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Court : Mumbai Nagpur

Decided On : Feb-22-2013

Judge : A.P. Lavande & a.B. Chaudhari

Appeal No. : Criminal Appeal No.343 of 2009

Appellant : Sanjay

Respondent : State of Maharashtra

Judgement :

A.P. Lavande, J.

By this appeal, the appellant (hereinafter referred to as "the accused") takes exception to the judgment and order dated 24.4.2009 passed by 2nd Additional Sessions Judge, Amravati in Sessions Case No.233/05 convicting the accused for the offences punishable under Sections 302 and 506 of the Indian Penal Code. The accused has been sentenced to undergo life imprisonment and to pay fine of Rs.1000/-, in default to undergo S.I. for one month for the offence punishable under Sections 302 and to undergo R.I. for three months for the offence punishable under Section 506 of the Indian Penal Code. Both the sentences are ordered to run concurrently.

2. Briefly, the prosecution case is as under:-

Deceased Hawasu Dhurwe was the father of the first informant PW.1 Bastiram Dhurwe. They were residing at Tiosa Ghat. The accused was also resident of Tiosa Ghat. The accused had alleged that the deceased had practised witchcraft upon him and had threatened to kill him. On 24.8.2005 at about 3.30 p.m. while the informant, his sister Nirmala and brother Rambhau were sitting in front of their house, the accused came there armed with a knife. The deceased was sitting in front of the house of one Madhu Ahake. The accused straightaway went near deceased and stabbed him in the stomach. The informant, his wife, sister and brother rushed to the spot. The accused also inflicted blows on the neck of the deceased on account of which the deceased collapsed.

3. When the informant and his brother tried to apprehend the accused, the accused pointed out the knife towards them and threatened to kill them and fled away from the spot. The deceased died on the spot. The informant immediately approached Shendurjanaghat Police Station and lodged report vide C.R. No.49/05, pursuant to which investigation was taken up. The inquest panchnama and the spot panchnama were conducted. The dead body of the deceased was sent for postmortem examination which was conducted by PW.6 Dr. Ashwini Madawi. The accused was arrested on the same day. The clothes of the accused were seized under a panchnama. Pursuant to the disclosure statement made by the accused, the knife which was used in the commission of the crime was recovered and seized. The articles seized were sent for analysis. After completion of investigation, charge-sheet was filed against the accused for the offences punishable under Sections 302 and 506 of Indian Penal Code.

4. Since the offence punishable under Section 302 of Indian Penal Code was exclusively triable by Court of Sessions, the case was committed to Court of Sessions. In Sessions Case No.233/05, charge was framed against the accused for the offences punishable under Sections 302 and 506 of Indian Penal Code. The accused pleaded 'not guilty' to the charge and claimed to be tried.

5. In order to prove the offences against the accused, the prosecution examined 8 witnesses and produced several documents. Thereafter, statement of the accused under Section 313 of Criminal Procedure Code was recorded. The accused did not

lead any defence evidence. The defence of the accused is of total denial and false implication. Upon appreciation of the evidence led by the prosecution, the trial Court held that both the offences were made out against the accused and consequently, convicted and sentenced him as above.

6. The learned trial Court held that homicidal death was proved by the prosecution and the complicity of the accused in the commission of the crime was also established by the two eyewitnesses, namely, PW.1 Bastiram Dhurve and PW.3 Sushila Dhurve, the wife of the deceased. The learned trial Court also relied upon the circumstances of discovery of knife at the instance of the accused and also the presence of blood on the clothes of the accused. The trial Court held that the prosecution was able to establish both the offences beyond reasonable doubt against the accused. In the judgment, the learned trial Court relied upon several judgments of the Apex Court in support of the conclusions arrived.

7. Mr. N.R. Saboo, learned Counsel appearing on behalf of the accused, submitted that there is inter se variation in the testimonies of PW.1 and PW.3 and as such, no reliance can be placed upon their testimonies. The learned Counsel further submitted that the prosecution has examined only related witnesses though other independent witnesses were available to prove the prosecution case. The learned Counsel further submitted that PW.2 Sangita Sariyam, an independent eye-witness has turned hostile which assumes importance and as such, no reliance can be placed upon the testimonies of PW.1 Bastiram and PW.3 Sushila. According to the learned Counsel, conduct of PW.1 and PW.3 is not natural and this is additional ground for not placing reliance upon their testimonies. Moreover, there is a delay of two days in recording the statement of PW.3 which creates serious doubt about her testimony. The learned Counsel further submitted that there was no attempt on the part of either PW.1 or PW.3 to save the deceased from the alleged assault by the accused and as such, it is difficult to accept that both these witnesses were eye-witnesses to the incident as claimed by them. In so far as recovery of knife at the instance of the accused is concerned, Mr. Saboo submitted that it was from open and accessible place and as such, no reliance can be placed on the same. The learned Counsel further submitted that the prosecution has not been able to establish motive on the part of the accused by

leading cogent evidence and, therefore, serious doubt is created about the prosecution case. In the alternative, Mr. Saboo submitted that even if the prosecution case is accepted in toto, at the most offence punishable under Section 304-II and not Section 302 of Indian Penal Code is made out against the accused. In support of his submissions, Mr. Saboo placed reliance upon the judgment in the case of Ashok s/o Raghunath Bawane and others vs. State of Maharashtra reported in 2007 ALL MR (Cri) 2554.

8. Per contra, Mr. T.A. Mirza, learned Additional Public Prosecutor appearing for the respondent State, supported the impugned judgment and order and submitted that PW.1 and PW.3 are natural witnesses and as such, their testimonies inspire confidence. The learned A.P.P. submitted that mere delay of two days in recording statement of PW.3 Sushila, in the absence of any explanation having been sought from the Investigating Officer or the witness is not fatal to the prosecution case. The learned Counsel further submitted that since this is a case based on direct evidence, motive is not much relevant and in any case the prosecution has been able to establish that the accused believed that deceased had practised witchcraft on him and as such, the accused committed the murder of deceased. Mr. Mirza further submitted that the panch to the recovery of knife at the instance of the accused has admitted his signature and in any case, recovery has been proved by the Investigating Officer and as such, this circumstance lends assurance to the prosecution case. Mr. Mirza further submitted that the place from which the knife was seized was not visible to one and all and as such, the recovery of the knife at the instance of the accused cannot be faulted. Lastly, Mr. Mirza submitted that having regard to the weapon used and the injuries caused, a clear case of offence punishable under Section 302 and not Section 304-II of Indian Penal Code is made out against the accused and, therefore, no interference is warranted with the impugned judgment and order. In support of his submissions, Mr. Mirza relied upon the following judgments:-

- (1) (2012) 5 SCC 777 (Ramesh Harijan vs. State of Uttar Pradesh),
- (2) (1999) 4 SCC 370 (State of Himachal Pradesh vs. Jeet Singh).

9. We have carefully considered the rival submissions, perused the record and the judgments relied upon. The first question which arises for consideration is as to whether death of Hawasu Dhurve was homicidal. To prove this fact, the prosecution examined Dr. Ashwini Madawi PW.6, who conducted postmortem on the dead body of Hawasu Dhurve on 25.8.2005. She deposed that she found the following injuries on his person:-

- 1) Stab wound 2.1 x 2 inch supra umbilical region 3 cm., from umbilicus, parts of intestine seen through injury,
- 2) Incised wound of 2 x 2 inches below the right pinna along the margin of mandible,
- 3) Incised wound of 1.5 x 2 inches below left pinna along the margin of mandible,
- 4) Incised wound by 1 x 1 inch below xiphisternum left side.

All the injuries were ante-mortem and there was injury to abdomen 2.5 x 2.1 x 2 inch supra umbilical region, 3 cm. from umbilicus. The intestines were seen through injury. In the peritoneum cavity, there was collection of approximately 500 ml. to 1 liter blood. The cause of death was due to hypovolemic shock due to injury over the abdomen. He identified his signature on the postmortem report (Exh. 54) and confirmed its contents as true. The witness stated that the injuries found on the person of the deceased could be caused by the knife (Article A) which was shown to him. He further deposed that the injuries found on the person of the deceased were sufficient in ordinary course of nature to cause death as the injuries led to loss of blood. In the cross-examination, nothing tangible has been brought on record to discredit his testimony. The inquest panchnama (Exh. 49) also lends corroboration to the evidence of PW.6 Dr. Ashwini Madavi. As such, we have no hesitation to hold that death of Hawasu Dhurve was homicidal.

10. The prosecution examined three eye-witnesses, namely, PW.1 Bastiram Hawasu, who lodged the First Information Report, PW.2 Sangita Sariyam and PW.3 Sushila Dhurve. PW.2 Sangita did not support the prosecution case and although she was cross-examined by the prosecution, nothing tangible has been

brought on record in her cross-examination to support the prosecution case.

11. PW.1 Bastiram, the son of deceased Hawasu deposed that he knew the accused who was residing near his house. The incident had taken place 2+ to 3 years back. Before the incident, the accused told his father that he was doing black magic and that due to that he was not feeling well. At the time of the incident, he was present in the courtyard of the house. The incident took place at about 3 to 3.30 p.m. His father was present in front of the house of one Madhu Aahake situated one house after his house. At that time Nirmala was also present nearby. The accused came there and assaulted his father with a knife on the stomach and later on over the neck. He asked the accused as to what he was doing. He also pointed out knife to him. His wife Sushila rushed towards Hawasu. On account of the assault, Hawasu fell down and his vital part of the stomach had come out. The accused left the spot. Hawasu died on the spot. He visited the Police Station and lodged the report. He identified First Information Report (Exh. 40) and his signature on the same and confirmed its contents as true. He also identified printed FIR (Exh. 41) and his signature thereon. He further stated that he could identify the knife which was used by the accused. He stated that the knife which was shown to him was not the same knife but similar type of knife was possessed by the accused. In the cross-examination, the evidence of this witness on the main aspect of assault has not been shaken. The report was lodged by PW.1 within an hour at 4 p.m. The concerned Police Station is located at a distance of about 2 to 2.5 km. from the scene of the offence. The evidence of PW.1 thus stands corroborated by First Information Report (Exh. 40) and lodging of FIR lends further assurance to the prosecution case.

12. The evidence of PW.1 also stands corroborated by PW.3 Sushila, the wife of the deceased who deposed that at the time of the incident she and her husband were present in the house and she was cleaning the house. Deceased was present in the courtyard of Madhu Aahake and she was seated near house water tap. The accused came there. Bastiram was also with her. The accused assaulted deceased with knife over his stomach and neck. She noticed the blood. Thereafter, the accused left the place of incident. Before the incident, there was a talk between the accused and the deceased on the point of black magic. On

account of the assault, the vital part of the deceased had come out from his stomach and he died on the spot. She identified the knife Article A, which was shown to him as the knife which was with the accused. In cross-examination, she denied that she did not know whereabouts of the deceased on the day of the incident or that she had falsely stated that she was sitting near the water tap. The testimony of this witness corroborates the version of PW.1 on material aspects. The variations in their testimonies are minor in nature and as such are not fatal to the prosecution case. No doubt, her statement was recorded on 26.8.2005 but in the absence of any explanation having been sought from the witness or from the Investigating Officer, delay of two days cannot be said to be fatal.

The trial Court has rightly placed reliance upon the judgment of the Apex Court in the case of Ramanand Yadav vs. Prabhu Nath Jha and others reported in 2004 Cri.L.J. 640 in support of the proposition that unless the reason for delay in recording statement of witnesses is sought from the Investigating Officer, the defence cannot gain any advantage therefrom. The judgment in the case of Ashok Bawane and others (supra) does not advance the case of the accused inasmuch as in the said case there was inordinate delay in recording statements of eye-witnesses. No doubt, PW.2 Sangita Sariyam has not supported the prosecution case but this fact by itself is not sufficient to jettison the cogent evidence of PW.1 Bastiram and PW.3 Sushila, whose evidence is quite natural and convincing.

13. The evidence of the two eye-witnesses stands corroborated by discovery of knife (Article A) at the instance of the accused pursuant to the disclosure statement made by the accused on 26.8.2005. No doubt, both the panchas, namely, PW.4 Yadav Marotrao Gale and PW.5 Pramod Baliramji Sarode did not support the prosecution case with regard to discovery of weapon at the instance of the accused. However, the trial Court has placed reliance upon the evidence of Investigating Officer Mr. Sanjay Dhumal PW.7 in so far as recovery of knife at the instance of the accused is concerned. We do not find any infirmity in the approach of the learned trial Court inasmuch as the memorandum of disclosure and the recovery and seizure panchnama bear the signature of the panch. Mr. Mirza, learned Additional Public Prosecutor has rightly placed reliance judgment of the Apex Court in the case of Ramesh Harijan vs. State of Uttar Pradesh reported in

(2012) 5 SCC 777 in which it has been held that in case the disclosure and seizure panchnama bear the signature of panchas, the evidence of Investigating Officer regarding seizure of the weapon at the instance of the accused deserves to be accepted although the panchas do not support the prosecution case.

14. The prosecution has also led cogent evidence to prove motive on the part of the accused. PW.1 Bastiram and PW.3 Sushila have consistently deposed that before the incident the accused had alleged that deceased had practised witchcraft on him. Motive, therefore, is clearly established by the prosecution.

15. Thus, upon reappreciation of the entire evidence, we have no hesitation to hold that it was the accused who assaulted the deceased with the knife causing severe injuries on vital parts resulting in his instantaneous death.

16. The next question which arises for consideration is as to what offence is made out against the accused. Having regard to the nature of the weapon used, the parts of the body of the deceased on which the injuries were caused and also considering the fact that the accused died instantaneously on account of profuse bleeding, we are of the considered opinion that offence of murder is clearly made out against the accused. In our view, ratio of the judgment in the case of Virsa Singh vs. State of Punjab reported in AIR 1958 SC 465 is squarely applicable in the present case. The evidence clearly establishes intention on the part of the accused to cause injuries found on the person of the deceased and the medical evidence clearly establishes that those injuries were sufficient in the ordinary course of nature to cause death. Therefore, we are unable to accept the submission of Mr. Saboo that even if the prosecution case is accepted in toto, at the most offence under Section 304 Part II is made out against the accused. Thus, upon reappreciation of the entire evidence, we are of the considered opinion that no fault can be found with the judgment and order of conviction passed by the learned trial Court. The appeal is, therefore, liable to be rejected.

17. The appeal is, therefore, dismissed. The conviction of the appellant/accused for the offences punishable under Sections 302 and 506 of Indian Penal Code and the sentences imposed thereon are maintained. Both the sentences are ordered to run concurrently. Needless to mention that the accused is entitled to set off for the

period of detention in terms of Section 428 of Criminal Procedure Code. The order passed by the learned trial Court in so far as the disposal of property is concerned is maintained.

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