

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.557 OF 2010

Mohd. Yasin Chutan Shaikh.	]	
Aged about 25 years,	]	
Residing at Room No.19, B-Block, 2 nd Floor,	]	
Madina Manzil, Crawford Market, Mumbai.	]	... Appellant

Versus

State of Maharashtra,	]	
(At the instance of Ganeshpuri Police Station	]	
vide C.R.No.I-80/2007).	]	... Respondent

Mrs. Anjali Awasthi for Appellant.

Mr. Rajan Salvi, APP for State.

CORAM :- A. A. SAYED &

SARANG V. KOTWAL, JJ.

RESERVED ON :- 28 SEPTEMBER, 2017

PRONOUNCED ON :- 10 OCTOBER, 2017

JUDGMENT (PER : SARANG V. KOTWAL, J.) :-

1. The present Appeal is preferred by the Appellant challenging the Judgment and Order dated 13/11/2009 passed by the III Additional Sessions Judge, Thane, in Sessions Case No.71 of 2008 whereby the Appellant was convicted for having committed an offence punishable under Section 302 of the IPC and was sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs.2,000/-; and in default of payment of fine, to suffer rigorous imprisonment for six

months. The Appellant was given benefit of set off under Section 428 of the Cr.P.C.

2. The prosecution case pertains to the murder of one Sheetal Kamtekar. Initially, the charge was also framed under Section 309 of the IPC but was later on dropped by the order dated 05/11/2009 and the Appellant faced the trial for commission of offence punishable under Section 302 of the IPC alone. According to the prosecution case, between the night intervening 8th and 9th November 2007, the Appellant committed murder of the said Sheetal in Room No.10, of Gaurav Bar and Restaurant at Vajreshwari, Taluka – Bhiwandi, District – Thane. According to the prosecution case, both of them had checked-in the said lodge in the morning of 08/11/2009 and the incident took place at night. According to the prosecution case, the Appellant strangled the deceased with odhani and then tried to hang himself with the said odhani and in the process, suffered some injuries on the head. The commotion was heard by the staff of the lodge. The police were informed, who reached at around 11.00 p.m. They broke open the door and found that the deceased was lying dead on the bed and the Appellant was lying injured and was in a heavily intoxicated condition. Apparently, the Appellant confessed to his crime and then he was taken for medical examination and subsequently was arrested. The FIR was lodged vide C.R.No.I-80/2007 at about 1.05 a.m. on 09/11/2007 by PC Pote who had reached the lodge and had seen that the deceased was lying on the bed.

3. During the trial, the prosecution examined 9 witnesses. PW 8 Dr. Jayashree Mhaske had issued certificate in respect of the injuries suffered by the Appellant. She had found 3 simple injuries. One of them was on the occipital region. Another abrasion was on the right eyebrow and there was a contusion on the right and left lateral side of the neck.

4. PW 9 Dr. Baijbin Khan had conducted the post-mortem examination on the dead body of the deceased and had found 6 injuries on the dead body. There were 11 abrasions and contusions on the face and there was one ligature mark over the neck and the cause of death was mentioned as 'death due to asphyxia due to strangulation'.

5. PW 1 PC Rajendra Pote had lodged the FIR. According to him, on 08/11/2007 in the night, they received telephonic message that there was quarrel going on, in Gaurav Bar and Restaurant. Therefore he, along with PN Avsare and other police staff, went to the said lodge. They were told that there was a noise of quarrel from Room No.10. They found that the door of the room was locked from inside. They broke open the door. They found that the deceased was lying there on the bed and the Appellant was found in the bathroom with bleeding injuries to his head and near his eyebrow. He was not in a position to speak. They found one odhani lying near the door of the bathroom. He went back to police station and lodged his FIR. PW 2 Pralhad Pathari was a panch in whose presence spot panchanama was conducted. He noticed bloodstains on the wall of the bathroom.

One odhani was seized from the spot. PW 3 Narayan Kamtekar was brother of the deceased but he has not deposed about any important aspect. PW 4 Jitu Kotiyan was the waiter working in the said Gaurav Bar and Restaurant. In his presence, the Appellant and the deceased had come to the hotel at 9.15 p.m. and had booked the Room No.10. He has deposed that the Appellant had taken one quarter bottle of liquor and had consumed liquor in the bar of the hotel. He has further deposed that at 10.15 p.m., he heard shouts from the room. The door was not opened and therefore he informed the owner of the hotel Gajanan Pathak. The said Gajanan Pathak also knocked on the door. However, the door was not opened. Therefore, the police were informed. The police reached the spot and then broke open the door. All of them entered the room and saw the scene as mentioned earlier. This witness has further deposed that odhani was found tied to the door of the bathroom. He further deposed that when Gajanan Pathak asked the Appellant as to what had happened, the Appellant told that he had killed the the lady because of the quarrel. PW 5 Gajanan Pathak was the owner of the Gaurav Bar and Restaurant. He has deposed on the similar lines as those of PW 4. PW 6 Rajendra Gandhi was the panch in whose presence the clothes of the accused were seized. PW 7 API Devram Vadmare was the Investigating Officer.

6. We have heard Mrs. Anjali Awasthi, learned Advocate for the Appellant and Mr. Rajan Salvi, learned APP for the State and with their assistance, we have read the evidence and perused the record.

7. Mrs. Anjali Awasthi, learned Advocate for the Appellant, submitted that the evidence led by the prosecution is deficient and therefore benefit of doubt should be given to the Appellant. She further submitted that the alleged confession made by the Appellant was inadmissible in law and therefore, should not be relied upon. She has further submitted that there was a possibility that somebody else had entered the room and committed the murder. This is corroborated by the fact that the Appellant himself had suffered injuries on his head. She has further submitted that in the alternative, the Court may consider holding that the offence under Section 302 of the IPC was not made out and it should be a lesser offence because there appears to be a sudden quarrel and the incident appears to have taken place on the spur of the moment.

8. As against this, Mr. Rajan Salvi, learned APP for the State, submitted that the prosecution has sufficiently proved its case. All the circumstances unerringly point to the guilt of the Appellant and there is no scope to infer that the Appellant has not committed the offence. He has further submitted that it is a case of murder and the offence cannot be any lesser offence than under Section 302 of the IPC.

9. Though there is no direct evidence in the form of any eye witness to the incident, the circumstances brought on record are strong against the Appellant. From the evidence, it is quite clear that when the staff of the hotel and the police went to the said room, it was locked from inside. There was no other way from where they

could have entered the room or there was no other open door from where they could have made entry in the said room. The evidence shows that the witnesses had to break open the door to enter the room and on such entry, they found that the deceased was lying dead on the bed. Thus, the evidence is quite clear that the Appellant and the deceased were alone inside the room. The room was latched from inside and there is no possibility of any third person committing the said offence.

10. The learned Advocate for the Appellant rightly submitted that at the alleged confession made by the Appellant should not be taken into consideration. To that extent, we agree with her. She has relied on the Judgment of the Hon'ble Supreme Court in the case of **State of A.P. Vs. Gangula Satya Murthy**¹. The Hon'ble Supreme Court, in para 19 of the said Judgment, has held thus :

“19. The other reasoning based on Section 26 of the Evidence Act is also fallacious. It is true any confession made to a police officer is inadmissible under Section 25 of the Acct and that ban is further stretched through Section 26 to the confession made to any other person also if the confessor was then in police custody. Such 'custody' need not necessarily be post-arrest custody. The word 'custody' used in Section 26 is to be understood in a pragmatic sense. If any accused is within the ken of surveillance of the police during which his movements are restricted then it can be regarded as custodial surveillance for the purpose of the section. If he makes any confession during that period to any person be he not a police officer, such confession would also be hedged within the banned contours outlined in Section 26 of the Evidence Act.”

¹ (1997) 1 Supreme Court Cases 272

In the present case, we find that the alleged confession was made in the presence of police officer when the Appellant was under total control of the police officer. Moreover, he was in a highly intoxicated condition and therefore, such confession cannot be termed as voluntary. It is also hit by Section 26 of the Indian Evidence Act.

11. However, even if the said confession is left out of consideration, the other evidence led by the prosecution and the other circumstances are strong enough to hold that the Appellant has committed the murder of the deceased. As discussed earlier, there was no possibility of any other person committing the said offence.

12. The learned Advocate for the Appellant submitted that the Appellant and the deceased were having cordial relations and had checked-in the lodge in the morning in a normal state of mind. There was no sign of any discord throughout the day and it is only in the night after the Appellant had apparently consumed liquor, this incident had occurred. She further submitted that firstly, the incident had occurred on the spur of moment when the Appellant was highly intoxicated and was a result of possible sudden fight between the couple. She submitted that therefore the offence would not fall within the definition of 'murder' as suggested under Section 300 of the IPC.

13. As against this, the learned APP submitted that Sections 85 and 86 of the IPC takes care of such situation and being intoxicated does not absolve the offender from his liability of commission of the

offence. Sections 85 and 86 of the IPC read thus :

“85. Act of a person incapable of judgment by reason of intoxication caused against his will.-- Nothing is an offence which is done by a person who, at the time of doing it, by reason intoxicated, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law; provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

86. Offence requiring a particular intent or knowledge committed by one who is intoxicated.-- In cases where an act done is not an offence unless done with a particular knowledge of intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.”

14. In the present case, it is nobody's case that the Appellant was administered intoxicants against his will or without his knowledge. Therefore, he cannot take advantage of his intoxicated condition to justify the commission of murder.

15. Moreover, if the Appellant was to take recourse to Exception 4 of Section 300 of the IPC, the burden of proof was on him under Section 105 of the Evidence Act. Similarly, since he alone was inside the room in the company of the deceased, the fact regarding the incident which had taken place inside the four walls of the room, was within his exclusive knowledge and therefore, again, the burden to give explanation about the facts which were within his exclusive

knowledge only, was on him under Sections 105 and 106 of the Evidence Act. Sections 105 and 106 of the Evidence Act read thus :

“105. Burden of proving that case of accused comes within exceptions.-- When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code (45 of 1860), or within any special exception or proviso contained in any other part of the said Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.”

106. Burden of proving fact especially within knowledge.-- When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

16. In the present case, the Appellant has miserably failed to discharge such burden of proof which was on him. Therefore, we are unable to hold that the Appellant had committed lesser offence than that punishable under Section 302 of the IPC. With the result, we find that there is no merit in the Appeal. Hence the following order :

ORDER

The Appeal is dismissed.

(SARANG V. KOTWAL, J.)

(A. A. SAYED, J.)