

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

CRIMINAL APPEAL NO.13 OF 2016

Sanjay Shamrao Birange	... Appellant
Versus	
The State of Maharashtra	... Respondent

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Mr. Ajit M. Savagave, Advocate (appointed) for the Appellant.
Ms. Veera Shinde, APP, for the Respondent-State.

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**CORAM : SMT. SADHANA S. JADHAV &
SARANG V. KOTWAL, JJ.**

RESERVED ON : 09th MARCH, 2022

PRONOUNCED ON : 11th MARCH, 2022

JUDGMENT : [*PER SARANG V. KOTWAL, J.*]

1 The Appellant has challenged the judgment and order dated 6.4.2015 passed by the Additional Sessions Judge, Jaysingpur in Sessions Case No.14/2012. The Appellant was convicted for commission of the offence punishable under Section 302 of the Indian Penal Code and was sentenced to suffer life imprisonment and to pay a fine of Rs.1,000/-; and in default, to suffer rigorous imprisonment for three years. The Appellant was granted set off as per Section 428 of Code of Criminal Procedure,

1973 for the period which he had already undergone as an under-trial prisoner. The Appellant was the only accused in the trial.

2 Heard Shri Ajit Savagave, learned counsel appointed appointed for the Appellant and Ms. Veera Shinde, learned APP for the State.

3 The prosecution case, in brief, is as follows:

The deceased in this case was one Indu. She was earlier married with one Vijay and she had two sons from that marriage, namely, Ajay and Rohit. It is the prosecution case that subsequently she married the present Appellant and at the time of the incident i.e. on 13.2.2012 she was residing with the Appellant and Rohit at village Chipri. In that night, Rohit saw that the Appellant was removing money from the person of Indu. Rohit got suspicious. He went near her and touched her head. He found that she had suffered bleeding injury on the head. The Appellant went away from the house. Rohit inspected the injured Indu's injury and he found that her head was crushed by a grinding-stone which was lying nearby. He realized that the Appellant had committed murder

of the deceased Indu. He immediately rushed to Indu's sister Vimal, who was residing in the same village. He informed this fact to Vimal, who along with others rushed to the Appellant's house. They found that Indu was lying in a pool of blood. Vimal went to the police station and lodged her FIR at 1.20 a.m.. The investigation was carried out. The Appellant was not found immediately but he was found after about three months in a village in Karnataka. He was arrested. The investigation was carried out and the charge-sheet was filed. The case was committed to the Court of Sessions and at the conclusion of the trial the Appellant was convicted.

4 In support of its case, the prosecution examined following witnesses :

- ◆ PW-1 Vimal Kamble – sister of the deceased Indu. She had lodged the FIR.
- ◆ PW-2 Rohit Sathe, was the alleged eye witness. He was present in the house when the deceased was assaulted.
- ◆ PW-3 Ajay Sathe was the brother of PW-2 Rohit and son of the

deceased. He was staying separately for his education.

- PW-4 Ujwala Sankpal and PW-5 Jaysing Gaikwad were the neighbours of the Appellant and the deceased.
- PW-6 Suresh Birange was the relative of the Appellant. He had turned hostile. According to the prosecution case, the Appellant had called him and was checking about the news from his village.
- PW-7 Ramchandra Birange was another relative of the Appellant. He was also declared hostile. On 13.2.2012 he had received a phone call from the Appellant and he had asked for the phone number of PW-6 Suresh, which was given by this witness to the Appellant.
- PW-8 Dr. Pandurang Pakhare had conducted the postmortem examination. The deceased had one external injury on the left side of the head. Internal injury showed that there was fracture of left temporal bone of the skull, fracture of left ear ossicles and rupture of both ear drums. According to this witness the deceased had suffered injuries after two hours of the last meal.

Those were caused by hard and blunt object and the cause of death was due to shock due to intra cranial haemorrhage due to head injury. PW-8 opined that the injury could be caused by the grinding-stone.

- PW-9 Usman Indikar was the employer of the Appellant. On 12.2.2012 he had paid salary to the Appellant at 11.00 a.m. Thereafter he had not seen the Appellant. He has stated that the Appellant was residing at Chipri.
- PW-10 Satish Marale was a neighbour and he has deposed that the Appellant was residing with the deceased and her son in the same house and there used to be frequent quarrels between the Appellant and the deceased. In the cross-examination, he has admitted that he had not disclosed names of the Appellant, the deceased and PW-2 to the police.
- PW-11 Ananda Kamble was residing near PW-1 Vimal's house and he had accompanied PW-1 Vimal and others when they had gone to the house of the deceased after the incident. He has deposed that PW-2 Rohit had told him that his father had

assaulted the deceased. He has also deposed that the deceased, the Appellant and PW-2 were residing together in their house at Malbhag Area. He admitted that, he had not disclosed the same fact in his police statement. He had also not told the police that PW-2 had told him that the Appellant had assaulted his mother with a stone.

- PW-12 is ASI Bajirao Patil. He had arrested the Appellant on 7.5.2012 from Kankanwadi, Karnataka.
- PW-13 PSI Annappa Kamble was the first investigating officer. He had taken down the FIR and the entry in the station diary. He had prepared the inquest panchnama and thereafter had handed over the investigation to API Risawadkar. The station diary entry is produced on record at Exhibit-48. The entry was taken at 1.20 a.m. and the entire case as narrated by PW-1 Vimal was mentioned in that station diary entry. The FIR thus was lodged at 1.20 a.m. in the night.
- PW-14 Dy.S.P. Jaysing Risawadkar was the investigating officer. He had recorded the statements of the witnesses. He has proved

the omissions and contradictions from their statements.

Besides this oral evidence, the prosecution has produced on record the C.A. report which shows that there was human blood on the grinding-stone but the blood group was inconclusive. The blood on the clothes of the deceased was of 'B-group'. The blood group of the deceased examined separately also showed that it was of 'B-group'.

5 Shri Savagave, learned counsel for the Appellant submitted that there is no direct evidence to the incident. PW-2 Rohit has not actually seen the blow given to the deceased. His evidence is not free from doubt. He is the only witness who is deposing about the Appellant's presence in the house. There is no other evidence to show that the Appellant was in the house when the deceased was assaulted. PW-2 Rohit's evidence is not trustworthy. The record shows that he was not staying in the village but was working in Chennai. Therefore, his version that he came to reside with the deceased and the Appellant is not probable.

6 Shri Savagave further submitted that none of the other

witnesses are relevant in this case because they have not seen the Appellant and the deceased in the house around the time when the incident had taken place. PW-1 Vimal has relied completely on the information given by PW-2 Rohit. Therefore, if PW-2 Rohit's evidence is discarded, being not trustworthy, then, the entire prosecution case must fall.

7 He submitted that the circumstance of 'last seen together' theory is entirely dependent on the evidence of PW-2 Rohit and, therefore, considering the quality of his evidence, this circumstance must be discarded.

8 He submitted that there is no recovery at the instance of the Appellant though there are allegations that the mobile phone and some amount was taken by him after commission of murder. The spot panchnama itself does not show that there were any blood stains on the grinding-stone.

9 Shri Savagave relied on a few judgments in support of his case as follows:

[i] Judgment of a Division Bench of this Court in the case of **Krishna Mahadev Chavan Vs. State of Maharashtra through**

Pusegaon Police Station¹. In this judgment, Section 106 of the Evidence Act was considered as well as the observations of the Hon'ble Supreme Court in a case of circumstantial evidence was quoted in paragraph-50 of this judgment. It was observed that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstance so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can safely be drawn and no other hypothesis against the guilt is possible. There is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions.

Shri Savagave also relied on the observations made by the Division Bench in paragraph No.46 of this judgment based on the observations of the Hon'ble Supreme Court in another case. It was observed that Section 106 of the Evidence Act does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge, and which could not support any theory or hypothesis

1 2021 SCC OnLine Bom 191

compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain.

According to Shri Savagave, in the present case, there is no question of invoking Section 106 of the Evidence Act because the prosecution has not discharged its burden of proving the basic necessary facts.

[ii] Judgment of the Hon'ble Supreme Court in the case of **Shivaji Chintappa Patil Vs. State of Maharashtra**². In that case, the Hon'ble Supreme Court had observed that it was well settled that Section 106 of the Evidence Act does not directly operate against either a husband or wife staying under the same roof and being the last person seen with the deceased. Section 106 of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a *prima facie* case, that the question arises of considering facts of which the burden of

² 2021 ALL M.R. (Cri) 1569

proof would lie upon the accused.

In that case, the Hon'ble Supreme Court had observed that the prosecution had even failed to prove beyond reasonable doubt, that the death was homicidal.

[iii] The judgment of the Hon'ble Supreme Court in the case of **Nagendra Sah Vs. State of Bihar**³. The Hon'ble Supreme Court observed thus :

“22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the court can always draw an appropriate inference.

23. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the

3 2021 (10) SCC 725

Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused.”

10 On the other hand, learned APP submitted that the prosecution has established its case beyond reasonable doubt. The evidence of PW-2 Rohit is sufficiently reliable. He had immediately rushed to PW-1 Vimal, who had gone to the spot of incident and immediately the FIR was registered. There was no scope for concocting any false story. There is ample evidence on record to show that PW-2 Rohit, the deceased Indu and the Appellant were staying together in the same house. Therefore, PW-2 Rohit is a natural witness.

11 We have considered these submissions. We have appreciated the evidence on record based on the principles laid down in the judgments referred to hereinabove. In that context, the evidence of PW-1 Vimal and PW-2 Rohit is very important. PW-2 Rohit has stated that the deceased was his mother. One Vijay Sathe was his father. His younger brother Ajay was taking education at Turachi. In the year 2012 he was residing at

Dhanagar Galli with the deceased and the Appellant. According to him, the Appellant had married the deceased. They came to Chipri in the year 2012. The Appellant was staying with the deceased from about 8 to 9 years. But, he used to assault her by suspecting her character. Initially they resided near the house of PW-1 Vimal but because of the frequent quarrels in their house they left that house. On 12.2.2012, he received his salary in the morning. He handed it over to the deceased. Then the deceased went to Turachi to meet PW-3 Ajay—brother of PW-2. She returned at around 9.00 p.m.. There was quarrel between the Appellant and the deceased as she had come late. Then they had their meals. Then the deceased, the Appellant and PW-2 himself went to sleep in the house. He woke up in the night to answer the nature's call. He saw that the Appellant was removing money from the person of the deceased. PW-2 questioned him. The Appellant told PW-2 to go to sleep. This witness however went towards his mother and touched her forehead to find that she was bleeding. The Appellant did not offer any explanation and just ran away from the house with money and phone. According to PW-2, the Appellant had assaulted the

deceased with a grinding-stone on her head. The stone was lying nearby. PW-2 then immediately went to the house of PW-1. PW-1 then along with others came back to the place where the deceased was lying. After that, PW-1 lodged her FIR.

In the cross-examination, PW-2 Rohit admitted to a few omissions from his police statement. As per those omissions, he had not told the police that the Appellant was removing money from the person of the deceased. He had also not told the police that the Appellant had assaulted the deceased with the stone.

12 We have considered the impact of this witness's evidence on the prosecution story as well as on the defence argument. Though, there are two important omissions, as mentioned earlier, they do not go to the root of the matter. First of all, when this witness PW-2 Rohit woke up, the deceased had already suffered the bleeding injuries and, therefore, he had not actually seen the Appellant giving a blow with the stone on the deceased's head. Though, he has not stated to the police that the Appellant was taking out money, the fact remains, as per his deposition, that the Appellant was present in the house. He was near the deceased and

then the Appellant just ran away never to return back.

13 That the Appellant was in the same village is proved by the prosecution through the evidence of PW-9 Usman Indikar, who was employer of the Appellant and had paid him salary at 11.00 a.m. on 12.2.2012. PW-10 Satish Marale and PW-11 Ananda Kamble have deposed that the Appellant, the deceased and PW-2 Rohit were residing together. PW-4 Ujwala Sankpal has also stated that they were residing together. PW-5 Jaysing Gaikwad has stated likewise. Though PW-4 and PW-5 had not stated this fact in their police statements as per the cross-examination, the cumulative effect of their evidence and also that of PW-1 Vimal does prove that the deceased was residing with the Appellant and PW-2 Rohit. Therefore, PW-2 Rohit becomes a natural witness. He has deposed on material aspects about the Appellant's presence at the time of incident.

14 The subsequent conduct of the Appellant is also very material in this case. After committing the assault, he had just left the village never to return. He was arrested after about three months from a village in Karnataka. He tried to make enquiries to

see the reaction in his village by calling his relatives PW-6 Suresh Birange and PW-7 Ramchandra Birange. But, he himself never returned to the village to attend the funeral of the deceased. The fact that he was residing and was in a relationship with the deceased is sufficiently proved by the prosecution and, therefore, his subsequent conduct assumes more importance.

15 PW-1 Vimal has spoken about the deceased, the Appellant and their frequent quarrels. She has deposed about their stay together in a house near PW-1's house and then subsequent shifting to the house where the incident had taken place. PW-2 Rohit had immediately rushed to PW-1. She, in turn, had gone to the spot with others, and thereafter immediately had approached the police station. She had given her complaint on 1.20 a.m. i.e. within a very short time. The incident had taken place at about midnight when PW-2 Rohit had seen the bleeding injury. There was no scope to concoct a false story or to implicate the Appellant falsely. The immediate registration of FIR with the police is of some significance in this case.

16 The evidence of the Doctor who carried out the

postmortem examination shows that the deceased had died within two hours of taking meals. This also supports the version of PW-2 Rohit, because he has stated that they had taken meals at around that time and the incident had taken place after two hours of their taking meals.

17 Therefore, in our view, the prosecution has proved all the basic facts beyond reasonable doubt and, therefore, the burden shifts on the Appellant to explain the facts which were within his exclusive knowledge as per Section 106 of the Evidence Act. In this case, the Appellant has offered no explanation. His statement recorded under Section 313 of Cr.P.C. merely denies the prosecution case. No specific defence is taken. Therefore, his offering no explanation provides an additional link to the prosecution case which they have already proved. In any case, PW-2's evidence proves the prosecution case beyond reasonable doubt.

18 The subsequent conduct of the Appellant in this case assumes more importance in view of the facts narrated hereinabove. Therefore, based on the ratio of the judgments cited by the learned counsel for the Appellant; in this particular case,

since the prosecution has discharged its burden of proving all the important basic facts, the burden did shift on the Appellant, which he has failed to discharge.

19 Considering all these factors, no case for acquittal is made out. There is no reason to interfere with the impugned judgment and order convicting and sentencing the Appellant. The Appeal, therefore, fails and is accordingly dismissed.

20 The efforts put in by the learned counsel for the Appellant, who was appointed to represent the Appellant, are appreciated. He shall be paid his legal fees as per the Rules.

(SARANG V. KOTWAL, J.)

(SMT. SADHANA S. JADHAV, J.)

Deshmane (PS)