
(2017) 12 BOM CK 0013

In the Bombay High Court

Case No : 534 of 2003?with?CRIMINAL REVISION APPLICATION NO 109 of 2003

The State of Maharashtra & Anr

APPELLANT

Vs

Mangesh & Ors

RESPONDENT

Date of Decision : 07-12-2017

Acts Referred:

Indian Penal Code, 1860, Section 302,
Section 201 - Punishment for murder - Causing
disappearance of evidence of offence or giving false information to screen offender

Citation : (2017) 12 BOM CK 0013

Hon'ble Judges : R.K.Deshpande, M.G.Giratkar

Bench : DIVISON BENCH

Advocate : S.S.Doifode, P.R.Agrawal, Haidari

Judgement

1. Criminal Appeal No.534 of 2003 is filed by the State against the Judgment of acquittal by Additional Sessions Judge, Yavatmal in Sessions Trial No.99 of 2002. Criminal Revision Application No.109 of 2003 is filed by Prafulla s/o. Babarao Chinche (Complainant) praying to set aside the said Judgment in Sessions Trial No.99 of 2002 and to convict the accused.

2. The case of the appellant, in short, is as under : On 2.4.2002, at about 8.50 p.m., PSI Gajanan Ramesh Vikhe (PW5) working at Police Station, Yavatmal City received information on phone from Advocate Nimodiya that one person was lying in bleeding condition in front of Gupta building. PSI Vikhe went to the spot of incident and found that one person was lying in injured condition. Mother of deceased reached there. PSI Vikhe sent injured to the Government hospital.

3. As per the case of prosecution, accused nos. 1 to 3 were sitting near Gupta building. At the time of incident, at about 8.00 p.m. deceased came on motor cycle. Accused no.2 Gokul Kokewar assaulted on the head of motor cycle rider with a sword. Deceased fell down. Accused no.1 Mangesh Kale and accused no.3 Jagdish Tompe and one unknown person started assaulting the motor cycle rider with the weapon like knife. After sometime, the assailant ran away. Five to seven

persons assembled on the spot of incident.

4. Brother of deceased namely Prafulla Babarao Chinche (PW1) reached to the spot of incident and came to know that the deceased was his brother. He along with Girish Kanhaiyalal Vyas (PW2) took deceased Atul to Government hospital. Medical Officer declared him brought dead. Thereafter, Prafulla Chinche (PW1) went to Police Station and lodged report (Exh.37). Crime was registered vide F.I.R. (Exh.38). P.I. Gajanan Sanglu Yempalliwar (PW6) recorded statements of witnesses, arrested the accused and seized the weapon as per Confessional statements of accused nos. 2 and 3. He sent seized property to the Chemical Analyser. After complete investigation, filed charge sheet before the Court.

5. Charge was framed at Exh.25. Accused pleaded not guilty and claimed to be tried. Defence appears to be of total denial.

6. Prosecution has examined following six witnesses : a) Prafulla Babarao Chinche (PW1).

b) Girish Kanhaiyalal Vyas (PW2).

c) Dr.Vipul Namdeorao Ambale (PW3).

d) Vijay Bisesar Agrahari (PW4).

e) Gajanan Ramesh Vikhe (PW5).

f) Gajanan Sanglu Yempalliwar (PW6).

7. Case of prosecution is solely based on the evidence of Prafulla Chinche (PW1) and Girish Vyas (PW2). As per the evidence of Prafulla Chinche (PW1), he was going behind Gupta building by taking his nephew, aged about two years. There was one mercury light in front of Gupta building. There was one bench lying below mercury light. He saw accused nos. 1 to 3 and one unknown person sitting on that bench. One motor cycle came from Bapat Chowk at about 8.00 p.m. Accused no.2 Gokul Kokewar assaulted on the head of motor cycle rider with a sword. The motor cycle rider fell down. Accused no.1 Mangesh Kale, accused no.3 Jagdish Tompe and the unknown person started assaulting motor cycle rider with the weapons like knives. After sometime, all the assailants ran away. Five to seven persons assembled on the spot of incident. Girish Vyas (PW2) was one of them.

8. Prafulla Chinche (PW1) has further stated in his evidence that he went to the spot of incident and came to know that motor cycle rider was his brother Atul. Atul had sustained bleeding injuries from all sides. Atul was not responding. He went to the house and narrated the incident to his mother. Again, he came to the spot of incident. Police were there. He along with Girish Vyas took Atul to Government hospital in the auto. Doctor declared him dead. Thereafter, he lodged report (Exh.37).

9. Prosecution has relied on the evidence of Girish Vyas (PW2), who was eye

witness of the incident. Evidence of Girish Vyas (PW2) shows that he was standing in front of Shrikrishna Medical Stores at about 8.00 p.m. He wanted to purchase medicine. He heard some noise. He came out of medical store and went ahead to some extent. He saw that accused no.2 Gokul and accused no.3 Jagdish were assaulting somebody with sword and knife. He could not see the third person.

10. Girish Vyas (PW2) has stated that accused no.2 Gokul was having sword and accused no.3 was having knife. He know accused nos. 2 and 3 since his childhood. He had seen accused nos. 2 and 3 in mercury light which was on the pole. He apprehended, but he went towards the spot of incident. Accused ran away from the back side of Gupta building. When he reached near the spot of incident, deceased Atul was lying there in a pool of blood. He told Prafulla Chinche (PW1) that the dead body was of his brother. Thereafter, he started crying. Police reached there. He along with Prafulla took deceased to Government hospital. Medical Officer declared him dead.

11. Medical Officer Dr.Vipul Namdeorao Ambale (PW3) has stated in his evidence that, on 3.4.2002, he had conducted post mortem on the dead body of deceased Atul Chinche. He found fifty injuries. As per his opinion, the cause of death was due to shock and hemorrhage due to stab injuries to vital organs i.e. heart, lungs, kidneys, liver, stomach and intestine. Accordingly, he issued post mortem report (Exh73). Vijay Bisesar Agrahari (PW4) was the panch witness of Confessional statement and recovery of weapon from the accused. He did not support to the prosecution. He was crossexamined by learned A.P.P. In the crossexamination, he has stated about recording of statement, but he denied that accused produced the weapon like knife.

12. PSI Gajanan Vikhe (PW5) has stated in his evidence that he was in the Police Station on 2.4.2002 at about 8.50 p.m. He received phone message that one person was lying in front of Gupta building in a bleeding condition. He reached on the spot of incident along with his staff. He found one person lying in motionless condition. Crowd had assembled there. He inquired from the crowd about identity of that person. One lady came there. She told her name as Nirmalabai. She told him that the person lying in bleeding condition was her son Atul. Thereafter, he sent injured Atul to Government hospital, Yavatmal along with Police Constable, Anil.

13. Gajanan Vikhe (PW5) prepared Spot panchanama of incident vide Exh.67. He seized one Shaving razor (vastara), one goggle, one cover of sword (katyar), one locket and prepared Seizure panchanama vide Exh.44. He seized motor cycle vide Seizure panchanama (Exh.45). He seized simple earth and blood mixed earth from the spot of incident. At about 10.10 p.m., Prafulla came to Police Station and lodged oral report. He reduced said report into writing vide Exh.37. Crime was registered vide F.I.R. (Exh.38). On the next day, he prepared Inquest panchanama in respect of dead body for post mortem. He seized clothes of deceased, viscera etc. and prepared Seizure panchanama (Exh.47). Further

investigation was carried out by P.I. Gajanan Yempalliwar (PW6).

14. Investigating Officer Gajanan Yempalliwar (PW6) stated in his evidence about the investigation. On 4.4.2002, he arrested accused no.1 Mangesh vide Arrest panchanama (Exh.64). He arrested accused no.2 Gokul Kokewar and accused no.3 Jagdish Tompe on 14.4.2002. On 16.4.2002, accused nos.2 and 3 gave Confessional statement to show the weapon used in the crime vide Exh.78. Thereafter, they went to the spot where the accused had hidden the weapon. Accused produced the same. It was seized as per Exh.79.

15. After hearing the prosecution and defence, learned trial Court came to the conclusion that evidence of Prafulla Chinche (PW1) and Girish Vyas (PW2) is not reliable. They are not eye witnesses of the incident. There is no other evidence by the side of prosecution. Therefore, the learned trial Court acquitted all the accused for the offences punishable under Sections 302 of the Indian Penal Code and also acquitted accused no.3 Jagdish Tompe of the offence punishable under Section 201 of the Indian Penal Code. Being aggrieved by the Judgment of acquittal, prosecution has filed the present appeal.

16. Criminal Revision Application No.109 of 2003 is filed by Prafulla s/o. Babarao Chinche, brother of deceased Atul praying to quash and set aside the Judgment of acquittal delivered by the trial Court on the ground that the evidence given by him was not appreciated by the trial Court.

17. The trial Court also disbelieved the evidence of eyewitness Girish Vyas (PW2). It is contended that the trial Court also failed to consider the evidence in respect of recovery of weapons proved by the Investigating Officer, which were recovered at the instance of memorandum statements of accused.

18. Heard learned A.P.P. Mr.S.S.Doifode for the State and Ms. Haidari, learned Counsel for the applicant Prafulla Chinche in Criminal Application No.109 of 2003. They have submitted that evidence of Prafulla Chinche (PW1) and Girish Vyas (PW2) are reliable. Learned trial Court has wrongly acquitted the accused persons. Learned A.P.P. has prayed to allow the appeal. Ms Haidari, learned Counsel has prayed to allow the Criminal Revision Application.

19. Heard learned Counsel Mr.P.R.Agrawal for respondent (accused) nos. 1 to 3. He has submitted that crossexamination of Prafulla Chinche (PW1) and Girish Vyas (PW2) clearly shows that they are not eye witnesses of the incident. Learned Counsel has pointed out material omissions and contradictions in their evidence. At last, it is submitted that prosecution has failed to prove guilt of the accused. Hence, the appeal and revision are liable to be dismissed.

20. Perused the evidence on record. The case of prosecution is solely rested on the shoulders of Prafulla Chinche (PW1) and Girish Vyas (PW2). They claim to be eye witnesses of the incident. But their evidence is not reliable.

21. Prafulla Chinche (PW1) has stated in his evidence that, at the time of incident, he was going behind Gupta building. His nephew aged about two years

was with him. There is one mercury light in front of Gupta building and there is one bench below mercury light. He saw accused nos. 1 to 3 and one unknown person sitting on that bench. One motor cycle came from Bapat shop.

22. Prafulla Chinche (PW1) has stated that accused no.2 Gokul assaulted on the head of motor cycle rider with a sword. Motor cycle driver fell down. Accused no.1 Mangesh and accused no.3 Jagdish and one unknown person started assaulting motor cycle driver with weapon like knives. After sometime, assailants ran away. Five to seven persons assembled on the spot of incident. One of those persons was Girish Vyas (PW2). He went to the spot of incident and came to know that the motor cycle rider was his brother.

23. Prafulla (PW1) has stated that his brother Atul sustained bleeding injury from all sides. Thereafter, he went to his house and narrated the incident to his mother. He returned back to the spot of incident. He took his injured brother Atul to the Government hospital along with Girish Vyas. Medical Officer declared him dead. Thereafter, he went to Police Station and lodged report.

24. The evidence of Prafulla Chinche (PW1) is not reliable because he identified accused persons at the time of incident. But he did not identify his own real brother. This is impossible. He has stated in his evidence that there was mercury light. But spot panchanama Exh.67 does not show that there was any mercury light. He has stated that Girish Vyas was on the spot of incident. But, in his report Exh.37, he did not state that Girish Vyas was also there. In his report, he has stated that there was crowd of about 4050 people near the spot of incident. But he has stated in his evidence that 5 to 7 persons were there.

25. Prafulla Chinche (PW1) has stated in his evidence that he along with Girish Vyas took injured to the Government hospital in an auto. But his report itself shows that when he returned from the house, at that time he came to know that police had taken injured to the Government hospital. Portion Mark A in his report is duly proved.

26. Material evidence brought on record in the crossexamination of Prafulla Chinche (PW1) clearly shows that he was not present at the time of incident. If really he had been to the spot of incident, then he would have definitely identified his brother. He has stated in his examination in chief that he identified accused persons, but did not identify his brother. This conduct of Prafulla Chinche (PW1) is not acceptable. When he saw the incident personally, then it was his natural reaction to help his brother. But his evidence shows that he did nothing and after the incident, he reached near the injured.

27. Though Prafulla (PW1) has stated that he along with Girish Vyas (PW2) took deceased to the hospital. His report (Exh.37) itself shows that police had already taken the deceased. PSI Gajanan Vikhe (PW5) has stated in his evidence that when he reached to the spot of incident, one person was lying there in injured condition. Mother of deceased reached there. She introduced herself as the mother of deceased. Thereafter, he sent injured along with Police Constable Anil.

PSI Vikhe has not stated in his evidence that Prafulla Chinche (PW1) or Girish Vyas (PW2) were found on the spot of incident. Therefore, evidence of Prafulla Chinche (PW1) that he was present on the spot of incident and saw the incident personally is not reliable. He is interested person to prosecute the accused persons. Admittedly, there was rivalry between the accused and deceased. Hence, the learned trial Court rightly discarded evidence of Prafulla Chinche (PW1).

28. Girish Vyas (PW2) claimed to be eye witness of the incident. In his examination in chief, he has stated that he went to purchase medicine in Shrikrishna Medical Store. He heard some voice. He came forward. He saw accused no.2 Gokul and accused no.3 Jagdish assaulting somebody with sword and knife. He could not see the third person.

29. Girish Vyas (PW2) has stated that accused no.2 Gokul was having sword and accused no.3 Jagdish was having knife. He has stated that accused nos.2 and 3 assaulted the motor cycle rider. He has stated that he identified deceased Atul. Thereafter, Prafulla Chinche (PW1) went near the spot. Then he told Prafulla that dead body was of his brother Atul. Thereafter, Prafulla started crying. Police reached there. Thereafter, Girish Vyas (PW2) along with Prafulla Chinche (PW1) took Atul to Government hospital. Doctor declared him dead.

30. In the cross examination, Girish Vyas (PW2) has admitted that he along with deceased Atul and others were prosecuted for the offence of murder. They were in jail. It is pertinent to note that he has identified accused nos. 2 and 3 on the spot of incident. Then it was natural for him to identify the deceased. But his evidence show that till the incident was over, he did not go to help the deceased. This unnatural conduct shows that he was not eye witness of the incident. Moreover, there is material contradiction in respect of evidence adduced by Prafulla (PW1).

31. Prafulla Chinche (PW1) has stated that he reached to the spot of incident. There was crowd of 5 to 7 persons. Girish was one of the persons. Prafulla Chinche (PW1) has stated that Girish Vyas (PW2) told him that injured Atul was his brother. In the report (Exh.37), Prafulla Chinche (PW1) has not stated about presence of Girish Vyas (PW2). Girish Vyas (PW2) was a nearest friend of deceased. He was prosecuted along with the deceased in a murder case.

32. Material omission is brought on record in cross examination of Girish Vyas (PW2) that he first time stated before the Court that he came out of medical store and saw the incident by going ahead towards the place of incident and he did not disclose the incident till the recording of evidence before the Court. He has stated in his evidence that accused no.2 Gokul was having sword and accused no.3 Jagdish was having knife. But it is also material omission brought on record. Prafulla Chinche (PW1) has stated that accused no.1 Mangesh accused no.3 Jagdish and one unknown person assaulted the deceased. But Girish Vyas (PW2) has not stated about accused no.1. He has stated about accused nos. 2

and 3.

33. The crossexamination of Girish Vyas (PW2) shows that his statement was recorded on 28.6.2002. The incident took place on 2.4.2002. He has admitted in his crossexamination that being a nearest friend he was present for the funeral of deceased. He had been to immerse ashes of deceased in the river Shirpur on 3rd day of death of deceased. This itself shows that this witness was available to the police, but his statement was not recorded before 28.6.2002. Crossexamination of Police Inspector Yempalliwar (PW6) clearly shows that this witness was not available till 28.6.2002. He has stated in his crossexamination that, during the period from 4.4.2002 till 28.6.2002, Girish Vyas (PW2) met him for the first time on 28.6.2002. This itself shows that, being a nearest friend of deceased, this witness is introduced as an eye witness.

34. Girish Vyas (PW2) has stated in his evidence that he along with Prafulla Chinche (PW1) has taken the deceased to hospital. This version is falsified by report (Exh.37) and evidence of PSI Vikhe. Report (Exh.37) lodged by Prafulla (PW1) clearly shows that after the incident police reached there. Police sent injured to Government hospital with Police Constable. Therefore, it is clear that evidence of Prafulla (PW1) and Girish (PW2) that they have taken the deceased to the hospital is nothing but false. Prafulla (PW1) has not stated in his report about this fact. Moreover, PSI Vikhe (PW6) has specifically stated in his evidence that he sent the deceased with Police Constable Anil to the General hospital. PSI Vikhe has not stated about presence of Prafulla (PW1) and Girish (PW2) on the spot of incident. PSI Vikey (PW6) along with staff immediately reached to the spot of incident. As per his evidence, mother of deceased reached there. She introduced herself as mother of deceased. Thereafter, he sent the injured/deceased to Government hospital.

35. The learned trial Court rightly recorded its findings that Prafulla (PW1) and Girish (PW2) are not eye witnesses of the incident. It is the case of prosecution that accused nos. 2 and 3 gave confessional statements and produced knife, which was hidden below the stone. Though Vijay Agrahari (PW4) has stated in his evidence about the Confessional statement. But, in his crossexamination, he has specifically denied that the accused produced knife in his presence. Therefore, his evidence is also not helpful to the prosecution.

36. Evidence of Medical Officer Dr.Vipul Ambale (PW3) shows that he conducted post mortem of the dead body of deceased Atul and found fifty injuries. As per his opinion, cause of death was due to injuries to vital organs. Therefore, it is clear that it was a homicidal death. But prosecution has failed to prove that accused persons are author of crime.

37. C.A. Report filed on record (Exh.86) shows that blood group of deceased was not determined. Only human blood was found on article nos. 1, 2 to 8 and 9. Therefore, C.A. Report is also not helpful to the prosecution. Evidence of Prafulla (PW1) and Girish (PW2) is not reliable because of their unnatural conduct. There

are material omissions and contradictions brought on record. Evidence of Medical Officer show that he found 50 injuries on the dead body. This itself shows that the incident was going on for a long time. In such circumstances, Prafulla (PW1) could have identified his brother. But he did not state that he identified his brother before the incident was over.

38. Girish (PW2) was the nearest friend of deceased. He has also not identified the injured/deceased at the time of incident. Interestingly, both Prafulla (PW1) and Girish (PW2) have stated that they identified accused persons, but have not identified the deceased. Their evidence is nothing but only to involve the accused persons. Learned trial Court has rightly recorded its findings. There is no infirmity or illegality in the impugned Judgment. Hence, we pass the following order. // ORDER //

Criminal Appeal No.534 of 2003 and Criminal Revision Application No.109 of 2003 are hereby dismissed.

The record and proceedings be sent back to the trial Court.

No order as to costs.