

State Vs. Mohanand Naik

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Court : Mumbai Goa

Decided On : Oct-29-2013

Judge : Naresh H. Patil & F.M. Reis

Appeal No. : Criminal Appeal No. 4 of 2012

Appellant : State

Respondent : Mohanand Naik

Advocate for Def. : Ms. Collasco

Judgement :

NareshH. Patil, J.

This appeal is directed against the judgment and order dated 30th March, 2010, passed by the Additional Sessions Judge-1, at Margao, Goa in Sessions Case No.33/2009, by the State. The respondent-accused was charged for the offences punishable under Sections 302 and 392 of the Indian Penal Code.

2. The prosecution case, in brief, is as under:

It is alleged by the prosecution that between 19/2/2008 to 24/2/2008, the respondent-accused committed murder of Miss Nirmal, on the hillock at Verna and robbed her gold ornaments such as gold chain and a pair of gold earrings. It is alleged that Nirmal was the younger sister of PW.1 Pundalik Amolkar. In the

month of February, 2008, Nirmal left the house and did not return back. After 4 to 5 days, PW.1 Pundalik filed a missing report dated 23.2.2008 (Exhibit-13) at Quepem Police Station. When the report was lodged, PW.1 also handed over a photograph of his sister Nirmal to the police. After about 4 to 5 days, cousin of PW.1 Umesh met him in the market and told him that one Suresh Kepekar had called him up and told him to go to Hospicio Hospital to see a dead body of a female which was found at Verna. Accordingly, PW.1 along with Mrs. Neela, wife of his cousin brother, one Sattu, their neighbour and Suhas went to Hospicio Hospital at Margao to see the dead body. They were shown the dead body of a female and PW.1 identified the same as that of his sister Nirmal. The dead body was identified by PW.1 on the basis of the clothes, glass bangles and nail polish appearing on the fingers of the deceased. When the body was seen at the Hospicio Hospital by PW.1, two earrings and the nose ring (kaddi) were on the dead body, but the gold chain was missing. The said items were handed over to the family of the deceased. After conducting the postmortem, the dead body was handed over to the family of Nirmal for cremation. The cremation was done at Revona. A formal complaint was recorded by Verna Police. The complaint is at Exhibit-14.

3. During the course of investigation, the police recorded scene of offence panchanama dated 24/2/2008, inquest panchanama dated 24/2/2008, attachment panchanama dated 25/2/2008 and arrest panchanama dated 29/6/2009. The prosecution claims to have recovered melted gold weighting 19 gms. from Ulhas Rivonkar, Gold Smith by profession, resident of Varkhande, Ponda, who was running a jewellery shop at Kaji Building, Kajiwada, Ponda. The post mortem report is at Exhibit 21. Police filed Charge-sheet. The charge was framed on 13.1.2010. The accused pleaded not guilty and claimed to be tried.

4. The original record reveals that an application was filed on 9/3/2010 by the prosecution under Section 294 of the Code of Criminal Procedure. Out of seven documents, except documents at serial nos. 5 and 6, rest of the documents were admitted by defence. The documents at serial nos. 5 and 6 are the Panchanama dated 4.7.09 and the attachment panchanama dated 6.7.2009.

5. The prosecution has listed in the charge-sheet, 35 witnesses, but examined only five witnesses. They are PW.1. Pundalik Amolkar, brother of the deceased Nirmal; PW.2 Dr. Avinash Pujari who conducted postmortem examination on the dead body of Nirmal; PW.3 Elisbao Vaz, a businessman, as pancha witness for proving the panchanama of spot of the incident; PW.4 Shailesh Narvekar, P.S.I. who had conducted part investigation and PW.5 Nolasco Raposo, Police Inspector who conducted another part of investigation.

6. The trial Court reached conclusion that the prosecution failed to prove beyond reasonable doubt that the death body which was lying in the morgue was that of Nirmal Amolkar. The trial Court further held that there is absolutely no evidence brought on record by the prosecution to show that the death of the said woman was a homicidal one. In view of the recovery of the melted gold, it was submitted that the said recovery could not connect the respondent-accused with the crime as it does not establish nexus of the respondent-accused with the missing gold chain of the deceased.

7. Mr. Rivonkar, learned Public Prosecutor submitted that this is a fit case where the trial Court should have exercised powers under Section 311 of the Code of Criminal Procedure. Though the prosecution had cited several witnesses in the charge-sheet, it was unfortunate that only five witnesses were examined by the prosecution, leaving behind material witnesses which has resulted in failure of justice. According to the learned Public Prosecutor, the trial was not conducted in a fair manner. The learned Public Prosecutor submitted that the witnesses like Neela Amolkar, cousin of the victim, Pandurang Patil, with whom the deceased was working as a maid, a neighbor of PW.1 and the deceased, Sandeep Amolkar, and the jeweller whose statements were recorded by the police were not examined. Several investigating officers were involved in the investigation of the offence, but except two, none was examined, according to the learned P.P. It was submitted that one of the vital pieces of evidence collected by the investigating agency was the judicial confession of the respondent-accused recorded by the Special Judicial Magistrate, North Goa. It is submitted that within one day the prosecution closed the evidence, the trial Court recorded the statement of the accused under Section 313 Cr.P.C., heard the arguments and delivered the

judgment acquitting the accused. This undeserving and undue haste shown by the prosecution and the Court has caused serious prejudice. The facts, therefore, disclose that the trial has not been conducted in a fair manner. Therefore, the matter needs to be remanded for examination of the material witnesses or for retrial as this Court deems fit. The learned Public Prosecutor in respect of question of law and the powers of the appellate Court in recording additional evidence or directing retrial, has placed reliance on a judgment of the Apex Court in **Zahira Habibulla H. Sheikh (5) and Another V/s. State of Gujarat and others**, (2006) 3 SCC 374. The learned Public Prosecutor has placed on record two judgments delivered by this Court in Criminal Appeals No.20 and 21 of 2012, wherein the respondent was the accused who was convicted for Life Imprisonment.

8. This is one of the sensational cases in the State of Goa where young girls/women were found killed, robbed, molested and sexually exploited in near about similar fashion. It was submitted that for a considerable long period the respondent-accused committed such crimes and was not traceable by police. There was social unrest and public outcry raised as the investigating agency was unable to book the culprit. The learned Public Prosecutor submitted that the judicial confession of the respondent-accused was not only recorded in respect of the incident in question, but in respect of other incidents too. It was submitted that in two other cases the confession recorded by the Special Judicial Magistrate was believed by this Court and the respondent was convicted and sentenced for Life Imprisonment. The prosecution ought to have led evidence in respect of the judicial confession recorded by the Special Judicial Magistrate before the trial Court. Failure of the same would be contrary to the concept of holding a fair trial.

The learned Public Prosecutor has relied upon the following judgments :

1. **UkhaKolha V/s. The State of Maharashtra** AIR 1963 SC 1531
2. **RajendraPrasad V/s. Narcotic Cell** (1999) 6 SCC 110
3. **Rambhauand Another V/s. State of Maharashtra** (2001)4 SCC 759

4. **ZahiraHabibulla H. Sheikh and Another V/s. State of Gujarat and others** (2004) 4 SCC 158
5. **ZahiraHabibulla H. Sheikh (5) and Another V/s. State of Gujarat and others** (2006) 3 SCC 374
6. **BabubhaiUdeshi Parmar V/s. State of Gujarat** (2006) 12 SCC 268
7. **U.T. Of Dadra and Nagar Naveli and Another V/s. Farehsinh Mohansinh Chauhan** (2006) 7 SCC 529
8. **Hanuman Ram V/s. State of Rajasthan and others** (2008) 15 SCC 652
9. **Godrej Pacific Tech. Limited V/s. Compute Joint India Ltd.** (2008) 11 SCC 108
10. **State of Punjab V/s. Harjagdev Singh** (2009) 16 SCC 91
11. **Sunil Damodhar Gaikwad V/s. State of Maharashtra 2009(3) Bom.C.R. (Cri.) 504**

9. Ms. Collasco, learned Counsel for the respondent-accused, appointed under the Legal Aid Scheme, submitted that allowing request of the prosecution would amount to permitting filling in lacunae in the prosecution case. The prosecution, consciously did not lead evidence any further other than recording of oral evidence of the four witnesses. The prosecution was not compelled from leading evidence further, nor they were prevented from, in any manner, leading any further evidence, oral or documentary. The learned Counsel submitted that this is a case where the prosecution has miserably failed to establish that the dead body found was that of Nirmal, sister of PW.1. In that view of the matter, the prosecution failed to establish case against the accused person. In the postmortem examination, the Medical Officer has clearly opined that the cause of death could not be ascertained. Considering the facts and circumstances and the medical opinion, the trial Court held that the prosecution failed to establish that the death of Nirmal is homicidal one. Even if the prosecution is allowed now to lead evidence of the witnesses cited, no substantial purpose would be served. Considering basic theory

of the prosecution and the quality of the evidence, it would be unnecessary, in the submission of the Counsel, to remand the matter to the trial Court or to order *denovo* trial. Merely because the accused-respondent was shown as accused in several other cases, could not be a ground to establish that he must be the killer of Nirmal. The Counsel referred to the evidence and the findings reached by the trial Court. It was submitted that PW.1 Pundalik Amolkar filed the complaint after one year, though missing report was filed on 20/3/2008. Description of Nirmal given in the missing report and the postmortem report, as also the Panchanamas, are contrary to each other. A photograph of the respondent was already published in the newspaper. Therefore, it was not difficult for the prosecution witnesses to name the respondent as accused. The statements of the witnesses like PW.1 were recorded along with other witnesses, after one year. Merely having suspicion, however strong it may be, could not be a ground to convict the respondent-accused. The learned Counsel submitted that the prosecution has miserably failed in carrying out the investigation in honest and proper manner. DNA test was not conducted so as to identify as to whether the deceased was Nirmal, sister of PW.1. The clothes mentioned on the person of the deceased by PW.1 and noticed at the time of carrying out panchanama of the dead body did not match with each other. The description in respect of the earrings and chain as mentioned by PW.1 and noticed in the panchanama is contrary to each other. Age of the deceased Nirmal was mentioned as 32 years in the missing report, while the scene of offence panchanama showed the age as 20 to 25 years. The learned Counsel submitted that the judgments wherein this Court had convicted and sentenced the respondent for Life Imprisonment for other offences, could not be considered to be evidence in the trial. Those cases must have been decided in the peculiar factual background of its own. The Counsel submits that the trial Court did not commit any procedural violation in conducting the trial in the facts and circumstances of the case.

10. We have perused the original record, evidence and the judgment delivered by the trial Court. From the tenor of the arguments, the basic argument of the learned Counsel for the appellant-State is that this Court, in the facts and circumstances, should exercise the powers under Section 386 and 391 of the Code of Criminal Procedure. Relevant provision of Section 386 reads as under :

386. Power of the Appellate Court. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may -

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

...

Section 391 of Cr.P.C. reads as under:

391. Appellate Court may take further evidence or direct it to be taken.

(1) in dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry.

The learned Public Prosecutor submitted that the trial Court failed to exercise powers under Section 311 of Cr.P.C. which reads as under :

311. Power to summon material witness, or examine person present. - Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though

not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case..

11. The Apex Court in the case of **Godrej Pacific Tech. Limited vs. Computer Joint India Limited**, (2008) 11 SCC 108, referred to the observations made by the Apex Court in **ZahiraHabibullah Sheikh (5) and another** (supra). The Apex Court in **ZahiraHabibullah Sheikh (5) and another** (supra) in paras 27 and 28 had observed thus :

27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is at any stage of any inquiry or trial or other proceeding under this Code. It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

28. As indicated above, the section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court. Sections 60, 64 and 91 of the Evidence Act, 1872 (in short the Evidence Act) are based on this rule. The court is not empowered under the provisions of the Code to compel either the prosecution

or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the court may result in what is thought to be filling of loopholes. That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

12. The learned Public Prosecutor could not specifically point out the reasons for the State in not examining other witnesses by leading further evidence in the trial Court. The learned Public Prosecutor at one stage submitted that though the Prosecutor who was conducting the prosecution case, was an experienced person, it may be due to inadvertence or due to misunderstanding of the case that the prosecution withheld some of the evidence which was very much material for just decision of the case. Counsel for the respondent submitted that though the Prosecutor conducting the case was an experienced one, there must be just and reasonable ground for the prosecution/prosecutor not to venture into leading further evidence, as the prosecution was aware that they could not establish the case any further.

13. Though we have gone through the Charge-sheet, it would not be appropriate for us to discuss at this stage, the statements recorded by the police under Section 161 of Cr.P.C. and the judicial confession of the respondent-accused, on which the State places heavy reliance. It is the submission of the learned P.P. that in case the judicial confession statement of the respondent-accused was admitted and relied upon, the case would have resulted in conviction. We may not observe anything on the said argument as it would cause prejudice to the respondent-accused as, such evidence has not been led and considered by the trial Court.

14. It is a settled legal position that the trial Court is not supposed to act like a referee in a match and raise hand of a winning person. During conduction of trial, the trial Court has to be attentive and should participate in the trial in the sense that no party is prejudiced, nor any party is prevented from leading any evidence, nor any material evidence is withheld from consideration of the Court. Statutory provision of Section 311 is of vital significance in serious cases. At the same time, the trial Court needs to observe caution during the course of trial, so that no prejudice is caused to either of the contesting parties.

15. Turning to the material collected by the prosecution, we find that the evidence of some of the persons which are referred to by the learned Public Prosecutor could have been recorded by the State. The prosecution has placed heavy reliance on the judicial confession of the respondent recorded by the Special Judicial Magistrate. Certainly, this Could be a vital piece of evidence which was withheld from Court from its consideration.

16. In respect of identification of the deceased Nirmal, we find that PW.1 Pundalik Amolkar, the brother of the deceased and other family members of the deceased have accepted the body of the deceased to be that of Nirmal. Much reliance needs to be placed on the nearest relatives who had not only received the dead body, but also cremated it as that of their sister/daughter. The Prosecution could have collected more reliable evidence in a scientific manner to establish the identity of the deceased, but unfortunately the prosecution has failed to do so. It is equally true that the medical examination of the deceased could not reach to the conclusion in respect of the definite cause of death. This goes contrary to the theory of the prosecution that the deceased might have been strangled. It seems, considering the highly decomposed state of body of the deceased, the Medical Officer could not give definite opinion in respect of the cause of death.

17. Considering the settled legal position in respect of conducting of fair trial, we find that the facts and circumstances of this case are required to be looked into. At the same time, we are of the view that giving undeserving concession to the prosecution so as to cover up their lapses to fill up the lacunae should not be permitted and encouraged. The trial Court has held the respondent as not guilty. In

normal circumstances, the settled position is that if two views are possible and the view which has tilted in favour of the accused in recording acquittal, ought to have been given weightage. Judicial confession which was recorded by the Special Judicial Magistrate is not restricted to in respect of the incident in question alone, but in respect of other cases also.

18. In the case of **Babubhai Udesinh Parmar** (supra), the Apex Court, in para 12 of the said judgment has observed as under:

12. A judicial confession undoubtedly is admissible in evidence. It is a relevant fact. A judgment of conviction can also be based on a confession if it is found to be truthful, deliberate and voluntary and if clearly proved. The voluntary nature of the confession depends upon whether there was any threat, inducement or promise and its truth is judged on the basis of the entire prosecution case (see *Bharat v. State of U.P.* (1971) 3 SCC 950 and *Subramania Goundan v. State of Madras*, 1958 SCR 428).

19. In the case of **State of Punjab** (supra), the Apex Court in para 16, observed as under;

16. It is hardly necessary to emphasise that the act of recording confessions under Section 164 of the Code is very solemn act and in discharging his duties in the said section, the Magistrate is required to take care to see that the requirements of sub-section (3) [sic (2) of Section 164 of the Code are fully satisfied. It is necessary in every case to put questions as intended to be asked under Section 164(3) [sic 164(2)].

20. According to the Roznama recorded by the trial Court, the deposition of PW.1 Pundalik Amolkar was recorded on 27th January, 2010. The deposition of PW.2 Dr. Avinash Pujari was recorded on 9th March, 2010. On the same day, the Court issued summons to CWs. 8, 9, 29 and 30, returnable on 22nd March, 2010. On 19th March, 2010, summons came to be issued to CW.29, which was returned unserved as the witness was under training at Hyderabad. On 20th March, 2010, summons issued to CW.8 and CW.9 returned duly unserved. On 30th March, 2010, evidence of PW.4 Shailesh Narvekar and PW.5 Nolasco Raposo was

recorded. There is an endorsement to the effect that prosecution closed its evidence. Statement of the respondent-accused under Section 313 Cr.P.C. was recorded. The respondent-accused did not lead evidence in defence. Final arguments were heard and the judgment was pronounced, on the same day.

21. In the original record and proceedings, we have noticed that the Special Judicial Magistrate, Tiswadi/Bardez (North-Goa) had recorded judicial confession of the respondent in respect of various incidents, including the one for which the respondent-accused was put on trial. In the statement under Section 313 Cr.P.C., the respondent-accused answered question Nos. 7, 8 and 9 as under :

Q.No.7. Do you have anything else to state ?

Ans: This is a false case.

Q. No. 8. Do you wish to examine yourself ?

Ans: No.

Q.No.9. Do you wish to examine any witness in your defence ?

Ans: No.

22. Taking into consideration the settled principles behind holding fair trial and in the peculiar facts and circumstances of this case, we are of the opinion that an opportunity needs to be provided to the prosecution to lead further evidence.

ORDER

(a) The appeal is allowed.

(b) The impugned judgment and order dated 30th March, 2010, passed by the Additional Sessions Judge-1, at Margao, Goa in Sessions Case No.33/2009, is quashed and set aside.

(c) The case is remanded to the trial Court.

(d) The evidence which was already recorded in Sessions Case No. 33/2009 shall be read in evidence. All such witnesses whose evidence was already recorded, shall not be recalled/reexamined/cross examined.

(e) The trial Court shall issue summons to the witnesses, namely Neel Amolkar, Pradeep Patil, the concerned Special Judicial Magistrate who recorded the alleged judicial confession of the respondent-accused and the concerned jeweller. The trial Court and the prosecution are at liberty to examine any other witness/ess, except the witnesses whose evidence was already recorded.

(f) The respondent-accused is entitled to lead evidence, if any, in defence.

(g) After recording the evidence, the trial Court shall frame additional questions for recording statement of the accused under Section 313 of Cr.P.C.

(h) After completion of recording of additional evidence on remand, arguments of the parties shall be heard and thereafter, the trial Court shall deliver the judgment.

23. It is clarified that the observations made in this judgment shall not be construed to be final expression of opinion of this Court, on merits of the case. All issues, on merits of the case, are kept open. The trial Court shall deal with the evidence in accordance with law and on its own merits.

24. We record our appreciation for the assistance provided by Ms. C. Colasco, learned Counsel representing the accused, appointed under the Legal Aid Scheme. We quantify the fees of the learned Counsel at Rs.7,500/- (Rupees seven thousand five hundred only).

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