
(2013) 02 BOM CK 0005
In the Bombay High Court
Case No : Criminal Appeal No. 264 of 2009

Subhash Tukaram Gaikwad	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 06-02-2013

Acts Referred:

Citation : (2013) 6 ABR 1150 : (2013) ALLMR(Cri) 3596

Hon'ble Judges : A.P. Lavande, J;A.B. Chaudhari, J

Bench : Division Bench

Advocate : Nisha Gajbhiye holding for . Dr. U.K. Kalsi, for the Appellant; T.A. Mirza, APP, for the Respondent

Judgement

A.B. Chaudhari, J.—Being aggrieved by the judgment and order dated 18/2/2009, passed by Additional Sessions Judge, Darwha convicting the appellant original accused No. 1 for the offence punishable u/s 302 of Indian Penal Code and sentencing him to suffer imprisonment for life and to pay fine of Rs. 1,000/- (Rs. One Thousand Only) in default to undergo further simple imprisonment for one month and also for u/s 324 of Indian Penal Code and sentencing him to suffer rigorous imprisonment for one year and to pay fine of Rs. 500/- (Rs. Five Hundred Only) in default to undergo further simple imprisonment for fifteen days, the present appeal was filed by the appellant original accused No. 1. In support of appeal, the learned counsel for the appellant made the following submissions:

(A) That the impugned judgment and order passed by the learned trial Court is not based on the correct appreciation of evidence on record and the trial Court has believed the testimonies of the related and interested witnesses, who were examined by the prosecution and who claimed to be the eye witnesses.

(B) The alleged eye witnesses examined by the prosecution were in fact not the eye witnesses and the cross-examination of the said witnesses clearly shows that they could not see the incident proper regarding the alleged assault on the

deceased. Evidence of these witnesses is therefore, liable to be rejected.

(C) This Court ought to re-appreciate the evidence of the said alleged eye witnesses. The statement of alleged eye witnesses were recorded pretty late and for which there is no explanation from the prosecution and therefore, the evidence of these alleged witnesses was tainted with falsity and was liable to be rejected.

(D) In fact, in the cross examination of P.W. 3 Ukanda it is clear that he was not knowing the incident, still the police recorded his statement as eye witness. Thus, the appellant was deliberately involved in the said alleged offence and the alleged eye witnesses were setup by the prosecution.

(E) The prosecution story was required to be rejected because there is an admission from the evidence of the eye witnesses of the prosecution that the deceased was playing game on the mobile phone in the light displayed in mobile phone and if that is so, the question of initiation of quarrel on extinguishing of candle by the son of the appellant did not arise.

(F) The trial Court committed an error in relying upon the forensic evidence namely finding of blood group A on the knife allegedly seized from the appellant when as a matter of fact the blood group of appellant is also A.

(G) At any rate, the trial Court committed an error in convicting the appellant u/s 302 of Indian Penal Code and the offence at the most be one u/s 304-II of Indian Penal Code. The finding of conviction u/s 324 of Indian Penal Code in respect of assault on Madhukar by knife is also illegal since the alleged injury on the person of Madhukar was not at all proved and thus, the trial Court should have acquitted the appellant of the offence punishable u/s 324 of Indian Penal Code.

(H) Though independent witnesses from the village namely the villagers were available, the prosecution chose not to examine them before the trial Court for which no explanation has been offered by the prosecution. Finally, the learned counsel for the appellant prayed for acquittal of the appellant.

2. Per contra, the learned APP for the State/respondent, supported the impugned judgment and order and argued that there are number of eye witnesses to the incident of murder of the deceased Amrut. The appellant inflicted several blows of knife on the vital part of body of the deceased resulting into heavy bleeding and while being taken to the hospital Amrut died. There is ocular evidence to show that P.W. 2 Madhukar - injured is an eyewitness. There is no reason why any fault can be found with the impugned judgment and order. Lastly, the learned APP prayed for dismissal of the appeal.

3. With the assistance of the learned counsel for the parties to this appeal, we have gone through the entire evidence, so also the impugned judgment and order passed by the trial Court. We have also heard the learned counsel for rival parties.

4. At the outset, we find that there are six eye witnesses examined by the prosecution in support of its story. Insofar as evidence of P.W. 3 Ukanda is concerned, the trial Court has chosen not to rely on his evidence. We have carefully perused the evidence of P.W. 3 Ukanda and we are satisfied that the trial Court has rightly refused to rely on his evidence. That apart, there is evidence of P.W. 1 Shankar - complainant in this case, who lodged the first information report. He deposed that he, another witness Nitin Dhoke and the deceased Amrut Dhoke were playing game on mobile phone in light of a candle when Suraj son of appellant came and mischievously extinguished the candle and ran away by abusing him. Thereafter, appellant came on the spot, who also started abusing him. The deceased Amrut asked appellant why he was abusing, whereupon appellant gave a call to Rita and asked her to bring knife, which was brought by her from her house and was given to Shantabai and Shantabai gave it to the appellant. The appellant took that knife and assaulted Amrut on right ribs. Soon P.W. 2 Madhukar came and saw injured Amrut. Appellant Subhash returned back and assaulted Madhukar on his back side by means of knife. Many people gathered on the spot.

5. It is true that in the cross-examination in fact it is brought on record that there is a dispute amongst P.W. 2 Madhukar and the appellant side in respect of marriage of accused Rita because there were differences between her and Madhukar's son Gajanan and that Gajanan and his family members were prosecuted for the offence punishable u/s 498A read with 34 of Indian Penal Code. The omission that Subhash had assaulted the appellant by knife on right side of ribs will not be material omission because the omission is relating to only ribs of right side. After going through the entire cross examination of this witness, we find that the incident proper relating assault by the appellant by knife on the person of the deceased has not been shaken in the cross-examination. On the contrary, first information report lodged by this witness (Exh.-34) corroborates the evidence of this witness. The first information report was lodged at about 23.45 Hrs. and the incident took place at 21.30 Hrs. and the distance from the police station is 4 kilometers. Thus, the first information report was promptly lodged with the police station.

6. The next witness is P.W. 2 Madhukar. He deposed that at relevant time he heard shouts of quarrel and therefore, came out from his house and saw that Amrut was lying on the ground and Subhash was seen at some distance. Having noticed the appellant, the appellant came back from his back side and assaulted on his backside from right side and then the appellant ran away. Thus, strictly speaking this is not a witness who is an eye witness for assault on deceased Amrut but his evidence is useful since appellant was seen by him near Amrut and seeing him, the appellant came back and assaulted him. In the cross-examination, he admitted about the matrimonial dispute and the criminal case pending against him u/s 498A of Indian Penal Code.

7. The next witness is P.W. 4 Janardhan who deposed that at the relevant time

he was resting in his house. He heard shouts of quarrel. Hence he got up and went to the spot of incident where he found that an altercation was going on between the appellant Subhash and Madhukar and Subhash took a knife, given to him by Shantabai and Rita, and assaulted the deceased on his abdomen five times. In his cross-examination he was also asked the questions regarding the matrimonial dispute. In the evidence of this witness there is some discrepancy regarding description of the offence since Madhukar had come later but he stated that Madhukar was the first person to run from the spot and Amrut came later. According to us it will be risky to rely on the evidence of this witness.

8. The next witness is P.W. 5 Kamlabai Dhoke. She deposed that she heard shouts of the quarrel when she was in her house and from there she went out and found that appellant and Amrut were present. Amrut had asked Subhash as to what happened and then appellant called Shantabai and Rita. Shantabai brought dagger and gave it to the appellant and the appellant assaulted the deceased Amrut by giving four to five blows to Amrut who fell on the ground. One blow was also dealt on Madhukar by the same dagger. In her cross-examination we find that about incident of assault on the deceased Amrut by the appellant there is no material discrepancy on the incident proper. We are, therefore, prepared to believe the evidence of this witness P.W. 5 Kamlabai.

9. The next witness is P.W. 6 Nitin Dhoke. He deposed that he, complainant Shankar and deceased Amrut were playing game on the mobile phone in the light of a candle when Suraj extinguished the candle. When asked, Suraj started abusing Amrut and thereafter appellant came and he also abused the deceased Amrut. Deceased Amrut told the appellant that his son had extinguished the candle and why they were abusing. Thereupon appellant called Rita and Shantabai to come with knife. Shantabai brought the knife and gave it to the appellant and then appellant assaulted Amrut by knife. Amrut fell down on the ground. Madhukar came there. The appellant also assaulted on his back by knife. We have seen the cross-examination of this witness. In the entire cross-examination we do not find any material by which the evidence of this eye witness can be discarded. In fact, he is the person who was playing along with deceased and P.W. 1 Shankar and therefore, he is the natural witness. His evidence is consistent insofar as assault by the appellant on the deceased Amrut is concerned and we are satisfied that trial Court has rightly relied on the evidence of this witness.

10. Next evidence relied on by the prosecution is the forensic evidence. It is true that blood group found on the knife was A which is the blood group of appellant Subhash but this by itself cannot be the reason to reject the forensic evidence. It was for the appellant to prove that he suffered injury and that is why blood group A was found on the knife. Therefore, the burden shifted on the appellant to prove that he was injured and that is why blood group A was found. We also do not agree with the submission made by the learned counsel for the appellant that the same set of evidence, by which Shantabai and Rita was acquitted by the trial

Court, should have been utilized for acquitting the appellant. We have gone through the evidence as well as reasons adopted by the trial Court for acquitting Shantabai and Rita. The evidence relating to Shantabai and Rita about bringing knife and handling the same to the appellant has been found to be discrepant and therefore, acquittal of Shantabai and Rita cannot have any impact on the finding of conviction recorded by the trial Court in respect of assault on Amrut. The next submission that the eye witnesses are related and interested witnesses therefore, their testimonies should be rejected equally does not appeal to us. It is trite law that the testimony of interested or related witness is not to be rejected only on that score if the evidence of related or interested witness is to be found above board and inspires the confidence. The fact that they are relatives or interested witnesses should not affect their credibility. In the instant case we have carefully perused the evidence of the witnesses, which we have relied upon namely P.W. 1 Shankar, P.W. 5 Kamlabai and P.W. 6 Nitin. The evidence of other eye witnesses does not inspire confidence as found by us.

11. The next question is what offence is constituted upon the evidence discussed by us above. We find that the deceased suffered following injuries.

(1) Stitched stab wound present over left inguinal region, oblique, linear, 5 stitches in situ, blood oozing, on removal of stitches 4 c.m. x 2 c.m. x cavity deep, margins clean cut, gaping present, directed upwards, inwards, medially, underlying vessels cut, mesentery cut, reddish.

(2) Stitched stab wound present over lower back on left side at the level of L1 vertebra, oblique, blood oozing, 3 stitches in situ, on removal of stitches, 4 c.m. x 2 c.m. x muscle deep, directed inwards, upwards medially, gaping present, reddish, margins clean cut.

(3) Stitched stab wound present over left lumbar region, oblique, two stitches in situ, on removal of stitches 3 c.m. x 2 c.m. x cavity deep. Directed inwards medially, gaping present, margins clean cut, reddish.

(4) Stitched stab wound present over posterior aspect of right thigh in upper part, 6 stitches in situ, on removal of stitches, 7 c.m. x 3 c.m. x bone deep, margins clean cut, blood oozing out, reddish.

(5) Stitched stab wound present over anterolateral aspect of left thigh, 4 stitches in situ, on removal of stitches 5 c.m. x 2 c.m. x muscle deep, margins clean cut, gaping present, blood oozing out, reddish.

Perusal of the injuries clearly shows that the assault by means of knife was made on the lower portion of the body and the appellant never chose the vital portion of the body i.e. the upper portion of the body. The background facts and evidence show that quarrel initiated between the deceased and the appellant was regarding extinguishing of candle and exchange of abuses. It can, therefore, be said that there was a sudden quarrel between the deceased and the appellant and Madhukar also, and in that process, the appellant assaulted the deceased.

We have already found that the injuries were made on the lower part of the body and the stab wounds resulted into cutting of blood vessels of the lower part of the body and due to excess flow of blood the deceased Amrut died due to shock and haemorrhage. We, therefore, do not find any preparation on the part of the appellant to commit murder of Amrut. We, however, find that the appellant inflicted five blows on the lower part of the body of Amrut with full knowledge that he will cause death of the deceased. In our opinion, therefore, no offence of murder but the offence u/s 304-I of Indian Penal Code would be made out. The rigorous imprisonment for 10 (ten) years would sub-serve the interest of justice. In the result, we make the following order.

ORDER

- (i) Criminal Appeal No. 264/2009 is partly allowed.
- (ii) The impugned judgment and order convicting the appellant for the offence punishable u/s 324 of Indian Penal Code is confirmed.
- (iii) The impugned judgment and order convicting the appellant for the offence punishable u/s 302 of Indian Penal Code committing murder of deceased Amrut is set aside. Instead, the appellant is held guilty of the offence punishable u/s 304-I of Indian Penal Code and is sentenced to undergo rigorous imprisonment for a period of 10 (ten) years with a fine of Rs. 10,000/- (Rs. Ten Thousand Only), in default of payment of fine further to undergo rigorous imprisonment for a period of 1 (one) year.
- (iv) The appellant is entitled for set-off the period of detention already undergone u/s 428 of Code of Criminal Procedure.