

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 113 OF 2016

Babu Vansha Gangad
R/at Vadavli, Bhojpada,
Taluka-Talasari, District Palghar.

[Presently lodged in Nashik Road Central
Prison as Convict No. C-10190]

Appellant
.. (Org. Accused)

Versus

The State of Maharashtra
through Talasari Police Station

.. Respondent

-
- Ms. Nasreen Ayubi, Appointed Advocate for the Appellant
 - Ms. P.P. Shinde, APP for the State
-

**CORAM : SMT SADHANA S. JADHAV &
MILIND N. JADHAV, JJ.**

DATE : APRIL 05, 2022

JUDGMENT (Per MILIND N. JADHAV, J):

1. This is an Appeal against conviction of the Appellant by the Trial Court. The learned Additional Sessions Judge, Palghar by judgment dated 04.09.2015 has convicted Babu Vansha Gangad (Appellant-original accused) of the offence punishable under Section 302 of the Indian Penal Code, 1860 (for short "**IPC**") and sentenced him to suffer imprisonment for life and to pay a fine of Rs. 500/- and in case of default in the payment of fine, to suffer rigorous imprisonment for one month. For the sake of convenience we shall refer to the Appellant as accused.

2. The case of the prosecution is as under:-

2.1. The incident took place on 23.04.2003. At about 08.00 p.m., the first informant was at his house and Jethibai was in the courtyard of their house. At that time the first informant heard Jethibai's scream that accused Babu had assaulted her and therefore he rushed towards Jethibai. On seeing the first informant the accused started running away with the weapon in his hand.

2.2. The first informant - Zinya Gangad is the elder brother of the accused. The deceased - Jethibai was the wife of the first informant and sister-in-law of the accused. The first informant and accused were jointly residing with their mother Ladku and Jethibai at village Vadavli, Bhojpada, Palghar. The first informant was employed in Prestige Company. The accused is unmarried.

2.3. Jethibai was seriously injured and bleeding due to the injury on the right side of her neck. Jethibai informed the first informant that the accused had given a blow of the weapon on her neck. Because of the commotion, people gathered and Jethibai was taken to government hospital in an auto rickshaw. Since the nature of injury sustained by Jethibai was serious, she was shifted to Haria Hospital at Vapi.

2.4. The first informant immediately lodged a report at Talasari Police Station and Crime No. 37/2003 (FIR) came to be

registered for the offence punishable under Section 307 IPC at 08.20 p.m. against the accused.

2.5. On 24.04.2003 i.e. the next day Mr. Nagare, Police Inspector visited the incident spot along with two panchas and carried out seizure of certain articles; viz. the mangalsutra, necklace having black beads, lungi, plain soil and soil mixed with blood from the scene of crime. The seized items were sent for Chemical Analyser's report.

2.6. On 25.04.2003 Jethibai succumbed to the injury in the hospital. Police Inspector Kailas Nagare, PW-9 who had recorded the FIR prepared the inquest panchanama in the presence of panchas and referred the dead body for post-mortem.

2.7. After the incident, the accused absconded. In absence of the accused, the Investigating Officer (I.O.) filed the charge sheet in the Court of Judicial Magistrate First Class, Dahanu. The Judicial Magistrate committed the case to the Court of Sessions under the provisions of Section 209 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C.") as the case was triable exclusively by the Court of Sessions.

2.8. The accused was arrested in the year 2010 and thereafter produced before the District Judge-I and Additional Sessions Judge, Palghar for framing of charge. The charges against the accused were read out and explained to him in vernacular language. The accused

denied his complicity in the offence by a total denial. However by the impugned judgment the learned Trial court found the accused guilty of committing the offence punishable under Section 302 IPC and sentenced him to suffer imprisonment for life along with fine of Rs. 500/- and in default to pay fine, to suffer rigorous imprisonment for one month.

3. The Appeal was admitted on 08.02.2016 and on that date, Ms. Nasreen S.K. Ayubi, Advocate from the panel of Advocates of the High Court Legal Services Committee was appointed to represent and espouse the cause of the accused.

4. Ms. Nasreen S.K. Ayubi, learned Advocate appearing for the accused has submitted that the impugned judgment has been passed without appreciating the factual and circumstantial evidence placed on record and solely relying upon the statement given by the accused under Section 313 Cr.P.C. purporting to have confessed to have committed the murder of Jethibai. Ms. Ayubi submitted that immediately after recording the statement of the accused under Section 313 Cr.P.C., the Advocate of the accused filed Application on behalf of the accused @ Exh. 40, *inter alia*, contending that at the time of recording the statement, the accused was not mentally fit and it was necessary to refer the accused for medical treatment to hospital. The statement under Section 313 Cr.P.C. was recorded on 27.07.2015; the

Application @ Exh. 40 was filed on 17.08.2015 i.e. within 20 days thereafter. She submitted that the learned Trial court instead of ascertaining the mental condition of the accused by referring the accused to the hospital / medical practitioner, took it upon itself and posed questions to the accused to determine whether his mental condition was proper or otherwise. She submitted that the only motive which emanated through the entire evidence was the allegation that Jethibai did not provide the accused with food properly and asked the first informant to keep the accused with his sister. She submitted that the learned Trial court fell in grave error in convicting the accused solely on the basis of his statement given under Section 313 Cr.P.C. without ascertaining and appreciating the evidence on record. She submitted that the first informant - PW-1 stated in his cross-examination that he had not seen as to who had assaulted his wife Jethibai; that on the date of the incident he had gone to work in his company on night shift; that he used to leave the house for night shift at about 7.00 p.m. and return on the next day morning at about 6.00 a.m. and most importantly, he confirmed that on the date of the incident i.e. at 8.00 p.m., he had gone for work. She therefore submitted that the learned Trial court has completely misdirected itself in not considering the evidence on record and convicting the accused solely on the basis of his statement recorded under Section 313 Cr.P.C. She submitted that the statement recorded under Section

313 is stereotype and cannot be used as the sole basis for convicting the accused especially in the backdrop of overwhelming evidence available on record. She has therefore prayed for quashing and setting aside of the impugned judgment.

5. PER CONTRA, Ms. P.P. Shinde, learned APP has supported the impugned judgment and stated that the accused has categorically admitted in his statement given under Section 313 Cr.P.C. that as Jethibai was not providing the accused proper and sufficient food since childhood and was asking the first informant to send the accused to the house of his sister, the accused had committed the murder of Jethibai. She submitted that the aforesaid answer / statement given by the accused is a confession of the accused of the offence charged with and the learned Trial court has relied upon the said confession and proceeded to convict the accused after analyzing the evidence on record. She submitted that though the Advocate for accused filed Application dated 17.08.2015 immediately after his statement was recorded under Section 313 Cr.P.C. for ascertaining the sanity of his mental condition, the learned Trial court examined the accused by asking him several questions and on the basis of the answers given by the accused concluded that the accused had given rational answers to the questions and therefore the mental condition of the accused was proper while recording his statement under Section

313 Cr.P.C. Hence the learned Trial court rejected the Application filed by the accused. She submitted that the impugned judgment is not at variance with the settled legal position and has rightly held the accused guilty for committing the murder of Jethibai and has sentenced him to life imprisonment.

6. We have perused the entire record with the help of both the learned Advocates appearing for the parties, considered the submissions and the evidence on record.

7. In the present case, the prosecution has examined nine witnesses in support of its case. The defence has not examined any witness. The prosecution has also relied upon documentary evidence in the nature of the complaint, spot panchnama, seizure panchnama, inquest panchnama, post-mortem notes / report and C.A. report.

8. We shall now outline the evidence given by the prosecution witnesses to satisfy ourselves about the incriminating material against the accused, since the impugned judgment is solely based on the admission of the offence by the accused in his statement recorded under Section 313 Cr.P.C.

9. PW-1 - Zinya Vansha Gangad is the elder brother of the accused and husband of Jethibai. In his evidence he has stated that the incident took place on 23.04.2003 and at that time he was present in the house along with his daughters and Jethibai had gone in the

courtyard for taking bath; that he heard Jethibai shouting "*dhawa dhawa, Babune mala marle*" upon which he came in the courtyard and noticed that Jethibai had sustained an injury on the right side of her neck and on seeing him, Babu (accused) started running; that Jethibai told him that Babu (accused) had assaulted her; thereafter Jethibai was taken to government hospital, Talasari and later to Haria Hospital, Vapi; Jethibai expired in the hospital and the Police Officer recorded his statement.

9.1. PW-1 in his cross-examination has given answers which are critically important from the view of his evidence as the said answers given by him are in contradiction with his own deposition. In cross-examination PW-1 has stated that when his statement was recorded in the court, he had not stated before the court that his wife had shouted "*dhawa, dhawa Babune mala marle*" and that after the incident his wife had informed him that she was assaulted by Babu (accused); that he had given the evidence in court which was told to him by the Police and most importantly on the date and time of the incident he had gone for work and he did not see as to who had assaulted Jethibai and Jethibai did not inform him that Babu (accused) had assaulted her.

9.2. The answers given by PW 1 in his cross-examination clearly go to the root of the matter because apart from the statement

given under Section 313 Cr.P.C., the case of the prosecution is entirely banking upon the evidence of PW-1 as being the eye witness to the incident. However from the above answers, it is clear and apparent that PW-1 had not seen the accused assaulting Jethibai, he has himself stated that he had gone to work on the date and time of the incident and it is his own case in evidence that he was working on night shift on the date of the incident for which he used to leave his house at 7.00 p.m. and return back at 6.00 a.m. on the next day. Hence, we find that the evidence of PW-1 is completely unreliable and cannot be countenanced for indicting and convicting the accused.

10. PW-2 - Lahanya Vanshya Gangad and PW-3 - Dharmibai Lahanya Gangad are relatives of the Gangad family. Both these witnesses on the date of the incident heard cries from the first informant's house, rushed there and saw that Jethibai was injured and the first informant was holding her. Both these witnesses in their cross-examination have categorically stated that they did not ask Jethibai and she did not inform them as to who had assaulted her. The evidence of these two prosecution witnesses therefore is not relevant.

11. PW-4 - Sunita Ashok Dumada is the daughter of Jethibai (deceased). In her evidence she has stated that Jethibai was outside the house while she was standing in the door of the house and after

hearing the scream of Jethibai went running and found that Jethibai had sustained injury to her neck. She has further stated that her uncle i.e. Babu (accused) had assaulted Jethibai. However, immediately thereafter in her cross-examination PW-4 has answered that there was darkness when the incident took place; that at the time of the incident she was inside the house playing with her brother and she had not seen as to who had assaulted Jethibai. Once again the evidence of PW-4 is self contradictory, unbelievable and on similar lines as that of PW-1.

12. PW-5 - Jairam Ladkya Gangad is the pancha witness who has signed the spot panchnama pertaining to seizure of plain as well as blood stained soil, lungi and mangalsutra from the scene of the crime. However in his cross-examination, PW-5 has stated that the Police did not seize the lungi in his presence. PW-6 - Jayesh Vanshya Gangad is the pancha witness who has signed the seizure panchnama which records that the Police had seized one blouse and one lungi in his presence. PW-6 is the younger brother of the first informant and accused. PW-7 - Daji Devlya Dandekar, a neighbour had gone to the scene of the crime after hearing the commotion. He has stated that he had not seen the accused assaulting or killing his wife. PW-7's entire evidence is on the basis that the accused was involved in killing his own wife and hence is completely irrelevant. The evidence given by

PW-4 to PW-7 is not relevant from any perspective.

13. PW-8 - Dr. Manisha Manesh Patel working as Medical Officer in the Community Health Center, Vapi conducted the autopsy along with Dr. Shinde and in the post-mortem report noted the following injuries on the dead body of Jethibai:-

- (i) Incised wound 2 cm below the chin, C shape, measuring about 6 cm. x 1 cm. x 1 cm. on right side;
- (ii) Incised wound over right side of neck anteriorly measuring about 12 cm. x 2 cm. It was muscle deep. Blood clots were present;
- (iii) Tearing of right sided sterno vestoid muscle;
- (iv) Right side carotid artery and jugular vein were cut.

13.1. The post-mortem report show the aforestated four injuries in Column No. 17. This evidence needs to be considered and is dealt with later on in the judgment.

14. PW-9 - Kailas Mattu Nagre, I.O. in his evidence has stated that Jethibai was admitted to Rural Hospital, Talasari in an injured condition; that PW-1 lodged the FIR and he registered Crime No. 37/2003 and went to the hospital to record the statement of Jethibai but the doctor informed him that she was unconscious; that thereafter Jethibai was referred to Haria Hospital, Vapi for better medical treatment and she died while being treated and he completed the formalities. What is significant to note is that after Jethibai was

referred to Haria Hospital at Vapi for better medical treatment, instead of visiting Haria Hospital to record her statement, the I.O. completed the other formalities and did not visit Haria Hospital, Vapi even once to record the statement of Jethibai. This is considered to be important because the evidence given by the other prosecution witnesses to indict the accused of committing the offence has been retracted by the said witnesses in their respective cross-examination wherein the said witnesses have categorically stated that they did not see the accused assaulting Jethibai. Hence, every possible effort should have been made by the I.O. to record Jethibai's statement before she passed away. Jethibai was assaulted on 23.04.2003 and she expired on 25.04.2003.

15. In criminal appeal, while considering the evidence on record, we may remind ourselves of the observations of the Hon'ble Supreme Court in *Rama vs. State of Rajasthan*.¹ An excerpt from Paragraph 4 of the said decision is relevant and reads thus:

"4. ... It is well settled that in a criminal appeal, a duty is enjoined upon the appellate court to reappraise the evidence itself and it cannot proceed to dispose of the appeal upon appraisal of evidence by the trial court alone especially when the appeal has been already admitted and placed for final hearing. Upholding such a procedure would amount to negation of valuable right of appeal of an accused, which cannot be permitted under law."

[emphasis supplied]

1 (2002) 4 SCC 571 : 2002 SCC (Cri) 829

15.1. Keeping in mind the aforementioned principle of reappraising the evidence in the case of criminal appeals as laid down by the Apex Court, we shall now weigh the probative value and sufficiency of the evidence on record as outlined herein above.

16. In the backdrop of the aforesaid evidence given by the prosecution witnesses and more particularly the evidence of PW-1 who is the first informant, we find that :

- (i) the so called eye witnesses i.e. PW-1, PW-2, PW-3 and PW-4 who are closely related to the first informant and the accused have stated that they had not seen the accused assaulting Jethibai;
- (ii) that PW-1, the first informant and husband of Jethibai has stated that on the date of the incident he had gone for work and had not seen as to who had assaulted Jethibai and that Jethibai did not inform him that Babu (accused) had assaulted her;
- (iii) that none of the witnesses have established the presence of the accused at the scene of the crime;
- (iv) that according to the post-mortem report the injury on the right side of the neck of Jethibai had ruptured her jugular vein and carotid artery which

injury is sufficient to cause the death of a person in the ordinary course due to severe hemorrhage; further two incised wounds over the neck are observed to be severe and they admeasure 6 cm. x 1 cm. and 12 cm. x 2 cm., these wounds are muscle deep leading to the tearing of the sterno vestoid muscle on the right side of the neck. *Prima facie*, such injuries are severe injuries which are caused due to hacking with sharp weapons;

- (v) therefore, the presence of the accused at the scene of crime is not established and is highly suspicious.

17. In so far as the reliance placed by the learned Trial Court on the statement recorded under Section 313 Cr.P.C. is concerned, we state that it is not a hard and fast rule that if the accused has confessed to the commission of the offence with which he is charged, the Court has to necessarily proceed to convict him relying upon that confession sans the evidence on record.

17.1. As held by the Supreme Court in the case of *Sujit Biswas Vs. State of Assam*², the statement made by the accused under Section 313 Cr.P.C. cannot be treated as evidence as the accused cannot be subjected to cross-examination with reference to his statement.

² AIR 2013 SC 3817 :: (2013) 12 SCC 406

The observations of the Supreme Court in paragraph No.

12 of the aforesaid judgment are relevant and reproduced below:-

"12. It is a settled legal proposition that in a criminal trial, the purpose of examining the accused person under Section 313 Cr.P.C., is to meet the requirement of the principles of natural justice, i.e. audi alterum partem. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination under Section 313 Cr.P.C., cannot be used against him and must be excluded from consideration. The said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act, as the accused cannot be cross-examined with reference to such statement."

17.2. Section 313 Cr.P.C. relates to power of the Court to examine the accused. This empowers the Court to examine the accused after the evidence for the prosecution has been taken. The object of empowering the Court to examine the accused is to give him an opportunity to explain any circumstances which may tend to incriminate him and to enable the Court, in case where the accused is undefended, to examine the witnesses in his interest. The object of questioning an accused by the Court is to give him an opportunity of explaining the circumstances that appear against him in the evidence. On perusal of the statement recorded under 313 of the accused in the present case it is seen that the said statement is a stereotype statement of the prosecution's case stated by the Court in the questions which are asked, whereas in so far as the answers are concerned, the accused has

merely stated his denial. It is well settled that an accused cannot be convicted merely and solely on the confession of his guilt made in his examination under Section 313 of Cr.P.C., especially when there is overwhelming evidence on record which does not establish the charge against the accused. Further it is also well settled principal of law that the admission made by the accused should be read as a whole and should not be dissected and considered only in part where that part is inextricably connected with the other part. It is important to note that conviction cannot be based on the statement given by the accused under this section as it is not evidence, yet this has to be considered vis-a-vis the evidence of the prosecution case.

17.3. Section 313 of the Cr.P.C. reads thus:-

"313. Power to examine the accused.- (1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-

(a) may at any stage, without previously warning the accused put such questions to him as the Court considers necessary;

(b) shall after the witnesses for the prosecution have been examined and before he is called on for his defence question him generally on the case:

Provided that in a summons-case where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub- section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken

into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

[(5) The Court may take help to Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section.]"

17.4. Sub-section (3) of Section 313 states that the accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them. Sub-section (4) further states that the answers given by the accused may be taken into consideration and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed. A conjoint reading of sub-sections (3) and (4) clearly show that the answers given by the accused may be taken into consideration and put in evidence for or against him in the trial, as such the answers given by the accused in his statement recorded under Section 313 Cr.P.C. cannot be used as the sole basis for indicting and convicting the accused. This is particularly so because in the present case the evidence given by the four prosecution witnesses namely PW-1, PW-2, PW-3 and PW-4 who are all relatives of the first informant, deceased and the accused do not on their own establish the fact that the accused was involved in the commission of the offence.

18. That apart we have also referred to the Application made

on behalf of the accused within 20 days after his statement under Section 313 came to be recorded to state that the accused was not mentally fit at the time of recording his statement under Section 313 Cr.P.C. The Application dated 17.08.2015 clearly states that the accused is not mentally fit and he is insane and therefore, it is just and proper to send the accused for medical treatment under supervision of the civil surgeon or medical superintendent and a report be called on the duration of the insanity of the accused. The learned Trial Judge has simplicitor put a remark on the said Application on 17.08.2015 itself stating that he put several questions to the accused to ascertain his mental condition and the accused has given rational answers, hence it was not necessary to send the accused for medical examination and report and the Application stood rejected. It is pertinent to note that the entire evidence of PW-1 to PW-8 was recorded between 24.02.2014 to 12.08.2014. The statement of the accused under Section 313 Cr.P.C. was recorded on 27.07.2015. The Application for medical examination was made on 17.08.2015. As alluded to and discussed herein above the evidence given by PW-1 to PW-4 is completely unreliable so as to indict the accused, the said evidence is of such importance that it cannot be discarded in the facts and circumstances of the present case. The learned Trial court has committed a grave error in convicting the accused solely on the basis of the answer given by the accused to question No. 26 in his statement

recorded under Section 313 Cr.P.C. The learned Trial court has concluded that since the accused has admitted in his statement under Section 313 Cr.P.C. that he has committed the murder of Jethibai, the accused can be held guilty for the murder of Jethibai by solely relying on his statement under Section 313 Cr.P.C. The Trial court has further held that the prosecution has proved that the accused has committed the murder of Jethibai. We are afraid to state that on a thorough scrutiny of the evidence before the trial Court, the prosecution has failed to prove that the accused has committed the murder of Jethibai.

19. In view of the above discussion and findings, we find that there are serious shortcomings in the prosecution's case to prove that the accused had killed Jethibai. The evidence given by PW-1 to PW-4 is contradictory in itself. None of the prosecution witnesses have seen the accused committing the offence, in fact PW-1 to PW-4 have categorically stated that they did not see the accused assaulting Jethibai. Hence the prosecution's evidence is demonstrably unreliable and does not inspire any confidence and in any case is insufficient for convicting the accused of the offence under section 302 IPC. We may add that this is a case of "**no evidence**" against the accused. We are of the considered opinion that the learned Trial court has erroneously arrived at the conclusion that the accused is guilty of the act to commit the murder of Jethibai and in view of the unreliable evidence given by

PW-1 to PW-4 as established herein above, the impugned judgment is not sustainable and deserves to be interfered with. We are not convinced that the evidence adduced by the prosecution is sufficient to prove the guilt of the accused beyond reasonable doubt for the offence punishable under Section 302 IPC as determined by the Trial court.

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

- (i) Criminal Appeal No. 113 of 2016 is allowed.
- (ii) The conviction and sentence imposed by the Additional Sessions Judge, Palghar in Sessions Case No. 82 of 2010 thereby convicting the Appellant for the offence punishable under Section 302 of the Indian Penal Code, 1860 is hereby quashed and set aside.
- (iii) The Appellant be released forthwith, if not required in any other offence. Fine if any paid, be refunded.

21. The Appeal stands disposed of on the above terms.

22. Office to communicate this order to the accused who is in jail.

23. Ms. Nasreen S.K. Ayubi, Advocate appointed to espouse the cause of the Appellant has appeared for the Appellant. She is entitled to the professional fees to be paid by the Legal Aid Services Authority / Committee as per rules.

[MILIND N. JADHAV, J.]

[SMT. SADHANA S. JADHAV, J.]

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