

(2011) 06 PAT CK 0034

Patna High Court

Case No: Criminal Appeal No. 343 of 2001

Wasudeo

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision: June 15, 2011

Final Decision: Allowed

Judgement

1. This is an appeal against conviction. The appellant was tried for offence of murder and is convicted of said charge. He is sentenced to undergo life imprisonment and to pay fine of Rs. 1,000/-, in default to undergo rigorous imprisonment for six months.

2. The case of the prosecution, in short, was that :-

(a) The deceased Naresh Mankar was an agricultural labourer and always used to accompany the accused for such work;

(b) About 8 days prior to the incident, a quarrel took place between the deceased and the accused over the transaction of money and since then they were not in good books with each other;

(c) On 29/3/1996, at about 9.00 p.m., the deceased along with some others was in a square near the school at village Jatanzari, when the accused came and threatened the deceased to kill him before Shigma festival;

(d) The accused was however pacified and then he went away;

(e) Within a short time thereafter, the accused returned with a knife and suddenly started assaulting the deceased with that knife as a result of which the deceased sustained bleeding injuries on various parts of his body and he fell down after which the accused ran away;

(f) The deceased died on 1/3/1996.

3. The oral report lodged by P.W.-I Raju Mankar, the brother of the deceased was recorded by P.S.I. Chandu Keizarkar (P.W.-13), who registered the offence. P.W.-I 1, P.S.I. Shivaji Bachate drew the Inquest Panchanama and P.W.-12, P.S.I. Madhukar Mahatale carried out further investigation which culminated into the charge-sheet against the accused for offence punishable u/s 302 of the Indian Penal Code. That gave rise to the said Sessions Trial No. 292 of 1996.

4. Besides the witnesses mentioned in paragraph 3 above, the prosecution examined other witnesses who are :- P.W.-2 Ganpat Mankar, P.W.-3 Nilkant Dongre, P.W.-4 Chandranbhan Rangari, P.W.-6 Ramrao Sawarkar, who are all eye witnesses; P.W.-5 Bandu Sonone and P.W.-7 Govindrao Mankar are part eye-witnesses; and P.W.-8 Suresh Sawarkar, P.W.-9 Dhanrak Bharasakhare and P.W.-10 Vasudeo Bharasakhare, who are the panch witnesses.

5. The learned Additional Sessions Judge, Nagpur has held thus :-

(a) The inquest panchanama (Exh.42) and the post mortem examination report (Exh.17) prove that the deceased died homicidal death;

(b) The evidence of eye-witnesses namely P.W.-2 and P.W.-3 is free from infirmities and is not shaken in cross-examination and there are no material contradictions or omissions in their evidence;

(c) The recovery of the weapon of assault i.e. knife at the instance of the accused and the detection of blood of group "B" which is of the deceased on that knife is important circumstantial evidence which supports the testimonies of P.W.-2 and P.W.-3.

(d) The circumstantial evidence of the detection of blood of group "B" on the clothes of the accused also supports the evidence of said eye-witnesses;

(e) The evidence of P.W.-4, in his cross-examination indirectly supports the testimonies of P.W.-2 and P.W.-3.

(f) The evidence on record proves the charge of murder against the accused.

6. Heard the learned Advocate Shri R. M. Daga for the accused and learned A.P.P. Shri R. S. Nayak for the State.

7. Perused the entire record and proceedings.

8. The post-mortem examination report pertaining to the deceased was directly taken on record as Exh.17, without concerned doctor's evidence because the same was admitted by the accused by making an endorsement as such on the application filed by the learned A.P.P. u/s 294 of the Code of Criminal Procedure.

9. The learned trial Judge relied upon Shaikh Fardi Hussinsab v. The State of Maharashtra 1983 Cri. L.J. 487. wherein the Full Bench of this Court has held that Section 294 of Cr. P.C. applies to every document whose genuineness is not

disputed and that post-mortem report whose genuineness is not disputed is admissible in evidence without doctor's evidence.

10. Learned Advocate Shri R. M. Daga has not cited any decision contrary to the above.

11. As per the post-mortem report (Exh.17), the deceased had sustained following external injuries. :-

17. Surface wounds and injuries -

Their nature, position, dimensions (measured) and directions to be accurately

1) Stab wound over right side of chest in flank, obliquely situated of size 1/2 x 1 cm. Muscle deep, oozing present. Lever -Lower costal cartilage, stated-their probable age and cause to be noted. If bruises be present, what is the condition of the subcutaneous tissues?

(N.B.- When injuries are numerous and cannot be mentioned within the space available they should be mentioned on a separate paper which should be signed).

2)

3)

4)

5)

6)

7) Stab wound over Right side of back in lumbar region below lower costal cartilage obliquely situated, Margins sharp of size 2 1/2 x 1 cm. Stab wound over back in mid line, along vertebral column at the level T10, of size 2 1/4cm x 3/4 cm. upper margin clean cut, lower margin blunt, oozing present. Stab wound over back in Right para vertebral region at the lever of L2, of size 2 x 1/2 cm. margins and angles clean cut. Stab wound over back in Right para vertebral region 1.5 cm below injury No.4, of size 2 x Vz cm. margins clean cut. Stab wound over Left shoulder anterior posteriorly situated, 2 cm medial to shoulder of size 1.5 x 1 cm. Three contused abrasion over Right elbow Joint, 1 cm apart from each other, of size 1 x 1/2 cm each, Reddish brown in colour.

(Quoted from page Nos. 52 & 53 of paper book of the criminal appeal)

12. There were internal injuries corresponding to the external injuries No. 1 to 5.

13. The cause of death was stab injuries to vital organs.

14. The post mortem report (Exh.17) does not mention that the injuries are sufficient in the ordinary course of nature to cause death.

15. P.W.-1 is not an eye witness and his evidence is relevant only to prove that report of incident was promptly lodged.

16. P.W.-2, who is admittedly an illiterate person and who does not even know his birth date, has stated the exact date of incident i.e. 29/2/1996 though his testimony was recorded on 21/9/2000 i.e. more than after four years.

17. In his examination-in-chief, P.W.-2 has stated :-

...Incident took place on 29/2/1996 at 9 p.m. At that time, I was chit-chatting with Bandu Sonone, Nilkanth Dongre near the school. Accused Wasudeo was also present there near us. Bandu Sonone then went to his house for meal. Naresh was also present there at some distance from us. Accused Wasudeo came back from his house and gave five stab blows to the deceased Naresh. I then went to call Raju Mankar...

(Quoted from page No. 63 of paper book of the criminal appeal)

18. In his cross-examination, P.W.-2 has stated :-

...I had stated before police that Bandu Sonone was present with us near school. I also stated before police that accused was also standing there near us. I have also stated before police that accused Wasudeo gave five blows of knife to Naresh. I cannot assign any reason why police has not written this fact in my statement.

(Quoted from page Nos. 63 & 64 of paper book of the criminal appeal)

19. The Investigating Officer (P.W.-12), who recorded the statement of P.W.-2, has stated in his cross-examination :-

...I have recorded statement of P.W.-2 Ganpat as per his say. He has not stated before me that Bandu Sonone was present with them near school. He has also not stated that accused was also standing near them. He has also not stated where accused gave five knife blows to him...

(Quoted from page No. 108 of paper book of the criminal appeal)

20. Thus, practically the entire testimony of P.W.-2 is omission in police statement. P.W.-2 is admittedly the cousin of the deceased. The above material omissions in the evidence of P.W.-2 coupled with his mentioning the exact date of the incident can lead a prudent man to believe that P.W.-2 was tutored to depose in that manner. Hence, the testimony of P.W.-2 cannot be relied upon.

21. P.W.-3, in his examination-in-chief, has stated :-

...Incident took place at about 4 years back at about 9 p.m. At that time, myself, Ganpat Mankar, Bandu Sonone were present near school. Naresh also came there. At the same time accused also came there. At that time, accused Wasudeo threatened deceased Naresh to commit his murder. Bandu Sonone then took the

accused Wasudeo to his house. 2-3 minutes after it, accused Wasudeo again came there and again threatened Naresh to commit murder. At that time deceased Naresh Mankar was sitting on the ground. Accused Wasudeo then caught hold neck of deceased Naresh and gave four stab blows. Due to it, Naresh fell down...

(Quoted from page No. 65 of paper book of the criminal appeal)

22. In his cross-examination, P.W.-3 has stated that he has not stated before police that accused Wasudeo caught hold of the neck of Naresh and stabbed him.

23. Thus, besides the fact that the testimony of P.W.-3 does not corroborate with that of P.W.-2 on material aspect of the assault, it is further seen that there is omission of the said material aspect of assault by accused, in the police statement of P.W.-3. Therefore, it is not advisable to rely upon the testimony of P.W.-3.

24. P.W.-4 in his examination-in-chief has stated that he heard cries near the school and went there and saw Naresh lying there and that he has not seen the incident.

25. P.W.-4 has been cross-examined by the learned A.P.P. with the permission of the Court. In his cross-examination, P.W.-4 has stated that portions marked "A" and "B" of his police statement read over to him are correctly recorded, as per his say.

26. The statement of P.W.-4 was recorded by P.W.-12. However, the alleged portions marked "A" and "B" from the police statement of P.W.-4 were not shown to P.W.-12 for him to confirm/prove that P.W.-4 did state to him the said facts. Be that as it may, the presence of P.W.-4 at the place of incident is not spoken to by P.W.-2, P.W.-3, P.W.-5 and P.W.-6. Hence, the testimony of P.W.-4 is also rendered useless.

27. P.W.-5 and P.W.-7 are admittedly not eye witnesses to the alleged incident of assault by the accused by means of knife on the deceased.

28. P.W.-6 in one sentence has stated in his examination-in-chief that in his presence, accused Wasudeo assaulted deceased Naresh with knife.

29. In his cross-examination, P.W.-6 has stated that police recorded his statement as per his say and that he had not stated before police that accused Wasudeo assaulted deceased Naresh.

30. Thus, even the testimony of P.W.-6 before the Court is by way of an improvement since there is omission of material fact in his police statement and hence the same cannot be acted upon.

31. It was contended by the learned A.P.P. that the alleged omission in the police statement of P.W.-2 is only as regards specifically giving the number of blows i.e. five stab blows and not regarding the assault with knife. He further contended that the alleged omission in the police statement of P.W.-3 is only as regards the fact of catching hold of the neck of the deceased and not regarding the assault i.e. giving four stab blows.

32. The above grievance of the learned A.P.P. is pointed out by him from his personal knowledge about the statement of P.W.-2 and P.W.3 recorded by the Investigating Officer (P.W.-12) u/s 161 of Criminal Procedure Code. Such statements, in terms of Section 162(1) (proviso) cannot be used for any purpose except to contradict the said witnesses with the same in the manner as provided by Section 145 of Indian Evidence Act. When any part of such statements is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose of explaining any matter referred in his cross-examination. Hence, the police statements cannot be used for corroboration.

33. The law is well settled that when a witness is to be confronted with any statement or part thereof made before the police, the same has to be put to that witness while deposing in the Court and if the same is denied, it has to be proved to have been so stated by that witness, by confirmation through the Investigating Officer, who recorded the same. When any part of the statement so used in the cross-examination requires explanation, then such explanation has to be brought on record by means of reexamination.

34. In the present case, unfortunately, the learned A.P.P. conducting the case before the learned trial Judge did not pay appropriate attention to see as to what has come on record during evidence and what should have actually come on record. No reexamination of P.W.-2 and P.W.-3 has been conducted by the learned A.P.P. for necessary explanation regarding the said omissions.

35. The police statements of P.W.-2 and P. W.-3 cannot be seen and directly used to cure the defects in the oral evidence. Hence, there is no force in the contention of the learned A.P.P. that the omissions are not material.

36. It is further noticed that none of the witnesses has stated as to on which part of the body of the deceased the blows were inflicted. There is therefore no chance for comparing their testimonies with the medical evidence. None of the said eye witnesses has identified the knife (Ar-ticle-8) as the weapon of assault.

37. The direct evidence on record cannot therefore be said to be sufficient to prove that the death of deceased was caused by the accused.

38. P.W.-10 Wasudeo Bharsakhare has deposed that on 3/3/1996 the accused told that he has hidden the knife used by him in the crime at village Tisti and was ready to produce it. P. W.-2 has then stated that the accused took them to that place and from the stem of one Bharati tree took out one knife and produced it before the police.

39. P.W.-10 has identified Article-8 to be the same knife and has added that it was stained with blood when it was attached.

40. P.W.-12 the Investigating Officer, who has conducted the panchanama of the recovery of knife has, however stated that accused took out the knife from near the

root of the Bharati tree and produced it before him. He does not say that the knife was blood stained.

41. Root and stem of a tree are two different things. Hence, there is contradiction between P.W.-10 and P.W.-12 regarding the place from where the knife was allegedly removed by the accused. P.W.-10 has stated in his cross-examination that the place from the village from where the knife was produced was an open place.

42. Learned [State of Himachal Pradesh Vs. Jeet Singh](#), wherein, the Hon"ble Supreme Court has observed that evidence of recovery of crime article from a place which is "open and accessible to others" is not vitiated. It is held that the test is not whether the place was accessible to others but whether it was ordinarily visible to others.

43. In the present case, neither the evidence of P.W.-10 nor that of P.W.-12 reveals that the place, whether it be the stem or near the root of the tree, was not ordinarily visible to others. Ordinarily the place near the roots or the stem of tree are visible to others.

44. The evidence on record reveals that the said knife (Article-8) was not sealed after recovery and it remained in the custody of Malkhana Moharir till 22/4/1996, except from 5/4/1996 to 16/4/1996 during which period it was sent to and remained with the Medical Officer for query report.

45. As per the query report given by the doctor, which has been admitted u/s 294 of Cr.P.C, the injuries mentioned in the post mortem report are possible with the said knife (Article -8). As per the Chemical Analyzer"s report blood of group "B" was detected on the blade of this knife and the blood group of deceased is "B".

46. The recovery of the knife at the instance of the accused is not proved beyond reasonable doubt and even the detection of blood of group "B" on the same is not of any use, for following reasons. :-

(a) There is contradiction between P.W.-10 and P.W.-13 regarding the part of the tree from which it was removed;

(b) P.W.-10 has stated in his cross-examination that the place from the village from where the knife was produced was an open place;

(c) The said knife was not sealed;

(d) There was delay in forwarding the knife to the Chemical Analyser;

(e) None of the eye witnesses has identified Article 8 to be the knife used by the accused.

47. According to P.W.-10, the police had also attached the clothes of the accused under seizure panchanama in his presence and these clothes were shirt, pant, banian and underwear. The panchanama (Exh.37) reveals that only the shirt and full

pant were removed from the person of the accused and attached, but P.W.-10 has added one underwear to them.

48. The incident had occurred on 1/3/1996. It cannot be believed that the accused would move around with blood stained clothes from 1/3/1996 till 3/3/1996 for police to arrest him with such incriminating evidence.

49. The detection of blood of group "B" on the said clothes which are alleged to be of the accused will not prove the guilt of accused because of the above reasons and further because the said clothes were not sealed and the blood group of the accused is not known.

50. Though the learned A. P.P., has contended that motive for offence is established, however, the above is not true since none of the witnesses including P.W.-1 the brother of the deceased has stated that there was dispute between the deceased and the accused over money.

51. There is nothing on record to prove the contention of learned A. P.P. that the accused was absconding.

52. In view of all the discussion supra, we are of the view that the prosecution has failed to prove beyond reasonable doubt that the death of the deceased was caused by the accused.

53. Considering the nature of assault, nature of injuries and that those are on the vital parts of the body, it can certainly be said that the death of the deceased was homicidal, yet the accused being its author is not proved.

54. The impugned judgment and order is therefore not in accordance with the settled principles of criminal law. Upon re-appreciation we find that the evidence on record is not sufficient to prove the guilt of the accused. Hence, the accused is entitled for acquittal.

55. In the result,

A) The Appeal is allowed.

B) The impugned judgment, order and sentence is quashed and set aside.

C) The accused is acquitted of the offence u/s 302 of the I.P.C.

D) The bail bonds are cancelled.

E) Muddemal property be destroyed after the appeal period is over.

F) Fine amount be refunded.