

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.845 OF 2009

Santosh Maruti Gaikwad,	]	
Age : 34 Yrs.,	]	
R/o. Karunde, Tal. Malshiras,	]	
Dist. Solapur	]	 Appellant /
At present in Yerawada Jail, Pune.	]	(Org. Accused)

Versus

State of Maharashtra	]	 Respondent
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Mr. Daulat G. Khamkar for the Appellant.

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

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

DATE : 27TH JANUARY, 2015.

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

1. The Appellant is the Original Accused, who stands convicted for the offence punishable under Section 302 of the IPC and sentenced to suffer imprisonment for life and to pay fine of Rs.1,000/-, in default to suffer R.I. for one month, by the Additional Sessions Judge, Malshiras, Dist. Solapur in Sessions Case No.4 of 2008 by Judgment dated 25th March, 2009, by this Appeal challenges his conviction and sentence.

2. Facts, which are necessary, for deciding this Appeal can briefly be stated thus :-

On 13th October, 2007, at about 7 a.m., while PW-4 Head Constable Aba Ohal was on duty at Natepute Police Station, PW-7 Maruti Gaikwad, father of the Accused, came to the Police Station and lodged a report (Exhibit-19) about the death of his sister Shewanta with bleeding injuries on her body. On his report, PW-4 Head Constable Aba Ohal registered A.D. Case No.30 of 2007 and handed over the inquiry of the said A.D. Case to PW-8 ASI Kamble, who went to the spot and made Inquest Panchanama (Exhibit-9) and sent dead body for autopsy. He made Spot Panchanama (Exhibit-8) in the presence of PW-1 Panch Vijay Gaikwad. From the spot, he collected blood smeared and the simple earth. On the very day, he recorded the statements of two witnesses, namely, Kavita and Savita, the daughters of PW-7 Maruti. On 15th October, 2007, he recorded the statements of the neighbours, namely, Malan Gaikwad, PW-6 Radha Gaikwad, Savitra Gaikwad and Mahadev Gaikwad. From their statements, it was transpired that Malan heard the noise of beating in the house of Shewanta. Hence, she rushed there with PW-6 Radha and saw that Accused was beating Shewanta with soldiering gun and then Accused left the house after latching the door and after ascertaining that Shewanta is no more.

Meanwhile, PW-7 Maruti also received the same information from the neighbour Malan. His supplementary statement came to be recorded accordingly. PW-8 ASI Kamble then lodged complaint on behalf of the State against the Accused for the offence punishable under Section 302 of the IPC on 16th October, 2007. On his complaint (Exhibit-30), C.R. No.77 of 2007 came to be registered and further investigation was taken over by PW-9 PI Yakub Pimpri. In the course of investigation, he recorded supplementary statements of the witnesses and arrested the Accused on 18th October, 2007. During Police custody, Accused gave a disclosure statement and at his instance, the weapon of assault, namely, the soldering gun, came to be recovered from his house. It came to be seized under Panchanama (Exhibit-12). He seized the clothes of the Accused and sent the same along with the clothes of the deceased and the soldering gun to the Chemical Analyzer on 21st November, 2007. After completion of due investigation and collection of Post Mortem Report of deceased Shewanta, which disclosed the cause of death as homicidal one, he filed Charge-Sheet in the Court against the Accused.

3. On the case being committed to the Sessions Court, the Trial Court framed charge against the Accused vide Exhibit-2. The charge was read over and explained to the Accused. Accused abjured the guilt and claimed

trial raising the plea of total denial and false implication.

4. To bring home the guilt of the Accused, Prosecution examined in all nine witnesses including the Panchas, the Police persons, PW-5 Dr. Hemant Dixit and others, mainly relying on the evidence of PW-6 Radha, the eye witness and PW-7 Maruti, the Informant. The Trial Court has relied upon this evidence and convicted and sentenced the Accused as stated above.

5. This Judgment of the Trial Court is being assailed in this Appeal by the learned Counsel for the Appellant Shri. Khamkar, by submitting that the impugned Judgment is based on conjectures, assumptions and surmises, without there being an iota of incriminating evidence on record. Per contra, the learned A.P.P. Smt. Shinde has tried to support the Judgment without any success.

6. At the outset itself, it has to be stated that the Judgment of the Trial Court is not based on the evidence which can be admissible in law. Except for the fact that the death of Shewanta is proved to be homicidal one, there is no incriminating material worth the name to connect the Accused with the offence charged against him.

7. Evidence of PW-5 Dr. Hemant Dixit, who has performed the post mortem, no doubt, goes to prove that he found 18 external injuries and corresponding 5 internal injuries on the dead body of Shewanta, when he conducted her post mortem on 13th October, 2007. According to him, the cause of her death was *“shock due to severe head injuries with contusion of frontal lobes of both the sides with pneumonitis on account of senility”*. He has categorically opined that cause of her death was homicidal and certainly not accidental, suicidal or natural. Accordingly, he has issued the Post Mortem Report (Exhibit-21).

8. The burden lying on the Prosecution is, however, not discharged from mere proof of the fact that Shewanta has succumbed to homicidal death. The Prosecution has to further prove the complicity of the Accused in the said death. The Prosecution and the Trial Court has relied upon only three pieces of evidence. The first is the ocular account of PW-6 Radha. This witness has not supported the Prosecution case and she is declared hostile. The learned A.P.P. has then cross-examined her and in her cross-examination, it is brought on record that she has stated before the Police that on hearing noise of beating, she and Malan rushed in the house of Accused and saw that Accused was assaulting Shewanta by means of the

soldering gun. She has further stated before Police that she accosted the Accused whether he is going to finish Shewanta and at that point of time Malan's son Mahadev came there. Then Accused left the place putting the latch to the house from outside.

9. However, this witness PW-6 Radha, in cross-examination by the learned Counsel for the Accused, has again changed the colour by deposing that the statement recorded by Police was not read over to her. She has not stated any of these facts before the Police, which she has deposed earlier in cross-examination by the A.P.P. Thus, this witness has not at all remained consistent and whatever she has stated in her cross-examination conducted by learned A.P.P., being the contents of the statement recorded by Police and not as to what actually she has seen or done, her evidence to that effect was totally inadmissible. The Trial Court has, therefore, erred in relying on the same and holding the Accused guilty.

10. Except for her evidence, there is no other eye witness account on record. Neither Malan is examined nor her son Mahadev, who had come there, is examined by the Prosecution.

11. Prosecution and the Trial Court have then relied on the circumstantial evidence like the recovery of the weapon of assault at the instance of the Accused. To prove it, the Prosecution has examined PW-2 Panch Lalit Tamboli and PW-9 API Yakub Pimpri. The alleged recovery is stated to be on 21st October, 2007 i.e. about seven days after the incident. It is from the heap of stones in the space outside the house of the Accused. Panch Witness PW-2 Tamboli has admitted in his cross-examination that the signature of the Accused was not obtained on the Memorandum Panchanama (Exhibit-12) in his presence. He has further admitted that the Accused did not disclose the name and description of the weapon.

As per the Prosecution case, the blood stains were found on this weapon and also on the clothes of the Accused, which were seized under Panchanama (Exhibit-14) on his arrest. The weapon and clothes were sent to the Chemical Analyzer and as per the C.A. Report, the blood stains were of human blood of "B" group. The Trial Court has, hence, arrived at the conclusion that as the blood stains of "B" blood group were found on the clothes of the deceased and also on the clothes of the Accused and the weapon, the Accused is the author of the injuries caused to the deceased.

12. However, this conclusion cannot be justified from the material on record because, as per the C.A. Report (Exhibit-25), the blood group of the Accused could not be ascertained as the results were inconclusive. Therefore, it cannot be said positively that blood stains found on the clothes of the Accused or on the weapon were not of the Accused, but of the deceased only.

13. Secondly, the important and crucial circumstance i.e. the contents of C.A. Report (Exhibit-26) were not put up to the Accused while recording his statement under Section 313 of the Cr.P.C. This was a very relevant incriminating circumstance and without confronting the Accused with the same, it cannot be used against him as it is going to cause great prejudice to him. Even the C.A. Reports were also not shown to him in his statement under Section 313 of the Cr.P.C., far remain to obtain his explanation about the contents thereof that blood stains found on his clothes and the weapon were that of the blood group of the deceased. In view thereof, this circumstance cannot be used against the Accused to connect or implicate him with the offence charged.

Moreover, in cross-examination of PW-7 Maruti, Accused has offered explanation as to how his clothes came to be stained with the blood. PW-7 Maruti has admitted that when Accused gave information to

him on 13th October, 2007 that Shewanta was found injured in the house, he has also informed him that as he saw Shewanta lying in the pool of blood, he was shocked and fell on her person and hence his clothes were stained with blood. This explanation offered by the Accused also appears probable. Hence, it cannot be said that this circumstance of the clothes of the Accused and the weapon being stained with the blood group of deceased, unerringly point to the only and only hypothesis of Accused being guilty of the offence.

14. To sum up, therefore, there is no evidence on record at all to prove the guilt of the Accused. The Judgment of the Trial Court of convicting the Accused, therefore, cannot be sustained in law. Consequently, 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.]