

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

CRIMINAL APPEAL NO. 423 OF 2013

Late Umesh Rajaram Samant
Through his legal heirs;

1A) Samruddhi Umesh Samant,
Aged 21 years, Occ. Education,
R/o. Room No.27, First Floor,
Old Nurses Quarters, School of Nursing,
K.E.M. Hospital, Parel,
Mumbai 400 012

1B) Mayur Umesh Samant,
Aged 16 years, Occ. Education,
R/o. Gopal Niwas, Harkul Khrud,
Mohul, Tal. Kankawali,
Dist. Sindhudurg – 416 602,
Minor through Guardian
Applicant No. 1 above

...Appellants

Versus

The State of Maharashtra
through the Police Inspector,
Police Station, Nivati,
District Sindhudurg

...Respondent

Mr. Amit A. Mane a/w Mr. Sagar A. Mane i/b Mr. N. V. Bandiwadekar for
the Appellants

Mr. S. S. Hulke, A.P.P for the Respondent-State

***CORAM : S. S. SHINDE &
SURENDRA P. TAVADE, JJ.***

***RESERVED ON : 15th DECEMBER 2021
PRONOUNCED ON : 23rd DECEMBER 2021***

JUDGMENT (Per S. S. Shinde, J.) :

1 Heard learned counsel for the appellants and the learned A.P.P for the respondent-State.

2 By this appeal, the appellant/accused has challenged the judgment and order dated 12th March 2013 passed by the learned Additional Sessions Judge, Sindhudurg at Oros, in Sessions Case No. 18 of 2012. Vide the said judgment and order, the learned Additional Sessions Judge has convicted the appellant/accused for the offence punishable under Section 302 of the Indian Penal Code ('IPC') and sentenced him to suffer rigorous imprisonment for life and to pay a fine of Rs. 5,000/-, in default of payment of fine, to suffer simple imprisonment for five months.

3 At the outset, it is necessary to mention that the appellant/accused, while undergoing the sentence, died on 29th November 2020, after pronouncement of the judgment and order by the Sessions Court. In normal course, upon death of appellant/accused, appeal would abate, however, in the present case, pursuant to the order dated 16th November 2021, the legal representatives of the appellant/accused i.e.

daughter and son of the appellant/accused are brought on record, to pursue the appeal for the cause of justice, by invoking provision to Section 394 of the Cr.P.C.

4 The facts in brief as are necessary for deciding the appeal can briefly be stated as under:

The appellant and the deceased-Vaishali were husband and wife. They were residing at Village Parule Manjardewadi, Taluka Vengurla, District Sindhudurg. The incident is alleged to have taken place on 16th February 2012 at about 11:30 a.m at their residence at Village Parule, Manjardewadi. It is alleged by the prosecution that the appellant/accused was working as Conductor in M.S.R.T.C. One Mahesh Gopal Madhav, a friend of the appellant/accused had come to the appellant's house on 14th February 2012 at about 7:00 p.m. At that time, Vaishali, appellant/accused's wife (deceased) and their children were in the house, while the appellant/accused was on duty at the relevant time. It is stated by the prosecution that said Mahesh Madhav slept at the appellant/accused's house on 14th and 15th February 2012 during night time. It is alleged that on the next day morning i.e. on 16th February 2012 at about 11:30 a.m, the appellant/accused came home from his duty and after some time, asked his

wife-Vaishali, who was cutting vegetables at the relevant time, as to why did she suppress the fact that Mahesh Madhav had slept at their house on 14th February 2012. The appellant/accused, dissatisfied by the reply given by Vaishali, got annoyed and took out a scythe (koyta) from the place beneath the TV and gave a blow on the head of Vaishali by means of said koyta from back side. Mahesh, on seeing the said incident, fled to the mango orchard. However, the appellant/accused caught hold of Mahesh and threatened him not to disclose the incident to anyone, else, he would kill him like Vaishali.

It is the case of the prosecution that on the day of incident, at about 1:00 p.m, one Ghanshyam @ Nilesh Vinayak Samant had been to the house of the appellant/accused and had seen that Vaishali was lying in a pool of blood in the kitchen room and some cut vegetables were lying near the body of Vaishali. The said Ghanshyam had asked the appellant/accused as to what happened, to which, appellant/accused replied that he did not know anything, as he had been to jungle to bring wood. At about 2:00 p.m, the said Ghanshyam brought Dr. Dipak Thakur at the house of the appellant/accused. The said doctor on examining Vaishali, declared her dead. It is the case of the prosecution that said Ghanshyam lodged a report against unknown person.

Pursuant to the report filed by Ghanshyam, a Crime No. 2/12 was registered against unknown person for the offence punishable under Sections 452, 454 and 302 of the IPC. During investigation, the appellant/accused was arrested on 17th February 2012. The clothes of the deceased were seized under panchanama; the spot panchanama of the offence was prepared; the koyta having blood stains was recovered from the kitchen room of the appellant/accused's house, the inquest panchanama was prepared and the Medical Officer carried out post-mortem examination on the dead body of Vaishali.

According to the prosecution, two days after the incident i.e. on 18th February 2012, said Mahesh Madhav approached the police and disclosed the said incident, pursuant to which, on 19th March 2012, his statement came to be recorded before the Judicial Magistrate under Section 164(5) of Cr.P.C. On 20th February 2012, clothes of the accused were seized. After completion of investigation, the charge-sheet was filed and charge was framed against the appellant/accused for the offence punishable under Section 302 of the Indian Penal Code.

The appellant/accused pleaded not guilty and claimed to be tried. The defence of the appellant/accused was that of denial and of false

implication. It is the case of the appellant/accused that Vaishali and Mahesh Madhav were in illicit relationship.

The prosecution, in support of its case, examined as many as 7 witnesses. The Trial Court, after considering the evidence adduced by the prosecution, convicted the appellant/accused for the offence as aforestated in para 2 above.

5 Learned counsel for the appellant/accused challenges the legality and validity of the impugned judgment and order. He submits that the eye-witness i.e. P.W 1 has not supported the prosecution case. Learned counsel submits that although PW 1 has admitted that he was visiting appellant/accused's house during day and night time, however, he has denied that he visited appellant/accused's house two to four days prior to the date of incident. He has stated that he had not seen the incident and that he was not present at the house but was in the jungle at the relevant time. Learned counsel submits that PW 1, in his cross-examination has accepted that he was present on the spot and also stated that he was threatened by the police to make statement against the appellant/accused, lest, he would be made co-accused in the case. Learned counsel submits that there is no

corroborative evidence to support the evidence of PW 1. Learned counsel submits that there is delay in recording the statement of PW 2 i.e. his statement was recorded after 4 to 5 days of the incident and his evidence is also not corroborated.

It is submitted by the learned counsel for the appellant/accused that the doctor who conducted the post-mortem on the body of Vaishali, is not examined. The post-mortem report shows the cause of death due to 'hypovolemic shock due to multiple skull fracture with severe brain injury', however, it is silent on the time of death and opinion about the weapon used in the offence.

Learned counsel submits that the prosecution could not have relied on the documents i.e the cause of death certificate (Exhibit 22), the post-mortem report (Exhibit 23) and the spot panchanama (Exhibit 19), as the same were not put to the appellant/accused while recording his statement under Section 313 of the Code of Criminal Procedure ('Cr.P.C). He submits that the prosecution has failed to prove the homicidal death of Vaishali (deceased).

Learned counsel submits that it is the prosecution case that the appellant/accused, on the day of incident, questioned the deceased as to why did she suppress the fact that Mahesh Madhav had slept at their house during night on 14th February 2012 and that the appellant/accused, dissatisfied by the reply given by Vaishali, got annoyed and took out a scythe (koyta) from the place beneath the TV and gave a blow on the head of Vaishali by means of said koyta from back side. Learned counsel submits that the best witness i.e. daughter of the appellant/accused, who was aged 13 years at the relevant time, is not examined by the prosecution to prove the presence of Mahesh Madhav at the residence of the appellant/accused. Thus, adverse inference may be drawn against the prosecution on part of motive, presence of PW 1 and appellant/accused and deceased last seen together.

Learned counsel further submits that the investigation is not fair investigation, inasmuch as, the appellant/accused was arrested on 17th February 2012, when there was no evidence against the appellant/accused and that the statement of the alleged sole eye-witness was recorded only after the arrest of the appellant/accused.

Learned counsel submits that in view of the above, the impugned order of conviction and sentence dated 12th March 2013 passed by the learned Sessions Judge, Sindhudurg, be set-aside and the appellant/accused be acquitted of all the charges levelled against him.

6 Learned A.P.P invites attention of this Court to the findings recorded by the trial Court and submits that the trial Court has properly appreciated the evidence on record. Star witness of the prosecution case is PW 1-Mahesh Gopal Madhav, who has actually witnessed the incident. The death of Vaishali is homicidal and the post-mortem report has been admitted by the accused. Therefore, learned A.P.P submits that appeal may be dismissed.

7 We have given due consideration to the submissions of learned counsel appearing for the appellant/accused and the learned A.P.P appearing for the State. With their able assistance, we have carefully perused the notes of evidence and also the findings recorded by the trial Court.

8 In order to prove the prosecution case, the prosecution examined 7 witnesses. One Mahesh Gopal Madhav was examined as

PW 1. In his examination-in-chief, so far as main act of the accused is concerned, he stated that he was present in the house of the accused at the relevant time and there was exchange of words between appellant/accused and his wife-Vaishali. Thereafter, accused has removed scythe (koyta) from the place beneath the TV. The accused assaulted on the head of Vaishali by means of said weapon from her back side. PW 1-Mahesh fearing that accused may assault him, fled away towards jungle. He further deposed that one hour thereafter, the accused brought him at his house from the jungle. The accused threatened him that if he would disclose the said incident to anybody, then he will kill him like Vaishali.

In his cross-examination, he stated that when his statement was recorded, he did not tell anything about the incident to the police. He further deposed that the police gave threat to him that he should depose against the accused before the Court. He further stated that even the statement under Section 164 Cr.P.C. before the Judicial Magistrate was recorded under the pressure of police. Judicial Magistrate did not ask any question to him whether there was a pressure of police upon him. He further deposed that he had not seen the accused while beating on the head of Vaishali by scythe from her back side. At the time of happening of the incident, he was cutting woods in the jungle.

Upon careful perusal of cross-examination of PW 1, it is abundantly clear that he has not supported the prosecution case. It appears that after the actual incident, the concerned Investigating Officer recorded his statement after 5 to 6 days. As deposed by PW 1, he had given said statement before the police supporting the prosecution case under the threats given by the police. The statement recorded before the Magistrate was also under the pressure of police. In substance, he has not supported the prosecution case. There is no other evidence on record brought by the prosecution in the nature of eye-witnesses who have actually witnessed the incident.

9 The prosecution examined Ghanshyam Vinayak Samant as PW 2. In his deposition, he stated that after completion of his routine work, when he was proceeding to his house, one Mr. Vitthal Madaye asked him to stop. He told PW 2 that something has happened to the wife of accused-Umesh. Thereafter, PW 2 and Vitthal went to the house of the accused. They saw that Vaishali was lying on the door of the kitchen. Blood was oozing from her injury. Accused-Umesh was there. He asked the accused as to how Vaishali suffered the injuries, in reply, he had stated that he was not aware how she had sustained the injuries, since he had been to jungle

for bringing wood and he does not know anything about the incident. PW 2-Ghanshyam informed the police about the death of Vaishali and thereupon, FIR came to be registered.

10 The other witness Mahadev Madwal (PW 3.) who was examined to prove the spot panchanama, has turned hostile.

11 The prosecution examined Vishnu Khobrekar (PW 4), who took the custody of the muddemal property and carried it to the Chemical Analyser for analysis.

12 The prosecution examined Vidyadhar Walawalkar (PW 5), father of the deceased Vaishali. In his deposition, he has stated that accused asked for money in the year 2009 and upon refusal, he got annoyed. From the entire evidence of PW 5, it can safely be stated that he has deposed in chief without stating any specific act of cruelty or mental harassment by appellant/accused to his wife Vaishali.

13 The Police Inspector-Uday Balakrishna Aafale, who conducted the investigation is examined as PW 7 by the prosecution.

14 It appears that since the medical report has been admitted by the defence, the Medical Officer was not examined by the prosecution. However, there is no dispute that Vaishali died homicidal death. In the post-mortem report, the cause of death of Vaishali has been mentioned as under :

“Hypovolemic shock due to multiple skull fracture with severe brain injury”.

15 Except the evidence of PW 1 discussed hereinabove, there is nothing brought on record to suggest that at the relevant time of actual incident, the appellant/accused was present in the house. However, as discussed hereinabove, PW 1 has turned hostile and did not support the prosecution case.

16 In that view of the matter, we are of the considered view that there is no substantive or direct piece of evidence to support the prosecution case and therefore, the prosecution case should fail. The Chemical Analyser’s report received by the Investigating Officer suggestive of blood stains of deceased on the clothes of accused is of no use, in absence of substantive piece of evidence on record.

17 In the light of of evidence brought on record and the discussion in the foregoing paragraphs, we are of the considered view that the impugned judgment and order of conviction of the appellant/accused cannot sustain. Hence, the following order :

ORDER

(1) The impugned judgment and order dated 12th March 2013 passed by the learned Additional Sessions Judge, Sindhudurg at Oros, in Sessions Case No. 18 of 2012, is set-aside.

(2) The appeal is allowed and stands disposed of accordingly.

[SURENDRA P. TAVADE, J.]

[S.S SHINDE, J.]