

(1997) 01 BOM CK 0062
In the Bombay High Court
Case No : Criminal Appeal No. 601 of 1984

The State of Maharashtra

APPELLANT

Vs

Shivaji Shivram Tambe and Another

RESPONDENT

Date of Decision : 16-01-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 307, 34

Citation : (1997) 3 ALLMR 332 : (1997) BomCR(Cri) 897 : (1997) 99 BOMLR 539

Hon'ble Judges : Vishnu Sahai, J; R.P. Desai, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Vishnu Sahai, J.—The appellant aggrieved by the Judgment and Order dated 30th March, 1984, passed by the Additional Sessions Judge. Thane, in Sessions case No. 136 of 1982. acquitting the Respondents for an offence punishable u/s 307 r/w. 34 I.P.C., has come up in appeal before us.

2. Briefly stated the prosecution case runs as under:

The victim Ramesh Chintaman Kose (P.W. 1) and the Respondents were well known to each other from before the incident. On 20.4.198 I at about 11.15 p.m. the victim was returning from Forest Office in front of Kalyan Police Station. He had gone there to take a pass for transporting wood. He was on a scooter and on the pillion scat (hereof was silting Datta Sudam Jadhav, a deal and dumb person. At the said lime he reached the turning of Rambaug and Murbad Road. There were two betel shops there. In front of one of them namely Krishna's Pan-shop the Respondents were standing. In front of the other shop Arun Chhagan Tapase (P.W. 3) was standing. It is alleged that the scooter of the victim dashed against Respondent Shivaji. On that Respondent Datta caught hold of his hand and thereafter Shivaji came from the back side and inflicted a knife blow on his person. When the said blow was inflicted the victim was on scooter. He

consequently left his scooter and ran to Subnet's shop. After assaulting him the Respondents are alleged to have run away. Apart from the victim, Datta Sudam Jadhav and Arun Chhagan Tapase, this incident was seen by Datta Rambaug Borkar.

3. The evidence shows that Datta Borkar took Ramesh Kose, who was in a precariously injured condition, to Municipal Dispensary, Kalyan.

The injuries of the victim were medically examined the same day at 11.30 p.m. by Dr. Swati Kari (P.W. 10) at Municipal Hospital, Kalyan. She found on his person the following injury:-

Incised wound 1/10 inch below and 1/10 to the right side of umbilicus 1 1/2 " x 1/3" cavity deep, oblique, depth not ascertained by probe.

In the opinion of Dr. Swati Kari, the injury was fresh and was attributable to sharp edged instrument like knife.

As the condition of the victim was precarious he was advised to be taken to Central Hospital, Ulhasnagar and there in turn the same night the doctors advised him to be shifted to K.E.M. Hospital, Bombay.

The evidence shows that at K.E.M. Hospital, Bombay, the victim was surgically operated by Dr. P.D. Daruwala (not examined). The certificate prepared by Dr. Daruwala (Exh. 20) was sought to be proved by Dr. Hilary Nezereth. There is a technical flaw in the said certificate being proved inasmuch as Dr. Hilary Nezereth has nowhere stated that she had seen Dr. Daruwala signing and the writing in Exhibit 20 was his.

4. Going backwards Datta Jadhav, who at the time of the incident was on the pillion seat of the scooter of victim Ramesh Kose, immediately after the incident left for the house of Sharad Kose P.W. 2, the brother of victim Ramesh. The evidence of Sharad Kose is that the same day at about 11.15 p.m. he reached there and he told them by signs that his brother was assaulted by knife and he pointed towards the house of Respondent Shivaji.

5. On receiving the information from Datta Jadhav, Sharad Kose came to the place of incident. He found his brothers' scooter lying there on the road at the side of the Pan Shop. He learnt that his brother had been shifted to Municipal Hospital. When he did not find him there he was told that he had been shifted to Central Hospital, Ulhasnagar. It was at the said hospital in the presence of this witness that Ramesh was shifted to K.E.M. Hospital.

6. The F.I.R. of the incident was lodged by Sharad Kose at 2 a.m. the same night at Police Station Kalyan.

7. According to the prosecution Suresh Chintaman Kose (P.W. 4) the brother of the victim was also present at the house when Datta Jadhav gave the information about the attack on Ramesh. The evidence of Suresh is that first Sharad left for the place of incident and, thereafter he followed him. He further

stated that Arun Tapase (P.W. 3) met him on the road and told him about the assault on his brother.

8. The investigation was conducted by P.I. Bhimrao Maruti Karalkar, P.W. 11. On 21.4.1981, he prepared the panchnama of the place of incident (Exhibit 12). The same day he arrested the Respondents. The Respondent Shivaji during the course of interrogation stated that he could get the weapon of assault, namely knife recovered. Consequently in the presence of public panch Kishan Gopal Shinde (P.W. 6) (who turned hostile) on 20.4.1981, on the pointing out of Shivaji, a knife was recovered from behind a mirror in Room No. 4, in Prabhu Dayal Chawl. The recovered knife and some other articles were sent to the Chemical Analyst by P.I. Karalkar.

Finally after the completion of investigation P.S.I. Patil submitted the charge sheet on 18.1.1982.

9. The case was committed to the Court of Sessions in the usual manner. In the trial the Respondents were charged on the grounds mentioned in paragraph 1. To the said charges they pleaded not guilty and claimed to be tried. Their defence was that of denial.

During trial apart from tendering and proving some documentary evidence, the prosecution in all examined 11 witnesses. Two out of them namely victim Ramesh Kose (P.W. 1) and Arun Tapase (P.W. 3) were examined as eye witnesses.

In defence no witness was examined.

After recording the evidence adduced by the prosecution, the statement of the Respondents u/s 313 Cr.P.C. and hearing learned Counsel for the parties, the learned trial judge concluded that the prosecution had failed to bring home the guilt of Respondents beyond reasonable doubt and consequently acquitted them vide (he impugned judgment, which has been assailed by means of the present appeal.

10. We have heard Mr. V.T. Tulpule, Public Prosecutor for the appellant and Mr. S.V. Kotwal holding for Mr. S.R. Chitnis for the Respondents. We have also perused the depositions of the prosecution witnesses, the material exhibits tendered and proved by the prosecution, the statements of the Respondents recorded u/s 313 Cr.P.C. and the impugned judgment. After thoughtfully reflecting over the matter we are satisfied that the view of acquittal recorded vide the impugned judgment cannot be stigmatised as being either grossly unreasonable on facts or suffering from a manifest illegality resulting in failure of justice. As a logical imperative, this appeal must fail.

11. The short and the crucial question in this appeal is whether the evidence of the two eye witnesses examined by the prosecution namely Ramesh Kose (P.W.I) and Arun Tapase (P.W. 3) inspires confidence or not? We may straightway mention [hat the two other eye witnesses namely Datta Sudani Jadhav and Datta Rambaug Borkar have not been examined by the prosecution. The latter as the

evidence of Suresh Kose (P.W. 4) shows "because his whereabouts were not known". We would first like to take up the statement of Arun Tapase.

12. The learned trial Judge in the impugned judgment has given a large number of reasons for not placing any reliance on Arun Tapase's testimony. Those reasons are to be found in paragraph 11 of this judgment. We do not propose enumerating all of them because apart from swelling the bulk of this Judgment no other useful purpose would be served. In our judgment there is a solitary circumstance namely the inordinate delay in interrogation of this witness u/s 161 Cr.P.C. which shows that in all probability he is a got up witness. Evidence shows that the incident took place on 20.4.1981 but this witness was interrogated u/s 161 Cr.P.C. 19 (nineteen) days later i.e. on 9.5.1981. No explanation, much less a plausible one, is forthcoming from the side of the prosecution for the inordinate delay in the interrogation of this witness during investigation.

We wish to emphasise that whenever there is an inordinate delay in the interrogation of a witness u/s 161 Cr.P.C. a lurking suspicion creeps in the mind of the Court about the probability of the witness being a got up one. We are not shy in observing that this suspicion has crept in our mind. Apart from this we find that there are major contradictions between the testimony of this witness and that of the victim Ramesh Kose. They have been highlighted in the impugned judgment and we do not wish reiterating them.

It is true that this witness, as contended by Mr. V.T. Tulpule, appears to be a wholly independent witness but the circumstance that a witness is independent does not ipso facto mean that he is a truthful witness. The settled law is that the testimony of an independent witness has also to be in consonance with probabilities. He too has to pass the test of a truthful witness. In this connection it would be useful to refer to the observations of the Apex Court in the oft quoted decision of Shankarlal Gyarasilal Dixit Vs. State of Maharashtra, wherein in paragraph 33 Chandrachud, C.J., as he then was, speaking for the Court observed as under:-

Our judgment will raise a legitimate query: If the appellant was not present in his house at the material time, why then did so many people conspire to involve him falsely? The answer to such question is not always easy to give in criminal cases. Different motives operate in the minds of different persons in the making of unfounded accusations. Besides human nature is too willing when laced with brutal crimes to spin stories out of strong suspicions.

13. In our view the learned trial Judge acted correctly in not placing reliance on the testimony of Arun Tapase.

14. In our judgment the learned trial Judge was also right in not relying upon the testimony of Ramesh Kose (P.W. 1), the injured witness.

15. We would straight way like to deprecate a tendency on the part of the Courts to ipso facto accept the evidence of an injured witness. Courts would do well to

remember that injuries only at the best guarantee to the presence of a witness; they do not ensure the credibility or truthfulness of a witness; and even in the case of an injured witness, no Court ever convicts unless it is satisfied that the said injured witness is a truthful witness on aspects which constitute the core of the prosecution case. The proposition is far too well-settled to require amplification by judicial pronouncement.

16. It is bearing in mind this angle of appreciation of evidence that we have to examine the evidence of Ramesh Kose, the injured witness. We find that he is not a truthful witness. During his cross-examination he has stated that Respondent Shivaji pierced the knife in a straight manner in his stomach. However, the evidence of P.W. 10 Swati Kari belies this. In her cross-examination she stated that the injury by this knife is only possible in this case if it was used by dragging it from upwards to downwards direction. There is no evidence to this effect.

Mr. S.V. Kotwal strenuously urged and rightly in our judgment that the aforesaid admission by Dr. Swati rules out the injury of Ramesh Kose being caused in the manner alleged by him.

17. We further find that the account given by him appears to be extremely unnatural. His evidence shows that at the time of the incident on the pillion seat of the scooter Datta Sudam Jadhav was sitting. His evidence further is that an altercation, in fact a scuffle between the Respondents and him, preceded the assault on him. In such a situation we feel that had Datta Sudam Jadhav been actually sitting on the pillion seat then he would have rushed to his rescue. In our judgment in Datta Jadhav, this witness has endeavoured to create a false eye witness. We feel that this is the reason why the prosecution did not examine him.

Apart from it we find that there are some other plausible reasons for rejecting his testimony which have been spelt out in the impugned judgment. We do not propose reiterating them as it would only result in swelling the bulk of this judgment.

18. We also feel that the claim of both the eye-witnesses that the incident took place at the purported place of the incident is doubtful. In our view had the incident taken place there blood must have been found. It is significant to point out that the injury sustained by the victim was a cavity deep incised injury on his abdomen. That being so, in our judgment blood must have gushed out from this injury. And that being so, it should have been found at the place of incident.

18A. The investigating officer was fully aware of this lacuna in the prosecution case and therefore, at the level of his intelligence, in the panchnama of the scene of the incident (Exhibit 12) he has taken care to mention that as the place of incident was a Pakka Tar Road and there was a heavy traffic, blood stains were not visible. In our view considering the large quantity of blood which must have gushed out from the injury of the victim there was no question of blood marks being completely erased by heavy traffic.

18B. We would like to emphasise that when investigating officers prepare a spot panchanama they are not expected to give a Judgment as to why a certain thing which should have been found on the place of the incident is not found there and sometimes when they do this, as in the case here, a suspicion creeps in the mind of the Court that they are definitely trying to overdo in the matter and are trying to cure the infirmities in the prosecution case.

19. In our view, the incident did not take place at the place alleged by the prosecution. And since the ocular account is categorical that it did take place there this is another reason, and a very weighty one, in our judgment, for rejecting the same and the prosecution case, in support of which they depose.

20. The time of incident even according to the prosecution was 11.15 p.m. What appears to us is that at the said time when the victim Ramesh Kose was all alone, someone whom he could not recognise either on account of darkness or on account of suddenness with which the assault took place, came from behind and inflicted a solitary blow on his person and in the twinkling of a second ran away.

21. Matters do not end there. In the instant case prosecution tried to bolster its case by evidence u/s 27 of the Indian Evidence Act. According to it on 24.4.1981 on the pointing of the Respondent Shivaji from behind a mirror in room No. 4, in a chawl, a knife was recovered. The investigating officer to us it appears, once again was guilty of overdoing by mentioning in the recovery memo of knife that on the said knife there were blackish blood-spots. However, this observation is belied by the fact that the report of the Chemical Analyst, to whom the knife was sent, is crystal clear that there was no blood found on the knife. This is another infirmity in the prosecution case.

22. We would like to emphasise that we are seized of the matter in an appeal against acquittal. Although the Code of Criminal Procedure draws no distinction between the powers of the Appellate Court in an appeal against acquittal from those in an appeal against conviction but the law as has crystallised through a catena of decisions of the Apex Court, is that unless the appreciation of evidence of the Trial Court is grossly perverse or bordering on perversity or the impugned order of acquittal is vitiated by a manifest illegality, the Appellate Court should not interfere in spite of the fact that it may feel that had it been the trial court it would have taken a different view.

23. The test in an appeal against acquittal is whether the view of acquittal in a given case is a possible view and not whether it is a plausible view. If only where the Appellate Court finds that the view of acquittal cannot be categorised as a possible view does it interfere with the impugned judgment of acquittal.

24. In the instant case for the reasons mentioned above, in our judgment, the view of acquittal is not only a possible view but a wholly plausible one. In our Judgment the converse view would have been a manifestly perverse view.

25. For the said reasons we are implicitly satisfied that the impugned judgment

of acquittal has been correctly recorded by the trial court and merits no interference.

26. In the result, this appeal is dismissed. The acquittal of the Respondents is confirmed. They are on bail. They need not surrender. Their bail bonds stand cancelled and sureties discharged.

Before parting with this judgment we would like to record our appreciation for the highest traditions with which the learned Public Prosecutor has performed his duty. We were oblivious to some of the reasons recorded by us in support of acquittal of the Respondents in this judgment. It is the learned Public Prosecutor who has made us aware about them. We would also like to record the assistance rendered to us by Mr. S.V. Kotwal, the learned Counsel for the Respondents.

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