L.L. Kale

Vs

State of Maharashtra and Others

Criminal Appeal No.1130 of 1997

(G. B. Pattanaik, M. B. Shah JJ)

30.11.1999

JUDGMENT

PATTANIK, J.:-

1. The appellant stood charged along with two other accused persons under Section 147, 148, 302 307, 326 and 324 read with Section 34 of the Indian Penal code for having caused the death of Shankar on 2-2-1981 at 11 a.m. and injuring PWs 2, 5 and 7 in course of the said incident. The session trial was registered as session Case No. 94 of 1984. Prior to this case, in respect of the same incident, one Ankush Landya Kale was tries in Session Case No. 279 of 1982 and was acquitted by the learned Sessions Judge. The said order of acquittal became final, not having been challenged in any higher forum. Apart from these four accused persons, the prosecution alleged that there was another accuses who is still absconding and has not been arrested. So far as the three accused persons, who stood their trial in the case in hand are concerned, the learned Sessions Judge convicted the present appellant under Section 302 and sentenced him to imprisonment for life. So far as the charge under Sections 302/34 or in the alternative Sections 302/149 is concerned, the learned Section 34 are concerned, the learned session judge acquitted all the accused person. He however convicted all the three accused persons under Section 148 and sentenced them to rigorous imprisonment for one year thereunder and also convicted them under Section 324 read with section 149 IPC and sentenced them to undergo rigorous imprisonment for 1 1/2 years each and a fine of Rs 300, in default to suffer further RI for two months. On appeal, the High court affirmed the convection of the appellant under Section 302 as well as under section 324 read with section 149, but modified the sentence to the period already undergone. The conviction and sentence passed by the Sessions Judge under section 148 IPC, however was quashed and hence, the present appeal by the appellant, L.L. Kale alone.

2. Mr. V. A. Mohta, the learned senior counsel appearing for the appellant does not assail the conviction and sentence of the appellant under Section 324 read with section 149n IPC but has seriously assailed the conviction of the appellant under Section 302 and submitted that under the prosecution case as against the appellant has been proved beyond reasonable doubt.

3. The prosecution case in a nutshell is that complainant and the accused persons are related to each other and the deceased Shankar was uncle of PW 1 Govind. The accused persons are all brothers and it is alleged that PW 1 and the deceased used to make false complaints of theft of crops against the accused persons, on which score, the police had raided the house of the accused persons on several occasions. On 1-2-1981, as Govind, PW 1 did not return to his house his wife and PWs 2, 5 and 7 went to Shankar, who was then working in the field. Shankar also came with them and made some query and learnt that the accused persons had taken away Govind with them. They then

approached PW 3 for his help to trace out Govind but the said PW 3 directed them to go to the police and inform the police about the same. When the police was preached, it was learnt that both Govind and assessed Ankush were with the police and therefore, they went to the police station and brought Govind with them. On 2-2-1981, at about 5 a.m., while Govind was returning him from his field, these accused persons met him on the way. There was a scuffle and then Govind was taken to on Kumbhar Guruji and Ankush informed the said Kumbhar Guruji that Govind was caught red-handed, while stealing corn from his field but sometime after both Ankush and PW 1 came on foot and on the way met the other accused Persons. The prosecution alleged that the accused persons, finding Govind alone, started assaulting him with different weapons like gut and this was seen by deceased Shankar, PW 2, PW 5 and PW 7, who came on the railway line. Seeing these people, the present appellant who was armed with a Gupti, rushed towards the deceased and gave a blow on his chest and two other bows on the back and left side of the head. The other accused persons also started assaulting PWs 2, 5 and 7, on account of which, they were also injury. Shankar fell down on getting the fatal blows and died at the spot. Govind, PW 1 wanted to carry the deceased to the dispensary but the accused persons prevented him on the plea that they would pay Rs 3000, if the dead body was thrown into Ujani Dam. This was however not acceptable to PW 1 and, therefore, PW 1 carried the dead body to Bhigwan Dispensary and he was accompanied by PWs 2, 5 and 7. PW 1 then went to the police station and narrated theatre incident which was treated as FIR Exh. 9 and the police started investigation. On completion of investigation, the police submitted the charge-sheet. As has been state earlier thought the charge-sheet was filed against the five accuse persons, only accused Ankush was tried in Sessions Trial No. 279 of 1982 and the three tours were tried in Session Trial No 94 of 1984, out of which the present appeal arises. Though the prosecution examined a number of witnesses but the prosecution 5 and 7 were injured and the evidence of Dr D.B. Tavare, who conducted the autopsy over the dead body of Shankar. According to the medical evidence the deceased had four injuries and all the injuries were ante- mortal in nature and death was on account of Injuries 3 and 4 namely:

> "3 Deep punctured wound in xiphoid process measuring 3 ½ cm x 1 ½ cm 5 cm deep by putting probe.
>
> 4. Incised deep wound below the lower end of scapula measuring 1 ½ x ½ x 7 cm probe."

4. The doctor had further opined that these two injuries could be cause by a sharp-edged weapon like a gupti. The Aforesaid medical evidence unequivocally indicates, that Shankar Sayan Bhosal, met a homicidal death and the said conclusion has not been assailed in any forum. The learned Session judge, on elaborate discussion of the evidence of the evidence of four eyewitnesses came to the conclusion that PW 1 Govind was not present at the Time of incident and, therefore, his evidence cannot be pressed into service for bringing home the charge against the accused persons. He however, relied upon the evidence of the three injured witnesses PWs 2, 5 and 7 came to the conclusion that it was appellant (L. L. Kale), who caused the injured witnesses and their evidence establishes the charge of murder against the accused appellant beyond reasonable doubt. He, therefore convicted appellant of the charge under Section 302 IPC. ON an appeal being carried, the learned Judges of the High Court without any discussion of the evidence on record abruptly jumped to the conclusion that the conviction of the appellant under Section 302 remains unassailable.

5. At the outset, and after going through the impugned judgment of the High Court, we have no hesitation to come to the conclusion that the learned Judges have failed to discharge their duty of an appellate criminal court inasmuch as the evidence on record has nor been looked into, nor has there

been any appreciation of the evidence, excepting, affirming the conclusion of the learned Session Judge. Neither the credibility of the witnesses has been examined nor has the appellate court drawn its concussion, after examining the evidence on record. The appellate court while sitting in appeal against the accused has been established beyond all reasonable doubt. To say the least. The impugned judgment of the High court suffers from proper (sic improper) judicial approach in a case of murder.

6. Mr. Mohta, learned Senior counsel appearing for the accused appellant in assailing the conviction under section 302 submitted with force that the evidence of PWs 2, 5 and 7 cannot be held to be truthful and reliable in view of their earlier statements made in Sessions Trial No. 279 of 1982, wherein the accused Ankush was being tries and on being duly confronted with such earlier statement, the witnesses have offered no explanation for reconciling the two versions and, therefore the concoction being based on such infirm evidence, the said cannot be upheld.

7. Dr. Rajeev B. Masodkar, appearing for the state on the other hand contended that notwithstanding the alleged inconsistency between the statement of the witnesses in the earlier sessions trial, and the; present proceeding, the role ascribed to the appellant has been consistent and therefore, the conviction of the appellant remains sunassailable.

8. In view of the rival submissions at the Bar, and in view of the fact that the high Court itself has not appreciated the evidence on record, we have Ourselves examined the evidence of the aforesaid three injured witnesses PWs 2, 5 and 7. PW 7 though in his statement-in-chief, had stated that accused Layalasha (the appellant), gave a blow with the gupti on the chest of Shankar and another blow with the gupti on the back of Shankar, as a result of which Shankar fell down but in the earlier trial in Sessions Case No. 279 of 1982, he not stated so and on the other hand had stated that accused Ankush gave two gupti-blows to Shankar, one on the stomach and other on the back side of the ear. On being confronted, he denied having stated so in the earlier trial and further states that he cannot assign any reason as to why it has been so recorded. PW 7 having been duly confronted with his former statement, wherein a completely different picture had given, it is difficult of place and reliance on any part of the evidence of the said witness. In other words, while in the trial against Shankar the very witness had ascribed the role of giving two blows by the gupti to Ankush, in the present case he ascribed the same role the appellant. This in our opinion makes the witness wholly unreliable and the courts below committed error in our opinion makes the witness wholly unreliable and the courts below committed error in relying upon such testimony to bring home the charge against the accuse appellant. It may be notices at this stage that the medical evidence was categorical to the effect that only two injuries on the deceased could be caused by a gupti, namely Injuries 3 and 4. PW 1 who also claimed to be an eyewitness to the occurrence, had indicated in her examination-in—chief, that appellant was armed with a gupti and Ankush was armed with a stick and it is appellant layalasha who gave two blows by means of a gupti, one on the chest and another on the head of Shankar, as a result of which Shankar fell down. She was confronted with her evidencing the earlier session case, wherein she has not stated about the accused Layalasha (appellant), giving Ankush gave the blows with the gupti, one on the back and the other on the back side of the ear and according to her she cannot assign any reason as to why the resold in the earlier proceeding is different from what she has stated. Needless to mention that the witness was being examined in the present case. Looking at her statement in the earlier pocking, as confronted by the defense in the present case, it would transpire that the witness has given a clear go-by to what she had stated in the former proceeding inasmuch as while she had stated in the former proceeding that it was the accused Ankush who gave a gupti- blow on Shankar but in the present case she had stated that it is the appellant Layalasha, who gave the gupti-blows. In this view of the matter, in our

considered opinion, no reliance can be placed on the said testimony. The only other evidence is that of PWs 5, but she also stands on the same e footing Though in the emanation-in-chief in the present proceeding, she has stated that the appellant rushed towards them and gave blows with the gupti on the chest of Shankar but in the earlier statement made in Session Case No. 279 of 1982, with which had been confronted, shed had categorically stated that it is Ankush, who gave the blows with the gupti, on eon the back side and the other on the back side of the right ear of Shankar. Apart from the fact that in the earlier statement, the gupti-blows on the deceased were ascribed to Ankush, event in respect of the other injured persons also the witness had made prevaricating statements, with which she was duly confronted and no explanation had been offered for the same. On going through the examination of this witness, we have no hesitation to come to the conclusion that the witness is unreliable and the evidence cannot be pressed into service in bringing home the charge against the accused appellant. We are not discussing the evidence of PW 1 on whom, the learned Session Judge did not rely upon and even the learned counsel for the respondent also in course of arguments had stated that he does no press into service the evidence of the said witness. In the aforesaid premises and in view of our conclusion on the trustworthiness of the three injured witnesses 2, 5 and 7, it is difficult for us to hold that he prosecution case can be said to have been proved beyond reasonable doubt. Consequently, the conviction and sentence of the appellant of the charge under Section 302 IPC cannot be sustained and we accordingly set aside the same.

9. This appeal is allowed. The appellant be set at liberty forthwith, unless required in any other case.