

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.249 OF 2000

Dilip Shankar Ganesh

Age : 38 years, Occ.: Service,

R/o : 1049, New Nana Peth,

Pune – 411 002

(Present at Yerwada Central Prison) Appellant
(Ori. accused)

Vs.

The State of Maharashtra

.... Respondents
(Ori. Complainant)

Mr. Deepak Girme, Advocate for the Appellant.

Ms. Anamika Malhotra, APP for the State.

Coram : SARANG V. KOTWAL, J.

Date : 17th March, 2018

JUDGMENT .:

1 By this appeal, the appellant has challenged the judgment and order dated 8th March, 2000 passed by the Additional Sessions Judge, Pune in Sessions Case No. 395 of 1999, whereby the learned Judge was pleased to convict the appellant for the offence punishable under Section 307 of Indian Penal Code and was further pleased to

sentence the appellant to suffer rigorous imprisonment for 5 years and to pay a fine of Rs.2,000/- and in default to suffer rigorous imprisonment for 3 months.

2 During the pendency of the appeal, the original appellant Dilip Shankar Ganesh expired, his son Nikhil Dilip Ganesh preferred Criminal Application No. 578 of 2016 in the present appeal and sought permission to prosecute the appeal in place of his father, who was the original appellant. This Court, vide order dated 28th April, 2016 allowed the said application and Nikhil Dilip Ganesh was allowed to prosecute the appeal.

3 I have heard Mr. Deepak Girme, the learned counsel for the appellant as well as Ms. Malhotra, the learned APP for the State.

4 The prosecution pertains to the incident dated 2nd July, 1999. The original appellant, Dilip (hereinafter referred to as “the accused” for the sake of convenience) was seen walking on the road in suspicious circumstances at 4.00 pm. When he was accosted by

the police, he told them that he assaulted his wife-Meenakshi with sickle in his house. The police went to his house and found that his wife was lying on the mattress on the loft where she used to sleep in a pool of blood. She was removed to the hospital. The accused was arrested. According to the prosecution case, at the instance of the accused, the weapon i.e. sickle was recovered from under the mattress of the loft. The mattress, pillow cover and clothes of the injured were seized. When the accused was arrested, his clothes were seized under panchanama. The seized articles were sent for chemical analysis. The investigation was conducted pursuant to the F.I.R. lodged by Police Head Constable, Gani Hussain Shaikh. After completion of the investigation, the charge-sheet was filed and case was committed to the Court of Sessions.

5 During trial, the prosecution examined PW-1, Police Head Constable, Gani Hussain Shaikh, who had lodged the F.I.R. and who had seen and had apprehended the accused moving around on the road in suspicious circumstances. PW-2, Meenakshi Dilip Ganesh was the injured wife of the accused. She did not support the

prosecution case and was declared hostile. PW-3 Prakash Ramchandra Pacharne was a relative of the accused and was residing in the same house where the incident had taken place. He also did not support the prosecution case and was declared hostile. PW-4 Rashmi Dilip Ganesh was the daughter of the accused, but her evidence does not help either the prosecution or the defence as she has merely stated that she was sleeping during the night and she has not said anything about the incident. She was even not declared hostile and contradictions if any from her previous statement were not brought on record. PW-5 Salim Abum Shaikh was the panch witness, in whose presence the accused was arrested and his clothes were seized. The arrest and seizure of clothes panchanma was produced during trial at Exhibit 15. PW-6 Rafiq Gani Shaikh was a panch witness, in whose presence the clothes of injured were seized. PW-7, Sanjay Nagesh More was another panch in whose presence the accused had given a statement leading to recovery of the sickle from under the mattress on the loft where the injured was assaulted. PW-8 Sudhakar Panditrao Kate, PSI was the Investigating Officer. He had

conducted the investigation and had arrested the accused. He was in-charge when the articles were seized and recovered. He had recorded the statement of witnesses. The statements given by the hostile witnesses were brought on record in the nature of contradictions from their depositions and were proved by the prosecution through this witness. PW-8 also produced some letters sent by the accused, when he was in jail to his mother-in-law. The mother-in-law of the accused however has not been examined by the prosecution. PW-9, Dr. Sushilkumar Sharad Rane was examined to prove the injuries suffered by Meenakshi. He has stated that there were two injuries one – large CLW over right fronto-parietal region, 10 x 5 cm. and the other was CLW over left frontal region, 4x1 cm. and there was fracture of the skull caused by these injuries. According to him, these injuries were possible by the weapon produced in the Court and the injuries were sufficient in ordinary course of nature to cause death. Besides this oral evidence, the prosecution has produced C.A. report.

6 The prosecution case was unfolded through the evidence of PW-1, Gani Shaikh, who alongwith other police staff accosted the accused at about 4.00 am. on 2nd July, 1999, while he was moving on a road in suspicious circumstance. On the information provided by the accused, the police went to his house and found that Meenakshi was lying in a pool of blood on the loft where the accused, Meenakshi and their children used to sleep.

7 Shri. Deepak Girme, the learned counsel for the accused rightly submitted that the confessional part of the statement given by the accused to the police in respect of assault on his wife was inadmissible. However, the fact that, on his information, the police went to his house and found Meenakshi lying in injured condition is an admissible piece of evidence. To that extent, the prosecution has proved that the police reached his house only on the information given by the accused himself.

8 PW-2, Meenakshi, the injured wife of the appellant has denied that she had stated in her statement that accused had

assaulted her and after the assault, she had lost consciousness. Her statement recorded by the police is brought on record through evidence of the Investigating Officer by way of contradictions. Same is the case with PW-3, Prakash Pacharne, who was the cousin of the accused. Shri. Deepak Girme, the learned counsel for the accused submitted that both these material witnesses have not supported the prosecution case and therefore the benefit of doubt should naturally go to the accused. He further submitted that the incident had occurred in the early hours on 2nd July, 1999 and the statement of Meenakshi was recorded only on 25th July 1999. There is no explanation as to why her statement was recorded so belatedly. He further submitted that the medical evidence shows that Meenakshi regained her consciousness soon after. He further submitted that Police did not take any steps to record her statement through any Special Executive Magistrate. He further submitted that even PW-3 has not supported the case of prosecution and admittedly he was in the house when the incident occurred. Therefore, he would have been the best witness for the prosecution.

9 On perusing the evidence of both these witnesses, it is obvious that they have turned hostile and they do not want to support the prosecution. Both of them are close relatives of the accused. From their evidence and their statements given to the police, which are brought on record, it is difficult to place reliance on their evidence. Even in the case of PW-4, the daughter of the accused, nothing much can be found either favouring the prosecution or the accused. Therefore, I am leaving the evidence of PW-2, 3 and 4 out of consideration.

10 The next circumstance brought on record by the prosecution is in respect of recovery of the weapon at the instance of the accused. For that purpose, the prosecution has examined PW-7 Sanjay Nagesh More. He has deposed that the accused made a statement that he had concealed the weapon in his house and he would produce the same. Whereas the memorandum statement, which is produced at Exhibit 21 does not mention that the accused has stated that he had concealed the weapon 'in his house'. However, the defence has not confronted the witness PW-7 regarding

these discrepancies and there is no suggestion given to him that the accused did not state before him that the place where the weapon was concealed was not mentioned in the memorandum of panchanma. However, only an omnibus suggestion was given that the accused had not made any statement, whatsoever. Therefore, in my opinion, the prosecution has sufficiently proved that the weapon i.e. sickle was recovered at the instance of the accused.

11 Another circumstance, which is relied upon by the prosecution is in respect of recovery of the clothes of the accused. Clothes of the accused were seized when he was arrested and pancha to such seizure has supported the prosecution case. All these articles namely clothes of accused, weapon, clothes of the victim as well as the pillow cover, bed sheet were sent for chemical analysis and the C.A. report shows that except one pillow cover, all the articles showed presence of blood of 'AB' group. Even those two articles i.e. the pillow cover and hair found on it showed presence of human blood. The blood of the accused was of "O" group. Therefore, the prosecution has successfully proved that the blood of the deceased

was found on the weapon as well as on the clothes of the accused. The weapon was recovered at the instance of the accused, therefore, these two articles showing the blood group of the injured victim is a strong circumstance against the accused.

12 Shri. Deepak Girme submitted that there was no evidence that after seizure of the articles, those articles were kept properly in sealed condition before they were sent for chemical analysis. In that regard, there is absolutely no cross-examination of the Investigating Officer and there is no suggestion that there was tampering with the articles before they were sent for chemical analysis.

13 The accused has taken a specific defence that when he returned home in the late night, he found that his wife was assaulted and was lying in a pool of blood. He was frightened and to have medical aid, he came out of the house and was going towards police station to inform the police about the same. However, at that time itself, the police accosted him and made him an accused in the said crime. According to him, the police ignored his case and instead

proceed on the assumption that the accused had committed the offence. According to him, he was falsely implicated in the case. In the contest of the specific defence raised by the accused, it is necessary to consider the prosecution evidence and it is necessary to consider as to whether the burden of proof lying on the accused is discharged. In this regard, a reference can be made to Section 106 of the Indian Evidence Act, which reads thus :

“**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.”

This burden would have been discharged by the accused either by leading cogent evidence himself or by taking help of the prosecution evidence itself. However, in the present case, I do not find that the accused has discharged his burden. It is an admitted fact that the accused was residing with his wife and family as well as the family of his cousin in the same house. The accused, Meenakshi and children used to sleep on the loft of the house. The incident had taken place at odd hours i.e. after midnight between 1st and 2nd July, 1999. Therefore it was only the accused who could have explained in what

circumstances, he returned home, who opened the door for him and how he found the wife in the injured condition and as to why other inmates of the house were totally unaware of the incident. The accused utterly failed to offer any explanation regarding these circumstances. In fact, the conduct of the accused himself was relevant in these circumstances. Section 8 of the Indian Evidence Act provides thus :

“8. Motive, preparation and previous or subsequent conduct.-- Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1.-- The word “conduct” in this section does not include statements, unless those statements accompany and explain acts other than statements, but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2 – When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

Therefore, conduct of the accused assumes great significance in the present case. According to the accused, when he returned home late in the night, he saw his wife was lying injured with serious injuries on her head. In such circumstances, it was expected that he would seek help of the inmates of the house or atleast inform them about the incident. In any case he would seek help of PW-3. The accused did neither of these. He did not make efforts to remove Meenakshi to hospital. The accused did not even go to his neighbours to seek help and was found moving in suspicious circumstances on the road. It fact is is accused himself, who inform the Police about the incident, who happen to pass-bye from the road. Thus the conduct of the accused himself was unnatural, which can be taken into account for the purpose of deciding this case.

14 Thus, though there is no direct evidence and though the material witnesses have not supported the prosecution case, I find

that there is sufficient incriminating material on record against the accused, which is proved by the prosecution through cogent evidence. The accused has not discharged the burden under Section 106 and his conduct is unnatural and is pointing towards his guilt rather than towards his innocence. In these circumstances, I do not find any merit in the appeal. Hence, the appeal is dismissed.

(SARANG V. KOTWAL, J.)