

THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.
APPELLATE SIDE JURISDICTION

CRIMINAL APPEAL NO. 425 OF 2012

1. Dnyaneshwar @ Nana Shivaji Mali
Age: 29 years, Occupation: Nil,
2. Bhartibai Dnyaneshwar @ Nana Mali,
Age: 23 years, Occupation: Nil,
Both R/o. Kismat Nagar, HUDCO,
Shirpur, Taluka: Shirpur,
District : Dhule.

... APPELLANTS

VERSUS

The State of Maharashtra.

... RESPONDENT

...

Mr. P. B. Shirsath, Advocate for the Appellants.

Mr. M. M. Nerlikar, APP for the Respondent / State.

...

CORAM : **A. B. CHAUDHARI &
INDIRA K. JAIN, JJ.**

DATE : 16th September, 2015.

ORAL JUDGMENT: (Per A. B. Chaudhari, J.)

. Being aggrieved by the judgment and order dated 30th
April, 2012, passed by the learned Additional Sessions Judge, Dhule,
in Sessions Case No.90 of 2011, by which Appellants were convicted

for the offences punishable under Sections 302 and 201 read with Section 34 of the Indian Penal Code, the instant appeal was filed by the Appellants in this Court.

2 In support of the appeal, Mr. Shirsath, learned counsel for the Appellants vehemently argued that the learned trial Judge ought to have acquitted both the Appellants for the offence of murder since direct evidence claimed by the prosecution is only of PW-3 Dilip and postmortem report showing death due to haemorrhage due to head injury caused to deceased Sangita. He submitted that evidence of PW-3 Dilip is of omissions and contradictions relating to FIR. His evidence is therefore untrustworthy. At any rate, according to him, in the substantive evidence he did not name the girl Sangita as the deceased who was assaulted according to prosecution and therefore, in the alternative he submitted that at any rate offence of murder is not proved and the trial Court has also rightly disbelieved the evidence of PW-3 Dilip.

3 Per contra, Mr. Nerlikar, learned APP supported the impugned judgment and order and submitted that the finding of the trial Court in not believing PW-3 Dilip is perverse and therefore, the same is required to be reversed. He, therefore, submitted that reading of the evidence of PW-3 Dilip clearly shows the involvement

of present Accused / Appellants both together in assaulting the deceased Sangita. He submitted that Sangita has been named in the FIR and therefore, it is idle to contend that she was not named in the substantive evidence of PW-3 Dilip. He, therefore, prayed for dismissal of the appeal.

Consideration:

4 We have seen the impugned judgment and order and the reasons recorded by the learned trial Judge. We have perused the evidence of PW-3 Dilip carefully. Upon perusal of his evidence, we find that he has proved the FIR in which name of Sangita is mentioned. Therefore, as to the identity of the girl we reject the submission made by the learned counsel for the Appellants.

5 Insofar as the author of the injuries to the deceased Sangita is concerned, we find that postmortem report reveals head injury as the cause of death due to injury to the parietal region. The postmortem report does not show that the death was caused due to burn injury caused by cigarette though deposed by PW-3 Dilip. It is therefore, difficult for us to accept that the Appellants could be said to have caused her death by burning cigarette, as alleged. Nevertheless, fact remains that she was in the custody of the

Appellants, but then offence of murder cannot be said to have been proved in view of the cause of death shown in the postmortem report, since PW-3 Dilip has not testified that the injury on the head were caused by any of the Appellants. That is left to the imagination. The prosecution must prove its case beyond all reasonable doubts and cannot simply rely on the incomplete evidence. In the instant case, we find that beyond causing burning injuries by cigarette there is no other evidence against the Appellants. The presumption drawn by the learned trial Judge under Section 106 of the Evidence Act will be applicable only if prosecution discharges its initial burden. We do agree with the learned trial Judge that injuries were caused to the deceased by the Appellants, but there is no evidence of injuries caused on head, which is the cause of death. That being so, we cannot hold Appellants guilty of murder in the above fact situation, but then the Appellants will have to be held guilty for her death. The trial Judge has unfortunately disbelieved the evidence of PW-3 Dilip. The evidence of PW-3 Dilip is consistent. Omissions amounting to contradictions have been brought on record with reference to the FIR, which is not a substantive piece of evidence. The omissions have not been brought qua the statement under Section 161. Therefore, we do not attach any importance to those omissions amounting to contradiction in the evidence of PW-3 Dilip. In the

result, we, therefore, find that offence of murder is not proved though offence punishable under Section 304 Part II of the Indian Penal Code is proved.

6 The Appellants have been in jail since 28th May, 2011, and therefore, we think that sentence undergone by them should be enough. That being so, we make the following order:

ORDER

- I. Criminal Appeal No.425 of 2012, is partly allowed.
- II. The impugned judgment and order convicting Appellant No.1 – Dnyaneshwar @ Nana Shivaji Mali and Appellant No.2 – Bhartibai Dnyaneshwar @ Nana Mali, for the offence punishable under Sections 302 of the Indian Penal Code is set aside and modified by holding Appellant No.1 – Dnyaneshwar @ Nana Shivaji Mali and Appellant No.2 – Bhartibai Dnyaneshwar @ Nana Mali guilty of the offence punishable under Section 304 Part II read with Section 34 of the Indian Penal

Code and are sentenced to undergo rigorous imprisonment, which they have already undergone.

III. No separate sentence for fine is imposed.

IV. Appellant No.1 – Dnyaneshwar @ Nana Shivaji Mali and Appellant No.2 – Bhartibai Dnyaneshwar @ Nana Mali be set at liberty forthwith, if not, required in any other offence.

ndm

[INDIRA K. JAIN, J.]

[A. B. CHAUDHARI, J.]