

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

CRIMINAL APPEAL NO.207 OF 2009

Manhar Beg Gadiwala & Anr.	...Appellants
Versus	
The State of Maharashtra	...Respondent

.....

Ms Naima Shaikh, Advocate appointed for the Appellants.
Ms A.A. Takalkar, APP for the Respondent -State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 15th JANUARY, 2018.

JUDGMENT:-

The Appellants herein, who are accused Nos.1 and 2 in Sessions Case No.227 of 2007 have challenged the judgment dated 10th December, 2008 whereby the learned Additional Sessions Judge, Vasai has convicted them for offences punishable under Section 304 II r/w. 34 IPC and sentenced to undergo simple imprisonment for two years with fine of Rs.1000/- i/d. to undergo simple imprisonment for one month.

2. The case of the prosecution in brief was that on 1.5.2006 at about 4.30 a.m. these two accused alongwith three absconding accused had committed murder of Savita Gaikwad. The First Information

Report in respect of the said incident was given by PW1-Raghunath Gaikwad. Based on the said FIR at Exhibit-12, PW4 Bajirao registered Crime No.128 of 2006 for offences punishable under Sections 143, 147, 149 and 302 of the IPC. He went to the hospital and conducted inquest panchanama over the body of the deceased Savita and forwarded the body for post mortem. The post mortem report at Exhibit-24 indicated that there were injuries over the body of the deceased, details of which are recorded in paragraphs 17 and 18 of the post mortem report. The Doctor had opined that the death of Savita was due to cardio respiratory failure due to aspiration pneumonia secondary to head injury.

3. PW5- Devendra Pal, PSI, conducted the scene of offence panchanama, arrested these two accused and seized the weapons of offence pursuant to disclosure statement made by the accused No.1. In view of the transfer of PW5-Devendra Pol, further investigation was conducted by PW6 Ramchandra Chikane. He recorded the statements and supplementary statements of the witnesses. He arrested the accused No.2. He was unable to trace the other three accused hence, they were declared as absconders. Upon completion of the investigation he filed charge sheet against these two accused for

committing offences punishable under Sections 143, 147, 148 and 302 r/w. 149 of the IPC.

4. Upon committal of the case, charge was framed and explained to the accused. The accused pleaded not guilty and claimed to be tried. The prosecution examined 6 witnesses in support of its case. The statements of the accused were recorded under Section 313 Cr.P.C. The defence of the accused was that of total denial. Upon appreciating the oral as well as the documentary evidence, the learned Sessions Judge acquitted the accused of the offences under Sections 143, 147, 149 and 302 of the IPC and held them guilty of offence punishable under Section 304 Part II r/w. 34 of the IPC and sentenced as stated above. Being aggrieved by this conviction and sentence, accused have preferred this appeal.

5. Heard Ms Naima Shiakh, the learned counsel for the Appellants and Ms A.A. Takalkar, the learned APP for the Respondent -State. I have perused the records and considered the submissions advanced by the learned counsels for the respective parties.

6. It is not in dispute that the death of Savita was a homicidal

death. It is the case of the prosecution that these two accused and three other absconding accused were involved in causing the death of Savita. Case of the prosecution rests mainly on the evidence of PW1-Raghunath Jadhav, PW2-Rabia and PW3-Malti Gaikwad. The testimony of these three witnesses indicate that Savita was deserted by her husband. She was not in a mentally sound condition and used to roam in the village. On 30.4.2006 PW2 Rabia brought Savita to her house and gave her food and clothes. The testimony of the first informant -PW1 Raghunath Jadhav indicates that on 1.5.2006 at about 4.30 a.m. while he was going to answer nature's call, he saw five persons assaulting Savita. He has identified accused No.1-Manhar Beg, who is also known as 'Gadiwala', as one of the assailants. He did not intervene since he was alone. Later he learnt that Savita was brought to the house of Rabia and went to see her. He has stated that Savita had sustained injuries. Accused Nos.1 and the absconding accused Mohammad Kombdiwala were present at the house of Rabia and they had assured to bear medical expenses of Savita. They had also disclosed the names of the other three accused including the accused No.2 Adalat Khan and other two absconding accused. On being questioned about the reason of assault, the accused No.1 had stated that they suspected that Savita was involved in kidnapping children.

Said Savita was later taken to the hospital. She expired on 4.5.2006, which led to lodging of the FIR at Exhibit-11. He has stated in his cross examination that he had not intervened as he felt that it was a family dispute between Savita and the accused persons. He has admitted that he cannot give description of other three persons. He has denied the suggestion that he has not seen the accused No.1 and absconding accused Manhar Beg assaulting Savita. He had also denied the suggestion that villagers had assaulted Savita as they suspected that she was indulging in black magic.

7. PW2 -Rabia has deposed that PW1 had informed her that some persons had assaulted Savita. She had gone to the house of the accused No.1 and she had seen accused No.1 assaulting Savita. She brought Savita to her house. Accused No.1 and another absconding accused had also come to her house. When she questioned them about the incident, Savita pointed out to accused No.1 and said absconding accused also known as Kombdiwala as the assailants. She has deposed that when she questioned accused No.1 and absconding accused, they told her that Savita was involved in kidnapping children. They agreed to bear the medical expenses of Savita. They also disclosed the names of the other three persons, who were involved in assailing Savita. She

has deposed that Savita succumbed to the injuries while undergoing treatment in the hospital.

8. PW3-Malti Gaikwad has stated that Rabia had told her that Savita was assaulted by the accused No.1 and four others and that Savita had sustained injuries. She accompanied Rabia to the house of accused No.1. Savita was present in the house of accused No.1. They brought her to the house of Rabia. She has stated that Savita had sustained injuries and that Savita had pointed out to accused No.1 and the other co-accused Kombdiwala as the assailants. She has stated that the accused had agreed to bear the medical expenses of Savita. Savita was taken to the hospital, but she succumbed to the injuries on 4.5.2006.

9. The evidence of PW1 clearly indicates that the accused No.1 was involved in assaulting Savita. The testimony of PW2 also indicates that she had brought Savita from the house of the accused No.1 and Savita had pointed out to accused No.1 and another accused as the assailants. Testimony of PW2 further indicates that accused No.1 had stated that he and others had assaulted Savita since they suspected that Savita was involved in kidnapping children. The testimony of PW3 also corroborates the evidence of PW2. The

testimony of these two witnesses amply proves that accused No.1 was involved in assaulting Savita. As regards the involvement of accused No.2, it is to be noted that PW1 had not disclosed the name of accused No.2. Accused No.2 was arrested based on the statement made by accused No.1. Even after his arrest, no test identification parade was conducted and PW1 the sole eye witness, had not identified the accused No.2 in test identification parade. The accused No.2 was also not present when the evidence of PW1 was recorded and hence, there was no identification in the Court. Hence, in my considered view there is no cogent and conclusive evidence to prove the involvement of the accused No.2 in committing the said offence and this being the case, conviction and sentence imposed against the accused No.2 cannot be sustained.

10. Under the circumstances and in view of discussion, supra the appeal is partly allowed. The conviction and sentence imposed against accused No.1 Manhar Beg is confirmed. However, conviction and sentence imposed against accused No.2 is quashed and set aside. Accused No.2 is acquitted of offence punishable under Section 304 II of the IPC.

(ANUJA PRABHUDESSAI, J.)