

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1216 OF 2011
IN
SESSIONS CASE NO.378 OF 2010

Samar Bahadur Nebulal Yadav,	]	
Age - 28 years, Occupation - Business,	]	
Permanently residing at Suprabhat Welfare	]	
Housing Society, Bastiwala Compound,	]	
Mahakali Cave Road, Andheri (E), Mumbai.	]	
(Presently lodged at Kolhapur Central Prison]	]	
at Kalamba, Kolhapur, Maharashtra,	]	
as convicted prisoner in C.R.No.3 of 2010	]	... Appellant/
of MIDC Police Station, Mumbai).	]	(Orig. Accused)

Versus

The State of Maharashtra,	]	
(At the instance of MIDC Police Station,	]	... Respondent/
vide C.R.No.3 of 2010).	]	Orig. Complainant

Mr. Fakruddin Khan a/w Ms. Naima Shaikh i/b Mr. Khan Abdul Wahab for Appellant/ Original Accused.
 Smt. V. R. Bhonsale, APP for State/Respondent.

CORAM :- SMT. I. K. JAIN, J.

RESERVED ON :- FEBRUARY 20, 2015
PRONOUNCED ON :- MARCH 09, 2015

JUDGMENT :-

This is an Appeal against the Judgment and Order
 dated 28/04/2011 passed by the learned Additional Sessions

Judge, Greater Bombay, in Sessions Case No.378 of 2010 convicting the Appellant/original accused for the offences punishable under Sections 304 (I) and 404 of the Indian Penal Code. The Appellant/accused was sentenced to suffer R.I. for 10 years and to pay a fine of Rs.1,000/-; in default to suffer S.I. for 10 days for the offence punishable under Section 304 (I) of IPC and R.I. for six months and fine of Rs.100/-; in default to suffer S.I. for two days for the offence punishable under Section 404 IPC. Both the substantive sentences were directed to run concurrently.

2. For the sake of convenience, we shall refer the Appellant as accused as he was referred before the trial Court.

3. The facts giving rise to the present Appeal may be stated, in brief, as under.

(i) Victim Shalu Samar Yadav @ Kamana Chaudhari was working in Royal Bar. She, along with other girls, was residing in a rented premises at Andheri. Accused Samar used to visit the bar. He got acquainted with Shalu. Accused started residing with Shalu and other girls in the rented premises. After some time, Shalu and accused took a separate premises on rent viz.

Room No.46, Su-prabhat Welfare Society, Bastiwala Compound, Mahakali Caves Road, Andheri (E), Mumbai. It was on the first floor of the building. Shalu and accused were residing as husband and wife. She continued to work in the bar.

(ii) Sapan Sahadev Jar was the landlord of the premises. He was having his workshop on the ground floor. Ramchandra Nilkamal Bhandari was the brother-in-law of Sapan Jar. Ramchandra was working at the workshop and residing at the same place.

(iii) On 29/12/2009, PW 10 Omprakash Vishwakarma visited the house of Shalu. He was known to Shalu and other girls Sapana and Payal. He found the house of Shalu locked. So he wrote two mobile numbers on a chit and gave it to Ramchandra Bhandari for handing it over to Shalu. On return of Shalu and accused, Ramchandra handed over the chit to Shalu. That gave rise to quarrel between Shalu and the accused. That time accused abused some person on mobile phone in loud voice. Accused and Shalu inquired from Ramchandra who gave the phone numbers. Ramchandra replied that one Prakash came and gave the phone numbers to him for handing over to Shalu.

According to Ramchandra, that time accused was beating Shalu and he pacified him not to beat her in late night.

(iv) On 01/01/2010, Pooja Dhumale, a bar girl and friend of Shalu, called Shalu on mobile to wish her on the occasion of new year. As there was no response, Pooja called the accused. Accused told her that he was out of the town and he was also unable to contact Shalu on phone so she (Pooja) to visit his house and find out Shalu. Thereafter Pooja went to the house of Shalu. She found the house locked. Then she went to the house of Sapana and Payal and informed them accordingly. When Pooja was with Sapana and Payal, she received a call from accused. He inquired from her whether she visited his house. Pooja informed the accused that house was locked. On that, accused asked Pooja to break the lock but she refused for the same. She informed Sapana and Payal about the conversation with the accused.

(v) On 02/01/2010 in the morning, accused returned home. He asked Ramchandra about Shalu and whether she had given the key. Ramchandra told him that key was not given to him. Accused asked Ramchandra to give him a hammer for

breaking the lock. Ramchandra gave him hammer and then accused broke the lock. Accused came down and said his wife was lying dead.

(vi) Police was informed. PW 1 ASI Dashrath Mahangare attached to MIDC Police Station was on duty on Mobile Van. He rushed to the spot and found accused standing at the door. He noticed foul smell at the place and found Shalu lying in a pool of blood. Her body was covered with bedsheet. PW 1 ASI Mahangare informed the Control Room. After some time, PSI Nikam of MIDC Police Station, along with staff, arrived at the spot. Spot and inquest panchanama came to be prepared. The dead body was sent for post-mortem examination. PW 6 Dr.Pankaj Subhan Gajare conducted post-mortem. He opined cause of death due to head injury. The injury marks were found on the face of accused. He was taken to police station. PW 1 ASI Mahangare lodged complaint. It was recorded by PW 14 PSI Krishnarao Nikam. Accused was arrested.

(vii) PW 15 PI Bhaskar Dere took over investigation. During investigation, statements of witnesses were recorded. Two mobile phones and a broken chain were recovered at the

instance of accused from the house of PW 12 Siyaram Yadav at Surat. On completion of investigation, charge-sheet was filed against the Appellant/accused. In due course, case was committed to the Court of Sessions.

4. Charge was framed against the Appellant/accused vide Exh.3. He pleaded not guilty to the charge and claimed to be tried. According to Appellant/accused, the death had taken place in his absence and he has been falsely implicated. In respect to the injuries on his face, he stated that injuries were received during scuffle with autorickshaw driver.

5. Prosecution examined 15 witnesses. On hearing both the sides, the learned Additional Sessions Judge came to the conclusion that prosecution has legally proved the guilt of Appellant/accused. Appellant was thus convicted and sentenced as stated in para 1 above. Being aggrieved, he has challenged the correctness of the said Judgment and Order in this Appeal.

6. Heard Mr. Fakruddin Khan, learned Advocate for the Appellant and Smt. V. R. Bhonsale, learned APP for State. On carefully considering the submissions made on behalf of the

parties, evidence of the prosecution witnesses and Judgment and Order passed by the learned Additional Sessions Judge, I am of the opinion that there is no merit in the Appeal for the reasons mentioned below.

7. The undisputed facts in the present are -
- (i) Shalu was working as a bar girl,
 - (ii) accused was visiting the bar and he got acquainted with Shalu,
 - (iii) initially accused and Shalu were residing in a rented room with other girls.
 - (iv) thereafter they shifted to the spot of incident and started residing separately as husband and wife,
 - (v) Sapan Jar was the landlord of the premises and he was running his workshop on the ground floor,
 - (vi) Shalu and accused were residing together on the first floor,
 - (vii) Ramchandra Bhandari was the brother-in-law of Sapan.
 - (viii) He was working in the workshop on the ground floor and residing there,
 - (ix) PW 8 Chaitali Rai, PW 9 Sapana Vishwas, PW 13 Pooja

Dhumale and Payal were working as bar girls and they were friends of Shalu,

- (x) PW 11 Arvindkumar Yadav and PW 12 Siyaram Yadav were the friends of accused residing at Surat.

8. So far as the cause and mode of death is concerned, evidence of PW 6 Dr.Gajare, inquest panchanama (Exh.22), post-mortem report (Exh.25), and F.I.R. (Exh.11) together establish that death in question was an unnatural death.

9. There is no eye witness in the case. Prosecution case exclusively rests on circumstantial evidence. The circumstances on which prosecution relied upon are -

- (A) Discovery of two mobile phones without sim cards at the instance of accused.**
- (B) No plausible explanation to the injuries on the face of the accused.**
- (C) Pre and Post incident conduct of the accused.**

10. **(A) Discovery of two mobile phones without sim cards at the instance of accused.**

- (i) PW 2 Jitu Singh and PW 15 PI Bhaskar Dere are the

witnesses on discovery under Section 27 of the Indian Evidence Act. Arrest panchanama (Exh.13) shows that accused was arrested on 03/01/2010. According to PW 2 Jitu Singh and PW 15 PI Bhaskar Dere, while accused was in custody, he made a statement that two mobiles without sim cards and one broken chain were kept at his relative at Surat and he was willing to show the same. Thereafter accused led police and panch witnesses to Surat at Ishwarnagar to the house of PW 12 Siyaram Yadav. Accused produced the bag containing a pant, a shirt, two mobiles without sim cards and one broken chain with pendent. PW 2 Jitu identified the two mobiles and broken chain and stated that pendent was having the alphabet "S".

(ii) The evidence of PW 2 Jitu is assailed on the ground that his behaviour was not normal and he acted as panch in many cases. On the close scrutiny of evidence of PW 2 Jitu, it is apparent that he stood the test of piercing cross-examination. There is nothing to show that he made an incorrect statement. He correctly identified two mobiles (Arts.14 and 15) and broken chain (Art.17). His testimony is fully corroborated by PW 15 PI Dere.

(iii) It is pertinent to note that PW 12 Siyaram Yadav is the friend of accused. He resides at Surat. It is stated by PW 12 Siyaram that the plastic bag was kept in his house by the accused and later seized by police at the instance of accused. The accused has not given any explanation in respect to the two mobiles without sim cards recovered in pursuance to the information given by him.

(iv) From the evidence of PW 9 Sapana Vishwas, it can be seen that deceased was having one mobile and another mobile was gifted to her by one of the customers. At the time of recording spot panchanama, mobiles were not found in the house. Thus, in view of the evidence of PW 2 Jitu, PW 12 Siyaram and PW 15 PI Dere, prosecution has succeeded in proving discovery of two mobiles without sim cards and a broken chain of the deceased at the instance of accused. It is the serious incriminating circumstance against the accused.

11. (B) No plausible explanation to the injuries on the face of the accused.

(i) On 31/12/2009, accused was seen at Surat. PW 11 Arvindkumar Yadav was knowing the accused. In the afternoon,

Arvindkumar was getting the service of his two wheeler done in Krishna Service Station. He saw accused Samar Bahadur proceeding with a bag. He asked the accused from where he came. Accused told him that he came from Mumbai. That time, Arvindkumar noticed scratch marks on the neck of the accused. When he asked about the injuries, accused informed that there was a dispute with a rickshaw driver about the change and in that he received the injuries. Though PW 11 Arvindkumar was declared hostile by the prosecution, his evidence in respect to the injuries remained consistent throughout.

(ii) Thereafter accused met PW 12 Siyaram Yadav who also noticed injury marks on the cheeks of the accused. When Siyaram inquired about the injuries, accused gave him evasive reply. Accused did not disclose to Siyaram that in a dispute with a rickshaw driver, he received the injuries. Thus the defence raised by the accused is inconsistent. He gave one answer to PW 11 Arvindkumar and another to PW 12 Siyaram. In view of the evidence of PW 11 Arvindkumar and PW 12 Siyaram, prosecution could establish that accused failed to give plausible explanation to the injuries on his face. This is the most clinching circumstance against the accused.

12. (C) Pre and Post incident conduct of the accused.

(i) PW 10 Omprakash was knowing Shalu, PW 9 Sapana and Payal. On 29/12/2009, he had been to Sapana and Payal. He came to know that Shalu had shifted to another place. So he came to the house of Shalu and found the door locked. He made inquiry from PW 5 Ramchandra Bhandari. PW 5 Ramchandra stated that on 29/12/2009 at around 6.30 p.m., one person Prakash came and gave him a chit containing phone numbers. He asked Ramchandra to give that chit to Shalu. At around 11.45 p.m., Ramchandra returned after having meals. He saw the lights of the house of Shalu on. He went to her and handed over the chit. Ramchandra then returned to his workshop on the ground floor. He was arranging his bed. That time he heard Samar Bahadur talking on mobile in loud voice and abusing. Both Shalu and Samar Bahadur inquired from Ramchandra who had given phone numbers. He informed them that Prakash had given the chit. That time accused was beating Shalu. PW 5 Ramchandra pacified the accused not to beat her in the late night.

(ii) As stated above, accused came to the spot of incident on 02/01/2010. PW 7 Sapan Jar came to the spot and inquired

from the accused how did it happen. The accused told him that he was not present as he left the house on 30/12/2009. During the course of arguments, Mr. Fakruddin Khan, learned Advocate for Appellant/accused, submitted that the accused had not absconded. He was available on the spot. he had an opportunity to abscond. Therefore his conduct be taken into consideration.

(iii) It can be seen from the evidence that at the time of arrest, two railway tickets (Arts.8/A and 8/B) were found in possession of the accused. One ticket was dated 30/12/2009 from Virar to Surat and the other was from Surat to Pune dated 01/01/2010. As per the prosecution case, Pooja Dhumale tried to call Shalu on 01/01/2010 to wish her on new year. It is stated by Pooja that she did not receive response from Shalu so she called her husband. Accused told her that he was out of Mumbai and he was also unable to contact Shalu on phone. He asked Pooja to go to his house and find out Shalu. Thereafter, Pooja went to the house of Shalu. She saw the door locked and then returned. Pooja went to Sapana and Payal and informed that house of Shalu was locked and she was unable to contact her on phone. Sapana and Payal informed Pooja that since last two days, they

had not seen Shalu. That time Pooja received a call from accused. He told her to go to his house, break the lock and find out Shalu. Pooja refused.

(iv) PW 9 Sapana also had a talk with the accused on 01/01/2010 to know the whereabouts of Shalu. The evidence of PW8 Chaitali, PW 9 Sapana and PW 13 Pooja shows that accused asked them to visit the house, break the lock and find out Shalu.

(v) According to PW 5 Ramchandra Bhandari, accused came on 02/01/2010 at 8.30 a.m. He inquired about Shalu and asked Ramchandra whether key was with him. Ramchandra told him that he was not having key. Then accused took the hammer from him, broke open the lock of his house, came down and told Ramchandra that his wife was dead.

(vi) The evidence on record shows that accused was residing with Shalu. PW 9 Sapana was residing in the same vicinity. Accused did not contact Sapana before breaking the lock. He did not inquire about Shalu at Royal Bar where she was working. The other articles in the house were found intact when the dead body of Shalu was found. There was no opportunity for

the third person to enter the room. The house was locked from outside and dead body was lying inside. It appears that just to make a show of theft, the mobiles and gold chain were removed by the accused, he locked the door and fled away.

(vii) It can be seen from the evidence of PW 6 Dr.Gajare that the post-mortem was performed on 02/01/2010 between 3.00 p.m. and 4.30 p.m. According to Dr.Gajare, the death must have occurred 72 hours before the post-mortem commenced. It means death must have occurred between 3.00 p.m. and 4.30 p.m. on 30/12/2009. It has come in the evidence that till 30/12/2009 afternoon, accused was present at home. This circumstance, in the absence of reasonable explanation, connects the accused with the commission of act.

(viii) It appears from the evidence that traveling time between Mumbai and Surat is around 5-6 hours. Accused was seen in the afternoon on 30/12/2009. He had not given any explanation how he spent the day thereafter. He was seen by PW 11 Arvindkumar and PW 12 Siyaram on 31/12/2009 at Surat. It is not his defence that he had some urgent work at Surat. When PW 12 Siyaram asked him the purpose of his visit to Surat,

he said that just he came. The railway tickets recovered at the time of arrest of the accused show that from Surat, he was to travel to Pune and not to Mumbai. These are the circumstances self speaking to show the conduct of the accused inconsistent with his innocence and tilt in favour of prosecution.

13. Thus on going through the record, it is found that the prosecution has proved beyond reasonable doubt the guilt of the accused. There is no merit in the Appeal. Appeal is dismissed.

14. Office to communicate this order to the Appellant through the concerned jail authorities.

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