(1992) 06 BOM CK 0050

Bombay High Court

Case No: Criminal Appeal No. 68 of 1990

Sitaram Vishnu Chalke		APPELLANT
	Vs	
State of Maharashtra		RESPONDENT

Date of Decision: June 16, 1992

Acts Referred:

- Evidence Act, 1872 - Section 27
- Penal Code, 1860 (IPC) - Section 302

Citation: (1993) CriLJ 3364

Hon'ble Judges: S.S. Dani, J; I.G. Shah, J

Bench: Division Bench

Advocate: S.P. Thorat, for the Appellant; Mrs. S.S. Pingulkar, Assistant Public Prosecutor, for the Respondent

Judgement

Dani, J.

The appellant-original accused has challenged the order of conviction and sentence dated 22nd December, 1989, passed by the IIIrd Additional Sessions Judge, Satara, in Sessions Case No. 144 of 1989, holding him guilty for the offence of murder punishable under S. 302, IPC and sentencing him to suffer imprisonment for life and to pay a fine of Rs. 1,000/- in default to suffer R.I. for two years.

2. The deceased involved in the case was one Vishnu Chalke the father of the present appellant-accused. P.W. No. 4 Housabai is the mother of the accused. Dattaram is a younger brother of the accused. P.W. 8 Anantabai is the wife of the elder brother. The deceased Vishnu along with his family members was residing at Chalkewadi, district Satara. The deceased was addicted to liquor and it is alleged that the quarrels used to be ensued between the family members inter se on this. The incident in question is alleged to have taken place on 6th May, 1989 at 10 p.m. at the house of the deceased. It is alleged that deceased Vishnu returned to the house on that night in a drunken state and started quarrelling with Housabai P.W. 4.

The accused is the younger brother of Dattaram and P.W. 8 Anantabai were also present at that time in the house. The appellant-accused got enraged because of the quarrel between the deceased, Vishnu and his wife Housabai and he noticed that deceased Vishnu was on the point of attacking his wife with an axe in his hand. The accused then picked up a scythe (Article 7) from the cattle shed and inflicted blows with it from back at the neck and head of his father Vishnu, who was sitting by the side of the fire place. The blows proved fatal and deceased Vishnu died instantaneously. P.W. 5 Ramchandra Chalke was working along with the deceased as a labourer on the construction of a Dam and on the next day morning, the witness reached the house of the deceased so as to enquire as to whether the deceased Vishnu was willing to give him company for the work. P.W. No. 5 Ramchandra then came to know about the death of Vishnu and he himself noted the dead body lying in the pool of blood in the kitchen-room, of the house, P.W. 5 Ramchandra then rushed to P.W. 6 Jotiram, the brother of deceased Vishnu. On receiving the information of the death of Vishnu, P.W. 6 Jotiram then narrated the incident to P.W. 7 Shankar Chalke (Kotwal). Both of them started proceeding towards the Police Patil of the village and on their way they met the accused near the water reservoir, and on making the query, P.W. 6 Jotiram received the confession from the accused, and he rushed to Village Kotwal P.W. 7 and contacted Chalkewadi Police Station at Satara and lodged his FIR, Exh. 28 which came to be recorded by P.W. 9 Pandurang Barge, an investigating officer. The Police Patil then reached the village on 6th May, 1989 at about 12 noon and the inquest Exh. 10 and the panchanama of the scene of offence Exhibit-23 in the presence of two panchas including P.W. 3 Changu Chalke were made and various articles came to be attached. The dead body of Vishnu was sent for post mortem examination and the accused came to be arrested under the panchanama Exhibit 19. The clothes from the person of the accused were then attached and they were found stained with blood. On 7-5-1989, the accused while in police custody made a voluntary statement that he shall produce Scythe kept concealed in his house, and the memorandum panchanama, Exhibit-20 of the discovery statement in respect of Scythe was made in the presence of two panchas including P.W. 2 Ramchandra Chalke. The accused then led the panchas and the police to the kitchen room and discovered the article 7 and it was attached under a panchanama Exhibit-21. All these articles were then sent to Chemical Analyser for examination and the reports Exhibits 12 and 13 were duly received. On completion of the other necessary investigations, the accused came to be charge-sheeted of the alleged offence of murder and he ultimately stood his trial in Sessions Case No. 144 of 1989.

3. The accused pleaded not guilty to the charge and claimed to be tried and his defence was of a complete denial.

4. On consideration of evidence on record, the IIIrd Additional Sessions Judge, Satara, found the death of Vishnu as homicidal and also accepted the evidence of the prosecution as trustworthy and reliable and held the accused guilty for the said

offence. By an order dated 22nd December, 1989, the appellant-accused came to be convicted and sentenced as aforesaid. It is this order of conviction and sentence which is being challenged in the present appeal by the original accused.

5. There is no dispute in the present case that the evidence on record is sufficient to hold the death of Vishnu as homicidal and the affirmative finding on the said point recorded by the learned Judge is also not disputed before us. The main crux of the matter is whether the evidence placed on record by the prosecution is sufficient to inspire confidence and whether the learned Judge was right in relying upon the said evidence so as to hold the accused guilty for the alleged offence.

6. In order to prove the criminal liability for the act of murder, the prosecution has adduced the evidence of 9 witnesses. Out of them P.W. 4 Housabai, and P.W. 8 Anantabai are alleged to be the eye witnesses to the incident. P.W. No. 6 Jotiram Dhondiba is related to the accused and it is alleged that the accused made extra judicial confession to this witness. P.W. 5 Ramchandra Chalke has been examined so as to prove the alleged confessional statement and P.W. 2 Ramchandra Tatyaba Chalke and P.W. 3 Changu Raju Chalke are examined as panchas in whose presence the accused is alleged to have made a voluntary statement to discover and produce the weapon of attack at his instance. On the basis of this evidence on record, the prosecution desires to fasten the criminal liability on the shoulders of the accused and the Additional Sessions Judge has accepted the evidence of the prosecution in the shape of extra judicial confession of discovery of the weapon of attack as sufficient to clinch the accused in the commission of the alleged act.

7. P.W. 4 Housabai is the mother of the accused while P.W. 8 Anantabai Dayanu is the daughter-in-law of deceased Vishnu. It is alleged by the prosecution that the accused inflicted blows on the person of deceased Vishnu in the presence of these two witnesses and as such, these two inmates of the accused are eye witnesses to the incident. However, both of them have refused to support the story of the prosecution before the Court. P.W. 4 Housabai and P.W. 8 Anantabai have both resiled from supporting the story of attack by Scythe by the accused on the person of his father Vishnu. P.W. 4 Housabai is emphatic in her evidence at Exhibit-24, that when Vishnu started quarrelling with herself, she, her daughter-in-law, P.W. 8 Anantabai and her sone, Sitaram the accused and Dattaram left the house out of fear. She is further positive in her evidence that all of them concealed at Bandh near their house and after about an hour they all returned back to the house and noticed the dead body of Vishnu, lying in the pool of blood in the kitchen. P.W. 8 Anantabai also narrates the same story and has stated in her evidence at Exhibit-30 that when Vishnu threatened to kill his wife and other members, they all ran out of the house and remained outside and on their return they noticed Vishnu lying dead in pool of blood. It is, therefore, an admitted position that both the inmates of the house had refused to support the story of the prosecution that the assault on the person of Vishnu was by the present accused. The Additional Sessions Judge has also observed

that the evidence of these two witnesses does not support the story of the prosecution and has rightly discarded their evidence. The Additional Sessions Judge has, however, found the other evidence on record as sufficient to hold the appellant-accused guilty. The evidence is in the shape of extra judicial confession made by the accused to P.W. 6 Jotiram Dhondiba and the discovery weapon Article 7, at the instance of the accused u/s 27 of the Indian Evidence Act. The Additional Sessions Judge has further found the circumstance of the presence of blood on the weapon and on the clothes of the accused as sufficient to involve him as the person responsible for causing the death of Vishnu. It is, therefore, necessary to scan and scrutinize the evidence and to find out as to whether the criminal guilt alleged against the accused can be held to have been sufficiently proved. Coming to the first circumstantial piece of evidence, it is alleged by the prosecution that the accused immediately after the incident made extra judicial confession to P.W. No. 6 Jotiram Dhondiram, Exhibit-27, and admitted the complicity in the commission of the alleged act. It need not be stated that the evidence in the shape of an extra judicial confession, by itself, is a weak piece of evidence and the court would normally expect sufficient and reliable corroboration to such type of evidence. P.W. 6 Jotiram Dhondiba Chalke has stated in evidence at Exh. 27 that when he returned back to his house at 3-10 a.m., his wife told in that Vishnu was assaulted with Scythe and he also came to know about it from P.W. 5 Ramchandra Raghunath on the next day morning. The witness further states that when he was proceeding to the house of village Kotwal so as to narrate this incident, he met the accused on the way and then the accused told him that he committed the murder of his father because of the domestic quarrel. This witness P.W. 6 Jotiram Dhondiram reached Satara Taluka Police Station at 9-30 a.m. and lodged his FIR Exh. 28. and in the complaint itself it is mentioned that the accused had admitted his guilt before him. It is on the basis of this evidence on record, that the criminal liability has been held as duly proved against the present accused. It may, however, be noted that P. W. 6 Jotiram Dhondiba admits strained and hostile relations between himself and the accused and his brothers. He is emphatic in his evidence that the brothers inter se, are just the neighbours and they are not having any cordial relations between them. It is further admitted by the witness that the agricultural land of deceased Vishnu adjoins his own land and the land of the accused received canal water and there is a dispute between them over this. It is, therefore, an admitted position that P.W. 6 Jotiram Dhondiba was having hostile and inimical relation with the accused and his other brothers. Therefore, the evidence of this witness P.W. 6 Jotiram will have to be considered with pinch of salt. Further it may be noted that the subsequent conduct of this witness makes his evidence more and more doubtful and unreliable. The witness admits that in spite of learning the fact of assault on Vishnu by the accused, he himself did not think it necessary to rush to the house of the accused. Admittedly, the witness is a neighbour and it was also then expected to go and enquire with the accused and other inmates of the house about the incident, especially when he had come to know about the murderous assault on the person of Vishnu. In spite of this,

the witness, as per his evidence, proceeded towards the house of the village kotwal and Police Patil. It may also be noted further that as per the evidence of this witness, he met the accused on the road near the water reservoir, and according to him the accused was simply standing on the road. It is fallacious to expect a guilty person to stand clam and cool on the road and normal and natural conduct would have been to disappear from the scene of offence, if he really had committed the alleged murder. Further it may be noted that specific recitals mentioned in the FIR Exh. 28, also make the circumstantial piece of evidence still more unreliable and doubtful. If we peruse the FIR Exh. 28, it is specifically mentioned therein thus :

"I got frightened and I then proceeded towards the house of village Kotwal so as to narrate the incident to him. While proceeding, I met Sitaram Vishnu Chalke on the road. I asked him as to why he had killed his father. Thereupon Sitaram told me that his father all the while consumes liquor and quarrels with the members of the family and, therefore, I killed him with Scythe."

It is, therefore, amply clear that P.W. 6 Jotiram Dhondiba, himself asked the accused as to why he killed his father and the accused replied to that question by saying that he did it because his father used to quarrel. It is, therefore, clear that the accused had replied the question asked by P.W. 6 Jotiram and P.W. 6 Jotiram assumed that the accused had killed his father and on the said assumption he asked the question. By no stretch of imagination this can be considered to be an extra judicial confession made by the accused. As the matter of fact, the specific recitals of the F.T.R. Exh. 28, do not make out the case of any confession and it is abundantly clear that this witness P.W. 6 who trusted the liability on the shoulders of the accused for killing his father and the accused then admitted it. It may also further be noted that it is again mentioned in the F.I.R. Exh. 28 that when he reached his house at 8 a.m. in the morning his wife Vaijayanta hold him that Vishnu was murdered by Sitaram. In spite of this, the witness P.W. 6 Jotiram, wants us to believe that he still retired to bed without doing anything and the next day morning he contacted P.W. 5 Ramchandra. It may be noted that Vaijayanta, the wife of this witness from whom he came to know about the involvement of the accused as the assailant, has not been examined by the prosecution. Another dead blow to this circumstantial piece of evidence is afforded by the sworn testimony of P.W. 7 Shankar the village Kotwal. This witness has stated in his evidence at Exhibit-29/1 that when P.W. 6 Jotiram came to his house at about 6-30 p.m., Jotiram told him that his brother was murdered and he (Jotiram) requested him to go with him to the Police Station. It is, therefore, clear from the evidence of the village Kotwal that what was narrated to him by P.W. 6 Jotiram was only to the effect that his brother Vishnu was murdered. The complicity and the involvement of the accused as the assailant of Vishnu is conspicuously absent when the incident is narrated by P.W. 6 Jotiram to this witness P.W. 7 Shankar. Therefore, if really the accused had made any extra judicial confession about his guilt, it was but natural and expected that P.W. 6 Jotiram, would also narrate about the said extra judicial confession to the Village Kotwal. In this

connection, further the evidence of P.W. 7 Ramchandra Raghunath may also be considered. As stated above, P.W. 5 Ramchandra was working as co-labourer with deceased Vishnu on a construction of some Dam at the village and the prosecution has adduced his evidence in order to show that P.W. 5 Ramchandra noticed the dead body of Vishnu, lying in the house and he narrated this incident including the involvement of the accused to P.W. 6 Jotiram. P.W. 5 Ramchandra, however, in his evidence at Exh. 25, shatters the alleged source of information by him to P.W. 6 Jotiram. It is pertinent to note that P.W. 5 Ramchandra admits in his evidence at Exhibit 25, that when he saw the dead body of Vishnu lying in the pool of blood, he straightway proceeded to his house and nothing happened on his way to the house. The witness, therefore, emphatically admits that he did not meet P.W. 6 Jotiram. If this is so, then the information alleged to have been received by P.W. 6 Jotiram, also cannot be accepted and it loses its evidentiary value. Further P.W. 5 Ramchandra, appears to be a got-up witness. As stated above, the witness was working as a labourer along with the deceased and on that day he had been to the house of Vishnu to enquire as to whether Vishnu was going to attend the work with him. The witness, however, admits that the day of incident was a Sunday and on Sunday there was no work at the site of the Dam. If this is accepted, then one fails to understand as to on what occasion P.W. 5 Ramchandra Raghunath had to go to the house of Vishnu and to make any enquiry. P.W. 5 Ramchandra had, therefore, no cause or occasion to go to the house of deceased Vishnu and if, this is so, the alleged information supplied by him to P.W. 6 Jotiram, in respect of the death of Vishnu, and involvement of the accused as the assailant loses all its force. P.W. 5 Ramchandra Raghunath admittedly does not involve the present accused in the commission of the alleged incident. Considering all these facts and circumstances on record, it is rather risky to rely on the circumstantial piece of evidence in the shape of extra judicial confession alleged to have been made by the accused to P.W. 6 Jotiram Dhondiba. We are, therefore, of the opinion that the learned Additional Sessions Judge was patently in error in relying on this circumstance, as sufficient to inspire confidence and to hold the appellant-accused guilty for the alleged offence of murder.

8. Another piece of circumstance, relied on by the Additional Sessions Judge is in the shape of the discovery of a weapon of attack, that is scythe (Article 7) at the instance of the accused. It is the case of the prosecution that on 7-5-1989, the accused while in police custody, made a voluntary statement that he shall discover and produce the scythe kept concealed in his house and a memorandum panchanama, Exhibit 20 was accordingly made. It is the further case of the prosecution that the accused in pursuance of that voluntary statement led the police and panchas to his house and discovered the scythe (Art. 7) and it was attached under a panchanama Exhibit 21. As per the said panchanama, this article was found to have been stained with blood. It is on the basis of this evidence that the conviction against the appellant accused is tried to be maintained by the State. It may be noted initially that this Art. 7, has been

admittedly discovered and found kept on the door-frame of the wall of the house. It is, therefore, an admitted fact that this article was not found concealed when it came to be attached under the panchanama, Exhibit-21. The article No. 7, was, therefore, found and discovered from an open place and if this is so, it cannot be held to be a discovery under S. 27 of the Indian Evidence Act. It may be further noted that as per the memorandum of the voluntary statement Exhibit-20, the accused had kept sickle on the door frame of the north-wall of the kitchen and it is, therefore, clear that it is not also the case of the prosecution as disclosed by the Memorandum Panchanama, Exhibit-20 that the sickle was kept concealed by the accused. Further it may be noted that P.W. No. 3 Changu Raju Chalke, another panch, in whose presence, article No. 7 was discovered, has admitted in his evidence that the accused made a voluntary statement and the article No. 7 was discovered from the house on 7-5-1989 at 2 p.m. It may, however, be noted that as per the evidence of another Panch witness P.W. No. 2 Ramchandra Tatyaba, that discovery of article 7 Scythe was made at 4-30 p.m. It is, therefore, noted that the evidence of these two panch-witnesses in whose presence the article is alleged to have been discovered by the accused is completely at variance. Further it may be noted that as per evidence P.W. 3 Changu Raju also admits the position that when the police inspected the house of the deceased at 2 p.m. the scythe was already noted by the police on the wall near the room and this happened at 2 p.m. However, it is to be found from the evidence of P. W. 1 Ramchandra Tatyaba that the discovery was made at 4-30 p.m. It is, therefore, abundantly clear that the Art. 7 was already known to the police before it came to be discovered at the instance of accused. It may also be noted that the Additional Sessions Judge has found that the report submitted to the Chief Additional Magistrate for police custody for the remand of the present accused was filed and the seizure of the scythe was incorporated therein. It is, therefore, clear that the article was already seized under the panchanama before the alleged discovery was made at the instance of the accused. It may also be noted that the article in question i.e. scythe is admittedly an article easily found with every agriculturist in the field. The article was, therefore, commonly available article and it was also found open and not concealed in the house of the deceased. Article No. 7 scythe was an agricultural implement and as such the finding of Art. 7 in the house of the deceased cannot be said to be a clinching circumstance against the accused when the accused and the deceased were admittedly agriculturists. Reliance is placed by the Additional Sessions Judge on the circumstance of the presence of the blood stains on the weapon and also on the clothes of the accused. The prosecution has placed on record the reports of the C.A. at Exhibits 12 and 13, wherein it has been noted that human blood was found on the sickle and the blood group of the accused was of ''B'' Group while that of the deceased was of ''O'' Group. It is on the basis of this evidence on record, that Additional Sessions Judge has held the appellant-accused guilty inasmuch as the blood of deceased Vishnu was found on the Banian of the accused. In the opinion of the Additional Sessions Judge, this circumstance was a clinching one and was more

than sufficient to hold the appellant-accused guilty. It may, however, be noted that the report of the C.A. Exhibit 13 does not make any mention of blood group of the blood found on the sickle. Further it may be noted that it is the defence of the accused that when he noticed the dead body of his father Vishnu, lying in the pool of blood in the kitchen, he himself lifted the dead body and placed it in order. It is but natural and expected that the son would lift the dead body of his old father. There is nothing unnatural or unbelievable in the action of the present appellant-accused in lifting the dead body of his father and keeping it in order. The possibility, of finding blood of deceased Vishnu to certain extent, on the clothes of accused is not only probable but also natural. The finding of the blood of the deceased Vishnu on the clothes of the accused is, therefore, in our opinion, sufficiently and properly explained by the accused and the explanation offered by the accused is natural, probable and deserves acceptance. In view of these facts, circumstances on record we are, therefore, of the opinion that neither the circumstance in the shape of the extra judicial confession nor the circumstance of the discovery of weapon of attack at the instance of the accused and the finding of the blood of the deceased on the clothes of the accused is sufficient to hold the appellant-accused guilty of the alleged offence of murder and especially when the near relations of the deceased who were admittedly present in the house at the time of the incident have resiled from supporting the story of the prosecution. We are, therefore, of the opinion that the circumstances on record are insufficient to inspire confidence and the evidence adduced by the prosecution in the shape of these circumstances cannot be accepted. The evidence on record as discussed above is therefore insufficient and not legal to hold the appellant accused guilty for the alleged act of murder. Therefore, disagreeing with the findings and reasoning of the learned Additional Sessions Judge, we are of the opinion that the evidence on record falls short to bring the guilt sufficiently to the home of the accused. The accused, therefore, will have to be acquitted of the alleged offence. This criminal appeal filed by the appellant-accused will, therefore, have to be allowed and the order of conviction and sentence will have to be disturbed.

9. In the result, criminal Appeal No. 68 of 1990, is hereby allowed. The order dated 22nd December, 1989, passed by the IIIrd Additional Sessions Judge, Satara in Sessions Case No. 144 of 1989, holding the appellant accused guilty for the offence of murder punishable under S. 302, IPC and sentencing him to suffer imprisonment for life and to pay a fine of Rs. 1,000/- in default to suffer R.I. for two years is set aside and quashed and the accused is acquitted of the offence with which he stood charged. The appellant-accused shall be released forthwith, if not required in any other case.

10. Appeal allowed.