

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

CRIMINAL APPEAL NO.851 OF 2013

Arun Bandu Erkal

Age : 50 years, residing at

Udyog Kendra Karmachari Vasahat,

Plot No.34,

Yerwada, Pune.

Presently at Yerawada Prison.

.... Appellant

versus

The State of Maharashtra

(through Yerwada Police Station,

Pune)

... Respondent

.....

Mr.Satyavrat Joshi a/w Mr. V. V. Dushing, Advocate for the Appellant.

Mrs. P.P. Shinde, APP for the State/Respondent.

**CORAM : A. S. OKA &
SARANG V. KOTWAL, JJ.
DATE : 09th MAY, 2018.**

JUDGMENT (PER : SARANG V. KOTWAL, J) :

1. The Appellants have preferred the present Appeal challenging the Judgment and Order dated 10th July 2013 passed by the learned Sessions Judge, in Sessions Case No.112/2003. By the impugned Judgment and Order the

learned Trial Judge has convicted the Appellant for the offence punishable u/s 302 of the Indian Penal Code and the Appellant was sentenced to suffer imprisonment for life and to pay a fine of Rs.10,000/- and in default of payment of fine to undergo rigorous imprisonment for two years. The Appellant was given benefit of set off u/s 428 of Cr.P.C. for the period undergone in custody during trial.

2. The Appellant was charged for committing murder of his own daughter Yashoda Arun Ikral by inflicting wounds with a scissor and stick. He is alleged to have committed this murder because he was angry with Yashoda for having love affair with a boy from a different Caste.

3. The prosecution case in brief is as follows;

At the relevant time, Yashoda was a college going girl of about 17 years of age. She was residing with her family consisting of two brothers, mother and the present Appellant. They were residing in flat No.34 at Udyog Kendra Karmachari

Vasahat, Yerwada, Pune. One Ajay Daniel was residing in the same building. In the past, Ajay Daniel was prosecuted for kidnapping Yashoda. It appears that there was a love affair between Yashoda and Ajay which continued even after his release. On 20th December 2002, Yashoda's brother Bandeshwar saw Ajay and Yashoda going together on a motorcycle. Bandeshwar informed the present Appellant, who was travelling from Pune to Solapur in a train. Bandeshwar informed him about Yashoda and Ajay when the train was about to start. According to the prosecution case, getting angry the Appellant got down at the earliest opportunity, came to his house and in a heat of anger, assaulted Yashoda with a stick and a scissor causing her death. The Appellant himself went to the police station and informed the police. His statement was recorded. The investigation was carried out. The Appellant was arrested. A scissor and a stick were recovered at the Appellant's instance on different dates. When the Appellant had reached the police station, his clothes were blood stained. The articles were sent for chemical analysis. The clothes of the deceased, the scissor and

the clothes of the Appellant showed presence of blood group 'B'. Statements of various witnesses were recorded and finally after completion of the investigation, the charge-sheet was filed. The case was committed to the Court of Sessions. The charges were framed on 21st May 2003.

4. During the trial, the prosecution examined nine witnesses. P.W.1 Bandeshwar Arun Irkal and P.W.2 Nilkanth Arun Irkal, were brothers of the deceased. P.W.3 Rohidas Ramdas Bansode was a Pancha witness, in whose presence scissor was recovered at the Appellant's instance. P.W.4 Arvind Sakharam Sawant was a neighbour of the Appellant. He did not support the prosecution case and was declared hostile. P.W.5 Khandu Dattu Shitole was another Pancha. In his presence, a stick was recovered on 24th December 2002. P.W.6 Prakash Sampatrao Bhoite was present at Yerwada Police Station where the Appellant approached him to inform about the incident. P.W.7 Pratap Dhondiram Poman was a Pancha in whose presence the clothes of the deceased were seized. P.W.8 Laxman

Maruti Jadhav was a Pancha in whose presence, the clothes of the Appellant were seized. P.W.9 Dr.Bhagwan Subhashchandra Narkhede had conducted the post-mortem examination and had found 43 injuries. There were about 8 abrasions, 8 contusions and remaining injuries were incised wounds. These incised wounds were mostly on the limbs. However, injury Nos.26 and 43 had penetrated vital organs and the cause of death was given as “Hemorrhagic shock due to multiple penetrating incised wounds involving injury to lung and blood vessels.

5. The defence of the Appellant was that of total denial and he mentioned in his statement recorded u/s 313 of Cr.P.C. that because of the quarrels he had left his house. His wife was of loose character and therefore his sons had deposed against him.

6. After recording the evidence and considering the submissions made on behalf of both the parties, the learned Trial Judge convicted and sentenced the Appellant.

7. We have heard the learned Counsel Mr.Mr.Satyavrat Joshi, for the Appellant and Mrs. P.P. Shinde, APP for the State of Maharashtra. With their assistance we have read the evidence and we have gone through the record and proceedings of this case.

8. P.W.1 Bandeshwar Irkal is the brother of the deceased and son of the present Appellant. He has deposed that about 4-5 years before the incident on 20th December 2002, Ajay who was residing in the same building; had kidnapped Yashoda and a few days prior to 20th December 2002 was released from jail. On that day, this witness saw Ajay and Yashoda going together on a motorcycle. P.W.1 chased them and stopped them. This witness took Yashoda with him to Swargate. P.W.1 made a phone call from STD booth. At that time again Ajay came there and took Yashoda with him on his motorcycle. Again P.W.1 chased them, but this time, could not track them. Around that time, the Appellant was leaving Pune by train to Solapur. Therefore this

witness went to Pune railway station to inform about this incident to his father/ the present Appellant. He saw that the train was about to leave the station. But he could locate the Appellant in the train and somehow informed him about Ajay and Yashoda. Then this witness came home and tried to search for Yashoda at different places.

9. Thereafter he along with his mother came to police chowky to lodge a report at about 05.30 to 06.30 p.m. When they were at the police station, they received information from police control room that Yashoda had returned home and the Appellant was assaulting her. This witness along with his mother rushed to their house, and found Yashoda lying dead in a pool of blood. Then P.W.1 came to Yerwada Police Station where he saw the Appellant with blood stained clothes. He has admitted in his cross examination that he met his brother Nilkanth for the first time at Yerwada Police Station. This admission is important in the light of the evidence of P.W.2 Nilkanth Irkal.

10. P.W.2 Nilkanth is an important witness. He is the brother of the deceased and the P.W.1. He is the Appellant's son. According to him, on 20th December 2002 at around 06.30 p.m., he came back from his school and opened the house which was locked. Yashoda came back at around 07.00 to 07.30 p.m. followed by the Appellant after 15 minutes. According to P.W.2, the Appellant started scolding and started assaulting her with a stick. The Appellant drove this witness out of the house. P.W.2 has further deposed that he waited in the open ground in front of their house waiting for his mother and P.W.1, who came after about 45 minutes. According to him he narrated the incident between the Appellant and Yashoda to his mother. Then they went inside the house and found that Yashoda was lying dead in the house. They then came to Yerwada Police station where the Appellant was already present.

11. P.W.3 Rohidas Ramdas Bansode is the Pancha in whose presence a scissor was recovered at the instance of the Appellant on 21st December 2002 from his house. Memorandum

and recovery Panchanama are produced on record at Ex.28 and 29. Another recovery Pancha was P.W.5 Khandu Dattu Shitole in whose presence a stick was recovered at the instance of the Appellant from his house on 21st December 2002.

12. P.W.4 Arvind Sakharam Sawant was a neighbour and has not supported the prosecution case and was declared hostile. His evidence can therefore be left out of the consideration.

13. P.W.6 Prakash Sampatrao Bhoite was the Investigating Officer. According to him, the Appellant came to Yerwada Police Station at about 09.10 p.m. and confessed to having committed murder of his daughter in his house. P.W.6 API Bhoite then took entry in the station diary. He sent his staff to verify the information. When the incident was confirmed, he recorded the report of the Appellant and treated it as an FIR. He registered the offence vide C.R.No.487/02 u/s 302 of IPC.

14. In his cross examination, he admitted that he had

visited the spot of incident, 10-15 minutes after recording the FIR. Curiously he has deposed that when he reached the spot at about 11.00 p.m. he did not think it fit to seize the scissor from the spot. He has categorically admitted that he was knowing that the scissor was at the spot of incident itself. This admission is important in the context of the evidence of recovery led by the prosecution, which we shall refer to subsequently.

15. The report given by the Appellant was produced on record at Ex.36. The admissibility of the said report is strongly objected by the defence.

16. P.W.8 Laxman Maruti Jadhav is another important witness in whose presence the clothes of the Appellant were seized. He has stated that police showed him some clothes and prepared the seizure Panchanama. The said seizure Panchanama is produced on record at Ex.45. API Bhoite has referred to this Panchanama in his evidence.

17. As can be seen, the prosecution case is based wholly on the circumstantial evidence. The circumstances can be enumerated as follows;

- (a) Motive
- (b) Theory of last seen together
- (c) Recovery of scissor
- (d) Recovery of stick
- (e) Seizure of blood stained clothes worn by the Appellant.
- (f) The report lodged by the Appellant admitting his guilt.

The learned Trial Judge has accepted that all these circumstances were proved by the prosecution beyond reasonable doubt except the admission of the guilt by the Accused/Appellant before the Police.

18. Mr.Joshi, the learned Counsel for the Appellant, submitted that none of the circumstances is proved by the prosecution. He submitted that the evidence of P.W.1 and P.W.2

is contrary and they do not corroborate each other. He submitted that the recovery evidence is not legally admissible. Mr.Joshi submitted that even the motive is not established against the Appellant as the Appellant had not taken any action against Yashoda in the past when Ajay was in jail. At that time, the Appellant had not blamed Yashoda for their love affair. He lastly submitted that the report lodged by the Appellant is inadmissible and should be left out of consideration.

19. On the other hand, the learned Addl.P.P. submitted that all the circumstances are sufficiently proved by the prosecution and each of the circumstances by itself is sufficient to hold that the Appellant has committed the murder of the deceased.

20. We have considered the rival submissions. Each of these circumstance can be dealt with as follows;

(a) Motive -:

In the past Ajay was in jail on the allegations of kidnapping Yashoda and on 20th December 2002 after he was released on bail, he again developed contact with Yashoda, who willingly went with him. This fact was not approved by P.W.1 and he informed the same to the Appellant. It is quite possible that the Appellant too, would not have approved of the same and would have got angered. This may furnish motive for the Appellant, but whether the motive was strong enough to commit murder of Yashoda, is still a big question. Even giving concession to the prosecution that this could furnish sufficient motive, that by itself may not be sufficient to bring home guilt of the Appellant unless all other circumstances are established and the chain of circumstances is completed.

In this case, it is rather difficult to believe that when the P.W.1 entered the railway station, the train was about to leave the platform and gathered a speed and at that time he located the Appellant and informed him about Yashoda and Ajay. The entire sequence is rather difficult to believe. Therefore

Mr.Joshi rightly submitted that the Appellant may not be aware of Yashoda going with Ajay.

(b) Theory of last seen together -:

To establish this circumstance, the prosecution has relied on the evidence of P.W.2. He is the only witness who claims to have seen the Appellant with the deceased before her murder. P.W.2 Nilkanth has stated that at about 07.30 p.m., Yashoda returned home followed by the Appellant. That time the Appellant started scolding and assaulting her. This witness has not seen the assault with the scissor. He left the place immediately. P.W.2 has further deposed that he waited nearby till his brother and mother came and then all of them went together to Yerwada Police Station, where the Appellant was already there. He has not seen the Appellant leaving the house and going towards the police station. His evidence is destroyed by P.W.1 who categorically deposed that he met P.W.2 for the first time at Yerwada Police Station meaning thereby that when P.W.1 and his mother returned home from police chowky to see the deceased lying a pool of blood

in their house; at that time, his brother P.W.2 Nilkanth was not present there. Therefore the evidence of P.W.2 is not helpful to the prosecution case.

(c) Recovery of scissor -:

Scissor was recovered at the instance of the Appellant, pursuant to the statement dated 21st December 2002. The statement is admissible u/s 27 of the Evidence Act only if it leads the discovery of the scissor concealed in the house. The evidence of API Bhoite shows that after registration of FIR he had gone to the spot and had seen the scissor, but it was not seized at that time. He has admitted that he was knowing that the scissor was lying at the spot of incident. Therefore the statement of the Appellant recorded on 21st December 2002 loses all significance and cannot be used against him because this statement had not led police to discover the scissor. The police were already aware of the presence of scissor at the spot. Therefore this circumstance cannot be held against the Appellant.

(d) Recovery of stick -:

Similarly a stick was recovered again pursuant to the statement made by the Appellant on 24th December 2002. The police on two occasions earlier i.e. on 20th December 2002 and on 21st December 2002 had visited the spot and yet they did not seize that stick from the spot. Therefore it is unbelievable that on 24th December 2002 the stick could be recovered only pursuant to the statement given by the Appellant. Therefore we are inclined to discard even this piece of evidence.

(e) Seizure of blood stained clothes worn by the Appellant:-

Another important piece of evidence is seizure of blood stained clothes, which were worn by the Appellant. In that behalf, the prosecution has examined P.W.8 Laxman Maruti Jadhav. He has deposed that police showed him some clothes and prepared seizure panchanama. He has not even identified the Appellant as the person from whom the clothes were taken charge of. API Bhoite is silent about this piece of evidence. Therefore though, the clothes shows presence of blood group 'B',

this circumstance cannot be held against the Appellant as the prosecution has failed to prove the connection of these clothes with the Appellant.

(f) Report lodged by the Appellant -:

The last circumstance against the Appellant was that he himself went to the Police Station and confessed to his guilt. The Appellant's statement was treated as an FIR. In this context learned Counsel Mr.Joshi has relied on the judgment of the Hon'ble supreme Court in the case of *Aghnoo Nagesia Vs. State of Bihar, AIR 1966 Supreme Court 119*. In the said judgment Hon'ble Supreme Court has held that when the accused himself gives the first information, the fact of his giving information was admissible against him as the evidence of his conduct u/s 8 of the Evidence Act. If the information was non-confessional it was admissible against the accused as an admission u/s 21 of the Evidence Act and was relevant, but a confessional first information report by the accused to police officer cannot be used against him in view of section 25 of the Evidence Act.

Where a First Information Report was given by the Accused to the Police Officer and amounted to a confessional statement, the proof of confession was prohibited by section 25. The confession would include not only the admission of offence, but all other admissions of incriminating facts related to the offence contained in the confessional statement. The Hon'ble Supreme Court has held that no part of confessional statement was receivable in evidence except to the extent that the ban of section 25 was lifted by section 27.

Even the learned Trial Judge has rightly considered this ratio and has only relied on the factum of the lodging of the report by the Appellant without referring to the confessional contents thereof. Therefore in the instant case only the factum of lodging of the report by the Appellant is admissible and not the confessional part of the same.

21. Thus, considering all the above circumstances separately, we are of the view that the prosecution has not

established the chain of circumstances which is so complete that it leads to no other conclusion than the guilt of the Appellant.

22. As a result of the above discussion, the Appeal must succeed. Hence following order;

ORDER

23. The impugned Judgment and Order dated 10th July 2013 in Sessions Case No.112/03 passed by the learned Sessions Judge, Pune, is hereby quashed and set aside. The conviction and sentence of the Appellant under the impugned Judgment and Order is hereby quashed and set aside and the Appellant is acquitted of the offence alleged against him.

24. The Appeal is accordingly allowed.

ORDER

1. The impugned Judgment and Order dated 10th July 2013 in Sessions Case No.112/03 passed by the learned Sessions Judge, Pune, is hereby quashed and

set aside. The conviction and sentence of the Appellant under the impugned Judgment and Order is hereby quashed and set aside and the Appellant is acquitted of the offence alleged against him.

2. The Appeal is accordingly allowed.

(SARANG V. KOTWAL, J.)

(A. S. OKA, J.)