

VPH

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. 148 OF 2015

Sahadu Yadav Pawar)
Age 53 years, Occu.- Nil)
Residing at Bej, Taluka Kalwan)
At present Rameshwar Shivar,)
Taluka Deola, District Nashik)
(At present lodged in Nashik)
Road Central Prison) ... Appellant

Vs.

The State of Maharashtra)
Through Police Sub Inspector)
Deola Police Station, Nashik)
C. R. No. 44 of 2009 ... Respondent

Mr. Abhaykumar Apte, appointed for the Appellant.

Mrs. G. P. Mulekar, 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 1st January, 2010 passed by Sessions Judge, Nashik in Sessions Case No. 203 of 2009, by which Appellant is convicted for the offence punishable under Section 302 of Indian Penal Code and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs. 1,000/-, in default to suffer imprisonment for six months, and further convicted for offence punishable under Section 323 of I.P.C. and sentenced to suffer RI for one month and fine of Rs. 100/-, in default to suffer further imprisonment for 7 days. Both the sentenced are directed to run concurrently.

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

Appellant was appointed as Saldar workman on yearly basis by PW 1 Shivaji Pagar to work at field and for that purpose was provided his residence in a hut situated in the field itself. Appellant was accordingly staying in this hut with his wife deceased Kesarbai with minor children, including daughter Bharati. It is case of the prosecution that on 27.7.2009 as

deceased returned home from weekly market late, there was quarrel between her and Appellant, during the course of which Appellant committed assault on her by wooden log of axe, due to which she died on the spot.

3. PW 6 Dilip Bagul, Police Patil reported the matter to the police station vide report (Exhibit 23), on the basis of which offence came to be registered by PW 7 Saifuddin Sayyad, PI, Deola Police Station vide C. R. No. 44/2009 for the offences punishable under Section 302, 323 of I.P.C. and took over investigation, during the course of which he visited the spot and found dead body of a lady, having injuries on her person, lying in the hut. Inquest panchanama came to be drawn vide Exhibit 10. Dead body was forwarded for its autopsy under requisition memo. At the same time spot panchanama was drawn and blood stained clothes of Appellant consisting of two shirts and one pant alongwith other articles were seized (Exhibit 13), alongwith it sketch of scene of offence was drawn (Exhibit 14). On recording statement of witnesses, Appellant came to be

arrested under arrest panchanama (Exhibit 18).

4. During the course of interrogation, Appellant voluntarily made statement which was recorded at Exhibit 19 in presence of independent witnesses to recover one axe, concealed by him in the field, which came to be seized, as discovered by Appellant, under panchanama (Exhibit 20). Said weapon was forwarded to doctor for seeking opinion with regard to possibilities of injuries by it. The requisition memo is (Exhibit 34). All the seized articles came to be forwarded to Chemical Analyser of which C.A. reports (Exhibits 36 to 39) are on record. On receipt of C.A. reports and post mortem report (Exhibit 42), charge-sheet is filed before learned Judicial Magistrate, Kalwan, district Nashik.

5. In the course of time, case is committed to the Sessions Court for trial. Charge is framed against Appellant vide (Exhibit 4) for the offence punishable under Section 302, 323 of I.P.C. to which he denied and claimed to be tried. His defence is of total denial. Appellant has not examined any witness in

support of his case.

6. To establish charge levelled against Appellant, prosecution in all examined 8 witnesses and commenced evidence by examining PW 1 Shivaji Pagar, who visited the spot and in his presence spot panchanama and inquest panchanama came to be drawn; PW 2 Ashok Pagare on circumstance and in his presence blood stained clothes of Appellant came to be seized; PW 3 Bharati Pawar, daughter of Appellant, however, she did not depose though examined by prosecution; PW 4 Bhausahab Pawar, panch witness on memorandum statement of Appellant, however, he did not support case of prosecution; PW 5 Usha Pawar, daughter of Appellant; PW 6 Dilip Bagul, Police Patil, complainant; Investigating Officer PW 7 Saifuddin Saiyad and concluded evidence on examining PW 8 Dr. Smita Sonwane, who performed post mortem and issued PM. report (Exhibit 42). She has also given opinion to the query by Investigating Officer as per Exhibit 44. Learned Sessions Judge, considering oral and documentary evidence on record held Appellant guilty for

committing murder of his wife and imposed punishment, as aforesaid. Hence, this appeal.

7. Heard Mr. Abhaykumar Apte, learned counsel appointed for Appellant and Mrs. G. P. Mule, learned Additional Public Prosecutor for Respondent State. Learned counsel for Appellant has submitted that admittedly case of prosecution is based on circumstantial evidence. However, prosecution has failed to establish each and every incriminating circumstance beyond reasonable doubt, as is necessary when case is based on such type of evidence and submitted that merely because Appellant was present alongwith deceased in their hut in the night, that by itself can be no ground to hold him guilty, more particularly, when there is no evidence on record to establish motive on the part of Appellant for commission of such crime.

8. Learned APP, on the contrary, by referring to the evidence on record submitted that Appellant was found near the dead body, and as such, only he can have knowledge of circumstances under which deceased died. However, Appellant

has not explained a single circumstance to the satisfaction of the Court to even raise suspicion of his involvement in the crime. It is also contended that above fact coupled with fact of blood stained clothes on the person of Appellant having been found stained with blood group of deceased further establishes his involvement in the crime, and has therefore, submitted that appeal is liable to be dismissed on this count itself.

9. In the light of submissions advanced as aforesaid, evidence of PW 1 Shivaji Pagar reveals that on the day of incident, Appellant was working with him to work on his field on annual basis and was provided hut in the field itself, where he was residing with his wife and minor children. The field is situated at a distance of $\frac{1}{2}$ Km. from the house of Shivaj Pagar. On 27.7.2009 as daughter of deceased did not visit Shivaji's house for supplying milk, he went in his field alongwith one Gyandeo and on visiting to the hut of Appellant, he noticed Appellant's wife lying in the pool of blood, having injuries over head, chest. He also found Bharati, daughter of Appellant,

present at the door. He therefore, informed Police Patil, who in turn, informed police, who arrived at the spot and drew inquest panchanama (Exhibit 10). PW 1 Shivaji Pagar has also stated that on Police Patil inquiring with Bharati, as to incident, she stated that “Anna assaulted Akka by the wooden log of axe, due to which she fell down and when she started crying, assaulted her by footwear”. Bharati further stated that she referred “Anna” and “Akka” to Appellant and deceased. In the cross-examination of PW 1 Shivaji Pagar, nothing has come on record to doubt his evidence.

10. Evidence of PW 3 Bharati, however, when perused do not corroborate case of prosecution as deposed by PW 1 as it is found that despite all efforts, this minor witness failed to give any evidence. In view of above circumstances, evidence of PW 1 Shivaji Pagar as well as of PW 6 Dilip Bagul, Police Patil about his inquiring with Bharati about incidence, and of Bharati stating that Appellant assaulted her mother by log of axe needs no consideration, being hearsay evidence. Similarly, for this

reason, such evidence of PW 2 Ashok Pagar, PW 5 Usha is required to be kept out of consideration for want of evidence of Bharati being hearsay to this limited aspect.

11. In the circumstances, on considering further evidence on record, version of PW 2 Ashok Pagar corroborates evidence of PW 1 Shivaji about deceased lying in the hut of Appellant with injuries on her person where Appellant was present. He has further deposed that he is residing at a distance of 300 ft. from Appellant's hut, and also speaks of arrival of PW 6 Dilip Bagul, Police Patil on the spot. As per his further evidence, police drew spot panchanama and in his presence blood stained clothes of Appellant consisting of full pant and shirt were seized under panchanama (Exhibit 13).

12. PW 2 Ashok has denied that no seizure of clothes of Appellant was effected in his presence. In fact, it has come in his cross-examination that he on his own has visited the shed and has gone inside the shed alongwith Police Patil. In that view of the matter, from the evidence of PW 1 Shivaji of deceased

having found dead in the shed occupied by her with Appellant and their children is established, while from evidence of PW 2 Ashok, it is further established that Appellant was present near the dead body, which aspect is even otherwise not seriously disputed by the defence.

13. Similar is the evidence of PW 5 Usha, daughter of deceased. However, her evidence, as already stated on the point of Bharati informing about information, needs no consideration as Bharati failed to depose anything before the Court. Presence of Appellant in the hut near the dead body, is in fact, further substantiated from the evidence of PW 6 Dilip Bagul, Police Patil, who deposed that on his reaching to the shed, he saw Appellant providing warmth to deceased, and that deceased was having injuries on her person.

14. In view of evidence as aforesaid, there is ample evidence on record of Appellant having been in the room alongwith deceased where he, even otherwise was residing together since prior to the incident alongwith their minor

children. In the circumstances, burden is upon Appellant to prove said fact, which apparently was within his knowledge as to how deceased had sustained fatal injury. Appellant, however, has failed to discharge such burden, though said burden of proving this fact is upon him.

15. 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.

16. Apart from above, another incriminating circumstance against Appellant is of recovery of blood stained axe at his instance. Evidence of PW 4 Bhausahab Pawar examined by prosecution on this aspect do not substantiate case of prosecution, as he is declared hostile. However, evidence of PW 7 Saifuddin Saiyad, Investigating Officer establish that during the course of interrogation, Appellant voluntarily made statement to discover axe, which was recorded (Exhibit 19) in presence of panchas and in pursuance to same, one axe having

blood stains, concealed in shrubs near the hut is produced by Appellant, which was seized under panchanama (Exhibit 20). For the reasons best known to the prosecution, it has not examined second panch witness on this document. However, evidence of PW 7 Saiyad, I.O. establish fact of Appellant voluntarily making statement as aforesaid and recovery of axe in pursuance to it. Merely because PW 7 Saiyad, Investigating Officer, in the absence of independent evidence, cannot be termed to be interested witness, as it is settled that if the testimony of the police officer is found to be reliable and trustworthy, the Court can definitely act upon the same. If in the course of scrutinising the evidence, the Court finds the evidence of the police officer unreliable and untrustworthy, the Court may disbelieve him but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust. Perusal of evidence of PW 7 Saiyad does not create any doubt to rely upon his evidence as above. In view of above, prosecution has further established fact of recovery of axe as aforesaid, having blood stains.

17. It has further come in the evidence of PW 7 Saiyad that during the course of investigation, he forwarded seized muddemal articles for analysis to Chemical Analyser, of which C.A. reports are on record at Exhibits 36 to 39. As per C.A. report Exhibit 36 (collectively), blood group of deceased is “O” and of Appellant is of “B”. From C.A. report (Exhibit 38), it is proved that full shirt and full pant of Appellant and axe are stained with human blood of group “O”, which is of deceased. No explanation is given on this incriminating circumstance.

18. When the entire evidence as aforesaid is thus, considered collectively, it established guilt of Appellant beyond reasonable doubt. In that view of the matter, appeal is dismissed.

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

Sd/-
[ACTING CHIEF JUSTICE]

Vinayak Halemath