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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.606 OF 2007

Rupesh @ Prince Mahabal Shetty	]	
Age : 28 years,	]	
residing at Shri Adya Apartment	]	... <u>Appellant</u>
Opposite Laxminarayan Mandir	]	Orig. accused
Eksar Road, Borivali (West)	]	
Mumbai 400 103	]	
	]	
Presently lodged in Central Jail, Kolhapur	]	

V/s.

The State of Maharashtra	]	
at the instance of MHB Colony Police Station	]	 Respondent
Mumbai	]	

Dr. Yug Mohit Chaudhary a/w Mr. Ashish J. Dubey i/by Mr. A.K. Dubey, for Appellant.

Smt. V.R. Bhosale, A.P.P., for the Respondent-State.

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

DATE : 18TH APRIL, 2015.

ORAL JUDGMENT : [Per Dr. Shalini Phansalkar-Joshi]

1. The appellant, who stands convicted by the the Additional Sessions Judge, Greater Mumbai, in Sessions Case No.354 of 2003, by judgment dated 24th April, 2007, for the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer imprisonment for

life and to pay fine of Rs.10,000/- in default to suffer rigorous imprisonment for one year, by this appeal challenges his conviction and sentence.

2. The facts, as are necessary, for deciding this appeal may be stated as under :-

On 12th April, 2003, while P.W.10 API Murlidhar Bhoj was on night duty as Station House Officer at MHB Colony Police Station, at about 12.00'O clock in the midnight, he received one anonymous telephone call from building No.S-9 of LIC colony, informing him that some incident had taken place in room No.5 and police should come there immediately for making enquiry. On receipt of this information P.W.10 API Bhoj left the police station with staff for going to the spot. Within 15 to 20 minutes, he reached the spot which was at room No.5 on the first floor of building S-9. A crowd was seen gathered near building and also on the first floor. Room No.5 was open and small candle was burning inside the room. One dead body of a woman aged about 32 to 33 years, identified as Seva Dhakade, was lying in the front room. Her face was deep in a plastic tub containing some reddish water. P.W. 10 API Bhoj made enquiry with the persons present there. P.W.1 Sajani Jagtap came forward and

gave information that she had witnessed the incident. As per information given by her, she had seen the appellant assaulting and manhandling the deceased and forcing her face in the tub water. In view of this information given by P.W.1 Sajani, P.W.10 API Bhoj recorded her complaint Exh.14 on the spot itself and on phone he informed about the incident to police station and obtained running C.R. No.78 of 2003 for further investigation. An offence was accordingly registered against the appellant for the offence under Section 302 of the Indian Penal Code at 1.05 hrs.

3. P.W.10 API Bhoj, then made inquest panchanama of the dead body on the spot in the presence of panch P.W.3 Manish Revandkar and during the inquest, he noticed some 7 to 8 injuries on the dead body. After inquest, he referred the dead body for the postmortem examination to the Borivali Postmortem Center. He then made the spot panchanama (Exh.17), in presence of P.W.3 Manish and from the spot he seized various articles like clothes of deceased and blood stains. On that night itself he recorded statement of P.W.9 Prakash Jagtap, the husband of P.W.1 Sajani and P.W.5 Rekha Gawade, the neighbour. He sent staff for arresting the appellant. PSI Tonpe and staff arrested the appellant at 4.00 a.m. near gate of Karuna Hospital, LIC colony. He was brought to the police station and arrested under panchanama Exh.19. After the arrest,

he was referred for his medical examination as some abrasion was found on his right forearm.

4. On the next day P.W.10 API Bhoj recorded statement of P.W.2 Mosha Dhakade, the brother of deceased and some other witnesses including P.W.6 Padmakar Ramdasi, P.W.8 Prakash Shelar, who claimed to be eye witnesses to the incident. Meanwhile postmortem report Exh.23 was received by him conveying that the death was due to suffocation on account of smothering with head injury. On 29.4.2003, he sent seized Muddmal articles to Chemical Analyzer vide requisition Exh.34. The Chemical Analyzer's reports are collectively marked Exh.35. Further to completion of investigation, P.W.10 API Bhoj submitted chargesheet in the Court against the appellant.

5. On the case being committed to the Sessions Court, the trial Court framed charge against the appellant vide Exh.8. The appellant pleaded not guilty to the charge and claimed trial.

6. In support of its case, the prosecution examined in all 10 witnesses and on appreciation of their evidence, the trial Court held the guilt of the appellant to be proved beyond reasonable doubt and convicted

and sentenced him as aforesaid.

7. This judgment of the trial Court is assailed in this appeal by learned counsel for the appellant Dr. Yug Mohit Chaudhary; whereas supported by learned APP Smt. V.R. Bhosale. In our considered opinion, in order to effectively deal with the submissions advanced by them, it would be useful to refer to the evidence on record.

8. To prove homicidal death of deceased Seva, the prosecution has examined P.W.7 Dr. Vitthal Vihurkar, who has conducted postmortem on her dead body on 13.4.2003 in between 2 to 3.45 p.m. On external examination, he found following injuries:-

- 1) Contusion on the right side of the face 2.5 cm x 2 cm.
- 2) Abrasion on the opening of nostrils
- 3) Contusion on the left eye 4 cm x 3.5 cm.
- 4) Abrasion on the left upper eye below eye brow medially 0.2 cm x 0.2 cm.
- 5) Contusion on the right side of forehead near scalp hair line 2.5 cm x 2.5 cm.
- 6) CLW on the right parietal region obliquely transverse measuring 2.5 cm x 0.8 cm. It was bone deep.
- 7) Semi Circular abrasion 8 in number in front and right side

- 0.5 cm in length and 0.1 cm . (it might be nail marks).
- 8) Contusion on the both lips in front and on the inner side of lips 0.8 cms width (injuries against teeth)
 - 9) Abrasions two semicircular on the left hand dorsal (bite mark) (looked like teeth mark) length was 3.2 cm x 2cm.
 - 10) Abrasion on the left hand elbow on the lateral aspect 2 cm x 1.5 cm.
 - 11) Contusion on the right hand dorsal 4 cm x 2 cm.
 - 12) Abrasion two semicircular on right shoulder near shoulder joint measuring 3.5 cm x 2.5 cm (5 teeth marks on either side);
 - 13) multiple contusions on the back of various sizes and shapes.
 - 14) CLW on left parietal region 'V' shaped 2.5 cm x 0.8 cm x bone deep.

Whereas on internal examination, he noticed following injuries :-

- 1) Contusion on the frontal region of the scalp 4 cm x 4 cm.
- 2) Scalp torned on the right parietal region.
- 3) Scalp torned on the parietal region.

9. According to him, all the injuries were antimortem and caused in an assault on account of coming into contact with hard and blunt object. He has further opined that the death might have occurred instantly

because of gagging of mouth with pressure. According to him there was no haemorrhage inside the head. The cause of death, in his opinion, was suffocation due to smothering with head injury and thus unnatural. He has issued postmortem report Exh.24 accordingly.

10. In his cross examination, he has admitted that no traces of water were found in the lungs, hence the death of deceased Seva cannot be called as death due to drowning. He has further opined that present case is also not a case of dry drowning. Further he has stated that if a person is dead or about to die and dies when his head is inside water tub, then head will not come out of water tub. His evidence thus, proves the death of deceased was homicidal in nature, though he has denied the possibility of death on account of drowning, but confirmed that it was death on account of suffocation due to smothering.

11. In order to prove complicity of appellant in homicidal death of the deceased, the entire reliance of prosecution is on the evidence of P.W.1 Sajani, who claims to be a sole eye witness to the actual incident of assault. Though the prosecution has also examined four other eye witnesses viz P.W.5 Rekha Gawade- neighbour, P.W.6 Padmakar – another neighbour and P.W.8 Prakash Shelar, all the three of them are

declared hostile and have not supported the prosecution case. Even P.W.9 Praksh Jagtap, the husband of P.W.1 Sajani, has not fully supported the prosecution case, hence he was also declared hostile. All these four witnesses were cross examined by the learned APP, but nothing substantive is elicited in their cross examination to prove actual incident of assault, as alleged and deposed by P.W.1 Sajani.

12. P.W.1 Sajani being solitary eye witness to the incident, her evidence is required to be subjected to careful scrutiny. According to her, on the night of 12th April, 2003, she and her husband, as usual, were taking walk after dinner at around 11 to 11.30 p.m. along LIC road. On the road, they came across the deceased and saw that the present appellant was fighting her. The appellant was asking the deceased in Hindi why she was abusing his mother in filthy words. According to P.W.1 Sajani, she and her husband did not pay much attention to this and proceeded to take one more round of the building, ignoring the deceased and the appellant. They completed round to building S-9 within 10 minutes. By that time they heard shouting of the deceased calling for the help. Hence she and her husband went near the building to know as to what has happened. She climbed upto first floor and her husband P.W.9 Prakash remained on the ground floor. She also saw the other neighbours coming out of house

after hearing shouts and were standing there. The entrance door of the flat of the deceased was open. However, safety door of the grill was closed. She could see through the grills of the safety door, however, there was darkness inside the room. There was no electric supply. By standing at the entrance, she saw the appellant in the house, catching hold of the deceased. The deceased was trying to rescue herself. There was some scuffle and then she saw the appellant bending the head of deceased in a tub containing water. After 5 to 10 minutes she saw the appellant coming out of the said house. At that time, the deceased was shouting for help continuously. She further deposed that as there was darkness inside, she did not go. However, she immediately contacted MHB Colony police on mobile. Then the police arrived in 10 to 15 minutes. By that time, the appellant had left the spot. Thereafter alongwith police she went inside and found the head of deceased inside tub and rest of the body outside tub on the floor.

13. In the cross examination she has admitted that the flat of P.W.5 Rekha Gawade is opposite to the flat of the deceased and she saw P.W.5 Rekha also coming out of the flat when she reached there hearing the cries. It is further admitted by her that though she was standing at the entrance of the flat of deceased, P.W.5 Rekha did not stand by her side.

She also did not ask for help or support either from P.W.5 Rekha or from any other neighbour, who had gathered there. According to her, her husband was having mobile, hence she came down on the ground floor where her husband was standing. She contacted the police on mobile of her husband.

14. In her cross examination she has admitted that the road on which they were taking the round was not their regular road. She has further admitted that her husband did not join with her upto first floor and was on the ground floor throughout. Hence she was confronted with the contents in the complaint that her husband was with her and he joined her to climb the first floor. However, she is unable to explain the same. At this stage, it may be stated that as per evidence of P.W.9 Prakash, her husband, after hearing shouts his wife went to room of deceased, but he did not accompany her. He went home with his son Akash, 8 years old, who was also taking round with them. According to him, P.W.1 Sajani returned to house at about 3.30 a.m., but she did not tell him anything about the alleged incident. She also did not tell him, she was witness to the incident and she has reported the incident to the police. After 7 days, he came to know about Seva's murder, that too from the newspaper.

15. P.W.5 Rekha, has in her evidence deposed that she does not know the appellant. She had never seen him before the incident. According to her, she heard that Seva was murdered. On the night of incident as there was ringing of the door bell, she opened the door and saw P.W.1 Sajani present before her. P.W.1 Sajani's husband P.W.9 Prakash was also present there. However, she closed the door of her own house and remained seated inside the room. At that time P.W.1 Sajani did not inform her about the incident or fact that she had seen the incident. In her cross examination, she has further admitted that electric supply of the room of the deceased was cut since long and she did not see any oil lamp or candle burning in the room of the deceased even when police came to enquiry.

16. As regards evidence of P.W.8 Prakash Shelar and P.W.6 Padmakar, they have denied the suggestions not only about this incident, but they also denied their presence at the time of incident.

17. In the light of this evidence on record, the question arising for consideration is whether implicit reliance can be placed on the solitary testimony of eye witness to the incident, namely P.W.1 Sajani, to convict the appellant for the offence. The answer thereto, has to be in the

negative, not because the conviction cannot rest on the sole testimony of solitary eye witness, but then evidence of such solitary eye witness has to be cogent, consistent and wholly reliable. However, the evidence of P.W.1 Sajani, in the instant case is not found to be of such sterling worth that without corroboration from any other source, it can be relied upon to prove the guilt of the appellant. She is contradicted by each and every witness and her own husband has also not supported her evidence. The neighbour, P.W.5 Rekha whom, she is knowing since last 7 to 8 years, has also not given any corroboration of her testimony. From the evidence on record it is also difficult to accept that P.W.1 Sajani was in a position to see what was happening inside the room, as she has admitted in her examination-in-chief itself that there was darkness inside the room; no bulb was glowing and she was standing at the entrance.

18. The Investigation Officer P.W.10 API Bhoj has also admitted that electric supply of the said room was cut off since long. Therefore, the case of P.W.1 Sajani, who claims to have seen the incident by standing outside room at the distance of 4 to 5 feet which has happened in the darkness, is difficult to be relied upon. It is also coupled with the fact that the evidence of P.W.7 Dr. Vihurkar goes to prove that the cause of death was not due to drowning. He has given the cause of death as suffocation

due to smothering, whereas as per evidence P.W.1 Sajani, she saw the appellant putting head of the deceased in tub water. She has never seen anything about the appellant assaulting deceased with hammer or otherwise. The reason may be because she was unable to see what was happening inside room.

19. In the face of such fact situation, it becomes rather difficult to accept her evidence. Moreover, as per her evidence, there was half door covering kitchen portion. The said door was like office cabin. The incident according to her, has happened in the kitchen and said door was at a distance of 3 feet away from the main entrance. She has stated that from standing outside she could see everything inside the kitchen portion and therefore there might not be such type of half cut-door to the kitchen. The spot panchanama Exh.17 however, reveals that there was such half door open to the kitchen. She has tried to cover herself by deposing that said kitchen portion door is lifted on the spring hinges and can be opened by pushing or pulling from inside and not otherwise, as she had experienced it when she had visited the flat of P.W.5 Rekha. In view of these contradictory statements made by P.W.1 Sajani, it becomes really difficult to place implicit reliance on her testimony to hold that she had actually seen the incident.

20. Though the prosecution has also relied upon seizure of hammer from the spot, the C.A. report goes to prove the results of examination of blood group thereon were inconclusive. In such a situation from that source also, the prosecution could not get any support and this is coupled with the fact that P.W.1 Sajani is not deposing anything about the assault with hammer to deceased and therefore, use of hammer in the incident of assault is also not proved.

21. To sum up, therefore, it has to be held that the prosecution has failed to bring cogent, convincing and reliable evidence on record against the appellant to prove his guilt beyond reasonable doubt. Consequently the conviction and sentence of appellant cannot survive and hence the Criminal Appeal is allowed and the conviction and sentence of the appellant is hereby quashed and set aside and the appellant 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.]