

UNREPORTED

IN THE HIGH COURT OF JUDICATURE AT

BOMBAY

BENCH AT AURANGABAD.

CRIMINAL APPEAL NO.533 OF 2012.

Sanjay S/o Ramjeet Bhoiya,
Age 31 years, Occ. Nil,
R/o Shahare, Tq. Gomiya,
Dist. Bhokari Jharkhand
(At present lodged in
Central Prison, Yerwada,
Pune).

... APPELLANT.

Versus

The State of Maharashtra

... Respondent.

...

Mr. M. A. Tandale, advocate for the appellant.
Mr. Shashibhushan P. Deshmukh, A.P.P for the State.

...

**CORAM : S.V.GANGAPURWALA AND
V.K.JADHAV, JJ.**

**Reserved on: 24.11.2015.
Pronounced on: 23.12.2015.**

JUDGMENT (Per S.V.Gangapurwala, J.)

1. Heard.

2. The present appellant is prosecuted for an offence punishable U/s 302 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.1,000/-(Rupees one thousand), in default of payment of fine, to suffer rigorous imprisonment for six (6) months. The accused has filed the present appeal against the said conviction.

3. Mr.Tandale, learned counsel for the appellant is appointed through Legal Aid. The learned counsel strenuously contends that the prosecution has miserably failed to prove its case beyond reasonable doubt. The learned counsel submits that the appellant is Sanjay Ramjeet Bhoiya. In the FIR the informant has referred the act being committed by one Sanjay Sharma. The person prosecuted is Sanjay Bhoiya and not Sanjay Sharma. The identity of the accused has not been established. It can not be said that the present accused is guilty of causing homicidal death of any person, much less deceased Babita.

4. The learned counsel further submits that the Sessions Court has laid much emphasis on the evidence of one Anita P.W.3. The said P.W.3 can not be said to be eye witness at all. The said P.W.3 is said to be sleeping outside her shed (room) more than at a distance of 50 ft. The incident is said to have taken place at 3 a.m. i.e. when it was dark. In the said darkness, there was no way the said alleged witnesses could have identified any person. According to the learned counsel, the evidence of P.W.3 can not be relied. The said evidence is full of improvisation. In the evidence P.W.3 states that the accused had come to her house for eating meal. This fact does not appear in the statement before the Police. So also her statement that she did not offer her food does not appear in Police statement. In the statement before the Court, she says that accused was her assumed brother. The same also does not appear in the statement before the Police. The learned counsel submits that the said statement can not be believed and relied. Even statement of P.W.2 Pramila who is said to be sleeping beside the

deceased is untrustworthy. Moreover, it is clear from her evidence that she is not an eye witness. She has not seen the incident. It is unlikely that P.W.3 who was sleeping at much distance could see the incident when P.W.2 who was sleeping beside the deceased could not see the incident. According to the learned counsel, it was a dark night, as such the accused could not be recognised and that is why the informant in his complaint has referred to be accused as Sanjay Sharma. He was also not confident as to who the accused is whether accused is Sanjay Sharma or Sanjay Bhoiya. According to the learned counsel, P.W.1 can not be relied upon. He states that he got up on hearing the cry of P.W.2. The learned counsel submits that the post-mortem report, its contents are not proved. If the post-mortem report is perused, it states that semi digested food is present in the stomach. The food is completely digested within two and half to three hours. It is submitted that the deceased had taken food at about 8 to 8-30 in the evening. If the incident had taken place at 3 a.m then the complete food ought to

have been digested and no remains of semi digested food would have been left in the stomach. The said time assumes significance. As such the time of incident and the presence of accused, so also narration of incident becomes doubtful. The learned counsel relies on the judgment of the Apex Court in a case of **"Moti etc. Vs. State of U.P."** reported in **"2003 ALL MR (Cri.) 984 (S.C.)"**. The learned counsel submits that the appellant is entitled for the benefit of doubt.

5. The learned counsel in alternate submits that at the most this case would fall within the parameters of Section 304 Part I of the I.P.C. It was a death by throwing of stone i.e. a singular act.

6. Mr.Deshmukh, learned A.P.P. Submits that the accused is guilty of committing a heinous act. The life of a fifteen years old girl before she could achieve womanhood has been taken away by the appellant in a cruel manner. The case is based on the testimony of eye

witnesses. P.W.3 is eye witness. The motive is also writ large. The deceased had questioned the act of the accused in maintaining illicit relations with P.W.3. According to learned A.P.P. The accused and the witness knew each other well. The parties were living in the midst of nature and were accustomed to live without light. They all were living in the neighbouring sheds and in moon light the accused could be identified by them. The learned A.P.P relies on the judgment of the Apex Court in a case of **"Shivraj Bapuray Jadhav and others Vs. State of Karnataka"** reported in **"(2003) 6 Supreme Court Cases 392"**. The learned A.P.P. Submits that the medical evidence is in consonance with the ocular evidence. It is stated in the evidence that the deceased had meal at about 8 to 8-30 p.m and the incident occurred at about 3 a.m. The post-mortem report specifically states that the death is within six hours of the meal. When the oral evidence and the medical evidence are in consonance with each other, the same can be considered. The learned A.P.P relies on the judgment in a case of **"Kathi Bharat Vajsur and**

another **Vs. State of Gujarat**" reported in **"AIR 2012 Supreme Court 2163**. The learned A.P.P. Submits that the evidence of P.W.2 who is an injured witness has to be considered. Her testimony can not be ignored. She has specifically stated that she saw accused running away from the spot and deceased was sleeping beside her. Her testimony can not be ignored. The learned A.P.P relies on the judgment in a case of **"Bhajan Singh alias Harbhajan Singh and others Vs. State of Haryana"** reported in **"AIR 2011 Supreme Court 2552"**.

7. It is further submitted that the witnesses are rustic persons. They are illiterate. Their testimony can not be rejected on the ground that it lacks spontaneity when witness is examined after a long gap following the offence. The learned A.P.P relies on the judgment of the Apex Court in a case of **"State of Karnataka Vs. M.V.Manjunathgowda and another"** reported in **"(2003) 2 Supreme Court Cases 188"**.

8. With the assistance of the learned

counsel and learned A.P.P. We have gone through the judgment, depositions and the documents. The prosecution has examined five witnesses. As per the prosecution case P.W.3 is the eye witness.

9. From the evidence on record it is clear that all these persons are rustic persons. They have come from different States for the purpose of labour. The deceased and the witnesses had come from Madhya Pradesh, whereas accused is from Jharkhand State. They had come there for work. There were more than 200 persons who were working at the site and were residing in small sheds.

10. The post-mortem report Exh.26 shows that deceased Babita died due to "Neuragenic shock due to head injury". The defence has not disputed that Babita died homicidal death. While performing spot panchanama Exh.36 stone having weight 15 Kg is seized. The factum of death of Babita by stone is not controverted.

11. The motive towards the alleged crime

is, the deceased questioning the accused for visiting the house of Anita frequently and asking him not to visit the house. Because of the said fact, the accused was enraged. P.W.2 Pramila has also stated that accused had quarrel with Babita. At about 8 p.m. Deceased Babita told accused not to visit Anita. The accused thereupon retorted that if his motive is not going to be fulfilled then he would end her life. The motive is well established.

12. The accused has also raised defence with regard to the identity. In FIR at one place name of Sanjay Sharma is mentioned as accused, whereas accused is Sanjay Bhoiya. The learned counsel for the accused had laid emphasis on this aspect and said that the present accused is different than Sanjay Bhoiya and the real accused is Sanjay Sharma. The said theory was not raised before the Sessions Judge, nor the theory can survive, in view of the consistent evidence on record. Only because at one place, the name of accused is mentioned as Sanjay Sharma, that would not affect the merit of the case. Everywhere the

name of accused is stated as Sanjay Bhoiya. The accused and the witnesses were knowing each other. They were residing in the close vicinity.

13. The evidence of P.Ws.1 to 3 is consistent on the incident. P.W.1 is the person who had lodged the FIR. On the fateful night Pramila and deceased Babita were sleeping nearby and at some distance P.W.1 was sleeping along with his better half. At about 3 a.m., accused came and put stone on the head of Babita. Pramila raised hue and cry and alarmed him to get up stating that stone was hit to Babita. Thereupon he awoke and saw the accused running. He also saw blood coming from the nose and mouth of Pramila. After contacting the contractor on phone, he lodged the FIR. The evidence of P.W.1 that he saw blood coming from the nose and mouth of Babiba, contacted contractor on phone and lodged FIR is not shaken in cross-examination. He is not an eye witness. He has not seen the accused hitting Babita on head by stone. The only improvement in the statement of P.W.1 that he saw the accused hitting stone.

14. The evidence of P.W.2 Pramila shows that in the evening prior to the incident, accused had threatened Babita. It is further stated by her that P.W.2 slept with Babita. She was awakened because blood oozed from her nose and her face due to hitting of the stone. Her clothes were full of blood. She saw accused running and alarmed P.W.1. Babita succumbed to death due to the stone blow. Pramila was also injured. The only omission is that in the statement before the Police, she had not stated about the blood oozing from her nose and mouth, that would hardly make any difference.

15. P.W.3 is an eye witness to the incident. This witness has categorically stated that prior to the incident the accused had come to her when P.W.3 was sleeping. Accused awoke her, P.W.3 asked accused to go away. Accused told her that after ending the life of Babita only he would go away. This part of evidence has gone unchallenged in cross-examination. Said Anita was sleeping at a distance of 10-15 fts. Away from where P.W.2 and deceased Babita were

sleeping. This witness P.W.3 states that thereafter accused hit Babita with the stone on the head and P.W.2 Pramila and she shouted and accused fled away. She went to the scene of offence and saw the stone. In the cross-examination it was brought that she was unable to state the directions of the houses, that may hardly affect her statement as far as incident is concerned. It was stated by her that it was a moonlight night. The accused was within the realm of her vision. The evidence of P.W.3 that accused was residing near her shed is not denied. The evidence of P.W.3 establishes the act of accused hitting Babita on head with stone. The evidence is corroborated with the evidence of P.W.2 and P.W.1. The defence plea that due to darkness of night the ocular witnesses could not have witnessed the occurrence deserves to be rejected. The accused, deceased and witnesses were knowing each other well. The parties herein are used to live in the midst of nature and accustomed to live without light. Living in the neighbouring huts the witnesses could have naturally witnessed the incident. Reliance can

be placed on the judgment of the Apex Court in a case of **"Shivraj Bapuray Jadhav and others Vs. State of Karnataka"** reported in **(2003) 6 Supreme Court Cases 392.**

16. P.W.2 is an injured witness. Her testimony can not be ignored. The witnesses are rustic and their testimony can not be rejected on the ground that it lacks spontaneity. It is difficult to expect them to remember the events with mathematical precession. P.Ws.2 and 3 are illiterate ladies. Certain discrepancies in the form of omission are bound to occur, moreover, when the evidence is being recorded after lapse of one year. Reliance can be placed on the judgment of the Apex Court in a case of **"State of Karnataka Vs. M.V.Manjunathgowda and another"** reported in **(2003) 2 Supreme Court Cases 188.**

17. Much emphasis is laid by Mr.Tandale, learned counsel on the fact that in the post mortem report it is stated that the death has occurred within six hours of last meal. In the evidence it is stated by P.W.2 that they had meal

at about 8 to 8-30 in the evening. As such the incident alleged by the witnesses having taken at 3-00 a.m. Is unbelievable. The learned counsel has relied on the judgment of the Apex Court in a case of **"Moti etc. Vs. State of U.P."** reported in **2003 ALL MR (Cri.) 984 (S.C.)**. The Apex Court in a case of **"Joga Singh Vs. State of Haryana"** reported in **AIR 2011 Supreme Court 2552**, has held that conflict between medical and ocular evidence, the ocular evidence has greater evidentiary value vis-a-vis medical evidence. Moreover, the time lag is not much. According to the witness they had dinner at about 8 to 8-30 in the evening. The incident had taken place at about 3 a.m. i.e. after about six and half hours. It can not be said that the medical evidence is totally in contrast with ocular evidence.

18. Considering the evidence on record, the prosecution has established the guilt of the accused beyond all reasonable doubt.

19. The Sessions Judge has rightly

convicted the accused. As such the Criminal Appeal is dismissed.

20. We appreciate the assistance of Mr.Tandale, learned counsel for the appellant appointed through legal aid. We quantify his fees at Rs.7,000/- (Rupees seven thousand).

Sd/-
(V.K.JADHAV, J.)

Sd/-
(S.V.GANGAPURWALA, J.)

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