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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 945 OF 2014

Suresh Vithal Parkar
Age 48 years, Occ: Service,
Residing at Room No.9, Second Floor,
“B” Wing, Sai Krupa Society, Sector 46,
Seawood, Navi Mumbai, Dist. Thane. .. Appellant

Versus

The State of Maharashtra .. Respondent

Mr. Manoj J. Bhatt for appellant.
Mrs. S. D. Shinde, APP for State.

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

JANUARY 30, 2015.

ORAL JUDGMENT [Per P. V. Hardas, J.] :

1. The appellant, who stands convicted for offence punishable under Section 302 of the Indian Penal Code and sentenced to imprisonment for life and to pay a fine of Rs.5000/-, in default of which to under go further RI for 15 days, by the Sessions Judge, Thane, by judgment dated 25/9/2014, in Sessions Case No. 143 of 2013, by this appeal questions the correctness of his conviction and sentence.

2. This appeal was admitted by us on 19/12/2014 and while dealing with Criminal Application No. 1613 of 2014, which was filed by the appellant, praying for his release on bail, this court by its order dated 16/1/2015, upon considering the nature of evidence against the appellant, directed that the appeal be listed for hearing out of turn. This court further dispensed with the preparation of a formal paper book in the light of the fact that the appellant had submitted the copies of the deposition of the witnesses. This court, therefore, by the aforesaid order directed that the record and proceedings be called for and the appeal be listed for final hearing before this court after receipt of record and proceedings on 30/1/2015. Pursuant thereto, this appeal has been listed before us for hearing.

3. Facts as are necessary for the decision of this appeal may briefly be stated thus:-

PW 9 – API Anil Behrani, who, in November, 2012, was attached to the N.R.I. Sagari Police Station, was entrusted with the investigation of Crime No. 136 of 2012. On 18/11/2012 PW 1 – Dhanesh

had come to the police station and accordingly his report at Exh. 23 was recorded. On the basis of the report of PW 1 – Dhanesh, an offence vide Crime No. 136 of 2012 under Section 302 of the IPC was registered. Upon registration of the offence, PW 9 – API Behrani proceeded to the scene of the incident i.e. Room No.9, Sai Krupa Society and on entering the said room, he noticed the dead body of deceased Asha. He also noticed blood stains on the wall of the bath-room. A scene of the incident panchanama was accordingly drawn in the presence of panchas at Exh.38. Inquest panchanama of the dead body of deceased Asha was drawn in the presence of panchas at Exh. 12. The dead body of deceased Asha was referred for postmortem examination. A photographer was called for taking the pictures of the dead body and of the scene of the incident. Statements of witnesses were recorded. The clothes of deceased were seized under seizure memo at Exh. 13 in the presence of panchas. The nail clippings of the deceased, along with the blood stains and the blood sample were forwarded to the Chemical Analyzer. Further to the completion of investigation, a charge-sheet against the accused was filed.

Postmortem on the dead body of deceased Asha was performed by PW 4 – Dr. Bhushan Jain, who noticed the following

external injuries:-

- (i) Contused lacerated wound over left occipital region, of size 10 x 8 cm., bone deep, along with avulsion of scalp posteriorly and reddish in colour.
- (ii) Contused lacerated wound over left face, in front of ear, of size 0.3 x 0.3 cm., skin deep and reddish n colour.

He opined that the injuries were antemortem in nature and on internal examination, he noticed hemorrhage under scalp over right temporal and occipital region, 8 x 7 cm. and 15 x 12 cm. respectively, reddish in colour. There was also depressed fracture of left occipital bone, 3 x 3 cm., extending into posterior cranial fossa, 12 cm in length. The brain matter was also seen lacerated. 50 cc whitish fluid was noticed in the stomach. PW 4 – Dr. Jain, therefore, opined that deceased might have died due to head injury. The postmortem report is at Exh. 31.

4. On the case being committed to the Court of Sessions, trial court framed the aforesaid charge, to which the accused pleaded not guilty and claimed to be tried. Prosecution, in support of its case, examined 9

witnesses. The case against the appellant/accused rests on circumstantial evidence. In support of the said case, the prosecution principally relied on PW 1 – Dhanesh, PW 2 – Umesh, sons of the appellant and deceased Asha as well as PW 3 – Manisha, daughter of appellant and deceased Asha. Prosecution has also relied on the testimony of PW 6 – Arif, a neighbour. The trial court upon appreciation of the evidence, convicted and sentenced the appellant as afore-stated.

5. We have heard the learned counsel for the appellant and the learned APP and in order to effectively deal with the submissions advanced before us by the learned counsel for the parties, it would be useful to refer to the evidence of the prosecution witnesses.

6. PW 1 – Dhanesh, son of deceased Asha and appellant, deposes that initially he was residing with the appellant and deceased Asha. Subsequent to his marriage, PW 1 – Dhanesh was residing separately. Asha, wife of the appellant, had not been treated by the appellant well and consequently deceased Asha also began to reside with Dhanesh. According to Dhanesh, the appellant was not providing money for daily expenses and was also treating his wife in a very shabby manner. The appellant,

however, used to insist Asha to join him at his house. Asha, however, declined to join appellant and was residing with PW 1 -Dhanesh. Thereafter on account of Diwali, deceased Asha agreed to reside with the appellant in Sai Krupa Housing Society where the appellant was residing along with his other son i.e. PW 2 – Umesh. According to Dhanesh, he had received information from Umesh that the appellant was behaving properly with Asha and the appellant had improved his behaviour. PW 1 – Dhanesh further deposes that on 18/11/2012, he had been informed that the relations between the appellant and his wife Asha were normal and, therefore, PW 1 – Dhanesh and his daughter Manisha decided to permit deceased Asha to reside with the appellant. On 18/11/2012, PW 3 – Manisha, attempted to contact deceased Asha on her cell phone, but could not establish the contact as the cell phone was switched off. Manisha, therefore, telephoned the appellant and the appellant is alleged to have asked her to come home and see for herself as to what appellant had done to Asha. Accordingly, Manisha and Dhanesh went to the house of the appellant and noticed the appellant sitting on the cot. On being asked about deceased Asha, the appellant pointed out towards the bath-room, where the dead body of deceased Asha was noticed. Subsequently, PW 2 – Umesh also arrived at the scene of the incident. The police were accordingly informed and after

the arrival of the police, the panchanama etc. was performed.

7. In cross-examination, certain omissions have been elicited. Omission has been elicited that he had not stated in his FIR at Exh. 23 that after he began to reside separately along with his wife and mother, the appellant had given threats to deceased Asha. Omission is also elicited that he had not stated in his FIR at Exh. 23 that Manisha had attempted to contact deceased Asha on cell phone but her cell phone was found switched off.

8. Prosecution has examined PW 2 – Umesh. Incidentally, PW 2 – Umesh, son of the appellant and deceased Asha was residing with the appellant. According to him, on 18/11/2012 he had gone to attend his employment at about 8 a.m. The appellant and deceased Asha were present in the house. Thereafter he had returned at about 3 O'clock on being informed by PW 3 – Manisha about the death of deceased Asha.

9. Prosecution has also examined PW 3 – Manisha, daughter of the appellant and deceased Asha. Manisha also deposes on the same lines as that of PW 1 – Dhanesh and PW 2 – Umesh and also deposes that on

18/11/2012 she had attempted to contact Asha on telephone, but found that the cell phone of Asha was switched off. She had thereafter telephoned the appellant, who had informed her to personally come and see as to what the appellant had done to Asha. According to Manisha thereafter she along with Dhanesh had gone to the house of the appellant and had noticed the dead body of deceased Asha. Manisha also deposes that she had contacted PW 2 – Umesh and had informed him about the incident. In cross-examination, an omission has been elicited that she had not stated in her previous statement that on ringing the door bell, the door had been opened by the appellant.

10. Apart from the evidence of these three witnesses, prosecution has examined PW 6 – Arif, a neighbour, who deposes that on 18/11/2012 he was present at his house and at about 9 a.m. he had heard some noise about a quarrel from the flat of the accused. He had also heard the noise of something falling or dashing against the wall. He has admitted that thereafter he had not heard anything and was busy. At about 3 p.m. he had noticed the appellant and the police.

11. Prosecution has examined PW 4 – Dr. Jain, who had

performed the postmortem examination. He has deposed that deceased could have died 24 hours prior to the commencement of the postmortem examination. In the cross-examination, he has admitted that it could be 17 to 18 hours prior to the commencement of the postmortem examination. Thus, we find that the medical evidence has not been able to establish the exact time of death of deceased Asha. We further find that there is no evidence of the prosecution witnesses to indicate the presence of the appellant in the house at about the time when the offence was committed. Admittedly, deceased Asha was alive at about 8 to 8.30 a.m. when PW 2 – Umesh had left the house. According to Umesh, the appellant was present in the house at that time. There is no further evidence about presence of the appellant at about the time when the offence was committed. Curiously also the prosecution has not been able to establish the time of death with any degree of certainty. The appellant, it appears, when examined under Section 313 of the Cr. P.C. has not offered any explanation in respect of the manner in which deceased Asha had died. The report of the C.A. does not indicate that the C.A. had examined the clothes of the appellant. Thus, even the corroborative circumstance of blood stained clothes is also absent.

12. The prosecution, therefore, relies upon the following circumstances :-

- (a) The homicidal death of deceased Asha in the house which was occupied by the appellant and deceased Asha.
- (b) Failure of the appellant to explain under Section 106 of the Indian Evidence Act about the manner in which deceased Asha had died, and
- (c) Deceased Asha being last seen alive in the company of the appellant.

13. As far as the first circumstance is concerned, it cannot be taken as an incriminating circumstance. In respect of the second circumstance i.e. failure of the appellant to offer any explanation, a reference at this juncture may usefully be made to the judgment of the Supreme Court in Shambu Nath Mehra vs. State of Ajmer [**AIR 1956 SC 404**]. The Supreme Court in the aforesaid judgment has held that Section 106 of the Indian Evidence Act is not a substitute for the burden of proof which rests on the prosecution. In the present case, the prosecution has not

been able to establish the exact time of death nor has the prosecution been able to establish the presence of the appellant in the house at about the time when the offence was committed. In the absence of such evidence, the failure of the appellant to offer any explanation under Section 106 of the Indian Evidence Act cannot be used as a circumstance against the appellant nor can a presumption of guilt be drawn on the failure of the appellant.

14. The only circumstance, therefore, against the appellant is the third circumstance that PW 2 – Umesh, when he had gone for attending his duty, had seen the appellant and deceased Asha in the house. Admittedly, the appellant was residing in the house and, therefore, his presence in the house by itself is not suspicious. As pointed out by us above, the prosecution has not been able to establish the exact time of death of deceased Asha and, therefore, the circumstance that the appellant and deceased Asha were seen together by PW 2 – Umesh cannot be said to be an incriminating circumstance which would prove the offence against the appellant beyond reasonable doubt.

15. At this juncture a reference may usefully be made to the judgment of the Supreme Court in *Sohel Mehaboob Shaikh vs. State of*

Maharashtra [(2009) 12 SCC 588]. The Supreme Court in the said judgment at paragraph 7 has reproduced the circumstances against the accused therein. At paragraph 9 of the said judgment, the Supreme Court, has held thus:-

“9. The first and third circumstances cannot be considered to be relevant either separately or collectively. So far as the second circumstance is concerned, there is no evidence to show circumstantially that accused was present in the room at the time of occurrence. The time of occurrence, even by approximation has not been established by the prosecution.”

In the light of the judgment of the Supreme Court, in our opinion, the prosecution has utterly failed to prove the offence against the appellant beyond reasonable doubt. The appellant, in our opinion, therefore, is entitled to be given the benefit of doubt.

16. Resultantly, Criminal Appeal No. 945 of 2014 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.)