

Chhotu & Ors.

Vs

State of Maharashtra

(M.K. Mukherjee, K.T. Thomas JJ)

29.08.1997

JUDGMENT

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M.K. MUKHRJEE, J.

1. This appeal is directed against the judgment and order dated June 14, 1993 passed by the Bombay High Court, Nagpur Bench, in Criminal Appeal No. 300 of 1992 whereby It reversed the order of the Additional Sessions Judge, Nagpur acquitting the four appellants (hereinafter referred to as 'A1 to A4') of the charge under Section 302/34 I.P.C. and convicted them thereunder.

2. Shorn of details the prosecution case is as follows:

(a) On February 2, 1990, at or about 6 A.M. Suresh Bhute (the deceased) along with Madhav Chauhan (P.W.1), Gangadhar Badwaik (P.W.2), Vijay Babre (P.W.3) Lok Nath Bhure (P.W.8) and others went to Nagpur airport to receive Ashok Dhawad, who was the sitting M.L.A. from Nagpur. After receiving him they went to his house at Ganeshpeth. At or about 8 A.M. Ashok Dhawad asked his supporters, including the deceased and the above witnesses, to assemble at Yeshwant Stadium at 11 A.M. as from there he would go to the Office of the Collector to file nomination forms for the next elections. They then left the place to board their respective vehicles. While P.W.8 and Suresh went to board the jeep of P.W.2, P.W. 1 and P.W.3 went towards the car of the former. When P.W.8 and Suresh were about to get into the jeep, A-1 to A-4 accosted them and started assaulting Suresh with knives. To thwart such assault P.W.8 started throwing brick-bats towards them, but in vain. being so assaulted when Suresh fell down in a pool of blood the Miscreants fled away. P.Ws.3 and 8 immediately removed him to the hospital in the jeep of P.W.2 where he was declared dead.

(b) In the meantime, Ashok Dhawad had rung up Ganeshpeth Police Station and reported the murder. On receipt of that message P.S.I. Motilal Jadhav (P.W.11) rushed to the spot and from there to the hospital. At the hospital he met P.W.8 who narrated the incident to him. Accompanied by P.W.8, P.W.11 then went to the police station and recorded his complaint (Ext. 56). P.W.11 then went back to the spot and prepared a site plan (Ext. 45). From there he seized two pairs of chappal, blood-stained blade of a knife and some bloodstained earth. He then went back to the hospital and after holding inquest upon the dead body of Suresh forwarded it for post- mortem examination. Dr. Ashok Tonk (P.W.7) held the autopsy and found 55 incised wounds on, the person of the deceased. He opined that the death was due to injuries sustained

on vital parts of the body.

(c) A 1 and A 2 were arrested on the same day while A 3 and A 4 were arrested on the day following. At the time of their arrests A 1 and A 3 were found to have injuries on their persons and A 1, A 2 and A 3 blood stains on their clothes. Therefore, they were referred to the medical officer for examination and their clothes were seized. Pursuant to the statements made by A 1 and A 2, P.W. 11 recovered two blood stained knives from a public latrine and the house of A 2 respectively. The seized clothes of the deceased and of A 1 to A 3 and the knives were sent to Forensic Science Laboratory (F.S.L.) for examination. After receipt of reports of the examination and completion of investigation Police submitted charge sheet against A 1 to A 4 and in due course their case Was committed to the Court of Session.

3. A 1 to A 4 pleaded not guilty to the charge levelled against them and contended that they were falsely implicated.

4. To prove its case the prosecution examined 16 witnesses of whom P.Ws. 1, 2, 3 and 8 figured as eye-witnesses. P.Ws. 1 and 2 however did not fully support the prosecution case, in that, they did not name or identify A 1 to A 4 as the assailants though in their statements recorded under Section 161 Cr.P.C. they named them and hence they were declared hostile.

5. From the judgment of the trial Court we find that on consideration of the submissions made on behalf of the parties, it first observed 'the fact that an incident of the type alleged by the prosecution occurred on February 2, 1990 at about 8 A.M. near the house of Ashok Dhawad and Gymnasium was not seriously disputed.' It then discussed the evidence of the two hostile witnesses namely, P.Ws. 1 and 2 and drew the following conclusion:-

"On careful consideration of their evidence it becomes crystal clear that P.Ws 1 and 2 were present to the place of the incident. The presence of P.Ws. 1 and 2 therefore, can not be doubted. Therefore, from the evidence of P.Ws. 1 and 2 it has been established that they were present at the of the incident and assault was launched on the deceased in their presence. However they have denied their earlier statement in regard to the identity of the assailants. I shall deal with this part of the evidence a little latter but, the fact remains that the deceased received stab injuries as narrated by P.W.7 Dr. Tonk, to which he succumbed on the spot." (emphasis supplied) The trial Court then posed the question whether the four accused were the assailants of the deceased and to answer the same took up for discussion the evidence of P.Ws. 3 and 8, in the context of the other evidence adduced during trial and keeping in view the comments made on behalf of the accused against reliance thereupon. The discussion ended with the following observations and the consequential order of acquittal:-

(a)P.Ws. 3 and 8 were not natural and probable witnesses as they were not residents of the locality where the incident took place;

(b)Though the murder took place near the house of Ashok Dhawad and he first gave information to the Police about the same he was not examined by the prosecution;

(c) If P.Ws. 3 and 8 had really seen the incident it was expected that they would disclose the names of the appellants as the assailants to Ashok Dhawad but in the

telephonic message given by him to the police station, the names of the assailants were conspicuously absent;

(d) P.Ws. 3 and 8 claimed that their clothes became blood stained while lifting the injured Suresh in the jeep but those were not seized at the police station, which necessarily meant that they were not there;

(e) Though P.W.3 was named as an eye witness in the statement made by P.W.8 at the Police Station (Ext.56), the former's statement under Section 161 Cr.P.C. was recorded as late as on February 5, 1990 i.e. three days after the Incident. Besides there was discrepancy and over-writings in Ext. 56 regarding the surname of P.W.3;

(f) There was apparent contradiction regarding the weapons the accused were carrying for, while P.W.8 stated in Court that they had knives before police he stated that they assaulted with knives and guptis; and

(g) In his testimony P.W.8 claimed that he pelted pieces of bricks but in his statement recorded under Section 161 Cr.P.C. he had stated that he had thrown bricks as well as stones.

6. This being a statutory appeal we have, with the assistance of the learned counsel for the parties, gone through the entire record to ascertain whether two views of the evidence are reasonably possible and whether the High Court was justified in setting aside the order of acquittal. Having approached the case and assessed the evidence from that perspective we are of the opinion that the view taken by the trial Court is wholly unsustainable. The High Court has specifically dealt with each of the above quoted reasons given by the trial Court in support of the order of acquittal and has demonstrated in a good measure that they are patently wrong. Nevertheless, we feel, that while upsetting the acquittal of A 1 to A 3, the High Court ought to have given the benefit of reasonable doubt to A 4 and upheld his acquittal.

7. Culling the evidence of P.Ws.3 and 8 we glean that they along with P.W.1, P.W.2, the deceased and others were working for Ashok Dhawad, who was a nominee for the legislative assembly elections and in the early morning of that fateful day all of them went to the airport to receive him. In a procession they returned along with him to his house in Ganeshpeth. After they waited there for a few minutes, Ashok Dhawad instructed them to assemble at Yeshwant Stadium as from there he would go to file his nomination forms for the election. For going to the Stadium when the above two witnesses along with P.Ws. 1 and 2 boarded their respective vehicles, somebody gave a call to the deceased Suresh, Suresh then got down accompanied by P.W.S. Immediately thereafter they saw A 1 to A 3 assaulting Suresh with knives while A 4 was standing there holding a knife. P.W.8 then threw few pieces of bricks to save Suresh. After assaulting Suresh continuously for 2-3 minutes A 1 to A 4 left the place. P.Ws 3 and 8 then lifted Suresh in the jeep of P.W.2 and took him to the hospital, where P.W.11 met them. Accompanied by P.W.11, P.W.8 went to the police station and lodged a report about the incident. Though both these witnesses were subjected to lengthy cross examination the appellants could not elicit any favourable answer to discredit them or to prove that they were in inimical terms with the appellants. The only suggestion that was put to them in cross examination was that being friends of the deceased they were deposing falsely but that suggestion was denied.

8. To appreciate the reasons canvassed by the trial Court for disbelieving the evidence of these two

witnesses and, for that matter, discarding the prosecution case, we may appositely first refer to the earlier quoted finding of the trial Court that in presence of P.Ws.1 and 2 an incident took place in front of the house of Ashok Dhawad on February 2, 1990 at or about 8 A.M. in which Suresh met with a homicidal death owing to 55 incised injuries sustained by him. After having believed the entire evidence of the above two witnesses, the trial Court could not have doubted the presence of P.Ws. 3 and 4 also, for P.W.1 admitted the presence of P.W.3 at the spot and P.W.2 stated "at the same time some one called Suresh Bhute. Suresh Bhute got down and went behind the jeep. Loknath Bhure (P.W.8) also accompanied him." When the presence of P.Ws. 3 and 4 stands established from the evidence of P.Ws. 1 and 2, which was found acceptable by the trial Court, the grounds put forward by i for disbelieving P.Ws. 3 and 4 namely, that they were not probable witnesses as they did not reside in the locality where the incident took place, that P.W.3 was examined under Section 161 Cr.P.C. belatedly, that the blood stained clothes of P.Ws. 3 and 8 were not seized by the police and that there was discrepancy in the surname of P.W.3 in the report lodged by P.W.8 (Ext. 56) pale into insignificance. While on this point it is pertinent to mention that the claim of P.Ws. 1,2,3 and 8 that all of them had gone to receive Ashok Dhawad from the airport and after they came back to his house that the assault took place there was not disputed by the defence. That necessarily means that all of them were the most natural and probable witnesses to an incident that then took place near his house, notwithstanding the fact that they were not residents of that locality. It also requires to be, mentioned here that if the Investigating Officer failed to seize the blood stained clothes of P.Ws.3 and 8 and to promptly examine P.W.3, whose name as an eye witness was disclosed immediately after the incident, it only indicates remissness on his part but the evidence of P.Ws.3 and 8 was not in any way impaired thereby.

9. Coming now to the contradictions in the evidence of PW 8 referred to by the trial court we find that those were brought to the notice of the High Court and in dealing with the same it observed:-

"P.W.8 Loknath in his substantive testimony has confined the assault by knife. Contradiction suggested was the assault by knife as also by gupti. Similarly he has confined his gesture of pelting the pieces of bricks at the assailants. Contradiction pointed out is that he referred pelting of stones and bricks. The learned Judge has viewed this discrepancy seriously and dislodged the claim of these witnesses. The Contradiction or omission as brought and took into account are trifle. It does not make such a material difference so as to discard their entire claim. Moreover, P.W.8 Loknath has explained that he could not know the exact difference between Gupti and knife."

10. As we are in complete. agreement with the above observations of the High Court this aspect of the matter need not detain us any further. We, however, hasten to add that it is the comments made by the trial Court regarding the evidence of P.Ws.3 and 8 which are patently contradictory - and not their evidence. In paragraph 9 of the judgment while commenting upon the contradictions in the evidence of P.Ws 3 and 8 the trial Court made the following observations:-

"No doubt, contradiction in the evidence of P.W. 3 and 8 is not relating to the material point of the incident, but it created doubt as to the presence of P.W. 3 and 8 at the time of incident. Then again in paragraph 11 it made the following further observations:-

"The evidence of P.W. 3 and 8 is consistent and corroborative to the extent of assault." (emphasis supplied) For the foregoing discussion we unhesitatingly hold

that the trial Court was not at all justified in discarding the cogent and consistent evidence of P.Ws. 3 and 8, who were material, probable and disinterested witnesses.

11. The next question that requires to be looked into is whether the trial Court was justified in disbelieving the prosecution case for non-examination of Ashok Dhawad who first informed the police about the incident over telephone. From the testimonies of the eye witnesses we get that immediately after the assault the deceased was taken to the hospital by P.Ws. 3 and 8 in the jeep of P.W.2. There was no occasion for them, therefore, to talk to Ashok Dhawad about the assault, much less about the assailants. This apart, there is nothing on record to indicate that Ashok Dhawad had seen the incident. For the self same reasons the observation of the trial Court that if P.Ws.3 and 8 had really seen the incident they would have certainly disclosed the name of the assailants to Ashok Dhawad is wholly unsustainable.

12. From the impugned judgment we further notice that In convicting the appellants the High Court relied upon not only the evidence of P.Ws.3 and 4 but also the report of the F.S.L. which indicates the presence of human blood of group 'B' on the clothes which A 1 to A 3 were wearing at the time of their arrest as well as on the clothes the deceased had on his person and the fact that injuries were found on the palm and fingers of A 1 and A 3. We need not, however, delve into this aspect of the matter as we find that the evidence of P.Ws. 3 and 8 coupled with the, evidence of the doctor conclusively proves that owing to assault by A 1 to A 3 with knives Suresh met with his death.

13. That brings us to the role played by A 4 in the incident. According to P.Ws.3 and 8 at the time of assault he was standing with a knife. From the cross examination of P.W.3 we however find that before the Investigating Officer he did not state that A4 was holding a knife in his hand though he spoke of his presence. Even if we proceed on the assumption that A 4 was there with knife still we feel that we will not be justified in reaching the firm conclusion that he shared the common intention with A 1 to A 3 to commit the murder. As earlier noticed the deceased had sustained 55 incised injuries on his person which Indicates that A 1 to A 3 had given repeated blows upon him for sometime. Considered in that context it was expected of A 4, if really he was sharing the common intention of the other three to commit the murder, to assault the deceased with the knife he was allegedly carrying. He is, therefore, entitled to at least the benefit of reasonable doubt.

14. On the conclusions as above we uphold the convictions of Chhotu @ Umesh (A 1), Raimu Dawre (A 2) and Deepak @ Balya (A 3) under Section 302/34 I.P.C. and sentences of imprisonment for life awarded to them by the High Court. We, however, set aside the conviction of Prashant Jadhav (A 4) for the above offence and acquit him. Let him be released forthwith unless wanted in connection with some other case. The appeal is thus disposed of.