CASE NO.:
Appeal (crl.) 1086 of 2006

PETITIONER:
Subhash Maruti Avasare

RESPONDENT:
State of Maharashtra

DATE OF JUDGMENT: 19/10/2006

BENCH:
S.B. Sinha & Dalveer Bhandari

JUDGMENT:
J U D G M E N T
(Arising out of S.L.P. (Crl.) No.710/2006)

S.B. Sinha, J.

Leave granted.

Appellant herein has been found guilty of commission of murder of one Baban alias Babdya along with one Sunil Maruti Avasare, Rakesh Tukaram Pawar, Jitendra Bappa Barawkar and Umesh Babanrao Khutwad who also took part in the assault, however, were convicted under Section 323 of the Indian Penal Code.

The first informant is one Ratnabai Shivaji Pawar, the mother of the deceased. She was a maid servant. Her husband was working in a quarry. The deceased was working as a fitter.

Appellant herein is known to the family of the deceased. He is a friend of the accused No.1. He went to the house of the deceased and inquired his whereabouts. He was not there at that time. When the deceased came back to his house, his mother informed him thereabout to which he had allegedly disclosed that the accused No.3, Rakesh Tukaram Pawar had asked him to provide a bottle of bear. He had refused whereafter, he was slapped. An attempt was also made to assault him with a knife, but he had run away.

On the day of incident, i.e., 30.10.1996 at about 6.30 p.m., the deceased had gone to a clinic of a doctor with his wife Renuka for medical check-up of his son Umesh who was ailing. After some time Renuka came back running to the house and informed the informant (P.W.1), that some persons have picked up a quarrel with her husband in front of the hospital of Dr. Babar. The informant ran to the spot and found that the accused No.2, Jitendra Bappa Barawkar had caught hold of the hands of the deceased from his back side; whereas accused No.1, Umesh Babanrao Khutwad was holding a knife in his hand. Appellant herein caught hold of the neck of the deceased and instigated the other accused to kill him. Accused No.1 stabbed the deceased, whereupon he fell down. Accused No.4, Sunil Maruti Avasare, and accused No.5, Rakesh Tukaram Pawar, also assaulted him with kicks and fist blows. The first informant tried to intervene. She was asked not to do so. Her husband, Renuka and son-in-law also came there. The accused persons ran away in the meanwhile. The deceased was taken to the local hospital and then carried to Sassoon Hospital. He breathed his last there.

Before the learned Trial Judge, the prosecution, apart from examining the first informant, examined 15 other witnesses. P.W.10, Rajendra Bangal, was the Medical Officer. He conducted the post-mortem examination of the deceased on 1.11.1996 and found 7 external injuries and 5 internal injuries.

The cause of death was said to be "traumatic and hemorrhagic shock caused by stab injuries."

The learned Trial Judge relied upon the testimonies of P.W.1, mother of the deceased and passed a judgment of conviction and sentence.

Appeals preferred by the accused were disposed of by the High Court directing :

"1. Appeals filed by the accused Nos.1, 2 and 3 are dismissed. Their conviction and sentence is maintained.

2. Appeals filed by the accused Nos.4 and 5 are partly allowed. Accused Nos.4 and 5 are acquitted of the offence under Section 302 of IPC but they are sentenced under Section 323 of IPC and sentenced to suffer R.I. for one year and fine of Rs.1000/- in default R.I. for two months.

3. All the accused to surrender to the concerned Authorities within four weeks from today. After they surrender their bail bonds shall stand cancelled. If the accused do not surrender, the trial court may take proper steps to send them to custody for undergoing sentence.

4. Accused will be entitled for set off as per the Rules."

Contention of Mr. K. Radhakrishnan, learned Senior Counsel for Appellant, in regard to the evidence of P.W.1 was that it was not possible for her to witness the occurrence as she had been informed about the incident by P.W.2, Renuka, the wife of the deceased. Our attention was drawn to the fact that P.W.2 was pregnant and, thus, was not expected to cover the distance within a short time as the road was 'sloppy'. It was, thus, likely that Renuka had taken some time to run back to her house, inform the first informant and then again come back to the place of occurrence.

The distance between the place of incident and the house of P.W.1 is said to be '5 minutes walking distance', being about 500 ft. A lady whose husband was being assaulted, despite being pregnant, would take the risk of running to her house and come back with her mother-in-law. Similarly, the mother of the deceased must not have lost any time to be at the place of occurrence with a view to save her son.

P.W.2, it is not disputed, had accompanied the deceased as their son was ailing. When the accused persons surrounded the deceased, she being a worried person must have started running. Presence of the accused persons at the place of occurrence, as was stated by P.W.2, cannot be said to be wholly unreliable.

Mr. K. Radhakrishnan would submit that grudge allegedly borne by accused No.3, cannot be held to be sufficient for causing murder of the deceased. We must notice the status of the families of the deceased and Appellants. They belong to the lower strata of the society. As had been disclosed by the deceased, P.W.1, the accused No.3 wanted to assault him then and there on his refusal to offer a bottle of beer. However, on that occasion he saved himself by running away from the place. We do not find any reason to disbelieve the testimony of P.W.1 that the accused No.3 had been nurturing grudge against the deceased and had, thus, a motive.

Another argument of Mr. Radhakrishnan is that no blood stain was found on the clothes of P.W.1 and her husband, although they had taken him to the hospital. Death of the deceased being homicidal in nature is not in

dispute. It has also not been disputed that the deceased was taken to the hospital by the prosecution witnesses. Only because no blood stain was found on the clothes of P.W.1 and her husband, the same by itself may not be sufficient to discredit them fully. The P.S.O, Baburao Rajaram Nagrale, who took the injured to the hospital, examined himself as P.W.9. He inquired from the injured his name as also the name of his assailants. The deceased disclosed the names of accused Nos. 1, 2 and the appellant herein as his assailants. He stated that two other persons have also assaulted him and a 'Yadi' to the said effect was prepared by P.W.9. Except giving a suggestion, he had not been cross-examined on behalf of Appellant on the said point. There was no reason for the said witness to depose falsely before the court. 'Yadi' which was prepared by him was a contemporaneous document which can be relied upon.

Recovery of knife at the instance of the accused has also not been disputed. Blood stained clothes were also recovered from all the accused. The blood group of the deceased was 'O' and the same blood group was found on all the seized articles. As per Exhibit 64, blood group of Jitendra Bappa Barawkar, accused No.2 was 'AB' and blood group of Sunil Maruti Avasare, accused No.4 and the appellant was 'O' and that of Rakesh Tukaram Pawar, accused No.5 was 'A'. Blood group of Umesh Babanrao Khutwad, accused No.1 was also 'A'. It may be placed on record that they were arrested immediately and the blood stained clothes had been recovered from all of them.

It is furthermore not in dispute that the First Information Report was lodged promptly.

The principal contention of Mr. Radhakrishnan that Appellant herein was suffering from a compound fracture and his leg was plastered, which has been admitted by P.W.1, cannot be accepted. The learned counsel would submit that having regard to the provisions contained in Section 58 of the Indian Evidence Act, it was not necessary for the appellant to prove the doctor's certificate which was dated 27.4.1996 and thus, the same should have been taken on record and marked as an exhibit. We do not know under what circumstances Appellant produced the certificate which is dated 27.4.1996. Admittedly, it was not proved. The doctor issuing the certificate was not examined. Appellant raised a plea of alibi. It was, therefore, for him to prove his defence. He failed to prove the same. If the evidence of P.W.1 is to be accepted on the said point, the same should be considered in its entirety. Apart from the fact what was the form of question put to her is not known. The statement of P.W.1, as recorded by the learned Trial Judge, is as under :

".....There was plaster to acc No.3 at the time of this incident. It is denied the accused No.3 was not able to walk properly at the time to this incident."

If he was not present at the time of occurrence or was suffering from a compound fracture, it was expected that the questions to the same effect would be put to the Investigating Officer. It was not done. Such a plea should have been taken at the first instance before the Court of Chief Judicial Magistrate when he was produced before him for the first time. If he had already been suffering from a compound fracture on the date of occurrence, i.e., 30.10.1996, we fail to understand why he had procured the certificate of an earlier date, i.e., 27.4.1996. Even the purported admission of P.W.1 taken in its entirety would go to show that Appellant was in a position to walk. Six months' time, even otherwise, is sufficient for healing up of an ordinary fracture, if any. By mere filing of a document, its contents are not proved. A certificate issued by an expert should be brought on record by examining him.

Concurrent findings of fact have been arrived at by the courts below as against Appellant. The learned Sessions Judge has taken pains to analyse the evidence of the prosecution witnesses. The High Court has also examined the matter at some details.

The approach of the learned Sessions Judge and the High Court in regard to the defence of Appellant may be different, but it is not of much significance inasmuch as the plea of alibi on the part of Appellant has been considered at some length.

It is also not of much significance as to what exact role Appellant had played. Whether he had instigated the accused No.2 to kill the deceased or had caught hold the neck of the deceased, would not be of much significance as his presence is not to be disbelieved thereby. Evidently, he had some role to play. Both the courts below have found some overt act on his part. We do not find any reason to disagree with the findings of the learned Sessions Judge as also the High Court. We accept the same.

We, therefore, dismiss the appeal.

JUDIS