

(2012) 02 BOM CK 0201

Bombay High Court

Case No: Criminal Appeal No. 915 of 2005

Manoj Bharat Vishwakarma
Asragaon

APPELLANT

Vs

The State of Maharashtra At the
instance of Dindoshi police
station and Another

RESPONDENT

Date of Decision: Feb. 10, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 201, 302, 506

Citation: (2012) BomCR(Cri) 131

Hon'ble Judges: Shrihari P. Davare, J; A.P. Lavande, J

Bench: Division Bench

Advocate: Arfan Sait, for the Appellant; P.P. Bhosale , Assistant Public Prosecutor for the Respondent-State, for the Respondent

Final Decision: Dismissed

Judgement

Shrihari P. Davare, J.

Heard learned counsel for the appellant and learned A.P.P. for the respondent-State.

2. By the present appeal the appellant (original accused) for brevity sake hereinafter referred as "accused" takes exception to the conviction and sentence imposed upon him by way of judgment and order dated 5th March, 2005 rendered by learned Additional Sessions Judge, Greater Bombay in Sessions Case No.385 of 2002 thereby convicting accused for the offence punishable u/s 302 of IPC and sentencing him to suffer imprisonment for life and to pay fine of Rs.1,000/- and in default to suffer S.I. for three months.

3. The factual matrix of the prosecution case is as follows :- The victim - deceased, namely, Tallbaram i.e. husband of the complainant, namely, Yashoda Tallbaram

Devagan, was residing with the complainant and his son, namely, Vicky as well as with the accused, namely Manoj Bharat Vishwakarma, who was his friend, at Building No.46, 4th Floor, Shivshahi Prkalp at the relevant time. The victim as well as the accused were mason. It is alleged that there were illicit relations between the complainant and the accused, and eight days prior to alleged murder of victim, the deceased saw the complainant and accused together. Hence the victim abused the complainant and the accused, and assaulted him with fist blows and leg kicks.

4. It is the case of the prosecution that on 6.1.2002 at about 9 pm, he returned home in drunk condition after consuming liquor and saw the complainant and accused Manoj in compromising position and, therefore, he got annoyed and assaulted the complainant and the accused and thereupon the accused went away. Thereafter, at about 10.15 pm the complainant heard screams of her husband as "mar gaya.... mar gaya....", hence the complainant rushed towards her husband and saw that accused was armed with spade and her husband was lying and he sustained bleeding injuries on his head and blood was oozing therefrom and witnessing the same the complainant became giddy. Thereafter, within minutes, she saw that accused dragged her husband away and thereupon the complainant was frightened and she stayed in the room alongwith her son. After sometime, the accused returned back and wiped out the blood lying in the room. He also threatened the complainant that he would break her head if she shouted and also asked her to keep quiet and went away.

5. It is alleged that on the next day morning at 8 am watchman PW 2 Bhandari and PW 3 Dubey arrived and informed her that her husband was lying down below the building in bleeding condition and, therefore, she went there. PW 7 ACP Rajendrasinha Pardeshi was attached to Dindoshi police station at the relevant time as well as PSI Chavan was also attached to the said police station and was on duty as SHO on 7.1.2002 and at about 8.35 am received phone message from Bhandari PW 2 and, therefore, PSI Chavan and police staff went to the spot of incident i.e. Shivshahi Prkalp Building No. 46, Near filmcity and they noticed that one person was lying in unconscious condition and, therefore, he was sent to Bhagwati hospital by Wireless Van. PW 7 ACP Pardeshi made inquiry and came to know the name of injured as Tallbram and his wife as Yashoda Tallbaram Devagan and received intimation from hospital that the said injured was expired. The statement of complainant was recorded and the complaint was lodged on 7.1.2002 and FIR was registered Exhibit 8-A.

6. Moreover, it is further case of the prosecution that ACP Pardeshi prepared spot panchnama Exhibit-14 in presence of the panch witness PW 4 Dilip Ahire and blood stained spade and one 4 app915.05 blood stained bamboo from the place of incident and one wrist watch was seized thereunder. Thereafter PW 7 Pardeshi went to Bhagwati Hospital and prepared inquest panchnama of dead body of victim at Exhibit-9. Moreover, the clothes of said deceased were also seized under

panchnama. Thereafter on receipt of information he returned to building No.46 and saw accused was sitting on the terrace of adjoining building and he arrested him under arrest panchnama at Exhibit-16. Moreover, the clothes of accused were seized in presence of panch witness PW 5 - Ganesh Pawar.

7. During the interrogation, accused made disclosure statement voluntarily, which was recorded under memorandum of panchnama Exhibit 22 and thereafter accused led panchas and police personnel to a building and discovery of spade and the cloth by which he wipe out blood stains were made under discovery panchnama Exhibit-22-A. Moreover, the clothes of the complainant which were worn by her were also seized. Accordingly, all seized articles and blood samples were sent to C.A. office for examination purpose alongwith forwarding letter dated 11.1.2002 Exhibit-24 and C.A. reports thereof were received. Besides, the dead body of victim was sent for post mortem and PW 6 Dr.Ramdas Sanap performed post mortem on the said dead body and prepared post mortem notes Exhibit-20 which were collected by PW 7 ACP Pardeshi. Accordingly, after completion of investigation the charge-sheet was filed before the learned Metropolitan Magistrate Court against accused and since present case was exclusively triable by Court of Sessions, it was committed to the said court. Thereafter, the Additional Sessions Judge, Greater Bombay framed the charge against accused for the offence punishable under sections 302, 201, 506 Part II of IPC on 21.7.2005 but accused pleaded not guilty for the said charge and claimed to be tried.

8. To substantiate the charges levelled against accused, the prosecution examined as many as seven witnesses as mentioned below:

PW 1 Yashoda Devagan, the complainant and wife of the victim.

PW 2 Narayan Bhandari main watchman/security supervisor at Shivshahi Prkalp.

PW 3 Sheshnath Dubey, watchman of Shivshahi Prkalp

PW 4 Dilip Ahire, panch to spot panchnama Exhibit-14.

PW 5 Gangadhar Pawar, panch to panchnama of seizure of clothes of accused Exhibit-16.

PW 6 Dr.Ramdas Sanap and P.M. doctor who tendered P.M. Notes at Exhibit-20.

PW 7 ACP Rajendra sinha Pardeshi, investigating officer.

9. The defence of the accused is of total denial but he neither examined himself on oath nor examined any defence witness. After scrutinising and analysing evidence and considering rival submissions advanced by learned counsel for the parties, trial Court 6 app915.05 convicted and sentenced the accused as aforestated. Being aggrieved and dissatisfied by the said conviction and sentence, the accused has challenged the same in the present appeal and prayed for quashment thereof.

10. Learned counsel for the accused canvassed that the charge against the accused mainly rests on three instances:

(i) Homicidal death of the victim.

(ii) Recovery/discovery of blood stained clothes of the accused under memorandum and discovery panchnama Exhibit.22 and Exhibit.22-A.

11. The first instance is the death of victim. It is not disputed that the victim met with homicidal death since the deposition of PW 6 Dr. Ramdas Sanap and the P.M. Notes Exhibit-20 spell out that cause of death as hemorrhage and shock due to head injury with multiple injuries and unnatural.

12. In the said context, learned counsel for the accused seriously disputed the conduct of the complainant and submitted that the conduct of complainant i.e. wife of the victim is suspicious and although allegedly her husband was killed by the accused there were no shouts or alarm after she allegedly witnessed the said incident. The said conduct is unnatural. It is also submitted that, in fact, bare perusal of the testimony of PW 1 Yashoda, first informant discloses that she has not seen alleged assault by accused upon the victim and, therefore, she cannot be construed to be eye witness to the incident and what she saw only that the accused was armed with spade with blood stains and victim was lying in bleeding condition, and not beyond that, and hence, it is submitted that the testimony of star witness of prosecution PW 1 Yashoda is in doldrums. Moreover, it is also argued that blood stained bamboo was seized under spot panchnama Exhibit-14 by the investigating agency in presence of PW 4 Dilip Ahire but it is not the case of the first informant PW 1 Yashoda that accused assaulted the victim by bamboo and, therefore, question arises how the said bamboo which was found on the spot was stained with blood and even C.A. report of the said bamboo discloses that it bore human blood stains, and hence, it is submitted that the said recovery of bamboo is of no aid and assistance to the prosecution. Moreover, it is further submitted that the prosecution has not examined material witness i.e. Sambhaji Yadhav watchman who was present at the spot.

13. Learned counsel for the appellant also argued that the testimony of PW 2 Bhandari and PW 3 Dubey are almost of similar nature who noticed the dead body of the victim on the next day morning i.e. 8.1.2002 by the side of building No.46 and, therefore, it is submitted that the question arose that when the alleged assault upon her husband - victim took place on the upper floor of the building under construction, how body of the victim came on the ground floor by the side of building No.46 and no explanation has been put forth by the accused therefor. It is also canvassed by learned counsel for the accused that the clothes of PW 1 Yashoda were also seized and same were also sent to C.A. for examination purpose alongwith forwarding letter Exhibit-24 and said C.A. report Exhibit-25 discloses that her sari bore human blood of "B" group and C.A. report of her blood sample

discloses her blood group as "B" group as well as C.A. report dated 23.4.2002 discloses blood group of victim - Tallbaram as blood group "B" and it is not case of the prosecution that PW 1 Yashoda sustained blood injuries, therefore, the question arises as to how her sari bore blood of victim Tallbaram and prosecution has not given any explanation therefor and the said circumstances indicates that PW 1 Yashoda is accomplice to the incident and, therefore, her testimony cannot be used against accused unless there is reliable corroboration.

14. According to learned counsel for the accused, as per the prosecution case, the accused was arrested on the next building under arrest panchnama on 7.1.2002, although the incident occurred on 6.1.2002 at 22.00 hours to 22.15 hours, and in natural course of events accused had run away since he was not arrested till next day, but so did not happen and, therefore, the conduct of the accused exhibits that he is not the culprit in the present case. Moreover, it is also submitted that alleged incriminating circumstance of the blood stained clothes of the accused bearing blood stains of the victim was not put to the accused in the statement recorded u/s 313 of the Criminal Procedure Code which causes serious prejudice to the accused. Accordingly, learned counsel for the accused submitted that the prosecution evidence does not prove and establish charges levelled against accused beyond reasonable doubt, and hence, the present appeal deserves to be allowed by quashing the conviction and sentence imposed on him, and acquitting him. Alternatively, it is submitted that the accused has not committed murder of the accused intentionally but caused such bodily injury to him which is likely to cause death amounting to culpable homicide not amounting to murder and, therefore, urged that present case would come under the preview of 304 Part I of the Criminal Procedure Code attracting sentence of imprisonment upto ten years and prayed that the appeal be partly allowed in those terms.

15. Learned A.P.P. countered the said argument and opposed the present appeal vehemently and submitted that homicidal death of victim - Tallbaram is not disputed and, therefore, only question remains whether accused is the cause of said homicidal death or not. In the said context, it is submitted that PW 1 Yashoda, first informant is eye witness to the occurrence of the incident, who has narrated the incident elaborately which involves the accused in crime. So also, testimony of PW2 Bhandari and PW 3 Dubey also support the testimony of PW 1 Yashoda and said three testimonies cumulatively connect the accused with the crime. Moreover, it is submitted that the clothes of the accused were blood stained and C.A. report discloses that it bore blood stains of human blood of "B" group and another C.A. report discloses that blood group of victim is of "B" group, and hence, it is apparently clear that clothes of the accused bore blood group of victim and accused has not given any explanation in that respect in the statement recorded u/s 313 which clearly connects the accused with the crime. It is also submitted that testimony of PW 7 I.O. Pardeshi speaks about recovery of spade i.e. weapon and also recovery of clothes of complainant Yashoda and also blood stained piece of

cloth which was used by the accused for wiping blood stains of the victim which was also seized at the time of panchnama and the said articles were also sent to C.A. office for examination purpose which also bore human blood may be of inconclusive nature but the fact remains that the said articles bore human blood and accused has not given any explanation therefor and, hence, said circumstance also amounts to incriminating circumstance against the accused. Accordingly, learned A.P.P. submitted that there is direct evidence against accused and other circumstantial evidence is in consonance with the said direct evidence which involves accused in the crime and, therefore, urged that present appeal bears no substance and hence it be dismissed.

16. In the context of submissions advanced by learned counsel for the parties, it is necessary to make useful reference to material evidence adduced/produced by the prosecution and in the said context PW 1 Yashoda has categorically stated in her deposition that her husband was doing mason work and accused was also doing mason work, accused and her husband were friends. She, her husband and accused Manoj used to reside at Shivshahi Prkalp building No.46, 4th Floor at the relevant time. However, her husband i.e. victim used to suspect about illicit relations between PW 1 Yashoda and accused Manoj. She also stated that incident occurred on 6.1.2002 when she took dinner alongwith her husband and son and went to bed, and at that juncture, she heard screams of her husband that "mar gaya mar gaya" and, therefore, she woke up and saw accused was holding spade in his hand and he gave abuses and threatened that he would kill him, and blood was oozing from his head and, therefore, she felt giddiness and noticed that accused dragged her husband, therefore, she was frightened and sat alongwith her son. The accused returned and cleaned the blood by cloth and threatened that he would kill her if she shouted and hence, she remained there for the whole night due to fear and next day when PW 2 Bhandari and PW 3 Dubey came there and told her husband was lying on ground floor, she alongwith said watchmen came to the ground floor. Police personnel also arrived there and took her husband to hospital and made inquiry with her and recorded her statement, and accordingly police personnel registered the complaint (Exhibit-8). In the cross examination, she stated that there were many persons working in the said building with said contractor and another person was staying on the third floor of the said building. She also stated that eight days prior to the incident her husband also saw her with accused when they were doing sexual work but further she stated that she did not state said fact to the police. She further stated that she was in police station for 2-3 days. She further stated that accused told her that he would kill her but she neither shouted nor disclosed to the others, but same was denied by her.

17. The evidence of PW 2 Narayan Bhandari discloses that he was main watchmen, and the project of construction work was going on at Shivshahi Nagar at the relevant time and on 7.1.2002 he and PW 3 Dubey and Sambhaji, watchman were on round at 3.00 to 3.30 am when one lady and small child met them by side of the

building at 6.00 am when he was on round he saw one person by the the side of Building No.46 and also saw blood stains showing the marks of dragging. He also saw one lady, small boy and one person there and on inquiry she disclosed that somebody injured her husband and small boy told name of the accused Manoj, stating that accused Manoj assaulted his father. Accordingly, he informed the same to the police personnel and police took the injured to hospital and he came to know that the injured was dead and police personnel recorded his statement. In the cross examination, he stated that Sambhaji Yadav was on duty at the gate of Building No.46. Omission in respect of fact that he saw one lady at 3.30 am and he sent her back tried to be taken out but since it was not proved, same cannot be of any aid and assistance to the accused. However, he admitted that he did not state name of Sambhaji in the police statement when he was on the gate of the building as well as he did not state in police statement about blood stains and marks of dragging. He did not state in the police statement that small boy told him that Manoj Vishwakarma assaulted his father since he thought that police will make inquiry about the same.

18. Moreover, the testimony of PW 3 Sheshnath Dubey discloses that he was working as watchman at Shivshahi Prkalp at the relevant time and on the morning of 7.1.2002 when he was on the round with PW 2 Bhandari they saw one person lying in injured condition near Building No.46 and the said person was staying with accused. They went to 4th Floor where accused was staying and saw that blood was lying in the hall and, therefore, they went to bedroom and saw one lady and small child in frightened condition and that lady stated that accused threatened her and also disclosed that accused assaulted her husband with spade and fled away. In the cross examination, she denied suggestion that accused was not present alongwith wife and injured and he did not threaten her.

19. That takes us to testimony of PW 5 Gangadhar, panch to the panchnama of seizure of clothes who stated that he knew accused as he was working as security at Shivshahi Prkalp and police seized her clothes from person of the accused i.e. one yellow colour baniyan Art. 7 and one blue colour full pant on his person Art. 16 in his presence. However, during the cross examination he stated that he was not knowing accused prior to the incident. He also stated that there is no specific mark on the clothes and similar clothes are available in the market and stated that clothes were not seized in his presence.

20. Coming to the testimony of PW 6 Dr.Ramdas Sanap was attached to Cooper Post Mortem Center as Medical Officer. On 7.1.2002 dead body of Tallbaram was brought by police personnel of Dindoshi police station and he conducted post mortem thereon on 8.1.2002 between 11.30 am to 12.30 pm at noted following external injuries :

"1. CLW over rt.side of face rt. Pre-auricular area 2 cm x 1 cm x bone deep.

2. CLW over rt.side of scalp temporal area of size 1.5 cm x 1 cm x bone deep.
3. Abrasion over rt. Shoulder two in Nos.1.5 cm x 1 cm and 1 cm x 1 cm.
4. Abrasion over rt. lower leg middle 1/3 rd 2 cm in diameter.
5. Fracture lt. hip joint.
6. Fracture lt. Elbow joint.
7. Linear abrasion over rt. illiac foss and rt. side of back irregular in shape and size.
8. Abrasion over rt. cheek 1.5 cm x 1 cm."

On internal examination of head he noticed heamotoma under the scalp. Fracture skull rt. temporal area of size 15 cm X 5 cm crack fracture lt. Parital area of length 8 cm. Sub-dural and sub aregnoid hemotoma present all around. All injuries were ante mortem. According to him, cause of death was heamorrhage and shock due to head injury with multiple injuries. Death was unnatural. He also stated that as per ADR history of assault it was by hard object (spade) over head. He further stated that above injuries are sufficient to cause death in the ordinary course of nature and injury nos.1, 2 and 5 are main injuries to cause death. He further stated that injury nos.5 and 6 can be caused by fall from 20 to 22 ft. Moroever, he also stated that aforesaid injuries can be caused by spade. Accordingly, he prepared post mortem Notes Exhibit.20. In the cross examination, he stated that above injuries can be caused due to fall from the height. He also stated that police personnel did not show him any weapon of assault.

21. We have perused the oral, documentary and medical evidence as well as evidence of forensic science laboratory adduced and produced by the prosecution and also perused impugned judgment and order under challenge as well as considered submissions advanced by learned counsel for the parties and at the outset the testimony of PW 6 Dr. Ramdas Sanap coupled with P.M. Notes Exhibit-20 leaves no room for suspicion that the deceased Tallbram Devagan met with homicidal death and injury nos.1, 2 and 5 are main injuries which caused death of the victim and all injuries were ante mortem and according to doctor cause of death was heamorrhage and shock due to head injuries and multiple injuries and said death was unnatural. He further stated that aforesaid injuries can be caused by spade before the Court. Although it is stated in the cross examination that above injuries can be caused due to fall from height, it is specifically stated that injury no.5 can be caused by fall from height but it is not the case of the accused that victim had ever fallen from the said height and even there is no basis and foundation in the cross examination of the prosecution witnesses in that respect as well as it is not the defence of the accused even in his statement recorded u/s 313 of the Criminal Procedure Code and hence reply given by doctor in that respect will not be of any aid and assistance to the accused.

22. Coming to important aspect that who was cause of death of the victim and who was culprit therefor and having considered the testimony of PW 1 Yashoda, first informant it is amply clear that she is the eye witness to the occurrence of the incident. Moreover, from the very utterance made by accused as stated by PW 1 Yashoda that accused would kill the victim, exhibits very intention of the accused to eliminate the victim. Moreover, she also stated that accused dragged her husband which clarifies how the body of the victim came from upstairs to nearby the Building No.46. Moreover, it is also apparent from the said testimony that accused had threatened her to kill if she shouted and disclosed the incident to anybody which is the clarification non raising of alarm/shouts by the complainant. Accordingly, it is apparent from the scrutiny of evidence of PW 1 Yashoda that same has not been shaken in the cross examination and same can be construed as trustworthy and reliable testimony of eye witness which connects the accused with the crime.

23. Moreover, testimony of PW 2 Dubey and PW 3 Bhandari are also in consonance with testimony of PW 1 Yashoda and have not been demolished in the cross examination. Moreover, it is evident from evidence of PW 5 Gangadhar Pawar that clothes of accused i.e. one yellow colour baniyan and one blue colour full pant were seized on 7.1.2002. Moreover, the testimony of PW 7 ACP Pardeshi discloses that weapon i.e. spade and clothes of the complainant were also seized under panchnama and all its article were sent to C.A. office for examination purpose alongwith forwarding letter Exhibit-24. Pertinently, the clothes of accused i.e. baniyan and full pant bore human blood stains of "B" group and another C.A. report disclose that blood group of victim was "B" group as well as blood group of accused was "B" group and that of accused was "A" group and significantly the blood stains on the clothes of accused bore human blood of "B" group i.e. blood group of victim and accused had not given any plausible explanation therefor in the statement recorded under section 313 of the Criminal Procedure Code, and hence, the said corroborative piece of evidence connects the accused with the crime clinchingly.

24. True, it is that sari of the first informant PW 1 Yashoda also bore human blood of "B" group i.e. blood group of victim but relying on this circumstance, inference cannot be drawn that she is accomplice as canvassed by the learned counsel for the accused and even assuming for the sake of assumption without admitting that PW 1 Yashoda is accomplice but there is other cogent and reliable evidence on record to corroborate with her testimony and hence, the said testimony of PW 1 Yashoda cannot be discarded. Moreover, it is also material to note that spade i.e. alleged weapon also bore human blood may be of inconclusive nature but considering the very theory advanced by the prosecution through the testimony of PW 1 that accused was armed with spade, which bore blood stains, and no explanation offered by accused in that respect, exhibits the complicity of the accused in the crime.

25. Having the entire survey of the prosecution evidence as well as considering the rival submissions advanced by learned counsel for the parties the involvement of

the accused in the crime is evident and, therefore, we are not inclined to accept the submissions advanced by learned counsel for the accused and accordingly, we are of the considered view that present appeal is devoid of merits and, therefore, same deserves to be dismissed and even alternate submission advanced by learned counsel for the accused also bears no substance, and hence, we are unable to persuade ourselves to concede to the same.

26. In the result, the appeal stands dismissed, and the conviction and sentence imposed upon the appellant/accused by the judgment and order dated 5.3.2005 in Sessions Case No.385 of 2002 stands confirmed.

27. Copy of the present judgment be served upon the accused through concerned jail authority.

28. Mr.Arfan Sait, advocate was appointed for the accused and his fees is quantified at Rs.2,500/- which be paid to him by legal aid committee.