

(1996) 08 BOM CK 0023
In the Bombay High Court
Case No : Criminal Appeal No. 56 of 1983

Suresh Pandurang Tigare

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 09-08-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302, 323

Citation : (1997) CriLJ 157

Hon'ble Judges : Vishnu Sahai, J;S.S. Parkar, J

Bench : Division Bench

Advocate : R.T. Walawalkar and Narendra V. Walawalkar, for the Appellant; Mrs. Jyoti S. Pawar, for the Respondent

Judgement

Vishnu Sahai, J.—Vide judgment and order dated 13/1/1983, passed in Sessions Case No. 36 of 1982, the Additional Sessions Judge, Nashik convicted and sentenced the appellant in the manner stated hereinafter :-

(i) u/s 302 I.P.C. to life imprisonment;

(ii) u/s 323, I.P.C. to one week's R.I. and to pay a fine of Rs. 100/- in default to undergo one week's R.I.

The substantive sentences of the appellant were ordered to run concurrently.

Along with the appellant ten others viz. Arun Shivram Vidhate, Dilip Kashinath Borade, Ramesh Kashinath Borade, Nivrutti Baburao Hingmire, Jagannath Shankar Deshmukh. Prakash Ramdas Bhawsar, Rajendra Govind Bhawsar, Vijay Shivram Vidhate, Satwa Kashinath Ekhande and Arjun Pandurang Gaikwad were also prosecuted and tried. Excepting Satwa Kashinath Ekhande who was convicted and sentenced in the same manner as the appellant u/s 323 I.P.C., the remaining persons were acquitted.

The State of Maharashtra has not challenged the acquittal of Satwa Kashinath

Ekhande on counts other than 323 I.P.C. and that of other accused on all the counts.

2. Briefly stated the prosecution case runs as under :-

Mebal Chitre P.W. 16 is the mother of the deceased Dipak. On 19-9-1981, she had given her son Rajesh Rs. 10/- for purchasing vegetables from the shop of acquitted accused Dilip Borade and Ramesh Borade which, from the evidence it appears, was in the proximity of her house. After purchasing vegetables Rajesh told her that he had purchased them for Rs. 2.50 and that the balance amount was not returned by the Borade brothers. Understandably Mebal Chitre went to the shop of Borade brothers with her son Dipak. At that time Ramesh Borade was at the shop. She asked him to return the balance amount of Rs. 7.50 On that Ramesh Borade replied that Rajesh was stating falsely and he had actually returned the balance amount to him. A quarrel then took place between Ramesh Borade and Dipak. Mebal Chitre told Ramesh Borade that he may spend the amount for his funeral. She then came back with Dipak to her house. The same day at about 11 p.m. Dilip Borade, Ramesh Borade, acquitted accused Arun Vidhate and Vijay Vidhate along with their associates came to Mebal's house. They asked her to hand over her son Pradeep to them. They also assaulted her and Mandakini (her daughter) and Dipak. As a consequence of assault she became unconscious and after regaining consciousness she lodged her complaint.

On 11-10-1981 at about 10-30-45, a.m. Sanjay Salve P.W. 10 while on way to his school saw a crowd collected in Canada Square. When he went near the crowd he saw that Pradeep had been surrounded by Dilip Borade and Ramesh Borade. Seeing this he went and informed Pradeep's sister Mandakini Chitre P.W. 12. At that time Mandakini had just returned after attending Service at Church. Her brother Dipak was sitting near Employment Exchange office. Sanjay Salve came and told her that Pradeep had been surrounded by the Borade brothers and their associates in Canada Square. It appears that the Employment Exchange office where Dipak was sitting was situated near her house and hence she went and informed Dipak about the news given to her by Sanjay Salve. Thereafter both she and Dipak went to Canada Square. As soon as they reached there the appellant threw sword upon Dipak. The same however did not strike him. When she went to pick up the sword the appellant and another bald person (Satwa Kashinath) kicked her. Thereafter the appellant picked up the sword and pushed Dipak to a distance of about 10 to 15 feet. He then inflicted sword blow on Dipak's chest. Dipak fell down as a consequence thereof. She rushed towards that place and pressed the injury in order to prevent bleeding. Dilip Borade with a gupti inflicted a blow on the arm of Dipak, Ramesh Borade, dealt a blow with a hockey stick on Deepak's head and Arun Vidhate dealt a blow with a gupti on various parts of body of Dipak including back. This incident is also alleged to have been seen by Jona Kurhade P.W. 13 who at that time was working as a waiter in a tea stall situated near the place of the incident.

It is also said that Pradeep P.W. 15 brother of Mandakini saw the appellant. Arun

Vidhate, Vijay Vidhate, Satwa Kashinath and about 20 to 25 other persons at the place of the incident. He also saw Dipak coming towards him. At that time he ran away to get a stick, presumably for self defence and when he returned with a stick, he found Dipak lying on the floor and his injury being pressed by Mandakini.

After assaulting the deceased the appellant and others are alleged to have run away.

2A. While the appellants and others were about to run away Mebal Chitre P.W. 16, mother of Mandakini and Kamlabai P.W. 17, the maternal aunt of Mandakini arrived on the place of the incident. after appellant and others had run away then put Dipak in a rickshaw and rushed him to Civil Hospital, Nashik. There the doctor told them that Dipak was dead. While Mandakini was at the Civil Hospital, Nashik Police Inspector Madhukar Deshpande P.W. 20 reached there. At about 1.15 p.m. he recorded Mandakini's FIR (Exh. 50). On the basis of FIR C.R. No. 322 of 1981, was registered.

3. The investigation of the case was conducted by P. I Madhukar Deshpande P.W. 20. After recording the FIR he visited the place of the incident viz. Canada Square. He prepared the panchanama of the scene of offence (Exh. 23). There were some blood stains on the place of the incident and he collected the same with the help of wet cotton. The same day he interrogated some witnesses, including same day he interrogated some witnesses, including Jona Kurhade P.W. 13, Pradeep P.W. 15 and Mebal P.W. 16. Between 11-10-1981, and 20-10-1981, the acquitted accused persons were arrested. On 20-10-1981 he arrested the appellant. The next day the appellant made a statement that he had kept one sword in the house of Satwa Kashinath and he could produce the same. Consequently in the presence of public panchas, under a panchanama on the pointing out of appellant Suresh Tigare from the house of Satwa Kashinath a sword and iron pipe was recovered. We may straightway mention that for very tenable reason recorded in paragraph 25 of the impugned judgment, no significance has been attached by the learned trial judge to this piece of evidence. On 30-10-1981. P. I. Deshpande asked the Executive Magistrate Shrikishan Shejwal P.W. 8 to hold the test identification of the appellant and the acquitted accused On 31-10-1981, he recorded statement of Pundalik Shewale. He sent the blood stained articles to the chemical analyst along with the forwarding letter. Finally after completing the investigation on 31-12-1981, he submitted the charge-sheet.

4. The identification of the appellant and the acquitted accused persons was held by the Executive Magistrate P.W. 8 Shrikishan Shejwal on 1-11-1981, at sub-jail, Nashik. In the test identification the prosecution sent all the three eye witnesses viz. Mandakini P.W. 12, Jona P.W. 13 and Pradeep P.W. 15 It is significant to point out that in the identification parade of the appellant Mandakini and Pradeep were not sent and only Jona was sent but he did not identify the appellant.

5. Going backwards the post-mortem examination of the dead body of Dipak was

conducted on 11-10-1981, at 12.15 noon by Dr. Shrinivas Kale P.W. 14. On the corpse Dr. Kale found the following antemortem injuries :-

(1) Incised wound, (2" x 1" x 4") on the right side chest 1" away from central line, in forth intercostal space.

(2) Abrasion, right cheek,, (half c.m. x half c.m).

(3) Multiple abrasions linear on the right arm and forearm about 2 to 3 c.m. in length on interior aspect.

(4) Abrasion left arm anterior (3 c.m. x 1/2 c.m.)

On internal examination he found pericardium and right ventricle to be punctured.

In the opinion of the doctor the deceased died on account of shock and hemorrhage as a result of rupture of right ventricle of heart and the said injury, in his opinion, was sufficient to cause his death in the ordinary course of nature.

6. The case was committed to the Court of Sessions in the usual manner. In the trial Court charges on a number of counts including 302 I.P.C simpliciter against the appellant were framed. To the said charges he pleaded not guilty and claimed to be tried. His defence was that of denial.

In the trial Court apart from tendering and proving a large number of exhibits, the prosecution examined as many as 20 witnesses. In defence no witness was examined.

After recording the evidence and hearing the learned counsel for the parties the learned trial judge passed the impugned judgment.

Hence this appeal.

7. We have heard Mr. R. T. Walawalkar with Mr. Narendra V. Walawalkar for the appellant and Mrs. Jyoti S. Pawar, the the Additional Public Prosecutor for the respondent at considerable length. We have also pursued the evidence of witnesses examined by the prosecution; material exhibits tendered and proved by the prosecution; the statement of the appellant recorded u/s 313 Cr.P.C; and the impugned judgment. After reflecting over the matter we are squarely satisfied that there is merit in this appeal and it must succeed.

8. The crucial question in this appeal in this appeal is whether the evidence of the three eye witnesses viz. Mandakini P.W. 12, Jona P.W. 13 and Pradeep P.W. 15 inspires confidence or not ? Our considered answer to the said question is in the negative. We may straightway mention that these witnesses had also implicated 10 other co-accused persons and nine of them have been clearly acquitted by the learned trial judge and one of them viz. Satwa Kashinath Ekhande has been acquitted on all counts except 323 I.P.C. As said earlier the State of Maharashtra has not challenged the acquittal of these acquitted.

9. Out of the three eye witnesses the evidence of Jona P.W. 13 can be straight

way rejected by us on the ground that although the deceased had been done to death in broad day light, at about 10.30-10.45 a.m. on 11-10-1981, Jona could not identify the appellant at the test identification parade held on 1-11-1981, by Shrikishan Sejawal, the Executive Magistrate P.W. 8. In our view if Jona could not identify the appellant 20 days after the incident what is the sanctity to be attached to his nominating the appellant in his statement in the trial Court. This is all the more so because in his cross-examination (para 7) he stated that he was not knowing the appellant from before the incident.

10. We are also not inclined to place any reliance on the testimony of Mandakini P.W. 12. We have our grave doubts about her claim of having seen the incident. In her examination in chief (in paragraph 5) apart from stating that the appellant inflicted a sword blow on the chest of the deceased she stated that co-accused Dilip Borade assaulted the deceased with gupti on his arm; co-accused Ramesh Borade dealt a hockey stick blow on the head of the deceased; and co-accused Arun Vidhate inflicted a gupti blow on various parts of body of deceased Dipak, including back. It is true, as Mrs. Pawar strenuously urged, that her statement vis-a-vis the assault of the appellant with a sword on Dipak's chest is corroborated by the post-mortem report as would be apparent from a perusal of the ante mortem injuries which have been detailed in paragraph 5. However the autopsy report and the statement of the Autopsy surgeon Dr. Srinivas Kale falsifies the correctness of her statement wherein she deposed about Dilip Borade assaulting Dipak with a gupti on his arm; Ramesh Borade assaulting Dipak with a hockey stick on his head; and Arun Vidhate assaulting Dipak with gupti on various parts of his body, including back. A perusal of paragraph 5 shows that the deceased did not suffer any gupti injuries or on injury attributable to hockey stick. Dr. Srinivas Kale in his examination-in-chief only stated that Injury No. (1) could be caused by sharp cutting and penetrating instrument. He did not state about the manner in which Injury Nos. (2), (3) and (4) could be caused. In his cross-examination (in para 8) he stated that injury Nos. (2), (3) and (4) could be caused by a fall. In the said paragraph he also stated that they could be caused while the injured was being lifted for being carried in a rickshaw. (The prosecution case is that from the place of the incident in a rickshaw Dipak was taken to Civil Hospital, Nashik.) A perusal of the statement of Dr. Srinivas Kale makes it crystal clear that the story of assault by the acquitted accused Dilip Borade and Arun Vidhate with guppies on the deceased and by Ramesh Borade with a hockey stick on him is false. In other words it means that as regards the roles of specific assault on the deceased, 3/4th of her statement is false. It may be mentioned that specific parts in respect of assault on the deceased have been only assigned by her to the appellant. Dilip Borade, Arun Vidhate and Ramesh Borade.

Mrs. Pawar, the learned Additional Public Prosecutor strenuously urged that this infirmity in the statement of Mandakini should not come in our way in accepting her evidence pertaining to the assault made by of the appellant with a sword on the chest of Dipak for the same is not only corroborated by medical evidence but

also because the principle *falsus uno falsus omnibus*, is not a rule applicable to our country. We have carefully considered the said submission of Mrs. Pawar and we regret that we do not find any merit in it.

It is true, as the Apex Court has repeatedly held that the principle *falsus uno falsus omnibus* is not a rule applicable to our country and the court should make every endeavour to separate the grain from the chaff. However, this exercise is only resorted to by courts where truth and falsehood are capable of being separated and are not inextricably mixed as is the case here. If in a purely mechanical manner Mandakini could falsely depose about the assault launched by Dilip Borade, Arun Vidhate and Ramesh Borade, what is the guarantee that there is truth in her claim that she saw the appellant assaulting the deceased with a sword on his chest. We are fortified in our view by the observations contained in paragraph 8 of decision of the Apex Court reported in *Balaka Singh and Others Vs. The State of Punjab*, which are to the following effect (Para 8) :-

"..... It is true that there are as many as eight witnesses who are alleged to have seen the occurrence and they have given a parrot-like version of the entire case regarding the assault on the deceased by the various accused persons. All these witnesses have with one voice and with complete unanimity implicated even the four accused persons, acquitted by the High Court equally with the appellants making absolutely no distinction between one and the other. A perusal of the evidence of the prosecution witnesses would show that the prosecution case against the appellants and the four accused is so inextricably mixed up that it is not possible to sever one from the other. It is true that, as laid down by this Court in *Zwinglee Ariel Vs. State of Madhya Pradesh*, and other cases which have followed that case, the Court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation the Court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply. We are satisfied that in the facts of the present case, having regard to the partisan and interested evidence of the prosecution witnesses who can implicate the appellants and the four accused equally with regard to the assault on the deceased it is not possible to reject the prosecution case with respect to the four accused and accept it with respect to the other five appellants. If all the witnesses could in one breath implicate the four accused who appear to be innocent, then one cannot vouchsafe for the fact that even the acts attributed to Balaka Singh, Joginder Singh, Pritam Singh, Darbara Singh and Jarnail Singh may have been conveniently made to suit the needs of the prosecution case having regard to the animus which the witnesses as also Banta Singh bore against the appellants"

While assessing Mandakini's evidence and that of her brother Pradeep we have to bear in mind that they are highly interested witnesses being the real sister and brother of the deceased Dipak respectively. It is well settled that extreme caution has to be exercised by the Courts in evaluating the testimony of interested witnesses. In our view when the infirmity referred to above is examined in the light of the fact that Mandakini is an interested witness it would not be safe to place reliance on her testimony.

There are other reasons also as to why we are not inclined to accept the evidence of Mandakini. Mandakini in her cross-examination (in paragraph 12) stated that the name of the appellant was told to her by her brother Pradeep. This obviously means that she was not knowing the appellant. If that was so she should have been sent to identify the appellant on 1-11-1981 at the test identification parade which was held in sub-jail, Nashik. In this connection it would be pertinent to point out that on the said date at the time of identification Mandakini was present because along with the appellant, identification of co-accused persons also took place and she was sent to their parades. In our view the failure of the prosecution to get the appellant identified by her is also a circumstance which considerably detracts from the value to be attached to her evidence.

We also have our very strong reservations about Mandakini claim of receiving injuries during the incident. In her examination-in-chief (in para 6) she stated that the appellant and Satwa Kashinath kicked her. We are not inclined to accept her statement because there is no medical evidence to corroborate it. It appears from the evidence on record that she was not even sent for medical examination. In our view had Mandakini actually received the injuries at the hands of the appellant and Satwa Kashinath as deposed to by her, she would have got them medically examined.

For the aforesaid reasons we strongly feel that Mandakini did not see the incident and lodged her FIR wherein she gave her ocular account after consultations and deliberations.

11. Having rejected evidence of Jona and Mandakini we are left with the evidence of the third and the last eye witness Pradeep PW 15, the real brother of Mandakini. His evidence is hardly better than hers. Firstly a perusal of his statement shows that he did not witness the actual assault launched on the deceased by his assailants. His evidence is that seeing Dipak coming towards him he went to take a stick and by the time he returned with the same he found Dipak lying on the floor and Mandakini pressing his injury with her hands. Apart from this, we also find that he in his cross-examination (para 9) stated that he was not knowing the name of the appellant prior to the incident. That being so, in our judgment, it was obligatory for the prosecution to send him to the test identification parade of the appellant which was conducted on 1-11-1981 in sub-jail, Nashik. The evidence is that at that time identification parades of some other accused persons were also held and he attended them. The failure of the

prosecution to get the appellant identified by him is a serious lacuna in his evidence.

In our view the said infirmities in the statement of Pradeep render his evidence unworthy of acceptance and also render the conviction of the appellant u/s 302 IPC unsustainable. As said earlier he does not state that he saw the appellant giving a blow with a sword on the chest of the deceased. Mandakini PW 12 and Jona PW 13 did say so but for the reasons mentioned above we have not placed reliance on their evidence.

Mrs. Pawar urged that the sole evidence of Pradeep is sufficient to sustain appellant's conviction. It is true that a conviction can be recorded on the testimony of a solitary witness but he has to be a wholly reliable witness. There is no dearth of authorities on this proposition. We however will only make reference to one that is the decision of the Apex Court reported in Kartik Malhar Vs. State of Bihar, , Kartik Malhar v. State of Bihar, wherein. Their Lordships of the Apex Court have observed thus (at p. 4542 of AIR SCW) :-

"On a conspectus of these decisions it clearly comes out that there has been no departure from the principles laid down in Vadivelu Thevar Vs. The State of Madras, and therefore conviction can be recorded on the basis of the statement of single eye witness provided his credibility is not shaken by any adverse circumstance appearing on the record against him and the Court, at the same time is convinced that he is a truthful witness."

In the light of the said principles laid down by the Apex Court also the evidence of Pradeep PW 15 cannot be relied upon.

12. In the instant case it is a mystery as to how Pradeep and Jona came to learn about the name of the appellant. No evidence could be pointed out to us on this aspect of the matter. In a case of the present type it was obligatory for the prosecution to establish beyond reasonable doubt as to how Pradeep and Jona learnt the name of the appellant. This was a part of the exercise which the prosecution was enjoined to carry out in law of proving its case beyond reasonable doubt.

13. Mrs. Pawar, learned Additional Public Prosecutor strenuously urged that the circumstance that the FIR of the incident was lodged within 2 and 1/2 hours of the incident taking place and in the same the act of assaulting the deceased with a sword on his chest has been attributed to the appellant speaks volumes in favour about the participation of the appellant in the murder of the deceased. We have reflected over the said submission of Mrs. Pawar. On the first blush it was certainly very attractive. However, on a deeper scrutiny we realised that all that glitters is not gold. It is well-settled that the FIR can only be used to contradict or corroborate the maker and is not substantive evidence. The substantive evidence are the statements of the witnesses in Court. The substantive evidence in the instant case was in the form of the evidence of the three eye witnesses viz. Mandakini PW 12, Jona PW 13 and Pradeep PW 15. That we have rejected for

the reasons stated by us above. Hence this submission of Mrs. Pawar fails.

14. We feel distressed by the thought that a brutal murder which took place in the broad day light in the heart of Nashik town is going unpunished but we cannot and should not be swayed by our emotions. What we have to see is whether cogent, truthful and credible evidence has been led by the prosecution to establish the guilt of the appellant beyond reasonable doubt. Such evidence in our judgement is wanting in the instant case. It might be that the prosecution case may be true. But before a conviction can be recorded/sustained a Court has to be satisfied that the prosecution case must be true. Emphasising this Gajendragadkar, J. (as he then was) in the decision reported in Sarwan Singh Vs. The State of Punjab, , in paragraph 11 observed thus :-

"(11)

It may be as Mr. Gopal Singh strenuously urged before us that there is an element of truth in the prosecution story against both the appellants Mr. Gopal Singh contended that, considered as a whole the prosecution story may be true; but between "may be true" and "must be true" there is inevitably a long distance to travel and the whole of this distance must be covered by legal, reliable and unimpeachable evidence."

In the instant case the distance between "may be true" and "must be true" has not been covered by the prosecution by adducing legal, reliable and unimpeachable evidence.

15. Pursuant to the above discussion we are squarely satisfied that the instant is a fit case in which the appellant deserves the benefit of doubt and we propose giving him the benefit of that doubt.

16. In the result this appeal is allowed. The conviction and sentence of the appellant recorded by the learned trial Judge on various counts is set aside. The appellant is given benefit of doubt and acquitted for the various offences for which he had been convicted. He is on bail. He need not surrender. His bail bonds stand cancelled, and sureties discharged. In case he has paid the fine it shall stand refunded to him.

Before parting with the judgment we would be failing in our fairness if we do not mention the enormous assistance which has been rendered to us by the learned counsel for the parties in the disposal of this appeal.

In case an application for certified copy of this judgment is made by the counsel for the parties the same shall be issued on an expedited basis.

17. Appeal allowed.