

Received on : 22.04.2010
Registered on : 22.04.2010
Decided on : 12.04.2013
Duration Y M D
02 03 21

IN THE COURT OF SESSIONS JUDGE, OSMANABAD.
(Before Shri. Shashikant A. Kulkarni)

SESSIONS CASE NO. 33/2010

Exh. No. 50

State of Maharashtra,
through complainant Shivram
Sardar Kale, r/o. Itkur Pardhi Pedhi
Kallam, Tq. Kallam, Dist. Osmanabad.

.... Complainant

Versus.

1.Kashinath Maruti Waghmare, age 45
years, r/o. Bhogaji Tq. Kallam, Dist.
Osmanabad.

2.Janak Meghraj Kharate, age 22 years,
r/o. As above.

3.Rajendra @ Ramraje Arun Waghmare,
age 28 years, r/o. Babhalgaon Tq.
Kallam, Dist. Osmanabad.

... Accused

Charge:- Under section 302 r.w. 34 of the Indian Penal Code.

Mr. PY Jadhav, APP for the State.
Adv. Mr. MS Patil, for accused.

JUDGMENT

(Delivered On 12.04.2013)

1 Accused persons are tried and prosecuted for the offence of committing murder in furtherance of their common intention.

2 Facts

The incident took place on 3.12.2008 between 1 a.m. to 5.30

a.m., early in the morning, in the field, near the cattle-shed of accused No. 1. It is alleged that, accused persons along with juvenile offender Sidheshwar, in furtherance of their common intention committed murder of one Hari Shivram Kale.

It was dark night on the day of incident. Accused No. 1 allegedly was staying with his family in a dwelling house in the field. Harvested cotton was kept in gunny bags in the cattle-shed. During mid-night at about 1 a.m. accused No. 1 on hearing the dogs barking awakened. He, his wife and son came out. Noticed some four figures, suspecting them to be thieves. They were preparing to protect their property. By the time there was scuffle between the juvenile offender, son of accused No. 1 and the deceased Hari. Accused No. 1 also tried to intervene. Accused No. 1, his wife, and his son (juvenile offender) sustained injuries with stones.

Allegedly one person who was scuffling with the son of accused No. 1 (juvenile offender) was caught hold tightly therefore he could not rescue himself. Whereas; rest of the accused persons, alleged to have, after injuring the accused No. 1 and his family took away two gunny bags full of cotton from their possession, without their consent and committed robbery. A separate FIR for committing robbery was lodged at about 8.25 a.m. After investigation two of persons and one juvenile offender have been sent for trial before the JMFC Court. As against deceased person the police station submitted abated summary in that case

The case being arising out of the same incident but triable by the JMFC Court has been called in this case as per order below Exh. 6 by simultaneous hearing and heard and disposed of today.

3 The person who was allegedly caught and tied with rope

allegedly with the help of accused No. 2 and 3 died at about 5.30 a.m. Upon hearing loud calls the near by farmers, villagers gathered in the field of accused No. 1. PW 1 Babasaheb, police patil, was one of the person amongst them. He noticed the condition of the person subsequently died to be feeble and uneasy. He thereby instructed not to leave him or beat him further and went to police station.

4 Before going there he called police officer on mobile phone of Kallam police station to send immediately a police van for taking the injured person alleged to be accused of committing robbery with another persons to hospital. Police replied in usual manner that, the van was on patrolling duty.

There was no entry made by police officer regarding such call made by PW 1 police patil, about incident and condition of injured. PW 1 police patil himself then went to police station and returned to the spot. By the time the person was dead.

5 The police officer of Kallam police station at about 4 p.m. on 3.12.2008, after obtaining the complaint from Shivram Kale, father of deceased, registered a crime No. 142/2008 of serious nature of murder against accused persons.

6 The informer, on the basis of whose information the FIR has been registered, being father of the deceased, was informed by one Gambhire (PW 8). Since the informer is no more alive but the I.O. has identified his thumb impression to prove the contents of first information.

7 The informer was not eye witness to the incident. The person

PW 8 Gambhire was also not eye witness. But he appears to have got knowledge from other sources. Being an agriculturist and also journalist he had been to the spot. He conveyed the information to the father of the deceased. The FIR contents thus apparently in absence of any support from Mr. Gambhire (PW 8) falls in the category of 'hear-say' evidence and not admissible.

8 On the basis of report by police patil (PW 1) (Exh. 18) an accidental death enquiry under section 174 of Cr.P.C. handed over to PSI Tambare. In the process of enquiry he has recorded inquest panchnama (Exh. 25) of the dead body and sent it to postmortem. By the time the investigating officer, although the crime was not registered under section 302 of IPC arrived at the spot at about 8.30 a.m. and recorded spot panchnama in presence of panchas with a short map of the situation (Exh. 26). The same panchnama has been then used as spot panchnama, for the purposes of further investigation into the offence of murder, in Cr. No. 142/2008.

9 The accused No. 1 was arrested. He made allegedly voluntary disclosure of nature of weapon used in the commission of the offence, allegedly produced the muddemal article stick seized under the panchnama. The voluntary statement of accused No. 1 being inculpatory in nature to involve accused No. 2 and 3 they have been arrested. I.O. obtained clothes, seized by the Enquiry Officer at the time of enquiry u/sec. 174 Cr.P.C., from the person of the deceased. He noticed blood stains on the shirt of accused No. 1. A vial containing of blood of deceased was taken for muddemal. All the muddemal property including that of a mud with blood stain and without blood stain from the spot allegedly in a sealed condition handed over to the carrier Shinde (PW 7)

for analysis to Chemical Analyzer Aurangabad. CA reports are at Exh. 43 to 48.

I.O. also examined orally the persons acquainted with the facts of the case and reduced their statements into writing. After compilation of papers he submitted charge-sheet before JMFC Court Kallam.

Learned JMFC in due course committed the case to Sessions Court. Accused persons were enlarged on bail pending trial.

10 I have framed charge against accused (Exh. 10). At the time of framing of the charge, the substance of accusation was read over and explained to accused persons. They pleaded not guilty and claimed to be tried. Their defence is of total denial.

11 To bring home the guilt of accused, the prosecution has examined in all nine witnesses and closed the evidence.

The accused persons reiterated their stand of being innocent have accordingly denied every incriminating circumstance which was put to them at the time of recording their statement under section 313 of Cr.P.C.

12 In the background of these facts and circumstances, I have heard the arguments of learned APP Mr. PY Jadhav for the State, and of Mr. MS Patil, learned advocate for for the accused persons.

Mr. Jadhav, submitted that though all the material witnesses have turned hostile I.O., has proved the signatures on spot panchnama, recovery panchnama, memorandum panchnamas. Also the police officer who recorded FIR proved the thumb impression of the father of deceased person to effect and point out finger against accused to hold them

responsible for causing custodial death of a person in furtherance of their common intention. He therefore prayed to record conviction against accused persons.

Mr. Patil on the other strongly objected the use of term 'custodial death'. Pointing out to the spot panchnama (Exh. 26) and the evidence of I.O. he submitted that, the deceased was never lying within the area of the field of accused No. 1. Dead-body was lying in empty land between road and field. Whereas; I.O. has even not taken pains to collect 7x12 extract of the land to prove holdership of accused No. 1.

Mr. Patil also submitted that, there is no substantive evidence before the Court. The police officer cannot be equated to the statement of independent persons panch witnesses. Panchas who turned hostile, the evidentiary value of police officer is of no avail to the prosecution. There are discrepancies and defect in prosecution case from the inception. The evidence brought on record in cross-examination of witnesses clearly suggest that the deceased died because of accidental injuries. There is no clear evidence that the accused persons beat the deceased to cause his death.

13 In the light of these arguments and circumstances, following point arises for my consideration. I record my finding thereto for the reason to follow;

<u>Point</u>	<u>Finding</u>
1) Whether accused persons in furtherance of their common intention intentionally caused death of a person by name Hari Shivram Kale on 3.12.2008 to commit his murder, as alleged ?	... No.

REASONS.**As to the point 1 :**

15 The first circumstance goes in favour of accused persons is, the field of accused Jagan which is about ½ k.m. from the field of accused No. 1. Whereas; accused Rajendra is resident of village Borgaon, another village. He has no land in the vicinity or near by the field of the accused No. 1.

Second circumstance which goes in favour of accused is that, they are not relatives. Even they do not, according to submission of defence counsel, belong to same caste.

Third circumstance which goes in favour of defence is that, there is absolutely no evidence about common pursuant of accused persons or their meeting of mind to share common intention to commit murder of the deceased, as alleged.

Fourth one is that, even if it is assumed that, death was culpable homicide, it was not murder, having not committed with malice or intention to cause it.

15 For the purposes of supporting the defence some incidences are brought on record, in the cross-examination of the witnesses. Prominent amongst them is presence of heap of stones, three in numbers, with some sharp edges, even as per the evidence of I.O., near the spot or dead body, in the field.

16 The deceased suffered two injuries having regular margins, similar to the dog bite C2 and D2 mentioned in the postmortem report in column No. 17 to make it probable that while running away from the spot due to dog bite the deceased fell down on heap of stones.

17 The deceased suffered fatal injuries to the left side of chest or thorex. His 5th, 6th and 7th ribs were fractured. Thereby causing damage to lung lower lobe resulting into heamorrhagic shock. Rest of the injuries were not sufficient to cause death even according to doctor's version.

Most eloquent fact stated by PW 3 Dr. Suryawanshi that there is no lineal mark on the body of deceased of hit by hard and blunt substance, like stick before the Court, allegedly used by accused No. 1.

18 The prosecution thus has tried to develop the story that, the deceased was beaten on the suspicion being thief by accused No. 1 and his son (juvenile offender) with the help of accused No. 2 and 3. As pointed out earlier, there is no evidence against accused No. 2 and 3, except inculpatory statement of accused No. 1, which is not sufficient; they are entitled to get benefit. There is no proof of discovery of the rope and the recovery from any of the accused by which the deceased was allegedly tied before beating.

19 The deceased was hard drinker of liquor. This fact is admitted by his wife. Investigating officer tried to deny it. On being shown the statement recorded by him of the wife of the deceased, Bhamabai (PW 2), he required to admit it that, it was transpired that, the deceased was hard drinker. Statement of wife of deceased shows that, in earlier night the deceased under influence of liquor quarreled with her and left the place.

20 The deceased belongs to Pardhi community. He did not answer whilst he was alive to the questions put by the persons in the crowd. There is no evidence that, these questions, as to why he had been to the field of accused being put by accused No. 1 or his family members

or any other accused persons before the Court. In the crowd there was another man namely Kashinath Shinde from the community of Pardhi, who in his language asked the deceased at the instance of police patil. The deceased told his name. Thereby he could be identified. But the deceased did not tell the names of other persons who were accompanying him for alleged robbery or as to who beat him by which he sustained injuries on his left side of thorex, resulting into his death.

21 Learned APP places his reliance on evidence of police patil Babasaheb (PW 1) (Exh. 17) and tried to convince that, when police patil (PW 1) was in the field, the deceased was alive and when he returned from police station he was dead. That means he was in custody of accused persons, who are responsible to explain his death.

 There is no evidence that the deceased was prevented by accused persons from proceeding beyond certain circumscribed limit to be in their custody. It is not proved that accused persons were exercising control over the deceased and therefore he was in their custody. I think the learned APP has not properly understood meaning of custodial death. Mere fact that person was alive as per one witness's version, in or near the field of accused No. 1, when he left for police station and after return, after some time he was found dead, does not put that person in control of accused persons.

22 The circumstance do not indicate that the deceased was in the custody of the accused persons or any other person between 1 a.m. to 5.30 a.m.

23 The initial burden to prove the homicidal death with intent to cause it, itself is not discharged. There is big question mark, as to

whether it was really homicidal death or an accidental ? .

24 The benefit of doubt goes in favour of accused persons. In absence of lineal marks on the left side of thorax, the Court cannot be assume that the fracture of 5th, 6th and 7th ribs were caused by use of stick and the stick was used by accused No. 1 or his son (juvenile offender).

25 I do not agree with the submissions of learned APP therefore that the prosecution has proved that the deceased met with homicidal death and accused persons were responsible for it.

I therefore, answer the point accordingly. In the result, I proceed to pass following;

ORDER

Accused No. 1 Kashinath Maruti Waghmare r/o. Bhogaji Tq. Kallam, Dist. Osmanabad, accused No. 2 Janak Meghraj Kharate, r/o. As above and accused No. 3 Rajendra @ Ramraje Arun Waghmare r/o. Babhalgaon Tq. Kallam, Dist. Osmanabad are acquitted as per Section 235 (1) of Cr.P.C., for the offence punishable under section 302 r.w. 34 of IPC.

Muddemal articles being worthless be destroyed after appeal period is over.

They shall surrender the bail bonds.

sd/-

dt. 12.4.2013

Date:- 12.04.2013

(Shashikant A. Kulkarni)
Sessions Judge, Osmanabad.

Dictated and pronounced in open Court.

