

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

CRIMINAL APPEAL NO. 331 OF 2017

Baban Datta Gaikwad
aged 37 years, resident of Juna
Boramani Naka, Raviwar Peth,
Solapur

....Appellant

Versus

1. The State of Maharashtra
(At the instance of Jodbhavi Peth Police
Station, Solapur)

2. Vidya Balaji Bansode
Aged 17 years, Occ. Student

3. Mayuri Balaji Bansode
Aged 15 years, Occ. Student

4. Vaishnavi Balaji Bansode
Aged 14 years, Occ. Student

5. Sanyukta Balaji Bansode
Aged 12 years, Occ. Student
Through their Grandmother
Mirabai Nathaji Kambale
Age. 61 years, Occ. Housewife
R/at. Dharavi Zopadpatti, Chote Sion
Hospital, Mumbai

....Respondents

Mr. Ganesh Bhujbal for the Appellant.
Mrs. M. M. Deshmukh, APP for Respondent No.1-State.
Mr. Shantanu Phanse for Respondent Nos.2 to 5 (Appointed by
Legal Aid Panel)

**CORAM : PRASANNA B. VARALE &
S. M. MODAK, JJ.**

RESERVED ON : 26th FEBRUARY, 2021

PRONOUNCED ON : 10th MARCH, 2021

JUDGMENT : (PER S. M. MODAK, J)

. Issue involved in this appeal is whether the theory of homicidal death is to be believed or whether the theory of homicidal death is doubtful on the basis of available investigation papers thereby suggesting accidental death ?

2. Trial Court i.e. the Additional District and Sessions Judge, Solapur had chosen to accept the theory of homicidal death and convicted the present appellant for committing murder of one Pooja Balaji Bansode. He was convicted for the offence punishable under section 302 of IPC. He has challenged the correctness of the said judgment before us.

3. We have heard Mr. Ganesh Bhujbal, the learned Counsel for the Appellant, Mrs. M. M. Deshmukh, the learned APP for Respondent No.1-State and Mr. Shantanu Phanse, the learned Counsel (Appointed by Legal Aid Panel) for Respondent Nos.2 to 5. Respondent Nos.2 to 5 are the daughters of deceased Pooja and they have been joined as the Trial Court was pleased to award them compensation of Rs.40,000/- from the fine amount of Rs.50,000/-, which has not been deposited by the Appellant. This Court granted

him bail.

4. After perusing the record with the assistance of both the sides, we are inclined to hold that there are materials brought on record which creates doubt about the theory of homicidal death. These materials were part of the investigation papers and they were tendered in evidence. The learned trial Judge has come to conclusion about homicidal death without considering those papers. So we have no alternative but to set aside conviction. We will give reasons for our opinion hereinafter.

5. Admittedly, the deceased Pooja and accused were not relatives in any form. Though not satisfactorily but it has come in evidence (through PW-6 Gangabai Kisan Randive) that the deceased Pooja used to sale liquor. The reasons for the quarrel suggested by the prosecution are two: one is deceased Pooja not paying any amount to the accused for consuming liquor and gutka. second is the accused doubted the character of deceased Pooja. Though it has not come in evidence that the accused was having any illicit relationship with deceased Pooja but the evidence suggest that accused was in position to make some demand with the deceased.

6. Deceased Pooja was one of the daughters of first informant Mirabai Nathaji Kamble-PW-1. Pooja's husband is no more. She was having 4 daughters. Out of them Mayuri Balaji Bansode and Sanyukta Balaji Bansode gave evidence as PW-3 and PW-2

respectively. Both have not completed their minority. Deceased Pooja was having two more daughters by name Vidya and Vaishnavi. The accused used to visit the house of first informant near Ravivar peth, old Boramani Naka, Solapur. The accused harassed the deceased during those visits. Resultant act took place on 2/11/2011.

7. To prove the allegations the prosecution in all examined 6 witnesses. Admittedly, the first informant Meerabai (the mother of deceased) is not an eye witness to the main incident, PW-2-Sanyukta Bansode and PW-3-Mayuri Bansode were portrayed as eye witness to the main incident whereas PW-6-Gangabai Randive is a neighbour, PW-4-Arjun Lagmanna Kankurti is a panch who attended the spot panchanama. PW-5- PI Yashwant Baburao Shirke is the Investigating Officer.

8. It is a matter of record that the Doctor who performed autopsy has not been examined. It is for the reason that the post mortem report was admitted by the defence and it is at Exhibit 45. Doctors at Government Hospital, Solapur performed post mortem on 3/8/2011. We can read the post mortem report. There are 83% burn injuries. The shock due to burn injury was the cause of death. No doubt it is unnatural death. We have to ascertain whether the findings of the trial Court about homicidal death is correct or not ?

9. The trial Court on one hand believed upon the evidence of eye witnesses account in the form of testimony of PW-2-Sanyukta

and PW-3-Mayuri whereas on the other hand has declined to believe the story of accidental death. The story of accidental death is suggested in two manner. One is in the form of dying declaration of the deceased recorded on 2/8/2011 by the Special Executive Magistrate. Secondly, by way of referring it in the letter dated 2/8/2011 sent by police head constable attached to Jodbhavi Peth Police Station, Solapur to the Special Executive Magistrate. Both were admitted by the accused. The learned Trial Judge has preferred to believe what the eye witnesses have actually seen rather than what is referred in the above documents while arriving at the said conclusion. Trial Court considered the seized articles (and also not noticed seizure of kerosene stove) from the spot panchanama and also referred to result of analysis done by the Chemical Analyzer (particularly clothes of the accused)

10. Trial Court has drawn inference against the accused for the reason of non examination of the Special Executive Magistrate and the Medical Officer who have been instrumental in recording the dying declaration. The trial Court has refused to consider the fact of both the hands of accused having burn injuries and his conduct of shifting the deceased to the hospital.

11. The appellant has challenged all these findings. According to him the trial Court has wrongly put the burden on the appellant. According to him the trial Court ought to have considered the

material which are part of the investigation papers (which were infact not produced by the accused) in favour of the appellant. Learned Advocate for the appellant also pointed out certain lacunae in the evidence of PW-2-Sanyukta and PW-3-Mayuri.

OUR OBSERVATION

12. We have gone through the prosecution evidence on the background of the objections. It is true that the first informant PW-1-Mirabai is not the witness to the incident. She has only set the criminal law into motion. Whether the accused has harassed the deceased during her life time is required to be ascertained from the available evidence because it is the reason for which the main incident of burning took place. As such there are two reasons for harassment. One is not paying money for liquor and gutka and second is doubting the character of the deceased. It can be said to be the motive behind burning. It is true that Mirabai, mother of the deceased has neither seen the previous harassment nor the main incident. Whatever she has stated about the harassment is on the basis of information given to her by the daughters of the deceased. We agree with the trial Court that there is no delay in lodging of FIR by her. The incident took place on 2/8/2011 in the evening and the deceased succumbed to the injuries on 3/8/2011. Whereas the FIR is lodged on 3/8/2011 at about 11.05 a.m.

13. We have read the evidence of PW-2-Sanyukta and PW-3-Mayuri on the point of harassment on account of non payment of

money for liquor, gutka and on account of suspecting the character of the deceased at the instance of the accused. We can find that both have stated about harassment by the accused to their grandmother. It is true that they have not stated any specific incident that is to say the date and time. No doubt true the Court is aware that both are child witnesses and have not attained the age of majority. The trial Court after putting preliminary questions found them competent to give evidence on oath. At the same time it is also true that their evidence may be crucial for deciding the guilt of the accused.

14. It is true that this case does not involve harassment of the woman due to matrimonial relationship. Section 498 of IPC is not applied. So the evidence on the point of harassment can only fall under the category of motive. It is true that the evidence of these two eye witnesses is very short. They tried to explain the background for the main incident in a very cryptic manner.

15. PW-2-Sanyukta was playing outside the house at the time of incident whereas PW-3 Mayuri had gone out for bringing rice from the grocery shop. PW-3-Mayuri had not seen the accused entering the house. Even PW-2-Sanyukta has not said when the accused came to the spot. She had explained the incident on the point of *"pouring kerosene on the person of the mother by the accused"* She had also explained the quarrel and reason prior to the incident of pouring kerosene.

16. It will be material to consider from where the kerosene and match box were brought. As per PW-2-Sanyukta the kerosene was brought by the accused whereas the match box was brought by the witness herself. After seeing the ghasty incident, she ran away from the house. It is true that no evidence is adduced from where the kerosene and matchbox were brought.

17. Our attention is brought to the admission given by these witnesses PW-1-Mirabai and PW-2-Sanyukta during cross examination thereby suggesting accidental death. The witness has admitted about explosion of stove and shouting by the mother and then assembling of neighbours and then the witness going inside the house. The witness admitted the above act of dousing of fire by the accused and shifting of the deceased by the accused by putting her in autorickshaw.

18. Whereas witness Mayuri arrived at the spot when she had seen smoke coming out of the house. She had seen her mother and the accused inside the house. She had seen accused pushing mother towards wall. So admittedly, she has not seen the incident. During cross examination she has admitted her dislike towards visit by the accused to their house.

19. The learned trial Judge has concluded about proving spot panchanama. It is through the panch witness PW-4-Arjun Kankurti

and Investigating Officer PW-5-Yashwant Shirke. Trial Court inferred about not finding out kerosene stove from the spot. The said factual finding is correct. Our attention is also brought towards the answer given by the witness Mayuri about the condition of PW-2-Sanyukta *"she was lying unconscious outside the house"* as stated by PW-3-Mayuri. According to the appellant if Sanyukta was unconscious, it was no way possible to witness the incident by her. It is unclear when actually Sanyukta fallen unconscious. Whether it is after witnessing pouring of kerosene by the accused or after witnessing her mother engulfed in fire.

20. From the evidence of PW-3-Mayuri it can certainly be inferred that accused was present in the house when the deceased caught fire. This inference is fortified by the fact that the accused has admitted some of the documents. Arrest panchanama carried out on 3/8/2011 is admitted by the accused. The left side collar of the shirt of the accused was burnt. There was a bandage applied to his both hands when he was arrested. The chemical analyzer has noticed residue of kerosene on that shirt. If such is the scenario it is for the accused also to explain how he received injuries and under what circumstances. Such burden is not heavy as that of prosecution.

21. The dying declaration of the deceased recorded on 2/8/2011 at 22.35 hours at Exhibit 41 by the Special Executive Magistrate is admitted by the accused. So also one letter dated 2/8/2011 at Exhibit 40 written by the Police Head constable,

Jodbhavi Peth Police Station, Solapur addressed to Special Executive Magistrate is admitted by the appellant. It is true that two different stories are mentioned in both these documents. Covering letter at Exhibit 40 mentions as follows: deceased and accused both were injured in the burning incident. second the deceased was cooking food and daughter Sanyukta poured kerosene from the glass in clay stove as a result there was explosion.

22. Whereas in dying declaration at Exhibit 41 the deceased has no where stated about pouring of kerosene by her daughter. But she has stated about pouring of kerosene in the stove by herself and explosion of stove.

23. Trial Court has put burden on the accused to prove these documents. According to him no witness either the writer or the Medical Officer were examined that is why adverse inference has been drawn against the appellant. We do not subscribe to this view. These documents are part of investigation papers. It is the prosecution who has filed them along with the charge-sheet. The accused may admit it or may not admit it. Some papers may be favourable to the accused or may be against him. The accused is at liberty to admit papers. That is wisdom of the accused. If prosecution files a particular paper and accused admits it, you cannot put the responsibility on the accused to prove it and draw an adverse inference for the failure. The Court has to consider such document relied upon by the prosecution and admitted by the accused. In fact

the burden will be on prosecution to prove that a particular story referred in such document is not a correct story but the story is otherwise.

24. Can it be said that by examining PW-2-Sanyukta and PW-3-Mayuri, the prosecution has tried to explain the veracity referred in these two documents. We do not think that prosecution has done that. The evidence of PW-2-Sanyukta and PW-3-Mayuri (subject to inherent limitation) can only throw light on the happening of the incident. They are certainly not authors of two documents at Exhibit Nos. 40 and 41. The prosecution can be said to have discharged their burden if they could have explained the circumstances for the author of these documents who created them. It has not happened. The trial Court has wrongly placed burden on the accused.

25. We agree to some of the factual observations by the trial Court made about the spot, kerosene residue found on the shirt of the accused, absence of delay in lodging FIR. But we are sorry that the other observations as referred above cannot be sustained.

26. The law on the point of multiple dying declarations is settled. Multiple dying declarations can be consistent with each other or may be inconsistent. If they are inconsistent, the job of the Court is more onerous that is to say which one amongst multiple inconsistent dying declarations is to be believed. No doubt the Court can certainly perform that delicate job. Unfortunately the trial Court

has not done that and arrived at the conclusion of the guilt of the accused by putting wrong burden on him. From the evidence of Investigating Officer also we cannot draw any inference about what are the compulsions for creating the documents at Exhibit 40 and 41. We think that the accused has succeeded in creating the doubt in the prosecution case. So we have to give benefit to him. So we have no alternative but to set aside the conviction based on wrong interpretation of principles of criminal trial. Hence we are inclined to set aside the conviction and we give benefit of doubt to the accused.

AMOUNT OF COMPENSATION

27. While dealing with the appeal against conviction the Hon'ble Supreme Court directed the Haryana State Legal Services Authority to pay interim compensation of Rs.10 Lakhs to the mother of the deceased. The Appeal was dismissed. The Hon'ble Supreme Court has taken overall survey of the schemes framed all over India as per the provisions of Section 357-A of Cr.P.C. The upper limit framed by certain States was considered on a lower side. These are the observations in case of Suresh and Anr. Vs. State of Haryana¹. Whereas while exercising the writ jurisdiction, the Patna High Court was pleased to award interim compensation of Rs.50,000/- to the Petitioner who is the father of the deceased. In that case the High Court was not exercising the appellate jurisdiction. This is in case of Abdul Rashid vs. State of Orissa,² whereas in case of State of

¹ (2015) 2 SCC 227

² 2013 SCC Online Ori. 493

Karnataka vs. Mr. Vishwanantha Devadiga & Anr.³, the High Court of Karnataka has set aside the order of acquittal passed by the Additional Sessions Judge and conviction was ordered. Certain guidelines were given for effective implementation of provisions of Section 357, 357 A of Cr.P.C. Whereas in case of Sumit Kumar Shaw & Anr. vs. State of Jharkhand⁴, the High Court of Jharkhand has emphasized on making recommendations to the Legal Services Authority in respect of quantifying and fixing the amount of compensation by the Court. There was a petition for quashing.

28. Above judgments are relied upon by Mr. Phanse, the learned Counsel (appointed by Legal Aid Panel) for Respondent Nos. 2 to 5. Whereas in case before us there is already an order of paying compensation. As for the reasons stated hereinabove we have set aside the conviction and hence the issue had cropped up before us as to whether recommendations can be made when there is an order of acquittal.

29. The trial Court has imposed fine of Rs.50,000/- on the appellant and directed to pay Rs.40,000/- towards compensation to the daughters out of that fine amount. This order is passed in exercise of power under section 357 of the Code of Criminal Procedure. Section 357 comes in picture only when there is conviction. Section 357(A) of Cr.P.C. takes care of the contingencies wherein the accused is acquitted and still the Court wants to pay

3 Cri. Appeal No.770 of 2013

4 Cri. M. P. No.2194 of 2020

compensation to the victim. The victim is defined in section 2 (wa) of Cr.P.C. as a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir. Four daughters certainly fall within that definition. They are Respondent Nos.2 to 5. The fact that accused is charged and tried is sufficient to satisfy the test of "has been charged" used in section 2 (wa) of Cr.P.C. It can no way to be interpreted as "convicted".

30. It mandates the District Legal Services Authority to decide the quantum of compensation if recommendation is made by the Court. It mandates the State Government to frame the scheme for providing funds. There is already a scheme framed and it is published in the notification dated 11/4/2014. There are 8 criteria of eligibility to get compensation as per clause 4 of the said scheme. Making recommendation by the Court is one of the criteria. Section 357 (A) does not specify the Court. It does not mean to say that it is the trial Court only and not the appellate Court.

31. As per the provision of section 386 of Cr.P.C. the appellate Court has got all powers to pass appropriate orders. It has come in the evidence that the father of PW-2-Sanyukta and PW-3-Mayuri has expired whereas their mother died in this incident. Other daughters Respondent No.2-Vidya and Respondent No.4-Vaishnavi are staying with PW-1-Mirabai (as per FIR). So this Court feels that their interest needs to be protected and ultimately it is the responsibility of the

State that is why the scheme has been framed and the State Government is under obligation to make available the funds. Here we do not want to lay down any law on the subject of making recommendation in each and every case of acquittal. But the observation only pertains to facts of this case.

32. It is a fit case for making recommendation to the District Legal Services Authority, Solapur. The concerned authority may also ascertain whether compensation has been paid to them under any other scheme. Hence the following order is passed:

ORDER

1. The appeal is allowed.
2. The conviction of the appellant-Baban Datta Gaikwad as per judgment dated 7/3/2017 passed by Additional Sessions Judge, Solapur in Sessions Case No.299/2011 is set aside.
3. The appellant is acquitted for the offence punishable under section 302 of IPC. Fine paid, if any be returned to the appellant.
4. The appellant is discharged from the bail bond and personal bond.
5. The District Legal Services Authority, Solapur is directed to fix the amount of compensation to be paid to present Respondent Nos.2 to 5 occurred to them due to death of their mother Pooja.

6. The District Legal Services Authority, Solapur is directed to comply with the order as early as possible and preferably within a period of 3 months from the date of receipt of communication of this order to them.
7. With all best efforts, if it is not completed, they are at liberty to ask for the extension of time.
8. Registrar Judicial-I is directed to communicate this order to the District Legal Services Authority, Solapur.
9. Mr. Shantanu Phanse, learned Counsel was appointed to represent Respondent Nos.2 to 5 through Legal Aid Services Authority. We record that his assistance helped this Court in appreciating the material and arriving at final conclusion. Fees of the learned Counsel is quantified at Rs.10,000/- (Rupees Ten Thousand Only.) Legal Aid Services Authority to take appropriate steps.

(S. M. MODAK, J.)

(PRASANNA B. VARALE, J.)