

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPEAL NO. 680/2018

Dinesh s/o Sakharam Fulkuwar,
(In Jail), aged about 37 years,
Occ. Labour, r/o Anjantola Vadegaon,
Tq. Kurkheda, Dist. Gadchiroli.

.....APPELLANT

...V E R S U S...

The State of Maharashtra,
through Police Station Officer,
Chichgrah, Police Station Chinchgrah,
Tq. Deori, Dist. Gondia.

...RESPONDENT

Mr. A. M. Kukday, Advocate for appellant.
Mr. M. K. Pathan, A.P.P. for respondent.

CORAM:- V. M. DESHPANDE AND
AMIT B. BORKAR, JJ.
DATE:- MARCH 1, 2022

JUDGMENT (Per: V. M. Deshpande, J.)

By this appeal, the appellant, who is in jail, is challenging judgment and order of conviction passed by learned Additional Sessions Judge, Gondia dated 22.03.2018 in Sessions Trial No.76/2015. Under impugned judgment, learned Additional Sessions Judge found that the appellant has committed an offence punishable under Section 302 of the Indian Penal Code. After holding him guilty for the said offence, punishment was awarded to the appellant that he shall suffer imprisonment for life and to

pay fine amount of Rs.2,000/- in default to pay fine, he shall suffer rigorous imprisonment for one month.

2. The prosecution case in short compass is as under:

Deceased is one Surjabai. She was wife of appellant. This couple was relative of Navalsingh (PW3), who has set criminal law into motion. This couple was not resident of Zhansinagar where Navalsingh used to reside along with his family. The appellant and deceased were residents of village Anjantola. Even according to the prosecution, this couple came to the house of Navalsingh (PW3) from 17.06.2018 as a guest. The incident in question occurred on 19.06.2015 at about 03.30 to 04.00 p.m. Navalsingh came to Police Station Chinchgad on 19.06.2015 and lodged his oral report resulting into registration of offence punishable under Section 302 of the IPC against the appellant vide Crime No.30/2015. The police report is at Exh.-22 whereas the printed FIR is at Exh.-23.

3. As per FIR, on the day of incident, after having morning works, the appellant, the deceased and other family members of Navalsingh (PW3) had their meals. At 04:00 O' clock, daughter of Navalsingh, Kalpana Miri (PW6), was in the kitchen, the deceased

and Navalsingh were sitting in chhapari and they were talking with each other. As per the FIR, he started the work of fixing roof tiles (kavelu) at the roof, the appellant and his wife Surjabai were sitting in chhapari itself. In the meantime, as per the FIR, he heard voice of Ramotinbai (PW5), "Dhava, Dhava". He came down of the roof. He noticed that deceased Surjabai was lying dead in drainage and appellant was standing there along with axe in his hand. As per the FIR, therefore, Navalsingh snatched the said axe and placed it inside chapri. Navalsingh, his brother Dhanesh and Balram tied hands of the appellant. Thereafter, the villagers gathered there. Information was given to Subhash Dongarwar, President of Tanta Mukti Samiti. The crime was registered. The investigation was conducted by PSI Satpute. However, PSI Satpute died on 20.05.2017. His death certificate is placed on record at Exh.-45. Therefore, Udaybhan Rukhmude (PW10) who was the writer of PSI Satpute, was examined by the prosecution. As per the evidence of Udaybhan (PW10), after receipt of information of the crime at Police Station Chichgarh, they went to village Zhansingar. They noticed dead body of a woman. Spot panchanama was prepared. Panchanama was written by Udaybhan (PW10) as per directions of PSI Satpute. It was singed by PSI Satpute as well as panchas. Panchanama is at

Exh.-23. PSI Satpute seized iron axe containing blood stains and mud. Inquest panchanama was prepared at Exh.-18. Thereafter, the appellant was arrested. His arrest panchanama is at Exh.-46. Iron axe and other muddemal property was deposited in malkhana. During the course of investigation, query report from the doctor was also procured. After completion of the usual investigation, challan was prepared. The case was committed to the Court of Sessions and it was registered as Sessions Trial No.76/2015. Charge was framed below Exh.-8 against the appellant that he has committed murder of his wife namely Surjabai by means of axe. The appellant abjured his guilt and claimed for his trial. In order to bring home guilt of the appellant, prosecution has examined in all 10 witnesses and the prosecution and also examined one defence witness.

On appreciation of the prosecution case, the learned Judge has passed the impugned judgment.

4. Heard Mr. Kukday, learned counsel for the appellant and Mr. Pathan, learned A.P.P. for respondent-State. Both the learned counsel vehemently argued their respective briefs and prayed for their respective reliefs in their favour.

5. During the course of investigation, investigating officer sent the dead body for its post mortem. The post mortem was conducted at Rural Hospital, Deori by Dr. Bhagyesh Gulhane (PW9). The post mortem was conducted on 20.06.2015. During the post mortem, the autopsy surgeon found following injuries:

- “(i) Crush injury to neck right side of size 8x5x6 cm.*
- (ii) Laceration wound on right arm on middle surface of size 5x2 cm.*
- (iii) Laceration wound on head on temporal occipital region of size 5x3 cm, along with fractured skull on right occipital region.*
- (iv) Fractured right arm,*
- (v) Fractured final vertibrass, No.C-2,C-3,C-4 along with I found injuries on left and right juglar vein and also found injuries to spinal cord, cut through injuries at C-3, C-4 & C-5.”*

The post mortem report is at Exh.-40. According to the autopsy surgeon, the probable cause of the death was hemorrhagic shock due to injury to vital organ, spinal cord, brain and major vessels.

In view of the autopsy surgeon's opinion and finding recorded by him in post mortem report Exh.-14, there cannot be any doubt that unnatural death of the deceased was homicidal one inasmuch as it is not either the prosecution case nor it was not supported by the defence that the injuries are caused accidentally.

6. According to the prosecution, the appellant is author of the injuries found on the dead body of the deceased. Whereas, according to the learned counsel for the appellant, case of the prosecution is not proved against him beyond reasonable doubt. He, therefore, submitted that benefit of doubt be extended to the appellant.

7. The prosecution case mainly rallies around the solitary eye witness i.e. Ramotinbai (PW5). Harishchand (PW1) is pancha witness in whose presence inquest panchanama Exh.-18 was drawn. Shivilal Koreti (PW2) is member of Tanta Mukti Samiti and he reached to Ward No.1 of village Zhansingar after receipt of the information about the incident. When Shivilal (PW2) went to the spot of incident, he noticed dead body of Surjabai lying beside the drainage. He found that villagers have tied hands of the appellant. His evidence would show that villagers told him that the appellant was trying to run after killing his wife and therefore, he was tied. He proved spot panchanama Exh.-12.

8. Navalsingh Miri (PW3) who is the first informant and is the person who firstly reached to spot after he heard his mother and he snatched weapon, the axe from the hand of the appellant.

Ashok Tichkule (PW4) is the police personnel who carried muddemal to deposit it with the chemical analyzer. Ramotinbai (PW5) is the eye witness. According to her evidence, it is the appellant who has assaulted upon his wife when she was tying hair of Ramotinbai. Kalpana (PW6) reached on the spot immediately and she noticed the dead body of the deceased. Another witness is Manbhotin (PW7). She is also relative of Navalsingh. She is not an eye witness. Deva Waghdhare (PW8) is a pancha in whose presence clothes of the deceased were seized under seizure panchanama Exh.-36 and also blood samples, Exh.-37. Dr.Bhagyesh Gulhane (PW9) is autopsy surgeon and Udaybhan Rukhmude (PW10) is writer of the investigating officer. Though the defence has examined witness i.e. Basraj Fulkunwar, brother of the appellant, at the time of hearing, learned counsel for the appellant has not submitted anything on his evidence.

From the list of the prosecution witnesses, it is clear that the first informant Navalsingh (PW3), eye witness Ramotinbai (PW5) and other witnesses who reached on the spot immediately, are close relatives of the first informant.

9. The prosecution has not attributed any motive to the appellant. There is nothing on record to show that the appellant

was having any grudge against his wife and therefore he has eliminated his wife. No doubt true, the prosecution has examined Ramotinbai (PW5) as eye witness. However, it is the duty of the Court to scan the evidence of each and every witness including the eye witness and record a finding as to whether their evidence is trustworthy. If for some reason, evidence of the eye witness is not found trustworthy, it is always open for the Court to discard evidence of such a witness.

10. In Exh.-22 i.e. oral report, first informant has not stated presence of Ramotinbai (PW5) in chapri. What he has stated in the report is that the appellant, the deceased and he were staying in chapri for quite some time and thereafter he climbed on the roof for fixing roof tiles and that time only the appellant and deceased staying in chapri. He narrated that thereafter he heard voice of his mother Ramotinbai (PW5), “Dhava, Dhava”. However, from the witness box, he stated as under:

“At that time, Surjabai was sitting with my mother named Ramotinbai on Chapri...”

Thus, there is variance in respect of presence of Ramotinbai (PW5), when Navalsingh (PW3) climbed on roof for fixing the roof tiles.

11. It is quite possible that after Navalsingh (PW3) climbed on the roof, Ramotinbai (PW5) might have reached to Chapri. Evidence of Ramotinbai (PW5) would show that when the deceased was sitting in the house, Surjabai came to her and told her that she would tie her hair and when she was tying her hair, accused came and gave blow of axe on her neck. Thus, if the evidence of Ramotinbai (PW5) is to be believed, Surjabai and present appellant were not sitting in chapri when Navalsingh climbed on the roof. If the evidence of Ramotinbai (PW5) is accepted as it is then it is clear that when Surjabai was tying her hair, the appellant came there and gave blow of axe on her neck. According to the charge, the appellant assaulted upon Surjabai at 04:00 O'clock in afternoon. In that context, it would be useful to record statements made by Ramotinbai (PW5) during her cross-examination, which is as under:-

“It is true that on the day of incident at about 12.00 noon the accused had entered in the field of others and his hands and legs were tied by the villagers. It is true that his hands and legs were tied till police arrived on the spot.”

12. Thus, from her evidence, it is clear that hands and legs of appellant were tied at 12:00 noon and he was in such condition till police arrived on the spot.

As per Exh.-46 i.e. arrest form of the appellant, he was arrested by police on 19.06.2015 at 23:30 hrs. As per evidence of Udaybhan (PW10), PSI Satpute arrested the appellant after drawing of spot panchanama and after dead body was sent for post mortem. If the evidence of Ramotinbai (PW5) is accepted as an eye witness then at 12:00 O'clock itself the hands and legs of appellant were tied by villagers when he tried to enter into the agriculture property of somebody and he was tied as such till the police came. If that be so, it would be really impossible for the appellant to commit murder of his wife.

13. It is the submission of learned A.P.P. that though this suggestion was given to other prosecution witness, during their cross-examination they have denied the same. Thus, according to the learned A.P.P. the statement made by Ramotinbai (PW5) during her cross-examination that the hands of the appellant were tied at 12:00 O'clock in the noon is required to be discarded and cannot be relied upon. However, we are not impressed by this

submission because of clear admission, which Ramotinbai (PW5) gave during her cross-examination.

It is also an admitted position on record that the clothes of Ramotinbai (PW5) were not seized during the course of investigation, which in our view, has its own importance for reaching to the conclusion as to whether the prosecution has proved its case beyond all reasonable doubts against the appellant inasmuch as even according to Ramotinbai (PW5), she was sitting and the deceased was tying her hair from backside when deceased was assaulted. The natural corollary of the said action would be that there will be splash of blood everywhere and it would be most natural that some blood stains will be on the clothes of Ramotinbai (PW5). The investigating officer ought to have seized the clothes of Ramotinbai (PW5), which were not seized for the reason best known to the prosecution. If that evidence was there, it would have proved the presence of Ramotinbai (PW5) on the spot. In absence of said and in the light of her cross-examination, which is reproduced hereinabove, we are of the view that it would be very risky to accept the evidence of Ramotinbai (PW5) as an eye witness.

14. If the evidence of Ramotinbai (PW5) is discarded then there is no evidence to show that the appellant was the author of the assault. The learned A.P.P. has stated that there are attending circumstances namely the appellant continued standing near the dead body along with axe in his hand and the said was snatched away by Navalsingh (PW3) and the said fact is being substantiated by other prosecution witnesses.

Another circumstance, according to the learned A.P.P. is that Gamcha of the appellant was seized and it was found to be stained with blood having human blood on it. Similarly, the axe was also having blood stains.

15. Insofar as presence of appellant near dead body is concerned, merely because the witnesses are coming and stating like that the Court need not accept the same unless that has been proved by cogent evidence. In this case, all other witnesses are close relatives of Navalsingh (PW3). Navalsingh (PW3) in his evidence and in his first information report states that, with the help of two other persons to whom he claimed to be his brothers, the hands of appellant were tied down by him and the axe was snatched. Now, these two persons, for the reasons best known to

the prosecution, are not examined during the course of trial though their statements were recorded by the investigating officer during the course of investigation. Further, there was no reason for Navalsingh (PW3) to keep the said axe under chapri after it was snatched from the hands of appellant. Further, there is a variance on that aspect also inasmuch as other prosecution witnesses state that axe was lying beside the dead body.

16. According to Shivilal (PW2), hands and legs of appellant were tied down because he was trying to run away from the spot as it was disclosed to him by the villagers. Navalsingh (PW3) is silent on that aspect either in the FIR or in his substantive evidence. Not only that, other witnesses examined by the prosecution are not speaking even a word that the appellant tried to run away from the spot and therefore he was tied down.

17. Insofar as the seizure of Gamcha is concerned, it is seized when spot panchanama, Exh.-20 was drawn. For the reasons best known to prosecution and the investigating officer, clothes of the appellant were not seized and only Gamcha was seized. The Gamcha is a piece of cloth which is normally tied on the head in this part of country. Now, further there is no other

evidence at all to show that after Gamcha was seized, it was sealed in presence of pancha witness, even the writer of the investigating officer is silent about same. Therefore, in our view, blood stains on the same loses its importance.

18. If evidence of eye witness is discarded then prosecution was under obligation to show that what was motive for appellant to kill his wife. Even according to the prosecution witness, relations between the appellant and his deceased wife were very cordial. Even just prior to the alleged incident, they were happily chit-chatting with Navalsingh (PW3), as it could be seen from the evidence of Navalsingh and FIR Exh.-22. Thus, there is no reason for the appellant to commit murder of his wife.

19. In view of the aforesaid discussion, we are of the view that the evidence of prosecution does not establish guilt of the appellant beyond reasonable doubt and therefore benefit of doubt has to be extended in favour of the appellant. Resultantly, we pass the following order.

ORDER

1. The Criminal Appeal is allowed.
2. Judgment and order of conviction dated 22.03.2018 passed by the learned Additional Sessions Judge, Gondia in Sessions Trial No.76/2015 is quashed and set aside.
3. Appellant– Dinesh s/o Sakharam Fulkuwar, is hereby acquitted of the offence punishable under Section 302 of the Indian Penal Code.
4. The appellant, who is in jail, shall be released forthwith, if he is not required in any other offence.

JUDGE**JUDGE**

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