

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.177 OF 2017

Hausaji s/o Bhaurao Jagdambe
Age: 32 years, Occu.: Agriculture,
R/o. Taluka Dharmabad,
District Nanded.
At Present Convict No.C-10981
Central Prison Nashik,
District Nashik

.. Appellant

Versus

The State of Maharashtra

.. Respondent

...

Mr. Abhishek Kulkarni, Advocate for appellant. (Appointed through Legal Aid)
Mr. S. J. Salgare, APP for the respondent – State.

...

CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.

DATE : 30th August, 2023

JUDGMENT [Per Smt. Vibha Kankanwadi, J.] :-

. Sometimes, we wonder as to how a man could be so cruel to kill his near and dear ones. Here is the case where the present appellant – original accused No.1 alleged to have murdered his wife, son and daughter. He challenges his conviction by learned Additional Sessions Judge, Biloli on 18.10.2016 in Sessions Case No.39 of 2015 for the offence punishable under Section 302 of Indian Penal Code. He has been sentenced to suffer imprisonment for life and to pay fine of Rs.25,000/- in default to suffer

simple imprisonment for two years.

2. Before we proceed to take the assessment of the case, it will not be out of place to mention here that the charge-sheet was filed against in all seven accused persons and it was for the offence punishable under Sections 302, 498-A read with Section 109 of Indian Penal Code. Original accused Nos.2 to 7 have been acquitted of all the charges, whereas the present appellant – original accused No.1 has been acquitted of the offence punishable under Section 498-A, 109 of Indian Penal Code. The charge has been framed at Exhibit-38, but we have found that the charge is defective. For triple murder, the charge is framed in a consolidated way i.e. in one line it is stated that the accused has committed murder of wife, daughter and son. It is the cardinal principle that for each distinct offence, there should have been separate charge. That means for murder of each person, there ought to have been a separate charge as against the appellant. Therefore, we can say that the gravity of the offence has been lessened due to such consolidated charge, however, though the charge is defective, now this Court being the Appellate Court cannot set it right, as at any point of time, the prosecution has not raised any objection. Same is the case as regards the operative order. For each distinct offence, after holding the accused committing murder of his wife, daughter and son, no separate punishment has been awarded. Thus, it can be again said that the gravity and

seriousness of the offence has been diluted by the learned Additional Sessions Judge himself. It appears from the submissions at the time of hearing the accused on the point of sentence that the prosecution was heard. Even at that point of time also, learned APP has not taken pains to consider the charge that was framed. He prayed for death sentence, but never attempted to place on record the evidence in respect of aggravating circumstances. The guidelines in **Macchi Singh and others Vs. State of Punjab**, [1983 AIR 957] and **Bachan Singh Vs. Union of India and others**, [(1980) 2 SCC 684] were not followed at all. The prosecution in this case has not filed any appeal under Section 377 of the Code of Criminal Procedure being aggrieved by the punishment for the murder of three persons and still sentencing accused No.1 to undergo imprisonment for life. Under the said circumstance, this Court need not get the compliance done as per **Manoj and others Vs. State of Madhya Pradesh**, [(2023) 2 SCC 353] and **Vikas Chaudhary Vs. The State of Delhi**, [2023 DGLS (SC) 450] : 2023 (4) JT 517]. Ultimately, what stands for consideration/reassessment and scrutiny in this appeal is the conviction of accused No.1 for the offence punishable under Section 302 of Indian Penal Code for which he has been awarded imprisonment for life.

3. The prosecution story in short is that P.W.2 Raosaheb Bhaurao Sawant, resident of Waghalwada, Taluka Umri, District Osmanabad lodged

report with Dharmabad Police Station on 21.06.2015. He has stated that his younger sister Kalpana was married to original accused No.1 (hereinafter referred to as the “accused”) about 10 years prior to the FIR. They had daughter Durga aged 8 years and son Rama aged 5 years on the date of FIR. The marital life of accused and Kalpana was good till 7 to 8 years after the marriage, however, two years prior to the FIR, the accused got addicted to liquor. He used to assault Kalpana and children by consuming liquor daily. It is alleged that the other accused persons used to instigate accused and harass her, however, in view of their acquittal, we would like to not to infer to the acts and the evidence as against the other accused persons. So also, we do not want to take note of the allegations attracting under Section 498-A of Indian Penal Code even as against the accused, as he has been acquitted. The informant has alleged that he had taken accused to Shirpur, District Buldhana to give him treatment for de-addiction. The husband and wife i.e. Kalpana and accused stayed there for about 3-4 days and returned to Karegaon on 20.06.2015. Durga and Ram were with Raosaheb at Waghalwada and, therefore, on the request of accused and Kalpana, he left the children to Karegaon around 10.00 to 11.00 a.m. on 20.06.2015. He received phone call around 7.00 a.m. on 21.06.2015 from Uttam i.e. brother of accused stating that accused is not opening the door of his house. They are hearing the shouts from inside. After the said phone call, Raosaheb and his wife P.W.3 Anita went on

motorcycle to Karegaon and they broke open the door of the house of accused with the help of villagers. After they entered the house, they saw that accused was sitting by holding stone in his hand. They then saw Durga's dead body on the grain bag in the front room and dead body of Ram was found on the mattress near Durga's dead body. They both had sustained severe injuries. The found dead body of Kalpana near the wall. A tile was kept below her neck. She had sustained injury to her head and it was appearing that she has been throttled. They found chilly powder sprinkled in the house. People caught accused and gave intimation to police. Raosaheb came to know from the villagers that shouts were heard from the house of accused around 12.00 mid-night to 1.00 a.m. It is alleged that none of the other accused persons had helped the deceased persons to come out. On the basis of said FIR, offence was registered vide Crime No.71 of 2015 and investigation was taken up. Inquest panchanamas were carried out and dead bodies were sent for postmortem. Panchanama of the spot was executed. Accused came to be arrested. The clothes of the accused as well as deceased persons came to be seized. Statements of witnesses were recorded and after completion of investigation, charge-sheet was filed.

4. After committal of the case, as aforesaid, the charge was framed. All the accused pleaded not guilty. Prosecution has examined in all eleven

witnesses to bring home the guilt of the accused and after hearing both sides, only the appellant - accused came to be convicted for the offence punishable under Section 302 of Indian Penal Code and other accused persons have been acquitted.

5. Heard learned Advocate Mr. Abhishek Kulkarni for the appellant (Appointed through Legal Aid) and learned APP Mr. S. J. Salgare for the respondent – State.

6. The learned Advocate who came to be appointed through Legal Aid to represent the appellant has vehemently submitted that the learned Trial Judge has failed to appreciate the evidence. The defence of the accused is that there were stones those were kept on the tin sheets of the roof. There was storm at night time and the stones had fall on the head of the deceased persons. PW.2 Raosaheb, in his cross-examination, has admitted that the first room of the house of accused is having tiles and the middle room is having tin sheets on roof. Some big stones were kept on the tin sheets. This admission and the height of the house ought to have been considered by the learned Trial Court. The alternative submission was that when these persons had gone inside the house of accused, they heard accused saying that somebody has killed his wife and children. The accused himself had sustained injuries and this fact has been accepted by PW.11 P. I. Rajendra Sahane. In the examination-in-chief itself he says that when he went to the

spot, he found that the accused was lying in front of his house in injured condition. Therefore, proper benefit ought to have been given to the accused by the learned Trial Court.

7. Per contra, the learned APP strongly opposed the appeal and submitted that the accused has committed murder of three persons in a brutal manner. The testimony of P.W.9 Dr. Virbhadra, who conducted the autopsy, would clearly establish that the death of Kalpana, Ram and Durga is homicidal in nature. The subsequent conduct is therefore required to be seen that till the arrival of P.W.2 Raosaheb, P.W.3 Anita, P.W.6 Baburao and P.W.7 Laxman, the accused was inside the house. The door was required to be broke open and the three persons were found in severe injured condition. The prosecution had proved the guilt of the accused beyond reasonable doubt.

8. At the cost of repetition, we would like to say that in spite of the said brutality, which ought to have been considered by the learned Trial Judge at the time of framing of charge itself, a defective charge has been framed. The Trial Courts are required to be sensitive enough while framing charge. When it comes to the Sessions Trial, the Sessions Judges/Additional Sessions Judges are required to follow the procedure laid down in Chapter XVIII of the Code of Criminal Procedure. The trial begins with compliance of Section 225 of the Code of Criminal Procedure, which prescribes that the

trial should be conducted by public prosecutor and then the said public prosecutor should open the case for the prosecution as per Section 226 of the Code of Criminal Procedure. Section 226 of the Code of Criminal Procedure prescribes that when the accused appears or is brought before the Court in pursuance of commitment of a case under Section 209, the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence, he proposes to prove the guilt of the accused. If this stage is strictly followed, then there is no scope for having a defective charge. The defect in the charge may cause injustice to either prosecution or the accused and, therefore, both the parties are also required to be vigilant when the charge is framed. Now, this defect cannot be ratified in absence of inaction on the part of the prosecution. We would like to specifically observe here that we witness prosecution taking active part in filing appeals under Section 377 of the Code of Criminal Procedure and Applications for Leave to Appeal under Section 378(1) of the Code of Criminal Procedure, when in fact no such case is made out for entertaining such appeals or applications, but in good cases, no steps are taken on behalf of the prosecution. This is the unfortunate scenario in the system.

9. PW.2 Raosaheb is the informant, who set the law in motion. Though PW.11 Rajendra, the investigating officer, has stated that around 9.00 a.m. on 21.06.2015, he had received phone call from unknown persons from

Karegaon regarding the murder at Karegaon, offence was not registered on the basis of said phone call. He has produced the true copy of station diary entry. The said station diary entry taken at 9.30 a.m. on 21.06.2015 Exhibit-93 shows that the information that was received was that there is murder of one lady and son. It appears to be a cryptic information and, therefore, non registration of FIR on the basis of said telephonic information is justified.

10. PW.2 Raosaheb and his wife PW.3 Anita both have stated that after eight years of marriage accused became addicted to liquor and he used to harass Kalpana. Raosaheb had taken accused to Shirpur for treatment on his addiction to liquor, where they stayed for about four days and they returned on 20.06.2015. Durga and Ram were at his place and, therefore, the accused had requested him to send children to Karegaon and, therefore, he took children to Karegaon on same day i.e. 20.06.2015. He left the children to Karegaon and returned to his house. They both have consistently said that after accused Uttam had given telephonic call at about 7.30 a.m. on 21.06.2015, they went to the house of accused, as accused was not opening the door of his house and only upon their arrival, with the help of villagers they broke open the door. Thereafter, they saw the accused was sitting in the room. There were pieces of floor tiles in his hands. They saw three dead bodies in the room and then the villagers took

the custody of accused. Important point to be noted is that the accused has not taken the *plea of alibi* and except the denial that the door of the house of the accused was required to be broke open, there is nothing. As regards the act of breaking of door of the house of accused is concerned, the testimony of P.W.2 Ramrao and P.W.3 Anita stands corroborated by P.W.6 Baburao and P.W.7 Laxman. No doubt, P.W.6 Baburao in his cross-examination has admitted that the door of the house of the accused was already broken when he went inside, but he was found consistent in saying that he saw the accused inside the room. P.W.7 Laxman had immediately gone to the spot. Thus, the presence of the accused inside the house and the house being locked from inside would cast a duty on the accused to explain the circumstances in which his wife, son and daughter were found injured and in dead condition. Section 106 of the Indian Evidence Act cast said duty on the accused and in his statement under Section 313 of the Code of Criminal Procedure, we cannot get any answer to the same. No doubt, a lame defence was tried to be taken that the stones on the tin roof fell on the head of the three deceased persons due to storm. However, if we consider the spot panchanama, which got proved through P.W.1 Jaibharat, there is absolutely no suggestion to him in respect of the condition of the tin roof. Further, as aforesaid accused has not taken the *plea of alibi* and he was found inside the house when the latch was from inside the house, then question arises as to how he was not got injured in

the said storm. How the said storm would have effected his house only.

11. Now, as regards the statement in examination-in-chief by P.W.11 Rajendra that when he went to the place he saw accused was lying in front of his house in injured condition is concerned, after witnessing the three dead bodies inside the house, the possibility of villagers, who had gathered, and also P.W.2 Raosaheb getting angry and assaulting accused, cannot be ruled out. Here itself we would like to take note of the cross-examination of P.W.9 Dr. Kotalwar, who had conducted the autopsy, but he has examined accused also. He had issued certificate Exhibit-88 in respect of the medical condition of accused when he was examined around 12.35 p.m. on 21.06.2015 i.e. immediately after he was taken in custody. He had found two injuries on the person of accused, (i) lacerated injury to occipital region measuring by 6 x 2 cm., caused by hard and blunt object, simple in nature, within 24 hours and (ii) contusion of left parieto frontal bone 8 x 4 cm. with blunt object. There is no further suggestion to the doctor that those injuries are possible by storm or due to beating by the mob. Those were the simple injuries. Under the said circumstance, prosecution was not duty bound to explain those injuries at all.

12. P.W.9 Dr. Kotalwar has conducted the autopsy between 2.45 p.m. to 4.00 p.m. on 21.06.2015 on the dead body of Kalpana and he found external as well as internal injuries which were basically communited

fracture with underlying brain crushed and exposed out. The cause of death was severe head injury and hemorrhagic shock. The postmortem report of Kalpana is at Exhibit-82. As regards the postmortem of Ram is concerned, it was conducted between 4.10 p.m. to 5.10 p.m. The injury was fracture on left side of parieto occipital region of skull with corresponding internal injury. It is specifically stated that the underlying brain below the fracture side of left parieto occipital region was completely crushed and exposed out. The cause of death was same i.e. severe head injuries with hemorrhagic shock and the postmortem report is at Exhibit-83. The postmortem of Durga was conducted between 5.10 p.m. to 6.10 p.m. She had sustained injury to right parieto occipital region of skull. The underlying bone was fractured and brain exposed and crushed completely. The cause of death is same. Thus, we can get with what severity the injury would have been caused. The weapon that was used was hard and blunt object. The seized stone was sent to P.W.9 Dr. Kotalwar for opinion and then the opinion has been given that those injuries are possible by the seized weapon. All these findings by the medical expert have not been shattered in his cross-examination. Therefore, in unequivocal terms, the prosecution had proved that death of Kalpana, Rama and Durga was homicidal in nature.

13. P.W.4 Lalitabai is the inquest panch for Kalpana and Durga. P.W.5

Govardhan is the inquest panch for Rama. P.W.8 Gangadhar is the panch for seizure of clothes of deceased, whereas P.W.1 Jaibharat is also the panch to the seizure of clothes of accused. P.W.10 Police Constable Raosaheb Jadhav is the carrier. These witnesses have supported/corroborated the prosecution story.

14. Thus, taking into consideration the re-appreciation and revisiting to the evidence that was led by the prosecution, this Appellate Court comes to the conclusion that the prosecution had proved the guilt of the accused beyond reasonable doubt. Again at the cost of repetition it was very unfortunate that the charge was not properly framed and even though it was proved by the prosecution that the accused has committed murder of three persons which was a distinct offence as regards each murder, yet the Trial Court has not considered its severity and it has not been so reflected while granting the quantum of punishment. As aforesaid, the prosecution has not challenged the conviction on the point that it is on the lesser side. We have no option but to confirm the said sentence. There is absolutely no merit in the present appeal. It deserves to be dismissed. Accordingly, the present appeal stands dismissed.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm