

Ankush Vs. State of Maharashtra

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Court : Mumbai Nagpur

Decided On : Jun-07-2016

Judge : B.R. Gavai & V.M. Deshpande

Appeal No. : Criminal Appeal No. 273 of 2014

Appellant : Ankush

Respondent : State of Maharashtra

Judgement :

V.M. Deshpande, J.

1. Felt aggrieved by the judgment and order of conviction passed in Sessions Trial No.4/2009 by which the learned Ad hoc Additional Sessions Judge-3, Nagpur convicted the appellant, he is before this Court in this appeal.

2. By the impugned order of conviction, the appellant is directed to suffer rigorous imprisonment for life and to pay a fine of Rs.5,000/- and in default to suffer rigorous imprisonment for one year for the offence under Section 302 of the IPC.

He is also convicted for the offence punishable under Section 377 of the Indian Penal Code and on that count, he was directed to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.2,000/- and in default to suffer rigorous imprisonment for four months.

3. The facts, giving rise to the present appeal, are stated hereunder:-

Mohan Makde (PW4) is the Sarpancha of village Welgaon. On 13.08.2008, when he was available at his house, some boys from the village had come to him at 12.30 noon. They informed him that a dead body is lying on the site of construction of one Meshram, situated at Tiwari Nagar. On getting the said information, it was transmitted by him to Police Station, Yashodhara nagar.

Anurag Thakur (PW12) was attached to Police Station, Yashodhara nagar. He received a telephonic message from Mohan Makde (PW4). Accordingly Anurag Thakur took entry in the station diary and proceeded to the spot along with police staff. Mohan Makde also accompanied the police staff to the spot. On reaching to the spot, Mohan gave a report to the police. The said report is at Exh.-18 on record.

4. The police party noticed that dead body of a boy was lying in an under-constructed toilet of the building. Anurag Thakur further noticed that blood was oozing from nose and mouth of the deceased. He also noticed that his pant was removed from his waist up to the thigh.

ASI Anurag Thakur (PW12) seized the soil, both simple and smeared with blood, piece of brick and stick of Beshram bush and plastic paper used for kharra (tobacco). These articles were seized by the drawing a seizure panchanama in presence of the panchas. The seizure panchanama is at Exh.-20.

The report given by Mohan Makde was registered as accidental death under Section 174 of the Cr. P. C. vide AD No.1/2008. The said AD is at Exh.-44 on record of the court below.

Anurag Thakur (PW12) sent the dead body for autopsy. On the evening of the same day i.e. on 13.08.2008 a person by name Vinod Sahare (PW8) came to the Police Station and informed to Anurag Thakur that his boy is missing and, therefore, he wishes to see the dead body. He was taken to the hospital and on noticing the dead body, Vinod Sahare identified that the dead body is that of his son Akash Sahare.

From the hospital, Vinod Sahare came to the Police Station and he lodged report (Exh.-28). The oral report Exh.-28 was disclosing commission of cognizable offences, therefore, Anurag Thakur registered the offence punishable under Section 302 and 377 IPC vide Crime No.8/2008. He also conducted the inquest on the dead body. It is at Exh.-21. He also drew the spot panchanama. The same is at Exh.20. Anurag Thakur handed over the investigation to Police Inspector Udaysingh Chandel (PW13).

5. The oral report of Vinod Sahare (Exh.-28) disclosed that he discharged his duties as mechanic at one company known as PCR. He is having two sons Umesh and Akash, the deceased, whose age is 14 years. On 12.08.2008, the first informant went for his work. That time, his two sons and his wife were present in his house. When in the night, after returning home in night after his work, Akash was not found in the house and, therefore, he made enquiries with his wife about him. That time, it was disclosed to him that Akash is not available in the house from 5.00 p.m. Resultantly, the enquiries were made by the first informant regarding his son and on 13.08.2008, he got the information that at village Bhelgaon/Welgaon, dead body of one boy is found and, therefore, he reached the Police Station and identified the dead body as that of his son.

6. During the investigation, it came to the knowledge of the Investigating Officer that the appellant/accused is the perpetrator of the offence and, therefore, he was arrested. He seized the clothes of the appellant by drawing seizure panchanama Exh.-37. He also seized the cycle-rickshaw from the house of the appellant under seizure memo Exh.-39. The Investigating Officer also seized clothes of the deceased under the seizure panchanama Exh.-38. After giving letter to the Chief Judicial Magistrate (Exh.48), statement of one Deepak Raghunath Shelke (PW6) was recorded under Section 164 of the Cr.P.C. After completion of the other usual investigation, charge-sheet was sent to the court of law. The learned Magistrate, in whose Court the final report was presented, passed the committal order and case was registered as Sessions Trial No.4/2009. The learned Ad hoc Additional Sessions Judge, Nagpur framed the charge against the appellant for the offence punishable under Section 377 and 302 of the IPC. The appellant abjured his guilt and claimed for his trial. The prosecution, in order to bring home the guilt of the

appellant, examined in all 13 witnesses and also relied on various documents proved during the course of the trial. After a full fledged trial, the learned Judge of the Court below convicted the appellant and sentenced him for the offence for which he was charged, as stated in the opening paragraph of the judgment. Hence, this appeal.

7. We have heard Ms S.H. Bhatia, learned counsel, who was appointed through Legal Aid Committee to represent the appellant and Mr. Tiwari, the learned A.P.P. for the State. With the assistance of both the learned counsel, we have perused the record and proceedings of the Court below.

8. Dr. Nilesh Tumdam (PW11) was attached to the Mayo Hospital. He along with Dr. A.L. Narde, conducted the post mortem examination on Akash. During the course of the autopsy, the surgeons found following external injuries:

"1) Anal Sphincture dilated up to 4 cm. with rough anal margins, loss of rugosity of anal mucosa. Healed tears present at 3 O'clock, 6 O'clock, 7 O'clock position with recent abrasion at 12 O'clock position of size 0.5 cm. X 0.5 cm., red colour, bleeds on touch, blood clots present, evidence of bleeding from anus present (Column No.15).

2) Contused abrasion present over forehead in midline 3.5 cm. from glabella of size 1.5 cm. X 0.5 cm. reddish brown.

3) Contused abrasion present over right side of forehead 1.5 cm. from middle of right eyebrow, 3 cm. from midline of size of 0.5 cm. X 0.5 cm. reddish brown.

4) Contused abrasion present over right side of forehead 1.5 cm. lateral to injury no.2 of size 0.5 cm X 0.5 cm. reddish brown.

5) Contusion present over right upper eyelid of size 1.5 cm X 0.5 cm. bluish.

6) Graze abrasion present over right zygoma 3.5 cm X 2.00 cm in size directing vertically upwards 1.00 cm. Lateral to lateral canthus of right eye, reddish brown.

7) Contused abrasion present over right cheek 8.5 cm. From midline of nose, 4.00 cm. From tragus of right ear of size 1 cm X 5 cm reddish brown.

- 8) Contusion present over right maxillary region 4 cm. From midline 5.5 cm. from tragus of right ear of size 3.5 cm X 3 cm. Bluish.
- 9) Graze abrasion present over right cheek 5 cm. From tragus of right ear 4 cm. From right angle of mouth of size 2 cm x 1.5 cm. Directing vertically upwards, reddish brown.
- 10) Contused abrasion present over right cheek 2 cm. lateral from midline, 2 cm. above right angle of mouth of size 2.5 cm X 0.5 cm. Reddish brown.
- 11) Contusion present over right side of upper lip of size 2 cm X 0.5 cm bluish.
- 12) Contused abrasion present over nose in midline of size 2.5 cm X 1 cm reddish brown.
- 13) Contused abrasion present over right cheek 1.00 cm. Lateral to right angle of mouth 8 cm. From tragus of right ear of size 1.5 cm. X 0.5 cm. reddish brown.
- 14) Contused abrasion present over right antero lateral aspect of neck 3 cm below right angle mandible 2 cm from midline of size 4.5 cm X 2 cm reddish brown, horizontally placed.
- 15) Two linear abrasion present over left antrolateral aspect of neck of length 1.5 cm each, 1 cm. Apart 2.5 cm. Below left side of mandible, 1 cm from midline.
- 16) Contused abrasion present over back of right shoulder joint of size 4 cm. X 1 cm reddish brown.
- 17) Three contused abrasion present over right lateral malleous of size 0.5 cm. X 0.5 cm each 0.5 cm apart reddish brown.
- 18) Two linear abrasion present over lateral aspect of left leg 13 cm from knee joint 16 cm. from left lateral malleous of size 2.5 cm. Each, 1.5 cm apart obliquely placed reddish brown.
- 19) Contused abrasion present over front of chest in left 7th intercostal space, 8 cm. from midline, 16 cm from left nipple of size 4 cm. X 0.5 cm reddish brown.

20) Contused abrasion present over front of chest in left 8th intercostal space, 11 cm. From midline, 1 cm below injury No.19 of size 3 cm X 1.5 cm reddish brown.

21) Linear abrasion present over left anterolateral aspect of thigh of length 1 cm, 13 cm, from left knee joint, 23 cm from left anterior superior iliac spine, reddish brown.

22) Contused abrasion present over right scapular region 12 cm from midline and 10 cm from shoulder blade of size 3 cm X 2 cm reddish brown.

23) Contused abrasion present over left scapular region 13 cm. From midline and 12 cm from shoulder blade, 4 cm X 2 cm reddish brown."

All the injuries were ante mortem. They also noticed the following internal injuries:

"Head-Underscalp hematoma present over left parietal temporal region, frontal region completely, occipital region and over right temporal region about 80 ml of dark red blood and blood clots present.

Brain - Meninges congested, subdural hematoma present over left parietal temporal region about 60 ml of dark red blood and blood clots present. Subarachnoid hemorrhage present as thin red film all over brain surface area. (Column No.18)

One concrete stone of size 7 cm. X 5 cm. X 3 cm. along with three cement stones of size 2 cm. X 1.5 cm. X 1 cm., 2 cm. X 1 cm. X 1 cm. and 1.5 cm. X 1 cm x 1 cm present in buccal cavity pressing tongue backwards towards posterior pharyngeal walls blocking the air passage (Column No.21)."

The post mortem report is at Exh.-42. According to the Doctor who conducted the autopsy, the cause of death was asphyxia due to manual strangulation and choking with head injury.

Looking to the evidence of the autopsy surgeon Dr. Tumram, the Post Mortem Report Exh.-42, in our view, the prosecution has successfully established that the deceased met with homicidal death and that he was subjected to carnal intercourse.

9. The next question falls for consideration of this court is, whether the appellant could be held guilty for the death of Akash and for the offence punishable under Section 377 of the IPC as claimed by the prosecution.

The learned counsel for the appellant submitted that there is no cogent evidence to connect the appellant with the crime. She submitted that in the absence of any eye witness and in view of the fact that the circumstances are not proved, the appellant needs to be acquitted.

10. Per contra, the learned A.P.P. submitted that two circumstances are appearing against the appellant. Those are; (i) extra judicial confession made by the appellant to Deepak Shelke (PW6) and (ii) the deceased being found lastly in the company of the appellant as established through the evidence of Gangadhar Rodge (PW7). She also submitted that the appellant has given confession to the police in presence of Vijay Bahadursingh Dixit (PW9) and in his presence, his statement Exh.-32 was recorded. Therefore, the learned A.P.P. submitted that the appeal be dismissed.

11. In view of the fact that there is no eye witness account in the prosecution case to secure conviction on the basis of the circumstantial evidence as laid down by the apex Court in the case Sharad Birdhi Chand Sarda vs. State Of Maharashtra; 1984 (1) 1984 AIR 1622, following are required to be established:

"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 with the hypothesis of guilt and 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

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."

12. After arrest of the appellant, he was sent to the Mayo Hospital for his medical examination. He was examined on 18.09.2008 by Dr. Fulchand Dhengre (PW1). He issued Medico-Legal Certificate in that behalf and the same is at Exh.-9. The doctor noticed no injuries on the person of the appellant, both external as well as on his private parts. In our view, the same will not clinch in favour of the appellant for the reason that the offence was alleged to have been committed in between 12.08.2008 to 13.08.2008 whereas the appellant was medically examined on 08.09.2008. Therefore, the medical certificate showing no injuries on the private parts of the appellant is not helpful to him to get himself absolved from the charge.

13. The prosecution is obliged to prove the circumstances against the appellant beyond reasonable doubt which were pressed into service to secure the conviction.

According to the prosecution, only two circumstances are against the appellant and they are; confession and last seen theory. Let us scrutinize these two circumstances on the touchstone of the principles laid down by the Apex Court.

The extra judicial confession is a weak piece of evidence. However, if there are other corroborative evidences available in the prosecution case, the said extra judicial confession can be made basis for securing the conviction of the accused.

14. In the present case, according to the prosecution, the appellant made extra judicial confession to Deepak Shelke (PW6).

The evidence of Deepak discloses that the appellant is his cousin and on the day of Pola festival in the 2008, the appellant came to his house. They had a session of drink and thereafter the appellant requested for sweets, which were offered to him and after eating the sweets, he disclosed that he has committed murder of a boy by name; Akash. After disclosing the sin to his brother Deepak, the appellant left his house.

From the evidence of Deepak, it is clear that the extra judicial confession is voluntary and was not solicited and, therefore, one would tend to accept the same at the first blush. However, the Court should be at guard before accepting the extra judicial confession readily and shall scrutinize the same in the light of other evidence.

15. The evidence of the Investigating Officer Udaysingh Chandel shows that he gave a requisition to the Chief Judicial Magistrate (Exh.48) to record statement of Deepak Shelke under Section 164 of Cr.P.C. The said requisition is dated 10.11.2008. Accordingly, the statement of Deepak Shelke (PW6) was recorded under Section 164 of the Cr. P. C. on 13.11.2008. The said statement would reveal that on 30.08.2008, on the date of Pola, the appellant came to the house of Deepak. He disclosed that he has committed murder of one boy and then left his place.

The evidence of Deepak (PW6) disclosed that he is Homeguard and he is in contact with the police. Being the Homeguard, certainly Deepak possesses the basic sense of urgency in respect of the commission of an offence. His statement discloses that he got knowledge about commission of the serious offence on 30.08.2008 and in spite of that he ventured not to disclose the same to the police till the statement was recorded by the learned Magistrate. The time gap between the knowledge of commission of offence and disclosure is about 2-1/2 months without there being any explanation. The delay is further fatal in view of the statement made by this witness in his cross-examination that he made the statement as per the say of the police. The evaluation of evidence of this witness Deepak (PW6) coupled with the unexplained delay of 2-1/2 months, desists this Court from accepting the so called extra judicial confession made by the accused-appellant to Deepak. In that view of the matter, this Court is of the view that the extra judicial confession be left out of consideration.

16. The record shows that the appellant was arrested on 07.09.2008. The learned A.P.P. has vehemently submitted that the statement of the appellant was recorded by the Investigating Officer and in presence of panchas Exh.-32 where at he agreed to show the place wherein he has committed the offence. Accordingly, the

panchanama of the spot which was shown is drawn and it is at Exh.33. In our view, the learned Judge of the Court below has rightly disbelieved the said evidence and we see no reason to take exception to the said finding.

17. The other circumstance is that the deceased being seen in the company of the appellant lastly as claimed by Gangadhar Rodge (PW7). This witness runs a tea and pan shop near Pili Nadi, Juni Vasti, Kamptee, Nagpur. According to his evidence, on 12.08.2008, the appellant came to his pan shop on his rickshaw. He kept the said rickshaw by the side of his shop. That time one boy was sitting in rickshaw. The appellant purchased a packet of biscuit and some tobacco from him and thereafter he left the shop along with rickshaw and went towards naka no.2. He claims that he was knowing the boy sitting in the rickshaw since he was from his zopadpatti area.

There are more than one reasons for not believing the evidence of Gangadhar (PW7). According to the evidence of Gangadhar, father of the boy by name Vinod came to his shop searching his son prior to the visit of the accused to his shop. It is to be noted that even as per the claim of Gangadhar (PW7), he was knowing the boy being resident of the same zopadpatti, which necessarily implies that he was knowing Vinod Sahare (PW8), father of the deceased.

The visit of Vinod Sahare to the pan shop of Gangadhar was not simple visit but the same was in search of his boy. Therefore, the conduct on the part of Gangadhar in not disclosing the fact to Vinod Sahare that his boy Akash came to his shop with the appellant, is unnatural.

Further, for a period of one month, Gangadhar Rodge kept mum. He gave his statement after a period of one month when police came to him along with the accused to identify him. The entire prosecution case is totally silent as to how the police reached to the shop of Gangadhar Rodge along with the accused. That clearly shows that Gangadhar Rodge is introduced by the prosecution and he is a got up witness. It appears from the cross examination that even before recording of the evidence of these two witnesses he used to sit inside the court hall when the evidence of other witnesses were recorded. Further, he has admitted that he is having acquaintance with the police since the police personnel used to come to his

shop for taking pan and tea.

Further, the statement made during the course of examination-in-chief that the boy was sitting in rickshaw on the date of the incident is an improvement. It is also an improvement in his evidence regarding Rickshaw going along with boy towards Naka no.2. The re-appreciation of the evidence of Gangadhar (PW7), shows that he is a witness not to be believed and is a witness under the thumb of police and was introduced to suit the case of the prosecution. Therefore, we have no hesitation in our mind to discard his evidence also.

18. Perusal of the impugned judgment shows that the learned Judge of the Court below has not taken pains to appreciate the evidence of Deepak Rodge (PW6) and Gangadhar (PW7).

The upshot of the above discussion leads us to pass the following order.

ORDER

The Criminal Appeal is allowed.

The conviction and sentence awarded to the appellant/accused for the offence punishable under Sections 302 and 377 of the Indian Penal Code vide judgment and order dated 27.08.2009 passed by Adhoc Additional Sessions Judge, Nagpur in Sessions Trial No.4/2009 are quashed and set aside and the appellant/accused is acquitted of the offence. The fine amount, if paid, be refunded to the accused.

The appellant is ordered to be released and set at liberty forthwith if not required in any other case.

Fees payable to the learned counsel appointed for the appellant are quantified at Rs.5,000/-.

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