

ABC 2017 (I) 227 BOM
ACQUITTAL & BAIL CASES
HIGH COURT OF BOMBAY

(B.R. Gavai & Kum.Indira Jain, JJ.)

Criminal Appeal No.78 of 2015

Decided on 4 January, 2017

Nagpur Bench

RAMESH MOTIRAM DHUMALE - Appellant(s).

Versus

STATE OF MAHARASHTRA - Respondent(s).

Law Covered:- (A) Indian Penal Code, 1860 – Section 302 – Murder – Conviction under – Based on circumstantial Evidence – Dying declaring & Recovery – Held, none of the circumstances been proved beyond reasonable doubt – Acquittal. (Para 14)

(B) Indian Evidence Act, 1872 – Section 3 – Relevant fact – FIR – Omission in – knife blow – inflicting of – missing in F.I.R. – Fatal to prosecution. (Para 11)

(C) Indian Evidence Act, 1872 – Section 3 – Relevant fact – Political rivalry – Held, it will be necessary to scrutinize the testimonies of prosecution witnesses with more rigor. (Para 11)

(D) Indian Evidence Act, 1872 – Section 32 – Uncorroborated Oral Dying declaration – Held, conviction on the basis of uncorroborated version of oral dying declaration would not be safe. (Para 12)

(E) Indian Evidence Act, 1872 – Section 32 – Uncorroborated Oral Dying declaration – Improvement in – fatal to prosecution – Acquittal. (Para 12)

(F) Indian Evidence Act, 1872 – Section 32 – Oral Dying declaration – Material witness in whose presence the declaration was made – non-examination – Held, it will not be safe to rest conviction solely on the basis of the alleged oral dying declaration. (Para 12)

(G) Indian Evidence Act, 1872 – Section 27 – Recovery in pursuance of discloser statement – Admission by Panch witness – that the said place was easily accessible to one and all – Held, It would thus be seen that recovery is from the place which is known to one and all – Held, the said circumstance cannot be said to have been proved beyond reasonable doubt – Acquittal. (Para 13)

Facts:- As per the prosecution case deceased and accused were residing in same locality. There was an altercation between them on account of throwing of some debris by the accused in front of house of the deceased. Thereafter, when the deceased was proceeding towards his field, the accused met him and had a scuffle with him. The accused inflicted a blow of knife on the neck of deceased. The incident was witnessed by three persons. Deceased stopped the bleeding by pressing his hand on the injury and travelled a distance of about 400 to 500 feet by walking towards his house and then fell down. The son of the deceased was informed about the incident. He came to the spot, the deceased had become unconscious by then. The deceased was carried to Rural hospital. The Medical Officer, after treating the deceased for some time, declared him dead. The trial Court convicted the accused for the offence of murder relying on the circumstances of oral dying declaration and recovery of knife allegedly used in the crime. In the present appeal the honourable High Court observed that both the circumstances relied by the Trial Court were not proved beyond reasonable doubt. The conviction was set aside.

Law of relief:- It is not safe to base conviction on uncorroborated oral dying declaration.

Held:- However, the evidence of this witness would show that there are material omissions and contradictions in his evidence. The very fact regarding Laxmikant (PW-4) and others telling him that accused Ramesh had inflicted knife blow on him is missing in his F.I.R. It is to be noted that this witness has admitted in his evidence that there are two political groups in the village. One of Laxmikant (PW-4) and another of one Patil. In that view of the matter, it will be necessary to scrutinize the testimonies of prosecution witnesses with more rigor. (Para 11)

However, conviction on the basis of uncorroborated version of oral dying declaration would not be safe. Laxmikant (PW-4) states in his evidence that said Nilesh Halde was with him when Dayaram gave oral dying declaration. However, the fact regarding said Nilesh being with him is an improvement and does not find place in the police statement. Apart from that, said Nilesh is also not examined by prosecution. In our considered view, therefore, it will not be safe to rest conviction solely on the basis of the alleged oral dying declaration given by the deceased to Laxmikant (PW-4). (Para 12)

The next circumstance on which the prosecution relies is recovery of knife allegedly used in the crime on the memorandum u/

a s.27 of the Evidence Act. There was an auto-rickshaw, which was out of order. Accused Ramesh discovered the knife concealed under the right side wheel. However, cross-examination of this witness itself would reveal that there is a clear admission that the said place was easily accessible to one and all. It would thus be seen that recovery is from the place which is known to one and all. In our considered view, therefore, the said circumstance also cannot be said to have been proved beyond reasonable doubt against the present appellant. (Para 13)

b We are of the considered view that the prosecution has not been in a position to prove any circumstance beyond reasonable doubt, leave aside it being in a position to establish the chain of events which is so interwoven to each other that it leads to no other conclusion that the guilt of the accused. We find that the order of conviction is not sustainable in law. Hence, the order. (Para 14)

c Counsel:- For Appellant(s): Mr.R.P.Thote, Advocate.

d For Respondent(s): Mr .S.M. Ukey, A.P.P.

JUDGMENT

e B.R. GAVAI, J.: - 1. Being aggrieved by the Judgment and Order dt.26.9.,2013 passed by the learned Sessions Judge, Washim thereby convicting the appellant for the offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life and to pay a fine of Rs.500/- and in default to undergo further rigorous imprisonment for 25 days, the appellant has approached this Court.

f 2. It is the prosecution case that deceased Dayaram Raut and accused Ramesh were residing in one Mohalla at village Bembla, Tq. Karanja. On 4.8.2011, at around 9.00 a.m., the accused threw some debris in front of house of deceased Dayaram. As a result of the same, there was an altercation between the deceased and the accused. Thereafter, the accused urinated in front of house of the deceased which led to further verbal exchange between them. Thereafter, at around 2 to 2.30 p.m., when the deceased was proceedings towards his field, the accused met him and had a scuffle with him. The accused inflicted a blow of knife on the neck of deceased Dayaram. The incident was witnessed by three persons. Deceased Dayaram stopped the bleeding by pressing his hand on the injury and travelled a distance of about 400 to 500 feet by walking towards his house and then fell down in front of house of Laxmikant Shyamsunder. Umesh

Raut (PW-1), son of deceased Dayaram was informed about the incident. He went to the spot. Dayaram had become unconscious. Umesh (PW-1) with the help of his friend carried Dayaram to Rural hospital at Kamargaon. The Medical Officer, after treating deceased Dayaram for some time, declared him dead. a

3. On the basis of oral report of Umesh (PW-1), the First Information Report came to be lodged below Exh.16A. Investigation was set into motion. The post mortem of deceased was conducted by Dr.Babusaheb Baburao Lahane (PW-7). Further investigation was carried out by Investigating Officer Rameshwar Dhoran (PW-10). At the conclusion of investigation, the charge sheet came to be filed in the Court of Judicial Magistrate, First Class, Karanja. Since the case was exclusively triable by the learned Sessions Judge, the same came to be committed to the Court of Sessions. Charge under Section 302 of the Indian Penal Code was framed below Exh.7. The accused pleaded not guilty and claimed to be tried. At the conclusion of investigation, the learned trial Judge passed an order of conviction and sentence, as aforesaid. Being aggrieved thereby, the present appeal. b c d

4. The learned Counsel for the appellant submits that the learned trial Judge has grossly erred in convicting the appellant. He submits that, having disbelieved the eye witnesses, the learned trial Judge ought not to have passed the order of conviction only on the basis of recovery of knife allegedly used in the crime and the oral dying declaration. He submits that the order of conviction is not at all sustainable in law. e

5. The learned A.P.P., on the contrary, submits that the circumstances such as recovery of knife under memorandum of accused under Section 27 of the Indian Evidence Act, oral dying declaration and the other incriminating circumstances like clothes of the accused and the deceased having been found with blood stains, point out towards guilt of the accused and the prosecution has proved the case beyond reasonable doubt. It is, therefore, submitted that the order of conviction and sentence warrants no interference. f g

6. The prosecution case rests on the following :

a) *Eye witness testimonies of Suddhodhan Sudam Chakre (PW-2) and Devchand Gulabrao Jawanjil (PW-3).*

b) *Oral dying declaration given to Laxmikant Pralhadrao Shamsundar (PW-4).* h

c) Discovery of weapon allegedly used in the crime.

a 7. Since, the death of deceased being homicidal, it is not challenged by the appellant, hence, it is not necessary to refer to the medical evidence.

b 8. Perusal of para 26 of the Judgment of learned trial Judge itself would reveal that the learned trial Judge has disbelieved the evidence of Suddhodhan Chakre (PW-2) and Devchand Jawanjal (PW-3). We find no reason to disagree with the view taken by the learned trial Judge in discarding the testimonies of eye witnesses. If the testimonies of eye witnesses are discarded then the case would come out of the ambit of direct evidence and would fall under the category c of circumstantial evidence. The law with regard to conviction on the basis of circumstantial evidence has been very well crystalised by various Judgments of Their Lordships of the Apex Court. It will be appropriate to refer to the following observations of the Apex Court in the case of *Sharad Birdhichand Sarda .vs. State of Maharashtra reported in (1984) 4 SCC 116.* d

"A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

e (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

f It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra*(¹) where the following observations were made:

g "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

h (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 (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." a

9. Perusal of the aforesaid would reveal that Their Lordships have held that the facts so established should be consistent only with the hypothesis of the guilt of the accused. It is observed that the circumstances should be of a conclusive nature and tendency and they should exclude every possible hypothesis except the one to be proved. b

10. The learned trial Judge has found that the circumstances of oral dying declaration and recovery of knife allegedly used in the crime have been proved beyond reasonable doubt. c

11. Umesh Dayaram Raut (PW1) states in his evidence that Laxmikant Shamsundar (PW-4) and others told him that accused Ramesh had inflicted knife blow on his father and they should administer him water and they should call him. Accordingly, he had gone to the spot and took his father to Kamargaon PHC. However, the evidence of this witness would show that there are material omissions and contradictions in his evidence. The very fact regarding Laxmikant (PW-4) and others telling him that accused Ramesh had inflicted knife blow on him is missing in his F.I.R. It is to be noted that this witness has admitted in his evidence that there are two political groups in the village. One of Laxmikant (PW-4) and another of one Patil. In that view of the matter, it will be necessary to scrutinize the testimonies of prosecution witnesses with more rigor. d e f

12. The main circumstances on which the learned trial Judge has relied on is the oral dying declaration allegedly given by the deceased to Laxmikant (PW-4). Laxmikant Shamsundar (PW-4) in his evidence states that deceased Dayaram told Nilesh to call Dayaram's son Umesh. He also demanded water from them. They brought water from Shivdas Jogi's house. Deceased Dayaram stated that Ramesh has assaulted him. Nodoubt that the oral dying declaration can be read in evidence. However, conviction on the basis of uncorroborated version of oral dying declaration would not be safe. Laxmikant (PW-4) states in his evidence that said Nilesh Halde was with him when Dayaram gave oral dying declaration. However, the fact regarding said Nilesh being with him is an improvement and does not find place in the g h

a police statement. Apart from that, said Nilesh is also not examined by prosecution. In our considered view, therefore, it will not be safe to rest conviction solely on the basis of the alleged oral dying declaration given by the deceased to Laxmikant (PW-4).

b 13. The next circumstance on which the prosecution relies is recovery of knife allegedly used in the crime on the memorandum u/s.27 of the Evidence Act. Prosecution, to prove this circumstance, relies on the evidence of Shyam Digambar Halde (PW-5). He states in his deposition that, on 5th August, 2011, he was called by police in Kamargaon outpost at around 4.00 to 4.30 p.m. It has further come in his evidence that the accused stated that he was ready to discover weapon of offence concealed below auto-rickshaw in out of order condition situated near Mahendra Shyamrao's house at Bembla. He further states that he along with the accused and police went to Bouddha Square, Bembla. He further states that thereafter the accused led police and panchas near the house of Mahendra Shyamrao. There was an auto-rickshaw, which was out of order. Accused Ramesh discovered the knife concealed under the right side wheel. However, cross-examination of this witness itself would reveal that there is a clear admission that the said place was easily accessible to one and all. It would thus be seen that recovery is from the place which is known to one and all. In our considered view, therefore, the said circumstance also cannot be said to have been proved beyond reasonable doubt against the present appellant.

f 14. We, therefore, find that the learned trial Judge has grossly erred in resting the order of conviction only on the afore-said two circumstances which, in our view, have not been proved beyond reasonable doubt. We are of the considered view that the prosecution has not been in a position to prove any circumstance beyond reasonable doubt, leave aside it being in a position to establish the chain of events which is so interwoven to each other that it leads to no other conclusion that the guilt of the accused. We find that the order of conviction is not sustainable in law. Hence, the order.

ORDER

The appeal is allowed.

h The order of conviction and sentence for the offence punishable under Section 302 of the Indian Penal Code is quashed and set aside and the appellant is acquitted of the offence punishable under Section 302 of the Indian Penal Code.

February 2017

Appellant be set at liberty forthwith, if not required in any other case.

Fees of the Advocate appointed for the appellant are quantified at **Rs.5,000/**.

Result:- Appeal allowed.

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