

(2012) 12 BOM CK 0092
In the Bombay High Court
Case No : Criminal Appeal No. 53 of 2006

Subramani Mandar Konar Convict Prison No. C.3302,
Kolhapur Central Prison, Kalamba, Dist. Kolhapur and A.
Maharaja Armogam Tevar Convict Prison No. C.3303,
Kolhapur Central Prison, Kalamba, Dist. Kolhapur

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 10-12-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2013) 1 BomCR(Cri) 450

Hon'ble Judges : V.M. Kanade, J;P.D. Kode, J

Bench : Division Bench

Advocate : Abhishek R. Singh, for the Appellant; P.P. Shinde APP for the State,
for the Respondent

Final Decision : Dismissed

Judgement

P.D. Kode, J.—By the present appeal, the appellants have challenged the judgment and order delivered on 29th August, 2005 by Addl. Sessions Judge, Brihan-Mumbai in Sessions Case No. 716 of 2002 convicting them for in furtherance of their common intention of committing murder of Mayadi Sohैया Konar (hereinafter referred as "deceased"). By the said judgment each of them was sentenced to suffer imprisonment for life and to pay fine of Rs. 1,000/- and in default of payment of fine to suffer R.I. for one month. The said prosecution has arisen out of charge sheet filed by P.W. 9 PI - Mr. Desai of Parksite police station as a result of investigation of C.R. No. 28 of 2002 registered upon First Information Exhibit-8 lodged by rikshaw driver at the said police station on 21st February, 2002 at 9.45 hours regarding incident occurred on same date at 9.30 am. According to the prosecution P.W. 4 - Pechiamma and P.W. 5 - S. Puludiyar had photographed their daughter P.W. 6 - Shivlaxmi about four months prior to occurrence of the incident. The appellant no. 1 had painted house of P.W. 4 and P.W. 5 at Bhandup (W), Mumbai. Since then the photograph of P.W. 6 was

missing from said house. P.W. 4 and P.W. 5 doubted of appellant no. 1 having taken away photograph of P.W. 6. The deceased - Mayadi, son of brother of P.W. 4, residing near the house of P.W. 4 was working in office of courier service at Borivali. He often used to visit house of P.W. 4. P.W. 5 asked the appellant no. 1 for photograph of P.W. 6 from, however, he refused and thereon quarrel had ensued in between appellant no. 1 and P.W. 5 and appellant had then beaten P.W. 5.

2. The deceased after knowing about said quarrel has asked appellant no. 1 about the assault upon P.W. 5 and thereon appellant no. 1 had assaulted the deceased. P.W. 6 was then attending the school and appellant no. 1 used to chase her while going to the school. P.W. 6 apprised the same to deceased and thereon the deceased questioned appellant and persuaded him not to follow P.W. 6. Thereafter, appellant no. 1 threatened P.W. 6 of causing injury to her and so also to the person who would help her. Thereafter often quarrels used to take place between appellant no. 1 and deceased regarding said missing photograph and chasing of P.W. 6. The appellant no. 1 had beaten the deceased during said quarrels.

3. Appellant no. 2, friend of appellant no. 1 was residing near house of P.W. 4. One week prior to occurrence of main incident both the appellants had a quarrel with the deceased.

4. According to prosecution on 21st February, 2002 as usual the deceased and his neighbour P.W. 2-Shivdas left the house for attending work. After having Darshan at Saibaba temple, they were proceeding towards Kanjur Marg railway station. Both the appellants came at about 8.45 am when they were near dustbin after Mangatram Petrol Pump, crossing Siba Dargha, at L.B.S. Marg. The appellant no. 1 placed his hand on the shoulder of deceased and asked as to what was told by him on that day in Tamily language. At that time appellant no. 2 took out weapon alike sickle and assaulted on neck of deceased due to which deceased sustained injuries and blood sprinkled on the clothes of both the appellants. As the deceased fell on ground P.W. 2 ran away. Surendra - P.W. 1, rickshaw driver while slowly proceeding by his rikshaw on said after reaching Siba Dargha saw two persons assaulting deceased i.e. person wearing green T-shirt and white pant with sickle like weapon deceased upon his neck and deceased attempting to ward blows by raising hands. P.W. 1 by then has reached 10 ft. away from place of incident. After other drivers of rikshaw and pedestrians behind P.W. 1 shouted for catching assailants, they ran away while P.W. 1 rushed to Parksite police station and informed about the assailants running away towards Kanjurmarg police station. P.W. 10-PSI Mrs. Anagha Satavase and P.W. 9 - PI Desai alongwith police staff rushed to place of incident and found that deceased was dead. He was then found wearing Green T-Shirt and White Full Pant and having sustained bleeding injuries on head, neck and fingers. The police telephoned to the relations of deceased i.e. P.W. 4. on receiving said phone message she went to Dargha by rickshaw and identified that deceased was her

relative Mayadi. P.W. 10 recorded the complaint Exhibit-8 of P.W. 1 and thereon crime for offence u/s 302 readwith 34 of IPC was registered. After completing the investigation of the crime registered P.W. 9 filed chargesheet against the appellants for commission of offences of murder of Mayadi in 31st Court of Metropolitan Magistrate, Mumbai which court in its turn committed the said case to Court of Sessions.

5. Both the appellants pleaded not guilty to the charge for offence of murder framed against them.

6. The prosecution examined in all ten witnesses at the trial i.e. in addition to witnesses so far referred panch P.W. 3 - Samastin Reddy regarding memorandum panchnama Exhibit-14 of the statement made by appellant no. 2 on 21st February, 2002 leading to discovery of concealed weapon and drawing of discovery panchnama Exhibit-15 at the place to which appellant no. 2 had led P.W. 3 and police party and seizure of said weapon. P.W. 7 - Dr. Vithal Vihurkar regarding post mortem examination of corpse of deceased made by him on 21st February, 2002 at Rajawadi hospital and cause of death of the deceased given by him as "haemorrhage and shock due to multiple incised wounds" as a result of said examination and post mortem notes Exhibit-22 prepared by him. Panch P.W. 8 - Satish Pawar regarding memorandum panchnama Exhibit-26 and discovery panchnama Exhibit-27 dated 24th February, 2002 regarding statement made leading to discovery of sickle wrapped in plastic bag from place to which he had led police party and said seizure of weapon.

7. The defence of both appellants was of total denial and they claimed that they were neither present at the time of incident nor assaulted the deceased.

8. The trial Court after assessment of prosecution evidence in light of criticism advanced on behalf of the appellants came to conclusion that the prosecution has established deceased Mayadi having met with homicidal death. It also came to the conclusion that both the appellants in furtherance of their common intention had assaulted Mayadi with sickle and committed his murder on the date, time and place as claimed by the prosecution and consequently both the appellants having committed offence punishable u/s 302 read with 34 of IPC. In consequence of such finding arrived the trial Court convicted both the appellants and sentenced them as described earlier

9. Both the sides after taking us through the evidence adduced at the trial made exhaustive submissions thereon. It is crux of the submissions of learned counsel for the appellants that the trial Court manifestly erred in accepting the evidence of P.W. 1 and P.W. 2 inspite of same being full of infirmities as canvassed by him. It was urged that the evidence of both said witnesses and/or atleast particularly the identification made by them of the appellants as the assailants do not inspire confidence and should have been rejected by the trial Court. He further urged that after discarding said evidence the remaining evidence adduced by the prosecution pertaining to the motive possessed by appellant no. 1 also does not

inspire confidence or atleast does not establish that either appellant no. 1 was having sufficient motive for committing the offence of murder or even appellant no. 2 any motive to commit such crime. It was urged that due to infirmities pointed out from their evidence pertaining to alleged discovery and seizure of weapon at behest of appellants and/or regarding seizure of their clothes apart from not inspiring the confidence even otherwise was not sufficient to arrive the conclusion of guilt of the appellants as erroneously arrived by the trial Court. It was thus canvassed that the appeal preferred by the appellants deserves to be allowed by acquitting them or atleast benefit of doubt deserves to be given to them.

10. On the other hand learned A.P.P. supported the judgment delivered by the trial Court. He submitted that considering evidence of eye witnesses as whole the infirmities tried to be highlighted are of insignificant nature and does not shake the core of testimony of the appellants being the assailants involved in assaulting the deceased by means of sickle/knife. He urged that apart from the evidence of both eye witnesses corroborating evidence of each other; other evidence also corroborated their evidence i.e. evidence adduced by the prosecution in shape of nature of injuries sustained by the deceased as deposed by P.W. 7 and recovery of blood stained weapons as sequel to the statement leading to said discovery as established by the prosecution through the evidence of panch witness P.W. 3, P.W. 8 and P.W. 9 - Investigating Officer. It was urged that the prosecution has also established that blood group of appellant no. 1 was "A" and appellant no. 2 was "AB" and that of deceased was "B" and blood of group of deceased was found upon the weapon's discovery seized as well as clothes of the appellants. He urged that the trial Court committed no error in accepting the evidence of eye witnesses and other prosecution evidence and coming to the conclusion of guilt of the appellants and convicting and sentencing them. It was urged that there are no merits in appeal preferred and same deserves to be dismissed.

11. We have given thoughtful consideration to exhaustive submissions advanced by both the parties of which summary is narrated hereinabove and carefully considered the record and proceedings to ascertain merits from the same.

12. After carefully taking into consideration the evidence of P.W. 7 Dr. Vihurkar who had performed post mortem examination upon the corpse of deceased at Rajawadi hospital on 21st February, 2002 and particularly about 19 ante mortem injuries noticed by him upon corpse of deceased and cause of death given by him and further evidence in shape of inquest panchnama Exhibit-19, scene of offence panchnama Exhibit-28 not disputed by appellants and that of Investigating Officer - P.W. 9 regarding place at which corpse of Mayadi was lying i.e. place at which investigating officer alongwith police party reached after receipt of information from P.W. 1, leads no doubt of the prosecution having established the deceased met with homicidal death. Hence no fault can be found regarding such finding the arrived at by the trial Court.

13. Now considering the moot question involved in this appeal i.e. whether

appellants were responsible for causing said 19 injuries to the deceased which has resulted in death; the evidence of eye witnesses P.W. 1 and P.W. 2 is apparently of immense importance. Out of them, the glance at evidence of P.W. 2 reveals that on relevant day he was accompanying the deceased when incident in question had occurred. He has deposed sketchy account of events which had occurred on said day upto occurrence of main incident. He has given graphic account about the part of main incident witnessed by him and particularly appellant no. 2 having taken out knife and assaulted the deceased on neck after appellant no. 1 placing his hand upon shoulder of deceased was asking him as to what deceased had said on the said date in Tamil language. He further deposed about the deceased collapsing and thereafter having seen appellant no. 2 continuing to assault deceased with weapon like sickle/knife. He further deposed about sprinkling of blood on his shirt and also upon clothes of accused persons and deceased bleeding profusely. He further deposed that thereafter he crossed the road and went to other side of the road for escaping from the spot. His deposition reveals that he had returned home due to fear instead of going to Kanjur marg station and on the way had washed his shirt at water tap and thereafter having proceeded to his house. He categorically deposed that to query made by his mother he told of having returned to take up railway pass which he had forgotten to carry while going for the work. He further deposed that he had not told her about the incident due to fear. His evidence reveals that thereafter he had been to Bhandup railway station for going to work and returned home at 7 pm and learnt about the deceased having succumbed to injuries. He deposed that he was too much scared and even did not think of approaching police. His evidence reveals that on same day he told about incident occurred to his mother and his mother told him necessity to inform the police. He also deposed of knowing appellant no. 1 prior to the incident as appellant no. 1 had carried work of painting at his house. He also deposed of having seen appellant no. 2 at the place of incident. He identified the photograph Art. 10 shown to him containing photograph of P.W. 2 - Shivilaxmi and of appellant no. 1. However, he claimed ignorance about quarrel in between appellant no. 1 and deceased prior to incident or about objectionable relationship of P.W. 6 and appellant no. 1. He deposed about the deceased having worn green colour T-Shirt and green colour jeans pant i.e. Art. 5 and Art. 7 and Art. 8 chappals at the time of incident. However, he was unable to identify Art. 10 and 11.

14. The close scrutiny of evidence of P.W. 2 in light of answers elicited during cross examination do not reveal core of his testimony regarding manner in which incident had occurred was shaken in any manner. He was also candid in stating that his statement was recorded three days after the incident when he was called at the police station. Learned counsel by laying finger upon said aspect vehemently contended that though P.W. 2 claimed of accompanying the deceased, the sanctity of said claim is taken away by his conduct of not immediately rushing to police station or not even informing his mother after returning home. Now considering the answers given by P.W. 2 during cross

examination and the incident which was witnessed by him, we do not find that his claim that he was scared due to occurrence of such ghastly incident was shattered during the cross examination. Resultantly, merely because of the said aspect or himself having not approached to police on same day or upto he was called by police cannot wipe out the claim staked by him of the appellants being person involved in the incident and out of them he had seen appellant no. 2 assaulting the deceased on neck and thereafter on his person by means of weapon like sickle/knife. Needless to add that close scrutiny does not reveal that foundation of his said claim of then accompanying deceased and hence having seen part of incident is shaken in any manner. Similarly, merely because he admitted that he had seen appellant no. 2 after the incident only in the court by itself is not sufficient to discard his claim regarding identity of appellant no. 2. No doubt his said claim being not corroborated by prior identification of appellant no. 2 made by him in test identification parade impairs to some extent his claim regarding identity of appellant no. 2, still his evidence regarding the manner in which incident had taken place, involvement of two persons i.e. appellant no. 1 and other and having seen other person assaulting deceased is not at all shaken in any manner.

15. Now considering the evidence of other eye witness P.W. 1, who had lodged first information report Exhibit-8, his evidence reveals the same being more so in consonance with the matters narrated by him while lodging F.I.R. Without reciting every aspect from his evidence it can be safely said that his evidence reveals that he had observed incident occurred from the close distance of 10 ft. away from place of incident, and he has seen entire incident i.e. even the part which could not be seen by P.W. 2, who has to escape midway from place of spot. The evidence of P.W. 1 reveals that he had identified both the appellants as assailants and narrated the role played by each of them i.e. assault made by them upon the deceased. The conduct of P.W. 1 after the incident as disclosed from his evidence is consistent with the fact of having witnessed such incident i.e. of rushing to police station and informing P.W. 9 and 10 and bringing them at the spot. His evidence is also duly corroborated by the matters stated in FIR Exhibit-8 promptly lodged by him. Without unnecessarily reciting each of answer given by P.W. 1 during cross examination it can be safely said that hardly any material surfaced on the record dislodging the reason for which he happened to be near to place of incident and observed the incident. His evidence also reveals that he had attended test identification parade at Thane jail and police had not shown him accused persons either in the police station or participated in parade which was held in Thane jail. Thus, hardly anything has come on record for doubting claim staked by P.W. 1 and on the contrary his evidence apart from being supported by FIR lodged by him is also found corroborated by the evidence of P.W. 2.

16. Learned counsel for the appellant tried to assail the evidence of P.W. 1 by stating that identification of assailants made by him at the trial is not corroborated by the prosecution by examining the S.E.M. who is said to have

conducted test identification parade and as such it will be unsafe to rely upon his evidence which lacks such corroboration. The said submission though apparently attractive does not stand to reason as careful scrutiny of evidence of P.W. 1 does not reveal that after the incident he had not seen the assailants and/or identified the assailants for first time only in the court. Having regard to said feature it is difficult to accept relevant submissions canvassed. In the same context it can be added that it is now settled legal position that test identification are primarily held by the Investigating Officer for ascertaining whether investigation is proceeded on right track and identification of the assailants made by the witnesses at such test identification parade being not substantive evidence merely because the evidence of S.E.M. have not adduced at the trial will not impair the evidence of P.W. 1 which otherwise inspires confidence. Needless to add that as observed earlier his evidence is well corroborated by FIR promptly lodged by him and also by the evidence of P.W. 2.

17. Similarly after considering the evidence of P.W. 1 and P.W. 2 in entirety we are unable to accept the submission that they had no sufficient opportunity to see assailants or could have seen only glimpse of them. Needless to add, no support for said submission in their evidence.

18. Thus, considering the evidence of P.W. 1 and P.W. 2 in the light of other evidence on record it can be safely said that the same is duly corroborated by the medical evidence of the doctor P.W. 7 regarding injuries sustained by the deceased. The same is also corroborated regarding the place of occurrence from the matters stated in the admitted documents i.e. scene of offence panchnama Exhibit 28 and inquest panchnama Exhibit-19 as well as evidence of police officer who had rushed at the spot i.e. P.W. 9 and P.W. 10 atleast regarding the date, time and place at which the incident in question had occurred. The further corroboration to the same is found from the finding of human blood at the scene of offence as established by the prosecution from the matters stated in the scene of offence panchnama and particularly sending of samples collected from the spot to chemical analyser through the evidence of P.W. 9 and receipt of C.A. report Exhibit-34 and matters from C.A. report.

19. Thus, considering the said aspect we find it difficult to accept the submission that the trial Court committed any error in accepting the evidence of P.W. 1 and P.W. 2 which is corroborated by the said prosecution evidence hereinabove. Needless to add as cumulative evidence of both the said witnesses duly establishes that appellant no. 1 and appellant no. 2 were persons involved in the incident in which initially the deceased was assaulted by means of weapon like sickle/knife by appellant no. 2 and later on by appellant no. 1 as deposed by P.W. 2. Needless to add that identity of both the said assailants is duly established as a cumulative effect of the said evidence, inspite of fact as pointed out by learned counsel for the appellant that P.W. 2 though then was knowing appellant no. 1 was not knowing appellant no. 2.

20. In addition to the aforesaid testimonies after carefully considering the

evidence of panch witness P.W. 3 and P.W. 8 and that of the Investigating Officer - P.W. 9 we find that by the said evidence the prosecution has duly established that as sequel to the statement made by appellant no. 2 on 21st February, 2002 and further leading P.W. 3 and police party has pointed out to the place at which he had concealed weapon and the same was duly seized by the police i.e. Art. 10. Similarly, on 24th February, 2002 as sequel to the statement made by appellant no. 1 in presence of P.W. 8 and further said appellant having led police to place at which he had concealed sickle and the same was seized by the police i.e. Art. 11. The further evidence of the Investigating Officer P.W. 9 considered alongwith C.A. report Exhibit-31 to 35 duly establishes that on both the said weapons blood of group "B" i.e. that of deceased was found. After careful scrutiny of evidence of said witnesses we do not find that the said evidence was shaken in any manner by the defence. The said evidence also additionally assures the finding of both the appellants being assailants as claimed by P.W. 1 and P.W. 2 and consequently by the prosecution.

21. In the premises aforesaid we are unable to find any substance in the submissions canvassed by learned counsel for the appellant upon evidence of P.W. 2 by laying finger upon decision in case of State of Karnataka Vs. Venkatesh and others, by urging that as in the said case the court has not believed the evidence of witness who had not disclosed the information of crime at the earliest to anyone till 10.11.1978 when murder had taken place on 8.11.1978, on similar reasons. The evidence of P.W. 2 is also liable to be discarded. We are unable to accept the said submission because during discussion made hereinabove we have already found that P.W. 2 though had not immediately rushed to police or not disclosed about the incident immediately to his mother, he had disclosed about the incident to his mother in the same night after he had returned to the house. Since the evidence of witness is to be appreciated as a whole and by the said process we find that evidence of P.W. 2 inspire confidence, merely because of such facet pointed out, we are unable to accept the submission that due to the same his evidence is liable to be discarded.

22. Similarly, learned counsel for the appellants by placing reliance upon decision in case of Satrik Alias Rony Rozario Meneze Vs. State of Maharashtra reported in 2008 (11) L.J. Soft (URC) 106 and particularly the observations made in paragraph 13 of the said judgment to the effect that no attempt was made to find if there were any finger prints on the knife which if done could have been used against the accused as tried to be canvassed. It was urged that in the instant case also the Investigating agency had not made any attempt to collect finger prints from any place or from weapon which could have afforded better evidence for ascertaining whether the appellants were culprits or otherwise. As a matter of fact before accepting the said proposition that is failure on the part of Investigating Officer to collect finger prints it was necessary for defence to question him then only the said aspect which is related to his conduct could be taken into consideration. After considering evidence of P.W. 9 we find that no such attempt was made. Hence we are unable to find any substance in such

criticism advanced or further criticism that even no attempt was made to make DNA test for fixing identity of the appellants. In the said context we hasten to add that at criminal trial, quality of evidence being material and not quantity, if upon evidence adduced, if conclusion of the guilt can be safely arrived then merely because certain evidence was not attempted to be collected cannot be said to be legitimate ground for doubting otherwise convincing evidence surfaced to the trial. Needless to add that even the Investigating Officer was not questioned by the defence before advancing such submissions for laying foundation for the same. In the premises aforesaid we are unable to find any fault with the finding of guilt of the appellants being arrived by the trial Court and consequent conviction of the appellants for the offence of murder and imposition of sentence for the same. Thus, we do not find any merit in the appeal and dismiss the same.