

(2015) 08 BOM CK 0208
In the Bombay High Court
Case No : Criminal Appeal No. 99 of 2010

Suresh Janardan Mhatre and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 03-08-2015

Acts Referred:

Evidence Act, 1872 — Section 157, 27

Penal Code, 1860 (IPC) — Section 120-B, 302, 34, 352, 506 (2)

Citation : (2015) 08 BOM CK 0208

Hon'ble Judges : B.P. Dharmadhikari, J;A.S. Gadkari, J

Bench : Division Bench

Advocate : Raja Thakare, for the Appellant; Sangeeta D. Shinde, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

B.P. Dharmadhikari, J—Appellants/convicted accused question the judgment and order dated 31/12/2009 in Sessions Case No. 200 of 2008 delivered by 2nd Additional Sessions Judge, Raigad-Alibag, convicting them of charge punishable under Section 302 read with Section 34 of the Indian Penal Code and sentencing them to suffer RI for life and to pay fine of Rs. 1000/- each or in default to suffer RI for one month. They are also convicted under Section 352 read with Section 34 of the Indian Penal Code with RI for three months. They have been acquitted of charge punishable under Section 506 (2) read with Section 34 and under Section 120-B of the Indian Penal Code.

2. We have heard Advocate Mr. Raja Thakare for the appellants and learned APP Mrs. Sangeeta Shinde for the respondent - State.

3. After pointing out the case of prosecution in brief, Mr. Thakare submits that trial court has not believed PW 2 - Shashikant, who claimed to be eye witness to the incidence dated 17/6/2008 in which his father-in-law, namely, Mohan Shinde has been killed. According to him inconsistencies in statements of PW 1 - Arun and PW 2 - Shashikant prompted trial court to discredit Shashikant. If evidence

of Shashikant is not found convincing, same logic have to be applied for appreciation of evidence of PW 1 - Arun, who is another son-in-law of deceased Mohan. He has taken us through the evidence of PW 1 and PW 2 with a view to demonstrate that PW 1 - Arun also has not witnessed the incidence. Arun could not explain injury on thigh of deceased and there is no material to demonstrate that he and Shashikant carried deceased in auto-rickshaw of Arun to the hospital. He states that there is no panchanama of auto-rickshaw, though it is claimed to be blood stained as clothes of PW 1 - Arun or PW 2 - Shashikant were also not stained with blood. Hence, except for mere word of mouth of both these persons, there is nothing on record to corroborate their version.

4. He has invited attention to history of previous enmity between two groups to urge that accused persons have been falsely implicated by PW 1 and PW 2.

5. Evidence on recovery from accused under Section 27 of the Indian Evidence Act is also assailed by pointing out that PW 10 - Anil has pointed out to court his obligation to help police and has further stated that he signed on paper which was already written and contents were not read over to him. He has also stated that he made all signatures at same time. Advocate Mr. Thakare points out that even PW 10 is not believed by the trial court.

6. Eye witness Sunil Patil (PW 5) has turned hostile and though PW 6 - Sagar has been examined to prove the seizure of a Minidor used allegedly by accused persons, that seizure by itself cannot connect the accused persons with the crime.

7. Evidence of Dr. Thomas (PW 9), who has conducted postmortem is also relied upon to urge that he found two stab injuries and the eye witnesses have not explained injury on thigh. Death had occurred within eight hours after last meal and weapon used was double edged weapon. No such double edged weapon was produced before the court by prosecution. Inviting attention to evidence of PW 8 - Jitesh, who has witnessed the seizure of clothes of deceased, learned counsel submits that there is nothing on record to show that clothes seized were from body of deceased, person who had handed over those clothes or who brought those clothes in police station is not pointed out by this witness. It is further submitted that if there was a stab wound in chest, the sando banyan put on by deceased would definitely been torn to show corresponding tear. The sando banyan is without any such tear and hence clothes produced are not of deceased.

8. Learned APP has invited our attention to report of Chemical Analyzer. She has pointed out that blood group of deceased is found to be "O", while that of appellant No. 1 - Suresh is "A" and of appellant No. 2 - Sachin blood group is "O". It is submitted that on clothes worn by accused persons and mentioned as Exhs. 7, 8, 9 and 10, in examination report at Exh. 66, human blood of "O" group has been found.

9. She has invited attention to evidence of Investigating Officer to urge that said Officer has carried out investigation properly. She has also read out the judgment delivered by trial court to urge that evidence of PW 1 is trustworthy and,

therefore, deserves to be accepted.

10. The story of prosecution in brief is, criminal case arising out of quarrel which had taken place between deceased Mohan on one hand and accused persons on the other hand in the year 2006 is pending in court at Alibag. PW 1 - complainant Arun is son-in-law of Mohan. On 17/6/2008 at about 8 a.m. complainant parked his three wheeler auto-rickshaw at Chavadi Naka Rickshaw Stand. He took his son with him and went on foot to house of his father-in-law at Phanas Dongri. His father-in-law, who had arrived that morning only from Bombay, wanted to meet his sister by name Suman at village Kamarli. Hence, they started on foot towards the place where his auto-rickshaw was parked. When both of them reached near Anil Kala Kendra at about 8.30 a.m., accused and two others came there by a Minidor rickshaw - MH 06/J7, got down from it and rushed towards complainant and his father-in-law. Accused No. 1 Suresh was armed with large knife. He pierced that knife in chest of Mohan. Accused No. 2 -Sachin and two other persons tried to assault and threaten to punish complainant - Arun. Arun, therefore, ran away towards Phanas Dongri side. Accused and others ran away towards Khopoli in Minidor. Arun went to house of his father-in-law and told about incidence to his relatives, including Shashikant, who is other son-in-law of Mohan. All of them immediately came to the spot. Mohan was lying on road with bleeding injury on his chest. Arun and his relatives brought Mohan by auto-rickshaw to Government Hospital at Pen. Medical Officer declared him dead. Hence, FIR was lodged on the same day in Pen Police Station.

11. Perusal of evidence of PW 2 - Shashikant in detail is not necessary. Learned trial court has, in paragraph 39 of its judgment, disbelieved PW 2. It has observed that though narration of events by PW 2 is admissible under Section 157 of Evidence Act, it could not have been relied upon. In FIR, Arun did not state that when he was proceeding towards house of his father-in-law after attack, PW 2 - Shashikant met him on the way and he narrated incidence to Shashikant. Arun in cross-examination stated that assailants ran away from spot of incidence in his presence and thereafter he started towards residence of Mohan. Hence, claim by Shashikant that he went to spot of incidence and saw accused and two other persons running away in Minidor could not have been accepted.

12. Perusal of evidence of PW 1 - Arun shows that after narrating attack, he has stated that he got frightened. He has also deposed that accused No. 1 made attack by big size knife on right thigh of Mohan and accused No. 2 - Sachin and two unknown persons threatened him. He, therefore, started running towards house of his father-in-law. He has deposed that while on way, he met PW 2 - Shashikant and narrated incidence to him. Then PW 1 - Arun proceeded towards house of his father-in-law. He met his wife and her two sisters also on way and he informed them about the incidence. Then he went to residence of Mohan and informed the event to his mother-in-law, brother-in-law and other relatives. All of them then came to spot. His cross-examination reveals that his father-in-law was

accused in criminal case pending before the court. There were ten more accused which included PW 2 and other relatives. He also accepted that he and PW 2 and others were accused in offence bearing Crime No. 96 of 2008 registered with police on 5/7/2008. He deposed that his clothes were not blood stained, but rickshaw in which he carried Mohan got blood stained. He further stated that accused persons ran away from spot in his presence. He has further stated that Mohan was declared dead half an hour after he was taken to the hospital. He has also accepted that police did not prepare panchanama of auto-rickshaw.

13. Paragraph 11 of his cross-examination shows that public road, where incidence occurred, is having heavy traffic and has bounded by residential houses and other commercial premises. Effort of accused/appellants is to demonstrate that incidence, if any, could have been witnessed by other persons also.

14. He could not explain why attack on right thigh of his father-in-law with big knife by accused No. 1 did not figure in his FIR, though he had stated it to police. He also could not explain why fact that his wife and her sisters met him on way did not figure when FIR was reduced into writing, though he had stated accordingly. He accepted that he did not state before the police that PW 2 - Shashikant met him on the way while going towards house of his father-in-law or that he informed him about the assault and then Shashikant directly went to spot of incidence. He accepted that Shashikant was present with him when he lodged FIR. He denied that two unknown persons sitting in Minidor did not come out. He denied that those two unknown persons committed murder of his father-in-law on road before 7 a.m. on the date of the incidence.

15. Other eye witness, namely, PW 5 - Sunil Patil runs Anil Kala Kendra just opposite the spot of occurrence. He claimed that he was sleeping and did not see the incident. He was declared hostile and in cross-examination, he has disowned his police statement.

16. In so far as recovery of weapon is concerned, PW 10 - Anil Jadhav has stated that accused No. 1 took out a sum from a plastic bag under cot near wall. That plastic bag also contained clothes. He then points out drawing of panchanama. In cross-examination, he has stated that he works in a gambling club and is required to oblige police whenever police want his assistance. He was not aware whether clothes, which form Muddemal properties, were in police station already. He accepted that police took his signature on written paper which was in police station. He did not remember how many signatures he made on that day. Police read out to him required facts to be disclosed to court in deposition and police instructed him to note down important points and to preserve the note. He further stated that police sealed the clothes in police station and weapon was also sealed in police station. Paragraph 10 of his cross-examination shows that police had taken accused inside the room and he was waiting outside. There was no specific identification mark on any of the clothes. Police marked two lines after writing on a paper and asked him to sign on it. He put signatures as instructed. He made all signatures at one and same time. He could not describe the room or

building where he went along with police and accused persons.

17. Though PW 11 - Investigating Officer has entered witness box, he has not thrown any light about this panchanama or its preparation or even signing or sealing on spot. It is, therefore, obvious that recovery of knife or clothes under Section 27 from accused persons has not been proved in accordance with law by the prosecution.

18. Dr. Thomas, who conducted postmortem, has pointed out two stab wounds and in paragraph 17, he has further stated that injuries are possible by knife which is before the court. However, in cross-examination, in paragraph 22, he accepted that if said knife is pierced by keeping its blunt side up, there will be vertical injury and if the knife is pierced by keeping its both edges parallel, there will be horizontal injury. He accepted that for causing injuries as has been shown in Column No. 17 of postmortem report, weapon should have sharp edges on both sides. Thus, knife (supra) produced by prosecution, which is blunt on one side, cannot be that weapon. This is additional material which warrants discarding of recovery under Section 27 from the appellants.

19. As the recovery cannot be accepted, it is not necessary for us to look into the report of the Chemical Analyzer. Enmity between two groups has come on record. It was known to police while investigating the offence. In this situation when the auto-rickshaw, in which deceased was carried to Government Hospital was available, why police did not collect blood sample from that auto-rickshaw or then why police did not make any panchanama thereof is not explained.

20. In FIR at Exh. 27 Arun has mentioned that he has come to lodge report as his father-in-law (Mohan) has expired. He has also mentioned therein that he carried Mohan in auto-rickshaw to Government Hospital. Evidence of PW 2 shows an admission in paragraph 9 that when FIR was lodged, they were not aware of the death of his father-in-law. PW 1 himself has stated that his father-in-law was declared dead after half an hour of his taking to hospital. He has also stated that in very same rickshaw he came to police station. Record shows that PW 2 was present with him in police station. PW 1 and PW 2 state that their clothes were not blood stained. PW 2 has accepted that when FIR was lodged, PW 1 and he were not aware of death of Mohan.

21. Thus, this possible evidence which could have corroborated version of PW 1 has not been collected by the prosecution. Looking to previous history of enmity between the parties, police ought to have collected best possible evidence. The events on record noted supra does not satisfactorily establish even presence of PW 1 - Arun at the spot.

22. We, therefore, find that judgment delivered by the trial court cannot be sustained. It will have to be quashed and set aside by acquitting appellants/ accused of offence punishable under Section 302 read with Section 34 and of offence punishable under Section 352 read with Section 34 of the Indian Penal Code.

23. Hence, following order:--

ORDER

In view of the discussion above, Appeal is allowed. Judgment dated 31/12/2009 delivered by 2nd Additional Sessions Judge, Raigad-Alibag, in Sessions Case No. 200 of 2008, convicting accused persons, is set aside.

Since accused No. 1 - Suresh Janardan Mhatre is in jail, he be released forthwith, if not required in any other case.

Bail bonds furnished by accused No. 2 - Sachin Laxman Kokate are cancelled.

Trial court has directed destruction of Muddemal property. Said direction shall be implemented after appeal period is over.