

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.913 OF 2014

Sadu Tambdya Waghmare

Nashik Road Central Prison-Nashik

..Appellant

[Ori. Accused]

Vs.

The State of Maharashtra

..Respondent

Mrs. Nasreen S. K. Ayubi, appointed for the Appellant.

Mr. A. S. Shitole, A. P. P., for the State.

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

DATE :- **MARCH 30, 2015.**

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

1 This appeal is directed by the appellant-original accused against the judgment and order dated 07.08.2014 passed by the learned Sessions Judge, Raigad-Alibag in Sessions Case No. 132 of 2012. By the said judgment and order, the learned Sessions Judge convicted the appellant under Section 302 of

IPC and sentenced him to imprisonment for life and to pay a fine of Rs.1000/-, in default RI for two months.

2 The prosecution case briefly stated, is as under:

Pw-1 Nitin Waghmare was the son of deceased Bhagi. At the time of the incident, Nitin was residing along with his wife, daughter and grandmother in a hut in village Gorhe. His father was Janu Marya Waghmare. Deceased Bhagi was his mother. His father Janu Marya Waghmare expired about five years prior to the incident. The wife of the appellant-accused had also expired. Thereafter, Bhagi married the appellant. The appellant and deceased were residing in the same village as PW-1 Nitin. PW-3 Subhash Janu Waghmare was the son of the first wife of Janu Marya Waghmare. He was residing in the same village as the appellant and the deceased. The house of PW-1 Nitin and PW-3 Subhash was situated near the house of the appellant and the deceased. Deceased Bhagi used to occasionally visit her son PW-1 Nitin and at that time she used to tell him that her husband i.e. the appellant used to beat her.

On 13.06.2012, at about 7.00 a. m., the appellant came to the house of PW-1 Nitin. The appellant told PW-1 Nitin that he had beaten his mother with wooden rod and she was lying in the house. PW-1 Nitin, then, went to the house of the appellant. He saw his mother lying in the corner of the house where food is prepared. He realized that his mother had expired. He, then, lodged F. I. R. Exhibit-12. Thereafter, investigation commenced. The appellant was arrested. The wooden rod and the clothes of the appellant came to be recovered at his instance. After completion of investigation, the charge sheet came to be filed against the appellant.

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. His further defence is that Bhagi fell down and sustained injuries due to which she died. After going through the evidence adduced in this case, the learned Sessions Judge convicted and sentenced the appellant as stated in para 1 above. Hence, this appeal.

4 We have heard the learned Advocate 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 Advocates for the parties, the judgment and order delivered by the learned Sessions Judge and the evidence on record, for the reasons stated below, we are of the opinion that the appellant caused death of his wife Bhagi.

5 There is no eye witness in the present case and the case is totally based on circumstantial evidence. The circumstances against the appellant are as under:-

- (I) Extra judicial confession given by the appellant.
- (ii) The dead body of Bhagi was found in the house of the appellant with injuries on her person.
- (iii) Recovery of wooden rod and clothes at the instance of the appellant.
- (iv) The C. A. Report which shows that blood was found on the shirt of the appellant.

6 As far as first circumstance i.e. extra judicial confession is concerned, PW-1 Nitin and PW-3 Subhash have deposed about this. PW-1 Nitin has stated that, he, along with his wife, daughter and grandmother were residing in a hut at village Gorhe, at the time of incident. Janu Marya Waghmare was his father and deceased Bhagi was his mother. His father Janu Marya Waghmare expired about five years prior to the incident. Wife of the appellant had already expired. After the death of his father Janu Waghmare, his mother Bhagi married the appellant. The appellant and Bhagi used to reside together in the same village as Nitin. The house of Bhagi was situated about four to five houses away from the house of PW-1 Nitin. Nitin has stated that when his mother occasionally used to come to meet him, she used to tell him that the appellant used to beat her.

On 13.06.2012, at about 7.00 a. m., the appellant came to the house of PW-1 Nitin. The appellant told PW-1 Nitin that he had beaten his mother with wooden rod and she was lying in the house. Nitin, then, went to the house of the

appellant. He saw his mother lying in the corner of the house where food is prepared. He realized that his mother had expired. He, then, lodged F. I. R. (Exhibit-12).

7 PW-3 Subhash was residing near the house of the appellant. He has stated that Bhagi was the wife of the appellant and the appellant and Bhagi were his uncle and aunt. He has stated that occasionally, quarrel used to take place between the appellant and the deceased. Subhash has stated that on 12.06.2012, when he returned from work at about 5 to 6.00 p.m., at that time the appellant and Bhagi were not in the house. They returned home after he went to sleep. The next morning when he got up at about 6.00 a.m., the appellant came to his house and told him that he had killed his wife and he requested Subhash to accompany him to his house. Nothing has been elicited in the cross examination of PW-1 or PW-3, so as to cause us to disbelieve their testimony.

8 The evidence of PW-1 Nitin and PW-3 Subhash shows that the appellant had made an extra judicial confession to them that he had caused death of his wife Bhagi. There is

neither any rule of law nor prudence that evidence furnished by extra judicial confession cannot be relied upon unless corroborated by some other credible evidence. The Supreme Court in the case of **Piara Singh Vs. State of Punjab**¹ observed that:-

“ Law does not require that the evidence of an extra judicial confession should, in all cases, be corroborated.”

In the case of **State of Rajasthan Vs. Raja Ram**² the Supreme Court observed as under:-

“Extra judicial confession if voluntary and true and made in fit state of mind can be relied upon by the Court.”

Accepting the admissibility of extra judicial confession, the Supreme Court in the case of **Sansarchand Vs. State of Rajasthan**³ held as under:-

“ There is no absolute rule that an extra judicial confession can never be the basis of a conviction,

1 1978 (1) SCR 597

2 2003 (8) SCC 180.

3 (2010) 10 SCC 604

although ordinarily an extra judicial confession should be corroborated by some other material”

9 In the present case, the extra judicial confession is corroborated by the fact that the dead body of Bhagi was found lying in the house. The injuries on the person of Bhagi were as per the medical evidence consistent with assault by wooden rod. The wooden rod which was used to assault Bhagi was also recovered at the instance of the appellant and shirt of the appellant was found stained with human blood. In such case, we are of the opinion that we can safely rely on the circumstance of extra judicial confession made by the appellant to PW-1 Nitin and PW-3 Subhash.

10 The second circumstance is that the dead body of Bhagi was found in the house of the appellant with injuries on her person. The evidence on record shows that only the appellant and Bhagi were residing in the house and no other person was residing in the house. Bhagi was found dead in the house of the appellant with various injuries on her person and cause of death was asphyxia due to strangulation and head

injury due to blunt object leading to concussion phenomenon and intra cerebral hemorrhage. Obviously, Bhagi could not have strangled herself and some other person had strangled her. As stated earlier, the evidence on record shows that the appellant and Bhagi were the only two persons residing in the house. In such case, burden would fall upon the appellant under Section 106 of the Evidence Act to explain in what circumstance Bhagi sustained injuries and died. In this connection, we may refer to Section 106 of the Evidence Act. 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 principle 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**⁴ 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

⁴ (2006) 12 SCC 254; AIR 2007 SC 144

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 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.

11 The appellant has tried to raise a defence that Bhagi fell down and sustained injuries and died. However, medical evidence shows that Bhagi did not die only on account of injury by hard or blunt object but she died due to asphyxia due to strangulation. Bhagi could not have suffered from asphyxia on account of falling down on stones as per the defence raised by the appellant. PW-5 Dr Sameer Bansode conducted post mortem on the dead body of Bhagi. On external examination he found following injuries:-

- 1) 3 x 2 cm. Abrasion over the right anterior chest wall below mid point of clavicle (Rt).
- 2) 1 x 1 cm. Abrasion on the right arm posteriorly on the upper end of humerus.
- 3) 0.5 x 0.5 cm diameter linear hyper pigmented graze abrasion from middle of hyoid bone (neck bone) to the left angle of jaw.
- 4) Contusion injury on the left cheek at the zygomatic bone (cheek bone) 5 x 3 cm vertically running down ward.
- 5) 3 x 2 cm vertically placed bruise over the right hypochondriac (gap between first and second rib) region laterally 2 cm from right mid clavicular line.

According to Dr. Bansode all these injuries were ante mortem in nature.

12 On internal examination Dr. Bansode observed as follows:

- (1) Haematoma 8 x 3 cm over left parietal region.
- (2) 3 x 2 cm haematoma over the forehead on

right side horizontally placed.

(3) Hemorrhagic spots on left parietal and temporal region within the brain.

In the opinion of Dr. Bansode cause of death was due to Asphyxia due to strangulation and head injury caused by hard and blunt object leading to concussion(to and fro) phenomenon and ICH (Intra cerebral hemorrhage).

13 It is pertinent to note that PW-5 Dr. Bansode has stated that Bhagi has sustained two hematomas on the head and both will not be possible simultaneously if a person fell on a stone. In any event, as stated earlier, the cause of death was also asphyxia due to strangulation which is not at all consistent with fall on stone. Thus, we find no merit in the defence raised by the appellant. The evidence on record clearly shows that Bhagi died a homicidal death and the appellant was responsible for the same.

14 In addition to the above evidence, prosecution has relied on the circumstance of recovery of wooden rod and shirt

of the appellant at his instance. The prosecution has examined PW-6 Subhash Dalvi and PW-7 Kamlakar Dabhane in support of the recovery. However, both these witnesses have turned hostile and have not supported the prosecution. However, PW-8- Sanjay Satav who is the Investigating Officer has clearly deposed about recovery of wooden rod and clothes of the appellant. 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 was unsupported and hence it cannot be relied upon. The 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.”

⁵ (2001) 9 SCC 362

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.

15 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 of Gujarat**⁷. In the present case, we find that evidence of PW-8 is cogent and convincing, and hence, we have no hesitation in relying on the same. The appellant took out a wooden rod and clothes which he had worn at the time of the incident, which was concealed by the appellant below the roof of his house. One of the clothes i.e. shirt was stained with blood.

6 AIR 1978 SC 1511

7 (2011) 11 SCC 111

16 The shirt of the appellant was sent to the C. A. As per C. A. Report Exhibit-41, the shirt was found stained with human blood. In this connection, we may usefully refer to the decision of the Supreme Court in the case of **Gura Singh Vs. State of Rajasthan**⁸ wherein it has been observed as under :

"In view of the authoritative pronouncement of this Court in Teja Ram Case (1999) 3 SCC 507) we do not find any substance in the submissions of the learned Counsel for the appellant that in the absence of the report regarding the 'origin of the blood, the trial Court could not have convicted the accused. The Serologist & Chemical Examiner has found that the chadar seized in consequence of the disclosure statement made by the appellant was stained with human blood. As with lapse of time the classification of the blood could not be determined, no bonus is conferred upon the accused to claim any benefit on the strength of such a belated and stale argument. The trial Court as well as the High Court were, therefore, justified in holding the circumstance as proved beyond doubt against the appellant."

8 (2001) 2 SCC 205

17 On going through the record, we are of the opinion that there is sufficient evidence to prove beyond reasonable doubt that the appellant committed murder of his wife Bhagi by assaulting her with the wooden rod and by strangulating her. Thus we find no merit in the appeal. In the result, the appeal is dismissed.

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

19 We quantify legal fees to be paid to Advocate Mrs. Nasreen S. K. Ayubi, by the High Court Legal Services Committee at Rs. 5,000/-.

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