

PETITIONER:
VINAYAK ETC.

Vs.

RESPONDENT:
STATE OF MAHARASHTRA

DATE OF JUDGMENT 21/09/1984

BENCH:
VARADARAJAN, A. (J)
BENCH:
VARADARAJAN, A. (J)
FAZALALI, SYED MURTAZA
MUKHARJI, SABYASACHI (J)

CITATION:
1984 AIR 1793 1985 SCR (1) 779
1984 SCC (4) 441 1984 SCALE (2) 417

ACT:

Criminal conspiracy-Conviction and sentence under s. 302 I.P.C. read with s. 120B-Whether one of the accused be convicted for criminal conspiracy when the rest of the accused were acquitted in State Appeal against acquittal of all-Retracted judicial confession of an accused, reliance against another accused, whether permissible when the other accused had been acquitted of the charge of conspiracy under s. 302 read with s. 120B and when the accused who has retracted from judicial confession was tried for the offence of murder- Code of Criminal Procedure Sections 164/306, 378-Corroborative evidence, conviction can be found on such evidence.

HEADNOTE:

In Sessions Case No. 26 of 1976, seven accused namely Sitarama @ Sitya, Sundera @ Sundarayya, Kishana @ Kishanayya, Gangarama @ Gangayya, Prakash, Vinayak and Shrirang were charged and tried together for offences under section 302 read with s. 120B and also under s. 302 read with s. 34 I.P.C. Charge No. 1 was for criminal conspiracy under s. 302 read with s. 120B I.P.C. on the allegation that between first week of October, 1975 and 2nd January, 1976 at Babultara and Waghala villages all the seven accused and the approver P.W. 1 entered into a criminal conspiracy to commit murders of young girls and women in the vicinity of Babultara village by injuring the victims or disfiguring their faces in order to make it appear that the accused in an earlier case called the Manwath murders case where 10 girls and women were murdered during the period from 14.11.1972 to 4.11.1974 in Manwath village were not the real culprits. Charges 2 to 4 were framed under s. 302 read with s. 34 I.P.C. alleging that in furtherance of their common intention, accused 1 to 3 committed the murder of Ashamati on or about 10th November, 1975, accused 1 to 4 committed the murder of Parubai on or about 29th November, 1975 and accused 1, 6 and 7 committed the murder of Malan on or about 1st January, 1976. The Sessions Judge on a consideration of the evidence acquitted all the seven accused under charge No. 1; all the accused under charges 2 and 3 and accused 7 under charge no. 4, but convicted accused 1 and 6 under

charge no. 4 and sentenced them to undergo imprisonment for life under s. 302 read with s. 34 I.P.C. Aggrieved by the conviction and sentence accused 1 and 6 filed Criminal Appeal No. 7 of 1977 in the High Court of Bombay, while the State preferred Criminal Appeal No. 38 of 1977 for enhancement of the sentence awarded to them under section 377 Cr. P.C. The State also preferred under section 378 Cr. P.C. Criminal Appeal No. 605 of 1978 against the acquittal of accused 2, 34, 5 and 7 of charge no. 1 framed under s. 302 read with s. 120B. There
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being no further appeal by the State against acquittal; the acquittal of accused 1 and 6 of charge no. 1 and of accused 1 to 3 of charge no. 2 and of accused 1 to 4 of charge no. 3 became final.

The High Court considered the evidence, in the case, and dismissed Criminal Appeals Nos. 7 of 1977 and the connected Criminal State Appeal No. 38 of 1977 and thereby confirmed the conviction and the sentence awarded to accused Nos. 1 and 6. The High Court, however accepted the State Appeal No. 605 of 1978 in part and convicted accused 5 and sentenced him to imprisonment for life under s. 302 I.P.C. read with s. 120B. Hence the present appeals by accused 5 and 6 only, accused no. 1 not preferring an appeal.

Allowing the appeal No. 288 of 1980 of accused no. 5 and dismissing appeal no. 287 of 1980, the Court.

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HELD: 1. In view of the fact (a) that accused 1 and 6 had been acquitted by the trial court of charge no. 1, that is, criminal conspiracy under s. 120B read with s. 302 I.P.C. (b) that no State Appeal against their acquittal had been preferred and (c) that accused 5 was not a party to charge no. 4 which was framed against accused nos. 1, 6 and 7 the conviction and sentence of accused no. 5 by the High Court is unsustainable in law. [783FG]

Topandas v. State of Bombay [1955] 2 SCR 881 referred to.

2. The retracted judicial confession of accused 5 could not be relied upon against accused 6 in this case in view of the fact that accused 6 who had been tried alongwith accused 5 had been acquitted by the High Court of the charge of conspiracy under s. 302 read with s. 120B I.P.C. and accused 5 was not a party for the offence of murder of Malan for which only accused nos. 1, 6 and 7 were tried. [785E-F]

3. However, the conviction and sentence of imprisonment for life under s. 302 read with s. 341 I.P.C awarded to accused 6 is in order as there is sufficient evidence against him proving his guilt in respect of charge no. 4 framed regarding the murder of Malan beyond all reasonable doubt. The evidence of the approver P.W. 1 and the retracted confession of accused 6 Exh. 138 with the corroborative evidence namely, the recovery of the bloodstained razor and the medical evidence of Dr. Suresh who conducted the autopsy and deposed that out of the antemortem injuries, injuries 1 to 7 collectively were sufficient to cause death in the ordinary course, conclusively prove the guilt of accused 6. [786A-B; 785F-G; 786A]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 287 & 288 of 1980

Appeals by Special leave from the judgment and Order dated the 27th July & 8th August, 1979 of the Bombay High

Court in CrI. Appeal Nos. 7 of 1977 and 605 of 1978.

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V.S. Desai, Mrs. J. Wad and Miss Aruna Mathur for the Appellants.

O.P. Rana, K. V. Sree Kumar and M.N. Shroff, for the Respondent.

The Judgment of the Court was delivered by

VARADARAJAN, J. These appeals of Vinayak and Prakash, accused 6 and 5 respectively in Sessions Case 26 of 1976 on the file of the Sessions Judge, Prabhani by special leave, are directed against the judgment of the Bombay High Court in Criminal Appeals 7 of 1977 and 605 of 1978. Criminal Appeal 7 of 1977 was filed by Sitaram @ Sitya and Vinayak, accused 1 and 6 respectively, against their conviction under s. 302 read with s. 34 I.P.C. in respect of the murder of one Malan, daughter of Kishan and the sentence of imprisonment for life awarded to them. Criminal Appeal 605 of 1978 was filed by the State of Maharashtra against the acquittal of Sundar @ Sundarayya, Kishan @ Kishanayya, Gangaram @ Gangayya, Prakash and Shrirang, accused 2, 3, 4, 5 and 7 respectively of the charge under s. 302 read with s. 34 I.P.C. in respect of the murder of Malan and against their acquittal of the charge framed under s. 302 read with s. 120B I.P.C. The State of Maharashtra filed Criminal Appeal 38 of 1977 for enhancement of the sentence of imprisonment for life awarded to accused 1 and 6 by the trial court.

After hearing the learned counsel for the parties we allowed the appeal of Prakash, accused 5 and acquitted him and set aside his conviction and the sentence awarded to him. So far as Vinayak, accused 6 is concerned, we dismissed his appeal on 13.9.1984 for reason to follow. Now proceed to record our reasons.

Sessions Case 26 of 1977 is stated to be an off-shoot of what is known as the 'Manwath murders case' in which Prakash's father Uttamrao Barhate and his permanently kept concubine Rukmanibai and 13 others were tried for the murders of 10 girls and women during the period from 14.11.1972 to 4.11.1974 in Manwath village, Prabhani district, Maharashtra State. In the case the above seven accused were tried for three murders of two young girls and a women alleged to have been committed them and the approver Sheshrao (P.W. 1) during the period from

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10.11.1975 to 1.1.1976 in Babultara village, Prabhani district. Charge No. 1 framed in this case was for criminal conspiracy under s. 302 read with s. 120B I.P.C. on the allegation that between the first week of October 1975 and 2.1.1976 at Babultara and Waghala villages, all the seven accused and the approver P.W. 1. entered into a criminal conspiracy to commit murders of young girls and women in the vicinity of Babultara village by inflicting injuries on the private parts of the victims or disfiguring their faces in order to make it appear that the accused in the Manwath murders case are not the real culprits and that in pursuance of that conspiracy these seven accused and the approver P.W. 1 committed three murders of Ashamati, aged 9 years, Parubai, aged 40 years and Malan, aged 12 years in Babultara village. Charge No. 2 framed against accused 1 to 3 was under s. 302 read with s. 34 I.P.C. On the allegation that in pursuance of the conspiracy and in furtherance of their common intention they committed the murder of Ashamati on or about 10.11.1975. Charge No. 3 framed against accused 1 to 4 was under s. 302 read with s. 34 I.P.C. on the allegation that in pursuance of the conspiracy and in furtherance of

their common intention they committed the murder of Parubai on or about 29.11.1975. The last charge No. 4 framed against accused 1, 6 and 7 was under s. 302 read with s. 34 I.P.C. on the allegation that in pursuance of the conspiracy and in furtherance of their common intention they committed the murder of Malan on or about 1.1.1976. The accused pleaded not guilty to the charges framed against them. The Sessions Judge found, on a consideration of the evidence, all the seven accused not guilty of the charge of conspiracy framed under s. 302 read with s. 120B I.P.C. and acquitted them. He found accused 1 to 3 not guilty of charge No. 2 framed against them in respect of the murder of Ashamati and accused 1 to 4 not guilty of charge No. 3 framed against them in respect of the murder of Parubai and acquitted them. He found accused No. 7 not guilty but accused 1 and 6 guilty of charge No. 4 framed against them in respect of the murder of Malan and acquitted accused 7 and convicted accused 1 and 6 and sentenced them to undergo imprisonment for life under s. 302 read with s. 34 I.P.C.

The State did not file any appeal against the acquittal of accused 1 and 6 of charge No. 1 framed against them under s. 302 read with s. 120B I.P.C. As state earlier, Criminal Appeal 38 of 783

of 1977 was filed by the State for enhancement of the sentence of imprisonment for life awarded to accused 1 and 6 in respect of the murder of Malan and Criminal Appeal 605 of 1978 against the acquittal of accused 2, 3, 4, 5 and 7 of charge No. 1 framed under s. 302 read with s. 120B I.P.C. Thus the acquittal of accused 1 and 6 of charge No. 1 framed against them under s. 302 read with s. 120B I.P.C. and of accused 1 to 3 of charge No. 2 in respect of the murder of Ashamati and of accused 1 to 4 of charge No. 3 in respect of the murder of Parubai became final.

The High Court considered the evidence and dismissed Criminal Appeal 38 of 1977 filed by the State for enhancement of the sentence of imprisonment for life awarded to accused 1 and 6 for the murder of Malan as also Criminal Appeal 7 of 1977 filed by accused 1 and 6 against their conviction and the sentence awarded to them. The first accused Sitaram @ Sitya has not filed any appeal in this Court against the High Court's judgment confirming his conviction and sentence awarded to him by the trial court under s. 302 read with s. 34 I.P.C. for the murder of Malan. Therefore, his conviction and sentence awarded to him have become final. Accused 5 and 6 only have filed Criminal Appeal 288 of 1980 and Criminal Appeal 287 of 1980 respectively against the conviction of accused 5 and the sentence of imprisonment for life awarded by the High Court under s. 302 read with s. 120B I.P.C. and the confirmation of the conviction and sentence awarded to accused 6 by the trial court under s. 302 read with s. 34 I.P.C. respectively.

In view of the acquittal of all the seven accused by the trial court of charge No. 1 framed under s. 302 read with s. 120B I.P.C. and the High Court's dismissal of Criminal Appeal No. 605 of 1978 filed against that acquittal which, as stated earlier, was filed only against accused 2,3,4 and 7 not against accused 1 and 6, in so far as it related to accused 2, 3, 4 and 7, Mr. V. S. Desai, learned senior counsel appearing for Prakash, accused 5, contended in his arguments that the conviction of that accused alone for conspiracy under s. 302 read with s. 120B I.P.C. is unsustainable in law as at least two persons are required for an offence of conspiracy under s. 120A I.P.C. and he

relied upon a decision of this Court in Topandas v. State of Bombay(1) in support of his contention. In

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that case the charge under s. 120B I.P.C. was framed against four named persons who had been arrayed as accused 1 to 4. The High Court acquitted accused 2 to 4 and convicted accused 1 alone of that charge and sentenced him, holding that he and some others had conspired together and fabricated the deed of assignment put forward by accused 1 and that accused 1 alone could not have fabricated that document. This Court allowed the appeal of accused 1 and set aside his conviction under 120B I.P.C. holding that the conviction of one of the accused alone was unsustainable in law having regard to the requirement of s.120A I.P.C. Mr. O.P. Rana learned senior counsel appearing for the state of Maharashtra sought to support the judgment of the High Court in this case against accused 5 in view of the conviction of accused 1 and 6 for the murder of Malan under s, 302 read with s. 34 I.P.C. We repelled that submission of Mr. Rana, in view of the fact that those two accused 1 and 6 had been acquitted by the trial court of charge No. 1 framed against them under s. 302 read with s. 120B I.P.C. and no appeal against their acquittal had been filed in the High Court and also the fact that accused 5 was not a party to charge No.4 which was framed only against accused 1, 6 and 7. It was in view of this technical flaw that we allowed the appeal of accused 5 without going into the evidence regarding the merits of the case against him. Mr. Rana did not draw our attention in the course of his arguments to the fact that in charge No. 1 even the approver P.W. 1 is alleged to have conspired with the seven accused to commit these three murders or contend that in view of that circumstance and the finding of the High Court that the approver P.W. 1 also was a party to the conspiracy the conviction of accused 5 alone of the charge of conspiracy under s. 302 read with s. 120B I.P.C. could be sustained. We were, therefore, not called upon to consider any such question.

As regards accused 6 in the High Court reliance was placed by the prosecution on four pieces of evidence besides the evidence of the approver P.W. 1 and the retracted confession of accused 5. Those four pieces of evidence are: (1) recovery of the razor blade, article 54, pursuant to the confessional statement of accused 6, admitted under s. 27, Evidence Act. The blade was found by the Serologist to be stained with human blood of group B like that of Malan; (2) recovery of the blood stained shirt, article 55, of accused 6 from his house; (3) evidence regarding the presence of

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6 along-with accused 7 and P.W. 1 near about the scene of offence before and after the commission of the murder of Malan. It is the case of the prosecution that Shivram, P.W. 45 saw accused 6 under a vad tree and Abasaheb, P.W. 44, saw him in the rivulet; and (4) retracted judicial confession, Exh. 138 of accused 6.

The High Court found on the evidence of Munjebi, P.W. 50 and Hanumant Salunke, Sub-Inspector of Police P.W. 53, that the blood-stained shirt, Art. 54 was recovered from the house of accused 6. But the Serologist was unable to determine the origin of the blood found on Art. 55 due to its disintegration. Therefore, the High Court did not place any reliance on this circumstance, namely, recovery of the blood-stained shirt, Art. 55 from the house of accused 6. The High Court found that the evidence of P.W. 44 and 45 does not establish beyond reasonable doubt that accused 6

was found in the company of accused 7 and the approver P.W. 1 near-about the place of occurrence as alleged by the prosecution before and after the murder of Malan. But the High Court accepted the evidence of the approver P.W. 1 against accused 6 as reliable and the judicial confession, Exh. 138 of accused 6 as being voluntary and reliable and (both) corroborated by other evidence and it acted also upon the retracted judicial confession of accused 5 in holding that the guilt of accused 6 for the murder of Malan had been proved beyond all reasonable doubt. We are of the opinion that the retracted judicial confession of accused 5 could not be relied upon against accused 6 in this case in view of the fact that accused 6 who had been tried alongwith accused 5 had been acquitted by the High Court of the charge of conspiracy under s. 302 read with s. 120B I.P.C. and accused 5 was not charged for the offence of murder of Malan for which only accused 1, 6 and 7 were tried. The evidence of the approver P.W. 1 and the retracted confession of accused 5, Exh. 138 are amply corroborated by other evidence, namely, recovery of the blood-stained razor, Art. 54 and the medical evidence of Dr. Suresh (P.W. 31) who had conducted autopsy on the body of Malan at 4.15 p.m. on 2.1.1976. The Doctor found 9 incised wounds on various parts of the body of Malan besides a small incised injury on the right wall of the vagina outside in the middle and a small incised injury on the lower end of the vagina just at the mouth and he is of the opinion that all the 11 injuries were antemortem injuries which might have been caused by sharp cutting weapons, that it is possible that injuries 5 to 7 found on the forehead and right and left side of the parietal eminence were

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caused by hard and blunt objects, that death must have been instantaneous and that injuries 1 to 7 collectively were sufficient in the ordinary course of nature to cause death. In these circumstances we found that there is sufficient evidence against accused 6 proving his guilt in respect of charge No. 4 framed regarding the murder of Malan beyond all reasonable doubt and that he had been rightly convicted and sentenced to imprisonment for life under s. 302 read with s. 34 I. P. C. Accordingly, we allowed the Criminal Appeal 288 of 1980 and acquitted Prakash, accused 5 and directed him to be set at liberty forthwith and dismissed Criminal Appeal 287 of 1980 filed by accused 6 and confirmed the conviction of accused 6 and the sentence awarded to him by the courts below.

S. R.

Civil Appeal No. 288/1980 allowed
and Civil Appeal No. 287 of 1980
dismissed,

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