
(2016) 07 BOM CK 0060
In the Bombay High Court
Case No : Criminal Appeal No. 409 of 2014

Syed Amin Syed Nabi	Vs	APPELLANT
State of Maharashtra		RESPONDENT

Date of Decision : 11-07-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 302

Citation : (2016) 3 AIRBomRCri 42 : (2017) ALLMRCri 245 : (2017) 2 MhLJCrI 115

Hon'ble Judges : B.R. Gavai and V.M. Deshpande, JJ.

Bench : Division Bench

Advocate : R.M. Mardikar, Advocate, for the Appellant; Mr. N.B. Jawade, A.P.P, for the Respondent/State

Final Decision : Allowed

Judgement

V.M. Deshpande, J.—The appellant has questioned his conviction and consequent order of sentence in the present appeal, which is imposed upon him by the learned Additional Sessions Judge, Amravati in Sessions Trial No. 205/2011 dated 23.05.2014 by which the appellant was sentenced to suffer imprisonment for life and to pay a fine of Rs. 25,000/- and in default to undergo simple imprisonment for one year for his conviction for the offence punishable under Section 302 of the Indian Penal Code.

2. The prosecution case as it is disclosed during the course of trial is as under :

When Sahebrao Jagdale was discharging his duties as Police Sub Inspector at Police Station, Badnera on 06.07.2011 at about 11.15 p.m., Mohd. Sharafatullah (PW3) came to the Police Station and gave his oral report Exh.36.

On the basis of the same, Sahebrao Jagdale registered a crime bearing Crime No. 116/2011. The printed FIR is at Exh37.

The FIR states that Mohd. Sharafatullah (PW3) is having two sons. Elder is

Najakatullah aged 30 years, the deceased who was working as truck driver. His friend Mohd. Amin, the present appellant is also truck driver. Both of them used to work on the truck of one Syed Harun for about 78 months. After marriage of Najakatullah, he left the driving of Syed Harun and then started working as driver of Mohd. Jamirulla (PW2), who is also the brother of the first informant. According to the FIR, the appellant used to insist that he should work on the truck of Syed Harun else he will face with the dire consequences.

The FIR further proceeds that on 06.07.2011 at about 7.30 p.m. the deceased Najakatulla left his house for going to Amravati. At 10 O" clock, he made a phone call to Mohd. Jamirullah (PW2) and it was informed that he is near railway gate. At the same time, the gateman Allauddin Waliuddin (PW4) informed that one boy is lying in the pool of blood and, therefore, the first informant and Jamirullah (PW2) went to the railway gate cabin. That time, they noticed that Najakatulla drenched with blood, was not able to speak properly. They noticed that there was a big injury to his neck. He was unable to speak. He was taken to Irwin Hospital, Amravati in auto rickshaw where, on his admission, he was declared dead.

On the next day, PSI Jagdale went to the General Hospital. He conducted inquest over the dead body and prepared the inquest panchanama Exh.40 in presence of pancha witnesses.

3. Subsequently, investigation was conducted by Sanjay Dahake (PW9) and also Prashant Kalputwar (PW8).

Sanjay Dahake (PW9) went to the spot of occurrence and prepared the spot panchanama Exh.44. He recorded statement of Rauf Khan on 28.09.2011.

Prashant Kalputwar (PW8) on 06.07.2011 seized the clothes of the appellant under seizure memo Exh.42. He also seized the clothes of Mohd. Jamirullah (PW2) and his mobile phone under seizure memos Exh.33 and 34 respectively. He also seized mobile phone of the appellant under seizure memo Exh.43.

On 09.07.2011, when the appellant was in custody, he made a disclosure statement to Prashant Kalputwar (PW8) in presence of pancha witnesses and agreed to show the place where the weapon "Sattur" is kept. The memorandum statement is at Exh.45 and consequent recovery of the said weapon is under seizure memo Exh.46.

On 10.07.2011, the appellant gave his disclosure statement to Prashant in presence of pancha and agreed to show the place where he has committed murder of the deceased Najakatulla. Accordingly, the police party, in presence of pancha, went to the spot. There he recorded the statement and spot which is at Exh.47. After completion of the investigation, charge-sheet was filed in the Court of J.M.F.C. Court No. 6, Amravati.

The learned Magistrate found that the case is exclusively triable by the Court of Sessions and, therefore, he committed the case to the Court of Sessions. The

learned Sessions Judge framed the charge against the appellant and one Syed Alim Syed Nabi. The appellant was charged for the offence punishable under Section 302 of the IPC whereas Syed Alim was charged for the offence punishable under Section 201 and 212 of the IPC.

By the impugned judgment, the learned Additional Sessions Judge acquitted the accused no. 2-Syed Alim Syed Nabi, however, convicted the appellant as observed in the opening paragraph of the judgment.

4. We have heard Mr. R.M. Mardikar, learned counsel for the appellant and Mr. N.B. Jawade, learned A.P.P. for the State. Both of them strenuously urged in respect of their respective prayers. They also took us through the record and proceedings, notes of evidence of the prosecution witnesses in detail.

5. Dr. Chandrashekhar Patil (PW1) has conducted the post mortem on the dead body of Najakatulla. He noticed the following external injuries :

"Lacerated wound of size 4 inches in length x 2 inches in width x 2 inch deep on middle part of neck anteriorly."

He also noticed,

"Fracture of thyroid glands and oesophagus present."

The injuries were found to be ante mortem. According to the Doctor, the cause of death is cut throat injury by sharp and hard object and shock.

The post mortem report, which is duly proved by Dr. Chandrashekhar is at Exh.23. From the evidence of Dr. Chandrashekhar and in view of the injuries and opinion as mentioned in the post mortem report, it is clear that Najakatulla's death was homicidal one.

6. The consequent question that has to be answered is as to whether the prosecution has proved the charge against the appellant beyond reasonable doubt.

7. Admittedly, in the present case, there is no eye witness account. Case of the prosecution is based on oral dying declaration made by the deceased Najakatulla to his father Sharafatulla (PW3) and his uncle Jamirulla (PW2). The prosecution also relied on the evidence of Rauf Khan (PW5) for connecting the appellant to the effect that the deceased was lastly seen prior to the receiving of injuries in the company of the appellant. The prosecution also heavily relied on the recovery of weapon at the instance of the appellant and noticing human blood (blood group "A") on the clothes of the appellant.

In order to appreciate the prosecution case in respect of the oral dying declaration, firstly, it would be required to see the evidence of Allauddin (PW4), the railway gateman. Admittedly, Mohd. Jamirulla (PW2) and Mohd. Sharafatulla (PW3) reached the railway gate after receipt of the mobile phone call from Allauddin (PW4) and thereafter when they reached to the spot, there oral dying

declaration was made to them is the prosecution version.

8. Allauddin (PW4) is serving as railway gateman with Central Railways. Since last 15 years, he was posted at the railway gate situated in Juni Vasti, Badnera.

The evidence of Allauddin discloses that on the date of the incident, his duty was from 4.00 p.m. to 12 midnight. There is a cabin near the railway gate. On the date of the incident, at about 9.55 p.m. he received a message from the Station Master that Nagpur Amravati Intercity Express is passing. Therefore, he closed the railway gate. Within 5 minutes, the said train passed from the gate. Thereafter, he opened the gate and went inside the cabin and stayed there.

His evidence further discloses that after some time a boy came near the cabin. That time his clothes were stained with blood. He asked that boy to go away from there. So the said boy went away at some distance. At that time, the said boy was talking on mobile phone. Again the boy returned to the cabin and sat on the platform outside the cabin. The said boy handed over his mobile to him and with gestures asked him to talk on mobile. That time, the mobile was on. This prosecution witness took the mobile from the said boy and started talking on mobile. He heard the voice of a lady to whom he informed that a young boy stained with blood is there.

Thereafter, he heard huge cry of the said lady on mobile. Thereafter, the said boy again took mobile from this prosecution witness and after some time, handed over the mobile again. That time, he heard the voice of a male person. This prosecution witness informed the said person to come near the railway gate. Thereafter within 23 minutes, initially the uncle of the boy reached to the spot. The said uncle was known to Allauddin. He informed Allauddin that the injured boy is his nephew.

According to Mohd. Jamirullah (PW2) and Mohd. Sharafatulla (PW3) when they reached to the railway cabin that time they noticed Najakatulla, the deceased was sitting near the platform and on seeing them, he stood up and told them that the appellant has assaulted on him by Sattur.

9. Whether really the oral dying declaration was made to these two prosecution witnesses as claimed by them?

10. Dr. Chandrashekhar Patil (PW1) who has conducted the post mortem has stated in his examination in chief as under:

"3. In my opinion, after receiving the injuries which is shown in the column No. 17 of the P.M. Notes Exh.23, the victim may survive for about half an hour and the injured may be able to speak."

The said autopsy surgeon when was under cross-examination of the learned counsel for the defence has stated as under:

"4. It is true that considering the nature of injuries mentioned in column 17 & 18 of the post mortem notes (Exh.23), the person may not be in a position to talk 5

to 10 minutes of receiving such injuries"

From the aforesaid, it is crystal clear that the Doctor himself was not sure as to up to what time the injured could be in a position to talk after receiving such a grievous injuries.

11. The prosecution could not establish the exact time of assault. Allauddin (PW4) in his evidence has stated that he received a call from the Station Master that Intercity Express is passing and, therefore, he closed the railway gate. After 5 minuses the said express passed on the gate and thereafter he opened the gate and stayed inside his cabin and after some time, a boy came near the window of cabin stained with blood. That shows that the time of assault may be either prior to 9.55 p.m. or in between 9.55 p.m.

Allauddin (PW4) did not claim in his evidence that he has seen anybody running away from or near the railway track.

12. Though the learned A.P.P. tried to support the prosecution case by making a submission that the evidence of Allauddin shows that when the boy came near the cabin he was talking on mobile phone and thus he was in a position to talk. Though, at the first blush, the said submission appears to be attractive on the closer scrutiny of the evidence of the prosecution in its entirety, the said submission needs to be rejected. Now, admittedly, Allauddin was inside the cabin and the boy was near the window of the cabin. It is nowhere brought on record through the evidence of Allauddin that at the relevant time, the window was open. It is brought on record in the examination in chief of Allauddin itself that he asked the said boy to leave the place and therefore he went away at some distance and at that time, according to the prosecution, the deceased was talking on phone. Thus, it is clear that at the time of the so called conversation, the boy was away from Allauddin. Further, it is not brought on record as to what was the talk of the deceased on the mobile phone. Even according to this prosecution witness, after some time, the boy again returned towards his cabin. It would be useful to reproduce the relevant portion of the evidence of Allauddin in that behalf, which is as under:

"Again that boy returned towards cabin and he sat on the platform outside the cabin. The said boy handed over me his mobile and with gestures asked to talk on mobile. At that time, the mobile was on. I took the mobile from the boy and started talking on the mobile. I heard voice of lady, I informed the said lady that a young boy stained with blood is there. I heard the hue and cry of the said lady on mobile. Thereafter, the said boy took the mobile from my hands and after sometime he handed over the said mobile to me. At that time, I heard the voice of male person. I informed the said person to come near the railway gate of Juni Vasti, Badnera. Within 2 to 3 minutes initially, the uncle and son of uncle of that boy reached on the spot."

From the aforesaid, it is crystal clear that the boy was not in a position to talk. Therefore, he asked Allauddin by gestures to talk on mobile and then handed

over the same to him. His evidence clearly shows that he was knowing Jamirulla (PW2). Jamirulla has stated in his evidence that, "When I reached on the spot, Allauddin was with Najakatulla". It is clear that when Jamirulla (PW2) and Sharafatulla (PW3) the uncle and father of the deceased reached on the spot, Allauddin (PW4) was with Najakatulla, the deceased. According to the uncle and father, when they reached that time oral dying declaration was made. In that backdrop, the evidence that, "I have not heard any conversation between the injured boy with his any of the relatives", appearing in the examination in chief of Allauddin assumes importance. The aforesaid evidence clearly destroys the claim of Jamirulla (PW2) and Sharafatulla (PW3) the uncle and father respectively that oral dying declaration was made to them by the deceased.

13. Further, according to Jamirulla (PW2) to whom the mobile phone was given, in his examination in chief he has stated that, "On that day about 10.00 10.15 p.m. I received a phone call on mobile. The said phone call was of Najakatulla and he asked me to come immediately near the railway gate. Immediately thereafter a person namely Allauddin who is the railway gateman gave me a phone call.

Thereafter, myself and my son Mohd. Shahjad went towards Railway gate, my brother Sharafat, father of the deceased also came there."

The aforesaid evidence shows that Najakatulla only asked him to come near the railway gate. That time, he did not disclose the name of the appellant as assailant. Even according to Mohd. Jamirulla (PW2), the deceased was losing his capacity to talk. Therefore, the first opportunity to disclose the name of the assailants would not have been missed by the deceased.

14. The evaluation of the aforesaid prosecution evidence shows that the evidence of Jamirulla (PW2) and Sharafatulla (PW3) do not inspire confidence in respect of oral dying declaration. The false implication at their behest of the appellant is not completely ruled out for the reasons stated in the FIR.

15. The another circumstance that has been put into service is the last seen. In that behalf, the prosecution has examined Rauf Khan Sarfaraz Khan (PW5). This prosecution witness is a property dealer and broker. He is also the close relative of the deceased Najakatulla. According to this witness, on 06.07.2011 at about 9.45 p.m. when he was returning to his house from Amravati and when he was passing Amravati Badnera old bye pass road near the railway gate in front of Ibrahim Garage, he noticed appellant and Najakatulla standing in front of the said garage. On noticing him, pleasantries were exchanged. According to the evidence of the prosecution witness, after taking dinner, he came to know that one person is assaulted near the railway gate and therefore when he reached near the railway gate he noticed Najakatulla sitting on the platform and on enquiry, he disclosed that he was assaulted by Syed Amin by means of Sattur.

The police statement of this prosecution witness was recorded on 28.08.2011. Though an explanation is sought to be given by Sanjay Dahake (PW9) about late recording of evidence of this witness that he was out of the city, it is hardly

supportive to the prosecution because of the following version appearing in the evidence of this witness:

"e` R;wph okrkZ dGY;koj eh nok[kkU;kr o iksyhl Bk.;kr xsyks0 R;kosGh eh jsYos dsfcu toG xsyks R;kosGh eh utkdrmyyk o vkjksih vehu gs bc~jkfge xWjst toG gksrks gs eh "kjkQrmYyk o eks0 uthjmYykyk lkafxrys uOgrs0"

In view of the aforesaid, it is crystal clear that after death, this prosecution witness was accompanying to the hospital so also to the police station. This witness is not a rustic person. He is a property dealer and broker. Therefore, it would have been but natural on his part to disclose immediately to the police that he had seen the deceased in the company of the appellant near Ibrahim Garage when he reached near the railway.

In that view of the matter, according to us, this witness is not trustworthy witness especially when he is a close relative of the deceased Najakatulla. Therefore, his evidence cannot be considered at all.

16. Insofar as the recovery of weapon from the place which is shown to the police where the appellant has committed murder and Chemical Analyzer's report, in our view cannot be considered at all for the following reasons.

(a) Memorandum statement by which the appellant agreed to show the place where he has concealed the Sattur is at Exh.45. The said statement is recorded on 09.07.2011. The recovery panchanama is at Exh.46. From the said, it is crystal clear that the weapon is recovered from a place which is open to sky and everybody has access to the said site. Consequently, the recovery of weapon from the said place is hardly supportive to the prosecution.

(b) Insofar as the statement made on memorandum to show the place by the appellant where he has committed murder is also of no value. The said statement is at Exh.47. In that behalf, the evidence of Afsar Baig (PW6), the pancha witness is required to be looked into. The relevant portion in that behalf is as under:

"4. On 10/07/2011 at about 2.00 p.m. I was called by the police in Police Station ? Badnera. Accused Amin took me and police to the place, where he assaulted the deceased. He pointed out the place of actual incident which was near the third electric pole from railway gate and from where earlier weapon Sattur was attached."

From the aforesaid, it is crystal clear that the place was known to police and, therefore, much importance cannot be attached to the memorandum statement Exh.47.

(c) Insofar as the Chemical Analyser's report is concerned, as per the Chemical Analyzer's report Exh.68, blood group of the deceased was "A" and also the blood group of appellant is "A" (as per report Exh.69). One of the clothes of the appellant shows that it is having blood of group "A". However, this particular

incriminating circumstance was not put to the appellant when his statement under Section 313 Cr. P.C. was recorded. We cannot forget that the blood group of deceased and the blood group of appellant is one and the same. Had this circumstance was put to the appellant, he could have given the explanation as to why the blood group "A" is appearing on his clothes.

In that view of the matter, the said evidence, which is in the nature of corroborative piece of evidence, is also not useful to the prosecution.

17. On reappraisal and reevaluation of the prosecution case, we are of the view that the prosecution has utterly failed to bring home the guilt of the appellant beyond reasonable doubt. Hence, we pass the following order.

18. The criminal appeal is allowed.

19. The appellant/accused is acquitted of the charges charged with.

20. The accused is directed to be set at liberty if not required in any other crime.