

Vinayak

Vs

State of Maharashtra

Prakash

Vs

State of Maharashtra

Criminal Appeal Nos. 287 and 288 of 1980

(Syed M. Fazal Ali, A. Varadarajan, Sabyasachi Mukharji JJ)

21.09.1984

JUDGMENT

VARADARAJAN J. -

1. These appeals of Vinayak and Prakesh, accused 6 and 5 respectively in Sessions Case 26 of 1976 on the file of the Sessions Judge, Prabhani, by special leave, are directed against the judgment of the Bombay High Court in Criminal Appeals 7 of 1977 and 605 of 1978. Criminal Appeal 7 of 1977 was filed by Sitaram alias Sitya and Vinayak, accused 1 and 6 respectively, against their conviction under Section 302 read with Section 34 IPC in respect of the murder of one Malan, daughter of Kishan and the sentence of imprisonment for life awarded to them. Criminal Appeal 605 of 1978 was filed by the State of Maharashtra against the acquittal of Sundar alias Sundarayya, Kishan alias Kishanayya, Gangaram alias Gangayya, Prakash and Shrirang, accused 2, 3, 4, 5 and 7 respectively of the charge under Section 302 read with Section 34 IPC in respect of the murder of Malan and against their acquittal of the charge framed under Section 302 read with Section 120-B IPC. The State of Maharashtra filed Criminal Appeal 38 of 1977 for enhancement of the sentence of imprisonment for life awarded to accused 1 and 6 by the trial court.

2. After hearing the learned counsel for the parties we allowed the appeal of Prakash, accused 5 and acquitted him and set aside his conviction and the sentence awarded to him. So far as Vinayak, accused 6 is concerned, we dismissed his appeal on September 13, 1984 for reasons to follow. Now we proceed to record our reasons.

3. Sessions Case 26 of 1977 is stated to be an offshoot of what is known as the 'Manwath murders case' in which Prakash's father Uttamrao Barhate and his permanently kept concubine Rukmanibai and 13 others were tried for the murders of 10 girls and women during the period from November 14, 1972 to November 4, 1974 in Manwath village, Prabhani district, Maharashtra State. In this case the above seven accused were tried for three murders of two young girls and a woman alleged to have been committed by them and the approver Sheshrao (PW 1) during the period from November 10, 1975 to January 1, 1976 in Babultara village, Prabhani district. Charge No. 1 framed in this case was for criminal conspiracy under Section 302 read with Section 120-B IPC on the allegation that between the first week of October 1975 and January 2, 1976 at Babultara and Waghala villages, all

the seven accused and the approver PW 1 entered into a criminal conspiracy to commit murders of young girls and women in the vicinity of Babultara village by inflicting injuries on the private parts of the victims or disfiguring their faces in order to make it appear that the accused in the Manwath murders case are not the real culprits and that in pursuance of that conspiracy these seven accused and the approver PW 1 committed three murders of Ashamati, aged 9 years, Parubai, aged 40 years and Malan, aged 12 years in Babultara village. Charge No. 2 framed against accused 1 to 3 was under Section 302 read with Section 34 IPC on the allegation that in pursuance of the conspiracy and in furtherance of their common intention they committed the murder of Ashamati on or about November 10, 1975. Charge No. 3 framed against accused 1 to 4 was under Section 302 read with Section 34 IPC on the allegation that in pursuance of the conspiracy and in furtherance of their common intention they committed the murder of Parubai on or about November 29, 1975. The last charge No. 4 framed against accused 1, 6 and 7 was under Section 302 read with Section 34 IPC on the allegation that in pursuance of the conspiracy and in furtherance of their common intention they committed the murder of Malan on or about January 1, 1976. The accused pleaded not guilty to the charges framed against them. The Sessions Judge found, on a consideration of the evidence, all the seven accused not guilty of the charge of conspiracy framed under Section 302 read with Section 120-B IPC and acquitted them. He found accused 1 to 3 not guilty of charge No. 2 framed against them in respect of the murder of Ashamati and accused 1 to 4 not guilty of charge No. 3 framed against them in respect of the murder of Parubai and acquitted them. He found accused No. 7 not guilty but accused 1 and 6 guilty of charge No. 4 framed against them in respect of the murder of Malan and acquitted accused 7 and convicted accused 1 and 6 and sentenced them to undergo imprisonment for life under Section 302 read with Section 34 IPC.

4. The State did not file any appeal against the acquittal of accused 1 and 6 of charge No. 1 framed against them under Section 302 read with Section 120-B IPC. As stated earlier, Criminal Appeal 38 of 1977 was filed by the State for enhancement of the sentence of imprisonment for life awarded to accused 1 and 6 in respect of the murder of Malan and Criminal appeal 605 of 1978 against the acquittal of accused 2, 3, 4, 5 and 7 of charge No. 1 framed under Section 302 read with Section 120-B IPC. Thus the acquittal of accused 1 and 6 of charge No. 1 framed against them under Section 302 read with Section 120-B IPC and of accused 1 to 3 of charge No. 2 in respect of the murder of Ashamati and of accused 1 to 4 of charge No. 3 in respect of the murder of Parubai became final.

5. The High Court considered the evidence and dismissed Criminal Appeal 38 of 1977 filed by the State for enhancement of the sentence of imprisonment for life awarded to accused 1 and 6 for the murder of Malan as also Criminal Appeal 7 of 1977 filed by accused 1 and 6 against their conviction and the sentence awarded to them. The first accused Sitaram alias Sitya has not filed any appeal in this Court against the High Court's judgment confirming his conviction and sentence awarded to him by the trial court under Section 302, read with Section 34 IPC for the murder of Malan. Therefore, his conviction and sentence awarded to him have become final. Accused 5 and 6 only have filed Criminal appeal 288 of 1980 and Criminal Appeal 287 of 1980 respectively against the conviction of accused 5 and the sentence of imprisonment for life awarded by the High Court under Section 302 read with Section 120-B IPC and the confirmation of the conviction and sentence awarded to accused 6 by the trial court under Section 302 read with Section 34 IPC respectively.

6. In view of the acquittal of all the seven accused by the trial court of charge No. 1 framed under Section 302 read with Section 120-B IPC and the High Court's dismissal of Criminal Appeal 605 of 1978 filed against that acquittal which, as stated earlier, was filed only against accused 2, 3, 4 and 7 and not against accused 1 and 6, insofar as it related to accused 2, 3, 4 and 7, Mr. V. S. Desai,

learned senior counsel appearing for Prakash, accused 5, contended in his arguments that the conviction of that accused alone for conspiracy under Section 302 read with Section 120-B IPC is unsustainable in law as at least two persons are required for an offence of conspiracy under Section 120-A IPC and he relied upon a decision of this Court in *Topandas v. State of Bombay* ((1955) 2 SCR 881 : AIR 1956 SC 33 : 1956 SCJ 86 : 1956 Cri LJ 138) in support of his contention. In that case the charge under Section 120-B IPC was framed against four named persons who had been arrayed as accused 1 to 4. The High Court acquitted accused 2 to 4 and convicted accused 1 alone of that charge and sentenced him, holding that he and some others had conspired together and fabricated the deed of assignment put forward by accused 1 and that accused 1 alone could not have fabricated that document. This Court allowed the appeal of accused 1 and set aside his conviction under Section 120-B IPC holding that the conviction of one of the accused alone was unsustainable in law having regard to the requirement of Section 120-A IPC. Mr. O. P. Rana, learned senior counsel appearing for the State of Maharashtra sought to support the judgment of the High Court in this case against accused 5 in view of the conviction of accused 1 and 6 for the murder of Malan under Section 302 read with Section 34 IPC. We repelled that submission of Mr. Rana in view of the fact that those two accused 1 and 6 had been acquitted by the trial court of charge No. 1 framed against them under Section 302 read with Section 120-B IPC and no appeal against their acquittal had been filed in the High Court and also the fact that accused 5 was not a party to charge No. 4 which was framed only against accused 1, 6 and 7. It was in view of this technical flaw that we allowed the appeal of accused 5 without going into the evidence regarding the merits of the case against him. Mr. Rana did not draw our attention in the course of his arguments to the fact that in charge No. 1 even the approver PW 1 is alleged to have conspired with the seven accused to commit these three murders or contend that in view of that circumstance and the finding of the High Court that the approver PW 1 also was a party to the conspiracy the conviction of accused 5 alone of the charge of conspiracy under Section 302 read with Section 120-B IPC could be sustained. We were, therefore, not called upon to consider any such question.

7. As regards accused 6 in the High Court reliance was placed by the prosecution on four pieces of evidence besides the evidence of the approver PW 1 and the retracted confession of accused 5. Those four pieces of evidence are : (1) recovery of the razor blade, article 54, pursuant to the confessional statement of accused 6, admitted under Section 27, Evidence Act. The blade was found by the Serologist to be stained with human blood of group B like that of Malan; (2) recovery of the blood-stained shirt, article 55, of accused 6 from his house : (3) evidence regarding the presence of accused of 6 along with accused 7 and PW 1 nearabout the scene of offence before and after the commission of the murder of Malan. It is the case of the prosecution that Shivram, PW 45 saw accused 6 under a vad tree and Abasaheb, PW 44, saw him in the rivulet; and (4) retracted judicial confession, Ex. 138 of accused 6.

8. The High Court found on the evidence of Munjebi, PW 50, and Hanumant Salunke, Sub-Inspector of Police, PW 53, that the blood-stained shirt, article 54 was recovered from the house of accused 6. But the Serologist was unable to determine the origin of the blood found on article 55 due to its disintegration. Therefore, the High Court did not place any reliance on this circumstance, namely, recovery of the blood-stained shirt, article 55 from the house of accused 6. The High Court found that the evidence of PWs 44 and 45 does not establish beyond reasonable doubt that accused 6 was found in the company of accused 7 and the approver PW 1 near-about the place of occurrence as alleged by the prosecution before and after the murder of Malan. But the High Court accepted the evidence of the approver PW 1 against accused 6 as reliable and the judicial confession, Ex. 138 of accused 6 as being voluntary and reliable and (both) corroborated by other evidence and it acted also upon the retracted judicial confession of accused 5 in holding that the guilt of accused 6 for the

murder of Malan had been proved beyond all reasonable doubt. We are of the opinion that the retracted judicial confession of accused 5 could not be relied upon against accused 6 in this case in view of the fact that accused 6 who had been tried along with accused 5 has been acquitted by the High Court of the charge of conspiracy under Section 302 read with Section 120-B IPC and accused 5 was not charged for the offence of murder of Malan for which only accused 1, 6 and 7 were tried. The evidence of the approver PW 1 and the retracted confession of accused 6, Ex. 138 are amply corroborated by other evidence, namely, recovery of the blood-stained razor. Article 54 and the medical evidence of Dr. Suresh (PW 31) who had conducted autopsy on the body of Malan at 4.15 p.m. on January 2, 1976. The Doctor found 9 incised wounds on various parts of the body of Malan besides a small incised injury on the right wall of the vagina outside in the middle and a small incised injury on the lower end of the vagina just at the mouth and he is of the opinion that all the 11 injuries were ante-mortem injuries which might have been caused by sharp cutting weapons, that it is possible that injuries 5 to 7 found on the forehead and right and left side of the parietal eminence were caused by hard and blunt objects that death must have been instantaneous and that injuries 1 to 7 collectively were sufficient in the ordinary course of nature to cause death. In these circumstances, we found that there is sufficient evidence against accused 6 proving his guilt in respect of charge No. 4 framed regarding the murder of Malan beyond all reasonable doubt and that he had been rightly convicted and sentenced to imprisonment for life under Section 302 read with Section 34 IPC. Accordingly, we allowed the Criminal Appeal 288 of 1980 and acquitted Prakesh, accused 5 and directed him to be set at liberty forthwith and dismissed Criminal Appeal 287 of 1980 filed by accused 6 and confirmed the conviction of accused 6 and the sentence awarded to him by the courts below.

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