

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1299 OF 2008

Dilip Kashinath Kshirsagar
Nashik Road Central Prison,
Nashik

..Appellant
[Ori.Accused]

Vs.

The State of Maharashtra

..Respondent

....

Mrs. Sonia Miskin, Advocate--appointed for the Appellant
Mrs. A. S. Pai, A.P.P. for the State

....

CORAM :- **SMT. V. K. TAHILRAMANI AND**
SHRI. B. P. COLABAWALLA, JJ

DATE :- APRIL 27, 2015.

ORAL JUDGMENT: [PER SMT. V.K. TAHILRAMANI, J.]

1 The appellant-original accused has preferred this appeal against the judgment and order dated 13.03.2000 passed by the learned 2nd Additional Sessions Judge, Nashik in Sessions

Case No. 153 of 1999. By the said judgment and order, the learned Sessions Judge convicted the appellant under Section 302 of IPC and sentenced him to R. I. and fine of Rs. 2000/- in default R.I. for six months.

2 The prosecution case briefly stated, is as under:

(a) Deceased Suman was the daughter of PW-4 Laxmibai Ganpat Landge. Suman was earlier married to one Raghunath. Raghunath expired. Thereafter, Suman got married to one Bholasingh. Thereafter, quarrel started taking place between them. Suman, then started selling vegetables in Panchak, Nashik. Suman developed some illicit relation with the appellant. The appellant used to visit Suman at her residence situated at Bhairavnath Nagar, Nashik where Suman resided along with her mother PW-4 Laxmibai.

(b) The incident took place on 24.05.1999. On that day, PW-4 Laxmibai returned home at about 6.00 p.m. She called out to her daughter Suman to open the door, as the door was latched from inside, but the door was not opened. Laxmibai then, peeped through the gap in the door and saw her daughter

Suman lying in a pool of blood. At that time, the appellant was lying on the body of Suman. Somebody informed the Police. Police then came to the spot. PW-5 Police Constable Dattatraya Palde, PW-12 PSI Ambadas Vispute were amongst the police personnel who came to the house of Suman. They also called to open the door, however, nobody opened the door. They then broke open the door by giving kick blows on the door. Due to this, the latch of the door along with lock fell down inside the house and the door opened. Then they entered the room. They saw Suman lying in a pool of blood. She was facing downwards. The appellant was lying on the body of Suman. At that time Suman was wearing blouse and petticoat and the appellant was only wearing pant. When they touched the body of Suman, they found that it was warm, hence, Suman was taken to the hospital. The appellant was found heavily intoxicated, hence, he was also sent to the hospital. In the hospital, Suman was declared dead. It is the prosecution case that the appellant assaulted Suman repeatedly on the head with a cement concrete brick. PW-1 Dilip, who was a tenant of Suman and was residing in the room adjoining the house of Suman, lodged FIR. Thereafter, investigation

commenced.

(c) The dead body of Suman was sent for postmortem. During postmortem, it was found that the death of Suman had occurred due to intra-cranial hemorrhage due to head injury. After completion of investigation, charge sheet came to be filed against the appellant. In due course, the case was committed to the Court of Sessions.

3 Charge came to be framed against the appellant under section 302 of IPC. The appellant pleaded not guilty to the said charge and claimed to be tried. The defence of the appellant is that of total denial and false implication. After going through the evidence adduced in the present case, the learned Judge convicted and sentenced the appellant, as stated in para 1 above. Hence, this appeal.

4 We have heard the learned counsel for the appellant and the learned APP for the State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned counsel for the parties,

the judgment delivered by the learned Judge and the evidence on record, we are of the opinion that the appellant caused murder of deceased Suman.

5 The evidence on record shows that Suman was lying in injured condition in her house and the appellant was lying on her person. The door of the house was latched from inside and lock had been put to the latch of the door from inside. This is brought out through the evidence of PW-4 Laxmibai, PW-5 Police Constable Dattatraya and PW-12 PSI Vispute. PW-4 Laxmibai was mother of Suman. She has stated that she was residing along with her daughter Suman at Bhairavnath Nagar in Nashik. Suman was earlier married. Thereafter, her husband died. On the day of incident, PW-4 Laxmibai came home at about 6.00 p.m. She called in the name of her daughter Suman and asked her to open the door. The door was latched from inside, the said door did not open. Thereafter, PW-4 Laxmibai peeped through the gap in door and she saw her daughter Suman lying in a pool of blood. She was facing downwards. The appellant was lying on the body of Suman. At that time Suman was wearing blouse and petticoat

and the appellant was only wearing pant. Then police were informed. The police came to the house and broke open the door. PW-4 Laxmibai categorically stated that when the door of the room, where Suman was residing, was broken open, the appellant was in the room and a cement brick was lying in the room.

6 PW-5 Police Constable Dattatray has also stated that the door was latched from inside. He has stated that on 24.05.1999, he was on duty. At about 8.15 pm., he was informed by PW-1 Dilip Bhavsar that landlady (Suman) was not opening the door and her mother was crying outside and blood was seen in the room. Pursuant to the said information, PW-5 Police Constable Dattatraya along with other staff members went in Police Jeep to Bhairavnath Nagar, Nashik. They noticed an old woman crying in front of the room. The old woman stated that the door is not being opened. Then, they gave call to open the door. On peeping inside the room, they saw a woman lying in a pool of blood and one person was sleeping with her. They confirmed that the door was latched from inside. PW-12 PSI Vispute asked Police Constable Dattatraya to

open the door by giving kick blows. Then, Police Constable gave kicks to the door and door was broken.

7 The last witness on the point that the door was latched from inside is PW-12 PSI Vispute. He has stated that at about 8.00 p.m., when he was present in the Police Station, PW-1 Dilip came to the Police Station and informed that his land lady Suman was not opening the door and her mother was crying outside and something has happened. PW-12 PSI Vispute has stated that he along with staff members went in police vehicle to the spot. On going to the spot, they peeped from the gap in the door. They called out to open the door, however, there was no response. Then, the door was opened by PW-5 Police Constable Dattatraya who gave kick to the door and broke open the door. Due to the said act, latch of the door along with lock which was put on it fell down inside the room. On entering the room, they saw one woman (Suman) and one man (appellant) lying in a pool of blood. They were facing towards the ground. The complainant identified the woman as his land lady. They noticed that the other person was intoxicated. They further noted that Suman was wearing

blouse and petticoat and the appellant was only wearing a pant. The clothes on the person of the appellant were found stained with blood. One cement stone /brick 6" x 6" size was found lying on the spot totally stained with blood. When mattress was removed from cot, photo of the appellant was found. Some articles were also found. All these articles were seized.

8 The evidence of PW-12 PSI Vispute shows that when they broke open the door the latch of the door fell down along with the lock inside the room. Spot Panchanama Exhibit-14 also shows that the room was closed from inside and when they broke open the door by giving kick blows the latch and lock on the door broke and fell down inside the room. Thus the Spot Panchanama clearly shows that the door was locked from inside.

9 The evidence on record shows that the room in which Suman was found dead was not only latched but it was locked inside. Suman was found dead with injuries on her person and the appellant was lying on the body of Suman.

This shows the presence of the appellant in the room of Suman. The room was latched and locked from inside. In such case, the appellant has to explain how Suman sustained injuries and died. In such case, Section 106 of the Evidence Act would come into play. Section 106 of the Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. In several recent decisions, the Supreme Court has held that the principles which underlies Section 106 of the Evidence Act can be applied in cases where certain facts are especially within the knowledge of a person. In the case of **State of Rajasthan Vs. Kashi Ram**¹ the Supreme Court has observed that if the accused fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does

1 (2006)12 SCC 254 : AIR 2007 SC 144

not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation as an additional link which completes the chain.

10 The Supreme Court in the case of **Ravirala Laxmaiah Vs. State of Andhra Pradesh**² has observed as under:

“In case where the accused has been seen with the deceased victim (last seen theory), it become duty of the accused to explain the circumstances under which the death of the victim has occurred. If the accused does not offer any explanation about receiving injuries or offers any explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime.”

11 In **Neel Kumar Vs. State of Haryana**³ the Supreme Court has observed as under:

“30. It is the duty of the accused to explain the incriminating circumstance proved against him

² (2013) 9 SCC 283

³ (2012) 5 SCC 766 : (2012) 3 SCC (Cri) 271

while making a statement under Section 313 Cr.P.C. Keeping silent and not furnishing any explanation for such circumstance is an additional link in the chain of circumstances to sustain the charges against him.”

Similar view was also taken in **Aftab Ahmad Ansari Vs. State of Uttaranchal**⁴

12 It is further the prosecution case that not only was the appellant found in the room of the deceased and door was latched from inside but the clothes of the appellant i.e. pant and underwear were found stained with blood. No doubt, panchas relating to seizure of clothes of accused have turned hostile and not supported prosecution, however, evidence of PW-6 Police Head Constable Gangurde shows that he has drawn panchanama Exhibit-12 under which the appellant was arrested and clothes on his person i.e. black pant and underwear were seized. In the decision of the Supreme Court in the case of **Mohammed Aslam Vs. The State of Maharashtra**⁵ it was contended that as the panch witness has turned hostile, the evidence of the Investigating Officer became unsupported and hence, it cannot be relied upon. The

⁴ (2010) 2 SCC 583 : (2010) 2 SCC (Cri) 1054 : AIR 2010 SC 773

⁵ (2001) 9 SCC 362

Supreme Court observed thus:-

"We cannot agree with the said contention. If panch witnesses turned hostile, which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated. Nor do we agree with the contention that his testimony is unsupported or uncorroborated. The very fact that PW 34 produced in the Court lethal weapons recovered is a very formidable circumstance to support his evidence."

Thus, it was held in the case of Mohd. Aslam that evidence of police officer effecting recovery would not stand vitiated by reason of panch witnesses turning hostile.

13 In the case of **Modan Singh Vs. State of Rajasthan**⁶ the Supreme Court observed that if the evidence of the Investigating Officer who recovered the material object is convincing, the evidence as to recovery need not be rejected on the ground that seizure witness does not support the prosecution version. Similar view was taken by the Supreme Court in the case of **Rameshbhai Mohanbhai Koli Vs State**

⁶ AIR 1978 SC 1511

of Gujarat⁷. It is pertinent to note that the appellant had not furnished any explanation in relation to his presence in the room or the blood stains on his clothes.

14 The same is the case in relation to the spot panchanama. As far as spot panchanama is concerned, though the panch has turned hostile, PW-12 PSI Vispute has clearly deposed about it. We find that nothing has been elicited in the cross-examination of PW-6 Police Head Constable Gangurde and PW-12 PSI Vispute which would cause us to disbelieve their evidence. The evidence of PW-6 Police Head Constable Gangurde shows that the clothes on the person of the appellant i.e. pant and underwear were seized. The clothes of the appellant were sent to the C. A. As per C. A. Report, pant of the appellant was stained with blood of "B" group and his underwear was stained with human blood. The clothes of deceased Suman were stained with blood of "B" group. From this, an inference can clearly be drawn that the blood group of Suman was "B". C. A. Report Exhibit-41 shows that blood group of appellant was "AB". Thus, finding of blood of "B" group on the pant of the appellant is a highly

⁷ (2011) 11 SCC 111

incriminating circumstance against the appellant. It is pertinent to note that the appellant has not furnished any explanation for the presence of blood of "B" group on his pant.

15 It is the prosecution case that the appellant assaulted Suman with cement brick/stone on the head and caused her death. This is supported by the medical evidence. PW-7 Dr. Wadgaonkar conducted the postmortem on the dead body of Suman. On external examination, he found the following injuries:-

- (1) CLW left parietal area 10 cm x 4 cm x bone deep.
- (2) CLW right front to parietal area 12 cm x 1 cm x bone deep.
- (3) CLW occipital area 4 x 1 cm x bone deep.
- (4) Fracture at the right and the left parietal bone was noticed.

Dr. Wadgaonkar found following internal injuries:-

Haematoma under scalp, fracture to the left and right parietal bone, brain was found congested, intra-cranial hemorrhage present, big blood clot

at the base of skull, heart was empty and all organs were pale.

16 According to Dr Wadgaonkar, the above injuries were ante-mortem. Dr. Wargaoonkar has stated that muddemal article no.13 Cement brick if thrown on the person on those parts of the body, injuries noted by him in post mortem notes are possible. So also, if forcibly head of a person is dashed against these articles injuries noted by him are possible. Dr Wadgaonkar has specifically stated that if a person falls from a cot at the height of two and half feet on rough surface injuries noted by him are not possible. In the opinion of Dr. Wadgaonkar, the cause of death was due to intra-cranial hemorrhage due to head injury.

17 The learned counsel for the appellant submitted that prosecution has not brought on record any motive for the appellant to commit crime. No doubt, the motive has not been brought on record but the fact that the appellant was found inside the house of the deceased, and was found lying on the body of the deceased and room was not only latched from

inside but was locked from inside shows that it could only be the appellant and none else who committed the murder of Suman.

18 On going through the record, we are of the opinion that there is sufficient evidence to prove beyond reasonable doubt that the appellant committed the murder of Suman. Thus, we find no merit in the appeal. The appeal is dismissed.

19 Office to communicate this order to the appellant who is in jail.

20 We quantify legal fees to be paid by the High Court Legal Services Committee to the appointed Advocate Mrs. Sonia Miskin at Rs.5,000/- .

[SHRI.B.P.COLABAWALLA,J.] [SMT. V.K.TAHILRAMANI, J.]