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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1291 OF 2011

Durga @ Karndya Shankar Nimbalkar,	]	
age: 33 years, Occn. Vaidu,	]	
residing at Vaiduwadi, Dorlewadi,	]	
Taluka: Baramati,	]	
District Pune.	]	... <u>Appellant</u>
	]	Orig. Accused
(At present in Prison)	]	

V/s.		
The State of Maharashtra	]	 Respondent

Mr. Daulat G. Khamkar, for the Appellant.

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

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

DATE : 27TH MARCH, 2015.

ORAL JUDGMENT: [Per P.V. Hardas, 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.2,000/- in default of which to undergo further rigorous imprisonment for six months, by the Additional Sessions Judge, Baramati, District Pune, by judgment dated 11.4.2011, by this appeal challenges his conviction and sentence.

2. The facts as are necessary for the decision of this appeal may be stated thus:-

P.W.5 Police Inspector Ganesh More, who on 30.12.2009, was attached to Baramati City Police Station, received report lodged by P.W.2 Shankar Shinde, at about 1.20 a.m. The said report is at Exh.25. The said report was in respect of death of sister of P.W.2 Shankar, who had been married to the appellant. On the basis of the said report, Accidental Death Register bearing No.89 of 2009 was registered and enquiry of the accidental death was entrusted to Police Head Constable Nikam. Accordingly Head Constable Nikam had drawn the scene of the incident panchnma, inquest panchnama and had also seized the clothes of deceased. On the same day, P.W.1 Muktabai the mother of deceased Tai had lodged report which was scribed at Exh.23. On the basis of said report of P.W.1 Muktabai, offence under Crime No.281 of 2009 was registered. The investigation of the said crime was entrusted to P.W.5 Ganesh More. On the same day, he recorded statement of four witnesses and on the next day recorded statement of six witnesses.

3. On 2.1.2010, he arrested the appellant and on 3.1.2010 seized the clothes of the appellant under seizure memo at Exh.28. The

seized property was then forwarded to the Chemical Analyzer under requisition at Exh.41. The reports of Chemical Analyzer are at Exh.33. Further to the completion of investigation, a chargesheet against the appellant was submitted.

4. The postmortem on the dead body of deceased Tai was performed by P.W.3 Dr. Pandurang Gawade, who noticed the following external injuries :-

- (I) Dry coloured blood oozing through nose and mouth.
- (II) Dry blood mark over cheek and neck.
- (III) both eyes closed face cynosed

P.W.3 also found following injures:

- (I) Pressure mark over posterolateral aspect of neck, bluish in colour 5 cm below the right mastoid process directed transversely upward approximate size 6 cm x 0.5 cm.
- (ii) On cut section ecchymosis.
- (iii) Brain cynosed and congested.
- (iv) Thorax – both lungs cynosed and oedematous and congested.
- (v) Bucal cavity- lips cynosed, bleeding through mouth.
- (vi) Liver, Spleen, kidney and pancreas all are cynosed and congested.

5. He had also noticed blood oozing through nose and mouth and dry blood over cheek and neck. On internal examination, he noticed that the organs were cynosed and congested. Viscera was preserved and was referred to the Chemical Analyzer. His opinion regarding cause of death was also reserved and after receipt of the report of Chemical Analyzer, it was opined that the deceased had died due to asphyxia due to smothering. The postmortem report is at Exh.36.

6. On the case being committed to the Court of Sessions, the trial Court vide Exh.7, framed charge against the appellant, for the offence punishable under Section 302 of the Indian Penal Code. The appellant denied his guilt and claimed to be tried.

7. The prosecution, in support of its case, examined five witnesses. The trial Court, upon appreciation of the evidence, convicted and sentenced the appellant as aforestated.

8. We have heard Shri. Daulat Khamkar, learned counsel for the appellant and Smt. V.R. Bhosale, the learned APP. In order to effectively deal with the submissions advanced before us, it would be useful to refer

to the evidence of prosecution witnesses.

9. The prosecution has principally relied upon testimony of P.W.1 Muktabai and P.W.2 Shankar. P.W.1 Muktabai deposed that deceased Tai was her daughter, who was married to the appellant about 12 years prior to the incident. The appellant was addicted to liquor and after consuming liquor used to assault Tai as he was suspecting her character. According to Muktabai, this was informed to her by deceased Tai. P.W.1 Muktabai also deposed that she was residing in the same area where the appellant was residing and house of P.W.1 Muktabai was at a distance of 300 feet from the house of the appellant. She has admitted that they had not attempted to resolve the dispute between the appellant and his wife either by approaching the Panchayat or taking appropriate proceeding either in the Court or at the police station.

10. According to P.W.1 Muktabai on 29.12.2009 at about 11.00 p.m., they had heard hue and cry and on hearing cries had come out of her house alongwith her son P.W.2 Shankar and they noticed that cries were coming from the house of the appellant and therefore, rushed to the house of the appellant. On going to the house of appellant, they noticed the dead body of deceased Tai lying in the room and also noticed

presence of the appellant as well as father of the appellant. She also noticed the broken pieces of bangles and blood stains on the pillow and quilt. She thereafter instructed Shankar to lodge report at the police station and thereafter she lodged report at Exh.23. According to P.W.1, the sister of the appellant is married to P.W.2 Shankar and the marriage was performed in the same pendol and on the same day of the marriage of the appellant with Tai.

11. In the cross examination, she has admitted as true that there was a wall between the room of the appellant and the room of his father and the height of the wall was about 6 to 7 feet and beyond the wall there was open space. She has also admitted in cross examination that the appellant was engaged in manufacturing of containers from tin sheets. She has admitted that at 1.00 a.m. in the night police and Police Patil of the village had come to the house of the appellant. She has denied suggestion that the appellant was not assaulting deceased Tai and suspecting her chastity. She has also denied suggestion that the appellant was not addicted to liquor.

12. The prosecution has examined P.W.2 Shankar, who has deposed that on the same lines as that of P.W.1 Muktabai. In the cross

examination, he has admitted that in the report at Exh.25, on the basis of of which A.D.R. was registered, he had not referred to the presence of the appellant. He has admitted that P.W.1 Muktabai was present when Exh.25 was scribed. From the evidence of these two witnesses, it is clear that the prosecution has established that the appellant was suspecting the character of his wife deceased Tai and on that count used to assault her though the appellant was married for 12 years and had three sons and two daughters.

13. The prosecution has also relied on the testimony of P.W.4 Yallappa a neighbour of the appellant who has deposed about the presence of the appellant at 11.00 p.m. when neighbours had assembled in front of the house of the appellant hearing cries. Though several suggestions have been made to the prosecution witnesses that the appellant was not present in his house since two days prior to the incident, the appellant has not led any evidence in respect of alibi which has been claimed by him.

14. Another circumstance against the appellant is the finding of the Chemical Analyzer that the clothes of the appellant were found stained with blood though the blood group could not be determined. The

findings of the Chemical Analyzer have not been put to the accused in his statement under Section 313 of the Code of Criminal Procedure. The finding of the Chemical Analyzer, therefore, will have to be left out of consideration while appreciating the evidence against the appellant.

15. In cases resting on circumstantial evidence, prosecution has to prove each and every circumstance on which it proposes to rely. The circumstances so proved by the prosecution should be of conclusive nature and should form a complete chain which should exclude every hypothesis of the innocence of the accused and should unerringly point to the guilt of the accused. In other words the circumstances should be capable of only one hypothesis i.e. accused and accused alone has committed the offence.

16. In the present case we find that the prosecution has established the following circumstances:-

- I) The appellant was assaulting his wife as the appellant was suspecting her character.
- II) The deceased had died - homicidal death - as the cause of death was asphyxia due to smothering.
- III) The offence had been committed in the room which was exclusively occupied by the appellant, deceased and their

children.

17. The presence of the appellant has been established by the prosecution at 11.00 p.m. when the neighbours had assembled in front of the house of the appellant.

18. The additional circumstance being that the appellant has taken a false defence.

19. Mr. Khamkar, the learned counsel for the appellant has urged before us that the prosecution has not been able to establish beyond reasonable doubt the presence of the appellant at the scene of the offence. The learned APP has referred to the evidence of the prosecution witnesses and has supported the findings arrived at by the trial Court.

20. The evidence of P.W.1 Muktabai as well as evidence of P.W.2 Shankar if read alongwith evidence of P.W.4 Yallappa, proves the presence of the appellant. Though P.W.2 Shankar has admitted in his report at Exh.25 that there was no reference to the presence of the appellant yet according to us, the aforesaid omission is not fatal as the report at exh.25 was only an intimation to the police regarding death of

deceased Tai. The substantive report against the appellant was lodged at Exh.23 by P.W.1 Muktabai. The evidence, therefore, in our opinion establishes beyond reasonable doubt the presence of the appellant. The omission of presence of the appellant in Exh.25, in our opinion, is not fatal as to over-ride the substantive evidence of these three witnesses.

21. Mr. Khamar, the learned counsel for the appellant has then urged before us that assuming the appellant was present in the house, yet the prosecution has failed to prove that it was the appellant and appellant alone who had committed crime as the father of the appellant was also residing with the appellant in the house. The learned APP has referred to the evidence of the prosecution witnesses and has urged before us that the evidence excludes every possibility of any other person excepting the appellant committing crime.

22. In the present case, we find that the possibility of any intruder entering the house of the appellant by breaking open the door and committing crime is completely ruled out. Deceased Tai is not alleged to have had enmity with any other person who would want to commit such crime. Moreover, no valuables are alleged to have been stolen from the house. The father of the appellant though was present in the house

cannot be said to have committed crime as the prosecution has not alleged any motive against the father of the appellant to commit murder of deceased, his daughter-in-law. The motive is only alleged against the present appellant and the motive is that the appellant was suspecting character and chastity of his wife and on that score used to assault the deceased. We, thus, find that the deceased had been killed in the room which was exclusively occupied by the appellant, deceased and their children. The deceased died of homicidal death, naturally the appellant must have committed crime as possibility of any other person is completely ruled out.

23. Though the prosecution had alleged that the clothes of the appellant were stained with blood, the said circumstance will have to be ignored as the findings of the Chemical Analyzer have not been put to the accused in his statement under Section 313 of the Code of Criminal procedure. Though in the cross examination, the appellant has taken a defence of alibi, but the appellant has not led any evidence to establish his plea of alibi. In his statement under Section 313 of the Code of Criminal Procedure also the appellant has not offered any explanation as to how his wife deceased Tai had died. The appellant has, therefore, taken a false defence which can be considered as additional circumstance.

24. Thus, on appreciation of the circumstances which had been proved by the prosecution, in our opinion, it is the appellant and appellant alone who has committed the said crime.

25. Mr. Khamar, the learned counsel for the appellant has placed reliance on the judgment of the Supreme Court in **Subramaniam -vs- State of Tamil Nadu and anr 2009 Cri. L.J. 3002**. In this case the evidence of the Medical Officer did not positively establish that the deceased died due to asphyxia. The Supreme Court found that no reliance could be placed on the opinion of the Medical Officer, therefore the Supreme Court extended benefit of doubt to the appellant in the said matter before it. In this case the offence had been committed in the house and no explanation is given by the appellant, in our opinion, therefore, the ratio of the Supreme Court would be inapplicable to the facts of the present case.

26. Mr. Khamar, learned counsel for the appellant has also placed reliance on the judgment of the Supreme Court in **Ranjit Singh -vs- State of Punjab (2011) 15 SCC 285**. In this case the Supreme Court found that there was no evidence to connect the appellant with crime though the

incident had happened in the matrimonial home of the deceased and the and some presumption regarding special knowledge could be raised. The Supreme Court found that the basic onus on the prosecution had not been discharged. Merely because the incident had happened in the matrimonial home, between husband and wife, an inference of guilt could not be drawn. The ratio of the judgment of Supreme Court, in our opinion, therefore, in the light of the facts of the present case would be inapplicable.

27. In the present case as pointed out by us, above apart from the fact that the offence had been committed in the room which was occupied exclusively by the appellant and the deceased, we find that the appellant had strong motive committing crime. The other inmates of the house i.e. father of the appellant had no motive for committing murder of the deceased. The possibility of any intruder committing crime has also been found by us to be highly improbable. The circumstances, therefore, in our opinion, lead to only one hypothesis which could be drawn is that it is the accused and accused alone who has committed the crime.

28. We, thus, find that the prosecution has proved the offence against the appellant beyond reasonable doubt and the appeal being

devoid of merit is, therefore dismissed confirming the conviction and sentence of the appellant.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[P.V.HARDAS, J.]