

SUPREME COURT OF INDIA

Arun Bhanudas Pawar

Vs.

State of Maharashtra

C.A.No.178 of 2006

(P. P. Naolekar and Lokeshwar Singh Panta,JJ.)

11.01.2008

JUDGMENT

P. P. Naolekar,J.

1. The appellant has filed this appeal against the judgment and order dated July 26, 2005 passed by the Division Bench of the High Court of Judicature at Bombay, Bench Aurangabad, confirming the conviction and sentence for life in respect of offence punishable under Section 302 of the Indian Penal Code [for short the IPC] and fine of Rs. 500/- with default clause to undergo R.I. for six months awarded by the IVth Additional Sessions Judge, Jalgaon, in Sessions Case No. 48/1995.

2. Brief facts, which led to the trial of the accused, are as follows:-

“In the year 1994, appellant Arun Bhanudas Pawar was residing in Room No. 12, Ravi Building, Gendalal Mills, Jalgaon. Prahlad P.W. 1 and Narayana-P.W.4 were working as Watchmen at Government ITI College, Jalgaon during the relevant time. On 26.7.1994 at about 22.00 hrs., when P.Ws.- Prahlad and Narayana were taking night round of the College premises, P.W.-Prahlad heard some noise near a nallah below a tree. He lighted torch and noticed 3-4 persons running away from that place. P.W.-Prahlad then went near the spot and found one person lying on the ground in an injured condition. The injured person was having bleeding injuries on his abdomen. On enquiry, the injured person told his name Raju Sonwane. Injured Raju allegedly told P.W.-Prahlad that on account of some previous enmity he was assaulted by his relative Arun Bhanudas Pawar and his two associates namely, Walmik and delinquent juvenile Vilas. P.W.-Prahlad then called P.W.Narayana, Watchmen, and Popat P.W.5 - Peon to the spot and asked them to inform about the incident to the police at Zilla Peth Police Station. Accordingly, a complaint (Ex. 39) came to be lodged by P.W.-Prahlad at Police Station.”

3. The police reached at the scene of occurrence and took injured Raju Sonwane to the Civil Hospital, Jalgaon. Dr. Nitin P.W.9 examined injured Raju and found the following injuries on his person:-

“(i) Incised wound of size 1 X < on his abdomen on right side;

(ii) Incised wound of similar size on the left side of the abdomen; and

(iii) Incised wound on the middle of abdomen at lower region of size = X =. The third injury reported to be grievous in nature was deep upto peritoneal region. The injured Raju was subjected to operation by Dr. Nitin.”

4. P.S.I., Kulat P.W.15 conducted the investigation of the crime. On 27.07.1994, the Investigating Officer prepared spot panchnama (Ex.22) in the presence of Yashwant - P.W.3. A pair of slippers and blood stained soil were collected from the spot. Some police constables informed Sundarbai P.W.12, mother of injured Raju that her son had been admitted in an injured condition in the Civil Hospital at Jalgaon. P.W.-Sundarbai proceeded to the Civil Hospital, Jalgaon, where she noticed her son Raju lying on the bed in unconscious condition. It was alleged that after some time, Raju regained consciousness and disclosed to P.W.-Sundarbai the name of the appellant who assaulted him with a knife. Raju further informed his mother that Vilas and Walmik had caught him. P.S.I. Kulat reached at the Civil Hospital and noticed that Raju was lying on the bed in an unconscious condition. He issued letter of request to the Executive Magistrate calling the latter to reach at the hospital immediately for recording the statement of injured Raju. The Medical Officer opined in writing that injured Raju was not in a fit condition to give his statement.

5. On 28.07.1994, Arun, Vilas and Walmik were arrested by the police. On the same day, accused Arun allegedly made a disclosure statement to the police expressing his willingness to point out the place where the weapon of offence and clothes were concealed by him. Arun took the police and the panch witness to Room No. 12, Ravi Building, Gendalal Mills, and produced one dagger and white coloured jean trouser and ash coloured shirt from the iron cupboard. The articles were seized vide panchnama (Ex. 54). On 31.07.1994, injured Raju unfortunately succumbed to his injuries.

6. Dr. Milind Kothe P.W.13 conducted post mortem examination on the dead body of deceased Raju and noticed the following injuries:-

“(i) Sutured wound curved 2 in epigastria region;

(ii) Sutured wound over abdomen in midline, 7;

(iii) Sutured wound 1 at both ankles medial side; and Bedsore 2 X 2 at scral region.”

7. On internal examination, Dr. Kothe found the brain of deceased Raju congested and showed septicemia patches. Both lungs also showed septicemia patches. There was sutured wound over the stomach 1 in size. Large intestines were sutured at three places 2 in size and purulent matter was showing septicemia patches and were congested. All the injuries, according to Dr. Milind Kothe, were ante mortem and corresponding to the external injuries. According to the opinion of Dr. Kothe, the cause of death of Raju was septicemia due to the above said injuries. Injury Nos. 2 and 3 were surgical. On 15.8.1994, the sample of blood, clothes produced by accused Arun and other articles seized by the Investigating Officer on the spot were sent to the Chemical Examiner at Aurangabad for chemical analysis.

8. After completion of the investigation and after receipt of the post mortem report and the report of the Chemical Analyser, charge sheet was filed against Arun and Walmik in the court of the Magistrate. Vilas, being juvenile offender, was tried by the Juvenile Court. The Judicial Magistrate committed the trial of appellant Arun and Walmik to the IVth Additional Sessions Judge, Jalgaon, who framed the charge against them for an offence punishable under Section 302 read with Section 34 of the IPC. The prosecution examined as many as 15 witnesses in support of its case. In their statements recorded under Section 313 of the Code of Criminal Procedure, both the accused have denied their involvement in the crime and pleaded false implication in the case by the police.

9. The case of the prosecution rests on circumstantial evidence. The prosecution relied upon the following circumstances:-

“(i) Motive

(ii) Last seen

(iii) Oral dying declaration and

(iv) Recovery of weapons and clothes at the instance of the appellant Arun”.

10. The trial court, on appreciation of evidence, held that out of the above said circumstances, the prosecution has been able to establish circumstances (ii) and (iii) against the appellant-Arun Pawar and, accordingly, convicted and sentenced him as aforesaid for the offences under Section 302 of the IPC. However, as no evidence has been led by the prosecution against the accused Walmik, therefore, he has been acquitted of the charge. The accused-appellant preferred an appeal under Section 374(2) of the Code of Criminal Procedure before the High Court and the High Court, as stated above, confirmed the conviction and sentence imposed upon the appellant by the trial court. The appellant is, thus, before us.

11. Shri Chinmoy Khaladker, learned counsel appearing on behalf of the appellant, assailed the judgment of the High Court inter alia contending:-

(i) That there was no direct evidence against the appellant and the trial court as well as the High Court have committed gross error in convicting the appellant on the basis of oral dying declaration of the deceased allegedly made to his mother which is not satisfactorily and firmly established.

(ii) That there is no evidence at all of last seen of the deceased with the accused on the day and at the relevant time of occurrence.

(iii) That no motive of any kind whatsoever has been established by the prosecution from the evidence on record against the appellant.

12. Mr. Sanjay V. Kharde, the learned counsel for the State, on the other hand, submitted that the reasons given by the trial court as well as by the High Court for recording the order of conviction of the appellant are based upon proper appreciation of evidence led by the prosecution in the case. According to him, the evidence of Sundarbai - P.W.12, mother of the deceased, that before his death deceased Raju had disclosed to her the name of the appellant who had stabbed him and further evidence that the relations between the deceased and the appellant were strained, is cogent, clear and satisfactory with the hypothesis of the guilt of the accused.

13. Before advertng to the arguments advanced by the learned counsel, we shall at the threshold point out that in the present case there is no direct evidence to connect the accused in question with the offence and the prosecution rests its case solely on circumstantial evidence. This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following tests:-

“(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) Those circumstances should be of definite tendency unerringly pointing towards guilt of the accused;

(iii) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(iv) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence”.

14. *Gambhir v. State of Maharashtra* See also *Rama Nand v. State of Himachal Pradesh*² *Prem Thakur v. State of Punjab*³ (1982) 3 SCC 462 : (AIR 1983 SC 61), *Earabhadrapa v.*

*State of Karnataka*⁴ *Gian Singh v. State of Punjab, 1986 Suppl*⁵ *Balvinder Singh v. State of Punjab*⁶.

15. as far back as in 1952 in *Hanumant Govind Nargundkar v. State of M.P*⁷ it was observed thus:

“It is well to remember that in case where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused”

16. A reference may be made to a later decision in *Sharad Birdhichand Sarda v. State of Maharashtra*⁸. Therein, while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defense or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are (SCC pp. 185, para 153):

“(i) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(ii) 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;

(iii) The circumstances should be of a conclusive nature and tendency;

(iv) They should exclude every possible hypothesis except the one to be proved; and

(v) 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.”

17. We may also make a reference to a decision of this Court in *C. Chenga Reddy v. State of A.P.*⁹ wherein it has been observed thus: (SCC pp.206-207, para 21)

“In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.”

18. Bearing the above principles of law enunciated by this Court, we shall scrutinize scrupulously and examine carefully the circumstances appearing in this case against the appellant.

19. There are certain salient and material features in the present case, they being that the deceased Raju had succumbed to his injuries on 31.07.1994 in the hospital which he received on 26.07.1994, the alleged day of incident. Dr. Nitin conducted operation of injured Raju immediately after he was brought to the Civil Hospital, Jalgaon. The Investigating Officer, Kulat P.W.15, on receipt of the First Information Report (Ex. 39) allegedly lodged by P.W.-Prahlad in the Police Station, immediately proceeded to the place of occurrence and conducted investigation at the spot. After sometime, he went to the Civil Hospital where injured Raju was admitted. It is the evidence of the Investigating Officer that when he reached at the hospital, he noticed injured Raju to be in unconscious condition and, therefore, he could not record his statement. The star witness of the prosecution, namely, P.W.-Prahlad, in his deposition has not supported the case of the prosecution and, accordingly, he was declared hostile. Despite lengthy searching cross-examination by the learned Public Prosecutor, no such fact could be elicited from his evidence which could be helpful to the prosecution case. He denied the suggestion of the Prosecutor that at the place of occurrence injured Raju had made an oral declaration to him naming the appellant and his two other associates who attacked and caused fatal injuries to him.

20. The evidence of P.W.-Prahlad would clearly show that he has not identified the appellant, who inflicted injuries on the body of deceased Raju on the night of 26.07.1994. It has come in the evidence of this witness that on the day of occurrence he was working as a Watchman in the Government ITI College at Jalgaon along with P.W.-Narayana. He heard some noise at about 10.30 p.m. from one corner of the College premises. He switched on his torch in the direction from where the noise was emanating and saw one person lying on the ground. He noticed 4-5 persons running from the scene of occurrence. The person, who was lying on the ground, had bleeding injuries. This witness categorically deposed that he did not ask anything from the injured nor the injured told him anything. He specifically denied the suggestion of the prosecution that the injured disclosed to him that it was the appellant and his two other associates who had inflicted knife injuries on his person. He also denied the suggestion of the prosecution that he lodged a Report (Ex. 39) in the Police Station about the occurrence.

21. Ashabai - P.W.7, sister of the deceased Raju, stated that when she visited the hospital she found her brother in unconscious condition. The trial court has rejected her evidence and, in

our view rightly so, as she was not found to be a truthful witness. The defence has duly proved in her cross-examination that no such statement was ever made by her to the Police and as such her version that injured Raju disclosed the name of the appellant to her as an assailant cannot be accepted.

22. The trial court as well as the High Court have mainly relied upon the evidence of P.W.-Sunderbai, mother of deceased Raju, holding the appellant guilty of the offence on the basis of the alleged oral dying declaration made to her by the deceased. It is her evidence that the appellant used to ask Raju to withdraw the amount outstanding in the account of his deceased brother Ramdas. Raju refused to oblige the appellant and it was on account of that reason that the appellant used to threaten Raju. She stated that two days prior to the incident, the appellant had come to her house and invited Raju for lunch, but at the relevant time Raju was not present at home. On the day of the incident till late night Raju did not return home and at midnight the police came and informed her regarding Raju's admission to the hospital in an injured condition. She categorically deposed that when she went to the Civil Hospital at Jalgaon she found her son in unconscious condition. However, as per her version later on Raju regained consciousness and informed her that it was the appellant who assaulted him with knife and his two other associates, namely, Vilas and Walmik, had caught him. In her cross-examination, she unequivocally admitted that Raju had never gone with the appellant for taking meals. In order to appreciate the evidence of P.W.-Sunderbai, it is of paramount importance for the prosecution to establish that injured Raju was in a conscious and fit mental condition to make the dying declaration to his mother. The evidence of P.W.-Sunderbai that Raju regained consciousness and named the appellant and two other associates, who were responsible for inflicting injuries on his person, does not find support from the testimony of P.W.-Abasaheb, the Investigating Officer, who was also present in the hospital when the mother of the deceased visited the hospital and saw Raju lying on the bed after he was operated by Dr. Nitin.

23. The High Court has clearly recorded a finding that P.W.-Prahlad did not support the prosecution case and, therefore, the oral dying declaration allegedly made to him and the report (Ex.39) could not be said to have been duly proved by the prosecution. The statement of P.W.-Sunderbai clearly proves that when she reached at the hospital, there were 2-3 more persons present near injured Raju. It appears from the record that those 2-3 persons were some police officials and hospital staff. It has come in the evidence of Dr. Nitin that considering the critical condition of Raju, the first step to give immediate medical aid to him was to conduct operation for treating his injuries. He stated that the effect of anesthesia made the injured Raju impossible to speak for several hours. P.W.-Ashabai visited the hospital on the following day of the incident when she noticed oxygen tubes having been inserted in the nostrils of injured Raju. It seems that injured Raju was in critical condition and his condition was worsening gradually and within 2-3 days from the day of the occurrence Raju unfortunately succumbed to the injuries. It is the evidence of the Investigating Officer, Kulat, that he issued a memo to the Executive Magistrate to visit the hospital and record the dying declaration of the deceased Raju, but the post operative condition of injured Raju was critical and he was not in a fit condition to make the statement. P.W.-Sunderbai met the injured Raju

in the hospital on the following day of the incident at about 3.30 P.M. when Dr. Nitin had already conducted operation of the injured.

24. The evidence of P.W.-Sunderbai further proves that Dr. Surwade was present by the side of injured Raju when he made oral dying declaration to her. Dr. Surwade has not been examined by the prosecution to corroborate the version of P.W.-Sunderbai, mother of the deceased. P.W.-Sunderbai is an interested witness and her testimony without corroboration from independent witness including the medical officer cannot be blindly accepted to prove that deceased Raju had regained consciousness when she met him in the hospital and named the appellant - Arun to be an assailant along with his two other associates who inflicted knife injuries on the body of the deceased. Her testimony cannot be accepted for another reason that she has not stated in her statement recorded by the police under Section 161 of the Code of Criminal Procedure that before his death injured Raju named the appellant as an assailant and it was for the first time in the Court that she made the said statement. It is well-settled law that the oral dying declaration made by the deceased ought to be treated with care and caution since the maker of the statement cannot be subjected to any cross-examination. In the present case, admittedly, the alleged dying declaration had not been made to any doctor or to any independent witness, but only to the mother who, as stated above, arrived at the hospital only on the following day at about 3.30 p.m. when Dr. Nitin had already operated Raju for his injuries and thereafter he was lying on the bed in unconscious condition with oxygen tubes having been inserted in his nostrils. The prosecution has not brought on record any medical certification to prove that after operation the deceased was in a fit condition to make the declaration before his mother. The evidence of alleged oral dying declaration by the deceased Raju to his mother P.W.-Sunderbai relied upon by the prosecution and accepted by the trial court and the High Court, in our view, was not cogent, satisfactory and convincing to hold that deceased Raju before his death was in a fit condition to make oral declaration to his mother.

25. The prosecution has not led any evidence to prove the identity of the appellant and his two other associates, namely, Vilas and Walmik. P.W.s- Prahlad, Narayana and Popat are the independent witnesses who, as per prosecution version, saw Raju in an injured condition near ITI College premises on the night of the occurrence. These witnesses have not identified the appellant on the spot. No identification parade has been conducted by the prosecution to identify the accused persons. P.W.-Narayana, who, according to the prosecution, was the other witness present at the spot of the occurrence, has also not supported the prosecution case and he has been declared hostile by the prosecution. He has been cross-examined at length by the Public Prosecutor but nothing favourable to the prosecution has been elicited from his evidence. It has come in the case paper (Ex.37) of injured Raju prepared by the staff of the Civil Hospital, Jalgaon that on medical examination Raju was found having taken alcohol on the day of occurrence. The trial court has rejected the evidence of the prosecution in regard to the recovery of the weapon of offence and the clothes allegedly recovered at the instance of the appellant by the police from Room No.12, Ravi Building, Gendalal Mills, Jalgaon, where the appellant was residing before his arrest.

26. The prosecution has not led any positive, cogent and convincing evidence to prove the motive against the appellant to commit murder of Raju. P.Ws.-Prahlad, Narayana and Popat, the independent witnesses, have not supported the case of the prosecution to prove that it was the appellant who had run away from the scene of occurrence after assaulting the deceased. The entire evidence led by the prosecution is improbable, weak and slender and no conviction of the appellant on such evidence can be maintained.

27. Having given our careful consideration to the submissions made by the learned counsel for the parties and in the light of the evidence discussed hereinabove and in the background of the principles highlighted above, we are of the view that the prosecution has failed to prove that it was the appellant and none else who caused the death of Raju. The evaluation of the findings recorded by the trial court, which are accepted by the High Court, suffer from manifest error and improper and mis-appreciation of the evidence on record. Hence, we hold that the appellant is entitled to the benefit of doubt.

28. In the result, there is merit in this appeal and it is accordingly allowed. The judgment and order dated 26.07.2005 of the High Court of Judicature of Bombay, Bench at Aurangabad, passed in Criminal Appeal No. 134 of 1999, upholding the judgment and order dated 16.03.1999 of the learned IVth Additional Sessions Judge, Jalgaon, in Sessions Case No.48/1995, convicting and sentencing the appellant for an offence punishable under Section 302 of the IPC is set aside and the appellant, accordingly, shall stand acquitted of the charge. The appellant-Arun Bhanudas Pawar, who is presently lodged in jail, shall be set free forthwith, if not required in any other case. Fine imposed by the trial court, if realised from the appellant, shall be paid back to him.

Cases Referred

¹(1982) 2 SCC 351 AIR 1982 SC 1157

²(1981) 1 SCC 511

³AIR 1981 SC 738

⁴(1983) 2 SCC 330 AIR 1983 SC 446

⁵SCC 676 AIR 1987 SC 1921

⁶(1987) 1 SCC 1 AIR 1987 SC 350

⁷AIR 1952 SC 3443

⁸(1984) 4 SCC 116 AIR 1984 SC 1622

⁹(1996) 10 SCC 193