

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

CRIMINAL APPEAL NO. 916 OF 2017

Parvez Farukh Dalvi
Age- 32 years, Occ: Nil,
R/o. Surai, Tal.- Mhasla,
District – Raigad,
At present Nashik Jail

...Appellant

Versus

State of Maharashtra
(through Shrivardhan Police Station)
Tal. Shrivardhan, District – Raigad,
(C.R. No. I-11/2015)

... Respondent

.....

Mr. Aniket Vagal a/w. Mr.Kunal Pednekar for the Appellant.
Mr. A.R.Kapadnis, APP for the Respondent -State.

.....

**CORAM : REVATI MOHITE DERE &
V. G. BISHT, JJ.**

DATE : 29th June, 2022

JUDGMENT (PER: V.G.BISHT, J.)

1. This appeal has been preferred against the judgment of conviction and order of sentence passed by the learned Additional Sessions Judge, Mangaon, District – Raigad in Sessions Case No. 22 of 2015 convicting the appellant-accused for the offence punishable under Section 302 of the Indian Penal Code (IPC) and sentencing him

to undergo imprisonment for life and to pay fine of Rs.1,000/- (Rupees One Thousand Only), in default, to further suffer simple imprisonment for one month. However, the learned Additional Sessions Judge acquitted the appellant-accused of the offence punishable under Section 304-B of the IPC.

2. In short, the prosecution case runs as under :-

(a) Informant's daughter, namely, Khairunisa Parvez Dalvi (since deceased) was married to the appellant. It is the case of the prosecution that on 6th March, 2015 at about 9.30 pm., the brother-in-law of deceased called informant and informed him that his daughter had been to his house but did not return. However, informant-father replied that the deceased had not come to his residence. The informant alongwith his wife immediately went to the matrimonial house of the deceased, which was locked. From there, they went to the house of in-laws of the deceased.

(b) According to the prosecution, the informant later on visited Masaba Police Station and from there went to Shrivardhan Government Hospital and saw the dead bodies of the deceased and grandson Abdul Aziz. The informant lodged an FIR against the appellant, which was registered by Shrivardhan Police Station under C.R. No. 11 of 2015 for the offences punishable under Sections 302 and 304-B of the IPC.

(c) The prosecution alleges that the appellant often used to torture the deceased in order to compel her to bring monies and also used to threaten to kill her. Considering the conduct of the appellant, the informant alleged that it was the appellant, who had killed the deceased and his grandson with the help of some of his associates at Shrivardhan beach by drowning them in water.

(d) After registration of the above crime, the investigation was taken up by PW-7 Maheshwar Reddy,

the then Additional S.P. Gadchiroli. PW-7 investigating officer got autopsy done over the dead bodies of the deceased and her son, recorded statements of the prosecution witnesses and also conducted Test Identification Parade of the appellant. PW-7 investigating officer also collected the Chemical Analyzer Reports, CDR and CCTV footages. According to him, during the course of investigation, it transpired that the appellant had murdered both the victims i.e. wife and his son. After completion of investigation, he forwarded the chargesheet against the appellant-accused under Sections 302 and 304 -B of the IPC and the case was committed to the Court of Sessions, Mangaon, District Raigad.

(e) To substantiate the charge against the appellant-accused, the prosecution has examined as many as eight witnesses and exhibited number of documents. The accused was questioned under Section 313 of the Code of Criminal Procedure (Cr.P.C.) about the incriminating evidence and circumstances and the appellant-accused

denied all of them as false and pleaded that a false case has been filed against him and that on the ground of suspicion, he has been arrested. According to him, he did not commit the murder of his wife and son. Upon appreciation of the oral evidence and the circumstances, the trial Court convicted the appellant-accused for the offence punishable under Section 302 of the IPC and sentenced him in the manner stated hereinabove. Hence, this appeal.

3. At the outset, Mr. Vagal, learned Counsel for the appellant-accused, submits that the delay in filing the FIR has not been explained by the prosecution and therefore, on this ground alone, the prosecution case is liable to be rejected. Learned Counsel then next submits that the only ground for conviction of the appellant is the testimony of PW-6, who claimed of having seen the deceased persons on 5th March, 2015 at about 5.00 p.m. in the company of the appellant and further claimed to have seen the dead bodies on 6th March, 2015 at 7.30 a.m. in the morning. However, according to the learned Counsel, PW-6 was silent till the police approached him on

11th March, 2015 for recording his statement. The said witness kept mum for five days. He being the only witness ought to have approached police immediately. No reasons are assigned for unreasonable delay in recording the statement of this witness and therefore, his testimony is not above the board.

4. Learned Counsel then lastly submits that although the prosecution claimed to have collected the CCTV camera, however, CCTV footages were not produced before the Sessions Court. This being so, the learned trial Court failed to appreciate the evidence properly and wrongly recorded the finding of guilt, which is liable to be quashed and set aside.

5. Mr. Kapadnis, learned APP, on the other hand, supported the impugned judgment and order of conviction and would submit that there being no merit in the appeal, the same is liable to be dismissed.

6. We have carefully gone through the evidence of the prosecution witnesses with the help of the learned Counsel and the learned APP. In our considered view, the prosecution has not been able to prove the

guilt of the accused beyond all reasonable doubt. We propose to give reasons for the same.

7. Before adverting to the other evidence, we intend to appreciate homicidal death first and then would like to go through the evidence of other prosecution witnesses.

8. PW-5 Dr.Sadanand Sangram Bhise states in his evidence (Exhibit 56) that on 8th March, 2015, he performed second autopsy over the dead bodies of Abdul Aziz and Khairunisa. The cause of death of Abdul Aziz was due to asphyxia due to drowning, whereas, according to this witness, there were 23 injuries on the dead body of Khairunisa, which are as under :

(1) First postmortem incision noted 52 cm in length total 15 stitch starting from Manubrium sternum to 5 cm above pubic symphysis.

(2) First postmortem incision noted 19 cm in length. 7 stitch present over anterior part of frontal bone region.

(3) Contusion of size 4X2 cm present over left

side of chest below manimillary region, muscle deep, dark red in colour.

(4) Contusion of size 1 X 0.5 cm present over left side of nostril, muscle deep, dark red in colour.

(5) Contusion of size 2 X 1 cm over right maxillary prominence, muscle deep, dark red in colour.

(6) Contusion of size 1 X1 present over just below right maxillary prominence, subcutaneous deep, dark red in colour.

(7) Contusion of size of 1 X 0.5 cm present over right lower lip, muscle deep dark in colour.

(8) Contusion of size 1 X 1 cm present over right arm lower 1/3rd posteriorly, subcutaneous deep, dark red in colour.

(9) Abrasion of size 0.5 cm in diameter present over left breast lower lateral quadrant, red in colour.

(10) Abrasion of size 0.5 cm in diameter below the injury no. 9 dark red in colour.

(11) Abrasion of size 1 X 1 cm present over left side abdomen left hypochondrium, dark red in colour.

(12) Abrasion of size 2 X 1 cm present over left side abdomen left hypochondrium 3 cm below injury no. 11, dark red in colour.

(13) Abrasion of size 1.5 X 1 cm present over 4 cm below and lateral to injury no. 12, dark red in colour.

(14) Abrasion of size 3 X 0.5 cm present over left lumbar region oblique in direction, dark red in colour.

(15) Contusion of size 3 X 3 cm present over left side of chest wall infraclavicular region, dark red in colour, muscle deep.

(16) Abrasion 0.5 cm over right infraclavicular region dark red in colour.

(17) Contusion 1 X 1 cm over right elbow cubital fossa subcutaneous deep, dark red in colour.

(18) Two contusion of size 2 X 1 cm and 1.5 X 1 cm pressed over right shine of tibia middle 1/3rd, muscle deep dark red in colour.

(19) Contusion of size 0.5 cm present over right breast laterally, subcutaneous deep, dark red in colour.

(20) Abrasion of size 1 X 1 cm and 2 X 1 cm present over right side of chest, dark red in colour.

(21) Abrasion of size 0.2 cm in diameter over right side of chest below 2 cm of injury no. 20, dark red in colour.

(22) Abrasion of size 3 X 1 cm present over upper lateral side of abdomen, dark red in colour.

(23) Abrasion of size 4 X 1 cm present over upper lateral side of abdomen. Dark red in colour.

9. His evidence further shows that on examination of head, he found the following injuries :

(1) There was under scalp contusion of size 14 X 11

cm present over the right frontotemporal region. Scalp deep dark red in colour.

(2) Under scalp contusion of size 12 X 9 cm present over left fronto temporal region. Dark red in colour.

(3) Communicated fracture vault of skull dividing into multiple pieces present at frontal and both parital region. Pieces of fracture of bone has lacerated the brain in frontal region and ports of bone fragments found inside the brain.

(4) Laceration of meninges and brain at the site of fracture area.

(5) Diffuse subdural and subarachnoid hemorrhages present over both frontal parital and temporal region. Dark red in colour.

(6) Patchy subarachnoid hemorrhage present over base of brain and cerebellum, dark red in colour.

(7) Laceration of both frontal lobe anderiorly and inferiorly, dark red in colour.

10. The cause of death, according to this witness, was the head injury with multiple blunt injuries over the body with asphyxia due to drowning. As far as the death of Abdul Aziz is concerned, at this stage, it cannot be held that whether the death was homicidal or otherwise. However, it is apparent from the postmortem report of deceased Khairunisa that she met a homicidal death. There is no dispute on this count. This witness has proved the final cause of death of Abdul Aziz at Exhibit 62 while that of Khairunisa at Exhibit 63.

11. It is seemly to state here that the whole case of the prosecution rests on the circumstantial evidence. Where a case totally hinges on the circumstantial evidence, it is the duty of the Court to see that the circumstances which lead towards the guilt of the accused have been fully established and they must lead to a singular conclusion that the accused is guilty of the offence and rule out the possibilities which are likely to allow the presumption of innocence of the accused.

12. In the case of **Dharam Deo Yadav vs. State of U.P.**¹ the Hon'ble Apex Court held as under :

¹ 2014 Cri. L.J. 2371 (S.C.)

“Each and every incriminating circumstances must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. Even when there is no eye witness to support the criminal charge, but prosecution has been able to establish the chain of circumstances which is complete leading to inference of guilt of accused and circumstances taken collectively are incapable of explanation on any reasonable hypothesis save of guilt sought to be proved, accused may be convicted on the basis of such circumstantial evidence.”

13. At the outset, we would like to make it clear that PW-1 Abdul Rajjaq Ibrahim Tambe, informant (Exhibit 30), PW-2 Rashida Abdul Razzak Tambe (Exhibit 40) are the parents of deceased Khairunisa. Similarly, PW-3 Simin Sarfarz Khanjada (Exhibit 41) and PW-4 Sadaf Vasim Murtuza (Exhibit 44) are the younger sisters of the deceased. All these witnesses unisonly have deposed that the appellant used to harass deceased and demand talaq or to pay him Rs. 7 lakhs.

14. Incidentally, we may note here that the appellant-accused was also charged under Section 304 -B of the IPC but came to be acquitted by the learned Additional Sessions Judge inasmuch as the prosecution had failed to establish necessary essentials and requirements of Section 304-B of the IPC. Therefore, the evidence of these witnesses cannot be read with a sense of satisfaction.

15. Above all, if the FIR is read carefully, there is no allegation of demand of dowry/ monies from the side of appellant-accused. This finding is not at all assailed or challenged by the prosecution and therefore, that finding of the acquittal under Section 304-B has attained finality.

16. According to the prosecution, PW-6 Nilesh Ganesh Sawant is a star witness of the prosecution, who had seen the appellant-accused in the company of the deceased on the day of incident.

17. PW-6 Nilesh Ganesh Sawant states in his evidence (Exhibit 69) that at the relevant time, he was entrusted with cleaning of the toilets

and bathrooms, which are adjacent to the sea beach of Shrivardhan near Government Rest House. The Municipal Council Shrivardhan had allotted the said work to him. On 5th March, 2015 at about 4.00 p.m., he was outside the toilets at sea beach Shrivardhan. At about 5.00 p.m., one motorcycle rider alongwith one lady and one kid came at sea beach. The face of the said lady was open though she had burkha. The motorcycle rider parked his motorcycle opposite to the toilets and he alongwith the said lady and boy went towards the sea beach.

18. It is his further evidence that on 6th March, 2015 at about 8.00 a.m., when he went to the toilets and bathrooms for cleaning, he found people moving towards beach. He also went there and saw the dead bodies of one lady and a kid. He remembered of having seen that lady and boy on previous day alongwith the motorcycle rider. It is his further evidence that on 11th March, 2015, the police made an enquiry with him and recorded his statement. He was also called at District Sub-Jail Alibag, Tehsildar, Shrivardhan where in a test identification parade, he identified the appellant-accused.

19. The evidence of this material witness is fraught with infirmities, which are mainly thus. First of all, according to this witness, he had seen the appellant -accused as a rider of the motorcycle and was able to identify him in test identification parade, which was held on 29th April, 2015 i.e. after more than one and a half month. Interestingly, this witness has nowhere deposed in his substantive evidence that he was able to capture the features, age, height and colour complexion of the appellant-accused when latter had parked the motorcycle opposite the toilets. This witness maintains an eerie silence as to how he was able to identify the appellant-accused after a period of more than one and a half month.

20. Secondly, though this witness saw the dead bodies of deceased Khairunisa and her son on 6th March, 2015, he did not bother to go to the concerned police station and apprise of what he had seen a day earlier to the incident. Rather he states in his cross-examination that since 6th March, 2015 till 11th March, 2015, he did not tell anybody that he had seen the appellant-accused as a motorcycle rider and one lady and one small boy on 5th March, 2015 at about 5.00 p.m. at Shrivardhan beach.

21. This speaks in volume as to the conduct of this witness. This witness had more than ample opportunity to inform the concerned police station immediately or within a reasonable time as to what he had witnessed a day prior to the incident. The delay of five days in recording the statement and that too when the police approached him, by all means should be frowned upon and needs to be questioned.

22. If, on the other hand, the evidence of PW-8 Balaji Padma Nigudkar, Residential Nayab Tehsildar (Exhibit 75) is read carefully and cautiously, then we see the prosecution in bad light.

23. According to this witness, she arranged the test identification parade of accused on 29th April, 2015 with the help of six dummies. She asked the appellant -accused whether he wanted to change his clothes and after changing the clothes, the appellant-accused stood in between dummy accused Nos. 2 and 3.

24. It is her further evidence that accused was duly identified by PW-6 Nilesh Ganesh Sawant. Accordingly, the memorandum of

panchnama was prepared and then she proved the panchnama at Exhibit 81. The above said test identification parade is also not free from blame for the ensuing reasons.

25. We have already pointed out from the evidence of PW-6 Nilesh Ganesh Sawant that his evidence is absolutely silent as to the features, age, height and colour complexion of the appellant-accused whom he allegedly had seen a day prior to the incident.

26. What is disturbing is that even PW-8 Balaji Padma Nigudkar in her evidence has nowhere deposed that having regard to the age, height, colour complexion and features of the appellant-accused, she arranged dummies and it is only then and thereafter she conducted test identification parade and asked the appellant-accused to stand in between dummies.

27. Thus, this being so, it could not have been possible for PW-6 Nilesh Ganesh Sawant to identify the appellant-accused and that too after a lapse of period of more than one and a half month.

28. Needless to say, we are not satisfied with the evidence of PW-6 Nilesh Ganesh Sawant qua test identification parade.

29. Even otherwise, we have given cogent and convincing reasons to doubt the testimony of PW-6 for more than one reason.

30. Apart from the above serious infirmities, we also note with alacrity that though PW-7 investigating officer in his evidence claimed that CCTV footages were collected from the spot of incident but those footages never saw day of light and admittedly were not produced before the learned Additional Sessions Judge. An adverse inference on this count also needs to be drawn.

31. On re-appreciation of the evidence, the only inescapable conclusion is that, it is the failure on the part of prosecution to prove the guilt of the accused beyond all reasonable doubt. Whatever evidence brought on record in the form of circumstances are incapable of inference that it was the accused and accused alone, who committed the murder of his wife. On a studied scrutiny of the evidence on record, we are of the considered view that the

prosecution has not been able to prove that it was the accused alone who authored the death of his wife and son.

32. In view of above, we pass the following order :

ORDER

- i) The appeal is allowed;
- ii) The impugned judgment and order dated 25th April, 2017 passed by the learned Additional Sessions Judge, Mangaon, District – Raigad in Sessions Case No. 22 of 2015 is quashed and set aside;
- iii) The appellant is acquitted of the offence, with which he is charged. The appellant is set at liberty forthwith, if not required in any other case.

33. All concerned to act on the authenticated copy of this order.

TRUPTI
SADANAND
BAMNE

V. G. BISHT, J.

REVATI MOHITE DERE, J.

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