

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.743 OF 2007

Mallikarjun Dundappa Benkanali,	]	
age: 30 years,	]	
occn. Agriculture labour,	]	... <u>Appellant</u>
r/o Chickbennur, Tal. Indi,	]	Orig. Accused
Dist. Bijapur, Karnataka	]	
	]	
at present lodged in	]	
Kolhapur Central Prison	]	

V/s.

The State of Maharashtra	]	
Through Borgaon Police Station	]	 Respondent
District Satara.	]	

Dr. Yug Mohit Choudhary, for Appellant.

Mrs. Sangeeta D. Shinde, A.P.P., for the Respondent-State.

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

DATE : 10TH APRIL, 2015.

ORAL JUDGMENT : [Per Dr. Shalini Phansalkar-Joshi, J.)

1. The appellant, who stands convicted 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.1,000/- in default to suffer

simple imprisonment for six months, by the Sessions Judge, Satara, by judgment dated 3rd May, 2005, in Sessions Case No.134 of 2006, by this appeal challenges his conviction and sentence.

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

On the night intervening between 1st and 2nd April, 2006, at about 2.30 a.m. while P.W. 2 Bhimrao Birajdar was sleeping in his house, the appellant came there and woke him up. The appellant was having a sickle in his hand, and was in a frightened state. On enquiry, by P.W.2 Bhimrao, the appellant disclosed that when he returned from the field, he saw his wife Laxmibai and one Kundalik in compromising position. Therefore, he has committed the murder of both of them. P.W. 2 Bhimrao told him to wait in his house. He went to the house of appellant with one Maruti Chougule and confirmed whatever was stated to him by the appellant is correct. By that time P.W.6 Police Patil Gulab Karande and P.W. 1 Mahipati Thoke have also reached there. P.W. 2 Bhimrao, P.W. 1 Mahipati and P.W.6 Gulab Karande, then went to house of P.W.2 Bhimrao. Before them also the appellant confessed his guilt. Hence they took the appellant to Borgaon Police Station.

3. P.W.10 API Vijay Jadhav, who was incharge of the Borgaon Police Station, on the receipt of telephonic information from ASI Mulani, came to the police station and recorded the complaint of P.W.2 Bhimrao vide Exh.18. On the basis of the said complaint, he registered C.R.No.33 of 2006 against the appellant for the offence punishable under Section 302 of the Indian Penal Code. He himself took over the investigation of the said C.R. He went to the spot and prepared the inquest panchanama of the dead body of Kundalik Exh.8 and dead body of Laxmibai Exh. 9 and handed over both the dead bodies to Constable Lavand for taking them to Civil Hospital for postmortem. Then in the presence of panch P.W.3 Mahipati Yadav, he made scene of offence panchnama exh.20 From the scene of offence which was in the house of the appellant, blood stains and other articles like Mangalsutra were collected under panchanama. The photographs of the scene of offence were taken by P.W.8 Mahesh Jadhav vide Exh.34.

4. On the very day P.W.10 API Jadhav recorded statements of three witnesses, arrested the appellant under panchanama Exh.24 and seized the clothes on his person, in the presence of panch P.W.5 Chandrakant Salunke. The appellant was referred to Civil Hospital for

medical check up. The clothes of both the deceased were received from the Civil hospital which came to be seized under panchanama Exh.37. The postmortem reports of deceased Kndalik and Laxmibai were received on 20.4.2006 vide Exh.Nos 14 and 15.

5. During police custody on 3.4.2005, the appellant expressed his willingness to show the place where he has concealed the weapon of assault, sickle. Memorandum of his statement was made vide Exh.24 in the presence of P.W.4 panch Amarsing Jadhav. Thereafter the appellant guided the police and panchas to the cattle shed near brook. There from the bushes, he produced the sickle with blood stains thereon (Article 17) which came to be seized under panchanama Exh.22A.

6. On 10.4.2006, P.W.10 API Jadhav sent all the seized articles to Chemical Analyzer vide his letter Exh.38. The C.A. reports are produced in the case at Exh.39 to 42. Further to completion of invesAPPA 304 OF 2015tigation, P.W.10 API Jadhav filed chargesheet in the Court against the appellant.

7. On the case being committed to the Sessions Court, the trial Court framed charge against the appellant vide Exh.4. The appellant

pleaded not guilty and claimed trial.

8. 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.

9. In this appeal, we have heard submissions advanced by Dr. Yug Mohit Choudhary, the learned counsel for the appellant and learned APP for the State. In our considered opinion, in order to effectively deal with the rival submissions advanced by them, it would be useful to refer to the evidence on record.

10. To prove homicidal deaths of deceased Laxmibai and Kundalik, the prosecution has examined P.W.7 Dr. Sanjay Hardas, who has conducted postmortem on their dead bodies on 2.4.2006. On examination of dead body of Kundalik, he found in all 11 injuries resulting into six fractures. The fatal injury was head injury which resulted into cause of his death. His postmortem report is at Exh.14.

11. On examination of the dead body of deceased Laxmibai,

P.W.7 Dr. Hardas, found five incise injuries and one internal injury. All these injuries, according to him, were grievous and the cause of death was haemorrhage with poly-trauma. Her postmortem report is produced on record at Exh.15. He has further opined that the injuries sustained by both the deceased are possible due to weapon of assault, sickle (Article 17).

12. To prove the complicity of appellant in the homicidal deaths of deceased Kundalik and Laxmibai, reliance of prosecution is on the evidence of P.W.1 Mahipati Thoke, P.W.2 Bhimrao and P.W.6 Police Patil – Gulab Karande, before whom extra judicial confession is made by the appellant. The prosecution has also relied on the evidence of P.W.9 Kumar Thoke, a neighbour who has heard shouts from the house of the appellant and reached the spot first. The evidence of this witness reveals that P.W.1 Mahipati is his uncle, whose house is adjacent to his house. In the said house, the appellant, who was working in the agricultural land of P.W.1 Mahipati, was residing with his wife Laxmibai. According to his evidence on the night between 1st and 2nd April, 2006, at about 2 to 2.30 a.m, while he was sleeping in the house, he heard shouts from the house of the appellant. He came out of the house. One Sunil Bhasme, who was residing nearby, also came out of his house. Both of them then went to the

house of appellant to know what was wrong. They saw from the gap of the door of the house, one man lying in a pool of blood. Seeing this, they retreated to some distance and then they saw the appellant coming out of the house with blood stained sickle in his hand. Appellant pulled door after coming out of the house. The appellant told him that he was going to his relatives in the village and then he left. P.W.9 Kumar Thoke, then informed about this incident to P.W.6 Police Patil Karande. All the three of them then came to the house of appellant. P.W.6 Police Patil Karande also confirmed the incident by peeping from the gap of the door. Then he went to the STD booth and informed P.W.1 Mahipati about the incident, as the appellant was working with him as labourer and was residing in his house. P.W.1 Mahipati came there. He also verified the fact of dead bodies lying in the house.

13. There is corresponding evidence of P.W.1 Mahipati Thoke that at that night while he was sleeping in the house, he received phone from the Police Patil, P.W.6 Karande informing him about the incident. Hence he came to the house of appellant, in his car. P.W.6 Police Patil Karande was present there. He also saw from the gap of the door that one body was lying in a pool of blood. Then he and Police Patil P.W.6 Karande went to the house of P.W.2 Bhimrao the relative of both the

deceased Kundalik and the appellant. There the appellant was present and he told them that when he returned from the field at night, he saw the deceased Kundalik and his wife Laxmibai in compromising position, therefore, he assaulted them with sickle in his hand.

14. This evidence gets further clinching corroboration from the evidence of P.W.2 Bhimrao, who is younger brother of the deceased Kundalik. The appellant is his wife's sister's son. He was knowing therefore, the appellant, the deceased Kundalik and Laxmibai. According to his evidence also, on that night at about 2.30 a.m. the appellant came to his house. The appellant was in a frightened state, holding sickle in his hand. Appellant told him that as he saw Kundalik and Laxmibai in a compromising position, he has committed their murder with sickle, which was having blood stains thereon.

15. As per evidence of P.W.2 Bhimrao, he asked the appellant to remain in his house and then he went to the house of appellant and saw dead bodies of Laxmibai and Kundalik. At that time P.W.6 Police Patil Karande and P.W. 1 Mahipati Thoke also reached there. Then three of them returned to his house, there appellant was present. When P.W.6 Police Patil Karande and P.W.1 Mahipati made enquiry with the appellant,

the appellant told before them also that he has committed murder of his wife Laxmibai and Kundalik as he saw both of them in compromising position, when he returned from the field. Thereafter the appellant was taken to the police station by P.W.2 Bhimrao and P.W.6 Police Patil Karande, where complaint Exh.18 came to be recorded and the appellant was arrested.

16. This evidence relating to extra judicial confession of the appellant is not only convincing and trustworthy, but it is most natural evidence. P.W.2 Bhimrao, being related to both the deceased and the appellant, it was but natural for appellant to go to him and disclose about the incident, admitting his culpability. The evidence of P.W.9 Kumar supports this evidence relating to extra judicial confession as he has seen the appellant actually coming out of the house with sickle in his hand. If at all any further corroboration is required to this evidence, then it is also coming from the recovery evidence of the sickle at the instance of the appellant, which is proved through the evidence of P.W.5 Salunke, P.W.10 API Vijay Jadhav and Chemical Analyzer's reports at Exh Nos 39 to 42. There is also corroboration from the spot panchanama Exh.20 and the inquest panchnama.

17. In the face of this overwhelming and clinching evidence on record proving the guilt of the appellant, the learned counsel for the appellant has also fairly conceded that he has no dispute in any way as to the involvement and complicity of the appellant in the incident and the manner in which the incident has occurred, including credibility of the prosecution witnesses. His only submission is that the present case falls under fourth exception to Section 300 of Indian Penal Code as the entire incident has occurred all of sudden under a grave and sudden provocation. According to him, there was sufficient cause also for the appellant to be provoked to the extent of assaulting both the deceased, in view of his seeing them in compromising position, when he returned to the house at midnight from the field, without any pre-intimation to the deceased.

18. In our considered opinion also, there is much substance in the submission advanced by the learned counsel for the appellant. The very presence of the deceased Kundalik in the house of appellant, that too at midnight hours, is more than sufficient to provoke the appellant, coupled with the fact that he saw Kundalik and his wife in compromising position. The act of the deceased was such that any ordinary reasonable prudent person can be victim of sudden provocation, which can be so

grave that the said person for a moment may be deprived of the power of self control. That's the reason that the adulterous intercourse has been held in several cases to be the cause of sudden and grave provocation and the act of killing in such situation is held as covered under the *fourth exception* to Section 300 of the Indian Penal Code.

19. The present case, thus, squarely falls under the *fourth exception* to Section 300 of the Indian penal Code and consequently the Criminal Appeal is partly allowed. The conviction and sentence of the appellant for offence punishable under Section 302 of IPC is set aside and instead the appellant is convicted for offence punishable under Section 304 part II of IPC and is sentenced to rigorous imprisonment for seven years and to pay a fine of Rs.1000/- in default of which to undergo further rigorous imprisonment for six months. Since the appellant has undergone the sentence imposed on him, the appellant be released forthwith, if not required in any other case.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[P.V.HARDAS, J.]