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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 335 OF 2014

Mainuddin s/o Imamuddhin Shaikh
Age 33 years, Occ: Agriculturist/Labourer
residing at Barkat Ali Shah Dargah, Jayak
Khadi, Wadala, Mumbai and presently
residing at Village Avhat, Tal. Khed,
District – Pune.

.. Appellant

Vs.

The State of Maharashtra

.. Respondents

Mr. Satyavrat Joshi for the appellant.
Mr. H. J. Dedhia, APP for State.

CORAM: P. V. HARDAS &
DR. SHALINI PHANSALKAR-JOSHI, JJ.

MARCH 31, 2015.

ORAL JUDGMENT [Per P. V. Hardas, J.] :

1. The appellant, who stands convicted for offence punishable under Section 302 of the Indian Penal Code and sentenced to imprisonment for life and to pay fine of Rs.1000/-, in default of which to undergo RI for three months, by the Extra Joint Adhoc Additional Sessions Judge -2,

Pune, by judgment dated 03/03/2014, in Sessions Case No. 504 of 2011, by this appeal challenges his conviction and sentence.

2. Facts, as are necessary for the decision of this appeal, may briefly be stated thus:

PW 12 – API Mahesh Dhavane, who was attached to Police Station Khed, received a telephone call from the PSO on 17/4/2011 at about 5 a.m., informing the incident which had occurred at Avhat and was directed to proceed to the scene of the incident with the staff. PW 12 – ASI Dhavane went to the police station and from there went to the scene of the incident and reached the scene of the incident at about 6.15 a.m. He noticed the dead body of deceased Dharma lying in a pool of blood in front of his house. Deceased Dharma had sustained injuries. PW 10 – Sunderabai, mother of deceased Dharma, lodged her report at Exh. 43. On the basis of the report of PW 10 – Sunderabai, an offence was registered. In the presence of panchas inquest panchanama was drawn at Exh.51. A scene of the incident panchanama was also drawn at Exh. 28. One slipper (footwear) was found lying behind the house and the footwear found stained with blood. It was accordingly taken into custody for the

investigation. A sketch of the scene of the incident was drawn. Sample of ordinary mud and blood stained mud was taken. The dead body of deceased Dharma was referred to the Primary Health Centre for postmortem examination. The scene of the incident panchanama at Exh. 28 under which the footwear was seized was drawn between 8.20 a.m. to 9.15 a.m.

The Dog Squad Unit had been called and the Dog Squad Unit arrived along with police personnel at 10.30 a.m. The sniffer dog was given the smell of the footwear and had proceeded towards the house at Walunj where the accused was employed. The sniffer dog stopped in front of the house and started barking. The appellant/accused was not present in the house. Accordingly, a report was prepared. PW 12 – API Dhavane then conducted the house search of the house of Walunj in the presence of panchas. The blood stained white T-shirt and blood stained Bermuda shorts, said to be belonging to the appellant, were seized. The house search panchanama is at Exh. 52. The blood stained clothes of deceased were seized under seizure memo at Exh. 53. The appellant was arrested on evening of 17/4/2011.

On 18/4/2011 the Dog Squad was again called and a letter was sent to the Tahsildar intimating that a Test Identification Parade would be conducted. The appellant/accused was produced before the Tahsildar and the Tahsildar submitted the report to the Dog Squad Unit. The seized footwear was also produced before the Tahsildar for conducting Test Identification Parade. A panchanama was drawn which is at Exh. 54.

On 19/4/2011 during custodial interrogation, the appellant expressed his willingness to point out the place where the weapon had been concealed. Accordingly, a memorandum was drawn in the presence of panchas at Exh. 30. The appellant led the police and the panchas to Avat and from the a place near the well produced one crowbar, which was seized under seizure memo at Exh. 31. Statements of witnesses were recorded and on 25/4/2011 the seized property was referred to the C.A. under requisition at Exh. 55. Statements of the witnesses were recorded under Section 164 of Cr. P. C. Further to the completion of investigation, a charge-sheet against the appellant was submitted.

Postmortem on the dead body of deceased Dharma was conducted by PW 11 – Dr. Shriniwas Kolod, who noticed that deceased had

sustained multiple facial fractures of bone. The fractures had been caused within 12 hours and on internal examination, he found a stab injury over the post auricular region under the skull. The stomach revealed food particles. He opined that all the injuries were antemortem and in his opinion, the cause of death was cardio-respiratory arrest and neurogenic shock due to the hard object injury to face and head. The postmortem report is at Exh. 46. The Medical Officer has opined that the injuries were possible by any hard object like article 10 – iron rod/crowbar.

3. On the case being committed to the Court of Sessions, trial court vide Exh. 2 framed charge against the appellant for offence punishable under Section 302 of the Indian Penal Code. The appellant denied his guilt and claimed to be tried. Prosecution in support of its case examined 12 witnesses. The defence of the appellant was of denial. The trial judge by accepting the evidence of the prosecution witnesses, convicted and sentenced the appellant as afore-stated.

4. We have heard Mr. Satyavrat Joshi, learned counsel for the appellant and the learned APP and in order to effectively deal with the submissions advanced before us by the learned counsel for the parties, it

would be useful to refer to the evidence of the prosecution witnesses.

5. Prosecution has examined PW 10 – Sunderabai, mother of deceased Dharma. PW 10 – Sunderabai deposes that deceased Dharma was her son and was residing with her and her husband. On the day of the incident, Sunderabai and her husband were sleeping inside the house, while deceased Dharma was sleeping in the veranda. Sometime at night, husband of Sunderabai awoke on hearing some noise and, therefore, Sunderabai came out of the house. She noticed one person running on the road holding a crowbar in his hand. The said person was wearing a T-Shirt and a Bermuda. She identified him as the accused.

According to Sunderabai there was a quarrel between the appellant and deceased Dharma on a day prior to the incident as the appellant was suspecting some illicit relations between deceased Dharma and Yogita, daughter of PW 3 – Kailas. The appellant was an employee of PW 1 – Shivaji and PW 3 – Kailas.

According to Sunderabai, on the next day at about 8 a.m. the police reached the scene of the incident and she narrated the incident to the

police and a report was accordingly scribed at Exh. 43. According to her, she had noticed one slipper (footwear) lying at the scene of the incident which did not belong to her.

6. In cross-examination, she has admitted that the accused had not been introduced to her prior to the incident and she had no occasion to talk with the appellant. She has admitted that on the next day of the incident in the morning, for the first time, she learnt the name of the appellant. She has admitted that there was no electricity at the house at the time of the incident and there were no street lights on the road in front of her house. She has admitted that when she rushed out of the house, she had noticed deceased Dharma lying on the ground and on seeing him, She broke down in tears.

7. Learned counsel for the appellant has urged before us that no reliance whatsoever can be placed on the testimony of PW 10 – Sunderabai in respect of the identification of the appellant. The learned APP has supported the findings arrived at by the trial court.

Sunderabai was aged 70 years when her evidence was

recorded. Sunderabai has admitted that there was no electricity in her house and has also admitted that there were no street lights. She has further admitted that on the next day of the incident, she had learnt the name of the appellant. We, therefore, find that it was not possible for Sunderabai to have identified the appellant as the incident had occurred at mid-night when it was dark. In the absence of any illumination, it would be virtually impossible for a 70 years old lady to have identified fleeing assailant. Since PW 10 – Sunderabai is the sole eye witness to the incident and is the sole witness in respect of the identity of the appellant, in our opinion, implicit reliance cannot be placed on the testimony of PW 10 – Sunderabai in respect of the identity of the appellant as the assailant.

8. Prosecution has examined PW 9 – Police Constable Ganesh Phapale, who was attached to the Dog Squad Unit of the Local Crime Branch at Pune. According to him, on 17/4/2011 at about 7 a.m. the Dog Squad Unit was directed to visit Avatwadi, Taluka – Khed and accordingly reached Avatwadi at about 10.30 a.m. The Investigating Officer produced the footwear and the smell of the footwear was given to the dog, who, after smelling the footwear, went to the house of PW 3 – Kailas. On enquiry, it transpired that the appellant who was residing in the house of Kailas was

not present. A report was accordingly drawn by PW 9 – Police Constable Phapale at Exh. 36.

On 18/4/2011, he was called for the purposes of the Test Identification Parade at the Tahsil office at Khed. Along with the Dog Squad, he had reached at about 12.30 noon on the same day and met the Investigating Officer. 4 to 5 persons were standing in a row before the Tahsildar and the Investigating Officer produced the seized pair of chappals. The sniffer dog was given the smell of the footwear and thereafter the dog barked at the appellant. The Tahsildar allowed the change of position in the row to the appellant and thereafter again the sniffer dog barked at the appellant. A report was accordingly submitted at Exh. 37.

9. In our opinion, the evidence of dog tracking is not substantive evidence. It is one of the steps in the investigation, which would aid the Investigating Officer to determine if the investigation was proceeding in the right lines. In the present case, the pair of slippers which was found at the scene of the incident had been seized by the Investigating Officer prior to the arrival of the dog squad. Thus, the pair of slippers had been handled

by others before the smell of the slipper was given to the sniffer dog. If that be the case, we find it inexplicable that the sniffer dog could accurately lead the police unit to the house of PW 3 – Kailas. The so called identification by the sniffer dog, in our opinion, will have to be left out of consideration. Moreover, there is no evidence whatsoever that the pair of slippers belonged to the accused nor is there any evidence to indicate that the pair of slippers had been left by the accused behind the house of deceased at the time of the incident. Thus the evidence in no manner assists the prosecution in proving the guilt of the appellant.

10. Prosecution has then examined PW 8 – Chindhu Chapte in respect of the discovery of the crowbar at the behest of the appellant. The said crowbar had been seized from a water channel. The Medical Officer in his cross-examination has admitted that a hard and blunt object would not cause the piercing injury and has further admitted that the seized crowbar was not a sharp edged object/weapon. In other words, the Medical Officer has in terms deposed that the said weapon could not have caused the injury. The report of the C.A. also does not indicate that the weapon was stained with the blood group matching the blood group of the deceased. Additionally we find that there is no evidence that the crowbar had been

sealed on its seizure and remained in that condition till it was examined by the C.A. The aforesaid circumstance, therefore, of discovery of the crowbar at the behest of the appellant will have to be left out of consideration.

11. Prosecution has examined witnesses to prove the seizure of the clothes of the appellant. The report of the C. A. discloses that the clothes of the appellant i.e. the half sleeve T-Shirt and Bermuda shorts were not stained with blood.

12. Prosecution has examined PW 1 – Shivaji to whom the accused had confessed to have killed deceased Dharma. According to Shivaji, there was a quarrel between the appellant and deceased Dharma as the appellant was suspecting that Dharma had illicit relations with Yogita, cousin of PW 1 – Shivaji. According to Shivaji a day prior to the incident, deceased Dharma had come to assault the appellant but the dispute between them was settled. In the night, Shivaji and the appellant were sleeping on the cot, while mother of Shivaji and sister and cousin were sleeping on the ground near the cot. PW 3 – Kailas was sleeping in the courtyard. At about 1.30 a.m. Shivaji awoke and noticed that the appellant was not

sleeping on the cot. Shivaji assumed that the appellant may have gone to attend the call of nature. One Gopal Burud came to the house and informed them that Dharma had been murdered. PW 3 – Kailas questioned PW 1 – Shivaji as to where the appellant was and Shivaji had informed him that the appellant had gone to answer the call of nature. The appellant returned home at about 5 a.m. and while they were milking the cows, the appellant confessed that he had killed Dharma. In cross-examination, he has admitted that the appellant was working like a servant in the house, though no wages were being paid to the appellant. The appellant was given a room, where the appellant was residing. He has further admitted as true that on the day of the incident, in the morning, the police had come to their house and had apprehended both PW 1 – Shivaji and PW 3 – Kailas. The police had taken both of them to the police chowky and were released from the chowky after four days. He has admitted as correct that the police were interrogating them about murder of Dharma. He has admitted that he had not disclosed to the police about the appellant confessing that he had committed murder of deceased Dharma till the statement was recorded. He has admitted that his statement was recorded on the day he was released from the police chowky. He has then admitted as true that the police had told him that he had to depose as per his statement.

13. Prosecution has examined PW 3 – Kailas to whom an extra judicial confession is alleged to have been made by the appellant. PW 3 – Kailas deposes that the appellant was residing in his house since 6 to 7 months prior to the incident. A day prior to the incident, there was a quarrel between deceased Dharma and the appellant. The appellant had informed Kailas not to allow Dharma to enter the house of Kailas as Dharma used to tease daughter of Kailas. According to Kailas on the next day there was a quarrel between him and his wife and, therefore, he had slept in the courtyard. The other members of the family were sleeping in the house. At about 1.30 a.m. one Gopal Burud came to the house of Kailas and informed him that Dharma had been murdered. He, therefore, enquired from his son PW 1 – Shivaji as to where the appellant was and Shivaji informed him that the appellant had gone for answering the call of nature. He further deposes that the appellant had confessed to PW 1 – Shivaji that he had committed the crime. In cross-examination, omission has been elicited that he had not stated that the appellant had confessed to PW 1 – Shivaji that he had committed murder of Dharma. He has admitted that he had not disclosed to anyone that the appellant had confessed to Shivaji that the appellant had killed Dharma.

14. In our opinion, no reliance whatsoever can be placed on the extra judicial confession of the appellant to PW 1 – Shivaji. Extra judicial confession by its very nature is a weak piece of evidence and by itself incapable of sustaining the conviction. In the present case, PW 1 – Shivaji and PW 3 – Kailas had been arrested by the police and it is only after their arrest and detention for four days, that Shivaji had informed the police that the appellant had confessed. Since there is no other evidence implicating the appellant in the commission of offence, in our opinion, no reliance can be placed on the extra judicial confession of the appellant made to PW 1 – Shivaji. The aforesaid circumstance, therefore, will have to be left out of consideration.

15. Thus, in our opinion, the prosecution has failed to prove the offence against the appellant beyond reasonable doubt and the appellant is entitled to be given the benefit of doubt.

16. Accordingly, Criminal Appeal is allowed and the conviction and sentence of the Appellant is hereby quashed and set aside and he is

acquitted of the offence with which he was charged and convicted. Fine if paid by the Appellant be refunded to him. Since the Appellant is in jail, he be released forthwith if not required in any other case.

(DR. SHALINI PHANSALKAR-JOSHI,J.)

(P. V. HARDAS,J.)