

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 3569 OF 2013

The State of Maharashtra,
Through, PSO Shirpur Police Station,
Shirpur, Dist. Dhule.

...Applicant

Versus

Phadsing Supa Pawara,
Age 35 Years, Occu. Labour,
R/o Juni Sati Panni, Tq. Shahada,
Now R/o Abhanpur Shivar,
Tq. Shirpur, Dist. Dhule.

...Respondent

Mrs. M.S. Patni, APP for Applicant.
Mr. P.B. Patil, Advocate for Respondent.

CORAM : S.S. SHINDE & A.M. BADAR, JJ.

ORDER RESERVED ON: 19TH JANUARY, 2015.

ORDER PRONOUNCED ON : 28TH JANUARY, 2015

ORDER (PER A.M. BADAR, J.) :

1] This is an application under Section 378(1)
(3) of the Cr.P.C. 1973 by the applicant State for
grant of leave to file appeal challenging the
judgment and order of acquittal recorded on
26.4.2013, in Sessions Case No. 52 of 2012, between

the parties, by the learned Additional Sessions Judge, Dhule, thereby acquitting the accused of the offence punishable under Sections 302, 323 and 504 of IPC, 1860.

2] Facts leading to the prosecution of the respondent/accused are thus :-

[a] Respondent/accused Phadsing Supa Pawara, married Durgabai Phadsing Pawara (since deceased) prior to 10 to 12 years of the incident. Out of this wedlock, the couple gave birth to a daughter and two sons. The accused and his wife Durgabai Pawara were working as Watchman in field Gat No.120 of Kisan Patil at village Tarhadi, in Abhankar Shivar, Taluka Shirpur, District Dhule and the couple used to reside in a hut in that field. It is the case of the prosecution that 2 or 3 years after marriage, the accused used to quarrel with his wife Durgabai by suspecting her character. The accused was addicted to liquor and under influence of liquor, he used to abuse and assault Durgabai.

[b] According to prosecution case, the incident happened on 7.1.2011 in the hut of the couple. Suspecting character of his wife Durgabai, accused Phadsing quarreled with her and assaulted her by means of stick as well as fist and kick blows. Because of this assault Durgabai Pawara succumbed to the injuries, on the spot itself. Uttam Gosawi, a villager from village Tarhadi, informed the incident to Kama Arsha Pawara – brother of deceased Durgabai Pawara. Kama Pawara alongwith Kisan Ravtale Sarpanch of his village and others left their village Satipani in Shahda Taluka and reached the spot of incident at about 11.00 p.m. of 7.1.2011. They all saw Durgabai in dead condition in the hut. Upon being asked, accused is alleged to have made an extra-judicial confession to them that he has murdered her, as she has been a characterless woman.

[c] On 8.1.2011, Kama Arsha Pawara, brother of deceased lodged report to the Police Station, Shirpur, whichi has resulted in registration of Crime No. 407 of 2011, under Section 302, 323, 324 and 504

of IPC against the accused. Thereafter, during the course of investigation, the dead body of Durgabai was sent for autopsy after recording inquest memorandum. The accused came to be arrested. The spot panchanama was recorded. Statement of witnesses came to be recorded and on completion of routine investigation, charge sheet came to be filed in the Court of the learned JMFC, Shirpur. As the offence punishable under Section 302 of IPC is exclusively triable by the Court of Sessions, the learned JMFC, Shirpur, committed the case to the Court of Sessions, Dhule.

[d] Charges for the offence punishable under Sections 302, 323 and 504 of IPC came to be framed against the accused. In order to bring home the guilt of the accused, the prosecution has examined in all 4 witnesses. Evidence of informant PW-1-Kama is at Exhibit 21, report lodged by him is at Exhibit 22. PW-2 Kisan Ravtale, Sarpanch of village Satipani who accompanied PW-1 Kama Arsha Pawara to village Tarhadi, is examined as PW-2 at Exhibit 23. Autopsy

Surgeon, Dr. Sheetal Shailesh Shinde is examined as PW-3 at Exhibit 26. Post Mortem report is at Exhibit 27. Investigating Officer, Dattatray Shamrao Patil, A.P.I. of Shirpur police station, is examined as PW-4 at Exhibit 28. Exhibit 14 is the inquest memorandum. Exhibit 15 is the spot panchanama. Exhibit 16 is the Seizure Panchanama of the clothes of the deceased. Exhibit 30 is the sketch of the spot of incident and Exhibit 31 is the spot panchanama.

3] The defence of the accused is that of total denial. However, he did not enter into defence. After hearing the parties, the learned Additional Sessions Judge, Dhule, was pleased to acquit the accused of the offence punishable under Section 302, 323 and 504 of IPC by impugned judgment and order dated 26.4.2013.

4] Heard learned APP for the State. She vehemently argued that the learned trial court has erred in not placing reliance on the extra-judicial confession given by the respondent/accused to

informant PW-1 Kama Pawara and PW-2 Kisan Ravtale. As such, according to learned APP, the impugned judgment and order is perverse, and thereby the prosecution is entitled for leave to appeal.

5] Per contra, according to learned counsel for the respondent/accused, the impugned judgment and order acquitting the respondent/accused is demonstrating a plausible view of the matter and, therefore, needs to be maintained. We have also perused the record and proceedings and have gone through the entire evidence on record of the trial Court.

6] At the outset, it needs to put on record that the evidence of autopsy surgeon PW-3 - Dr. Shital Shinde, which is virtually unchallenged goes to show that the deceased was having several external injuries all over the body. The Autopsy Surgeon further noted several fractures to ribs and testicles to lungs of the dead body of Durgabai Pawara. All these injuries were ante-mortem in nature. PW-3 Sheetal came to the conclusion that deceased Durgabai died

because of Cardio-respiratory failure due to bilateral aspect fracture with lung tears with multiple injuries all over body. Her evidence is duly corroborated by contemporaneous document i.e. the Post Mortem report (Exh.27). As such, we have no hesitation to come to the conclusion that the deceased Durgabai died homicidal death.

7] Now, let us examine, whether the prosecution has proved that the accused has caused fatal injuries to his wife Durgabai with an intention and knowledge of causing her death. On this aspect, the only relevant evidence is that of PW-1 Kama Pawara and PW-2 Kisan Ravtale. According to prosecution case, the accused had given extra-judicial confession before these two witnesses. Therefore, let us examine, the evidence about the extra-judicial confession allegedly made by the accused to these witnesses. According to PW-1 Kama Pawara, he came to know about the incident from Uttam Gosavi on 7.1.2011 itself. Therefore, alongwith PW-2 Kisan Ravtale he left his village and reached the spot of incident which is a hut situated in the field at village Tarhadi at about

11.00 p.m. According to this witness, he saw dead body of his sister Durgabai lying in the hut with swelling all over the body. PW-1 Kama, deposed that at that time accused Phadsingh told him that he had beaten Durgabai (the deceased) with stick and killed her on suspicion.

8] PW-2 Kisan Ravtale, to whom, according to prosecution case, accused has made extra-judicial confession, has stated in his evidence that he, accompanied PW-2 Kama Pawara to village Tarhadi. According to PW-2 Kisan, upon being asked, respondent/accused told him that after consuming liquor Durgabai (the deceased) used to act abnormally and, therefore, he killed her.

9] If we carefully peruse the extra-judicial confession allegedly given by the accused to both these witnesses then it is seen that evidence in respect of both these extra-judicial confession is not consistent. PW-1 Kama is claiming that the accused had confessed him that he murdered Durgabai because of suspicion may be about her character.

However, PW-2 Kisan Ravtale has stated that the accused confessed before him that he murdered Durgabai because she used to act abnormally after consuming liquor. Both these witnesses reached the spot of the incident together at about 11.00 p.m. of 7.1.2011. Obviously, both these witnesses must have heard the extra-judicial confession, if any made by the accused, at about the same time. Both these witnesses are giving different reason disclosed by accused for allegedly killing Durgabai. They are not reproducing the exact words in which the accused had allegedly made extra-judicial confession to them. They are stating the reason allegedly told by accused in a vague and ambiguous manner. It thus appears that both these witnesses tried to convey that the accused made extra-judicial confession to them simultaneously but their version about the same is divergent. True it is that it is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence but for considering extra-judicial confession as piece of reliable evidence, the court must get itself satisfied that such

confession passes the test of reproduction of exact words as well as the reason or motive for confession. The persons selected for making confession is also an important factor for determining reliability of such piece of evidence. The time when extra-judicial confession came to be made, nature of circumstances in which it is made and credibility of witnesses who spoke about the confession are also factors on the basis of which reliability of extra-judicial confession can be determined. In the case in hand the extra-judicial confession is alleged to have been made to informant-PW 1 Kama Pawara who happens to be the brother of deceased as well as PW-2 Kisan Ravtale, who was accompanying informant-PW-1 Kama Pawara. Both these witnesses give different reasons stated to them by accused for the commission of murder of Durgabai. One fails to understand as to why the accused has chosen these witnesses to make extra-judicial confession, particularly when he allegedly murdered sister of one of these witnesses. Motive of making extra-judicial confession to them is also missing from their cryptic evidence. These

witnesses are certainly not an independent witnesses. Because of homicidal death of sister of PW-1 Kama, they were certainly having grudge against her husband i.e. the accused. As such for the reasons stated in forgoing paras, we feel it unsafe to rely upon such evidence regarding extra-judicial confession coming from the mouth of interested witnesses, particularly, when there is no other evidence to corroborate their version.

10] Though, not argued by the learned APP, we are alive to the provision of Section 106 of the Indian Evidence Act, 1872 which prescribes that when any fact is especially within knowledge of a person the burden of proving that fact is upon such person. Considering this provision and the fact that deceased Durgabai was found dead in the hut, where she alongwith accused used to reside, one may argue that Durgabai died in custody of respondent/accused. As the accused has not explained circumstances in which she died homicidal death, he needs to be held guilty of offence of commission of murder of Durgabai.

However, by now it is settled that purport of section 106 of Indian Evidence Act, 1872 is not to cast any burden on the accused to prove that, no crime was committed by him by bringing on record the facts within his knowledge. The onus to prove commission of offence by the accused is always on the prosecution. However, when the prosecution is successful in proving facts from which reasonable inference can be drawn regarding commission of offence by accused, then the accused by virtue of his special knowledge regarding such facts is required to offer explanation which may drive the court to come to some different inference. Valuable reference can be had for this proposition from the judgment of the Hon'ble Apex Court in *State of Rajasthan Vs. Thakur Singh* reported in 2014(8) SCALE-82. In the case in hand evidence of PW-1 Kama Pawara and PW-2 Kisan Ravtale no doubt shows that, accused and his deceased wife Durgabai were residing in the hut situated in the field of Kisan Patil at village Tarhadi. However, perusal of spot panchnama as well as the sketch makes it clear that the said hut was not even

having a door and proper walls. The incident is alleged to have happened daytime at 5:00 PM of 7.1.2011. The prosecution has not adduced any evidence to show that the accused was present on the spot on 7.1.2011 much less at or about the time of the incident in question. The hut where incident has happened was situated in a field. It was an isolated hut. In such circumstances one cannot come to the conclusion that death of Durgabai occurred while she was in custody of the accused.

11] At this juncture it is apposite to note that the prosecution has not even examined the owner of the field or owners of the neighbouring agricultural field in order to establish presence of the accused on the spot of incident, at or about the time of incident in question. Therefore, it is not possible to conclude that the prosecution has succeeded in proving the fact that while in custody of the accused, Durgabai died and therefore, the accused should have explained the circumstances in which she died.

12] In the result after careful perusal of the evidence adduced on record by the prosecution, we are of the considered opinion that the view taken by the learned trial Judge is a plausible view and is in consonance with the evidence on record. The prosecution has failed to establish that it was the accused and none else who caused homicidal death of Durgabai Pawara. As such the application is devoid of any merit and therefore we pass the following order :-

The application is rejected.

[A.M. BADAR]
JUDGE

[S.S. SHINDE]
JUDGE.

grt/-