

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1324 OF 2008

ANIL S/O. SHAMRAO SUTE & ANR. ... APPELLANTS

VERSUS

STATE OF MAHARASHTRA ... RESPONDENT

JUDGMENT

(SMT.) RANJANA PRAKASH DESAI, J.

1. The two appellants (A1-Anil and A2-Ashok respectively) along with four others (A3-Baba, A4-Kishor, A5-Shankar and A6-Mayabai) were charged for offences under Sections 147, 148, 302 read with Section 149 of the Indian Penal Code (for short, "**the IPC**"). Alternatively, they were also charged for offence under Section 302 read with Section 34 of the IPC. During the pendency of the trial, A3-Baba was murdered and, therefore, the case abated as against him.

2. The prosecution case rests on the evidence of PW-3 Meena, wife of Vijay Lambat ("**the deceased**"). On 13/12/1991 at 22:25 hours, she is stated to have lodged FIR at Wardha City Police Station. In her FIR, she stated that the deceased was a driver. On 13/12/1991, in the evening, she and the deceased were at their house. At about 8.00 p.m., A1-Anil, A2-Ashok and A5-Shankar came to their house. They gave her money and asked her to bring liquor. At that time, the deceased was sleeping. She sent her son to the neighbour's house to bring liquor. When he brought liquor, they consumed it. Thereafter, they asked the deceased to accompany them for paan. The deceased told them that he was not well. Even then, they forced him to get up. They brought him out in the courtyard. In the courtyard, A1-Anil and A2-Ashok dealt knife blows on his abdomen. Her mother-in-law A6-Mayabai was holding the deceased. On account of knife blows, the deceased fell on the spot. When she rushed to help the deceased, she was pushed aside by holding her hair. She then rushed to the Wardha City Police Station and lodged the FIR. The deceased was shifted to the

General Hospital, Wardha where he was declared dead. On completion of the investigation, the accused came to be charged as aforesaid.

3. In support of its case, the prosecution examined seven witnesses. The accused stated that they were innocent. They claimed to be tried. On behalf of the accused, it was suggested that A1-Anil and A2-Ashok used to visit the house of A6-Mayabai, the mother of the deceased, which was resented by the deceased and his wife PW3-Meena. It was suggested that A3-Baba may have murdered the deceased. Upon perusal of evidence learned Sessions Judge acquitted A1-Anil, A2-Ashok, A4-Kishor, A5-Shankar and A6-Mayabai of the offences punishable under Sections 147, 143 and 302 read with Section 149 of the IPC. He also acquitted A4-Kishor, A5-Shankar and A6-Mayabai of the offence punishable under Section 302 read with Section 34 of the IPC. He found the appellants, A1-Anil and A2-Ashok guilty of the offence punishable under Section 302 read with Section 34 of the IPC and sentenced them to suffer imprisonment for

life and to pay a fine of Rs.500/- each and, in default, to suffer further rigorous imprisonment for one month each. The appeal carried by A1-Anil and A2-Ashok was dismissed by the High Court and, hence, this appeal is filed by them.

4. Mr. Nitin Tambwekar, counsel for the appellants submitted that the prosecution case rests on the evidence of PW-3 Meena. Counsel submitted that PW-3 Meena is not a reliable witness because she has improved her case in the court and tried to involve A3-Baba (since deceased) and A4-Kishor, who has been acquitted by the trial court. Counsel pointed out that, in any event, in the cross-examination, she stated that A1-Anil, A2-Ashok and A3-Baba only dragged the deceased out and A3-Baba assaulted him. Counsel submitted that, therefore, A1-Anil and A2-Ashok cannot be convicted under Section 302 read with Section 34 of the IPC. It cannot be said that A1-Anil and A2-Ashok shared intention to commit murder with A3-Baba. In support of his submission, counsel relied on the judgment of this court in **Narasappa v. State of Karnataka**¹. Mr. Sachin Patil,

¹ (2007) 10 SCC 770

counsel for the State, on the other hand, supported the impugned judgment.

5. From the evidence of Dr. Mun (PW-2), Medical Officer, attached to the General Hospital, Wardha, who conducted post-mortem examination of the dead body of the deceased and the post-mortem notes, it is clear that the deceased was brutally murdered. The question is whether A1-Anil and A2-Ashok could be held responsible for the murder.

6. We have already reproduced the contents of the FIR lodged by PW-3 Meena. It is now necessary to see her evidence. In our opinion, the version of incident given by PW-3 Meena in the FIR materially differs from the one she has given in the court. In her evidence in the court, in the examination-in-chief, PW-3 Meena stated that on the date of the incident, the deceased was in the house as he was not well; A1-Anil, A2-Ashok and A5-Shankar came to her house; they asked the deceased to accompany them for paan; they asked for money for liquor and when she told them that she did not have money, they pressurized her; she then sent one

boy to bring liquor from the neighbour; accordingly, the boy brought liquor; A1-Anil, A2-Ashok and A5-Shankar had liquor; they asked the deceased to have liquor but he stated that he was not well; at that time, other accused also came and all of them took the deceased to the courtyard; A1-Anil, A2-Ashok and A4-Kishor started assaulting the deceased; A1-Anil had knife, A2-Ashok had gupti and A5-Shankar had knife; A6-Mayabai came and caught hold of the deceased; after assaulting the deceased, all the accused went away. She then went to the police station and lodged the FIR. It is pertinent to note that in the FIR, A4-Kishor's name is not mentioned. Cross-examination of PW3-Meena brings out a completely new story but before we go to cross-examination, it is necessary to notice discrepancies in her FIR and examination-in-chief. Whereas, in the FIR PW3-Meena stated that A1-Anil, A2-Ashok and A5-Shankar gave her money and asked her to bring liquor and she sent her son to her neighbour's house to bring liquor, in her evidence she stated that they asked for money for liquor and when she told them that she did not have money, they pressurised her and

therefore, she sent a boy to bring liquor from her neighbour. She does not refer to her son. Even if this discrepancy is overlooked as a minor discrepancy, her evidence cannot pass the test of credibility because major improvements are made by her in her cross-examination to which we shall now turn.

7. In her cross-examination PW3-Meena stated that A1-Anil and A2-Ashok and A3-Baba were sitting in her house for five minutes for having liquor. PW3-Meena then changed her statement and stated that A3-Baba was not sitting there for having liquor but as soon as A1-Anil stood up A3-Baba came to the door. She further stated that A1-Anil, A2-Ashok and A3-Baba only dragged the deceased and A3-Baba assaulted the deceased in the courtyard along with others. Thus, here she excluded A1-Anil and A2-Ashok and stated that A3-Baba and others attacked the deceased. Presence of A3-Baba and his assaulting the deceased is absent in the FIR and in the examination-in-chief. This is a glaring event which should have been mentioned by her. Unfortunately, learned

Sessions Judge has at one place wrongly observed in his judgment that in the FIR names of A1-Anil, A2-Ashok and A3-Baba have been mentioned as persons who had caused the death of the deceased. At other place he has observed to the contrary. This mistake is not noted by the High Court. If PW-3 Meena had merely referred to A3-Baba in the cross-examination, her non-mentioning his name in the FIR and in the examination-in-chief would not have assumed much significance. But, she has refused to give any role to A1-Anil and A2-Ashok in the cross-examination in the actual assault on the deceased. There is also no statement in the FIR that the other accused assaulted the deceased. Surprisingly, little later, this witness stated that it is not true that A3-Baba assaulted the deceased. As already noted, she has given a specific role to A4-Kishor in the examination-in-chief that he assaulted the deceased. But, his name is not there in the FIR. She stated that A1-Anil had a gupti. Her story in the FIR and in examination-in-chief is that he had a knife.

8. In view of the above, in our opinion, the evidence of PW3-Meena does not inspire confidence. It is unsafe to make allowance for the discrepancies and improvements made by her in her evidence. It is true that being wife of the deceased, she is the most natural witness. But, after reading her evidence, we feel that she has not come out with the whole truth. We feel that the unvarnished truth is not placed before us either by the prosecution or by the defence. As earlier noted by us, in the FIR she has only referred to A1-Anil, A2-Ashok and A5-Shankar. In the examination-in-chief she has referred to these three persons and A4-Kishor. In cross-examination her version has drastically changed. At the cost of repetition it must be stated that she, for the first time, referred to A3-Baba, who was murdered during the trial. She stated that A1-Anil, A2-Ashok and A3-Baba only brought the deceased out and A3-Baba assaulted the deceased along with others. Thus, so far as assault on the deceased is concerned, in the cross-examination she specifically excluded A1-Anil and A2-Ashok and pointed a finger at A3-Baba and other accused. In the cross-

examination, she does not state that A1-Anil and A2-Ashok assaulted the deceased.

9. It is pertinent to note that learned Sessions Judge acquitted the accused of the offence punishable under Sections 147 and 148 of the IPC and observed that as per the prosecution case there were only three persons at the spot that is A1-Anil, A2-Ashok and A5-Shankar. He observed that the prosecution has failed to prove that all the accused were members of the unlawful assembly and in prosecution of their common object they committed murder of the deceased. All the accused were acquitted of the offence under Section 302 read with Section 149 of the IPC. As no overt act was attributed to A4-Kishor, A5-Shankar and A6-Mayabai, he acquitted them of offence punishable under Section 302 read with Section 34 of the IPC. The appellants A1-Anil and A2-Ashok were convicted for the offence punishable under Section 302 of the IPC with the aid of Section 34 thereof. Now, the question is whether the version given by PW3-Meena in the FIR that A1-Anil and

A2-Ashok assaulted the deceased is to be accepted or whether the version given by her in the examination-in-chief that A1-Anil, A2-Ashok, A4-Kishor and A5-Shankar assaulted the deceased has to be accepted or whether the version given by her in the cross-examination that A1-Anil and A2-Ashok only dragged the deceased out in the courtyard along with A3-Baba and A3-Baba assaulted the deceased with others is to be accepted. When there is such a great variance in her versions, we find it risky to convict the accused on the basis of such evidence. If her version in the FIR and examination-in-chief is to be accepted, then A5-Shankar could have been convicted with the aid of Section 34 of the IPC. But, he has been acquitted. If the version given in the cross-examination that A1-Anil and A2-Ashok only dragged the deceased out and A3-Baba assaulted the deceased is to be accepted, then, it is necessary to examine whether they shared common intention with A3-Baba to commit murder of the deceased. It is possible that they did share common intention with A3-Baba. It is equally possible that they did not. If A1-Anil and A2-Ashok merely dragged

the deceased and they had no intention to kill the deceased, they may be guilty of a lesser offence. It appears that unfortunately, this aspect was not examined properly by learned Sessions Judge because during the pendency of the case, A3-Baba was murdered and could not be tried. At this stage, in the absence of evidence, it is not possible for us to make out a new case. The prosecution case is, therefore, not free from doubt. Undoubtedly, the evidence on record creates a strong suspicion about involvement of A1-Anil and A2-Ashok, but, it is not sufficient to prove their involvement in the offence of murder beyond doubt. It is well settled that suspicion, however strong, cannot take the place of proof. Clear and unimpeachable evidence is necessary to convict a person. We find that such evidence is absent in this case. The prosecution cannot rely on the evidence of discovery of weapons at the instance of A1-Anil and A2-Ashok because the panchas have turned hostile. In order to have the evidence of an independent witness on record, the prosecution examined PW-7 Shashikala, but, she turned hostile. Similarly, another witness PW-4 Ramesh Kale also

turned hostile. Therefore, there is no other evidence on record which can support the prosecution case. In any case, there is no question of seeking corroboration to the evidence of PW-3 Meena because her evidence itself does not inspire confidence. It must be remembered that on the same evidence, A4-Kishor, A5-Shankar and A6-Mayabai have been acquitted. In the circumstances, we are of the opinion that benefit of doubt will have to be given to A1-Anil and A2-Ashok.

10. In the result, the appeal is allowed. Impugned judgment and order is quashed and set aside. The appellants Anil s/o. Shamrao Sute and Ashok s/o. Motiram Kudewal are in jail. They are directed to be released from custody forthwith unless they are required in some other case.

.....J.
(AFTAB ALAM)

.....J.
(RANJANA PRAKASH DESAI)

NEW DELHI,
JANUARY 24, 2013.

SUPREME COURT OF INDIA



JUDGMENT