

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 481 OF 2012

Omkar @ Rajabhau s/o
Sudhakar Rao Kale,
age 33 years, occ. Business,
R/o Neknoor, Tq. & Dist. Beed
(at present in jail)

...APPELLANT

VERSUS

The State of Maharashtra

...RESPONDENT

Mr. N.S.Ghanekar, Advocate for the appellant
Mr.S.P.Deshmukh, APP for Respondent/State

**CORAM : A.V.NIRGUDE &
INDIRA K. JAIN, JJ.
DATED : 6th January, 2016**

ORAL JUDGMENT : [Per Indira K.Jain, J.]

This appeal is preferred by original accused against the judgment and order, dated 4.6.2012, passed by the learned Sessions Judge, Beed, in Sessions Case No. 164 of 2011. By the

said judgment and order, the learned Sessions Judge convicted the accused under Section 302 of the Indian Penal Code and sentenced him to suffer imprisonment for life and to pay a fine of Rs.5,000/-, in default to suffer further rigorous imprisonment for six months.

2] For the sake of convenience, we shall refer the appellant in his original status as accused as he was referred before the Trial Court.

3] The gist of the prosecution case is as under : -

(i) Deceased Asmita was the wife of accused Rajabhau. Their marriage had taken place before ten years of the incident. The couple was blessed with three children. Till the birth of 3rd child deceased was treated well. Thereafter accused started suspecting her character and used to raise quarrel.

(ii) Incident occurred on 24.7.2011 at about 7.00 p.m. It is the case of prosecution that accused raised quarrel with his wife suspecting her character and assaulted her by means of wooden handle of a bat and thereby caused severe injuries to her. The persons who gathered on the spot separated the quarrel. Accused was brought

outside the house. The wife of accused was shifted to Neknoor hospital in unconscious condition. She was declared dead by the doctor.

(iii) The death was reported by Vinayak Kale real brother of the accused. A.D. No. 31 of 2011 was registered. During inquiry of A.D. it transpired that Asmita sustained fracture to ribs, her liver was ruptured and she died on account of assault by the accused.

(iv) P.S.I. Bajrang Malode lodged report. Crime No.86 of 2011 was registered. During investigation, spot panchanama was drawn. Postmortem report was collected. Medical Officer who performed postmortem opined probable cause of death due to hemorrhagic shock due to rupture of liver and fracture of ribs. Statements of witnesses came to be recorded. Accused was arrested. Pursuant to memorandum statement, wooden handle of bat was recovered from the house of accused. On completion of investigation, charge sheet was submitted before learned Judicial Magistrate, First Class, Beed, who in turn committed the case for trial to the Court of Sessions.

4] Charge of the alleged offence was explained to accused vide Exh. 7. He pleaded not guilty to the charge and claimed to be tried. The defence of accused was of denial in toto.

However, factum of relationship between the accused and deceased was admitted.

5] To bring home guilt of the accused prosecution examined in all 17 witnesses. After going through the evidence adduced by the prosecution learned Sessions Judge convicted and sentenced the appellant as stated in para 1 above. Hence this appeal.

6] We have heard the learned counsel for parties. After giving our anxious consideration to the facts and circumstances of the case, submissions made on the part of learned counsel for appellant and learned A.P.P. for the respondent/State, reasoning recorded by the Trial Court and the evidence on record, for the below mentioned reasons we are of the opinion that prosecution could not prove the guilt of the accused beyond reasonable doubt and accused ought to have been acquitted.

7] Prosecution case is mainly based on the evidence of three eye witnesses. PW 12-Balasaheb Nannaware, PW 13-Rukhmin Raut and PW 15-Shankar Kale. At the threshold it has to

be mentioned here that all the three witnesses turned hostile and they have not supported the prosecution story.

8] It appears that during investigation statements of the eye witnesses came to be recorded by the learned Judicial Magistrate, First Class PW 16 Smt. Yogita Rajendra Mukkanwar. Through this witness prosecution has tried to prove the omissions and contradictions in the evidence of the three eye witnesses named above.

9] Needless to state that statements of witnesses recorded under Section 164 of the Code of Criminal Procedure cannot be said to be substantive evidence. They can be at the most used for proving omissions and contradictions. In the absence of substantive evidence we do not find that accused can be convicted merely on the basis of statements under Section 164 of the Code of Criminal Procedure recorded by the learned Magistrate.

10] An attempt was made from the side of prosecution to point out some incriminating circumstances against the accused. The first circumstance relates to seizure of wooden handle of bat at

the instance of accused from his house. No Chemical Analyser's report is produced. In the absence of Chemical Analyser's report this circumstance would loose it's importance and accused cannot be connected to the alleged act.

11] Another circumstance on which prosecution has placed reliance is that accused informed brother of the deceased on phone that Asmita had suffered heart attack and she was taken to the hospital. By bringing this circumstance prosecution desired to suggest that accused tried to mislead, and therefore he is responsible. This circumstance also does not stand in view of the admission elicited in cross-examination of PW 9-Ashok who stated that accused told him that Asmita felt giddiness and fell down from the stair case. According to Medical Officer PW 14-Dr.Momin Ejaj injuries found on the deceased were possible due to fall but he added that those injuries were not possible in the present case. Considering the significant admissions brought in the cross-examination of PW 9-Ashok and PW 14-Dr.Momin it would be risky to rely upon this circumstance too.

12] Prosecution then made an attempt to show that wife of the accused died in his custody and under Section 106 of the Indian Evidence Act it was for the accused to explain the circumstances under which she died. If the evidence of PW 12 Balasaheb Nannaware is looked into it can be seen that at the time of incident father of accused was also present in the house. She died in the hospital and not in the house. Prosecution case is based on ocular evidence. It is not the case based on circumstantial evidence. Under these circumstances in our view even provisions of Section 106 of the Indian Evidence Act would not come to the rescue of prosecution.

13] In the above premise, we are of the considered opinion that prosecution case suffers from glaring infirmities creating mass of doubts and conviction and sentence of the appellant is unsustainable in law. Hence we pass the following order.

ORDER

- i] Criminal Appeal No. 481 of 2012 is allowed.
- ii] The judgment and order, dated 4.6.2012, passed by the learned Sessions Judge, Beed, in Sessions Case No. 164 of 2011 convicting the appellant/accused Omkar @ Rajabhau s/o Sudhakar Rao Kale for the

offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life and to pay a fine of Rs.5,000/-, in default to suffer further rigorous imprisonment for six months is set aside.

iii] Appellant-Omkar @ Rajabhau is acquitted of the charge under Section 302 of the Indian Penal Code.

iv] Appellant-Omkar @ Rajabhau shall be released forthwith, if not required in any other offence.

v] Fine, if paid, shall be refunded to the appellant.

[INDIRA K. JAIN, J.]

[A.V.NIRGUDE, J.]

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