

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

Criminal Application (APL) No. 125 / 2020

1. Sabirabano Yusuf Sayyad

2. Soliha Salim Sayyad

Both R/o 605, C-wing,
Hill view CHS, S.M.D. Road,
Antop Hill, Mumbai.

.. Applicants

Versus.

The State of Maharashtra

.. Respondent

Mr. Rizwan Marchant a/w Mr. Faisal F. Shaikh i/by Mr. Rizwan Marchant
and Associates, Advocate for Applicants.

Mr. Y.M. Nakhawa, APP for State.

Mr. Ravindra Wani, P.S.I., Antop Hill Police Station.

CORAM : SANDEEP K. SHINDE J.
RESERVED ON : 15th NOVEMBER, 2021.
PRONOUNCED ON : 24th NOVEMBER, 2021.

Oral Judgment : -

1. With the consent of learned Counsel for the parties, heard finally
at the admission stage.

2. Legality and correctness of order dated 7th January, 2020 passed by the Additional Sessions Judge, Greater Bombay in Sessions Case No. 518/2018 is assailed in this application.

3. Background facts are as under ;

(a). Mehnaz (deceased for short) was a 15 year old girl. Her mother had expired, when she was about four months old. Deceased was brought up by Yusuf, her maternal uncle. Salim is brother of Yusuf; Applicant No.1 is wife of Yusuf and Applicant No. 2 is wife of Salim. Deceased was reside in the house of Applicant No.1 and 2 and their family members.

(b). On 4th May, 2018 at about 09:30 pm on hearing commotion emanating from the house of Applicants, the neighbours rushed to the spot, where the deceased was found lying in unconscious state. Deceased's grand-mother Farida, Applicant No. 1 and 2 and Umaira, minor daughter of Applicant No.1 were then present in the house. They were making efforts to resuscitate the deceased. On enquiry the inmates of the house informed that deceased fell in bathroom and become unconscious. Deceased was shifted to Sion Hospital. She was declared dead, before admission.

(c). Initially the accidental death enquiry was registered. Inquest was conducted. It transpired that inmates had made incorrect statement about the cause of death. Hence, crime was registered with Crime No. 181/2018 at Antop Hill Police Station.

(d). Postmortem report revealed cause of death was ligature strangulation of neck (unnatural).

4. Prosecution case is, Accused used to ill-treat and harass the deceased and in-furtherance of criminal conspiracy, the deceased was done to death by strangulation and they caused disappearance of evidence.

5. The Applicants have been arraigned as Accused in Crime No.181/2018 for the offences punishable under Sections 302, 201, 120-B of the Indian Penal Code, 1860. Presently they are at Byculla Women's Prison. Out of eight, five accused have been discharged and one accused is juvenile.

6. Mr. Merchant, learned Counsel for the Applicants submitted that the Prosecution is erroneously proceeding to try the Applicants Accused

on charge for causing death of the deceased by strangulation; when the evidence on record distinctly and evidently leads to belief and indicate that the deceased had suffered 'suicidal' and not homicidal, death. Mr. Merchant in support of the submission, would rely on 'conduct' of the Applicants, post incident. Submission is that the Applicants made optimum efforts to save life of the deceased, which could be clearly seen from the statements of neighbours; Shagufta Khan and Jabin Shaikh. These witnesses had rushed to the house of the deceased, after hearing the commotion. Mr. Merchant submitted Applicants sought emergency medical help of Dr. Shahina Ansari, resident of the same building. It is submitted that the deceased was taken to the Keny Hospital, where Dr. Rasika examined the deceased in taxi. After which as advised by Dr. Rasika, deceased was taken to Sion Hospital. However, she was declared dead before admission. Contention of Mr. Merchant is that deceased was nourished by the Applicants and their family, when she was little one and ever since, her father abandoned her. Thus argued that there was no reason, that Applicants would cause her death. Mr. Merchant's argument is that the conduct of the Applicants post incident, cast shadow of doubt over the Prosecution case, which is inconsistent with the evidence of record. His argument is

that, had the Applicants intend otherwise, they would not have summoned the doctors and taken the deceased to the Keny Hospital and thereafter at another Hospital at Sion. Mr. Merchant submitted Prosecution case being founded on circumstantial evidence, according to him, leave a part the conduct of Applicants, the other circumstances have rendered the Prosecution case indefinite. He relied on medical evidence and statement of Carpenter Hanumant Chavan. Mr. Merchant submitted Carpenter's version, Medical Jurisprudence together coupled with the conduct of the Applicants reasonably suggest that deceased had attempted to commit suicide by hanging and suffered suicidal death. I have perused statement of Hanumant Chavan. His statement was recorded ten days after the incident. He was summoned by Police to remove a rod, which was affixed in the bathroom. According to Chavan, when he removed the rod, he found one screw had broke down. Mr. Merchant's submission is that since deceased had attempted to commit suicide by hanging to the said rod, the screw had broke down. In my view, this submission is made only for the rejection and rejected accordingly. It is illogical, unreasonable and inconsistent with the evidence available on record. Mr. Merchant further submitted that in the case of strangulation, fracture of Larynx, trachea and hyoid bone is

inevitable. He submitted fracture of hyoid bone is commonly associated with strangulation and rarely occurs in isolation. In this case, hyoid bone of deceased was not fractured. Pointing out this fact, it is argued that the circumstances and the evidence, including the medical evidence rules out the Prosecution case of homicidal death, but on the contrary it suggest the deceased had suffered suicidal death. Mr. Merchant therefore, submitted the learned trial Judge erred the framing charge under Section 302 of IPC.

7. Here in this case, learned Judge has framed the charge under Section 302 of IPC and in alternative under Section 306. Insofar as alternative charge under Section 306 is concerned; it may be stated that offence under Section 302 and Section 306 are distinct. Its ingredients are altogether different. The framing of charge under Section 302, and in alternative under Section 306 is not permissible inasmuch as when there is doubt as to facts, Section 221 of Cr.P.C. has no application. In the case of **Prasoon Gupta and Ors. Vs. The State of U.P.** 2010 SCC OnLine All 1887; the Hon'ble Apex Court has held that the question framing of charge in alternative can arise, when there is no doubt about the facts, which can be proved but doubt is as to what offence will be

constituted on those facts. It is not permissible in law, to frame a charge for accused having abetted the suicide and a charge in alternative of murder, as it shows doubt as to facts. The offence under Sections 306 and 302 are diametrically opposed to each other. The ingredients of two Sections are different, the framing of the charge in alternative charge under Section 302 as directed, is likely to prejudice the accused Applicants.

8. In the case in hand, there is sufficient material on record, suggesting homicidal death of deceased. At the first place, the foremost evidence is the Postmortem Report. Autopsy Surgeons in their report opined that deceased died by ligature strangulation of neck. The particulars in Column No. 17 of the Postmortem Report were about the surface wounds and injuries, read as under;

"1. Soft, dark red, abraded ligature mark present on the neck and below the level of thyroid cartilage extending from right lateral aspect of neck to left lateral aspect, having total length 16 cm and maximum width 1.5 cm. It is situated 3 cm below right angle of mandible, 7 cm below chin and 5 cm below left angle of mandible. On cut section, the tissues beneath the ligature mark appear soft and red; neck vessels; cartilages and hyoid bone are intact. Muscle haematoma present in cricothyroid muscle and right thyroid muscle.

2. Two scratch abrasions situated one below the other present on left

pararacheal region, situated 1.5 cm from midline. Upper of size 0.3 x 0.1 cm and lower of size 0.5 x 0.1 cm, both are red in colour.

3. Abrasion with brown scab present on dorsum of left little toe of size 0.8 x 0.2 cm."

. Thus, this piece of evidence completely rules out the case of hanging and suicidal death of the deceased as sought to be canvassed by the Applicants. I have no reason to disbelieve surgeons' opinion at least in these proceedings, which rules out the case of hanging and suicide.

9. Additionally, the Applicants (Accused) were examined by Medical Practitioner at the request of Investigating Officer, on 5th May, 2021. Injuries in the nature of scratch and linear were found on the person of Applicant No.1; whereas 11 simple injuries in the nature of burises were found on the person of Applicant No.2. Although, these injuries may not be of much relevance at this stage, but in the context of facts of the case, this piece of evidence on weighing on the backdrop of the case, supports Prosecution case. Insofar as the arguments of Applicants that they made optimum efforts to resuscitate the deceased, by relying on the statement of neighbours and doctors is concerned, it may be stated witnesses found the deceased was lying on the floor and froth was

coming out from her mouth. Witnesses found deceased could not be revived and her body temperature was not measurable. So far as statement of next door doctor is concerned, when she examined the deceased, she could not feel pulse and did not notice cornea reflection. Additionally, Dr. Rasika, who examined deceased in the taxi, could not detect the pulse of the deceased. Therefore to say, evidence of witness, apparently neither suggests nor leads to infer that deceased had attempted to commit suicide and suffered a suicidal death. In fact, the medical evidence undoubtedly validate the Prosecution case under Section 302 of IPC.

10. So far as, motive is concerned, Prosecution relies on the statement of Witnesses Samira Ansari `mother of deceased friend; and father of deceased. Their statement implies that the Applicants were upset, on account of close friendship or association of the deceased with her classmate. On this count, it appears once deceased abandoned the company of the Applicants. Statement of Samira Ansari also suggests contacts of deceased with third person were snapped and she was not permitted to go out of the house or even to receive the phone calls. The statement of father of deceased suggests that the

deceased had disclosed to him as to how she was ill-treated by the Applicants/Accused and requested him to take her away from the company of the Accused.

11. Thus, after going through the entire evidence, in my view, there is a sufficient material on record to frame the charge against the Applicants under Section 302 of IPC.

12. Undoubtedly, in view of the judgment of the Hon'ble Apex Court in the case of Prasoona Gupta (supra) and in consideration of the facts of the case, the learned Additional Sessions Judge could not have framed the charge under Section 302 and alternatively the charge under Section 306 of IPC. Thus, the order to the extent framing the charge alternatively under Section 306 of IPC against the accused No. 1 and 2 is quashed and set aside. Only to this extent, the application is allowed. Needless to say that Prosecution shall proceed to try the Applicants for the offences punishable under Section 302 of IPC. The application is disposed of in the aforesaid terms.

13. It is made clear that observations made hereinabove be construed

as expression of opinion only for the purpose of granting bail and the same shall not in any way influence the trial in other proceedings.

(SANDEEP K. SHINDE, J.)

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