the help of her sari and Ginabai, Bajya, Hupsing and Gulsing were present at that time, who intervened and separated the accused. She identified the piece of wood by which the accused hit Katthu, i.e. article 10, so also the piece of sari article 9. She denied the suggestion given by the accused in her cross-examination that she went to the agricultural field along with her husband. She further stated in her cross-examination that she informed police that the accused came from the house along with wooden log and hit the same on the head of the deceased. The said omission in her statement given to the police could not be appropriately explained by the prosecution. The evidence of this witness does not inspire confidence in relation to the fact that the accused came out of the house and hit on the head of her husband with a wooden plank. Evidence of this witness is required to be disbelieved as in testimony of this witness, there is no narration about the exchange of abuses, quarrel, etc. In her evidence it is noticed that at one point of time P.W.1 Indirabai in her evidence, stated that she found accused with a wood, whereas in her statement to police she has stated that the accused came out of the house with "Badvani". Certain substantial omissions were noticed in statement Exh. 14 and this witness, which was recorded by police and as such noticed that the evidence of said witness was not trustworthy. The mentioning of protruding of right eye, non-existence of such injury in the evidence of P.W.12 Dr. Jaimala prompted us to disbelieve the evidence of P.W.1 Indirabai. Though Indirabai had claimed that Gulsing was present at the time of incident, in the first information report Exh. 14 the said aspect was conspicuously missing.

24. So far as the evidence of P.W.4 Bajya is concerned, he is also claimed to be eye-witness to the incident. He has deposed that on the day of the incident he was present in the village and he saw that the deceased went towards the accused to inform him about movement of cattle in his agricultural field, which was around 5.00 p.m. He claimed that accused brought Lakdi Tipani and hit the deceased Katthu with the same and he (P.W.4), asked accused as to why he has

beaten Katthu. According to him, other witnesses Ginabai, Indirabai and Hupsing were also present. He further claimed that Indirabai put a piece of sari on the injury of the deceased.

25. In cross-examination, this witness has admitted that when the incident took place there was rush of villagers. He has admitted that the children informed him about the quarrel and when he went to the place of incident, he saw that Katthu was lying on the ground. He further claimed that though he had informed the police that Lakdi Tipani was brought by the accused from the house and hit the same on the head of Katthu but admitted that the same was after seeing the incident. He also claimed that he had informed the police about he having questioned the accused as to why he hit Katthu. He could not offer any explanation about the said omissions by the police while recording his statement. This witness could not be termed as an eye-witness and it is further noticed that substantive evidence regarding he being the witness of the incident is missing from his statement recorded by the police. In the cross-examination of this witness, he falsifies his statement given to the police, as he has admitted in the cross-examination that by the time he reached to the spot, Katthu was lying down. The learned Trial Court noticed that he was one of the persons amongst the villagers who gathered at the spot of incident and as such, his evidence is also to be disbelieved.

26. So far as the evidence of P.W.5 Ginabai is concerned, she claimed that she was present at the time of the incident. She noticed that the accused came out of the house with "Tipani" and hit Katthu. She further claimed that Indirabai, Dipak, Bajya and Kashiram were present at that time and she informed about the same while recording her statement by the police, however, she was unable to explain as to why the same is not mentioned in the statement given to police. From the testimony of this witness, serious doubt is noticed about on the presence of this witness at the time of the incident as the said evidence was not found to be probable and acceptable. The Trial Court noticed that when deceased asked the accused to control his cattle, the accused was inside the house and when he came out of the house, what transpired is conspicuously absent from her evidence. The case of the prosecution is use of "Badvani", whereas Ginabai has mentioned "Tipani" and thus the learned Trial Court discarded her evidence. The Trial Court also noticed that except this witness no other witness claimed presence of Dipak and Kashiram on the spot at the time of occurrence.

27. So far as evidence of P.W.6 Hupsing is concerned, upon scrutiny, it is noticed that he himself has denied to have witnessed the incident and thus his testimony is required to be disbelieved.

28. So far as the evidence of P.W.7 Bharat is concerned, he claimed that he returned to his village at 5.00 p.m. and saw people gathered in the courtyard of the house of the accused, so he went there. He further claimed that he saw blood oozing out from the head of the deceased and Indirabai, Hupsing, Bajya, Dilip and Ashabai were present. He has admitted that he has not witnessed the

incident. The evidence of this witness was considered only on the point that he saw people gathered in the courtyard of the house of the accused. What the Trial Court inferred from his evidence is that by the time he reached there, the incident was already over and he called a jeep and took Katthu along with Indirabai, Bajya and other persons to Taloda; initially to police station and then to the hospital. According to him, within half an hour after 5.30 p.m. they reached the Rural Hospital, Taloda and proceeded further towards Nandurbar at 8.00 p.m. and reached there by 9.00 p.m. He claimed that the Doctors provided initial treatment at Taloda and then referred Katthu to Civil Hospital, Nandurbar, where he went along with Indirabai. The learned Trial Court, upon scrutiny of the evidence of this witness noticed that the evidence of P.W.1 Indirabai corroborates with that of P.W.7 Bharat and as such inferred that Katthu was taken to Civil Hospital, Nandurbar where he expired on 29th January, 2010.

29. So far as the evidence of P.W.8 Dilip Padvi is concerned, he claimed to be Police Patil of the village and was present in the village on the date of the incident. It has come on record in his evidence that he got knowledge about the incident from the children of the village and when he went to the spot, he saw Indirabai, Bajya and Bharat present there, and noticed injury on the left side of the head of Katthu. He further claimed that P.W.1 Indirabai narrated the incident to him and then Katthu was taken to hospital. In view of above narration, it is noticed that he went to the spot after the incident was over and his evidence is required to be considered only for the purpose of inferring that Katthu was shifted to hospital in an injured condition from the courtyard of the house of the accused, which in the opinion of the learned Trial Court is in tune with the testimony of P.W.7 Bharat.

30. What is required to be noticed is that, while dealing with the evidence of P.W.1 Indirabai, P.W.4 Bajya, P.W.5 Ginabai and P.W.6 Hupsing, important omissions for which no proper explanation has come forward are noticed. The alleged eye-witnesses have not consistently deposed as regards the happening of event of attack by the accused on deceased Katthu.

31. Upon analyzing the evidence of Investigating Officer P.W.13 P.I. Lambate, it is noted that, the arrest of the accused on 30th January, 2010. He claimed that he visited the spot and in presence of the panchas prepared spot panchnama, admitted the contents of spot panchnama Exh. 17. He claimed that soil containing blood stains came to be seized, though he admitted over-writing at a place where Grampanchayat house number is mentioned.

32. Having gone through the evidence of Investigating Officer P.W.13 P.I. Lambate, it is noticed that the omissions were brought on record qua the evidence of the witnesses, namely, P.W.1 Indirabai, P.W.4 Bajya and P.W.7 Bharat.

33. The testimony of P.W.9 Rajesh is required to be disbelieved as he has deposed that when the spot panchnama was prepared, Indirabai as well as Bharat were present, whereas both of them had gone to the Civil Hospital along

with Katthu. It is noted that upon narration of incident by P.W.1 Indirabai before Nandurbar police, the same was reduced in writing, whereon she put her thumb impression, which is first information report Exh. 14. In cross-examination P.W.1 Indirabai has admitted that she is unable to read and write Marathi. She has further stated that when they first went to police station, Taloda; Police Patil, Bajya and Bharat had narrated the incident to the police and police had given them memo to take him to hospital. If the evidence of Bharat is compared with the statement of Indirabai, it is noticed that it is in Civil Hospital, Nandurbar, Indirabai's statement was reduced in writing as a first information report, whose version was translated in Marathi by Bharat and he has admitted his signature. In cross-examination P.W.7 Bharat has denied the visit of police in Rural Hospital and inquiry by them. He has also denied the writing of statement of Indirabai. P.W.8 Dilip has stated that Katthu was taken to Rural Hospital and he was examined by the Doctors and as such referred to the Civil hospital, whereas in his cross-examination he has admitted that after the death of Katthu he gave information to the police at Taloda. According to him, he personally went to the police station for giving information. The Trial Court, upon scrutiny of the evidence of the said witness noticed that there is a complete veracity in the statements given by P.W.1 Indirabai, Bharat, Dilip and Sursing and recorded finding that the Police Patil claiming to have visited the police station for lodging first information report is not believable and acceptable, in view of material contradictions and gave finding that the information reduced in writing at the behest of Indirabai, upon translation given by Bharat in the Civil Hospital, Nandurbar, is to be treated as first information report.

34. While dealing with the issue of seizure panchnama (Exh. 18) as regards the piece of sari, P.W.2 Shamsing has admitted the contents of the same, however, P.W.9 Rajesh, a panch witness claimed that the panchnama was prepared in the police station, Taloda. He further claimed that at that time he himself along with Shamsing and Indirabai were present. Having considered the evidence regarding seizure of piece of sari, this Court noticed material contradictions in the testimonies of the prosecution witnesses as one was claiming that the same was seized in the village, whereas another had claimed that the panchnama was prepared at police station and also noticed certain scorings. Hence, seizure memo as is sought to be pressed in evidence creates a serious doubt.

35. This Court, while dealing with the testimony of P.W. 12 Dr. Jaimala and the autopsy notes (Exh. 52) noticed corroboration. In the evidence of Investigating Officer it has come on record that seized property was referred to Chemical Analyzer for analysis and the said reports are at Exhs.79 to 82. In the said reports, it was noticed that the blood sample of the accused reflects blood group "A" and blood group of deceased was "B". The seized articles, i.e. clothes of deceased, clothes of accused, piece of sari and soil containing blood stain - articles 3 to 6 along with Badvani, referred for analysis were having blood stains of the blood group of the deceased. Articles 3 to 5 were having blood stains of the blood group of deceased, whereas the remaining chemical examination

remained inconclusive.

36. The learned Trial Court, having noticed that the evidence of the witnesses which were examined by the prosecution and other material evidence collected does not repose any confidence, ordered acquittal of the respondent/accused.

37. Having regard to the above mentioned analysis, in our opinion, the Trial Court has rightly analyzed the evidence and has reached to the conclusion that the evidence of the prosecution witnesses does not inspire confidence.

38. It is also required to be noted that the deposition of each of the witnesses is also not corroborated with the other incriminating circumstances, such as veracity in the claim of lodging of first information report, the presence of so called eye-witnesses at the time of occurrence of the incident, the veracity of the evidence of so called eye-witnesses, in our opinion, rightly prompted the learned Trial Court to order acquittal.

39. It is also required to be noted that the Trial Court has rightly taken a view which could be inferred from the evidence on record and available material which points finger towards acquittal of the accused. This Court, while exercising appellate jurisdiction is mindful about the principles to be considered while dealing with the appeal against acquittal as are laid down by the Apex Court in the matter of Muralidhar @ Gidda and Another Vs. State of Karnataka, AIR 2014 SC 2200 : (2014) AIRSCW 2278 : (2014) CriLJ 2365 : (2014) 4 SCALE 693 : (2014) 5 SCC 730 . In paragraph 12 of the said decision, the Apex Court has observed thus:--

"..... In dealing with appeals against acquittal, the appellate court must bear in mind the following: (i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court, (ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal, (iii) Though, the power of the appellate court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial court had an advantage of seeing the demeanor of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified, and (iv) Merely because the appellate court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view."

40. Once the Trial Court having regard to the demeanor of the witnesses who were present before it has found that the case for conviction upon evaluation of

the evidence is not made out, this Court upon re-appreciation and revaluation thereof is not inclined to take a different view. The view taken by the learned Trial Court is a possible view in the given set of evidence and material on record and merely for asking in an appeal by the State, this Court is not required to upset the same, unless a strong case for conviction based on the credible material available is made out. This Court does not notice any such strong piece of evidence which points finger towards the accused about his guilt. We thus find that there is no perversity in the reasoning of the Trial Court to warrant interference in the present appeal against acquittal.

41. In the light of above discussion, the judgment of acquittal rendered by the learned Trial Court does not call for any interference and, therefore, the instant appeal stands dismissed.

42. As the respondent/accused was unable to comply with the requirement of section 390 of the Code of Criminal Procedure, he was detained in the present case since 29th September, 2014.

43. In view of dismissal of the present appeal, it is ordered that the respondent/accused be set at free forthwith, if not required in any other case.

44. Fees payable to Mr. M.A. Tandale, learned Counsel appointed on behalf of the respondent/accused is quantified at Rs. 7,500/-.