

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.799 OF 2013

Arun Bhaurao Kharat	]	
Age – 22 years,	]	
R/o. - Dattar Colony, Bhandup (E), Mumbai.	]	... Appellant
		(Orig. Accused)
Versus		

The State of Maharashtra	]	
[Through Kanjur Marg Police Station,	]	... Respondents
C.R.No.105/2011) (C.C.No.542/PW/2011).]	]	(Orig. Complainant)

Smt. Nasreen S. K. Ayubi, Advocate appointed for Appellant.
Smt. V. R. Bhonsale, APP for State.

CORAM :- SMT. V. K. TAHILRAMANI AND
SMT. I. K. JAIN, JJ.
DATE :- JANUARY 06, 2015

ORAL JUDGMENT (PER SMT. V. K. TAHILRAMANI, J.) :-

1. The Appellant/original accused has preferred this appeal against the Judgment and Order dated 11/05/2012 passed by the learned Additional Sessions Judge, Sewree, Mumbai in Sessions Case No.781 of 2011. By the said Judgment and Order, the learned Additional Sessions Judge convicted the Appellant under Sections 302 and 324 of Indian Penal Code (IPC). For the offence punishable under Section 302 of IPC, the Appellant was sentenced to suffer life imprisonment and to pay fine of Rs.5,000/-; in default to suffer R.I. for one year and for the offence punishable under Section 324 of IPC, the Appellant was sentenced to suffer R.I. for six months and to pay fine of

Rs.100/-; in default to suffer R.I. for eight days. The learned Additional Sessions Judge directed that both the substantive sentences shall run concurrently.

2. The deceased in the present case is Nirmala. She was the wife of Satish. She had two daughters Sonali (PW 2) and Suchita (PW 3). Nirmala was residing along with her husband Satish, and her daughter Sonali in a hut in Govind Nagar hutment situated at Bhandup in Mumbai. The Appellant was residing in the house of Nirmala since about 1½ years prior to the incident. There were illicit relations between Nirmala and the Appellant. One Nathu (PW 4) who was an orphan, was also residing in the house of Nirmala. Nirmala was taking care of him. There was a big brooklet behind the house of Nirmala. This brooklet used to get flooded during the rainy season. Sunita (PW 1) was the sister of Nirmala. She was residing in the same area as Nirmala. Her house was situated after about 10 to 12 houses from the house of Nirmala. Suchita (PW 3) who was the daughter of Nirmala, was staying with Sunita (PW 1) at the time of the incident. Both Nirmala and her husband were addicted to liquor. Around midnight of 08/07/2011 and 09/07/2011, the Appellant assaulted Nirmala on her throat with a knife. This was witnessed by Sonali (PW 2) and Nathu (PW 4) who were present in the house of Nirmala at that time. Satish who was the husband of Nirmala, went to the house of Sunita and called his daughter Suchita who was residing with Sunita and asked Suchita to accompany him to the house. Hence Suchita went to the house of her father Satish. After some time, she returned back. Suchita informed her maternal aunt Sunita that she had applied turmeric powder to the injury sustained on the throat of Nirmala. On the next day i.e. on 09/06/2011 at about 9.00 a.m. the Appellant came to the house of Sunita. He told Sunita that her sister i.e. Nirmala had spoiled his life and he will not

leave her. Thereafter the Appellant went to the house of Nirmala. Soon after the Appellant left, Sonali (PW 2) i.e. the daughter of Nirmala and Nathu (PW 4) came running to the house of Sunita. They were weeping. They told Sunita that the Appellant had thrown Nirmala in the brooklet and they asked Sunita to accompany them. Thereafter Sunita went to the brooklet behind the house of Nirmala. She saw that the brooklet was flooded with water. She could not find Nirmala. The Fire-Brigade and the police were informed. However, despite vigorous search by Fire-Brigade and police, Nirmala was not found. They searched for about 15 days. Help of fishermen was also taken to search the body of Nirmala up to Thane as well as up to Alibaug, however, the body of Nirmala could not be found. In the meanwhile, Sunita (PW 1) lodged F.I.R. (Ex.13). Thereafter investigation commenced. After completion of investigation, charge-sheet came to be filed.

3. Charge came to be framed against the Appellant under Sections 324 and 302 of IPC. The Appellant pleaded not guilty to the said charge and claimed to be tried. The defence of the Appellant is of total denial and false implication. After going through the evidence adduced in this case, the learned Additional Sessions Judge convicted and sentenced the Appellant as stated in para 1 above, hence this appeal.

4. We have heard the learned Advocate for the Appellant as well as the learned APP for the State. We have carefully considered the facts and circumstances of this case, the submissions of both the sides, the Judgment and Order passed by the learned Additional Sessions Judge and the evidence in this case. After carefully considering the matter, for the below-mentioned reasons, we are of the opinion that there is no merit in Appeal.

5. The first and foremost submission made by the learned Advocate for the Appellant is that it cannot be said to be a case under Section 302 of IPC because the body of Nirmala was not found. As far as this submission is concerned, the Hon'ble Apex Court in case of ***Rama Nand and Ors. Vs. The State of Himachal Pradesh – 1981 Cri.L.J. 298 (S.C.)***, in para nos.26 and 27, have observed that '*in absence of corpus delicti, conviction can still be based on circumstantial evidence*'. The observations are as follows :

“It is true that one of the essential ingredients of the offence of culpable homicide required to be proved by the prosecution is that the accused “caused the death” of the person alleged to have been killed. However, discovery of the dead body of the victim bearing physical evidence of violence is merely a rule of caution and has never been considered as the only mode of proving the corpus delicti in murder. Indeed very many cases are of such a nature where the discovery of the dead body is impossible.”

Where the dead body of the victim in a murder case is not found, other cogent and satisfactory proof of homicidal death of the victim must be adduced by the prosecution. Such proof may be by the direct ocular account of an eye-witness, or by circumstantial evidence, or by both. But where the fact of corpus delicti, i.e. 'homicidal death' is sought to be established by circumstantial evidence alone, the circumstance must be of a clinching and definitive character unerringly leading to the inference that the victim concerned has met a homicidal death. Even so, this principle of caution cannot be pushed too far as requiring absolute proof. The corpus delicti or the fact of homicidal death, therefore, can be proved by telling and

inculping circumstances which definitely lead to the conclusion that within all human probability, the victim has been murdered by the accused concerned.”

These observations are answer to the submission that was canvassed by defence.

6. In addition to the above, we would like to refer to another decision of the Hon'ble Apex Court in the case of ***Prithi Versus State of Haryana, reported in (2010) 8 Supreme Court Cases 536***. Therein while considering the aspect of '*corpus delicti*', the Hon'ble Apex Court had referred to a decision by a bench of six Judges of the Irish Court and has observed thus in paras 17 and 18 of the Judgment which are reproduced hereinunder :

“17. A six-Judge Bench of the Irish Court of Crown in *R. v. McNicholl* speaking through Sir James Campbell, C.J., with regard to the statement of Sir Matthew Hale, said that it is not an inflexible legal maxim, but is a wise and necessary caution to be addressed by the presiding Judge to the jury. The Bench held that in a charge of murder, by proof of the *corpus delicti* is meant proof of the *factum* of murder, and that the accused committed the murder or took part in its commission. Such proof may be established by the confession of the accused without proof of the finding of the dead body.

18. In *R. v. Horry*, the New Zealand Court of appeal explained the legal position that at the trial of a person charged with murder, the fact of death is provable by circumstantial evidence, notwithstanding that neither the body nor any trace of the body has been found.”

7. The Hon'ble Supreme Court, in the case of ***Sevaka Perumal Vs. State of Tamil Nadu reported in (1991) 3 SCC 471***, observed that,

It is not essential to establish corpus delicti; the fact of death of the deceased must be established like any other fact. The court observed that "In a trial for murder it is not an absolute necessity or an essential ingredients to establish corpus delicti. The fact of death of the deceased must be established like any other fact. Corpus delicti in some cases may not be possible to be traced or recovered. Take for instance that a murder was committed and the dead body was thrown into flowing tidal river or stream or burnt out. It is unlikely that the dead body may be recovered. If recovery of the dead body, therefore, is an absolute necessity to convict an accused, in many a case the accused would manage to see that the dead body is destroyed etc. and would afford a complete immunity to the guilty from being punished and would escape even when the offence of murder is proved. What, therefore, is required to base a conviction for an offence of murder is that there should be reliable and acceptable evidence that the offence of murder, like any other factum of death was committed and it must be proved by direct or circumstantial evidence, although the dead body may not be traced."

Thus, the legal position is that in a trial of a person charged with murder, the fact of death is provable by circumstantial evidence, notwithstanding that neither the body nor any trace of the body has been found.

8. In the case in hand, it is the prosecution case that Nirmala was thrown in the flowing brooklet, which was flooded with water because of rainy season. Vigorous search was taken in that brooklet as well as in the creek up to Thane and Alibaug, but in vain. Fishermen were deployed by the Investigating Officer to search for Nirmala, but in vain. Efforts were also made by the Fire-Brigade and the police to search for Nirmala but the dead body could not be traced. In such scenario, the principle and observations as pointed out hereinabove are squarely applicable and sufficient to hold that murder can be proved, even in absence of corpus delicti. In fact, that is settled law.

9. Now we shall proceed to examine whether there is sufficient evidence to show that the Appellant is responsible for the death of Nirmala.

10. Heavy reliance is placed by the prosecution on the evidence of Sonali (PW 2) and Nathu (PW 4) who are eye witnesses to the fact that the Appellant had assaulted Nirmala on the earlier night with a knife on the neck and on the next day in the morning at about 9.00 a.m., the Appellant threw Nirmala into the brooklet which was overflowing due to rainy season. Sonali (PW 2) is the daughter of Nirmala. She has stated that she knew the Appellant as the Appellant was also residing in their house. Sonali was residing in the house with her father, her mother Nirmala, the Appellant and Nathu (PW 4). Sonali's sister Suchita (PW 3), at the relevant time, was residing with her maternal aunt Sunita (PW 1). Sunita's house was situated about 10 to 12 houses away from the house of Nirmala. Sonali had stated that the Appellant was residing in their house. The Appellant assaulted her mother Nirmala with a knife on the throat. Then in the morning, the appellant came to the house, caught legs of her mother and threw her mother

in the gutter. When she and Nathu tried to obstruct the Appellant, the Appellant assaulted Nathu on chest and caught the throat of Sonali. Sonali then went and informed her maternal aunt Sunita (PW 1) that the Appellant threw her mother in the gutter. Thereafter all of them started searching for her mother but her mother was not found.

11. Nathu (PW 4) was an orphan. As he was an orphan, Nirmala was looking after him and Nathu treated Nirmala as his maternal aunt. Nathu was residing with family of Nirmala and the Appellant. Nathu has stated that on the earlier night, the Appellant assaulted his maternal aunt Nirmala with knife on the throat. The Appellant then ran away. In the morning, the Appellant came and caught hold of Nirmala. When Nathu tried to obstruct him, the Appellant gave a blow to Nathu on his chest. The Appellant then dragged Nirmala by pulling her legs and threw her in the gutter. Due to rainy season, the gutter was full of water. Nothing has been elicited in the cross-examination of Sonali (PW 2) and Nathu (PW 4) to as to disbelieve their evidence. The evidence of Sonali and Nathu is corroborated by the evidence of Suchita (PW 3). Suchita was also the daughter of Nirmala. However at the relevant time, Suchita was residing with her maternal aunt Sunita (PW 1). Sunita's house was situated about 10 to 12 houses away from the house of Nirmala. On 08/07/2011, Suchita (PW 3) went to the house of her maternal aunt Sunita (PW 1). Suchita's father came to the house of Sunita at night and informed them that the Appellant had assaulted Nirmala. Therefore Suchita went to her mother's house. She noticed that her mother had sustained injury on her throat. When Suchita inquired with her mother Nirmala, her mother informed that the Appellant had assaulted her. The Appellant was not there as he had ran away. Suchita applied turmeric powder to the injury sustained by her mother. Suchita has further stated that in the morning, her younger

sister Sonali and Nathu came to the house weeping. Her sister Sonali told her that the Appellant had thrown their mother in the gutter. At that time, there was heavy rain. Sonali also informed Suchita about the assault by the Appellant on Nathu and that the Appellant had pressed Sonali's throat. They searched for their mother but their mother was not found.

12. Balkrushna (PW 5) was known to the family of the deceased. He knew the Appellant as the Appellant was residing in the house of Nirmala. Balkrushna (PW 5) has stated that on 08/07/2011 when he was proceeding near the hut of Nirmala, Nirmala told him that she wanted to have drinks. Therefore he brought liquor and beer. At that time, the Appellant was also in the house of Nirmala. Nirmala's husband was also in the house. All of them enjoyed liquor as well as beer. Thereafter the liquor was over. Therefore Balkrushna (PW 5) left the house to get more liquor/beer. When he returned to the house of Nirmala at 12.30 a.m., he noticed that Nirmala had sustained injury on her throat. Nirmala disclosed that the Appellant had assaulted her. In the morning, Balkrushna (PW 5) heard hue and cry to the effect that Nirmala was thrown in the brooklet by the Appellant and everybody was trying to search for Nirmala.

13. On going through the record, we find that there is sufficient evidence to show that the Appellant assaulted Nirmala with a knife around midnight of 08/07/2011 and 09/07/2011 and on 09/07/2011 in the morning at about 9.00 a.m., he threw Nirmala in the brooklet which was overflowing. Thereafter Nirmala was not found alive. Thus, the prosecution has proved beyond reasonable doubt that the Appellant committed offences punishable under Sections 323 as well as 302 of IPC. Thus we find no merit in the Appeal. The Appeal is dismissed.

14. We quantify legal fees to be paid by the High Court Legal Services Committee to the appointed Advocate Smt. Nasreen S. K. Ayubi at Rs.5,000/-.

(SMT. I. K. JAIN, J.)

(SMT. V. K. TAHILRAMANI, J)