
(2008) 10 BOM CK 0094
In the Bombay High Court
Case No : Criminal Appeal No. 355 of 2003

Sunil Bhagwan Bhende (Now in Jail)

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 10-10-2008

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 143, 147, 148, 149, 302

Citation : (2008) 110 BOMLR 3484

Hon'ble Judges : K.J. Rohee, J; A.P. Bhangale, J

Bench : Division Bench

Advocate : R.B. Gaikwad, in Criminal Appeal No. 355 of 2003 and R.M. Sambre, in Criminal Appeal Nos. 366 and 402 of 2003, for the Appellant; S.S. Doifode, APP, for the Respondent

Final Decision : Allowed

Judgement

A.P. Bhangale, J.—By these appeals, judgment and order passed by 2nd Ad-hoc Additional Sessions Judge, Yavatmal on 23.4.2003 convicting the appellants (original accused Nos. 1, 2, 4 and 5) for an offence punishable u/s 302 read with Section 34 of the Indian Penal Code and sentencing each of them to suffer imprisonment for life and to pay a fine in the sum of Rs. 1000/-, in default, to suffer simple imprisonment for three months, is under challenge. Since all the three appeals are arising out of one and the same sessions trial, they are being disposed of by this common judgment.

2. Briefly stated prosecution case is as under:

On 21.9.2000 first informant Ganesh Deshmukh (PW 4) had reported to Police Station, Yavatmal about the incident dated 19.9.2000 of quarrel between Manda (sister of first informant) with A-1 Sunil on account of dispute between children. According to Manda, she went to City Police Station, Yavatmal to report against sunil, but police had not taken cognizance of her report and then she informed

her brother Ganesh. On 21.9.2000 at about 06.00 pm complainant was informed by his nephew Gopal at ST Stand that A-1 Sunil with his 5-7 friends, went to the house of Manda, quarreled with her and abused her. PW 4 Ganesh with his brother Dinesh went to Pimpalgaon by scooter. While on the way A-1 Sunil and his 7-8 associates stopped them. A-1 Sunil assaulted the complainant by fist blow. A-1 Sunil had also knife in his hand and his associates were armed with sticks in their hands. Dinesh was also beaten and felled. PW 4 Ganesh was assaulted on stomach by A-1 Sunil by means of knife. PW 4 Ganesh was also assaulted by blow on his chest and on right shoulder. Dinesh died on spot.

3. Crime was registered vide No. 484/2000 at City Police Station, Yavatmal under Sections 143, 147, 148, 302 read with Section 149 of the Indian Penal Code and Section 135 of the Bombay Police Act. Investigation followed. Inquest over dead body was held at Main Hospital, Yavatmal. Investigating Officer API Dambelkar (PW 13) visited spot and prepared spot panchanama. Weapon knife was recovered at the instance of A-1 Sunil. Razor was recovered at the instance of A-2 Santosh. Upon completion of investigation, charge- sheet was filed in the Court of Chief Judicial Magistrate, Yavatmal who committed the case being Sessions Trial No. 41 of 2001 to the Court of Sessions at Yavatmal. Charge was framed on 5.8.2002 (exhibit 97). The appellants had denied it and claimed trial.

4. The prosecution examined fifteen witnesses and also relied upon documentary evidence to substantiate its version.

5. Trial Court placed reliance upon direct evidence as deposed by PW 4 Ganesh and PW 5 Ravindra as also documentary evidence led by the prosecution. The trial Court believed prosecution case to the extent that A-1 Sunil, A-2 Santosh, A-4 Bandu @ Suraj and A-5 Anil had in furtherance of their common intention murdered Dinesh on 21.9.2000 at village Pimpalgaon, District Yavatmal.

6. The defence counsel do not dispute that victim Dinesh met with homicidal death considering medical evidence as deposed by PW 14 Dr Wankhede and PW 15 Dr Ramteke.

7. In support of the appeals, it is submitted on behalf of the appellants that the trial Court ought not to have relied upon evidence as to seizure of clothes of Sunil (A-1), Santosh (A-2), Bandu (A-4) and 6 Anil (A-5) as PW 11 Shankar Dhore admitted that police had prepared all the panchanamas on the same day and further more, clothes were not removed from the person of the accused in his presence. The clothes were lying in the Police Station and Investigating Officer told him that the clothes were belonging to accused. Police had seized only one stick in his presence. His signature was not obtained on chit which was affixed on stick (in token of seizure). Within one and half hours entire panchanamas were prepared by the police. The defence counsel pointed out that panchanamas in respect of which PW 11 Shankar deposed were purportedly drawn on different dates from 21.9.2000 to 24.9.2000 and not on the same day. If PW 11 Shankar had signed them on same day, then in view of admissions in

the course of cross-examination, grave doubt is created about genuineness of the panchanamas at exhibits 139 to 151. Learned Counsel further contended that PW 4 Ganesh, who is brother of victim, was interested witness. He admittedly did not know A-1 Sunil Bhonde prior to the incident and he stated before police that Sunil Bhonde came along with 7-8 persons by guess. He also admitted that after 5 6 days of arrest of accused police called him in the Police Station and asked him to identify Sunil Bhonde in the lock-up when he was along with other accused. Thus, identification parade held at City Police Station, Yavatmal was farcical. Another eye witness is PW 5 Ravindra, a 15-Year old boy and a rickshaw puller. In the course of cross- examination, he stated that he had seen incident occurred near tube well, but he does not know anything as to what happened prior to that. He also stated that about 50 persons had assembled on the spot of village Pimpalgaon, but he cannot tell their names. Since PW 5 Ravindra stated that the incident occurred at about 07.00 p.m. on 21st September, the trial Court ought to have considered the fact of darkness and visibility at the time of incident at about 07.00 p.m. in the month of September at village Pimpalgaon. Our attention is invited to oral report lodged by PW 4 Ganesh which is at exhibit 121 and time mentioned as 7.00 o'clock in the night. Learned Counsel for defence contended that the omissions admitted by PW 5 Ravindra from his earlier statement recorded by police were material to indicate the substantial improvements made by PW 5 Ravindra in his version before the trial Court. The defence counsel also criticised the prosecution case on the ground that genesis of the alleged occurrence of quarrel between Manda and accused was suppressed as prosecution did not examine Manda as witness though her evidence was essential. No report is produced about alleged chilly powder used at the time of incident. Thus, learned defence counsel contended that the presence of the alleged eye witnesses -PW 4 Ganesh and PW 5 Ravindra at the time of incident is extremely doubtful and their version of the incident is not reliable. The prosecution also did not make any attempt to ascertain that knife (weapon of offence) allegedly recovered was stained with blood of the same group as that of the deceased. The investigating agency did not hold test identification parade when eye witness Ganesh admittedly did not know accused. The defence counsel also submitted that the appellants were not questioned in their statement recorded u/s 313 Cr.P.C. about blood stained clothes and about C.A. Report mentioning about finding human blood thereupon.

8. Learned Addl. Public Prosecutor, on the other hand, submitted that judgment and order passed by the trial Court is correct and proper.

9. Having given our anxious and thoughtful consideration to the rival submissions and evidence appearing in the matter, we hold that investigating agency ought to have conducted test identification parade to ensure that investigation was on proper lines. In our opinion that test identification parade held at Police Station while accused are in lock-up with every chance of witnesses having seen the accused before such identification test renders identification totally useless. If the eye witnesses did not know the appellant-accused prior to the incident, it

was necessary for investigating officer to hold test identification parade preferably in jail while the accused were in judicial custody. Formal permission of the Court can be obtained by investigating officer to hold test identification parade in jail, as early as possible during the course of investigation. We also find that PW 1 Bhaurao, PW 2 Omprakash, PW 6 Vijay, PW 7 Ramrao, PW 8 Suresh, PW 9 Prashant, PW 10 Pravin and PW 12 Bhaurao were disowned by the prosecution as hostile witnesses. PW 4 Ganesh and PW 5 Ravindra were examined as eye witnesses, but considering their testimony with substantially improved version at trial over their original version before the police as admitted by them in cross-examination persuaded us to accept arguments advanced on behalf of defence that the version of the incident as given by PW 4 and PW 5 does not inspire full confidence in judicial mind. Reference is made to ruling in *Lallu Manjhi v. State of Jharkhand* reported in 2003 (4) SRJ 224 in support of argument that substantially improved version of alleged eye witness at trial ought not to have been accepted by the trial Court. Reference is also made by defence counsel to the ruling in *Ashraf Hussain Shah Vs. State of Maharashtra*, to argue that in the absence of proof that the articles seized were sealed and were so sealed till being sent to chemical analyst, the evidence about seizure of blood stained clothes and weapon cannot be relied upon as it is not credible. We have gone through both the rulings. We find that the ratio laid down in the rulings is helpful to the defence in the facts and circumstances disclosed in the case. The learned trial Judge also appears to have been caught in two minds in his appreciation of evidence of the case. In paragraph 12, it is observed thus:

...The evidence of complainant is not fully supported by the evidence of his nephew Ravindra on the point of assault by all accused to the complainant and Dinesh. The complainant in his evidence has not disclosed the name of other accused except accused Santosh and Sunil nor he has disclosed the act of each and every accused while assaulting Dinesh and complainant. Thereafter in paragraph 15 while observing that the evidence of PW 4 and PW 5 is supported by evidence of PW 11 Shankar, a panch witness, learned trial Judge is again caught in two minds by his own observations in paragraph 16, thus

...Therefore, the evidence of this witness in respect of all these five panchanamas cannot be accepted for establishing that on 22.9.2000 the I.O. has seized clothes from the persons of accused Rameshwar stained with blood and stick from the possession of accused Chandan on 23.9.2000 and sample of blood from accused persons on 24.9.2000 and sample of blood of Ganesh on 27.9.2000 and seizure of blood stained pant from the possession of accused Chandan vide Ex. 143 but the rest of panchanamas prepared by the I.O. vide Ex. 140 to 144 and Ex. 149 to Ex. 151 are in respect of same day i.e. 22.9.2000....

The trial Court has failed to bear in mind that for proof of serious offence of murder by two or more persons in furtherance of their common intention the evidence must be adduced which must satisfy the test of proof beyond all reasonable doubt. The greater the charge, the stricter has to be proof. The

evidence cannot be shaky in character, but must positively point out that authors of the crime were none other than the accused. When according to eye witness Ravindra, 50 persons had assembled, finding of guilt cannot be based upon assumption or presumption particularly when evidence of Manda who was essential witness and her evidence would have thrown light upon genesis, motive and links in the chain of circumstances leading to sure conclusion. Best evidence cannot be withheld by prosecution. Thus, in this case although it cannot be disputed that deceased Dinesh met with homicidal death as a result of multiple stab wounds, for unexplained lacunae and shortcomings in the investigation and available evidence failing to positively connect the appellants with crime of murder in furtherance of common intention, we have no other option but to accept defence submissions in the facts and circumstances of the case and award benefit of doubt to the appellants herein as possibility of their false implication cannot be ruled out, because if two views are possible one pointing to the guilt and other pointing out towards innocence of accused, view which is favourable to accused, shall be preferred.

10. For the above reasons, we conclude that trial Court erred to convict the appellants for offence u/s 302 read with Section 34 of the Indian Penal Code. The appeals are, therefore, allowed. The conviction and sentence recorded by the trial Court in Sessions Trial No. 41 of 2001 against appellants is set aside. The appellants are hereby acquitted of offence punishable u/s 302 read with Section 34 of the Indian Penal Code. The appellants who are in jail, be released forthwith, if their detention is not required in any other case. Bail bonds entered into by appellants in Criminal Appeal No. 402 of 2003 shall stand discharged.