

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

Criminal Appeal No. 191 of 2003

- 1) Laxman s/o Kisan Kanhe,
Age 31 years,
Occupation : Agriculture,
R/o Pangarkheda,
Taluka Ambad,
District Jalna.
- 2) Kisanrao s/o Tatyaba Kanhe,
Age 76 years,
Occupation : Agriculture,
R/o Pangarkheda,
Taluka Ambad,
District Jalna.
- 3) Seetaram s/o Kisan Kanhe,
Age 34 years,
Occupation : Agriculture,
R/o Pangarkheda,
Taluka Ambad,
District Jalna.
- 4) Godabai w/o Seetaram Kanhe,
Age 28 years,
Occupation : Agriculture,
R/o Pangarkheda,
Taluka Ambad,
District Jalna.
- 5) Ashabai w/o Nanasaheb Pund,
Age 36 years,
Occupation: Household,
R/o Jod Kawadgaon,
Taluka and District
Aurangabad.

.. Appellants.

Versus

* State of Maharashtra. .. **Respondent.**

Shri. Joydeep Chatterji, Advocate, for appellants.

Mrs. D.S. Jape, Additional Public Prosecutor, for respondent.

**Coram: T.V. NALAWADE &
K.L. WADANE, JJ.**

Date: 21 JUNE 2018

JUDGMENT (Per T.V. Nalawade, J.):

1) The appeal is filed against the judgment and order of Sessions Case No.25/1997 which was pending in the Court of learned 2nd Additional Sessions Judge, Jalna. The trial court has convicted all the appellants for offence punishable under section 302 read with 149 of Indian Penal Code and each of the appellants is sentenced to suffer imprisonment for life and fine is also imposed on the appellants. Both the sides are heard.

2) In short, the facts leading to the institution of the appeal can be stated as follows :

3) Deceased Dwarkabai was the wife of accused No.1-Laxman. Accused No.2-Kisanrao is father of accused No.1. Accused No.3 is a brother of accused No.1. Accused No.4 is wife of accused No.3 and accused No.5 is married sister of accused No.1.

4) The incident in question took place on 10-12-1995 after 11.00 a.m. in the field of the accused persons. Ranjana, a grand daughter of Kisan, who was aged about 11 years at the relevant time, was present in the field along with the deceased. She informed to the accused persons that the deceased had gone towards well to fetch water but she had not returned. She had informed that she had visited the well but she could not see anything except a rope and a bucket which they were using for lifting water manually.

5) On 10-12-1995 itself Kisan, accused No.2 took out the dead body from the well with the hope that deceased was still alive. When they took out the deceased, they realised that she was already dead. Kisanrao then gave A.D. report to Ambad Police Station. It was informed

that the deceased had gone to the field with Ranjana and Ranjana had supplied the aforesaid information. Name of the neighbouring land owner Digambar was given in the A.D. report as he had helped the accused persons to take out the dead body from the well. On the basis of this report, A.D. No.70/1995 came to be registered at 5.20 p.m. on 10-12-1995.

6) On 11-12-1995 between 10.45 a.m. and 11.45 a.m. post mortem was conducted on the dead body by Dr. Somani. Doctor gave opinion that the deceased died due to asphyxia due to suffocation (smothering).

7) On 11-12-1995 father of the deceased, Trimbak gave report against all accused persons expressing his suspicion that all of them had murdered Dwarkabai. He informed about the ill-treatment which the deceased was receiving and also the illegal demand of money made by the accused persons. On the basis of the report given by Trimbak, crime at CR No.229/1995 came to be registered at 2.20 p.m. for offences punishable under sections 302, 304-B, 201 of Indian Penal Code.

8) On 11-12-1995 panchanama of the well was prepared as spot panchanama in the presence of panch witnesses by police. The statements of relatives of the deceased on parents side came to be recorded. During course of investigation accused No.1 came to be arrested and his clothes were taken over which were on his person. On the basis of statement given by accused No.1, one stone was recovered from a place situated at some distance from the well and blood was found on the stone. Shoes of accused No.1 were also taken over. The clothes of the accused No.1 and the aforesaid articles taken over from the accused No.1 came to be sent to C.A. office. Blood was detected on the clothes and shoes of accused No.1. Charge-sheet came to be filed for the aforesaid offences. To the charge all the accused pleaded not guilty.

9) The prosecution examined in all 13 witnesses for proving the offences. The trial court has examined aforesaid Ranjana as Court Witness. No defence evidence is given. All the accused have taken defence of total denial.

10) The trial court has held that there is circumstantial evidence like presence of blood on the clothes and the shoes of accused No.1 and a stone having blood stains was also recovered on the basis of statement given by accused No.1. As it is a homicide, on the basis of these circumstances, conviction is given for offence punishable under section 302 read with 149 of the Indian Penal Code against all the accused but they are acquitted of the other offences. The trial court has held that the accused ought to have offered explanation regarding the cause of death as the death took place in the field belonging to them.

11) To prove the homicidal death, prosecution has examined Dr. Somani (PW-7). Post mortem was conducted on 11-12-1995 between 10.45 a.m. and 11.45 a.m. The doctor found following ante mortem external injuries on the dead body.

- (i) Abrasion with cut of the right ear pinna.
- (ii) Abrasion - multiple on the forehead, above right eye brow each 0.2 x 0.2 cms reddish brown in colour.

- (iii) Multiple abrasion on the right cheek near the lips of size 0.5 x 0.5 cms reddish brown in colour.
- (iv) Multiple abrasions on both the upper and lower lips inner aspect size 0.5 x 0.5 cms reddish in colour.
- (v) Multiple abrasion on the right side cheek near the lower lip of size 0.5 x 0.5 cm each red in colour.
- (vi) Multiple abrasions on the left cheek near the lips region of size 0.5 x 0.3 cms reddish brown in colour.
- (vii) Multiple abrasion on the both nostrils size 0.2 x 0.2 cms red in colour.

12) On internal examination Dr. Somani made following observations :

"On internal examination there were no injuries on scalp. Skull vault was intact. Brain was congested. Thorax examination, walls, ribs, cartilages were intact. Larynx, Trachea and Bronchi were normal. Right lung and left lung were oedematous and congested. Pericardium were normal. Heart was normal. On examination of the abdomen walls and peritoneum were normal, cavity no blood. Buccal cavity, teeth, tongue and pharynx were normal. On examination of stomach about 300 to 400 ml of semi digested food material grayish white in colour odourless, mucosa was congested. Small and large intestine were loaded. Liver, pancreas, spin, kidneys were congested. Bladder was empty. Organ of generation NAD non-pregnant."

Post mortem report is proved in the evidence of Dr. Somani. The doctor has given evidence that the aforesaid injuries are sufficient to cause death.

13) The stone which is shown to be recovered by police was not shown to the doctor and nothing is asked as to how the aforesaid injuries can be caused. Defence suggested that such injuries can be caused by aquatic animals like crabs. The doctor has denied this suggestion. The doctor has, however, given admission in respect of the proposition made by Dr. Modi which is as follows :-

"On the other hand water may not be present in the stomach, if the person died from sudden cardiac arrest, or became unconscious immediately after falling into the water, so that he could not struggle and swallow water in the act of drowning."

14) It can be said that the evidence of Dr. Somani has created a probability that it is a homicidal death but there are other circumstances also like injuries were found mainly only on the face of the deceased and not on other parts of the body. No probability is created about substance which must have been used for causing these injuries when injuries of aforesaid nature were found. These injuries were not crush injuries. It is the case of the prosecution that 5 accused had together murdered the deceased. In that case, some accused must have held the hands and legs and much force must have been applied to hold her tight. If smothering was there by accused No.1

the deceased must have offered resistance. The opinion evidence of the doctor shows that such injury can be caused if the head is on the ground and face is pressed. But on other side of the head no injury was found. Absence of injuries on other parts of the body and also absence of injury on the person of the accused has created a doubt about the case of the prosecution. This doubt needs to be kept in mind while appreciating the other evidence of the prosecution. At this stage this Court is observing that these circumstances are not that convincing and are not fully and satisfactorily established.

15) The incident did not take place in the close space like house of the accused and it took place in the field of the accused as per the case of the prosecution. Nothing is there on record to show as to what is the distance between the house of the accused and the field. But it can be said that the house is situated in the village and the field is situated at some distance from the village. The incident took place in the morning time, prior to 11.30 a.m. In view of these circumstances it was necessary for the prosecution to prove that all the accused

had either proceeded to the field on that day in the morning or they were seen in the field or that they were seen leaving the field at the relevant time. Virtually no evidence is given to show that they were present in the field or in the vicinity of the field at the relevant time. If there is no such evidence and if the incident took place in open space, in the field, it is not possible to use provisions of sections 106 and 114 of the Evidence Act against the accused persons only due to the circumstance that the death took place in the field. Thus absence of evidence of aforesaid nature is a missing link in the chain of circumstantial evidence.

16) The spot panchanama at Exhibit 68 is proved in the evidence of panch witness Ramesh (PW-5). The spot panchanama was prepared on 11-12-1995 between 8.15 a.m. and 9.00 a.m. The spot was shown by Kisan, accused No.2. The panchanama was prepared during inquiry of A.D. No.70/1995. The spot panchanama shows that the well was considered as the spot of incident and its panchanama was prepared. The well is situated in the field of Kisan. The well was at western corner of the field

and it was not having constructed wall. On northern side there were three steps and some space kept for lifting water manually from the well. The well was surrounded by thick grass. The circumference of the well was 24 feet and the depth of the well from ground level was 25 feet. Water depth was of 7 feet. Thus the water was at a distance of around 17 feet from the ground level and the place from where water was to be lifted from the well. When panchanama was prepared crabs were seen in the water. One rope of wire was seen floating on the water of the well and with this rope there was a steel bucket. These articles were taken over. The rope had the length of around 8 cubits. Chappals of the deceased were found at the distance of 500 feet from the well and they were at the thrashing place of the field. No other suspicious things were noticed by police on that date.

17) Vishnu Gore (PW-8) was working in Ambad Police Station as Police Head Constable. In his evidence, the A.D. report given by Kisan is proved at Exhibit 73. His evidence and the document show that the A.D. report was given at 5.20 p.m. of 10-12-1995. This document shows

that immediately after learning about the death, the family members of Kisan had taken out the deceased from the well with the hope that she was still alive. It was informed that Ranjana, grand daughter of Kisan had informed about the incident to the accused persons and the deceased had gone to the field at about 8.00 a.m. for preparation of thrashing field as *Toor* crop was to be thrashed. At 12.00 hours Ranjana had given information to the accused persons and then they had gone towards the well. As Ranjana had informed that she had visited the well, where the deceased had gone to fetch water, accused went towards the well as per the information given in Exhibit 73. It was informed by accused No.2 Kisan to police in the A.D. report that the neighbouring land owner Digambar and accused No.1 Laxman had together taken out the dead body from the well after jumping into the well. It was informed that, with a hope that she was still alive, they had made the body to lie on the ground keeping face towards the ground but they soon realised that she was already dead. It was specifically informed that the deceased had probably fallen in the well and had died accidental death.

18) The aforesaid information given by Kisan cannot be ignored only for the reason that it was given by accused persons. In the said information it was informed that accused No.1 Laxman had taken out the dead body from the well and he had made the body to lie on the ground and attempt was made to see that water comes out of the body. This information was important as blood stains were found on the clothes and on the shoes of accused No.1. Accused are illiterate village persons and the information was given immediately to police and so this information cannot be ignored and it can be used as explanation of the accused No.1 in respect of the blood found on his clothes and shoes.

19) In the spot panchanama there is mention that the well is situated at western corner of the field. In the A.D. report it was mentioned that Digambar, owner of the adjoining field had helped the accused persons for taking out the dead body from well. In view of these circumstances, it was necessary for the prosecution to examine at least Digambar. Considering the boundaries of the well it can be said that investigation ought to have

been made to find out as to whether anybody including Digambar had seen any of the accused in the field prior to the time when the dead body was taken over by Digambar and Laxman, in early hours of morning. Due to non examination of Digambar as a witness, there is no explanation and evidence on the aforesaid probable circumstances. This is again lacuna in the case of the prosecution and it creates doubt about the case of the prosecution. Due to this lacuna it is not possible to use the provisions of sections 106 and 114 of the Evidence Act against the accused persons.

20) Prosecution examined Prabhakar (PW-11) and Madhukar (PW-12) who are from different places and who acted as panch witnesses to prove the statement given by Laxman, accused No.1 under section 27 of the Evidence Act. These two panch witnesses have turned hostile. They have admitted their signatures on the memorandum of statement and also the seizure panchanama in respect of stone but the contents of the memorandum of statement and seizure panchanama are not proved. One stone and a pair of shoes of the accused No.1 are shown to be

recovered on the basis of statement of accused No.1. These two documents are given Exhibits 77 and 78 by the trial court as signatures are admitted by the panch witnesses. For proving the statement given by the accused and also the discovery, the prosecution has not examined Police Inspector Gat to whom the statement was allegedly made by accused No.1. One Head Constable Motilal (PW-13) is examined to prove the signature of Police Inspector Gat on some police statements and the statements of some witnesses who have turned hostile but he also did not say anything about Exhibits 77 and 78 in his evidence. Police Inspector Gat was alive but he is not examined.

21) The aforesaid circumstances show that the contents of Exhibits 77 and 78 are not proved. There is no substantive evidence on both the statement shown to be recorded in Exhibit 77 of accused No.1 and discovery of articles. As there was no evidence to prove the statement given by the accused and also the recovery of the aforesaid two articles, Exhibits 77 and 78, could not have been used by the trial court against even accused No.1. The trial court has used this material not only against

accused No.1 but also against all the remaining accused. These circumstances show that, the learned Judge of the trial court did not properly appreciate the procedure given in the Evidence Act, the principles of the Evidence Act with regard to the provision of section 27 of the Evidence Act and the proof of a fact including the contents of the document. This has led to the error in the decision of the court.

22) The other witnesses examined by prosecution are on motive. Trimbak (PW-1), father of the deceased, Parvatabai (PW-2), mother of the deceased, Punjaram (PW-3) brother of the deceased, Parasram (PW-6) brother of PW-1 hail from village Deo Pimpalgaon, Tahsil Badnapur, District Jalna. Evidence of PW-1, PW-2 and PW-3 shows that the marriage took place 2 and half years prior to the incident. The deceased has left behind no issue.

23) Evidence is given by the aforesaid close relatives of the deceased that after three months of the marriage ill-treatment was started to the deceased by the accused on the ground that the deceased was not able to

do the household work and then there was demand of Rs.5000/- made by the accused for purchasing field. This demand was not met with and so to force the demand the ill-treatment was given as per these witnesses.

24) Evidence of the father of the deceased (PW-1) in the cross examination shows that at no time accused had refused to send the deceased to the house of her parents for any occasion. The deceased had visited the place of her parents on many occasions and relatives of the deceased like brother of the deceased had visited the house of the accused on many occasions. On the last Diwali festival the deceased had stayed in the house of her parents for about 3 weeks and for that also no grievance was expressed by the accused persons.

25) The evidence of the father of the deceased (PW-1) shows that the accused persons had sent a four wheeler, jeep, to his village to take them to the village of the accused and they had made arrangement for giving the news. These circumstances cannot be ignored as this conduct of the accused persons was not consistent with

their guilt. It is already proved that A.D. report was given by accused No.2-Kisan. Thus, on 10-12-1995 itself everything was clear and the father of the deceased had opportunity even to see the dead body in the field of the accused. In spite of all these circumstances, the father did not give F.I.R. on 10-12-1995. F.I.R. was given only when the post mortem was over. Thus, the F.I.R. was given late and on that circumstance there is no plausible explanation from the father (PW-1). This delay has created a doubt about the evidence given on motive. The trial court has acquitted the accused of the offence punishable under section 304-B of the IPC and that circumstance also shows that the trial court was not inclined to accept the evidence on motive. Thus, there was no convincing evidence on motive.

26) The evidence of the father of the deceased (PW 1) shows that the accused own 20 acres of agriculture land and there is a well in the land of the accused. The evidence shows that after the marriage, the accused No.1 had purchased more land. PW-1 has admitted that the financial condition of the accused persons was sound.

These circumstances also create doubt about the case of the prosecution that accused No.1 had demanded Rs.5000/- for purchasing the land and to force that demand accused had given ill-treatment to the deceased.

27) There is one more circumstance like the other close relatives of the deceased on parents side like Prayagbai (PW-9) who is resident of Deo Pimpalgaon and who is aunt of the deceased; Subhadrabai (PW-10), maternal aunt of the deceased, who is resident of Old Jalna, have turned hostile and they have given evidence that there was no ill-treatment to the deceased from the accused persons. There was no reason for these ladies to give false evidence in favour of the accused. There is circumstance that even after 2 years of the marriage, the deceased had no issue and this circumstance needs to be kept in mind as there may be many reasons for committing suicide for Indian women.

28) The aforesaid circumstances have created serious and reasonable doubt about the case of the prosecution that accused persons murdered Dwarkabai.

The aforesaid discussion shows that the so called incriminating circumstances are either not proved or not satisfactorily established. This Court has no hesitation to observe that the trial court has committed error in using the relevant facts which are not proved by the prosecution as provided in section 3 of the Evidence Act. In the result, following order :

29) The appeal is allowed. The judgment and order of conviction and sentence is hereby quashed and set aside. All the appellants are acquitted of the offence punishable under section 302 read with 149 of Indian Penal Code. Fine amount if any paid be returned to the appellants. The bail bonds of the accused persons shall remain in force for a period of six months to enable the State to challenge the decision of this Court.

Sd/-
(K.L. WADANE, J.)

Sd/-
(T.V. NALAWADE, J.)

rs1