

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

CRIMINAL APPEAL NO. 265 OF 2016

Santosh S. Mokashi .. Appellant.
v/s.
The State of Maharashtra .. Respondent.

Ms. Vriddhi Maria i/b. Mr. Ashish S. Sawant for the Appellant.
Mr. S. H. Yadav, APP for the Respondent-State.

CORAM: PRAKASH D. NAIK, J.
DATED : 25th FEBRUARY, 2022.

PER COURT:

This is an appeal under Section 374 of Code of Criminal Procedure, challenging the judgment and order dated 18th March, 2016 passed by learned Addl. Sessions Judge-1, Vasai in Sessions Case No.56 of 2013, convicting the Appellant for the offence punishable under Section 304 (part-II) of Indian Penal Code (IPC) and sentencing him to suffer imprisonment of seven years and fine of Rs.1000/-.

2 The case of the prosecution is as follows:-

- (a) Deceased was wife of the Appellant. Their marriage was solemnized about 20 years prior to the registration of First Information Report. Accused was suspecting character of deceased and there used to quarrels between them;
- (b) On 1st April, 2013, the first informant, who is brother of the accused, had returned from work. Thereafter, he heard the sound of quarrel from the house of accused. He ignored it taking

it as usual quarrel. After sometime, one person of his acquaintance informed him that the accused is beating his wife by means of stone;

- (c) First informant and his wife went to the house of accused and saw that accused was beating his wife Geeta by means of stone on her head and hand. At that time, friend of informant Rahul came there. He separated quarrel. Injured had sustained grievous injuries on head, face and hand;
- (d) Complainant and his friend Rahul took injured to Golden Park Hospital, Vasai. She was under going the treatment. She expired in the hospital. FIR was registered under Section 302 of IPC vide CR No.I-136/2013 ;
- (e) Investigation proceeded. Statements of witnesses were recorded. Clothes of deceased and accused were seized. Accused was arrested. Samples were sent to FSL for chemical analysis. On completing investigation, charge-sheet was filed.

3 Charge was framed against Appellant on 11th March, 2014 for offence punishable under Section 302 of Indian Penal Code. Prosecution examined six witnesses. Statement of accused was recorded under Section 313 of the Code of Criminal Procedure.

4 PW-1 Dilip Mokashi is the first informant. PW-2 Rahul Saroj is acquaintance of informant and accused. PW-3 Dr. Altmas Khan is the Medical Officer. He conducted post mortem. PW-4 Dinesh Yadav is Panch. PW-5 Avinash Patil is Panch. PW-6 Ramdas Wakode is Investigating Officer.

5 Learned Advocate for the Appellant submitted that, prosecution has failed to establish its case beyond reasonable doubt against the Appellant. There is no cogent evidence to convict the Appellant under Section 304 (part-II) of IPC. There are serious discrepancies in the evidence. There is no eye witness to the incident. Only on the basis that, the blood group found on the clothes of the victim and the accused is similar, the Trial Court ought not to have drawn adverse inference against the Appellant. The spot panchanama indicated that deceased could not have been with accused. Deceased was found at the distance from the house of the Accused. Statement of independent witnesses were not recorded. Conviction cannot be based on inference. Prosecution has not established circumstances to prove charge under Section 304 (part-II). PW-1 was not declared hostile. His version could not have been relied upon by trial Court. PW-2 did not support case of prosecution. He did not state that he is eye witness to the incident. Learned APP was permitted to put questions to the witness in the form of cross examination. He maintained his version in examination in chief. The prosecution did not examine any other witness from the locality. According to PW-1, one Bhayya told him that one lady is lying in injured condition by the side of house of his brother. This person has not been examined by prosecution. The Panch for arrest panchanama has not supported prosecution case about scratch mark on body of accused. There is no medical evidence to corroborate this fact. The incident took place near house of accused. However, the spot panchanama mentions the spot being at some other place i.e. in front of house of Narayan Mokashi. There is discrepancy about recovery of clothes. The accused is entitled for benefit of doubt.

6 Learned APP submitted that although the case is based on the circumstantial evidence, there are strong circumstances to show the involvement of the Appellant in the crime. Deceased is wife of the Appellant. Before the death of the deceased, she was in company of the accused. There is no explanation coming from the accused as to how the victim has died. The conduct of the accused is suspicious. The deceased is the wife of Appellant. They were residing together. On the date of incident, both of them were together. Soon after the quarrel, deceased was found lying in injured condition. The burden is cast upon the Appellant to tender the explanation under Section 106 of the Evidence Act as to what was the cause of death of the victim. Although, PW-1 has not supported the prosecution case fully, the evidence deposed by him supporting the case of the prosecution can be taken into consideration. PW-1 is brother of the accused. The evidence establishes that the deceased and Appellant were together at the time of incident. In these circumstances, the silence of accused in his explanation under Section 313 of Cr. P. C. or in accordance with Section 106 of the Evidence Act is sufficient to draw inference against him. There are strong circumstances to show the involvement of the Appellant in the crime. The clothes of the victim and accused were seized. These articles were forwarded to FSL for examination. Report indicates that the blood found on the clothes of the victim and the accused were similar. The evidence on record discloses the relationship between the accused and the victim was not cordial. On the date of incident, there was quarrel and the same was heard by the complainant. Victim was taken to the hospital by complainant and PW-2. Appellant did not take any steps to take the victim to the hospital. He has no explanation about his absence while victim was taken to hospital for

treatment. The trial Court has considered all the circumstances showing his involvement in the crime.

7 PW-1 Dilip Shaniwar Mokashi is the brother of the Appellant. His house is situated near the house of the accused. He lodged FIR. In the FIR, he has stated that after hearing the sound of quarrel and information received by him through another person, he visited the spot of incident. He saw the accused assaulting the deceased with stone. She had suffered several injuries and she was taken to hospital. She died in the hospital. However, in the substantive evidence before the Court, he stated that accused is his elder brother. His marriage was performed with the deceased about 20 years ago. Both of them were addicted to liquor and sometimes they used to quarrel under the influence of liquor. On 1st April, 2013, at about 8.00 p.m. he heard the noise of their quarrel and one Bhaiyya informed him that one lady was lying in injured condition by the side the house of his brother. He along with his wife went there. Geeta (wife of accused) was found at spot. He took her to the hospital for treatment. Doctor declared her dead. He informed it to Police. Police recorded statement. He signed it. The contents are correct. In cross examination, he admits that he has not personally witnessed the quarrel between accused and deceased. It requires 5 to 10 minutes to go to the house of accused from his house. The noise of quarrel from the house of accused is not audible. It is not correct that accused and Geeta were addicted to liquor and used to quarrel under influence of liquor. It is not correct that he had not heard noise of quarrel on the day of incident. He cannot tell name of Bhaiyya. He not know personally about the incident. He is illiterate person. Complaint was not read over to him. Complainant has resiled from his original version reflected in the FIR. Trial Court has,

observed that brother of the accused had no reason to lodge FIR. Assuming that he is resiling from the original version, he has deposed that he heard the sound of quarrel between the deceased and the accused. Immediately thereafter, deceased was found lying in injured condition. She was taken to the hospital. PW-1 is brother of accused.

8 It is pertinent to note that PW-1 has not deposed as per contents of FIR. There was no attempt from the prosecution to declare him hostile and cross examine him or seek permission from Court to put questions to the witness in the form of cross examination. Thus, the Court has considered whatever deposed by PW-1 before the Court. From the deposition of the witness, it is evident that he heard sound of quarrel on the date of incident. He was informed by one person that one lady is lying in injured condition by the side of house of accused. On visiting the spot, he saw victim lying in injured condition. He took victim to hospital. Thus, before the incident, there was quarrel between accused and the deceased. At the time, when complainant visited the spot, accused was not present. Victim was taken to the hospital by PW-1. The conduct of the accused post incident requires to be considered. He has not stated where he was when the victim was found injured.

9 PW-2 Rahul Saroj has deposed before the Court that he knows the complainant and accused. The name of wife of accused was Geeta. Sometimes, he used to go to the house of the accused. He do not know what habit both of them had. He cannot tell whether the accused was raising suspicion over the character of deceased. On 1st April, 2013, he went to job and returned home at about 7.00 p.m. There was commotion in locality that some one is beating Geeta. He went to the

place. He found that deceased was found lying in injured condition. It was open space. There were injuries on her head. He along with PW-1 and his wife took the deceased to Golden Hospital. When she was brought to the hospital, she was alive. At about 2.30 a.m. doctor told them that victim is dead. Police recorded his statement. He has stated to the police who and how deceased Geeta was assaulted. He did not see the assailant while assault. He resiled from the previous statement and hence, learned APP was permitted to put the question to him in the form of cross examination. He deposed that he did not tell the police while giving the statement that accused was suspecting character of the deceased and on that ground, he used to assault her. He did not state to the police that one person told him that he heard screaming of deceased and Santosh (Accused) was assaulting his wife Geeta with stone. He denied that he along with PW-1 and his wife, went to the open space in front of the house of the accused. He did not state to the police while recording statement that accused was hitting the deceased with stone on her head, face and hands and the deceased was shouting. He also denied that PW-1 and he took accused at the distance from the place where injured was lying. He read portion marked A, B, C from his statement and could not assign any reason why it was so written in his statement. He also denied that he has deposed falsely to save the accused. From the evidence of this witness, it is apparent that although he was eye witness to the incident, he resiled from his original version. In the Examination-in-Chief, it is stated that he knows the accused, the complainant and deceased. He used to visit the house of the accused. He heard the commotion in locality and visited the place of the incident. He also deposed that there were injuries on the head of victim. PW-1, his wife and he took the injured to hospital.

She was admitted in the hospital and was subsequently declared dead. From his evidence, it can be seen that accused did not admit deceased to hospital. Till she was declared dead at 2.30 A.M. the accused did not visit hospital to see his wife.

10 The inquest panchanama and the spot panchanama were admitted in the evidence by consent of the defence.

11 PW-3 – Dr. Almas G. Khan is Medical Officer. He conducted post mortem on the deceased. He was of opinion that death was due to neurogenic shock. Injuries mentioned in column 17 were ante mortem. The injuries may be possible by sharp and hard object. The injuries No.1 and 2 mentioned in column 17 of the post mortem report are sufficient to cause the death in ordinary course of nature. Post mortem report was marked in evidence as Exh. 20. In the cross examination, he stated that he did not find corresponding internal injuries to the injuries at Sr. No.1 and 2 mentioned in column No.17. The skull was not fractured. He denied that both the injuries were simple in nature. He sent viscera and found fluid in stomach. The fluid had smell. It was smell like alcohol. He denied that if the person falls from short height, the injuries mentioned in column 17 are possible. The death in this case is not intstntaneous.

12 The evidence of this witness refers to the injuries suffered by the victim, the nature of weapon by which injuries are possible and cause of death. The evidence discloses that deceased had consumed alcohol. Post mortem report refers to CLW over occipetal region 4 x 8 x 2 cm, CLW over (Rt) partial region, abrasion over (Rt) shoulder, abrasion over (Lt) shoulder and contusion over (Rt) hand cause of death is shock due to head injuries.

13 PW-4 – Dinesh S. Yadav is panch witness. He has not supported the prosecution case. He stated that he had not seen that there were abrasions mark on both hand, right side of the back, knees and head of accused. Police has recorded arrest panchanama of the accused. He had signed Panchanama. Accused was at police station. He knows the accused. He identified him in Court. Panchanama bears his signature. However, he do not know what Panchanama was recorded, where panchanama was drawn, he had singed at two places. It did not happen that Panchanama was already written before he reaches police station. When he went to police station, writing of panchanama had started. He do not know contents of Panchanama.

14 PW-5 – Avinash N. Patil is panch witness. According to him, he was called at Waliv police station to act as panch witness on 3rd April, 2013. He was knowing the accused as he was resident of his village. Accused gave statement that he has concealed the clothes worn by him at the time of incident in the corner of bath room of his house and he is ready to produce it. His statement was reduced into writing. He signed thereon. Another panch witness – Dharmendra and Ramdas B. Wakode-API, Shiruru Police Station also singed the Panchanama. He admitted the contents of the panchnama which was marked as Exh. 27. He further stated that accused took them at his house. He produced pant smeared with blood and shirt with blood from behind the bath room. Seizure panchanama was recorded. He admitted contents of the panchanama. Same was marked as Exh. 28. He identified seized clothes. He identified the accused in Court.

15 In the cross examination, he stated that API Wakode had

called him. When he went to the police station, API Wakode was there. It took half an hour to leave for the spot. They reached at the place shown by the accused. It took about half an hour for leaving that place on completing the panchanama. He went inside the house. It is not true to say that it did not happen that the accused gave a statement that he has concealed the cloths wore by him at the time of incident were behind the bath room of his house and it was reduced into writing in his presence. It is not mentioned in the panchanama that accused gave statement that he has concealed the cloths behind the bathroom and were seized from behind the bathroom. He cannot assign any reason as to why it is not mentioned therein. He denied that he signed the panchanama at the behest of police, which was already prepared by the police. He denied that he was deposing falsely at the behest of the police.

16 PW-6 Ramdas B. Wakode was attached to the Valiv Police Station as API. According to him, on 2nd April, 2013 Dilip Mokashi lodged a report. Crime was registered. He arrested the accused. He recorded the arrest panchanama. It is marked as Ex. 31. He drew inquest panchanama. It is admitted by accused. He went to the spot and drew the spot panchanama. He collected blood mixed earth and simple soil from the spot. Panchanama was marked in evidence as Ex. 18. He prepared map of spot. He seized blood smeared clothes of the deceased. The said panchanama was admitted by the accused. The photographer took photographs of the spot. He recorded statements of witnesses near the spot of incident. At the instance of accused, clothes were seized. He admitted the contents of the panchanama. The seized muddemal was sent to the F.S.L. He admitted the contents of the said documents. He forwarded these articles for analysis. He sought opinion from F. S. L. He

received C. A. report. After collecting the evidence, he submitted report in accordance with Section 173 (2) of Cr. P. C. In the cross examination, he stated that he personally called the panchas of discovery statement. They came within five minutes. He recorded the statement of neighbour of the accused. He denied that he had obtained the signature of the witnesses on arrest panchanama and spot panchanama which were already kept ready. He denied that the portion marked Exh. 34, 35 36 from the statement of PW-2 Rahul is not correct as per his say.

17 Statement of accused was recorded under Section 313 of the Cr. P. C. The defence of the accused is of denial. According to him, he has been falsely implicated in the crime.

18 The Trial Court, on analyzing the evidence on record, arrived at the conclusion that the incriminating circumstances brought on record by the prosecution are unmistakably and inevitably lead to the guilt of the accused and nothing has been highlighted or brought on record to make the facts proved or the circumstances to be in any manner in consonance with the innocent of accused. During the time of questioning under Section 313 of Cr. P. C., the accused instead of making an attempt to explain or clarify the incriminating circumstances connecting him with the crime has taken stand of total denial and lost opportunity to provide explanation. Such incriminating links of facts could, if at all, have been only explained by the accused and by nobody else, they being personally and exclusively within his knowledge. All incriminating circumstances, with sufficient and reasonable certainty on the facts proved, connect the accused with the death of deceased. However, for the reasons stated in the judgment, the trial Court has arrived at finding that the offence

committed by accused is '*culpable homicide*' not amounting to murder and convicted the accused for offence under Section 304 (II) I.P.C.

19 The deceased was the wife of the Appellant. PW- 1 & 2 have resiled from their original statement. Evidence deposed by them is sufficient to draw adverse inference against Appellant. The First Informant is the brother of the accused (PW-1). He has stated that there used to be quarrel between deceased and the accused. On the date of incident, he had heard quarrel between accused and deceased. On receipt of information, he went to the spot with his wife. He found that wife of accused was lying in injured condition. He took her to hospital. The Appellant was nowhere around during the process of admission of his wife in the hospital. PW-2 has stated that, he found deceased lying injured with injury on head. He accompanied PW-1 and his wife while taking deceased to hospital. She died at around 2.30 A.M. He had not referred to presence of Appellant-accused while taking deceased to hospital or after her admission in hospital till she was declared dead. Although both these witnesses had resiled from their version in their previous statement, the circumstances appearing in their evidence, reflects the conduct of accused. The statement under Section 313 of Cr. P. C. is totally silent about where he was at the time of incident or while deceased was in hospital for treatment. The inquest panchanama and the spot panchanama were adduced in the evidence by consent of the accused. The spot was shown by PW-1. PW-1 is brother of the accused. He has lodged FIR against the accused. His evidence refers to hearing of quarrel between accused and deceased. Immediately, thereafter, deceased was found lying in injured condition. Thus, immediately before incident, accused and deceased were together.

20 Defence has urged that victim was found injured out side the house of one Narayan which is situated at the distance from the place of the house of the accused. It is also argued that there is discrepancy about place of recovery of clothes. The evidence of PW-1 discloses that, there was quarrel between the accused and the victim in the house. Thereafter, the victim was lying injured at the place reflected in the spot panchanama. Spot was shown by PW-1. Such discrepancies if any, would not weaken the case of prosecution. Arrest panchama of the accused was recorded at the time of his arrest which has been proved in the evidence. Injuries were noticed on the version of the accused. There is no explanation from the accused qua the said injuries.

21 Post mortem was conducted by PW-3. Deceased had sustained C.L.W.'s over occipetal and parietal region. The injuries are anti-mortem. The injuries are possible by hard/ sharp object. Injuries are sufficient to cause death in ordinary course of nature. Cause of death according to PW-3 is that, the death was due to neurogenic shock. As per post mortem, report Ex. 20 opinion as to cause of death is shock due to head injuries. PW-3 has stated that fluid was found in the stomach of deceased which was having smell like alcohol. The opinion of PW-3 could not be discarded by defence in any manner. Spot Panchanama is admitted by defence. One pointed stone was recovered from spot of incidence. Spot was shown by PW-1. Deceased met with homicidal death.

22 FIR Ex. 10 was lodged by PW-1. PW-1 and PW-2 were eye witnesses. They are brother and friend of accused. While recording evidence, they did not name accused as assailant nor they stated that they have witnessed the assault. Accused is residing near house of PW-1.

He referred to addiction of Accused and his wife (deceased) to liquor and their quarrels. He heard quarrel between them on the day of incident. Immediately thereafter, deceased was found lying injured. There is no suggestion that for any reason, PW-1 has lodged the false FIR. Apparently, accused being brother of PW-1, there is variation in previous statement and evidence before Court. Evidence of PW-1 indicate that at the relevant time, deceased was in company of accused. PW-2 has also resiled from his original version. He was cross examined by prosecution. Omissions were proved. PW-2 helped PW-1 to take deceased to hospital. PW-5 is panch for recovery of clothes of accused. Memorandum statement was proved vide Ex.27 and Recovery Panhanama was proved vide Ex. 28. He identified clothes of accused. Accused was arrested on 2nd April, 2013. There were blood stains on clothes. There is no suggestion that no such recovery was made from house of accused. No explanation for blood stains on clothes of accused was given by him. The accused was never present with deceased while she was admitted to hospital by PW-1 and PW-2. The Arrest Panchanama Ex. 31 refers to injuries on knee, head, back and hands of accused. He has not given any explanation.

23 CA Report Ex.20 refers to human blood on stone and hair. ABO grouping is inconclusive. Earth found on the spot was mixed with human blood. ABO grouping is inconclusive. Clothes of accused were stained with human blood 'A' group. Maxi of deceased was stained with human blood of 'A' group. No explanation by accused to these circumstances in his statement under Section 313 of Cr. P. C.

24 The Accused has nowhere stated about his presence at the time of incident or post incident. He has not explained his absence. He

did not lodge any complaint of assault on his wife. He did not go to hospital to enquire about well being of his wife. His conduct is unnatural.

25 Shortly, before the incident, accused and deceased were together. The quarrel took place between them in house. Accused did not offer any explanation how his wife sustained injuries when the death of wife occurred in custody of husband, he is required to give plausible explanation for cause of her death in his statement under Section 313 of Cr. P. C. The injuries caused to victim were within special knowledge of accused and he failed to discharge the burden cast upon him under Section 106 of Evidence Act.

26 The incriminating circumstances, appearing against the Appellant establishes the charge against him. The Appellant had been convicted under Section 304(II) of I. P. C. The reasons assigned by trial Court are in conformity with evidence on record. Interference of this Court in impugned judgment of conviction is not warranted.

27 Letter dated 26th November, 2021 received from Thane Central Jail, stating that the accused is released from jail on 18th February, 2019 after completion of sentence. However, the appeal was pursued and argued on merits by learned Advocate for the Appellant.

28 In the circumstances, I find no reason to disturb the finding of Trial Court. The judgment of trial Court needs to be confirmed.

O R D E R

Criminal Appeal No.265 of 2016 stands dismissed.

(PRAKASH D. NAIK,J.)