

JPP

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

***CRIMINAL APPEAL NO. 512 OF 2017
with
CRIMINAL APPLICATION NO.881 OF 2018***

Mr. Ulhas Sudam Gorhe.
Taluka : Khed, District : Pune
(Currently in Yerwada Central Jail).

... Appellant
(Orig. Accused)

V/s.

The State of Maharashtra.
(Through Chakan Police Station, Pune)

... Respondent

Mr. Adwait Bhonde i/b. Rahul Deshmukh for the Applicant.
Appellant.

Mr. H.J. Dedhia, APP for the Respondent – State.

***CORAM : S.S. Shinde and
A.S. Gadkari, JJ.***

DATE : 12th October 2018.

Oral Judgment (Per A.S. Gadkari, J.) :-

The Appellant has questioned the correctness of his conviction and sentence for rigorous imprisonment for life under Section 302 of the Indian Penal Code imposed upon him by the

learned Additional Sessions Judge, Khed, Rajgurunagar, District – Pune in Sessions Case No. 46 of 2015, by its Judgment and Order dated 06.05.2017.

2. Heard learned Counsel appearing for the Appellant and the learned APP for the State. Perused the entire record.

3. Shorn of the unnecessary details, the prosecution case in brief is that the deceased Smt. Kavita Sanjay Kamble was residing with the Appellant in Room No.8 of a chawl situated at Kadachiwadi, Village Awasari Khurd, Taluka Ambegaon, District – Pune with the Appellant alongwith her son Darshan. The relation between the Appellant and deceased was an extra marital affair and it appears from record that they were living in 'live in relationship'. It is the prosecution case that both the Appellant and deceased Kavita were earlier married with different spouses. That the deceased did not permit the Appellant to meet his wife and children and even if the Appellant on any occasion met them, the deceased used to have bickering with him. That being fed up with the constant bickering, the Appellant, committed murder of Kavita with the help of an iron hammer/katawani (a gadget used

in the construction industry) by assaulting her on head and other parts of body.

4. The neighbours namely Smt. Namrata Temkar and Smt. Jarina Khan on 9.2.2015 at about 11.30 a.m. noticed that, the door of Room No.8 wherein the Appellant and deceased used to reside was latched from outside and there was no movement inside the room. Smt. Namrata Temkar (Pw-2) and Smt. Jarina Khan (PW-3) therefore opened the latch and noticed that Smt. Kavita was lying in a pool of blood. They informed the said fact to the manager of the said chawl namely Yuvraj Kad (PW-1), who inter-alia lodged the First Information Report with the Police. During the course of investigation, the Appellant came to be arrested on 12th February 2015 and after completion of investigation, the Police submitted charge-sheet in the Court of competent jurisdiction under Section 302 of the Indian Penal Code and under Section 3(1)(xi) and 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. As the offence under Section 302 of the Indian Penal Code is exclusively triable by the Court of Sessions, the learned Magistrate committed

the said case to the Court of Sessions as contemplated under Section 209 of the Code of Criminal Procedure.

5. After committal of the said case the Trial Court framed charge below Exhibit-2 which was read over and explained to the Appellant in vernacular language. The Appellant denied the said charge and claimed to be tried. The prosecution in support of its case examined in all 11 witnesses. The Trial Court, after recording the evidence and after hearing the parties to the said case was pleased to convict the Appellant by the impugned Judgment and Order dated 6.5.2017 as noted herein above.

6. The present case is based on circumstantial evidence. It is the settled position of law that in a case of circumstantial evidence the circumstances on which the prosecution relies must be consistent with the sole hypothesis of the guilt of the accused. In case of resting on circumstantial evidence, it is incumbent for the prosecution to prove each and every circumstance on which it proposes to rely. The circumstances so proved should be of conclusive nature i.e. they should have a definite tendency of implicating the accused. The circumstances so established should

form a complete chain which should exclude every hypothesis of innocence and unquestionably point towards the guilt of the accused. In other words, the circumstances should be conclusive i.e. accused and the accused alone has committed the crime.

7. A minute perusal of record would indicate that, there is no evidence to suggest that, the Appellant in fact had any motive to commit murder of Smt. Kavita. The only circumstance which is propounded by the prosecution is that, the Appellant did not offer any explanation as contemplated under Section 106 of the Indian Evidence Act, as he was residing in the said house alongwith deceased Kavita. It is to be noted here that the prosecution has examined Smt. Namrata Temkar (PW-2), Smt. Jarina Khan (PW-3) and Yuvraj Kad (PW-1) to suggest that the Appellant was residing alongwith Smt. Kavita in Room No.8 of the said chawl. That the evidence on record is absolutely silent about the fact that, either prior to the noticing of the dead body of Smt. Kavita or a day prior to, the Appellant was last seen in the company of the deceased in the said room by any witness. The evidence is further silent on the aspect that prior to noticing the

dead body of the deceased on 9.2.2015 at about 11.30 a.m. or within reasonable period prior thereto, the Appellant either entered into the said room or left it, which would lead to draw an inference that, the Appellant was in fact in the company of deceased Kavita prior to noticing her dead body in the said room.

8. It is to be noted here that the Trial Court has based conviction of the Appellant mainly on the ground that the Appellant has failed to rebut the presumption under Section 106 of the Indian Evidence Act and it has been treated as an exception to the general rule governing burden of proof by the prosecution.

9. The Supreme Court in the case of ***Shambhu Nath Mehra v/s. State of Ajmer*** reported in ***AIR 1956 SC 404***, has held that Section 106 of the Indian Evidence Act is not a substitute for the burden of proof which rests on the prosecution. As noted earlier, in the present case, there is no evidence on record even to remotely suggest that the Appellant was in fact last seen in the company of the deceased Kavita either, at the time of noticing the dead body or prior thereto or he was seen in the vicinity of the scene of offence within the proximity of the relevant time. In the

absence of such evidence, the failure of the Appellant to offer any explanation under Section 106 of the Indian Evidence Act cannot be used and termed as a circumstance against the Appellant nor can a presumption of guilt can be drawn on the failure of the Appellant. As noted earlier, there is no other material except mentioned above, available on record to connect the Appellant with the present crime. In other words, the prosecution has failed to lead any cogent and succinct evidence to base conviction of the Appellant. It appears to us that, the case of the prosecution is based on the presumption of accused was being in the said room without there being any evidence in that behalf and therefore, the only conclusion which we can draw is that the Appellant is entitled for a clean acquittal.

10. In view of above, we pass the following order :-

(i) The Appeal is allowed.

(ii) The impugned Judgment and Order dated 6.5.2017 in Sessions Case No. 46 of 2015 passed by the learned Additional Sessions Judge, Khed, Pune is hereby quashed and set aside and the Appellant is

acquitted from the offence punishable under Section 302 of the Indian Penal Code.

(iii) Fine amount, if any, deposited by the Appellant prior to this, be returned to him on production of the authenticated copy of the present Judgment and Order of this Court.

(iv) In view of Section 437-A of the Code of Criminal Procedure, the Appellant is directed to execute a bail bond in the sum of Rs.15,000/- (Rupees Fifteen Thousand only) with one or two local sureties before the Trial Court.

(v) In view of disposal of the Criminal Appeal, Criminal Application No. 881 of 2018 does not survive and the same stands disposed of, accordingly.

(A.S. Gadkari, J.)

(S.S. Shinde, J.)