

VPH

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. 915 OF 2014
Through Jail

Bahadursingh @ Kadayat)
Jitendrasingh Kesi, R/o. Trishul)
Building, Pump House, Sector-4,)
Charkop, Kandivali (E), Mumbai ... Appellant

Vs.

The State of Maharashtra)
(Through Senior Police Inspector,)
Charkop Police Station, vide C. R.)
No. 110/2006) ... Respondent

Ms. Rohini M. Dandekar, appointed for the Appellant.

Mr. Arfan Sait, APP for the Respondent – State.

CORAM : Smt. V. K. TAHILRAMANI,
ACTING CHIEF JUSTICE, &
P. N. DESHMUKH, J.
(SPECIAL VACATION BENCH)

DATE : MAY 9, 2018

JUDGMENT [Per : P. N. DESHMUKH, J.]

1. This appeal takes exception to judgment dated 7th

February, 2009 passed in Sessions Case No. 908 of 2016 by which Appellant came to be convicted for the offence punishable under Section 120B I.P.C. and is sentenced to suffer rigorous imprisonment for one year; under Section 381 I.P.C. he is sentenced to suffer R.I. for five years and to pay fine of Rs. 500/- and in default to suffer R.I. for one month; and under Section 302 of I.P.C. he is sentenced to suffer R.I. for life. All the sentences are to run concurrently.

2. Case of prosecution in brief can be briefly stated as under:

(i) PW 7 Nita Patil, complainant, a psychologist is resident of Flat No. 402, Trishul Apartment, Charkop, Kandiwal, Mumbai where deceased Surekha and Appellant were serving as maid and full time servants respectively for last four years of the incident. Complainant used to keep one key of her flat with herself; one with PW 5 Anjana Nair, her neighbour and one with Appellant. On 25.7.2006, Appellant sought leave for 26.7.2006 i.e. the day of incident, and therefore, complainant took the flat

key from Appellant and gave it to PW 5 Anjana, with a request to hand over it to Surekha when she would come at 12.00 noon.

(ii) On her returning back at 5.00 p.m., complainant met Anjana to collect key, however, she was informed that Surekha had not returned back the key and thus, went to her flat on the 4th floor and rang the door bell. However, nobody responded. Foot wares of Surekha were lying outside. Complainant, thus, came back to Anjana and collected the keys and opened the door and found that Surekha was lying dead on the bed. Complainant, therefore, again rushed to PW 5 Anjana, who accompanied her back to complainant's flat. Both of them noticed that cupboard in the room was broke opened and jewelery and all articles therein were scattered and cash amount of Rs.24,00,000/- and jewelery were missing. On the basis of information to police at around 6.15 p.m., PW 10, Tanaji Shinde, API attached to Charkop Police Station arrived on the spot alongwith other staff and recorded statement of complainant, and on the basis of said complaint, offence came to

be registered. Dead body was forwarded for post mortem.

(iii) PW 4 Dr. Kiran Kalyankar noted two stab wounds on the neck and opined that cause of death of deceased was due to hemorrhage and shock due to incised stab wounds associated with fracture of cervical vertebra (un-natural).

(iv) On 27.7.2006 on obtaining house search of deceased, Rs. one lakh in cash and gold ornaments worth Rs.16,200/- were seized under panchanama.

(v) It is the case of prosecution that on the day of incident, in spite of Appellant being on leave, arrived in the house of complainant at night when the police were present, and was apprehended for interrogation purpose. On interrogation, as Appellant was found involved, he was arrested and blood stained clothes on his person came to be seized, consisting of one T-shirt and pant.

3. During investigation, it is further transpired that on

the day of incident at 2.00 p.m. Appellant had visited house of PW 6 Virendra, where he was residing alongwith one Bhimahadur Singh, who is in relation with Appellant and had left one black colour bag in the house of PW 6 Virendra in the absence of Bhimbahadur. On his arrival, PW 6 Virendra handed over suitcase to Bhimbahadur.

4. On 27.7.2006, PW 6 Virendra received telephone from Bhaimbahadur informing that suitcase left by Appellant might be a stolen bag, as he was informed by some one that Appellant is in custody of police and thus, Virendra directed Bhimbahadur to come to their room. In the meantime, Virendra informed police about bag left by Appellant. At around 3.30 p.m. police from Kurar Police Station arrived and collected the bag. The Investigating Officer from Charkop Police Station were informed about such bag, who directed complainant to visit Kurar Police Station. Complainant accordingly visited there with her husband, and in presence of panch witness PW 8 Ramchandra, she identified the bag to be owned by her, which

was found containing ornaments, clothes and cash of Rs.20,40,300/-, which came to be seized.

5. During interrogation on 28.7.2006 Appellant made statement to discover knife, involved in the crime, and in pursuance to same, one blood stained knife came to be recovered from one of the drawers in the kitchen room of complainant's Flat No. 402.

6. It is also case of prosecution that on the day of incident, at around 2.00 p.m., Appellant was seen coming out of the building with black suitcase by PW 1 Sunil Jadhav and at that time Appellant was wearing yellow colour T-shirt and blue pant. It is case of prosecution that on 29.7.2006 when complainant visited Appellant in the police station to inquire as to why he has done such act in spite of her treating him like his son, he disclosed the entire incident that deceased Surekha and he were aware of cash in the Almirah of complainant as Surekha earlier committed theft out of said amount. Since they both had

knowledge of complainant being out of house for a long time, he on 27.6.2006 obtained leave as he alongwith deceased had decided to steal the amount and jewelery. It was disclosed that after they removed cash from the cupboard, they entered into heated arguments on the point of distribution of booty and in the course of same transaction, he strangled deceased and to confirm her death, stabbed her by knife.

7. After completion of investigation, charge-sheet is filed before the competent Court. In the course of time, case came to be committed before the Court of Sessions. Charge is framed against the accused for the offence punishable under Section 120B, 381, 376 and 302 of Indian Penal Code, wherein he pleaded not guilty and claimed to be tried. His defence is of total denial. Accused did not examine any witness in support of his defence.

8. To establish charge against Appellant, prosecution in all examined 13 witnesses. Considering the evidence on record,

trial Court while acquitting Appellant of offence punishable under Section 376 of I.P.C., convicted him as aforesaid, hence, this appeal.

9. Learned counsel Ms. Rohini Dandekar, for Appellant submitted that Appellant is falsely implicated after the murder of deceased Surekha, only because they were working as servants together at the material time with complainant and in fact, when deceased came to be murdered on 27.7.2006, Appellant was on leave and had visited the spot only to know what has happened. It is further contended that if Appellant could have played any role in the commission of present incident, it is highly improbable that he could visit the spot, that too with blood stained clothes on his person, and hence, submitted that recovery of knife at the instance of accused is false, as such knives are normally available almost in all kitchens in most of the houses.

10. Commenting upon evidence of PW 6 Virendra, it is

submitted that in the absence of test identification parade of Appellant, his evidence is not convincing, as he was not knowing Appellant and thus, it is contended that there is nothing to show that black colour rexin suitcase alleged to be kept with PW 6 Virendra by Appellant only. It is therefore, contended that when all these aspects are considered together, appeal is liable to be allowed.

11. Per contra, learned Additional Public Prosecutor Mr. Arfan Sait, for Respondent State contended that the entire circumstance and incriminating facts brought on record conclusively establish involvement of Appellant and by referring to the material evidence on record together with extra judicial confession of Appellant contended that appeal is liable to be dismissed.

12. One of the points further urged is of letter, alleged to be written by Appellant to complainant from jail, requesting her to forgive him. It is therefore, contended that entire evidence

unerringly points out the guilt of Appellant. It is therefore, submitted that appeal be dismissed.

13. In the background of submissions advanced as aforesaid, evidence of PW 7 Nita Patil would reveal that she is residing in Flat No. 402, situated at Trishul Apartment, Charkop, Kandivali (E) Mumbai with her husband and deceased Surekha as well as Appellant were working with her as maid and male servant. She further stated that one key of the flat used to remain with her neighbour PW 5 Anjana, and one with Appellant. However, on 26.7.2006 as Appellant was granted leave, she on collecting key from him left it with PW 5 Anjana Nair with a request to hand over it to Surekha when she would arrive at 12.00 noon. After such instructions, complainant left for the job to her clinic and returned back at 5.00 p.m. On her visiting PW 5 Anjana to collect key, she was informed that Surekha had not returned back the key. Complainant therefore, went to her flat and rang the door bell. However, it was not responded. The dogs inside her house were barking, she

therefore, visited flat of PW 5 Anjana and on collecting the flat key, entered in the flat and found that Surekha was lying on her bed and the cupboard was found broke opened and articles therein were scattered. She then went to PW 5 Anjana and informed her about such fact, who accompanied her to the flat. In the meantime, the neighbours arrived and gave information to police who recorded her statement and treating it as FIR registered the offence.

14. It is specific evidence of complainant that on 25.7.2006 Appellant sought leave for 26.7.2006 saying that he wanted to go to Kurla to meet his relative, however, return back in the night when he was apprehended by police. As per her evidence, on 27.7.2006 she received telephonic instructions from Charkop Police Station about recovery of one bag and thus, she visited Kurar Police Station for identification of the same, which she identified to be the same, owned by her, containing her clothes, jewelery and cash of Rs.20,40,300/- which came to be seized. All muddemal involved is identified by complainant.

15. Though PW 7 Nita Patil, complainant had further stated that on her meeting Appellant in Charkop Police Station on 27.7.2006, Appellant had confessed commission of crime and had in detail deposed the facts, alleged to be stated by Appellant in respect of alleged conspiracy between deceased and himself to commit theft of ornaments and cash, and the circumstances in which he committed murder of deceased, said evidence cannot be considered as extra judicial confession of Appellant, as it has come in her cross-examination that on complainant's visiting police station, police had hesitantly allowed her to meet Appellant and the talk between them was in presence of the police. She has specifically admitted that while Appellant was talking with her and her husband, police were present. In that view of the matter, evidence of complainant as aforesaid is inadmissible in law as it amounts to statement of Appellant made before police and therefore, is required to be kept out of consideration. So far as other evidence of complainant is concerned, in her cross-examination, nothing is brought on

record to doubt her evidence.

16. Evidence of PW 1 Sunil Jadhav establish fact of Appellant having been seen coming out of Trishul building on the day of incident at around 1.45 p.m. alongwith one black suitcase in his hand. He has, in fact, deposed that on his inquiring with Appellant, who was occupying rickshaw hastily, he did not answer and left. On the next day, PW 1 Sunil learnt about death of Surekha and theft in the house of complainant from complainant's husband, and on reading the newspaper item, he visited Charkop Police Station and informed police that on 26.7.2006, he had seen Appellant with black colour suitcase, hurriedly occupying auto rickshaw and leaving Trishul building. Nothing has come in the cross-examination to doubt his evidence. In fact, it has come on record that he had seen Appellant sitting in rickshaw from distance of 10 ft. and before that he saw him coming out of the gate of the building and occupying rickshaw, which was in front of the gate while he was on bicycle.

17. In the background of case of prosecution and evidence of above witnesses, evidence of PW 6 Virendra reveals that he is resident of room in Ratnadeep Society, Kandivali (East) alongwith 4-5 others, including Bhimbahadur on rental basis, of whose Appellant is relative and was knowing Appellant by his face and has stated that on 26.7.2006 Appellant arrived in room alongwith a black coloured bag like suitcase and inquired about Bhimbahadur, who was not present and thus, left the suitcase stating that he would come back after Bhimbahadur returns back to room. Bhimbahadur came late in the night and on receiving the bag, kept it in another room. On the following day, PW 6 Virendra received phone call from Bhimbahadur at about 2.00 p.m. informing that bag left by Appellant might be a stolen bag as he was informed by some one on phone that Appellant was in police custody and thus, PW 6 Virendra gave information to Kurar Police Station, who arrived at 3.30 p.m. and took away the bag. His evidence corroborates with evidence of complainant about one lady arrived at Police Station and

identified bag to be owned by her own alongwith its contents, consisting of clothes, ornaments and cash as aforesaid.

18. In the background of above evidence, evidence of PW 3 Bhavesh Joshi reveals that on 28.7.2006 Appellant gave statement to police to produce one knife concealed by him in one of the drawers of kitchen of complainant, which was reduced into writing at Exhibit 15 and led police party and panch witnesses to 4th floor of Trishul Building, Flat No. 402, Charkop, Kandivali (East), Mumbai and produced one knife from kitchen cabinet.

.. According to memorandum statement of Appellant, apart from knife, he was also to discover bag containing booty kept by him with his friend Bhimbahadur, and in pursuance to the statement, he led police to one room where Bhimbahadur was present. No recovery of bag, however, was effected as Bhimbahadur alongwith PW 6 Virendra had already deposited it with Kurar Police Station. In the light of above evidence, and particularly in view of specific evidence of PW 1 Sunil Jadhav, as

fact of Appellant's coming out of Trishul Building, Flat No. 402 is situated where deceased Surekha was murdered is established beyond doubt, theory of last seen comes into play.

19. In the background of above circumstances, we find it useful to rely upon decision of the Apex Court in the case of Rishi Pal vs. State of Uttarakhan (2013 Cri.L.J. 1534) wherein reference is made to the case of *Bodh Raj alias Bodha and others vs. State of Jammu and Kashmir [(2002) 8 SCC 45]* wherein Apex Court held as under :

“The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in

between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.”

20. In the present appeal, admittedly, Surekha alongwith Appellant were working together during the day time as servants in the house of complainant since four years, and on the day of incident, Appellant though had obtained leave, without proceeding on leave, on 26.6.2006 in furtherance to his conspiracy with deceased to commit theft in the house of complainant arrived in Flat No. 402, prior to 1.45 p.m. and since it is established that there arose dispute between Appellant and deceased on the count of distribution of booty, which was to the extent of Rs. 20,00,000/-, caused her death and fled away with entire cash, when he was seen with the bag, hurriedly going in auto rickshaw by PW 1 Sunil Jadhav. In that view of the matter, there can be no possibility of anybody else causing murder of

deceased, whose body was found in complainant's Flat No. 402, on the same day at 5.30 p.m.

21. In the background of above facts, burden is also upon accused to explain the circumstance leading to the death of deceased. However, there is nothing on record to consider in favour of Appellant. In fact, from the evidence as discussed above, it can safely be said that Appellant alone is responsible for the act charged against him.

22. Section 106 of the Indian Evidence Act, 1872 provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. In several recent decisions, the Supreme Court has held that the principles, which underlie Section 106 of the Indian Evidence Act, 1872 can be applied in cases where certain facts are especially within the knowledge of a person. In the case of *State of Rajasthan vs. Kashi Ram [(2006) 12 SCC 254]*, the Supreme Court has observed that if the accused fails to offer an

explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Indian Evidence Act, 1872. In a case resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation as an additional link which completes the chain.

23. Apart from above circumstance, evidence of PW 2 Vishwas Bhandari establish that in his presence clothes of Appellant consisting of one T-shirt and pant having blood stains which were on his person were seized on 27.7.2006, which according to the evidence of Investigating Officer were

forwarded to Chemical Analyser. alongwith other articles, including knife. According to the C.A. report (Exhibit 55), blood of deceased is of group “B”. The same is the blood group of Appellant and as per C.A. report (Exhibit 57), T-shirt of accused and knife are certified to be stained with human blood of group “B” and on his full pant though blood is detected, its group is not detected. No explanation is putforth by Appellant as to how blood of group “B” is detected on his T-shirt and knife and though blood is detected on the pant of Appellant, its blood group is not stated as pant was having human blood. We find it proper to refer to the decision in the case of ***Gura Singh Vs. State of Rajasthan, reported in (2001) 2 SCC 205*** wherein Supreme Court observed as under:

“In view of the authoritative pronouncements of this Court in Teja Ram's case (supra), we do not find any substance in the submissions of the learned Counsel of the appellant that in the absence of the report regarding the origin of the blood, the trial court could not have convicted the accused. The Serologist and Chemical Examiner has found it that the Chadar (sheet) seized in consequence of the disclosure statement made by the appellant was stained with human blood. As with lapse

of time the classification of the blood could not be determined, no bonus is conferred upon the accused to claim any benefit on the strength of such a belated and stale argument. The trial court as well as the High Court were, therefore, justified in holding this circumstance as proved beyond doubt against the appellant.”

24. Similar view is taken by the Supreme Court in the cases of -

- (i) ***R. Shivaji Vs. State of Kerala***, reported in **2013 (14) SCC 266**;
- (ii) ***Molai & Anr. Vs. State of Madhya Pradesh*** reported in **1999 (9) SCC 581**;
- (iii) ***Khujji @ Surendra Tiwari Vs. State of Madhya Pradesh***, reported in **AIR 1991 SC 1853**.

25. Evidence of PW 4 Dr. Kiran Kalyankar established unnatural death of Surekha when he deposed that on his examining deceased, she was found to have sustained incised stab wounds over right side neck, lateral aspect 5 cm. right to mid line and 7 cm. below right ear lobule, oblique size 2 cm x 0.5 cm. Both angles acute and paraspinal muscle deep. Apart from this, two incised wounds on her neck and three contused

abrasions on the shoulder line are detected and the cause of death is hemorrhage and shock due to incised stab wounds associated with fracture of cervical vertebra. According to the PW4 Dr. Kiran Kalyankar, injuries Nos. 1 and 2 referred above are sufficient to cause death of deceased.

26. When the entire evidence as discussed above, is collectively considered together, prosecution said to have established guilt of Appellant beyond reasonable doubt, as all circumstances proved are inter woven to each other and leads to no other conclusion than the guilt of Appellant. Appeal is therefore, dismissed.

Sd/-
[P. N. DESHMUKH, J.]

Sd/-
[ACTING CHIEF JUSTICE]

Vinayak Halemath