

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.21 of 2019

Mr. Taru Chawan,
Son of Valu Chawan,
48 years of age,
Resident of Dhavali Mill,
Ponda and native of
Siddapur, Tal. Gangawati,
District Koppal,
Karnataka.
At present in Colva Jail

Appellant
(Original
Accused No.2)
...

Versus

1 Police Inspector,
Ponda Police Station,
Ponda, Goa.

2 State
Through PP,
High Court of Bombay at
Panaji, Goa.

... Respondents

Mr. Arun Bras De Sa, Advocate for the appellant.

Mr. Mahesh Amonkar, Additional Public Prosecutor for the respondents.

**Coram:- M. S. SONAK &
NUTAN D. SARDESSAI, JJ.**

Dated : 29th August, 2019

ORAL JUDGMENT: (per M.S. Sonak, J.)

Heard Mr. Arun Bras De Sa, learned Counsel for the appellant and Mr. M. Amonkar, learned Additional Public Prosecutor for the respondents.

2. With the consent of the learned Counsel for the parties we take up this appeal for final disposal. On the last occasion, we had called for the records and proceedings in the matter. The records and proceedings have been received and the same have been perused with the assistance of the learned Counsel for the parties.

3. The appellant, originally accused No.2 in Sessions Case No.10 of 2012, by the judgment and order dated 30/03/2019 passed by the learned Additional Sessions Judge, Panaji in Sessions Case No.10 of 2012 was convicted for the offence punishable under Section 302 r/w. 34 of Indian Penal Code and sentenced to undergo life imprisonment and to pay fine of ₹2,000/- and in default of payment of fine to undergo further rigorous imprisonment for two years.

4. At the outset, it is made clear that this appeal has been instituted only by the original accused No.2.

5. The case of the prosecution is that the appellant alongwith his brother Hiru, on 18/11/2011 at about 19.45 hours went to the house of their third brother Thawru Chawan on their motorcycle to demand money. It is the case of the prosecution that when their brother Thawru refused to give money, both the accused in

furtherance of their common intention assaulted Thawru with sandal and knife and murdered him.

6. The prosecution, in support of its case examined Sushila Chawan (Pw8), the wife of the deceased Thawru, as an eyewitness to the incident.

7. Pw8 in her examination-in-chief stated that the appellant caught hold of her husband from the back side and the accused No.1 Hiru removed knife and stabbed her husband on his neck and chest and three other places. Thereafter, her husband collapsed on the floor.

8. Pw8, in the cross-examination has however stated the following:

*Accused No.1 is the elder brother followed by my husband and accused No.2 is the younger brother. Sometimes my husband used to take liquor. On the day of the incident my husband returned back at about 6.30 p.m. I and my husband was sitting in the hall. At that time he had not consumed liquor. It is correct that in front of the house there are steps which leads to the varandah from one enters the hall. Adjoining the hall there are 3 bedrooms and a kitchen. **As soon as accused no.1 entered the house he talked to***

my husband for about 10 minutes. At that time accused No.2 was in the varandah talking to me. My conversation with accused No.2 was normal and cordial. I say that when there was heated discussion between the accused No.1 and deceased we were in the varandah. I say that when the incident of stabbing took place I was near my husband and accused no.2 was in varandah. I say that when accused no.1 stabbed my husband Taru was in the varandah and he did not do anything. Only after shouting accused No.2 came to stop the fight.

I know the difference between plastic and wood. I say that the knife is not from our kitchen. I do not know from where accused no.1 had brought the knife, however, I had witnessed the accused no.1 stabbing my husband with a knife. My complaint was recorded by the Police at my residence. I say that my complaint was taken during night but I do not remember the exact time. Police officer had recorded my complaint.

I say that one Ambulance had come to take my husband. I do not know in which hospital my husband was taken. I say that panchanama was recorded at the time when the body of my deceased was lying on the floor. I do not remember whether I had stated to the police and Magistrate that accused no.1 stabbed my

husband with kitchen knife but I had definitely stated that accused no.1 stabbed my husband with knife. Witness is confronted with complaint and 164 statement wherein it is stated that the accused no.1 stabbed my husband with kitchen knife. I say that it is correctly record. I had stated to the police that accused no.2 was not involved in the actual act of stabbing and assault.

I say that I do not hear property when the contents of the complainant were explained to me in Hindi and I was in tension.”

(Emphasis supplied)

9. In the aforesaid circumstances, it is quite clear that Pw8, who is eyewitness to the incident has, in the first place, stated that when Hiru was having an agitated discussion with her husband Thawru, the present appellant was in the varandah talking to her. She had even stated that the conversation between her and the appellant was normal and cordial. She had again stated that while heated discussion between Hiru and her husband, she alongwith the present appellant were in the varandah. She has again repeated and stated that when the incident of stabbing took place she was near her husband but the present appellant was in the varandah. She has also stated that when Hiru stabbed her husband, the appellant was in the varandah and did not do anything. She has also stated that

only after shouting consequent to the stabbing of her husband did the present appellant come inside to stop the fight.

10. Pw8, has in fact deposed that she stated that the appellant was not involved in the actual spot of stabbing and assault. This is after she was confronted with the statement under 164 CrPC wherein she had stated that the present appellant was involved in atleast holding her husband whilst Hiru stabbed him. Pw8 in her deposition stated that she cannot hear properly and that the contents of her complaint was explained to her in Hindi she was in tension.

11. According to us, the aforesaid precise and substantially categorical evidence of Pw8 in the course of her cross-examination is sufficient to upset the conviction recorded against the appellant herein.

12. The learned Sessions Judge, has taken cognizance of the aforesaid deposition of Pw8, however, the learned Sessions Judge has observed that Pw8 had given a statement under Section 164 CrPC in which she had stated that the appellant had caught hold of her husband from behind and Hiru then had stabbed her husband

with a knife and after such stabbing both the accused persons ran away.

13. The learned Sessions Judge has therefore preferred to rely upon the statement of Pw8 recorded under Section 164 CrPC, in preference to the substantive evidence rendered by her in the course of the trial. According to us, this is not proper. If at all, there are inconsistencies between the statements recorded under Section 164 CrPC and the substantive evidence tendered in the course of the trial, it is the substantive evidence which deserves to be taken into consideration.

14. In this case, Pw8 was confronted by her statement under Section 164 of CrPC. However, Pw8 stood her statement and clearly stated that the present appellant was not involved in the incident of stabbing and in fact the present appellant came into the room after he heard the shouting and even tried to stop the fight.

15. We have also perused their evidence on record and we find nothing in the evidence on record to sustain the conviction on the basis of Section 34 of IPC as well. It is true that the appellant and his brother did come to the house of the deceased and Pw8 to demand some money. Mr. Arun Bras De Sa, learned Counsel submits

that the issue was in relation to the maintenance of the parents. It was the case of the appellant and his brother who now stand convicted for murder, that even the deceased was liable to contribute for the maintenance of their parents.

16. Mr. Amonkar, learned Additional Public Prosecutor states that there is circumstantial evidence to sustain conviction. According to us, when the direct evidence of the eyewitness, who is none other than the wife of the deceased establishes that the appellant was not involved in the murder, there is no question of adverting to circumstantial evidence, if any, in the matter.

17. In this state of the evidence, we cannot sustain the conviction against the appellant herein. Accordingly, the appeal is allowed and the conviction recorded against the appellant and the sentence imposed upon the appellant is hereby quashed and set aside.

18. The appellant is directed to be released forthwith if not required in any other case.

19. The records and proceedings to be returned to the Sessions Court.

20. The Criminal Misc. Application does not survive and the same is also disposed of.

21. All concerned to act on the authenticated copy of this order.

NUTAN D. SARDESSAI, J.

M. S. SONAK, J.

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