

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1103 OF 2012

KASHINATH TANAJI PAWAR

)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA

)...RESPONDENT

Ms.N.S.Ayubi, Advocate for the Appellant.

Mr.Vinod Chate, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 31st AUGUST 2017

ORAL JUDGMENT :

1 By this appeal, the appellant / convicted accused is challenging the judgment and order dated 7th May 2012 passed by the learned Additional Sessions Judge, Karad, in Sessions Case No.31 of 2010, thereby convicting him for offences punishable under Sections 340 (Part I) and 323 of the Indian Penal Code

(IPC). For the offence punishable under Section 304 (Part I) the appellant / accused is sentenced to suffer rigorous imprisonment for 10 years apart from directing him to pay fine of Rs.100/-. For the offence punishable under Section 323 of the IPC, he is sentenced to suffer rigorous imprisonment for 6 months apart from directing him to pay fine of Rs.50/-. The appellant / accused is, however, acquitted of the offence punishable under Section 498A of the IPC.

2 Briefly stated, facts leading to the institution of the present appeal can be summarized thus :

(a) The appellant / accused married Swati in the year 2007. Out of this wedlock, he has begotten two children. At the time of the incident in question, his elder son was two years old whereas his young daughter was just three months old. The appellant / accused was working at Dubai for earning his livelihood. He had returned to his native place village Karad just two months prior to the incident in question.

(b) On 19th March 2010, the incident in question took place. On that day, son of the appellant / accused was ailing and therefore, PW6 Shobha Kanwar – cousin of Swati Pawar (since deceased) came to her house for enquiring about the health of son of Swati Pawar. In presence of PW6 Shobha Kanwar, the appellant / accused abused and beat his wife Swati Pawar. PW6 Shobha Kanwar returned to village Natoshi where PW1 Santosh Kavar-brother of deceased Swati Pawar used to reside. She narrated the incident to PW1 Santosh Kavar. As village Kusrund and Natoshi were situated at short distance, PW1 Santosh Kavar decided to go to the house of his sister Swati Pawar, who had suffered beating at the hands of her husband i.e. the appellant / accused.

(c) According to prosecution case, when PW1 Santosh Kavar reached the house of his sister Swati Pawar, the appellant / accused asked him as to why he has come there. PW1 Santosh Kavar informed the appellant / accused that he came to meet his sister. Then the appellant / accused gave abuses to PW1 Santosh Kavar. When Swati Pawar tried to intervene, the appellant /

accused slapped her in presence of her brother PW1 Santosh Kavar. Hence, Swati Pawar left the house of the appellant / accused for proceeding to her paternal house with PW1 Santosh Kavar.

(d) When PW1 Santosh Kavar and his sister Swati Pawar were proceeding to village Natoshi, near a streamlet called as 'Molaicha Odha', the appellant / accused came from behind them armed with an axe and gave a blow thereof on head of Swati Pawar. Then he immediately assaulted PW1 Santosh Kavar from blunt side of the axe and fled from the spot.

(e) People from the vicinity gathered on the spot and took Swati Pawar as well as PW1 Santosh Kavar to Rural hospital, Patan. Swati Pawar succumbed to the injuries on the way to hospital. Report of the incident in question came to be recorded by PW7 Dayanand Dhome, P.I. of Patan Police Station, by making inquiry about the incident from PW1 Santosh Kavar, who was taking medical treatment at the said hospital. Accordingly, Crime No.19

of 2010 came to be registered against the appellant / accused for offences punishable under Sections 302, 323 and 498A of the IPC. The spot of the incident came to be inspected and incriminating articles were seized from the spot. On 20th March 2010 itself, the appellant / accused came to be arrested and on the basis of his voluntary disclosure statement recorded on 23rd March 2010, blood stained axe came to be seized. Clothes of informant PW1 Santosh Kavar and that of the appellant / accused came to be seized. Clothes of the deceased were also seized. Statement of witnesses came to be recorded and on completion of investigation, the appellant / accused was charge-sheeted.

(f) The appellant / accused abjured his guilt when charge for offences punishable under Sections 302, 323 and 498A of the IPC were explained to him. He claimed trial by taking defence of total denial. In order to bring home the guilt to the appellant / accused, prosecution has examined in all seven witnesses. Informant Santosh Kavar is examined as PW1 and the First Information Report (FIR) lodged by him on 19th March 2010 is at

Exhibit 21. Dr.Dattatraya Dongare from Rural hospital, Patan, is examined as PW2. He had conducted autopsy on dead body of Swati Pawar. The report of postmortem examination is at Exhibit 28. This witness has also examined injured PW1 Santosh Kavar whose report of medical examination is at Exhibit 30. Suresh Shirke, a panch witness to the spot panchnama is examined as PW3. The spot panchnama is at Exhibit 32. PW4 Ramchandra Kadam is a panch witness to the arrest panchnama and seizure of clothes from the appellant / accused on 20th March 2010. Dyanadeo Kanwar, a panch witness to the disclosure statement and the resultant recovery at the instance of the appellant / accused is examined as PW5. He, however, turned hostile to the prosecution. Shobha Kanwar, cousin of deceased Swati Pawar, is examined as PW6. Investigating Officer P.I. Dayanand Dhome is examined as PW7.

(g) Upon hearing the parties, after conclusion of the trial, the learned trial court by the impugned judgment and order dated 7th May 2012 was pleased to convict the appellant / accused for

offences punishable under Sections 304 (Part I) and 323 of the IPC. The appellant / accused was then sentenced as indicated in the opening paragraph of the judgment.

3 I have heard Ms.N.S.Ayubi, the learned advocate appearing for the appellant / accused at sufficient length. By taking me through the entire record and proceeding, the learned advocate argued that evidence of the prosecution suffers from serious infirmity. Except interested witnesses, nobody else is examined by the prosecution. She further argued that evidence of PW1 Santosh Kavar shows that on the way to village Kusrund, he met one Nathuram Pawar and told him the cause of going to village Kusrund. However, this Nathuram Pawar is not examined by the prosecution. The learned advocate further argued that, as stated by PW1 Santosh Kavar, soon after the incident, many people had gathered on the spot. However, none of them is examined by the prosecution. The learned advocate further argued that evidence of PW1 Santosh Kavar shows that Swati Pawar was assaulted by one assailant. Description of this assailant

is not reflected from cross-examination of PW1 Santosh Kavar, and therefore, his evidence is unreliable. The learned advocate further argued that statement of neighbours of the appellant / accused are not recorded by the Investigator in order to show that PW6 Shobha Kanwar had visited the house of the appellant / accused and deceased Swati Pawar on the day of the incident. Similarly, statements of neighbours are also not recorded to point out that deceased Swati Pawar had left the house along with PW1 Santosh Kavar. This creates infirmity in the prosecution case, and therefore, the appellant / accused deserves acquittal.

4 I have also heard the learned APP, who vehemently argued that evidence of injured witness i.e. PW1 Santosh Kavar is sufficient to uphold the conviction. His evidence is corroborated by other evidence adduced by the prosecution on record.

5 I have carefully considered the rival submissions and also perused the record and proceedings including deposition of witnesses.

6 Factum of homicidal death of Swati Kashinath Pawar is not in challenge. Evidence of autopsy surgeon PW2 Dr.Dattatraya Dongare from Rural hospital, Patan, is sufficient to hold that Swati Kashinath Pawar died homicidal death on 19th March 2010. Evidence of this autopsy surgeon coupled with contemporaneous report of postmortem examination (Exhibit 28) of dead body of Swati Pawar shows that deceased Swati Pawar had suffered incised wound over fronto parietal region admeasuring 12 cm x 3 cm x cavity deep. This external injury was corresponding to fracture of fronto parietal bone. In the opinion of autopsy surgeon, deceased Swati Pawar died because of asphyxia caused due to head injury which was ante mortem in nature. With this evidence, coupled with undisputed inquest panchnama at Exhibit 11, the fact that Swati Kashinath Pawar died homicidal death on 19th March 2010 is proved by the prosecution.

7 Now let us examine whether evidence of the prosecution establishes the fact that the appellant / accused, on

19th March 2010 gave blow of an axe on head of his wife-deceased Swati Pawar with intention of causing her death, making his act an offence punishable under Section 304 (Part I) of the IPC. For proving this fact, case of the prosecution is primarily based on evidence of PW1 Santosh Kavar – brother of deceased Swati Pawar and to some extent on evidence of her cousin PW6 Shobha Kanwar.

8 The episode commenced with the visit of PW6 Shobha Kanwar to the house of the appellant / accused and his wife Swati Pawar (since deceased). As seen from version of PW6 Shobha Kanwar, she had been to the house of the appellant / accused for enquiring about health of their elder son Yash. At that time, the appellant / accused picked up a quarrel and slapped his wife Swati Pawar in presence of this witness. PW6 Shobha Kanwar, as deposed by her, then returned back to village Natoshi and disclosed this fact to PW1 Santosh Kavar – brother of Swati Pawar.

9 Evidence on record indicates that matrimonial life of deceased Swati Pawar had seen rough weather and therefore, her brother PW1 Santosh Kavar decided to visit Swati Pawar immediately on the very same day. Accordingly, as seen from his evidence, he left his house and went to the house of his deceased sister Swati Pawar at village Kusrund. No doubt, on the way, PW1 Santosh Kavar met Nathuram Pawar, but this meeting cannot be given undue importance. What happened when he actually visited the house of his deceased sister Swati Pawar and her husband Kashinath Pawar i.e. the appellant / accused is more material. In the words of PW1 Santosh Kavar, this is what, which had happened when he visited house of the appellant / accused and Swati Pawar :

“Thereafter, I went to house of my sister Swati. My sister and husband were present at the house. Accused asked me why I had come there. I told him to have come to see my sister. On that accused started abusing me. My sister asked the accused why he was abusing me. On that accused dealt two to three slaps below Swati’s ear. I said to the accused I would take Swati to my house and that he should look after the

children. Thereafter, I and Swati started for my house at Natoshi by the Kusarund Shindewadi road.

We came to a water stream which is known as Malai-Devi Odha. At that time, it was about 8.00 in the evening. The accused came running with an axe in his hand. He came in front of us and he dealt a blow to the head of Swati by the sharp side of the axe. Swati suffered bleeding injury and fell down. I went near Swati. On that the accused dealt blows by the blunt side of the axe to my forehead and arm. I shouted loudly. The people from the vicinity gathered there.”

10 The eye witness account of the incident coming on record from PW1 Santosh Kavar as such shows that when he saw his sister was subjected to beating by the appellant / accused, he asked his sister Swati Pawar to accompany him to her parental house at village Natoshi by telling the appellant / accused to look after his children. Cross-examination of PW1 Santosh Kavar shows that, at that time, elder son of the appellant / accused and deceased Swati Pawar was aged about 2 years, whereas younger child was just 3 months old. PW1 Santosh Kavar denied the suggestion that he uttered that the appellant / accused would be

compelled to come to his residence when children became hungry. This suggestion was denied by PW1 Santosh Kavar but the fact remains that undisputedly Swati Pawar – wife of the appellant / accused accompanied her brother PW1 Santosh Kavar to leave her matrimonial house, leaving her tiny tots at the mercy of the appellant / accused. This had infuriated the appellant / accused and by chasing PW1 Santosh Kavar and his wife Swati Pawar, he had assaulted both of them and the assault on his wife Swati Pawar proved to be fatal.

11 So far as actual assault on Swati Pawar and PW1 Santosh Kavar is concerned, cross-examination of PW1 Santosh Kavar does not reflect any material to disbelieve his version about the incident. Ultimately, PW1 Santosh Kavar had also suffered blows from blunt side of the axe, given by the appellant / accused. Evidence of PW2 Dr.Dattatraya Dongare on this aspect is very clear. PW1 Santosh Kavar has suffered two contused lacerated wounds – one admeasuring 1 cm x ½ cm x ½ cm over forehead and another on the right forearm admeasuring 1½ cm x ½ cm x ½

cm. There was dislocation to his right shoulder as seen from evidence of PW2 Dr.Dattatraya Dongare and the contemporaneous medical certificate at Exhibit 30 issued by the doctor. It is well settled that evidence of an injured witness carries great weight. In the case in hand, PW1 Santosh Kavar, apart from being an injured witness, is also brother of deceased Swati Pawar. Being the nearest relative of deceased Swati Pawar, it is hard to believe that he will leave the real culprit and would falsely implicate the appellant / accused in the crime in question. There is no reason for PW1 Santosh Kavar to shield the real culprit and to rope in an innocent person.

12 Though evidence of PW1 Santosh Kavar about the incident in question is found to be cogent and trustworthy, without placing explicit reliance on it, let us see whether his evidence is gaining corroboration from other material on record. As seen from evidence of PW1 Santosh Kavar, the appellant / accused had left the spot immediately after the incident along with the weapon of the offence. The appellant / accused came to

be arrested on the next day i.e. on 20th March 2010. At that time, as seen from evidence of PW4 Ramchandra Kadam – a panch witness, so also from evidence of PW7 P.I. Dayanand Dhome, Investigator, clothes of the appellant / accused were stained with dried blood. Evidence of PW7 P.I. Dayanand Dhome shows that, while in custody, the appellant / accused had given a voluntary disclosure statement, which ultimately resulted in recovery of a blood stained axe. Memorandum statement Exhibit 37A and the resultant recovery panchnama Exhibit 38A is duly proved by PW7 P.I. Dayanand Dhome. In the matter of **Modan Singh Vs. State of Rajasthan**¹, it is held by the Hon'ble Apex Court that if evidence of Investigating Officer is found to be trustworthy, then hostility of panch witnesses to the Memorandum statement and resultant recovery panchnama is of no consequence. Careful scrutiny of evidence of PW7 P.I. Dayanand Dhome does not show any material to conclude that his evidence on the aspect of disclosure statement and resultant recovery of an axe at the instance of the appellant / accused is doubtful. Ultimately, during chemical analysis, the said

1 (1978)4 SCC 435

axe was found to be stained with human blood.

13 In presence of PW4 Ramchandra Kadam, PW7 PI. Dayanand Dhome seized clothes of the appellant / accused after his arrest. Exhibit 34 is the panchnama to seizure of clothes of the appellant / accused. There is slight misdescription about the clothes, but ultimately, those clothes were found to be containing human blood. Baniyan seized from the appellant / accused was stained with blood of "A" group. Though postmortem blood of deceased Swati Pawar was not sent for chemical analysis, the fact remains that the only person who profusely bled in the incident was Swati Pawar, who ultimately succumbed to the head injury. Her seized clothes were found to be stained with blood of "A" group. This fact indicates that deceased Swati Pawar was having blood of "A" group, which was ultimately found on clothes of the appellant / accused.

14 This evidence adduced by the prosecution is sufficient to show that it was the appellant / accused who had inflicted a

blow of an axe on head of the deceased Swati Pawar causing her death. Now the question which remains for consideration is what offence is made out by the prosecution. As stated in foregoing paragraphs, evidence of PW1 Santosh Kavar reflects that the deceased Swati Pawar had left her matrimonial house leaving her two children with the appellant / accused. Out of those two children, one was just a sucking child aged about 3 months. The learned trial court, in this fact situation, came to the conclusion that the appellant / accused was deprived of his power of self control and was overwhelmed by passion, which ultimately resulted in commission of the crime in question by him. Careful scrutiny of evidence on record unerringly points out that the appellant / accused hit Swati Pawar by the sharp side of axe causing her death with requisite intention. However, surrounding circumstances, as disclosed earlier, does not show that this act amounts to an offence of murder punishable under Section 302 of the IPC. The prosecution has made out the offence punishable under Section 304 (Part I) of the IPC and the trial court has rightly convicted the appellant / accused on this count.

15 Medical evidence coming from mouth of PW2 Dr.Dattatraya Dongare fully corroborates version of PW1 Santosh Kavar regarding the offence punishable under Section 323 of the IPC. Hence, conviction of the appellant / accused on this count cannot be faulted with.

16 The appellant / accused is sentenced to suffer rigorous imprisonment for 10 years for the offence punishable under Section 304 (Part I) of the IPC and for the offence punishable under Section 323 of the IPC, he is sentenced to suffer rigorous imprisonment for 6 months. Considering the circumstances in which the crime in question was committed, I see no reason to interfere with the sentence awarded to the appellant / accused for offences proved against him, as the same is appropriate.

17 In the result, the appeal fails, and therefore the order:

ORDER

The appeal is dismissed.

(A. M. BADAR, J.)