(2009) 07 BOM CK 0149

Bombay High Court

Case No: Criminal Appeal No. 1378 of 2002

Bilal Bishad Shaikh		APPELLANT
	Vs	
The State of Maharashtra		RESPONDENT

Date of Decision: July 9, 2009

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 294, 313
- Evidence Act, 1872 - Section 27
- Penal Code, 1860 (IPC) - Section 302, 34

Citation: (2009) 07 BOM CK 0149

Hon'ble Judges: Swatanter Kumar, C.J; S.C. Dharmadhikari, J

Bench: Division Bench

Advocate: A.D. Khot and Amita Kuttikrishnan, for the Appellant; A.S. Pai, Additional Public Prosecutor, for the Respondent

Final Decision: Dismissed

Judgement

Swatanter Kumar, C.J.

The present Appeals are directed against the judgment of conviction and order of sentence both dated 30th October 2002 passed by the II Adhoc Additional Sessions Judge, Sangli. The challenge is primarily based upon the argument that there was inordinate delay in lodging the First Information Report (FIR); the recovery of the offending articles and the weapon was bad in law; even the other witnesses produced by the prosecution have not supported the case of the prosecution and as such the accused were entitled to the benefit of doubt. Further, it is contended that the learned trial Court failed in error of law inasmuch as it acquitted one of the accused on the same evidence and it ought to have passed an order of acquittal in favour of all the accused. To that extent, the judgment suffers from contradiction in findings of fact and law.

2. Vide charge Exhibit 4 all the three accused were charged for an offence punishable u/s 302 read with Section 34 of the Indian Penal Code (IPC) on the ground that on 3rd February 2001 between 22.30 to 22.45 hours in furtherance of common intention they committed the murder by intentionally or knowingly causing death of Abdul Samad Salar Inamdar by causing grievous hurt by knife and iron bar. To support this charge, the prosecution produced twelve (12) witnesses including the Doctor who had performed post mortem of the deceased body. The complaint in the present case was lodged by one Shri Abdul Latif Abdul Kazi who was examined as PW4 and his testimony is recorded at Exhibit 21. According to him, he was in the hotel Khwaja Darbar and was having tea. Thereafter, he came out and saw one person being beaten by two/three persons. The person who was being beaten was Abdul Samad Salar Inamdar who was also known to him. The persons beating him were named, Irfan Sikandar Bagewadi, Bilal Bishad Shaikh and Raufan Ibrahim Shaikh (Accused Nos. 1 to 3). They were duly identified by him in the Court. Accused Irfan gave fist and kick blows. Accused Bilal Shaikh was beating the deceased with iron bar. Abdul Samad Inamdar cried "Maa, Maa" and fell down there. He was having his hand on his stomach and was crying. Then some persons lifted the deceased and shifted him in a rickshaw. PW4 saw this incident in tube light but from some distance and then went to the Police Station to lodge a complaint being Exhibit 22 and later on Abdul Samad Inamdar died due to injuries. It may be noticed that in Exhibit 22 which resulted in registration of the FIR, he had stated that Irfan had taken out a sharp knife and given a blow to the deceased into his stomach twice or thrice. He could not give exact role of each accused because he admitted that he was at a distance of nearly 25 feet from the place of occurrence. There are some variations in his version given in the complaint and the statement made in the Court as PW4. It is clear from a bare reading of Exhibit 22 that the FIR was registered at 1.15 a.m. on the night of 4th February 2001. Thereafter the investigation of the case was taken over by Investigating Officer Ranjeet Dadasaheb Dhure, PW12, who had said that he had received a telephone call about the occurrence, went to the hospital but by the time he reached there, the victim was already dead. Then he went to the spot and after posting a constable at the site he came to police station. After going to the police station he recorded the statement of the witness Abdul Latif Abdul Kadar Kazi PW4, and registered C.R. No. 19/01. He then proceeded to the spot and prepared spot panchanama, where he collected blood stained soil, etc. vide Exhibit 47 and recorded the statement of the witnesses. The clothes of the accused were also seized by panchanama Exhibit 52. On 5th February 2001 he arrested Bilal Bishad Shaikh. On 6th February 2001 accused Irfan Sikandar Bagewadi was also arrested and on his disclosure statement, the knife and the iron bar used in the offence were recovered vide panchanama Exhibit 54. The blood stained knife was identified by him in Court along with iron bar Article 16.

3. The body of the deceased, as already noticed, was subjected to post mortem by Dr. Sujata Jagannath Joshi, PW6, vide Exhibit 33 and, according to her, the injuries and the cause of death were as under:

...The cause of death according to me is "haemorrhagic shock due to injury to vital organ."

2. Following external injuries as noted by me in para 17 page 4 were found:

1. Penetrating stab wound over Lt. Inframammary region 13 cm. Below Lt. Nipple 2cm x 1 cm. Deep into thoracic cavity eliptical in shape with clean cut edges.

2. Incised wound over Lt. Buttock 2 cm. X 1 cm x muscle deep eliptical in shape with clean cut edges.

3. Incised wound over Ltd. Occipital region 7 cm. Away from Lt. Mastoid process 2 cm. X 1 cm. X bone deep eliptical in shape with clean cut edges.

4. Abrasion over Lt. Shin of tibis upper third 1 cm x 1 cm. red.

5. Abrasion Lt. Knee joint lateral aspect 1 cm. x 1 cm. red.

xxxxx xxxxx xxxxx

2. On opening the body I found following internal injuries, as specified by me against para 20 page 7 of P.M. Notes:

1) Thoracic wall cut in the area between Lt. 7th and 8th rib intercostal muscle cut in this area, the size of hold is 2 cm x 1 cm haematoma + pleura cut in this area. 2) Left lung : Stab wound over left lung anterior portion of lower lope 2 cm x 1 cm x 1.5 cm deep, haemothorax(profuse bleeding) lung tissue, pale.

3) Injury No. 1 (external) corresponds to injury No. 1 internally.

4) In the instant case deceased died due to injury to lung (it) which is a vital organ.

As is evident from the above conclusions of the Doctor, the injuries, particularly, Injury No. 1 could be caused by a sharp edged weapon like knife.

4. The recovery witnesses to the panchanama had been declared hostile by the Court at the instance of the Public Prosecutor and were subjected to cross-examination.

The first and the foremost question that arises for consideration is that what is the effect of these witnesses turning hostile. The knife in question was recovered at the behest of the accused Irfan. PW No. 7, Sharad Bhanudas Kamble, had resiled from his statement in relation to the panchanama prepared on 6th February 2001 in regard to article No. 15. However, in his crossexamination, this witness admitted his signatures on the panchanama and also identified his signatures on the slip tied on article No. 16 iron bar. Similarly, Hanamant Bhimrao Algure PW1, Ayub Gulmahamad Bagwan PW2, Masjit Lal Mushrif PW3 and Murad Hasan PW8, who are panchas to panchanama relating to the

arrest of the accused and scene of offence respectively also did not support the case of the prosecution. Mohd. Khalil Salim Sharikmaslat, PW10, the Proprietor of the Hotel, and Imamsab Aminsab Vijapure PW11, the waiter in the hotel, who according to the prosecution were the eye witnesses to the occurrence, have also not supported the case of the prosecution. Mohd. Khalil Salim Sharikmaslat, PW10, the owner of the hotel, though has not stood by his statement made u/s 161 of the Code of Criminal Procedure, 1973, to the police, has stated that an occurrence took place outside his hotel and he immediately closed the hotel. When such witnesses do not support the case of the prosecution, the Court has to examine the matter with greater caution. The Court essentially should look into the cross-examination of the witnesses who have been declared hostile and see if it supports the case of the prosecution which otherwise has been proved by independent witnesses. In the present case, the complainant has proved the incident and injuries which ultimately resulted in the death of the deceased which have also been established by Exhibit 33, statement of the Doctor. The Investigating Officer had provided a complete story of the prosecution which is mainly supported by the witnesses and particularly the chemical analysis reports Exhibits 12 to 15. Another important aspect of the case is that all the accused had admitted Inquest Panchanama (Exh.9), Panchanama of attachment of clothes of deceased (Exh.10), office copy of letter to Chemical Analyser (Exh.11) and Chemical Analysers Reports (Exhs.12 to 15) in terms of Section 294 of the Criminal Procedure Code. Thus, they cannot be permitted to question now the authenticity of such documents or proof of the contents thereof. Even in the cross-examination, Mohd. Khalil Salim Sharikmaslat, PW10, has admitted that an occurrence took place outside his hotel, while in his statement u/s 161 of the Code of Criminal Procedure, he had given the details of the incident, but later on said that he had closed the hotel and went away. It obviously means that incident had taken place and to that extent there is no denial even by these two witnesses who had turned hostile.

5. Coming to the witnesses to the panchanama for recovery of the weapons, they have also admitted their signatures on the panchanamas but have denied the contents of the documents. The recovery of the weapon is otherwise proved by the Investigating Officer and the admitted documents. Chemical Analyser''s reports Exhs.12 to 15 clearly show that the weapons were containing human blood. According to the Doctor, Injury No. 1, which ultimately proved fatal, could be caused by knife Article 15.

6. The Supreme Court in the case of Mohd. Aslam Vs. State of Maharashtra, , stated the principle that evidence of a Police Officer effecting recovery could not stand vitiated merely by reason that panch witnesses supporting the case have turned hostile. The Court held as under:

7. Regarding A1 Mohmed Aslam (@ Sheru Mohd. Hasan) the only evidence for possession of the forbidden lethal weapon is the testimony of PW 34 (Nagesh Shivdas Lohar, Assistant Commissioner of Police, CID Intelligence, Mumbai). Learned Counsel contended that two panch witnesses who were cited to support the recovery turned hostile and therefore the evidence of PW 34 became unsupported. We cannot agree with

the said contention. If panch witnesses turned hostile, which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated. Nor do we agree with the contention that his testimony is unsupported or uncorroborated....

7. The burden on the prosecution to prove its case is of course beyond reasonable doubt. Its ambit and scope has to be construed with reference to the facts and circumstances of a given case. In the case of State of U.P. Vs. Krishna Gopal and Another, , the Supreme Court held as under:

25. A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to "proof" is an exercise particular to each case. Referring to the interdependence of evidence and the confirmation of one piece of evidence by another a learned author ["The mathematics of Proof II": Glanville Williams: Criminal Law Review, 1979, by Sweet and Maxwell, p. 340 (342)] says: The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A juror may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions, and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other.

Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubts; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.

26. The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimisation of trivialities would make a mockery of administration of criminal justice.

8. In the impugned judgment, the learned trial Court referred to and discussed the seizure evidence and expressed the following opinion:

36. ...Accordingly, his statement Exh. 54 was recorded and then he led to Idgah Maidan, Bharatnagar, Miraj and produced muddemal knife and iron bar concealed below the dry leaves on the slab of public latrine. The said panchanama is at Exh. 55. This particular recovery duly proved by I.O. As per provisions of Section 27 of Evidence Act, when especially all the witnesses turned hostile, in my opinion forms valuable link. Similarly, this particular weapon i.e. knife was sent to C.A. cor examination and the C.A. report is at Exh.12. It clearly shows that Exh. 14 i.e. Muddemal knife is stained with blood and it was human blood with "A" group. The office copy of letter addressed to Director of Regional Forensic Laboratory, Pune, is at Exh.11 which specifically enlist the articles sent Exh. 1 is the sample of earth containing blood seized from the spot. Exh.2 is plain soil from spot of offence, Exh.3, 4, 5 and 6 are the clothes on the person of deceased. So far as panchanama of spot of offence is concerned, it is proved by I.O. whereas inquest panchanama and panchanama of seizure of clothes on the person of deceased. Exh. 10 is admitted by defence. Exhs. 3, 4 and 5 enlisted in C.A. report Exh. 12 had human blood of "A" group. Therefore, in my opinion, this is also a best possible linking evidence which shows that the blood group of deceased was admittedly "A" and the blood of "A" group was also found on the knife, seized at the behest of accused No. 1. Therefore, in such circumstances, I find that the prosecution duly proved the recovery and also established that the muddemal knife is used in the assault. So also, the iron bar (Article No. 15) which is used in the assault also had human blood, but the group could not be detected as per Exh. 12 on it. Therefore, this forensic evidence coupled with the testimony of complainant corroborated by F.I.R duly supports the fact that accused Nos. 1 and 2 are the same persons who beat deceased on the relevant date and relevant time due to which deceased died. So far as the weapon used by accused No. 1 is concerned, the complainant stated that he was assaulting with hand, but he could not see the object in his hand. But in the F.I.R. it is stated that accused No. 1 assaulted with knife. Even if it is believed, then also it is duly proved that the deceased died on the spot and he had injury on his chest and on other parts of the body i.e. injury Nos. 2 to 5 (external) enlisted in P.M notes and these injuries could be caused by iron bar. The complainant categorically stated that third person assaulted with fists and kicks and this is the version in the F.I.R also. The third person is unidentified person and hence, the only plausible conclusion that could emerge is that accused Nos. 1 assaulted deceased with knife which resulted in fatal injury to him.

9. The above reasoning given by the learned trial Court cannot be faulted with as it is proper appreciation of evidence and cannot be termed as perverse or illogical .The burden to prove its case on the prosecution is an absolute burden, but a mere fault here or there or some variation in the statement not amounting to a serious contradiction relating to the actual commission of the offence would not per se justify interference in the judgment of the trial Court. In the statements of the accused recorded u/s 313 of the

Criminal Procedure Code, there is a case of denial and the accused chose not to lead any defence. In fact, the accused even chose to deny the fact of death of the deceased. It also needs to be noticed with some significance that vide letter Exhibit12 some of the articles were sent for chemical analysis and were found to be examined by the Chemical Analyser. It included the earth, clothes including Item No. 8 Pant. This pant was of the deceased which upon chemical examination was found containing human blood of Group A and the blood group of the deceased was "A". Thus, the evidence of the prosecution examined cumulatively and particularly in light of the evidence of the complainant, Doctor, report of chemical analyzer which were admitted by the accused and the statement of the Investigating Officer, clearly establishes the involvement of the Appellants in the commission of the crime. The view taken by the learned trial Court that the prosecution has been able to prove its case beyond reasonable doubt as far as the Appellants are concerned, cannot be faulted with.

10. Learned Counsel appearing for the Appellants attempted to draw some support and wishes to buttress her submission on the ground that one of the accused viz. Accused No. 3 Raufan has been acquitted. This argument though appears to be attractive on the first sight but upon examination of the record, there is hardly any merit in this contention. First of all, the said accused was not named in the FIR. Secondly, about his role in the commission of crime there was definite contradiction in the evidence and the learned trial Court also found certain defects in the identification parade held for identification of the said accused. Besides all this, this accused No. 3 was not known to PW4 ï¿½ the Complainant and he had stated that he was 25 ft. away from the place of occurrence and there was only tube lights thus his statement was not much relied upon by the Trial Court on the point of identity of Accused No. 3. In these circumstances, the Trial Court passed an order of acquittal in favour of the said Accused No. 3. The Court also noticed that there was definite, cogent and reliable evidence which provides complete chain of links to the case of prosecution and the minor contradictions or variations were really not of much substance and thereby convicted the present Appellants.

11. The argument that there was undue and unexplained delay in lodging the FIR again is not a matter of great consequence. The occurrence had taken place at 10.45 in the night which was witnessed by the Complainant. On the information received by the Investigating Officer in the Police Station that he had reached the spot and posted a policeman there and as expected had gone to the hospital where he noticed that the victim was declared dead and thereafter he recorded statement of PW 4 ï¿½ Complainant at about 1.15 a.m. on 4th February, 2001. Thus, there is no such inordinate delay in lodging the First Information Report that the accused would get an advantage. The Courts have taken a view that such explained delay cannot be fatal to the case of the prosecution. Reliance in this regard may be placed on the judgment of the Supreme Court in the case of State of Rajasthan Vs. N.K.-The Accused, , where the Supreme Court held thus:

15. We may however state that a mere delay in lodging the FIR cannot be a ground by itself for throwing the entire prosecution case overboard. The court has to seek an explanation for delay and test the truthfulness and plausibility of the reason assigned. If the delay is explained to the satisfaction of the court it cannot be counted against the prosecution.

12. In view of the above discussion, we find no merit in the present Appeals. The same are dismissed.