

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 511 OF 2019

1. Somnath s/o Balu Tambe,)
Age 20 years, Occ : Agri,)
r/o Dongaon Tambe, Taluka)
Paithan, district Aurangabad.)
)
2. Shiru @ Shriram s/o Dattu)
Tambe,)
Age 22 years, Occ : Agri,)
r/o Dongaon Tambe, Taluka)
Paithan, district Aurangabad.) ...Appellants

Versus

State of Maharashtra) ...Respondent

Mr. Joydeep Chatterji, Advocate a/w Mr. R.A. Jaiswal,
Advocate for the Appellants.

Mr. R.B. Bagul, APP for Respondent – State.

CORAM : R.G. AVACHAT &
R.M. JOSHI, JJ.

DATE : DECEMBER 05, 2022

JUDGMENT (PER R.M. JOSHI, J)

1. Out of 3 accused put on trial in Sessions Case no. 38 of 2015, present Appellants are convicted for the offences punishable under Section 302 of Indian Penal Code, 1860 by the impugned judgment and order dated 02.05.2019 passed by Additional Sessions Judge, Aurangabad. One of the accused stood acquitted against whom no appeal is preferred by the State.

2. As per the report of Satyabhamabai (PW 1), wife of deceased Abasaheb, on 06.11.2014 at about 08.30 pm Shiru Tambe and Sominath, Appellants herein, came to her house and invited Aba for mutton treat. Though she opposed Aba going with them but still he went along with them and did not return in the night. On the next day, dead body of Aba was found in the well. Thereafter, the postmortem was conducted on the dead body and when it was found that Aba died due to injury to his head, report was given to concerned police station. On the basis of the said report C.R. No. 106/14 came to be registered with MIDC Paithan Police Station.

3. Investigation into the said crime was done by PSI Dongare. During investigation he visited the spot and panchnama was drawn in presence of witnesses. Similarly, statements of witnesses were recorded. On completion of investigation charge-sheet came to be filed. On committal of the case it came to be registered as Sessions Case No. 36 of 2015. Charge was framed against the accused vide Exhibit 45. On denial of the charge, they were tried.

4. According to learned Advocate for the Appellant - accused there is no conclusive evidence to show that the deceased died homicidal death and hence present prosecution must fail. It is also argued that testimonies of Satyabhamabai (PW 1) and Nanasaheb (PW 2) are inconsistent on material aspects and also in view of the fact that initially report was given to the police of accidental death of deceased, it is after 2 days report was lodged against the Accused, it is an afterthought and false case of implication. It is also argued that in absence of any inimical terms between Appellants and deceased, they had no motive to kill him and when from the evidence of medical officer who conducted autopsy it is clear that the possibility of accidental death is not ruled out, the judgment of conviction cannot sustain.

5. Learned APP supported the impugned judgment and order by citing evidence of Satyabhamabai and Nanasaheb. According to him, prosecution has proved that accused were seen together with the deceased and shortly thereafter deceased died and hence, the burden is on the accused to explain the circumstance in which

the death of deceased is occurred. According to him, therefore, it is not a fit case to cause interference in the impugned judgment.

6. Satyabhamabai (PW 1), wife of the deceased, deposed that on 06.11.2014 at around 08 to 08.30 pm Sominath and Shiru came to her house calling Aba for mutton party and in spite of her opposition Aba went along with them by taking a pot, two plates, four Bhakaris and onions. He did not return home in the night and on the next day his dead body was found in the well. As per her testimony, Nanasaheb (PW 2) informed her that in the postmortem report it has come on record that deceased died due to assault on his head and hence, she lodged report (Exhibit 63). In the cross-examination of this witness it has come on record that there is no previous enmity between accused and deceased which could have provided motive for them to eliminate him. Her evidence before the Court is not consistent with her report given to the police. Apart from the fact that there are inconsistencies in her testimony, the said report is given after two days of the incident. The importance of immediate FIR need not

be emphasized as it rules out the possibility of concoction and false implication in the crime. Here in this case though this witness was aware that her husband went along with Appellants she had not suspected against them. Even as per evidence of Nanasaheb (PW 2), initially he gave report (Exhibit 85) to the police on 07.11.2014 informing death of deceased by fall in the well. There is nothing on record to show in postmortem notes that injury to head was caused by assault. It only states cause of death as "head injury". In the circumstances the result of postmortem was never sufficient to lodge report against accused.

7. This case is based on circumstantial evidence, for want of any one having witnessed the incident in which deceased died & hence prosecution is duty bound to prove all circumstances leading to sole conclusion of guilt of accused. The prosecution is relying upon last seen theory and homicidal death of deceased to connect accused with this crime. Even if testimony of Satyabhamabai is accepted to be true by overlooking the discrepancies in her evidence, at the most it can be said that at around 08.30 pm present Appellants went to

the house of deceased and took him along with them. It is however not sufficient for the prosecution to seek proof of the guilt of accused on this sole evidence without further corroboration. Prosecution at the first instance must prove the time of death as well as homicidal death of deceased.

8. Perusal of evidence of the medical officer Dr. Darandale (PW 10) shows that deceased died 24 to 48 hours before commencement of autopsy. Medical officer was therefore unable to give not only exact but also approximate time of death. The gap of 24 hours in determination of time of death is too long not be sufficient to call upon accused to explain as to when deceased departed their company and the circumstance in which he died.

9. Medical officer in his testimony has narrated the injuries which were found on the person of deceased during autopsy. He recorded following external injuries :

- 1] Multiple abrasions of size from 4 Cm X 0.5 Cm to 0.5 Cm. X 0.5 Cm over forehead and root of nose region of face, reddish in colour.
- 2] Laceration of size 3 Cms X 0.5 Cm X muscle

deep, placed over lateral side of left eyebrow, reddish in colour.

- 3] Contusion of size 2 Cms X 0.5 Cm, over upper lip, reddish in colour.
- 4] abrasion of size, 0.5 Cm x 0.5 Cm, over left side of lower limb, reddish in colour.
- 5] Abrasion of size, 4 Cm X 1 Cm, over dorsal aspect of first pharyngeal region of left middle finger, whitish in colour.
- 6] Abrasion of size, 4 Cm X 0.7 Cms, over dorsal aspect of second pharyngeal region of right index finger, whitish in colour.
- 7] Abrasion of size, 0.5 Cm x 0.5 Cm, over middle 1/3rd of anterior side of right leg, whitish in colour.

Out of these injuries, injury no. 1 to 4 were found antemortem in nature whereas other remaining injuries were caused post death. On internal examination, two injuries were found in the nature of contusions. He opined cause of death as "head injury". In the cross-examination he accepted that if any person falls accidentally in the well built in layers the injuries caused at serial no. 1 to 4 are possible by said fall. He further accepted that if the head is hit by surface of stone while falling hemorrhage can cause to the scalp.

10. In this regard, it would be relevant to consider the situation and construction of well wherein

dead body was found. Murlidhar (PW 3) in whose presence spot panchnama was done, has admitted that there is a step in the well at the distance of about 10 to 15 fts. Trimbak (PW 4) has deposed that the well has no protection wall. He also accepted that there is place / platform for engine and electric motor and for retaining articles. He further candidly accepted that if anyone falls accidentally in the well he may fall on these steps before entering in water. This evidence on record coupled with opinion of medical officer creates possibility of death of deceased being caused by accidental fall in the well.

11. Apart from the fact that there is delay in lodging FIR, the same has been lodged at the instance of Nanasaheb. There are circumstances appearing from the record which create doubt as to whether lodging of report against accused is an attempt to conceal involvement of any other person in this case. It has come on record from the testimony of Pandurang (PW 7) that deceased was habituated to liquor which runs contrary to the evidence of Satyabhamabai who claims that he never consumed liquor and which shows that she

is concealing relevant fact. This witness also claims that deceased used to go in the field in the night for lifting water meaning thereby the date of incident was not only time when in night he went out of house. Trimbak (PW 4) in his evidence before the Court has accepted that there used to occur quarrels between deceased and Satyabhamabai and there was talk in the village about illicit relations between her and Nanasaheb. Surprisingly, panch witness Murlidhar (PW 3) has deposed about a veil being found at the spot. He further stated that such veil is used only by Nanasaheb and no other person used such veil in the village. The finding of the veil at the spot at the time of spot panchnama creates possibility of presence of someone else at the spot other than Accused and that Satyabhamabai and Nanasaheb, might have some reason to suppress truth.

12. One more aspect needs mention herein is that not only there is a possibility of accidental fall of deceased in well but at the same time there is absolutely no evidence on record to show that at spot any incident of assault or even scuffle has taken

place. In case the deceased was assaulted at or nearby to spot, some marks of scuffle or occurrence of any sort of incident would appear there. Spot panchnama does not indicate happening of any unnatural event at spot. In the result, it would be only mere assumption hold that the deceased was assaulted and his dead body was thrown in the well, which is not permissible in law to convict accused.

13. Considering the aforesaid evidence on record, and delay caused in lodging FIR there is reason to believe that the report against accused is lodged in order to create a false record. Similarly, there is no conclusive proof that deceased died homicidal death and circumstances appearing from the evidence on record indicate the possibility of accidental fall of the deceased in the well. Even assuming the case of the prosecution that deceased went along with accused, there was no motive or reason for the accused to kill him for want of any previous enmity. Similarly, since the time of death is not duly established it cannot be held with certainty that accused continued to remain in the company of deceased or he never left their

company. We find no substance in the contention of learned APP that the burden is on the accused to explain as to how deceased is died by taking aid of Section 106 of Evidence Act, for the reason that initial burden is always on the prosecution to prove all the circumstances leading to the conclusion of the guilt of the accused and only thereafter the accused can be called upon to provide any explanation. Since the prosecution has failed to bring reliable evidence on record to connect Accused with death of deceased, the stage for providing explanation by them never arrived. The evidence on record does not take case of prosecution any further than creating suspicion against accused, which can never take place of proof of guilt. Hence, the conviction recorded against Appellants / Accused cannot sustain.

14. In view of above discussions, we proceed to pass following order:

O R D E R

1. Criminal Appeal is allowed.
2. The impugned judgment and order of conviction and sentence dated 2/5/2019, passed by learned Additional Sessions

Judge, Aurangabad in Sessions Case No. 38/2015 is set aside. The appellants – accused are hereby acquitted of the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. They be set free forthwith if not required in any other case. Fine amount, if paid, be refunded to them.

(R.M. JOSHI, J.)

(R.G. AVACHAT, J.)

Malani