

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AURANGABAD

CRIMINAL APPEAL NO. 518 OF 1996

The State of Maharashtra

...Appellant
[Orig.Complainant]

VERSUS

- 1] Mohd. Salim s/o Sk. Munnumiyan,
age 30 yrs., occ. Hamali
r/o Hatai Ganipura, Itwara, Nanded,
- 2] Mohd. Ali s/o Amjad Ali,
age 40 years, occ. Owner of Hotel,
Evergreen Lal Dudhi Zarda Galli,
Road, Nanded,
- 3] Yousuf Ali s/o Abdul Sattar,
age 35 years, occ. Hotel owner,
r/o as above,
- 4] Zafaruddin s/o Babuddin,
age 25 years, occ. Education
r/o Ashok Technical School
Anand Nagar, Nanded
(originally r/o Kudhar, Dist.Nanded),
- 5] Sk. Anwar s/o Sk. Hussain,
age 22 years, occ. Unemployed,
r/o Nandigram Society,
Degloor Naka, Nanded

...Respondents
[Orig. Accused]

.....
Shri A.S.Shidne, A.P.P. for appellant/State
Shri Pratap Mandlik, advocate h/f
Shri P.V.Mandlik, Sr. Advocate for respondent
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CORAM : A.B.CHAUDHARI & INDIRA K. JAIN, JJ.
DATED : 1st OCTOBER, 2015

ORAL JUDGMENT [Per A.B.Chaudhari, J.]

1] The State has come up in this appeal against the judgment and order, dated 18.6.1996, passed by the Sessions Judge, Nanded, by which acquittal of accused nos. 1 to 5, for the offences punishable under Sections 302, 302 r/w 140 of Indian Penal Code was recorded.

2] Though the prosecution had eye witnesses, except one everybody turned hostile and did not support the prosecution. PW 2 Sabir Chaus supported the prosecution and lodged the first information report. The evidence of PW 2 Sabir Chaus was found to be unreliable by the learned trial Judge. He recorded the reasons therefor in paras 33, 34 and 35 of the judgment. We quote paras 33, 34 and 35 from the judgment of the learned trial Judge.

“33) Thus, once again has to come to the point that sole statement of PW 2 Sabir Chaus has to bear the burden of the prosecution edifice. There is nothing in the entire prosecution evidence to elicit any type of support to the statement of Sabir Chaus. The incident was simple in nature & as far as details of attack are concerned, the testimony of Sabir Chaus has remained substantially unshaken & therefore, the question as to whether that testimony can be held to be adequate to attribute the authorship

of injury which led to the death of Ali Chaus to accused No.1 Saleem. In ordinary course this could have been the conclusion, but for the admission of Sabir Chaus that the FIR was prepared after tearing of two drafts. The possibility of wrong person being named as an offender in course of drafting and redrafting of FIR cannot be denied. Therefore, the version of Sabir Chaus, affected by his own admission that FIR was not spontaneous report but a deliberate and well prepared version, would cast a shadow of doubt on his truthfulness. The investigating officer API Shisodia Exh.21 could not have explained as to why these drafts were prepared and cancelled, since it would have been against the rules, exposing him to the risk of action for concoction. Unless it is known as to what was it that Sabir Chaus had spontaneously reported, and why it was charged twice, the possibility that the prosecution decided to involve Sk. Saleem in the occurrence because FIR Exh.75 was already handy to indicate his involvement cannot be ruled out.

34) Even so, before discarding the testimony of Sabir Chaus as inadequate to support the prosecution case, I have once again gone through the entire prosecution evidence and have to come to the conclusion that the evidence on record does not contain a single statement to show that Sk. Saleem had entered Evergreen Hotel prior to the incident. Thus, even on this aspect Sabir Chaus's version cannot be propped up.

35) The story about arrest of Sk. Saleem and the finding of stains of blood on his person, to say the least, is funny. According to the prosecution, accused Sk. Saleem had murdered Ali Chaus on the night of 8.10.95. Ali Chaus must have been known atleast to the residents of that area. Yet we have PW 21 API Sisodia wanting the court to accept his version that on 10.10.95 at about 9 a.m. he found

accused Saleem near a mosque in Hatai area near his house. It is not the prosecution case that Sk. Saleem had moved into hiding. It is not the prosecution case that Sk. Saleem had to be searched and was found at an unexpected place. The arrest of accused Saleem was effected in broad day light at 9 a.m. on 10.10.1995 very much near his house. Therefore, finding of stains of blood on cuff of his shirt, in the report of Forensic Science Laboratory at Exh.67, would not lead to the conclusion that the accused had blood of deceased on his hand. The investigating officer had not cared to rule out the possibility that blood on the cuffs was not that of accused. He should have known that accused No.1, being a living person, his blood could have been tested in any local laboratory or hospital. The sample was sent to Forensic Science Laboratory. It reported vide exhibit 68 that the blood group could not be determined as the test was inconclusive. This report was received by the officer on 9.3.96. Yet, the officer did not feel it necessary to get the blood tested again even locally to rule out the possibility that the blood found on the clothes and cuff seized from the accused was not his own blood. The burden to prove that the accused had on his hands accused of the victim was clearly on the prosecution. The accused was not expected to come up and state that his blood group is also 'A'. Failure of the prosecution to rule out the possibility that the blood group of accused was the same as that of the deceased could lead to the conclusion that the blood on the clothes allegedly seized could be that of the accused himself. In any case, even if one has to accept the prosecution version about the character of accused No.1 on the basis of Exh.75, one could go to the extent of saying that the blood on the clothes seized may be that of any one else but not necessarily of victim in this case. Hence, this evidence is inadequate to indicate the involvement of the accused in the murder of Ali Chaus. ”

3] It clearly appears that PW 2 Sabir Chaus has been disbelieved, because the first information report was prepared after tearing two drafts thereof, meaning thereby that the third draft after tearing two, was finalised by PW 2 Sabir Chaus and the police officers, which was found to be a very risky circumstance to record the order of conviction by the learned trial Judge. We agree with the learned trial Judge that on such type of evidence of PW 2 Sabir Chaus, no conviction could be recorded and rightly so the learned trial Judge did not do so.

4] Keeping in mind the parameters in relation to appeals against acquittal, we do not think, the learned trial Judge has committed any mistake, nor there is any perversity in his finding of acquittal.

5] Learned A.P.P. for the State canvassed that there was discovery random, duly proved by the prosecution, which was the evidence which could have been believed. Para 36 of the judgment reads thus :-

“36) The last link in the chain by which the prosecution sought to book the accused is discovery and seizure of the weapon of offence, Gupti, article No.12 before the Court. The testimony of PW 21 API Shisodia on this point again shows a total lack of awareness as to the manner in which discovery under Section 27 of the Evidence Act is effected. The evidence does not at all show that the weapon could have been discovered,” and not just recovered, at the instance

of the accused. It is necessary for acceptance of the memorandum made under Section 27 of the Evidence Act, that there must be “discovery” of article at the instance of the offender, or in other words, none but the offender must be in the know of the concealment of the article discovered, in order to connect him to the use of the article in commission of crime. This evidence is, therefore, totally discardable. This is apart from the fact that the panchas on this discovery, Madan and Chandrakant, PWs 16 and 17, have not supported the prosecution, as also that the star witness of the prosecution, Sabir Chaus, failed to identify the article No.12 before the court as the same weapon which the accused No.1 Saleem had used.”

For the reasons recorded in para 36, we agree with the learned trial Judge and do not accept the submission made by the learned A.P.P.

6] The upshot of the above discussion is, this appeal by the State against the acquittal must fail.

7] In the result, Criminal Appeal No. 518 of 1996 is dismissed.

[INDIRA K. JAIN, J.]

[A.B.CHAUDHARI, J.]