

(2004) 12 BOM CK 0011
In the Bombay High Court
Case No : Criminal Appeal No. 253 of 1992

State of Maharashtra

APPELLANT

Vs

Pralhad Deshbhratar and Others

RESPONDENT

Date of Decision : 01-12-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 161
Penal Code, 1860 (IPC) — Section 147, 149, 302, 307, 34

Citation : (2005) 1 MhLj 784

Hon'ble Judges : P.S. Brahme, J;B.R. Gavai, J

Bench : Division Bench

Advocate : T.A. Mirza, app, for the Appellant; E.W. Nawab, for the Respondent

Final Decision : Dismissed

Judgement

B.R. Gavai, J.—The present appeal is directed against the judgment and order dated 11-3-1992 passed by the learned Additional Sessions Judge, Wardha in Sessions Trial No. 116 of 1986 thereby acquitting the accused for the offences punishable under Sections 147, 149, 302, 307 read with Section 149 and under Sections 302, 307 read with Section 34 of the Indian Penal Code.

2. The prosecution story, in brief, is as under :-

That, the deceased Purushottam along with his father and other members of the family resided at Bazarwada, Tahsil Arvi, District Wardha. So also the accused are the residents of the same village. That there is a political rivalry between the complainants' party and the party of accused No. 1. Most of the accused are related to each other and that they belong to the party of respondent No. 1. It is alleged that on the date of the incident, i.e. 7th June, 1986 at about 07:30 a.m., since the servant of Uttamrao had not come for work, he sent his son Kishor (PW-1) to call the servant. Kishor took his bicycle and started from his house. It is alleged that Kishor might have gone ahead on bicycle up to 100 or 150 feet from his house, near the house of one Rajaram Bhoge, accused No. 9 Janrao

Thombre hit bicycle of Kishor with a stone. It is alleged that there was altercation between Kishor and Janrao and Janrao caught hold of the bicycle of Kishor with one hand and started giving fist blows and kicks. It is alleged that after hearing shouts of Kishor, his brother Purushottam came there. It is alleged that the accused who were in a mob started beating Purushottam with stones, kicks and giving fist blows. It is further alleged that father of Kishor and Purushottam came there on the spot. So also wives of Uttamrao and Purushottam and another son of Uttamrao, Yogesh came there. It is alleged that when Uttamrao came on the spot, accused No. 16, Dadarao assaulted Uttamrao by giving a blow of axe on his head. Due to this, Uttamrao sustained bleeding injury to his head. After seeing the blood oozing from the head of Uttamrao, all the accused ran away. Thereafter, Kishor and Yogesh lifted Purushottam and kept him in the bullock cart and brought him to the Cottage Hospital, Arvi. He was treated in the hospital, but, he succumbed to the injuries. In the meantime, Uttamrao had gone to the Police Station for lodging the complaint. The report is at Exh.132. At the Cottage Hospital, Arvi, the Executive Magistrate also recorded the statement of Uttamrao and thereafter he was referred to the General Hospital, Wardha.

3. On the basis of the report of Uttamrao, Crime No. 118/1986 was registered under Sections 307, 147, 148, 149 and 336 of the Indian Penal Code. After the death of Purushottam, an offence u/s 302 was also added.

4. After completion of investigation, charge sheet came to be filed in the Court of Judicial Magistrate, First Class, Arvi. Since the offence was exclusively triable by the Sessions Court, the matter came to be committed to the Court of Session, Wardha. A charge was framed against all the accused. Accused pleaded not guilty and claimed to be tried.

5. The defence of the accused is that in the Gram Panchayat elections which were held recently, deceased Purushottam was defeated by accused No. 1 Pralhad. It is the defence of the accused that due to defeat, the party of Purushottam was against the party of Pralhad and hence the accused No. 1 has lodged the report with the Police Station, Arvi on 30th/31st May, 1986. It is the defence of the accused that Yogesh, Uttamrao and Ramdas came there and started beating Janrao with sticks. Due to this beating, Janrao was crying and on hearing his cries, accused No. 1 Pralhad, accused No. 2 Manohar, accused No. 16 Dadarao and accused No. 19 Bhagubai came there and tried to settle the matter. According to the accused, in the quarrel, accused Pralhad, Janrao, Manohar and Dadarao also received injuries i.e. fracture on his leg. In a nutshell, the defence of the accused is that the deceased and complainant were aggressive and that in the free scuffle, Purushottam might have received fatal injury by fall on peg (khunta).

6. At the conclusion of the trial, after assessing the evidence led on behalf of the prosecution, the learned trial Court held that the prosecution had failed to prove the case beyond reasonable doubt and as such acquitted the accused. Being aggrieved by the said order of the acquittal dated 11-3-1992, the State has

preferred the present appeal.

7. Heard Shri T.A. Mirza, the learned Additional Public Prosecutor appearing on behalf of the appellant/State and Shri E.W. Nawab, the learned Counsel appearing on behalf of the respondents.

8. Shri Mirza, the learned APP submitted that the learned trial Court has grossly erred in recording the finding of acquittal. He submitted that the prosecution had proved the charge against the accused beyond reasonable doubt. He submitted that the ocular testimony of PW-1, Kishor, PW-4, Uttam and PW- 5, Yogesh was corroborated by the medical evidence. He submits that the evidence of these witnesses cannot be discarded solely on the ground that they are interested witnesses. He submits that since the evidence of PW-1 Kishor, PW-4 Uttam and PW-5 Yogesh was cogent and reliable, the learned trial Court ought to have based the conviction on the basis of the same.

9. Shri Nawab, the learned Counsel appearing on behalf of the respondents, on the contrary, submitted that the prosecution case was full of fallacies and lacunae. He submitted that the prosecution had not come to the Court with clean hands. He submitted that various accused persons had sustained injuries in the incident. However, those injuries were not explained by the prosecution. He submits that non explanation of injuries on the body of the accused was fatal to the prosecution case. He relied on the judgment of the Apex Court in the case of Lakshmi Singh and Others Vs. State of Bihar, and in the case of Rehmat Vs. State of Haryana, .

10. Shri Nawab further submitted that the Investigating Officer had recorded the statement of PW-1 Kishor and PW-5 Yogesh after a considerable gap from the date of incident. He submits that the delay in recording these statements was not explained and, therefore, the testimony of the witnesses whose statements were recorded at a belated stage was liable to be rejected. He relied on the judgment of the Apex Court in the case of Ganesh Bhavan Patel and Another Vs. State of Maharashtra, and the judgments of this Court in the cases of Popat Balu Vanjari Vs. State of Maharashtra, and The State of Maharashtra v. Wafati Babu Qureshi and Ors. reported in 1997 All MR 518. He further submits that the testimony of PW-4 Uttam was full of improvements. He submits that PW-4 had deposed before the Court what has not mentioned in the First Information Report and Dying Declaration/Statement recorded by the Executive Magistrate and as such the improvements made by him in his deposition cannot be considered. He relied on the judgment of the Apex Court in the case of Yudhishtir v. State of Madhya Pradesh reported in 1971 SCC 684 in support of this proposition.

11. With the assistance of the learned Counsel for the respective parties, we have scrutinised the evidence on record. The prosecution has examined in all seven witnesses. PW-1 Kishor and PW-5 Yogesh are the brothers of the deceased Purushottam and sons of PW-4 Uttam. PW-4 Uttam is an injured witness. PW-2 Ganpat is a witness on spot panchnama. PW-3 Laxman Gulhane is the Executive

Magistrate who has recorded the alleged dying declaration. PW-6 Dr. Shaila Maidamwar is the Medical Officer who has carried out the autopsy on the body of the deceased and has examined the injured witness as also the injured accused. PW-7 Govind Vaidya is an Investigating Officer.

12. We will first examine the evidence of PW-4 Uttam. PW-4 narrates about sending his son Kishor to call the servant as he did not turn up for work. He states that after Kishor went to call his servant after about 15 minutes or so he heard some shouts, "they are beating me, beating me". He states that then immediately his elder son Purushottam went out of the house to see what was going on. He further states that after one or two minutes, he also followed Purushottam. His daughter Sindhu as also his son Yogeshwar came there. He states that near the house of Rajaram Bhoge, he saw mob of persons. He then saw his son Purushottam lying on the ground. Four persons were sitting on his chest, arm and on his body. He states that thereafter he immediately rushed towards Purushottam and tried to lay on the body of Purushottam, at that time accused No. 16 Dadarao hit him with an axe on his head. On seeing the blood, accused ran away. He states that he then went to the Police Station and lodged First Information Report. Now, it can be seen from the oral report lodged by this witness that he has stated that accused Pralhad, Manohar, Jagan and many others assaulted him with sticks in front of the house of his brother Ramdas. He states that he sustained injury of stick on the right side of the head. He further states that the accused also assaulted his son Purushottam. When this witness was brought to the hospital, his dying declaration was also recorded by the Executive Magistrate Laxman Gulhane (PW-3). The learned trial Court has rejected to treat Exh.147 as a dying declaration but has treated this to be the statement of the witness. It can be seen from this statement that he has implicated 19 persons and stated that these persons beat him by stones, axe, sticks and lathi. He states that his son Purushottam was at home. He further states that after he was beaten his son came out running to rescue him and that his son was also injured in the said assault. It can thus be seen that this witness has given three different versions. Whereas in the FIR he implicates only three persons, in the alleged dying declaration/statement, his version is that he was assaulted first and when he went to rescue his son, he was assaulted with an axe. Whereas in his deposition before the Court, his version is that his son Purushottam had gone earlier and was assaulted and thereafter when he went to rescue him he was inflicted blow with an axe. It can further be seen that there is an improvement in his deposition before the Court to the effect that the accused Nos. 1, 2, 8 and 9 were sitting on the person of Purushottam and that Pralhad was stretching the genital organ. It can thus be seen that this witness has given three inconsistent versions, which are incapable of being reconciled. It can further be seen that this witness has shown a tendency to make improvement and implicate various persons who were not named by him in the FIR. In any case, this witness is an interested witness. No doubt that the testimony of the interested witness cannot be discarded only on the ground that they are

interested witnesses. However, the testimony of such witnesses has to be scrutinised with greater care and caution. As already discussed hereinabove, this witness has given three inconsistent versions and has also shown tendency of improving the case. We find that the reliance placed by the learned Counsel for the respondent in this regard in the case of *Yudhishtir v. State of Madhya Pradesh* (cited supra) is well placed.

13. Insofar as PW-1 and PW-5 are concerned, the statement of PW-1 Kishor has been recorded after a period of almost one and half months from the date of the incident, whereas the statement of PW-5 Yogesh has been recorded after a period of two and half months. The prosecution has failed to give any explanation as to why the statements of these witnesses were recorded at such a belated stage. Not only this, but both these witnesses are interested witnesses as they are the brothers of deceased and sons of injured PW-4 Uttam. Since the prosecution has failed to give any explanation for delay in recording the statements of these witnesses, the learned trial Court has rightly discarded the evidence of these witnesses. The Apex Court in the case of *Ganesh Bhavan Patel and Anr. v. State of Maharashtra* (cited supra) has observed thus :-

"Delay of a few hours, simpliciter, in recording the statements of eye-witnesses may not, by itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eye witnesses to be introduced. Thus under the facts and circumstances of the case delay in recording the statements of the material witnesses, casts a cloud of suspicion on the credibility of the entire warp and woof of the prosecution story."

14. In the present case, it can be seen that the statements of these two witnesses have been recorded after a period of one and half and two and half months respectively. We, therefore, find that the testimony of these witnesses is not of any assistance to the prosecution case. We are supported in this view by the judgments of this Court in the cases of *Popat Balu Vanjari v. State of Maharashtra* and *State of Maharashtra v. Wafati Babu Qureshi and Ors.* (cited supra).

15. Another aspect that needs to be considered is non explanation of injuries on the person of the accused by the prosecution. PW-6 Dr. Shaila Maidamwar, in her cross examination, has deposed that the accused Pralhad, accused Janrao, accused Manohar and accused Dadarao had sustained injuries and that she had issued medical certificate to that effect. Undisputedly the prosecution has failed to explain the injuries on the bodies of these accused persons. The Apex Court in the case of *Lakshmi Singh and Ors. v. State of Bihar* (cited supra) has observed thus :-

"In a murder case, the non explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very

important circumstance from which the Court can draw the following inferences;

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case."

The Apex Court has further observed thus :

"The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one."

16. In the present case also, various injuries have been found on the persons of various accused persons, as mentioned above. The prosecution has failed to give any explanation regarding the injuries sustained by the accused persons. In our view, therefore, this factor casts a cloud of suspicion on the genuineness of the prosecution story.

17. As against this, the version of the defence appears to be probable. It is defence of the accused that due to enmity on the ground of election, the party of the complainant had started assaulting Janrao and that there was a free scuffle and in the free scuffle deceased Purushottam might have fallen down on peg (Khunta) and might have sustained fatal injury PW-2 Ganpat has deposed that he has seen the pegs in front of the house of Rajaram used for tying the cattle. PW-6 Dr. Shaila Maidamwar in Postmortem report has given internal injury to (Rt) kidney as cause of death and has stated in her cross examination that the injury of the kidney is possible by fall on the peg. It can thus be seen that the version given by the defence cannot be said to be improbable.

18. One more factor that needs to be considered is that PW-1 Kishor in his evidence has stated that various villagers had gathered at the place of incident. In spite of this position, the prosecution had not examined any independent witness but has only examined interested witnesses. This also casts a doubt as to the genuineness of the prosecution story.

19. The present appeal is an appeal against acquittal. The Apex Court in the case of State of Rajasthan Vs. Raja Ram, has observed thus :-

"Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the

case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to reappreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. The principle to be followed by the appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference."

20. In the present case, upon independent appreciation of evidence, we find that the prosecution has failed to prove the case beyond reasonable doubt. PW-4 Uttam has improved his version in his deposition, has given three inconsistent versions in FIR, alleged dying declaration/statement and deposition before the Court. The statements of PW-1 and PW 5 have been recorded after a period of one and half months and two and half months respectively and no explanation has been given for recording the statements at such a belated stage. The prosecution has failed to explain the injuries sustained by the accused. The prosecution has failed to examine any independent witness. We, therefore, find that the view taken by the learned trial Court was the only possible view. We, therefore, do not find any merit in the present appeal and as such is dismissed. The bail bonds, if any, shall stand cancelled.