
(2022) 06 BOM CK 0042

In the Bombay High Court

Case No : Criminal Appeal No. 145 Of 2016, Interim Application No. 866 Of 2020

Vijay Jagannath Khairnar And Others

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 10-06-2022

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 447
Code Of Criminal Procedure, 1973 — Section 164
Maharashtra Land Revenue Code, 1966 — Section 143

Citation : (2022) 06 BOM CK 0042

Hon'ble Judges : Sadhana S. Jadhav, J; Milind N. Jadhav, J

Bench : Division Bench

Advocate : Shirish Gupte, Supriya Kak I, Rahul Arote, Prasad B. Kulkarni, M.M. Deshmukh

Final Decision : Allowed

Judgement

Sadhana S. Jadhav, J

1. The Appellants herein are convicted for the offence punishable under sections 302 and 447 read with 34 of the Indian Penal Code and are sentenced to suffer imprisonment for life and fine of Rs.10,000/- each, in default to suffer rigorous imprisonment for three months by the Additional Sessions Judge, Malegaon in Sessions Case No. 112 of 2014 vide judgment and order dated 19th January 2016. Hence, this appeal.

2. Such of the facts necessary for the decision of this appeal are as follows:-

a) The Shewale family owns about 5.5 acre of irrigated agricultural land in Gat No. 218 / 1 at Village Nagaon, Tal-Malegaon. The Shewale family consists of Nimba Shewale, his wife Taibai, their sons Samadhan, Gorakh and Ganesh and daughter-in-law Poonam wife of Samadhan. The land is cultivated by Samadhan whereas Gorakh and Nimba are engaged in plying rickshaw. The accused-appellants are also agriculturalists and their land is situated on the eastern side

of agricultural land of Shewale. The accused have constructed a bungalow in their field and reside there. There was a dispute between the Shewale family and the family of the accused on account of a common way through the agricultural land. There used to be intermittent quarrels between both the families over the common way. A civil suit was also pending.

b) On 13th June 2014 at about 6.30 p.m., Samadhan was engaged in ploughing in agricultural land. Nimba and Poonam were at home. That Taibai, mother of Samadhan saw an altercation between Vijay, Suresh and Samadhan in her agricultural land. When she was on her way to give drinking water to Samadhan that Suresh had caught hold of Samadhan from front side whereas accused stabbed him with a sword stick on the back. When they saw Taibai, Vijay drew the Gupti from the back of Samadhan and fled from the spot. Thereafter, Samadhan was taken to Girna Hospital by their rickshaw. On admission he was declared dead. Doctor from Girna Hospital informed the police station officer at Malegaon Taluka Police Station about the demise of Samadhan.

The statement of Samadhan could not be recorded as he was declared dead. At the hospital Taibai narrated the incident to the police. On the basis of which, Crime No. 146 of 2014 was registered. Investigation was set in motion and charge-sheet was filed.

c) At the trial, prosecution examined as many as 8 witnesses to bring home the guilt of the accused.

3. PW.1 – Taibai Shewale claims to be sole eye-witness to the incident of assault. According to her, the incident took place on

13 th June 2014 at about 6.00 to 6.30p.m. She had seen the accused abusing and assaulting Samadhan. According to her, she was proceeding towards the agricultural land to provide water to Samadhan. Soon after, she was noticed the accused fled from the spot. In the meanwhile, Gorakh reached the spot in an auto-rickshaw, while Samadhan was lying in a pool of blood. That they took Samadhan to Girna hospital in the auto-rickshaw. Doctor informed her about the demise of Samadhan. After sometime the police arrived in the hospital and the incident was narrated by her. The police had obtained her thumb impressions and signature of Gorakh Shewale and Sagar Bacchav on her statement. The said statement is marked at 'Exhibit-27'. That according to her, the spot of incident was shown by her to the police. The spot was guarded during the night. The panchnama was conducted on the next day. The sandal of her son was lying on the spot of incident. The Gupti i.e. the sword stick was lying near the sandal and one rexin cover was lying at a distance of 9 to 10 feet from the spot where Samadhan was lying in a pool of blood. The statement of PW.1-Taibai was also recorded under section 164 of Cr.P.C. and marked at 'Exhibit-28'. She has further stated that four days after the incident, the police had enquired with her and she had narrated the incident to the police.

4. It is elicited in the cross-examination that the accused are owner of the

adjacent land on the eastern side and that they built the bandh on the said land. That on the northern side of the land of PW.1 there is a land of Nandkishor Khairnar and on the southern side there is a power loom factory of Sushil Agrawal. That the labourers working in the power loom factory are residing in the rooms situated on the eastern side of the power loom factory.

Another power loom factory of Pawan Timbbadwal is also situated there. That there is a flour mill in front of their house. On the eastern side of the house of the PW.1 there are rooms of the tenant Kamabi Najmoddin and others. A Well is situated at the distance of 100 feet from their house and there is a pipeline upto their house. That Samadhan was lying at a distance of 250 feet from the western side bandh of the house of accused. A cattle shed of the accused is near the boundary of their agricultural land and that the land of PW.1 is on the western side of the bungalow of the accused. The witness was confronted with the photograph of scene of offence which is collectively marked at 'Exhibit-31'. The location shown in the said photographs is admitted by PW.1. According to PW.1, the spot where Samadhan was lying in a pool of blood is more than 750 feet from the western side bandh of the land.

5. That the accused were demanding a way from the bandh situated at the western side of the bungalow of the accused. That the Tahsildar had granted the way to the accused. Besides the disputed way, there are two ways which lead towards the bungalow of the accused. That when she had been to the police to lodge a complaint in respect of abusing and threat to kill, the police had driven her away and she had not lodged any complaint against the police. It is admitted that Ganesh is the ambulance driver of Girna Hospital. That a case of dacoity was pending against Samadhan in Nashik Court but according to PW.1 it was a false case. That Samadhan used to come home for tea and lunch. On the day of incident, Samadhan had lunch between 10.00 to 10.30 a.m. She had further stated that she was carrying cold water bottle from the fridge for Samadhan. She had not heard any hue and cry. When she was inside the house she was carrying the water bottle which was kept in the house. The incident took place within two seconds. The assailants fled towards the eastern side, at that time she was also proceeding towards the eastern side of her house. The plough was 30 to 35 feet away from Samadhan.

6. According to her, Samadhan had spoken to her and when she saw his clothes soaked with blood and after seeing his clothes soaked with blood, she raised hue and cry. Her clothes as well as clothes of Gorakh were also stained with blood but their clothes were not seized by the police. She could not remember where was the water bottle which she was carrying. They thought that Samadhan was unconscious and therefore, he was taken to the hospital. She had narrated the incident to the doctor also.

7. The witness was confronted with her statement recorded under section 164 of Cr.PC. She has denied to have stated that at the time of incident she was proceeding to fetch water and Samadhan was ploughing the field. She has

denied to have stated so. It is marked as portion marked 'A'.

8. It is admitted by her that infact, there was a scuffle in between Samadhan and accused nos. 1 and 2. It is also admitted that after the death of Samadhan his wife married Gorakh i.e. her younger son. According to her, she had seen the accused stabbing Samadhan from behind. The F.I.R. is marked at 'Exhibit-27'. The photograph is at 'Exhibit-31'.

9. In the course of investigation, the scene of offence panchnama was conducted on 14th June 2014 in the presence of PW.2 - Sandeep Nikam. He has deposed before the Court that the plough was lying on the spot. One Gupti was lying at a distance of 9 feet from plough. A pair of sandals was lying on the spot. Rexin cover of Gupti was also lying on the spot. There was a standing bajra crops in the field.

10. It is elicited in the cross-examination that the house of PW.1 is situated in the field, in which the spot panchnama was being prepared in the presence of 25 persons. According to him, the police had called him after the preparation of panchnama. That there was a colony for the labourers in the field of Taibai. There are 4 to 5 blocks in the said colony and the said blocks were occupied by the labourers of Taibai. That there is a compound wall at the eastern side of the field of PW.1 and the height of the compound wall is about 4 to 5 feet and 30 feet area in the east-north corner of the field of Taibai was being ploughed. There were no blood stains on the iron plough.

11. PW.- 3, 4, 5 and 6 are hostile witnesses.

12. PW.7- Dr. Kishor Dange had performed autopsy on the dead body of the Samadhan. According to him, the cause of death was cardiorespiratory failure due to blood loss due to injury to left kidney, spleen and liver by stab knife. That there were three injuries on the dead body of Samadhan, which show the following:-

1) Stab wound with ragged margins left infra scapular region causing injury to the left kidney, spleen and liver, it was of size 2.5 x 2 x 1.5 cm.,

2) Elliptical wound in epigastrium, 1.5 x 1 cm.,

3) Elliptical wound right upper eye, 1.5 cm x 1 cm sharp margins. All three injuries were ante-mortem.

13. That the deceased had taken his last meal within 4 to 6 hours of his death. That the postmortem was conducted 24 hours after the death of Samadhan. The injury no. 1 was so fatal that the death must have occurred instantaneously. The injury No. 2 is on the front side above the stomach and below the ribs. Whereas injury nos. 2 and 3 can be caused due to slippery blows. The said injuries are not possible if the injured is held from front side by another person. Separate blows are required for the 3 injuries sustained by the deceased, that the margin of the injury no. 1 was ragged. Whereas the edge of the weapon seized, had no ragged

edge on either side. That injury nos. 2 and 3 are not fatal and could not have caused death.

14. PW.8-PSI-Bhagwat Patil had received the information on 13 th June 2014. According to him, he was attached to Malegaon Taluka Police Station as P.S.I. He has stated about the steps taken by him, in the course of investigation. He has proved the omissions and contradictions of the witnesses. The offence was registered at about 9.35p.m. That no water bottle was found on the spot of the incident, despite searching the entire area of the field.

15. Learned Senior counsel Mr. Gupte has urged before the Court that by no stretch of imagination PW.1 can be said to be an eye-witness to the incident. That water bottle which was purportedly being carried by PW.1 to give water to her son was not found on the spot. The dead body of the deceased was lying on the western side of their house. The learned senior counsel has drawn the attention of this Court to the photographs of the house of the complainant and the accused. There is a cattle shed on the boundary and there was a standing Bajra crop in the field. It would have been impossible to see anything from that distance. The photographs are admitted by PW.1. That in the year 2012 the accused had filed a petition under section 143 of the Maharashtra Land Revenue Code, 1966 against Nimba Shewale by an order dated 22nd June 2012. The Tahsildar had granted the road in favour of the family of the accused and had further warned that the respondents shall not create any hindrance in Gut No. 217 and 218/1 east-west boundary.

16. The learned senior counsel has further drawn the attention of this Court to 'Exhibit-66' which is the station diary entry in respect of the information received from the hospital by Malegaon Police Station at about 7.30p.m. The information indicates that on the day of incident Samadhan was assaulted by his neighbour and that he was taken to Girana Hospital in the ambulance of Ganesh Shewale and the ambulance was driven by Ganesh Shewale. The station diary further showed that at about 9.35p.m. the police had been to the hospital for recording the statement of the injured. However, doctor had declared him dead. Thereafter, the station house officer had informed the mother, brother and other relatives of the patient. It is submitted that the reference is only to an assault by neighbour. There are neighbours on all the three sides of agricultural land. Moreover, there are colonies of labourer who work in the power loom factory and therefore according to senior counsel it cannot be said that the present appellants are the only one who would have assaulted Samadhan.

17. Per contra, the learned APP has submitted that infact, PW.1 is eye-witness to the incident and only because she happens to be the mother of the deceased, her evidence cannot be brushed aside. She is the most natural witness and her evidence is consistent to the effect that she has seen the accused no.1 stabbing the deceased from behind.

18. The learned counsel appearing for the respondent no. 2 has supported the

case of the prosecution and has submitted that there is no reason to disbelieve PW.1. That she is an eye-witness to the incident and has proved the case. That injury No. 1 is fatal and the same is attributed to accused no.1 -Vijay and that accused no.2 – Suresh had facilitated the said assault.

19. With the help of respective counsel, perused the evidence meticulously. The entire case of the prosecution rests on the evidence of PW.1 i.e. Taibai, the mother of the deceased who claims to be an eye-witness. There is no doubt that there are discrepancies in the evidence of PW.1

20. First and foremost, it is established by the prosecution that the relations between the family of the accused and the family of the deceased were not cordial for quite a long time. Civil proceedings were pending before the Revenue Court. However, pendency of civil litigation by itself would not establish the motive to kill. There is no prelude to the incident. It is not a case of the prosecution that there were no altercation between the parties either in close proximity to the incident or on the day of the incident. PW.1 has deposed that in the evening at the end of the day she was taking cold water for her son in a bottle and at that time she saw that the accused no.2 had held the deceased from front side and the accused no. 1 had stabbed him from behind. That according to PW.7-Dr. Dange, there were 3 injuries on the dead body of Samadhan and that injury no. 1 was fatal whereas injury nos. 2 and 3 are due to slippery blows and are not fatal therefore, could not have caused death.

21. It is categorically opined that the said injuries are not possible if a person holds the injured from front side. That the deceased was brought to the hospital by Ganesh in his ambulance. According to PW. 1, the injured was taken to the hospital in an auto-rickshaw. It is admitted that the brother of the deceased is working with Girana hospital on an ambulance. PW.1 was confronted with the photographs of the scene of offence which is collectively marked at 'Exhibit-1'. The location shown is admitted by P.W.1.

22. It is pertinent to note that the deceased was lying at a distance of 250 feet from the western side bandh of the house of the accused. That a cattle shed stands near the boundary of their agricultural land which is on the western side of the bungalow of the accused. The plough was 32 to 35 feet away from the dead body. According to PW.1 Samadhan had spoken to her before he was taken to the hospital which cannot be believed by any stretch of imagination. According to her, she had seen accused no.1 stabbing the deceased, it does not appeal to a prudent mind that she would enquire with the deceased. The water bottle which she was carrying was not found on the spot. In the same breath she has stated that Samadhan was unconscious. In the course of recording of 164 statement, she has stated that she was proceeding to fetch water at the relevant time, however, she has denied to have stated so.

23. After perusing the photographs of scene of offence, it is difficult to believe that PW.1 must have actually seen the incident. The presence of the accused at

the spot while proceeding to their own house cannot be held against the accused as they have residence in the same Gat number. Moreover, the weapon of assault was lying at the scene of offence. Apart from the cattle shed, there was standing Bajra crop in the field. In fact, there are several people who are residing in the same area. In the eventuality, that the assault was made while Samadhan was ploughing the field there would have been bloodstains on the plough. There is no evidence on record to show that the deceased was dragged neither it is the case of PW.1 that after having been assaulted the deceased had made any movement so as to fall more than 35 feet away from the plough. The fact that the cause of death is cardiorespiratory failure due to blood loss by itself would show that Samadhan was not extended with medical aid immediately. The discrepancies, omissions and contradictions in the evidence of PW.1 makes it difficult for the Court to believe that PW.1 is actually an eye-witness to the assault mounted upon the deceased by the accused. The fact that litigation was pending in Court, it was convenient for PW.1 to presume that it can be none other than the accused who could have assaulted the deceased. Suspicion however, strong cannot taking place of proof. The evidence of eye-witness has to be a sterling testimony and has to be proved before the Court of law beyond reasonable doubt.

24. The statement of PW.1 recorded under section 164 which is at Exhibit-28 as well as the F.I.R. are at variance. PW. 1 has stated in the F.I.R. that initially there was a verbal altercation between the deceased and the accused. That the accused had abused the deceased and thereafter the accused no.1 had stabbed him in the back while accused no. 2 had held him from front side. She had stated in Exhibit-28 that there was no prelude to the incident the accused came on the spot, Suresh had held the accused whereas accused no.1 had stabbed him. This version would show that it is the case of a single stab injury, the same has been falsified by a medical evidence which would show that there are three injuries sustained by the deceased. One of the injury is on the right upper eye with sharp margin and another injury is on epigastrium i.e. the upper portion of the stomach. The eye-witness has made no reference to the second and third injury.

25. The scene of offence panchnama would show that at the relevant time the agricultural land in the east north corner of the field of Taibai was being ploughed.

26. In the case of *Lallu Manjhi v/s. State of Jharkhand* (2003) 2 SCC 401 the Supreme Court has held as follows:-

The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories, namely (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon testimony of a single witness.

27. In the present case also the evidence of PW.1 is neither wholly reliable nor wholly unreliable and in such circumstances when there is a doubt about the prosecution case the benefit necessarily needs to be extended to the accused.

28. That it is incumbent upon the prosecution to prove its case with such conviction that the innocence of the accused is totally eliminated. The overall story as narrated by PW.1 does not inspire the confidence of the Court to such an extent that no other view could be possible. In fact, the deceased himself was prosecuted for having committed dacoity. The possibility that he could have been assaulted by any other persons besides the accused also cannot be ruled out. 'Exhibit-66' the station diary entry would show that the deceased was admitted in hospital by Ganesh, driver of the ambulance and information was given to the family subsequently. Ganesh happens to be the brother of the deceased. The prosecution has not examined Ganesh. There is only reference to assault by neighbour. The identity of the accused has not surfaced right from the inception. There are several neighbours living in the rooms constructed by the deceased and the possibility that Samadhan could have been eliminated by any of the neighbours also cannot be totally ruled out. There is a long distance to be travelled between 'may be and must be' and the prosecution has to cover the distance in a manner which ultimately proves the guilt of the accused. It is in view of the abovementioned facts that the accused deserve extension of benefit of doubt. Hence, the following order:-

ORDER

i) The appeal is allowed.

ii) The conviction of the appellants for the offences punishable under sections 302 and 447 read with 34 of Indian Penal Code passed by Additional Sessions Judge,

Malegaon vide judgment and order dated 19th January 2016 in Sessions Case No. 112 of 2014 is hereby quashed and set aside.

iii) The appellant no.1-Vijay Khairnar is acquitted of the offence punishable under section 302 and 447 read with 34 of Indian Penal Code by giving him the benefit of doubt.

iv) The appellant no.1-Vijay Khairnar is in custody. He be released forthwith, if not required in any other offence.

v) The appellant no.2-Suresh Khairnar is acquitted of the offence punishable under 302 and 447 read with section 34 of Indian Penal Code.

vi) The appellant no. 2-Suresh Khairnar was on bail during the pendency of the appeal.

vii) His bail bonds stands cancelled.

viii) Fine amount if paid, be refunded to the accused-appellants as per rules.

29. The appeal as well as interim application stand disposed of accordingly.