
(2011) 01 BOM CK 0151
In the Bombay High Court
Case No : Criminal Appeal No. 229 of 2003

Sudhakar Vardhe

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 25-01-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 148, 149, 302

Citation : (2011) 01 BOM CK 0151

Hon'ble Judges : A.H. Joshi, J;A.B. Chaudhari, J

Bench : Division Bench

Advocate : V.G. Bhamburkar, in Criminal Appeal No. 229/2003, Shashank Manohar, in Criminal Appeal No. 164/2003, J.Y. Ghurde, in Criminal Appeal Nos. 204/2003 and 614/2008 and C.S. Kaptan, in Criminal Appeal No. 244/2003, for the Appellant; M.J. Khan, APP, for the Respondent

Final Decision : Allowed

Judgement

A.B. Chaudhari, J.—Criminal Appeal Nos. 164/2003, 204/2003, 229/2003 and 244/2003 were filed in this Court by the Appellants original accused namely, Jagannath Bhaurao Utane (accused No. 1), Rajesh Jagannath Utane (accused No. 2), Duryodhan Deorao Vardhe (accused No. 3), Babulal Chandumal Vardhe (accused No. 7), Dadarao Chandumal Vardhe (accused No. 9), Sudhakar Awdhoot Vardhe (accused No. 8), Chandu Ramkrishna Vardhe (accused No. 4), Vilas Shrikrishna Vardhe (accused No. 10), Raju Awdhoot Samdure (accused No. 6) and Rameshwar Ganpat Wankhade (accused No. 5) against the judgment and order dated 28.2.2003 in Session Trial No. 249/2000, passed by the IInd Ad-hoc Additional Sessions, Amravati, by which they were convicted for the offence punishable u/s 302 read with Section 149 of the Indian Penal Code and sentenced to suffer imprisonment for life each and to pay a fine of Rs. 2000/- each, in default of payment of fine to further suffer simple imprisonment for three months each, further convicted for the offence punishable u/s 147 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for six months each and to pay a fine of Rs. 500/- each, in default of payment of fine to further

suffer simple imprisonment for one month each and further convicted for the offence punishable u/s 148 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for one year each and to pay a fine of Rs.1,000/-each, in default of payment of fine to further suffer simple imprisonment for two months each.

Criminal Appeal No. 614/2008 was filed by accused Abhiman s/o Arjun Chakre (accused No. 1) and Ganesh s/o Zinguji Wardhe (accused No. 2) against the judgment and order dated 30.06.2008, passed by the 4th Ad-hoc Additional Sessions Judge, Amravati in Session Trial No. 194/2003 by which they were convicted for the offence punishable u/s 147 of Indian Penal Code and sentenced to suffer rigorous imprisonment for two years each and to pay a fine of Rs. 1000/- each, in default of payment of fine to further suffer rigorous imprisonment for three months each, further convicted for the offence punishable u/s 148 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for three years each and to pay a fine of Rs. 1000/- each, in default of payment of fine to further suffer rigorous imprisonment for three months each, and further convicted for the offence punishable u/s 302 r/w Section 149 of the Indian Penal Code and sentenced to suffer life imprisonment each and to pay a fine of Rs. 1,000/-each, in default of payment offline to further suffer rigorous imprisonment for two years each.

As these two Appellants in Criminal Appeal No. 614/2008 were absconding during earlier trial, their trial was separated and after they were arrested, Session Trial No. 194/2003 was conducted.

FACTS:

2. The incident dated 27.6.2000 which took place at Sayat Bhatkuli Road in the night was the subject matter of both the Session Trial Nos. 249/2000 and 194/2003. The earlier Session Trial No. 249/2000 was held after separating the trial of two accused persons namely, Abhiman s/o Arjun Chakre and Ganesh s/o Zinguji Wardhe since they were absconding, but later on their trial was also held vide Session Trial No. 194/2003.

The case of the prosecution as disclosed before the trial Court was that on 27.6.2000 at about 9 to 10 p.m. P.W. 1 -Shivkumar Anandrao Wardhe had gone towards the statue of Dr. Babasaheb Ambedkar in his village. He noticed that the one tube-light from the electric pole near the statue of Babasaheb was not seen, hence, he went to nearby Samaj Mandir and found Jagannath Utane, Rajesh Jagannath Utane, Chandu Ramkrushna Wardhe, Dadarao Chintumanji Wardhe, Duryodhan Deoraoji Wardhe near the hall of the Samaj Mandir. He heard noise and found Vilas Shrikrushna Wardhe, Dinesh @ Raju Samdure and Rameshwar Champat Wankhade removing the glass balls of marble from lotus in the temple. P.W. 1 -Shiv kumar obstructed them but they asked him to mind his own business. Therefore, P.W. 1 Shiv kumar went away, but Rameshwar, Vilas and Dinesh @ Raju held him and caught hold of his shirt collar and also abused him

and was threatened by Jagannath Utane with life. At that time, his cousin, Kashinath Wardhe arrived to whom he told the incident. Thereafter, all of them went to one Sharafat, auto rickshaw driver and proceeded towards Police Station Bhatkuli, where they lodged report of the incident (Exh. 39). While returning back from the police station, they noticed obstruction on the road by means of stones, as a result, the auto rickshaw in which they were travelling was stopped. They saw Rajesh Jagannath Utane and Jagannath Bhanudas Utane on the motorcycle and other persons were in the two auto rickshaws. The persons from auto rickshaws came out with weapon and Jagannath and Rajesh who were sitting on a motorcycle gave a signal to assault. Dinesh @ Raju caught hold the collar of auto driver Shara fat and pulled him down and Rameshwar started assaulting him. Since P.W.1 Shiv kumar got frightened, he and his brother escaped from the auto rickshaw and started running to save their life towards Bhatkuli road. While running, his brother Samadhan was caught by the accused persons, who started assaulting him with sharp cutting weapon and sticks and kicks. P.W. 1- Shiv kumar was running ahead of Samadhan but watching behind. He after running for sometime concealed himself behind the bush and started looking the incident from the bush and found Jagannath was giving kick blows to Samadhan. Raju was giving blows to him with sharp weapon" when Vilas, Sudhakar and Chandu were giving him blows with stick and iron pipe. Rameshwar was beating with sticks. The second group of the accused persons namely, Rajesh Utane, Dadarao Chantumanji Wardhe, Babulal Chantumanji Wardhe, Ganesh Zinguji Wardhe, Duryodhan Wardhe, Abhiman Chakre were hurling abuses and were saying that his brother Samadhan should be killed and thereafter they left the deceased injured. P.W.1 Shiv kumar reached his house and narrated the incident to his brother Mohan Wardhe, Subhash Sheshrao Ingle, Kashinath kisanrao Wardhe, Bhimrao Ukardaji Wardhe and they went to the site of the offence, who found that Samadhan was in dead condition. All of them then went to Bhatkuli police station and lodged report (Exh.40). After investigation, charge sheet was filed and the trials proceeded. All the accused persons denied the charge framed against them. The trial Court thereafter heard the evidence and parties and made the impugned judgments, convicting the Appellants.

SUBMISSIONS:

3. In support of the Criminal Appeals, various Counsel for the parties in these appeals made the following submissions.

(i) Vide Exh.39 and 40, reports lodged to the Police Station Bhatkuli by P.W. 1 Shiv kumar, claim was made that the first incident reported under Exh. 39 was seen by Shriram Wardhe and Kashinath Wardhe, while claim was made in respect of the incident i.e. incident of murder that P.W. 1 Shivkumar had narrated the incident of murder immediately after its occurrence to Mohan Wardhe, SuhashIngle, Kashinath Wardhe (cousin) and Bhimrao Wardhe. The prosecution examined P.W. 5 Bhimrao Urkad Wardhe, who turned hostile, but the prosecution did not at all examine other persons, who were eventually closely related to P.W.

1 Shiv Kumar. P.W. 6 Sharafat khan, auto rikshaw driver, an independent witness was examined, but he turned hostile. Thus, the entire prosecution case rested only on a single and sole testimony of P.W. 1 Shiv Kumar, who was an interested witness, actively involved in the previous background of the alleged political rivalry told by him. Therefore, the testimony of this witness P.w.1 Shiv Kumar is required to be rejected outright.

(ii) The omissions amounting to contradictions in the evidence of P.W. 1-Shiv Kumar if carefully seen go to the root of the prosecution story and affects the quality of evidence of P.W. 1 Shiv Kumar and therefore, his testimony is required to be rejected since his testimony is full of omissions and contradictions.

(iii) Admittedly, the time of incident is said to be in the midnight and P.W. 1-Shiv Kumar claimed to have been running fast to save his life for about seven minutes. His tall claim about being an eye witness in the dead night hours while running for his life has to be rejected. His further claim that the injuries were caused by sharp weapons is falsified and is in contradiction with the medical evidence which shows no injuries caused by any sharp weapon.

(iv) The version of P.W. 1-Shiv Kumar is clearly falsified since there are only six injuries on the person of the deceased as per post mortem report. It is difficult to believe that when 12 accused persons had assaulted by various weapons for quite sometime, there would be only six injuries.

(v) The testimony of P.W. 1 -Shiv Kumar does not find corroboration anywhere and there is no explanation whatsoever tendered by the prosecution as to why his other relatives who were the witnesses, according to him, as mentioned in F.I. Rs. (Exh. 39 and 40) were not examined before the Court.

(vi) The accused persons who are said to have only abused cannot be said to be the members of unlawful assembly and therefore, the conviction of all accused persons recorded by the trial Court in both the session trials is illegal, contrary to law and at any rate the Courts below ought to have extended benefit of doubt to the accused persons. The learned Counsel for the Appellants, therefore, prayed for acquittal.

4. Per contra, learned A.P.P. for the Respondent State in all appeals opposed the criminal appeals filed by the Appellants and argued that it is not necessary to reject the testimony of sole eyewitness P.W.1 -Shiv Kumar merely because he happens to be interested witness or the brother of the deceased. The Courts below have in both session trials carefully assessed the evidence of P.W. 1 Shiv Kumar and have come to conclusion that P.W. 1 Shiv Kumar was reliable, trustworthy and natural witness. There is no reason why his testimony should be rejected and nor there is any reason why insistence for corroboration of his evidence by any other witness should be made. The Courts below have marshalled the evidence in entirety and having found no loopholes in the evidence of prosecution have rightly convicted the Appellants in both sets of appeals. Learned A.P.P. prayed for dismissal of all these appeals and urged this

Court to maintain the conviction of all the Appellants.

CONSIDERATION:

5. We have heard learned Counsel for the parties at length and we have also carefully perused the record and proceedings of the Courts below. There is no doubt in our mind that the conviction can be based on the sole testimony of witness notwithstanding that such witness is an interested witness or witness related to the deceased and in this case the brother. There is no need to highlight this aspect any more. In the instant case, however, we are required to examine the truthfulness of the testimony of P.W. 1 Shiv Kumar in accordance with law and the settled principles of law in the matter of appreciation of evidence after marshalling the evidence. In this view of the matter, we have decided to carefully scan the testimony of P.W. 1 Shiv Kumar to find out whether the prosecution has proved its case beyond reasonable doubt and whether the conviction can be upheld.

6. It is seen from the oral report (Ex.39) that was initially lodged by P.W. 1 Shiv Kumar that Shriram Wardhe and Kashinath Wardhe(cousin)his relatives had witnessed the said earlier incident and had saved the life of P.W. 1 Shiv Kumar. Similarly, Mohan Wardhe, Subhash Ingle, Kashinath Wardhe (cousin) and Bhimrao Wardhe were the witnesses to whom he had immediately narrated the incident of murder on the fateful night and he had gone to lodge the report (Exh.40)along with them to Police Station in the dead hours of night after all of them had visited the place where the dead body was lying. The prosecution examined P.W. 5 -Bhimrao Wardhe and an independent witness P.W. 6 Sharafat Khan Shabbir Khan Pathan but both of them did not support the prosecution story. Other witnesses namely, Shriram Wardhe, Mohan Wardhe, Subhash Ingle and Kashinath Wardhe were not examined by the prosecution, who were important witnesses on reports Exh.39 and 40 and even the incident of murder which was told to them by P.W. 1 Shiv Kumar. No explanation is coming forth from the prosecution as to why these witnesses were not examined by the prosecution. It would not have been necessary for the prosecution to examine these witnesses but it became expedient from the prosecution to do so because we find that the evidence of P.W. 1 Shiv Kumar cannot be believed as a sole testimony to the incident of murder for the reasons which we would indicate later. It is in this background, we find that the examination of these witnesses by the prosecution was most essential and their non-examination is a factor which shakes the prosecution story.

7. Upon reading of the testimony of P.W. 1 Shiv Kumar at the outset, we find that according to him, it was midnight when he and Samadhan Wardhe were coming back after lodging report to the Police Station Bhatkuli at Bhatkuli Sayat road. When their auto rickshaw was obstructed by the stones placed on the road, Rajesh Utane and Jagannath Utane were on motorcycle, while other persons, who were in the two auto rickshaws came out of the auto rickshaws with weapons. He has not named who were the other persons. That Rajesh Utane and

Jagannath Utane had given signal to the other accused persons that they should assault is an omission in the report (Exh. 66). In substantive evidence he has not made clear as to signal was given to assault whom and the manner in which signal was given. Whether signal was given by them by shouting or by hands or by other mode of expression is not at all stated by him. In our opinion, in respect of Jagannath Utane and Rajesh Utane this is a very material deficiency or lacuna with the prosecution as no other role is attributed to them. As to the first incident under Exh. 39, the presence of Jagannath Utane and Rajesh Utane near Samaj Mandir on the platform -"Ota" is also an omission in the report (Exh. 39) so also the life threat given to him by Jagannath Utane. In the cross-examination, he stated that even before commencement of incident of assault on Samadhan Wardhe he and Samadhan Wardhe started running for their life and P.W. 1 Shiv kumar was ahead of Samadhan and when Samadhan was caught, he found that Samadhan was being assaulted by those persons following them. P.W. 1 Shiv Kumar was running for seven minutes for his life. It is not difficult for us to come to the conclusion that P.W. 1 Shiv kumar must have run more than half kilometer as he had run for seven minutes that too for saving his life, when some people were chasing him, whose names, he has not given. He then claimed that he took shelter behind a bush and watched the incident of murder there from i.e. after he stopped running. During investigation, no attempt was made by the Investigating Officer to locate the bush from which P.W. 1 Shiv kumar claimed to have seen the incident after he stopped running, nor there is any whisper about it or the details about it anywhere in the spot panchanama or in the substantive evidence of any of the witnesses. It is not possible for us to believe that after running for seven minutes for more than half kilometer in the dead hours of night at 1.30 a.m. by sitting behind the bush he had seen the entire incident of murder. This appears to be highly improbable and all the more so because he stated thus in his cross-examination about his eye sight.

If the figure is at long distance I cannot tell whether it is of human or an animal. But if the figure is nearer I can say whether it is of human or animal. From the close figure I cannot tell whether it is of a male or female.

8. It is then seen from his cross-examination that according to him sharp edged weapons were used. We quote relevant portion from his cross-examination dated 3.8.2002.

All persons were having sharp edged weapons. Knife, sword, axe, battle axe, spear are sharp edged weapons. It is true that by sharp edged weapons as above the persons had assaulted my brother and committed his murder.

9. From the above evidence it is clear that P.W. 1 Shiv Kumar claimed that sharp edged weapons described by him were used by the assailants. However, we find from the evidence of P.W. 9-Dr. Iqbal Yusuf Baig that following injuries were found.

(1) Fracture to be a and fabula of right leg lower 1/3 knee joint, femur shaft middle.

(2) Left leg: fracture to be a fabula upper 1/3 with lacerated wound on middle aspect of leg upper 1/3, size 1/2 cm. x 1/2 cm. deep muscle. Lacerated wound on middle aspect of leg on middle 1/3, size 1/2 cm x 1/2 cm. deep muscle.

(3) Lacerated wound on middle toe tip, size 1 cm. x 1/2 cm. deep muscle.

(4) Right upper limb forearm -Fracture radius ulna lower 1/3, Fracture radius ulna upper 1/3.

(5) Right upper limb arm: Fracture humours middle 1/3.

(6) Right forearm: Three punctured wound on posterior aspect, size - 1/2 c.m. x 1/2 cm. deep muscle.

(7) Abrasions over right elbow posteriorly, right cheek right infraorbital region, left lateral aspect of fore head.

10. None of the above injuries can be caused by sharp cutting

11. The cumulative effect of all the above circumstances lead us weapons as claimed by him. to believe that the evidence of P.W. 1 Shivkumar is not truthful and it will be risky to base conviction of the Appellants on the sole or singular testimony of P.W. 1 Shiv kumar. In addition, the prosecution did not at all recover any of the weapons from any of the accused persons.

12. The net result of the above discussion is that it is not possible for us to confirm the conviction of the Appellants solely on the testimony of P.W. 1 Shiv kumar in view of the serious discrepancies and truthfulness about his evidence. The prosecution did not rely upon any other evidence except the sole testimony of P.W. 1 Shiv kumar. We, therefore, find that benefit of doubt will have to be extended to the accused persons in accordance with the settled legal principles. For the above reasons, therefore, we make the following order.

ORDER

(i) Criminal Appeal Nos. 229/2003, 164/2003, 204/2003,244/2003 and 614/2008 are allowed.

(ii) All accused persons in Criminal Appeal Nos. 229/2003, 164/2003, 204/2003, 244/2003 and 614/2008 are acquitted.

(iii) Accused persons, who are in jail, be set at liberty forthwith.

(iv) Bail bonds of accused persons, who are on bail, hereby stand cancelled.