

Bombay High Court

Ganesh S/O Somaji Pithale vs State Of Maharashtra, Thr. P.S.O. ... on 21 December, 2017

Bench: Ravi K. Deshpande

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jg.a

THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

CRIMINAL APPEAL NO. 256 OF 2016

Ganesh S/o Somaji Pithale,
Aged about 30 years, Occ : Grocery Shop,
R/o Shivni, Taluka and District : Gadchiroli.

VERSUS

State of Maharashtra,
Through its Police Station Officer,
Police Station Gadchiroli
District : Gadchiroli

Shri R. M. Daga, Advocate for the appellant
Mrs. M. H. Deshmukh, Additional Public Prosecutor for the respondent

CORAM : R. K. DESHPANDE AND
M. G. GIRATKAR, JJ.

Date of reserving the judgment : 12/12/2017.

Date of pronouncing the judgment : 21/12/2017 Judgment (Per : M.G. Giratkar, J) Appellant has assailed the judgment of conviction awarded by learned Sessions Judge, Gadchiroli dated 24-6-2016 in Sessions Case No. 60/2011 for the offences punishable under Sections 302, 392 and 201 of the Indian Penal Code. The appellant is sentenced to suffer 2 jg.appeal.256.16.odt imprisonment for life and to pay fine of Rs. 2,000/-, in default to suffer rigorous imprisonment for six months for the offence punishable under Section 302 of the Indian Penal Code. He is sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs. 1,000/-, in default to suffer rigorous imprisonment for six months for the offence punishable under Section 392 of the Indian Penal Code. He is sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs. 1,000/-, in default to suffer rigorous imprisonment for six months for the offence punishable under Section 201 of the Indian Penal Code.

2. The case of the prosecution against the appellant in short is as under.

(i) Deceased Akbarbhai was running a grocery shop at Gadchiroli. He used to sell grocery articles to the residents of Gadchiroli and also adjoining villages. It is alleged that accused used to purchase grocery articles from the shop of deceased. Since December, 2010, appellant did not purchase

grocery articles from the shop of deceased. There was an outstanding amount of Rs. 20,611/- against the appellant. Deceased went to the house of appellant for the recovery of said amount on 3 jg.apeal.256.16.odt 26-3-2011. Appellant robbed deceased and killed him. Brother of deceased Asif Wadsariya lodged missing report. Thereafter, he found dead body in Gitti khadan (metal mines). Complainant Asif lodged the report on 27-3-2011 alleging that unknown persons committed murder of his brother Akbarbhai. Crime was registered.

(ii) Investigating Officer Ingawale went to the spot of incident, prepared spot panchanama, Exhibit 70 in presence of panchas. He seized one knife, one belt from the spot of incident, prepared inquest panchanama and sent dead body for postmortem. During investigation, he arrested appellant. He has recorded confessional statement (Exhibit 44), recovered weapon and other articles those were seized as per seizure panchanama, Exhibit 45. Investigating Officer recorded statements of witnesses, sent seized property to Chemical Analyser, Nagpur and after complete investigation, filed charge-sheet before the Chief Judicial Magistrate, Gadchiroli. The same was committed to the Court of Sessions, Gadchiroli for trial.

(iii) Charge was framed against the accused at Exhibit 26. Same was readover and explained to the appellant. Appellant pleaded not guilty and claimed to be tried. His defence appears to be of total denial and 4 jg.apeal.256.16.odt false implication.

(iv) The prosecution has examined following witnesses.

(1) P.W. 1 Asif Abdulbhai Wadsariya (Exhibit 35) (2) P.W. 2 Keshav Suresh Latelwar (Exhibit 39) (3) P.W. 3 Karim Sadruddin Budhwani (Exhibit 42) (4) P.W. 4 Shri Chandrabhan Balaji Sahare (Exhibit 50) (5) P.W. 5 Gulam Sadiq Gulam Sheikh (Exhibit 58) (6) P.W. 6 Jivan Bhikhaji Khedekar (Exhibit 59) (7) P.W. 7 Ashok Sakharan Bawne (Exhibit 62) (8) P.W. 8 Hasan Ali Jafarabhai Gilani (Exhibit 69) (9) P.W. 9 Vijay Madhavrao Bhavare (Exhibit 77) (10) P.W. 10 Mangesh Eknath Chafale (Exhibit 80-A) (11) P.W. 11 Shri Sachin Shivaji Ingawale (Exhibit 81) (12) P.W. 12 Dr. Tushar Shankarrao Dhavale (Exhibit 97) and (13) P.W. 13 Dr. Tushar Mukhiram Dahake (Exhibit 107)

(v) After hearing the prosecution and defence, learned trial Court convicted the accused/appellant as stated above.

3. Heard learned counsel Shri R. M. Daga for the appellant. He has submitted that the case of the prosecution is based on circumstantial evidence. Learned trial Court taken into consideration following circumstances.

(1) Appellant was last seen with deceased

(2) Motive and

(3) Recovery of weapon.

4. Learned counsel for the appellant pointed out evidence of P.W. 2 and P.W. 6. They have not stated that appellant was lastly in the company of deceased. He has pointed out cross-examination of P.W. 1 and submitted that there was no quarrel on account of outstanding amount. On the other hand, the appellant was paying outstanding amount. Therefore, motive is also not proved. Recovery of weapon is also doubtful. There is no connecting evidence to establish the guilt of appellant. Learned trial Court wrongly convicted the appellant. Learned counsel Shri Daga pointed out decision in the case of B.L. Satish Vs. State of Karnataka reported in 2001(3) Crimes 182 (SC). At last, learned counsel submitted that appeal be allowed and appellant be acquitted for the offences charged against him.

5. Heard learned Additional Public Prosecutor Mrs. Deshmukh for the State/respondent. She has supported the impugned judgment.

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6. From the perusal of impugned judgment, it appears that learned trial Court has recorded its findings that prosecution case is based on three circumstances, namely, (1) last seen (2) motive and (3) recovery of weapon.

7. There is no eye witness of the incident. Case of the prosecution is based on circumstantial evidence. To convict the appellant on the basis of circumstantial evidence, the Hon'ble Supreme Court in the case of Sharad Birdhichand Sarda Vs. State of Maharashtra reported in (1984) 4 SCC 116 has laid down five guiding principles as under :

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established, (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude every possible hypothesis except the one to be proved, and 7 jg.apcal.256.16.odt (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

8. Learned trial Court ought to have followed the guidelines of the Hon'ble Supreme Court. The circumstantial evidence should be of conclusive nature which unerringly points out the guilt towards the accused and none else. The circumstances should be of conclusive nature.

9. The trial Court has taken into consideration the last seen theory. On this point, prosecution has examined P.W. 2 Keshav Latelwar. He has stated that appellant was in his company on 26-3-2011. This witness not stated that appellant was in the company of deceased.

10. P.W. 6 Jivan Khedekar is examined by the prosecution on the point of last seen. P.W. 6 has stated that on 26-3-2011, deceased Akbarbhai came to his pan shop at about 5.30 p.m. After consuming 8 jg.apcal.256.16.odt water, he went towards Gurdada road. Except this, he has not stated anything more. This witness not stated that appellant was in the company of deceased.

11. From the perusal of evidence of P.W. 2 and P.W. 6, both witnesses have not stated that deceased was in the company of appellant on the day of incident. Learned trial Court wrongly taken into consideration the circumstance that the appellant was lastly in the company of deceased.

12. Learned trial Court relied on the motive of the appellant to commit murder of deceased Akbarbhai. For this purpose, learned trial Court relied on the evidence of P.W. 1 Asif Wadsariya.

13. From the perusal of evidence of P.W. 1 Asif, it is clear that this witness lodged the missing report and after he noticed dead body, he lodged report against unknown persons. In the report, he did not make any allegation against the appellant in respect of outstanding amount. He had stated in his evidence that appellant was purchasing grocery from their shop. Rs. 20,611/- was outstanding against the 9 jg.apcal.256.16.odt appellant. In the cross-examination, he admitted that appellant paid Rs. 5,500/- on 16-12-2010. he was making payment of previous amount partly. This evidence clearly shows that the appellant was not defaulting the amount. On the other hand, it is clear that he was regular customer of the deceased. Whenever he purchased grocery from the shop of deceased, he used to make part payment of earlier account.

14. P.W. 1 not stated any incident that there was any quarrel or enmity between the appellant and deceased on account of outstanding amount. Therefore, amount was outstanding against the appellant cannot be taken into consideration as a motive to commit an offence.

15. Learned trial Court has taken into consideration the recovery of weapon from the appellant. It is pertinent to note that after lodging the report by P.W. 1, Investigating Officer arrested the appellant on 31-3-2011. There is nothing in the evidence of any of the witnesses including the Investigating Officer to show how and why the appellant was arrested. P.W. 3 has stated about the confessional statement of appellant and recovery of two knives, blood stained clothes etc. The confessional statement is at Exhibit 44 and recovery panchanama is at 10 jg.apcal.256.16.odt Exhibit 45.

16. Spot panchanama is proved by P.W. 8 Hasan Ali. He has stated in his evidence that on 27-3-2011, PSI Ingawale called him on the spot of incident. Spot panchanama, Exhibit 70 was prepared in his presence. At the time of spot panchanama, one motorcycle was lying on the spot, one goggle, one pair of plastic chappal and chain of yellow colour were lying there. One belt, one knife was also lying on the spot of incident. It is pertinent to note that the knife was having blood stains.

17. The Investigating Officer called the dog squad. Smell of belt was given to dog but that dog did not show any way. The said belt was also sent to Finger Print Expert to show that fingers of appellant was there but report of Finger Print Expert, Exhibit 94 shows that the finger prints were not valid.

18. Two witnesses were examined by the prosecution to show that belt was purchased by the appellant but report of the Finger Print Expert, Exhibit 95 shows that there was no finger print of appellant.

11 jg.apeal.256.16.odt Hence, this evidence is not useful to the prosecution.

19. Appellant was arrested on 31-3-2011. He was examined by Dr. Dahake. He found four minor injuries. In the cross-examination, he has admitted that if a person fall from running two wheeler, then such injuries can be caused.

20. Recovery of weapon is not the material circumstance against the appellant. It is not established by cogent evidence that the weapon/knife which was seized from the accused was the same weapon examined by the Chemical Analyser. As per the spot panchanama, one knife was seized, it was blood stained. As per the recovery panchanama, Exhibit 45, two knives were seized from the accused. Chemical Analyser report, Exhibit 22 shows that only two knives were examined by the Chemical Analyser. Only on one knife human blood of Group 'B' was found. As per the Chemical Analyser's report, Exhibit 20, blood group of deceased was 'B'. Blood group of appellant was not determined as per the Chemical Analyser's report, Exhibit 21.

21. It is pertinent to note that blood sample of appellant was 12 jg.apeal.256.16.odt not extracted by Dr. Dahake. Medical Officer not stated about the extraction of the blood of the appellant. Investigating Officer Ingawale also not stated about the collection of blood sample of accused. Therefore, it is doubtful as to whether blood of appellant was collected and sent for chemical analysis.

22. It is brought on record in the evidence of panch witness of the spot panchanama and panch witness of recovery panchanama of weapon from the accused that two knives were seized at the instance of appellant and one knife was seized on the spot of incident. It is clear from the Chemical Analyser's report, Exhibit 22 that only two knives were examined by the Chemical Analyser. What about third knife is not explained by the prosecution. There might be possibility that any other person might have killed deceased and thrown the knife on the spot of incident itself. Possibility cannot be ruled out that the said knife was having blood of deceased. Hence, the recovery of weapons from the appellant cannot be taken as a circumstance against the appellant.

23. First two circumstances, namely, last seen and motive are not proved by the prosecution. Third circumstance 'recovery of 13 jg.apeal.256.16.odt weapons' is proved by the prosecution but this circumstance appears to be doubtful because one knife was found on the spot of incident and two knives were recovered at the instance of appellant. Only two knives were examined by the Chemical Analyser. Third knife was not examined by the Chemical Analyser. Therefore, possibility cannot be ruled out that any other person might have killed the deceased and thrown the knife on the spot. Said knife was having blood of deceased cannot not be ruled out. Hence, this circumstance is also not reliable.

24. In the case of B.L. Satish Vs. State of Karnataka (cited supra), Hon'ble Supreme Court has observed that "appellant convicted for murder of his grandmother aged about 75 years. Case based on circumstantial evidence. Death was by strangulation between 9.30 a.m. and 1.00 p.m. on 16-6-1994. Only circumstance pitted by prosecution against accused was that on 18-6-1994, he got ornaments, case property of the case, recovered from the house of his maternal grandfather. Single circumstance was hardly sufficient for Criminal Court to reach conclusion that appellant committed the murder. Conviction was liable to be set aside."

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25. In the present case also, prosecution has failed to prove the circumstances of last seen and motive. The third circumstance in respect of recovery of weapons though proved, it is doubtful. There is no eye witness of the incident.

26. There is no dispute about the homicidal death of deceased but prosecution has to prove that appellant is author of crime. In view of the guidelines of Hon'ble Supreme Court in the case of Sharad Birdhichand Sarda Vs. State of Maharashtra (cited supra), the circumstances are not sufficient against the appellant to convict him for the offences charged against him.

27. From the perusal of impugned judgment, it is clear that learned trial Court not recorded specific finding and come to the wrong conclusion. Hence, impugned judgment is liable to be quashed and set aside. In the result, we pass the following order.

ORDER

(i) The appeal is allowed.

(ii) Appellant is acquitted of the offences punishable under

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Sections 302, 392 and 201 of the Indian Penal Code.

(iii) Appellant is in jail. He be released forthwith if not required in any other crime or case.

(iv) Fine amount if paid by the appellant, be refunded to the appellant.

(v) R & P be sent back to the trial Court.

JUDGE

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