

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO. 58 OF 2019**

Mrs. Amita Bhomkar, w/o late Tatu @ Nilesh
Bhomkar, aged 27 years, r/o H. No. 250/1,
Warchawada, Bhoma, Ponda, presently lodged at
Central Jail Colvale, Goa. Appellant

Versus

1. State, as represented by the Officer in
Charge, Ponda Police Station, Ponda, Goa.
2. The Public Prosecutor, High Court
Building, Altinho, Panaji, Goa. Respondents

Mr. S. Pinto with Ms. D. Tulkar, Advocates for the Appellant.

Mr. S.R. Rivankar, Public Prosecutor for the Respondents.

Coram:- M.S. SONAK &
SMT. M.S. JAWALKAR, JJ.

RESERVED ON: 3rd March, 2020

PRONOUNCED ON: 9th March, 2020

JUDGMENT: (Per M.S. Jawalkar, J.)

Heard Mr. Pinto, the learned Counsel for the appellant
and Mr. Rivankar, the learned Public Prosecutor for the State.

2. The prosecution story in brief is that on 27.10.2015, the
accused allegedly assaulted her husband Mr. Tatu alias Nilesh Bhomkar
with a wooden danda (wooden log) at around 13:30 hours on the first

floor of an under construction building at Marcel market, thereby causing injuries on his head and other parts of the body and he succumbed to injuries. Thus, the accused committed murder of Tatu Bhomkar.

3. Charge sheet was filed and the matter was committed to the Sessions Court. Charge was framed on 21.03.2016. As accused pleaded not guilty, trial commenced. The prosecution in all examined 22 witnesses in support of its case. Statement of the accused came to be recorded under Section 313 of Cr.P.C., wherein the accused denied the incriminating evidence. It is the case of the accused that she was not present at the spot and her deceased husband was alcoholic.

4. The appellant was convicted under Section 302 of IPC with imprisonment for life and to pay fine of ₹1,000/- and in default to undergo rigorous imprisonment for a period of two years vide judgment and order dated 19.08.2019 and 31.08.2019 in Sessions Case No. 6/2016, before the learned Sessions Judge, North Goa, sitting at Ponda.

5. The learned Counsel for the appellant submitted that the entire case is based on circumstantial evidence and the Sessions Judge failed to appreciate the same in its proper perspective. There is no eye witness to the assault. It is pointed out that the CCTV footage was

not provided to the accused and the learned Sessions Judge mainly relied on the same. Moreover, there were no questions put to the accused, while recording her statement under Section 313 of Cr.P.C. in respect of deposition of PW-17, who is the witness, who recovered the CCTV footage from Tivrem Orgao Panchayat office and copied the same to the DVD, which was handed over to the police.

6. Our attention is drawn by the learned Counsel for the appellant to the deposition of PW-6, who is the panch witness to the recovery of CCTV footage from the Gram Panchayat, Marcela. At the end of the said deposition, it is clearly mentioned that after the examination in chief was over, at the request of the accused, the CCTV footage was provided to the Advocate for the accused. Thus, it is admitted fact that the CD was not provided along with the documents. This witness when shown CD no. 1, at the request of the Advocate for the accused, clearly admitted that at this point of time, one lady is seen with a child. He states that from the distance appearing in the CD, the face of the lady is not clear. He was also shown CD at time showing 13:04:36 hours and he answered that the face of the lady is not clear. Further, he was shown CCTV footage, from the CD recorded at the time 13:50:24 hours and he was shown as per his request the moving picture, to that also, he answered that he cannot identify the lady.

7. He also admitted that he has identified the said lady appearing in the CD to be the accused because PSI, Sinari had informed him and accordingly, he identified her in the open Court. Similarly, he identified the policeman as per the information of PSI, Sinari.

8. We have also perused judgment of the learned Sessions Judge. He has made his observations as under in respect of the deposition of this witness:

“This testimony of PW6 is the most important and the vital piece of evidence which clearly establishes the guilt of the accused as the presence of the accused last seen at the incident spot stands established as this Court has also perused the said CD wherein the accused is seen along with the child.

Even otherwise, the relevance of this testimony will be discussed later on. When the said CD was played in the open Court PW-6 has identified the said lady to be the accused who was present in the Court and on the said CD she was seen with the child. It is also come on record that the accused is seen along with the child crossing the road. The identification and the presence of the accused stands proved at the incident spot.”

9. In our considered opinion, the learned Sessions Judge totally erred in coming to the conclusion that the accused is last seen at the spot of the incident. It is important to note that PW-6 admitted

that he has acted as panch witness in many cases of Ponda Police Station and that he is working as Home Guard since last eight years and presently, he is posted at Ponda Police Station. The learned Counsel for the appellant submitted that in view of his cross examination, the witness is neither reliable nor trustworthy and is an interested witness.

10. This witness has clearly admitted in cross that he identified the lady at the instance of PSI, Sinari. He has admitted that when the CD was played in the open Court, it is difficult to identify the lady. In such circumstances, concluding that presence of accused is established, is itself perverse finding. Moreover, the last seen theory cannot be made applicable, unless the accused was seen along with the deceased within proximate time of his death. Even the learned Sessions Judge in para 42 observed that he has played the said DVD and seen a lady along with a child, though, the same was not very clear. He relied on deposition of PW-17, who has recovered the said CCTV footage, however, surprisingly, there is no question asked to the accused while recording her statement under Section 313 of Cr.P.C. in respect of deposition of PW-17.

11. PW-5 is a panch witness. From his deposition, it appears that the spot of incident is first floor of a building, which is under construction. Though, such attempt was made to show that the

weapon was recovered at the instance of the accused, there is no statement of the accused as such recorded under Section 27 of IPC. Moreover, as per the prosecution story itself, the owner of the Bar and accused were already there when the police persons reached on the spot. As such, the wooden danda was not recovered at the instance of the accused, though, it was attempted to show that it was recovered at the instance of the accused.

12. Though, it is deposed and mentioned in the panchanama that there are some red colour stains on the said wooden danda, the Doctor deposed otherwise. He deposed that there was no blood found on the weapon (wooden danda) and therefore, he opined the weapon report as probable. He further deposed that if the blood was found on the weapon, the report would have been with certainty. He deposed that there were no visible stains on the wooden danda. He further deposed that there were no identification marks or specification on the wooden danda. Thus, the prosecution failed in establishing the fact that the said wooden log was used by the accused for conflicting injuries and the same was recovered at the instance of the accused. The learned Counsel also pointed out from the C.A. report at page 385 of the paper book that the wooden danda, which was sent to the Doctor for his opinion ought to be sealed again by GMC. However, the said wooden danda was sealed with the specimen seal of Ponda Police Station, Goa, Ashoka Emblem. Thus, there is every possibility of

tampering with the article after the PW-18, Dr. Andrew Fernandes from GMC sent the said article to the Ponda Police Station. We find force in the contention of the appellant.

13. Needless to mention here that as pointed out by the learned Counsel for the appellant, it is clear from the deposition of PW-8, PW-9 (brother of the deceased), PW-10 (sister of the accused), PW-11 (brother of the deceased) that the deceased was alcoholic. Even the Doctor deposed in cross that he got the smell of alcohol from the deceased and he has mentioned so in the autopsy report. The learned Counsel also pointed out that the noting in the autopsy report is against clause stomach, which contained strong fruity odour of alcohol.

14. The C.A. report dated 27.04.2016 also shows result of the examination that 149.5mg.% w/v ethyl alcohol was detected. Thus, there is no doubt that the deceased was heavily under the influence of alcohol at the relevant time.

15. It is the case of the prosecution that there is a dying declaration by the deceased in the presence of the Jaiwant Raikar, Police Constable i.e. PW-16. PC Jaiwant Raikar deposed that the deceased Tatu Bhomkar was murmuring that he was assaulted by his wife, Amita, when he reported the place where Tatu was lying. At that time, his wife along with a small child came there and she told that she

had hit her husband with wooden danda and started saying that she will hit him until his death. He further deposed that he called 108 (ambulance). In the meantime, he asked Amita Bhomkar (accused) to get soda bottle, which she sprayed on the face of her husband. In the meanwhile within 15 minutes, 108 (ambulance) came to the spot and he along with the driver of the vehicle and Sachin Naik put said Tatu on stretcher and Anita Bhomkar accompanied her husband to PHC, Betqui. The deposition in relation to the dying declaration ought to have been discarded by the learned Sessions Judge, considering the fact that there is nothing on record to show that the statement made by the deceased is made in a condition fit to give such statement, specifically when the presence of substantial percentage of alcohol is found present in the body. There is nothing on record to show that the deceased was at the relevant time conscious, orientated and fit to give such statement.

16. Moreover, if any extra judicial confession is made by the accused, it is not admissible in law, except for the recovery of weapon. The statement of the accused as made before the said Police Officer, even if it is presumed to be true, the conduct of the witness, Raikar asking accused to bring soda and to spray it on the face of her husband or asking her to accompany the deceased upto the hospital is surprising. The driver of the ambulance is also examined. As per his version there were three police persons. However, PW-16 deposed that

along with him driver and Sachin Naik put the deceased in the ambulance. As such, the evidence of this witness cannot be held to be trustworthy nor there is any dying declaration on which one can rely.

17. The testimony of PW-7 and PW-8 is most important. PW-8 is the owner of Bar and Restaurant at Khandola market, near Tivrem Orgao Panchayat and the same Bar and Restaurant is named and styled as “Rekha Bar”. As per his deposition Tatu Bhomkar used to visit his Bar to drink. On 27.10.2015 at 10:00 hours, he opened the Bar and at 13:00 hours wife of Tatu namely Anita came to the Bar and informed him that her husband (Tatu) is sleeping on the first floor. Thereafter, he called his brother, Sachin on phone and informed him that Tatu Bhomkar is sleeping on the first floor. Accordingly, his brother came and went with him to the first floor. They found some construction material and saw Tatu Bhomkar was sleeping on the wooden plank. He was found very tired and sleeping. Thereafter, he called the police and informed and thereafter, he closed his Bar at 2:00 p.m and went for lunch. After his return, he saw 108 ambulance and Tatu Bhomkar was shifted to PHC Betqui and at about 4:30 p.m., he learnt that Tatu Bhomkar had expired.

18. Whereas PW-7 deposed that on 27.10.2015 at around 13:00 hours, he was in the corridor of the Bar and at that time, Anita Bhomkar told his brother (PW-8) that she assaulted her husband on

the first floor of the building. One omission is noted by the learned Sessions Judge that the deceased was having bleeding injury on his head. This is material contradiction in the deposition of PW-7 and PW-8. As per the version of PW-8, he gave phone call to his brother and asked him to come to Rekha Bar, whereas PW-7 deposed that he was in the corridor of the Bar, when Anita Bhomkar came and told his brother, Krishna that she had assaulted her husband on the first floor of the building. In the entire evidence of PW-8, there is nothing with regard to any statement made by the accused, specifically when it is deposed by PW-7 that Anita told his brother Krishna that she had assaulted her husband. When both these witnesses were together, it is surprising that PW-8 had never deposed about any statement made by the accused. He has also not deposed about any injuries sustained by Tatu Bhomkar. In fact PW-8 has acted as panch witness to the panchanama of the building. This witness in his cross examination mainly deposed that he does not remember anything. He admitted that he put his signature on the sketch at the Police Station on 28.10.2015. He was not aware that he was required to act as a panch witness and he would require to sign the panchanama. In the cross examination, he also deposed that he was not present when the wooden danda was brought nor was sealed in his presence. These two witnesses i.e. PW-7 and PW-8 are important witnesses. However, there is no cogent corroboration and consistent evidence, though, they appear to be present at the same time on the spot of the incident. It is

surprising that PW-8 does not talk about any statement made by the accused or about any injuries on the person of the deceased. However, the learned Sessions Court heavily relied on the evidence of these two witnesses.

19. Mr. S.R. Rivankar, the learned Public Prosecutor conceded that it may not be the case of Section 302 of IPC, but, it definitely falls under Section 304 (part II) of IPC. He also relied on two citations, **Lallu Manjhi & Another Vs. State of Jharkhand, 2003 2 SCC 401** in support of his contention that even if some questions are not put to the accused under Section 313 of Cr.P.C., it is not fatal to the case of the prosecution. He also relied on **Vikramjit Singh @ Vicky Vs. State of Punjab, 2006 12 SCC 306**, in support of his contention that the weapon was recovered purported to be pursuant to a confession made by the accused. The said statement is admissible in evidence. However, in our considered opinion, both the judgments are supporting the appellant. So far as **Lallu Manjhi** cited supra is concerned, the Hon'ble Apex Court has held that it is obligatory on the part of the Trial Court to examine the accused for the purpose of enabling the accused personally to explain any circumstances appearing in evidence against him. If such opportunity is not afforded, the incriminating pieces of evidence available in the prosecution evidence can't be relied on for the purpose of recording conviction of the accused persons. Insofar as **Vikramjit Singh** (supra) is concerned, the

Hon'ble Apex Court discarded confession made by the appellant as knife was recovered from the place of incident without something more, which would lead to a discovery of fact and held that it, therefore may not have much evidentiary value.

20. In the present matter, not even the confessional statement is on record. There is no discovery as such, if place of the spot of the incident was known to the police and it appears that so called wooden danda was recovered from the same place. As such, it has no evidentiary value at all.

21. Thus, in our opinion, the Appeal is required to be allowed as chain of circumstantial evidence is not at all complete to hold that the accused is the only author of the crime. Further more, the questions were not put to the accused while recording her statement under Section 313 of Cr.P.C., upon which the learned Trial Court heavily relied on. CCTV footage is not that clear to identify the lady in the footage as the accused, which is evident from the evidence of the witnesses, as well as opinion expressed by the learned Sessions Judge himself. Moreover, even if it is presumed that the lady crossing the road is accused, that itself is not sufficient to prove that she is the author of the crime. Thirdly, the extra judicial confession is not admissible insofar it relates to the witness PW-16, who is police person. In view of the foregoing discussion and material

contradictions between testimony of PW-7 and PW-8, who are brothers and alleged to be present when the accused arrived in the Bar. Thus, it can't be believed that accused made a statement, which may amount to extra judicial confession to PW-8, which was heard by PW-7. Surprisingly, PW-8 doesn't say a word about it. Insofar as the dying declaration is allowed is concerned, which have been given before PW-16, it cannot be said to be beyond reasonable doubt, as the deceased was heavily under the influence of liquor, which is clear from the evidence on record. The deceased was habitual drunkard as also seen from the evidence of his near relatives. Thus, there is nothing on record to show that he made statements, while he was conscious, orientated and in fit condition to give such statements. Insofar as medical evidence is concerned, the Doctor has explained that the injuries may be probable by the wooden log because he was not certain as there was no blood on the said weapon. The cause of death is hemorrhage shock vide injury no. 1. Injury no. 1 is not a head injury, but it is the injury to the ribs.

22. There is no explanation whatsoever from the side of the prosecution that when the wooden danda was sent to GMC for opinion of Doctor why there was no seal of GMC, when it was sent to CFSL for C.A report, which definitely raises doubt about tampering with the said article as there was seal of Ponda Police Station.

23. The learned Sessions Judge also misconstrued the last seen theory. For application of last seen, the accused and the deceased have to be seen together by someone within the proximate time of the death of the deceased. It is also come on record that the place where deceased was lying was an under construction site and there was construction material lying there. Possibility of injuries due to falling of such material also, cannot be ruled out. Considering the overall material on record, the prosecution failed to establish beyond reasonable doubt that the accused has committed murder of her husband Tatu Bhomkar and therefore, she is entitled to be acquitted. Accordingly, we proceed to pass the following Order:

O R D E R

- (i) The Appeal is allowed.
- (ii) The judgment and order dated 19.08.2019 and 31.08.2019 passed by the learned Sessions Judge, North Goa, sitting at Ponda in sessions Case No. 6/2016, are hereby quashed and set aside.
- (iii) The appellant/accused is acquitted from the charge of having committed offence under Section 302 of IPC.
- (iv) The appellant/accused shall be set at liberty forthwith, if not required in any other case.

SMT. M. S. JAWALKAR, J.

M. S. SONAK, J.