

Namdeo Daulata Dhayagude and Others

Vs

State of Maharashtra

Criminal Appeal No. 449 of 1974

(P.N. Bhagwati, Syed M. Fazal Ali JJ)

19.08.1976

JUDGMENT

BHAGWATI, J. -

1. The appellants, who were accused 1 to 3 in the trial before the Additional Sessions Judge, Satara, were charged under Section 302 read with Section 34 of the Indian Penal Code for the offence of intentionally causing the death of one Malhari (hereinafter referred to as the deceased) and Section 324 read with Section 34 of the Indian Penal Code for the offence of voluntarily causing hurt to one Babu Shaikh. The charge was sought to be substantiated by three categories of evidence; (1) evidence of Hiralal Sutar and Babu Shaikh, both of whom claimed to be eyewitnesses to the incident resulting in the death of the deceased and injuries to Babu Shaikh; (2) evidence of dying declarations made by the deceased before Dinkar Kunte and police Patil Madhavrao Dhayagude; and (3) evidence of recovery of bloodstained clothes from accused 1, 2 and 3. The learned Additional Sessions Judge was not satisfied with this evidence and taking the view that it suffered from considerable discrepancies and improbabilities, he acquitted all the accused. The State preferred an appeal against the acquittal and the High Court, which heard the appeal, came to the conclusion, on a review of the evidence, that the view taken by the learned Additional Sessions Judge was unreasonable and the evidence led on behalf of the prosecution was sufficient to establish the guilt of accused 1, 2 and 3. The High Court took the view that the reasons given by the learned Additional Sessions Judge for rejecting the prosecution evidence were flimsy and unsustainable and accepting the prosecution evidence as substantially true, the High Court convicted accused 1, 2 and 3 of the offence under Section 302 read with Section 34 for intentionally causing the death of the deceased and sentenced each of them to suffer imprisonment for life and also in addition convicted accused 3 of the offence under Section 324 for voluntarily causing hurt to Babu Shaikh and sentenced him to suffer rigorous imprisonment for one year, the substantive sentences of imprisonment against accused 3 being directed to run concurrently. All the three accused thereupon preferred the present appeal under Section 2(1)(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970.

2. The case of accused 2 stands on an entirely different footing from that of accused 1 and 3 and we shall, therefore, consider it separately. So far as accused 1 and 3 are concerned, we have carefully gone through the evidence led on behalf of the prosecution and we do not think that the High Court was in error in setting aside the acquittal of accused 1 and 3 and convicting them for the offence of intentionally causing the death of the deceased. We must admit that the evidence of Babu Shaikh suffers from serious infirmities and it is difficult to accept that Babu Shaikh was an eyewitness to the incident as claimed by him. The story narrated by him in his evidence before the court differs substantially from that set out in his statement before the police and having regard to the large

number of contradictions in his evidence - contradictions not on mere matters of detail, but on vital points - we do not think it would be safe to rely on his evidence and it may be excluded from consideration in determining the guilt of accused 1 and 3. But even so, the evidence of Hiralal Sutar, coupled with the dying declaration is, in our opinion, sufficient to bring home the offence against accused 1 and 3. There is no valid or cogent reason for rejecting the evidence of Hiralal Sutar. It appears to have been given on a natural and straightforward manner and it has a ring of truth. Hiralal Sutar was subjected to a lengthy and detailed cross-examination, but no serious dent appears to have been caused in his evidence. There are undoubtedly a few minor contradictions brought out in the cross-examination, but they are all on unsubstantial matters of detail and do not affect the broad features of his testimony. We may refer to one contradiction on which the strongest reliance was placed on behalf of accused 1 and 3. Hiralal Sutar said in his statement before the police that when the deceased along with Babu Shaikh and himself had gone about half the distance on their way to the basti of accused 1, accused 2, who is the brother of accused 1, came from the front side and offered them tobacco and whilst they were chewing tobacco, accused 1 and 3 emerged suddenly from the the darkness from the back side and come running and attacked the deceased. But in the course of his evidence before the court, Hiralal Sutar stated that the deceased, Babu Shaikh and himself, while proceeding towards the house of accused 1, stopped under the tamarind tree which was just at the edge of the road and from there, they called for sent inside the house and coming out after a while, he told the deceased, Babu Shaikh and Hiralal Sutar that accused 1 was not inside the house and then he offered them tobacco and after chewing the tobacco for a short while, all the four started walking back to the road when accused 1 and 3 suddenly came running from the corner of the hedge and assaulted the deceased. The story about the deceased, Babu Shaikh and Hiralal Sutar shouting for accused 1, and 2 going inside the house and then after coming out, informing these three persons that accused 1 was not at home and them walking back to the road along with them, which was narrated in his evidence by Hiralal Sutar before the court, was not to be found in his statement before the police and this, in the submission of accused 1 and 3 constituted a material contradiction impairing the evidentiary value of the testimony of Hiralal Sutar. Now, there can be no doubt that in his evidence before the court Hiralal Sutar made a definite improvement on the story set out in his police statement and to that extent we cannot accept his testimony. We must reject the embellishment made by him while giving evidence before the court. Presumably this embellishment was made by him with a view to roping in accused 2 by trying to show that he was party with accused 1 and 3 to the common intention to kill the deceased and he facilitated the attack on the deceased by misleading the deceased, Babu Shaikh and Hiralal Sutar in believing that accused 1 was not at home. But apart from this embellishment, which is obviously an afterthought and which may be rejected as a subsequent innovation, there is no contradiction or inconsistency so far as the broad features of the story relating to the assault on the deceased are concerned. Whilst the deceased, Babu Shaikh and Hiralal Sutar were approaching the house of accused 1, accused 2 met him, offered them tobacco and whilst they were chewing tobacco, accused 1 and 3 suddenly emerged from the back side and attacked the deceased - this is the main substance of the story narrated by Hiralal Sutar and that the High Court was right in relying on the evidence of Hiralal Sutar for reaching the conclusion that accused 1 and 3 assaulted the deceased with axe and killed him.

3. The evidence of Hiralal Sutar to the effect that accused 1 and 3 attacked the deceased and caused his death is also supported by the dying declaration made by the deceased before the police Patil Madhavrao Dhayagude. Madhavrao Dhayagude was awakened at night at about 12 p.m. by Dinkar Kunte and Hiralal Sutar and he was told by Dinkar Kunte that the deceased was lying injured as a result of an attack by accused 1, 2 and 3. He immediately accompanied them to the place where the deceased was lying injured and was that the deceased had received a serious injure on his abdomen

on the left side and his intestines had come out. The deceased was conscious and so he asked the deceased as to what had happened, on which the deceased stated that he had been beaten by "all the three accused." He placed the intestine back in the stomach and tied a bandage round it and then proceeded to the Lonand police station on foot for the purpose of giving information. He reached Lonand police station at about 4.30 a.m. and lodged the first information report. This evidence, if accepted, would clearly go to prove the dying declaration made by the deceased that "all the three accused" had assaulted him and that would strongly support the evidence of the eyewitness Hiralal Sutar. Accused 1 and 3, therefore, tried to attack the veracity of this witness by trying to suggest that there was enmity between him and the accused. But we do not find any substance at all in this suggestion. There is not an iota of evidence to show that there was any enmity between Madhavrao Dhayagude and any one of the three accused. It is true that in 1953 Madhavrao Dhayagude's father had given evidence in a civil case against the father of accused 1 and 2, but that was about eighteen years prior to the date of the incident and moreover, the evidence was given by him in his capacity as a revenue and Police Patil. It is difficult to believe that a solitary incident of giving evidence - not by Madhavrao Dhayagude, but by his father and that also at a distant past - could have given rise to such enmity that Madhavrao Dhayagude should falsely implicate the accused in an offence of murder. We have carefully gone through the evidence of Madhavrao Dhayagude and we are satisfied that he is a totally disinterested witness. There is absolutely no reason why he should have come forward to give false evidence against accused 1 and 3. The evidence given by him is in fact corroborated by the first information report lodged by him. The criticism levelled against the first information report was that though the attack on the deceased had taken place between 11 p.m. and 11.30 p.m., the first information report was not lodged by Madhavrao Dhayagude until 4.30 a.m. that is after a period of about five hours, though the distance between Andori where the incident took place and Lonand police station was only six to seven miles, and there was, therefore, a strong possibility that the first information report might have been lodged after discussion and premeditation and that would deprive it of much of its value as a corroborative piece of evidence. But this criticism is, in our opinion, not well-founded. Madhavrao Dhayagude was awakened from sleep at about 12 a.m. in the night. He was informed about the incident by Dinkar Kunte and he then went to the place of the incident. There he saw the deceased, enquired from him as to what had happened and was told by the deceased that he had been beaten by the three accused. He then placed the intestines in the stomach and tied a bandage round it. All this must have easily taken about an hour in the night. Then he made some efforts to get a conveyance and when he failed, he set out on foot to go to Lonand police station. This must also have taken about half an hour. Now, if he starts from Andori at about 1.30 a.m., he is bound to take at least two to two and half hours for covering six to seven miles at night. The first information report given by him at 4.30 a.m. cannot, therefore, be said to be so delayed as to excite suspicion. Moreover, it may be noted that the deceased was alive at the time when Madhavrao Dhayagude set out to go to Lonand police station that is supported by the first information report which states that when Madhavrao Dhayagude and others placed the intestines back in the stomach and tied a bandage round it, the deceased was groaning. The first information report, therefore, clearly corroborates the testimony of Madhavrao Dhayagude. The only point on which Madhavrao Dhayagude seems to have made slight improvement in his evidence in regard to the dying declaration is in regard to accused 2. According to the first information report the only persons named by the deceased before Madhavrao Dhayagude as his assailants were accused 1 and 3 and the deceased did not mention accused 2 as his assailant. But Madhavrao Dhayagude included the name of accused 2 as well amongst the persons named by the deceased as his assailants. This was clearly an improvement made by Madhavrao Dhayagude for the purpose of bolstering the prosecution case against accused 2. It is clear from the first information report that the name of

accused 2 was not given by the deceased when he named his assailants before Madhavrao Dhayagude. But the names of accused 1 and 3 were definitely given and that supports the oral testimony of Hiralal Sutar that accused 1 and 3 pounced on the deceased and killed him by giving axe blows.

4. Then there is also the evidence of recovery of bloodstained clothes from accused 1 and 3. The clothes were found stained with human blood and the explanation given by accused 1 and 3 for the presence of blood on the clothes can hardly be said to be convincing. Of course, this cannot be regarded as a conclusive piece of evidence for incriminating accused 1 and 3 but it is certainly a piece of evidence which goes to support the other evidence about the guilt of accused 1 and 3.

5. We are, therefore, of the view that there was clear and cogent evidence to establish that accused 1 and 3 suddenly emerged out of the darkness, accused 3 gave an axe blow on the left arm of the deceased, while accused 1 gave an axe blow on his abdomen and the latter injury resulted in his death. These facts clearly show that there was common intention between accused 1 and 3 to cause the death of the deceased and the High Court was, therefore, right in setting aside their acquittal and convicting them of the offence under Section 302 read with Section 34 of the Indian Penal Code.

6. We may also point out that the offence of voluntarily causing hurt to Babu Shaikh does not appear to have been established beyond doubt against accused 3. We have already pointed out earlier that he has been subsequently put forward by the prosecution as an eyewitness in order to strengthen the prosecution case. It is no doubt true that Babu Shaikh had some injuries on his person which were examined on the next day by Dr. Vardhamane and these injuries would not seem to suggest that he must have been present when the incident took place. But if we look at these injuries, we find that they are just superficial abrasions and they could have been caused by a fall. It is, therefore, not possible to say merely from the existence of these injuries that Babu Shaikh must have been present at the time of the incident and must have received these injuries as a result of a blow given by accused 3. Babu Shaikh's presence at the time of the incident being highly doubtful, the prosecution case against accused 3 for voluntarily causing hurt to Babu Shaikh cannot be said to be established and accused 3 must be acquitted of the charge. under Section 324.

7. That takes us to the case against accused 2. It is clear from what we have said above in regard to the dying declaration made by the deceased before Madhavrao Dhayagude that the deceased did not name accused 2 as one of his assailants before Madhavrao Dhayagude. Even according to Hiralal Sutar, accused 2 was talking to the deceased, Hiralal Sutar and Babu Shaikh when accused 1 and 3 attacked the deceased and he neither had any weapon with him nor did he participate in the attack. Not a single blow was given by him to the deceased. The only thing attributed by Hiralal Sutar to accused 2 was that after accused 1 and 3 had given axe blows to the deceased, accused 2 said "don't leave him." But that clearly appears to be a gloss introduced by Hiralal Sutar for that purpose of implicating accused 2. There is no reason why accused 2 should have tried to instigate accused 1 and 3 after they had already delivered axe blows to the deceased. It is also significant to note that neither accused 1 nor accused 3 delivered any further blows to the deceased pursuant to the alleged instigation of accused 2. We are not at all satisfied that accused 2 was a party to the common intention of accused 1 and 3 to kill the deceased or that he had anything to do with the attack on the deceased. He appears to have been falsely implicated as he happens to be the brother of accused 1. In the circumstances we think that he was rightly acquitted by the learned Additional Sessions Judge and there was no reason for the High Court to interfere with his acquittal.

8. We accordingly dismiss the appeal of accused 1 and 3 confirm their conviction and sentence

under Section 302 read with Section 34 of the Indian Penal Code. The appeal of accused 3 against his conviction and sentence under Section 324 is allowed and he is acquitted of the offence under that section. So far as accused 2 is concerned, his appeal is allowed, his conviction and sentence under Section 302 read with Section 34 of the Indian Penal Code are set aside and he is acquitted of the offence charged against him and in the circumstances he is ordered to be set at liberty forthwith unless he is required in connection with some other offence.

</html