

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.661 OF 1998

THE STATE OF MAHARASHTRA)...APPELLANT

V/s.

1) MAHAMMED ISAK MAHAMMAD SURVE)
)
2) SOU. KHATLJA MAHAMMAD SURVE)
Aged about 46 years, Occ : Household)
)
Both residing at Sovanas, Taluka – Khed,)
District – Ratnagiri.)...RESPONDENTS

Mr.H.J.Dedhia, APP for the Appellant-State.

Mr.S.V.Marwadi a/w. Mr.Ganesh Nadar, Advocate for the Respondents.

CORAM : PRASANNA B. VARALE &
V. G. BISHT, JJ.

DATE : 22nd OCTOBER 2020

JUDGMENT : (PER : V. G. BISHT, J.)

1 This appeal is filed by the State challenging the judgment and order of acquittal dated 21st April 1998 passed in

Sessions Case No.8 of 1997 by the learned Sessions Judge, Ratnagiri, for the offence punishable under Section 302 read with 34 of the Indian Penal Code, 1860 (Indian Penal Code).

2 Narrated in nutshell, on 17th July 1996 one Saud Abdul Wahab Surve (PW1) intimated Police Station Officer Khed that his daughter namely Firoza Mohd. Isak Surve (deceased) was married before three months on 16th July 1996 at about 12.30 p.m. While she had gone to take bath, she slipped and fell on the bathroom floor. Dr.Deelip Madhukar Daithankar (PW4) was accordingly summoned who examined her and declared her dead. He further informed Police Station Officer Khed that he had no complaints against anybody.

3 On the basis of above said information, ADR No.39 of 1996 under Section 174 of the Code of Criminal Procedure (Cr.PC.) vide Station Diary No.202 of 1996 came to be registered by Police Head Constable of Police Station Khed.

4 It then appears from the record that the said ADR was undertaken for investigation by PW9 Shripat Sadu Gurav – informant for investigation. During investigation he got the postmortem done over the dead body. The concerned Autopsy Surgeon opined the cause of death as asphyxia, due to suffocation. He even inspected the bathroom where the incident had taken place and did not find anything abnormal. He also, during the course of investigation, noted that the family members were giving evasive replies to his queries and keeping in mind the cause of death, as revealed in the postmortem, he concluded that Firoza (deceased) was suffocated to death by pressing her nose with the help of pillow.

5 PW9 accordingly lodged the report, on the basis of which, Crime No. 129 of 1996 under Section 302 read with 34 of the IPC came to be registered with Police Station Khed.

6 It further appears from the record that PW10 Popat Vinayak Ahivale, the then C.P.I. Dapoli carried out further investigation. During the course of investigation he recovered

pillow and chaddar at the instance of A-2 vide Disclosure Statement recorded under Section 27 of the Evidence Act. He also sent the articles collected in the case to Regional Forensic Science Laboratory, Pune. After collecting the Chemical Analyzer's Report and on conclusion of investigation forwarded the charge-sheet against the present respondents-accused.

7 To substantiate the Charge against the respondents-accused, the prosecution has examined as many as ten witnesses and exhibited number of documents. The respondents-accused were questioned under Section 313 of the Cr.P.C. about the incriminating evidence and circumstances and they denied all of them as false.

8 Mr.Dedhia, learned APP for the appellant-State, submitted that since the case was based on circumstantial evidence and as the prosecution was able to establish various circumstances, despite that the learned trial Court wrongly turned down those circumstances holding that the circumstances are not incriminating and the same cannot be taken to be adverse against

the respondents-accused. According to learned APP, the fact that the deceased was found to be murdered in her matrimonial home in which the respondents-accused along with younger brother of A-1 were residing, that in itself is a strong circumstance against the respondents-accused which the learned trial Court has failed to consider. Further, the learned trial Court also turned Nelson's eye to the Inquest Panchnama and Spot Panchnama reports which show that the death of the deceased was unnatural. In nutshell, the learned trial Court has miserably failed to appreciate the evidence on record tendered by the prosecution witnesses in proper perspective. The fact that the prosecution has been able to establish the guilt by proving all the incriminating circumstances against the respondents-accused, the present appeal deserves to be allowed, argued learned APP.

9 Mr.Marwadi, learned counsel for the respondents-accused, on the other hand, has supported the judgment and order of acquittal. The learned counsel takes strong exception to the submissions advanced by the learned APP contending that the

present case is based on circumstantial evidence and the prosecution has not been able to establish circumstances sufficiently to connect the accused with the alleged offence. Since the case has not been proved beyond reasonable doubt, the learned trial Court was justified in passing the order of acquittal. There being no merit in the appeal, the same is liable to be rejected, argued learned counsel.

10 Having heard the counsel for the parties and having perused the evidence and material on record, central question that arises for consideration is as to whether the death of deceased was homicidal in nature. Before that, we would like to note here quickly that there is no dispute to the fact that at the relevant time when the death of deceased occurred, the deceased was in company of accused and the younger brother of A-1. There is also no dispute to the fact that death of the deceased took place within few months of the marriage. This definitely raises suspicion regarding foul play having been played with the deceased but unless two material aspects of the case are proved, viz., firstly –

that the death was unnatural, and, secondly – that it was homicidal, the guilt cannot be proved and fastened on the accused.

11 In order to reach a finding regarding homicidal death, the medical evidence on record assumes greater significance. We will, however, have to examine and analyze the postmortem report and the evidence of PW7 Dr.Shabbir Akbar Shaikh who carried out an autopsy over the dead body of the deceased.

12 PW7 states in his evidence (Exh. 25) that on 17th July 1996, he performed an autopsy over the dead body of the deceased. On external examination of the dead body he noticed following injuries :

- “1. Chocolate coloured abrasion on lf. side of neck oblique 1/2” breadth and 5” in length
2. Bluish discolouration of whole face, neck (all sides) upper part of chest 4” cm. below both infra clavicular region up to shoulder

3. Reddish bluish discolouration of medial aspect of upper arm and forearm (midpoint)
4. Neck was swollen oedematous cyanosed bluish discolouration

All the injuries noted by him were anti-mortem. His evidence then shows that on internal examination of the dead body, he noticed that left side of heart was empty and right side of heart contained black red blood clots. He also noted patchial haemorrhage was present in brain. According to him, the probable cause of death was due to asphyxia, due to suffocation. He then proved the cause of death certificate at Exh. 26. The postmortem report is at Exh. 28.

13 The concluding part of his evidence shows that the death of deceased would have been caused by strangulation or by pressing pillow on the nose and mouth.

14 The evidence of this material witness appears to be

quite contradictory when on one breath he states that the death of deceased might have been caused because of strangulation and in another breath, due to asphyxia due to suffocation. He himself appears to be not sure as to what exactly was the cause of death. When this witness states that the death might have been caused by strangulation, on what basis he arrived to that finding or conclusion is not supported by any clear and cogent evidence. Even assuming for the sake of argument that the strangulation was the cause then his own cross-examination shows that the tongue was inside the mouth. Judicial note can be taken of the fact that in case of death due to strangulation, the tongue comes out of the mouth due to pressure on trachea and moreover there was no corresponding internal injury to the throat.

15 He admits in the cross-examination that asphyxial death may occur either by accident, violence, disease and suicide. He further admits that death due to asphyxia can also occur due to spasm of vocal cords, air embolism, pneumothorax, haemothorax, edema of lungs. Similarly, in case of severe reaction

of allergy, death may occur due to asphyxia. According to him, allergy may occur due to anything. He then lastly admits in the cross-examination that in the present case the death due to asphyxia because of allergic shock or many other things cannot be ruled out.

16 It is pertinent to note that prosecution has not been able to bring on record that the deceased was not suffering from any of the possible symptoms which are deposed to by this witness. Even there is no evidence to show that the deceased was also not having any kind of allergy. The ultimate and clinching admission given by the Medical Officer has completely washed out the prosecution case as to the homicidal death of the deceased. On the contrary, the possibility of accidental death is also not wholly ruled out by the medical evidence on record.

17 In the case of **Subramaniam vs. State of Tamilnadu and Another**¹ the Hon'ble Supreme Court has held that when death due to asphyxia was not coupled with the marks of violence

¹ (2009) 14 Supreme Court Cases 415

on the body of the deceased, it would be difficult to convict the accused-husband of the murder of his wife.

18 In the present case, the prosecution has come up with a positive case that the deceased was suffocated by throttling and further suffocated by means of pillow and chaddar. It is also to be noted here that according to the prosecution the pillow and chaddar was recovered at the instance of A-2 during the course of investigation by PW10 Investigating Officer, that too on 14th August 1996. There is no other evidence on record to show that the pillow and the chaddar were used by the respondents-accused to cause the death of the deceased. Thus, the said positive case of homicidal death sought to be made by the prosecution is clearly not proved.

19 The medical evidence on the record is not conclusive and there are doubts emerging from the record. Needless to say and having regard to the critical analysis of the evidence of Medical Officer, a clear finding regarding the nature of death

being homicidal, cannot be given in the facts and circumstances of this case, in the absence of clinching evidence. To this extent, in our considered opinion, the finding of the learned trial Court is just and proper and needs to be sustained.

20 The present case, admittedly, is based on circumstantial evidence. In such type of case, circumstance from which conclusion of the guilt is to be drawn should in the first instance be fully established and all the facts so established should also be consistent with only one hypothesis i.e. the guilt of the accused.

21 In Ramreddy Rajesh Khanna Reddy Vs. State of A.P., (2006) 10 SCC 172, the Hon'ble Supreme Court again considered the case of conviction based on circumstantial evidence and held as under:

“26 It is now well settled that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and

clinging evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances cannot be on any other hypothesis. It is also well settled that suspicion, however grave it may be, cannot be a substitute for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence. (See Anil Kumar Singh v. State of Bihar, (2003) 9 SCC 67 and Reddy Sampath Kumar v. State of A.P. (2005) 7 SCC 603)."

Keeping above noted principles in mind, the evidence led by the prosecution will have to be assessed and analyzed.

22 PW1 Saud Abdul Wahab Surve – brother of the deceased states in his evidence (Exh. 16) that at about 1.00 p.m. while he was in his house, he heard cries from the house of the deceased. He ran towards her house. On going there, he witnessed that A-1 was shouting and telling him that the deceased had fallen in the bathroom. He went to see the deceased in the bathroom and found her lying there. Her mother-in-law i.e. A-2

was standing there. She was taken out from there and placed on the floor.

23 It is his further evidence that he noticed that the corner of saree of his sister was wrapped around her neck and there was knot to the said corner of the saree on the throat. The same was removed. He showed black mark on the throat and neck of deceased to his maternal uncle.

24 Although in the substantive evidence this witness clarifies of having seen a saree wrapped around the neck of deceased with a knot thereon nearby the throat, but in the cross-examination when his attention was drawn about the absence of such fact from his statement recorded under Section 161 of the Cr.P.C. during the course of investigation, he fairly stated that he had not stated that fact to the police. He further stated that even he did not tell the police that the said saree was removed and then he noticed black mark on her throat. In our considered opinion, these were the material aspects and this witness ought to have

stated before the police, had he seen it in reality. Therefore, no evidentiary value can be attached to that aspect.

25 His cross-examination also shows that the deceased had no trouble from her in-laws and she had also not made any complaint against them. This is a very relevant and important aspect of his cross-examination which goes to show that all was well with the matrimonial life of the deceased.

26 PW5 Shahnaz Abdul Wahab Surve – mother of the deceased, on her part, states in her evidence (Exh. 22) that the deceased had come to her house on 15th July 1996 i.e. a day prior to the incident and had dinner with her. On the day of the incident, she was near water tap which is situated in between her house and the house of the deceased, for fetching water. Those were the rainy days. She, therefore, asked the deceased to bring an umbrella but did not get any response. After sometime, she heard commotion emanating from the house of the deceased. Her son, herself and her sister-in-law rushed to the house of the

deceased. The deceased was taken out from the bathroom. She found her dead. When she enquired with A-2 as to how it had happened, A-2 replied that after sweeping the house, the deceased went into the bathroom for taking water and fell in the bathroom and died.

27 Except above, there is nothing in her examination-in-chief. Like PW1, she also states in her cross-examination that the relations between her family and family of the deceased were good and then admits that the deceased had no sort of trouble in her matrimonial house. She further states that she does not remember whether in her statement before the police, she had stated that the deceased had any trouble in her matrimonial home, but this fact is proved by PW9 Investigating Officer in his cross-examination at paragraph 3 by stating that this witness in her statement before him had stated that her daughter had no sort of trouble from her in-laws. Thus, as far as the relations between the deceased and accused inter se are concerned, there is no manner of doubt in the light of cross-examination of PW1 and

PW5 that there was no complaint of deceased from either of the accused.

28 PW6 Jabbar Abdul Wahab Surve – brother of deceased states in his evidence (Exh. 23) that while the dead body of deceased was being taken out from the house for postmortem, he heard paternal aunt of A-1 saying that the people would not spare him and now he was entangled. Interestingly, the evidence of this witness does not disclose the name of paternal aunt of A-1. It was also probable that at the relevant time, while the deceased was being taken out of the house for postmortem, all the relatives might have gathered there. The alleged utterances of paternal aunt of A-1 was definitely going to involve A-1 in the crime. So, in the natural course, the paternal aunt would not have uttered those words in the fashion as is deposed by this witness. Further, there is one more reason to question the testimony of this witness. Admittedly, PW6 was at Village Sovanas from 17th to 19th July 1996. He was also aware that the Police Sub-Inspector was making inquiry about the cause of death of the deceased. If

indeed there were utterances by the paternal aunt, as is deposed by this witness, he would have immediately narrated it to the Police Sub-Inspector in between 17th to 19th July 1996. But that was not done and for the first time he had disclosed this fact on 20th July 1996. Thus, there was not only inordinate but unreasonable delay in recording his statement, thereby questioning the veracity of his evidence. We are, therefore, not inclined to accept his testimony.

29 Similar kind of evidence of this witness awaits. In his evidence he states that after cremation of dead body, he and others first went to the house of accused and at that time, he heard one of the sisters of A-1 saying, what A-1 had done. On its face value, this evidence does not sound convincing and true. There is nothing on record to show what prompted sister of the A-1 to say so, that too in presence of others. Moreover, PW6 did not disclose this circumstance till 20th July 1996 although he had earlier opportunity to disclose it to the Investigating Officer. It appears to be a concoction all the way.

30 We have, at the beginning, noted that the death of the deceased occurred in the house of accused and in their very presence. It was one of the arguments of the learned APP that since the deceased was found to be murdered in her matrimonial home in which the respondents-accused along with younger brother of A-1 resided, the burden was on accused to explain the circumstance under which the death took place. We may point out here that in Vikramjit Singh alias Vicky vs. State of Punjab² while interpreting Section 106 of the Indian Evidence Act, 1872, the Hon'ble Apex Court held that Section 106 of the Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved, the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. We have already pointed out in our earlier part of discussion that the homicidal death and as also motive have not been proved by the prosecution so as to draw an irresistible inference that it were accused who were instrumental in causing the death of the deceased.

2 (2006) 12 Supreme Court Cases 306

31 In this regard, the judgment of the Hon'ble Apex Court in the case of Dhanajaya Reddy vs. State of Karnataka³ is relevant. In similar circumstances, wife of the deceased was charged with murder of her husband, who was found dead in their bedroom. But she was acquitted and it was held by the Hon'ble Apex Court that the circumstance of the wife being last seen with her deceased husband or that she was supposed to be with him in the house, could not lead to the irresistible inference of her guilt, as there was lack of other circumstantial evidence to link her with the murder of her husband. Thus, in the instant case also, it cannot be inferred that the respondents-accused are guilty of murder of deceased, particularly in the absence of clear and cogent evidence, to give a finding that the death was homicidal in nature.

32 None of the circumstances is duly proved by the prosecution by producing cogent and convincing evidence. Evidence produced on record does not establish each and every circumstance connecting the accused with the alleged crime. It

3 (2001) 4 Supreme Court Cases 9

does not complete the chain of circumstances; which indicate that none other than the accused have committed the murder of Firoza i.e. the deceased.

33 For the aforesaid reasons, we are of the considered view that the trial court was perfectly right in acquitting the accused. There is no perversity or illegality in the order of acquittal.

34 We, therefore, do not find any merit in this appeal and hereby dismiss the same.

(V. G. BISHT, J.)

(PRASANNA B. VARALE, J.)