

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 485 OF 2016

Devidas @ Devdya Baban Mohite
Age 53 years, Occu. Agril,
r/o Nimbodi, Tq. and Dist.
Ahmednagar.

... Appellant

Versus

The State of Maharashtra
Through Police Inspector,
Police Station, Bhingar,
District Ahmednagar.

... Respondent

.....
Mr. M. A. Tandale, Advocate for the Appellant [appointed]
Mr. A. M. Phule, APP for the Respondent-State
.....

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

DATED : 16.06.2023

JUDGMENT [ABHAY S. WAGHWASE, J.] :

1. The instant appeal is directed against the judgment and order passed by Sessions Judge, Ahmednagar dated 06.05.2016 in Session Case No. 147 of 2015 by which appellant Devidas is held guilty for the offence punishable under Section 302 of the Indian Penal Code [IPC] and accordingly sentenced to suffer imprisonment for life and to pay fine.

BACKGROUND OF THE TRIAL CASE

2. PW1-Uttam i.e. brother of deceased Baban set law into motion alleging that his brother was residing with his son Devidas (accused) at village Nimbodi. On 03.03.2015, telephonic message was received from one Suresh Pote informing that Baban fell in the house and died. Therefore, informant, a resident of Nimbalak, rushed to his brother's place. On reaching there, he noticed that his nephew Devidas (accused) was present there. Informant came across injury on the left eye of his nephew. After entering the house, he saw brother Baban lying in supine condition. There were two bleeding injuries on the chin, fracture to right hand and muffled injuries on thighs. Informant also came across empty liquor bottles and clothes were in scattered condition. Therefore, he approached Bhingar Camp Police Station informing that his brother Baban and accused nephew were both addicted to liquor. There used to be frequent quarrels amongst them after getting drunk. Therefore, informant suspected that accused must have assaulted his brother on the night of 03.03.2015 after picking up quarrel.

3. On the basis of above information, Bhingar Camp police registered FIR vide Crime No. 28/2015 for the offence punishable

under Section 302 of IPC. Investigation was entrusted to PW8-API Gangurde who after completion of investigation, chargesheeted accused and as a result of it, accused came to be tried by learned Sessions Judge.

4. During trial, prosecution examined as many as nine witnesses. Learned trial Judge heard both sides and appreciated the oral and documentary evidence like FIR, post-mortem report, inquest panchanama etc. On appreciation of the evidence, learned trial Judge held that prosecution succeeded in proving the complicity of accused i.e. son murdering his own father, and thereby convicted and sentenced him as above.

SUBMISSIONS

On behalf of Appellant :

5. Now in appeal, learned Advocate for the appellant invited our attention to the oral accounts of all prosecution witnesses and also briefed us about their status. According to him, there was no iota of evidence in support of prosecution case. That, case is based entirely on circumstantial evidence, there being no direct evidence and therefore, according to him, it was the fundamental duty of the prosecution to put forth reliable and cogent circumstances to being

home the charge. According to him, at the outset, also case being based on circumstantial evidence, prosecution was duty bound to establish the very motive behind the occurrence but, it is his submission that, prosecution has utterly failed to attribute any motive behind the alleged incident. He next submitted that there was no circumstance to connect accused with death of Baban except the fact that accused and deceased were residing together. He hastened to add that mere residence of the accused in the house itself is not sufficient to hold him responsible and rather, according to him, something more is required for fastening guilt for serious charge of murder. He pointed out that admittedly informant is a resident of distinct village and on receipt of telephonic message, he rushed to the house of deceased brother in another village and thereafter, report has been lodged. Learned counsel pointed out that there is no evidence, either oral or documentary, to suggest that accused was the only person in the company of deceased that night. Learned Advocate took us through the impugned judgment and would submit that it is surprising to find learned trial Judge opining that accused lifted and threw deceased on floor forcefully causing fatal injuries even though there was no direct eye witness. He also pointed out that rather FIR itself is on suspicion and when it is so, he submitted that, it is settled law that suspicion can never take place of proof. He also pointed out

that it was not open for the learned Sessions Judge to invoke the provisions of Section 106 of the Evidence Act to arrive to any conclusion when in fact prosecution had failed to discharge primary burden against the accused. For all above reasons, it is his submission that the impugned judgment and order, which is based on conjectures and surmises, cannot be allowed to be sustained.

On behalf of Respondent-State :

6. Refuting the above submissions, learned APP would submit that no fault can be found in the judgment as prosecution in the trial court had brought strong, incriminating circumstances showing involvement of none other than accused. The circumstance of accused and deceased residing together has not been denied. Death was shown to be unnatural. Accused to be the only person in the company of his father and he having failed to offer plausible explanation and account unnatural death, unerringly finger gets pointed to him. Hence, according to him, judgment being based on sound reasons, need not be disturbed.

7. Being the first appellate court, as required, we propose to carefully re-appreciate, re-analyze and re-examine the available evidence on record.

8. It seems that case of prosecution is admittedly based on circumstantial evidence. This being the position, it needs to be seen as to whether law on manner of appreciation of circumstantial evidence has been correctly applied while accepting the case of prosecution by the learned trial court. Needless to say that it was imperative for the prosecution to establish a complete chain of circumstances which unerringly point to the involvement of accused, completely ruling out his innocence. The case was expected to be proved beyond reasonable doubt. We have born in mind the law laid down since the judgment of *Hanumant Govind Nirgudkar and another v. State of M.P.* ; AIR 1952 SC 343, *Shivaji Sahebrao Bobade v. State of Maharashtra* ; AIR 1973 SC 2622, *Sharad B. Sarda v. State of Maharashtra* ; AIR 1984 SC 1622, *Padala Veera Reddy v. State of Andhra Pradesh* ; 1989 (Suppl.2) SCC 706, *Dhananjoy Chaterjee @ Dhana v. State of West Bengal* ; 1994 SCC (2) 220 and *State (NCT of Delhi) v. Navjyot Sandhu @ Afsan Guru* ; 2005 (11) SCC 600. In light of such settled legal position, we have undertaken the exercise of re-appreciating the evidence.

9. PW1-Uttam, brother of deceased (informant) at Exhibit 14 stated that his deceased brother and his nephew were residing at village Nimbodi, taluka and district Ahmednagar, whereas informant

resided at village Nimbalak. It is his version that he received telephonic information from one Suresh Pote about death of his brother after fall in the house. So he rushed there with his family and saw accused Baban sitting outside the house with injury to right eye. After arrival of police, when door of the house was opened, they all went inside and deceased Baban was found lying in supine condition. There were blood stains on the floor. Deceased had suffered injuries to his head, chin and right hand. He testified that his brother and nephew both were addicted to liquor and that his mother Rambhabai had informed him that there used to be quarrels between Baban and accused son. He lodged report Exhibit 15.

10. Above witness is subjected to cross-examination and initial part is devoted on the aspects of family and occupation and information is extracted regarding neighbourhood. Omission is brought regarding time of reaching Nimbodi, description of clothes of deceased and about muffled injuries on abdomen and thigh. Rest all suggestions are denied by him.

11. Next important witness seems to be PW2-Jayram Berad, who was Sarpanch of the village. Unfortunately, except stating that he learnt about death of Baban and found him lying on the floor and

accused standing outside the house, nothing has been stated by him and therefore, finding him resiling, he was cross-examined.

12. Similar treatment is given by PW3-Dattatraya, who acted as pancha to alleged disclosure at the instance of accused regarding readiness to show the spot where assault was made on father. He also resiled as he denied that accused showed the place of incidence in his presence to the police.

13. PW4-Sandeep Shinde gave same treatment to the prosecution as he denied knowing whether accused and deceased were residing in the house and denied that accused was seen by him beating his father in the night at around 10.30 p.m.

Therefore, the only eye witness has taken a somersault and has not supported the prosecution in spite of his statement being recorded under Section 164 of the Code of Criminal Procedure [Cr.P.C.].

14. PW5-Deelip Tikone is the police official who recorded the report.

15. PW6- Police Naik Naresh Chavan is the carrier of seizure.

16. PW7-Dr. Amit Gosavi is the autopsy doctor.

17. PW8-Gorakhnath Gangurde is the Investigating Officer.

18. PW9-Bhaskar Bhos is the Special Judicial Magistrate who recorded statement of PW4-Sandip Shinde under Section 164 of Cr.P.C.

ANALYSIS

19. There being charge under Section 302 of IPC, it is to be seen whether death of Baban is established to be homicidal one or it is otherwise, i.e. suicidal or accidental. To find answer to this question, we need to visit autopsy doctor's evidence i.e. PW7-Dr. Amit Gosavi. It has come in his testimony that he carried out post-mortem on the dead body of Baban on 03.03.2015. He narrated five external injuries noticed by him. On internal examination of head and brain, he stated to have come across hematoma beneath scalp right-parietal and subarchnoid haemorrhage over fronto-parieto occipital region. He has opined that probable cause of death of Baban was "death due to head injury due to hard and blunt object, leading to subarchnoid haemorrhage over fronto-parieto occipital region".

In his cross-examination, autopsy doctor has admitted that post-mortem report does not bear seal and signature of the civil surgeon. He has flatly denied the suggestion that injury no.1 noted in

column no.17 is possible on account of fall on the edge of kitchen *oata* and injury no.3 is possible by fall after consuming liquor and landing on a hard surface twice/thrice.

20. On carefully analyzing the above medical evidence, it is seen that death is shown to be due to head injury due to hard and blunt object. Though defence tried to suggest said injury to be on account of coming into contact with kitchen *oata* or repeated falls in drunk condition, there is no material on record in support of such suggestions. It has not come on record that there was a kitchen *oata*, nor it has come on record that deceased was under influence of liquor and he repeatedly fell in such condition. Therefore, here, medico-legal expert has attributed death due to head injury. However, when autopsy doctor speaks of cause of death to be head injury, in view of the case of prosecution, it was expected that medical expert ought to have ruled out death to be either suicidal or accidental. Medico-legal expert has not confirmed that death is homicidal. Concrete opinion has thereby not come on record and therefore, in our opinion, in the light of above discussed medico-legal expert's evidence, it is doubtful whether Baban met homicidal death only and not other mode of death.

21. Here, as stated above, there was only one eye witness, but he has already resiled. There is no witness who had seen accused and deceased together, or quarreling after getting drunk as is submitted by informant. Informant claims that he learnt about quarrels between his brother and nephew from his mother, but surprisingly mother has not been examined. Therefore, on account of carrying out assault or beating deceased, there is absolutely no material. There is no witness speaking about deceased and accused to be together under one roof that night. In spite of no evidence whatsoever to show accused and deceased to be together, learned Sessions Judge in para 57 of the judgment has observed that prosecution has proved that accused lifted his father and hit him on the ground two to three times. Such aspect is not even put to the medico-legal expert by the prosecutor. Therefore, in absence of such suggestion on behalf of prosecutor, it was not open for the learned Sessions Judge to form such opinion about accused lifting his father and banging him on the floor repeatedly. When learned Sessions Judge had himself opined about motive to be not clear, then, merely by invoking Section 106 of the Evidence Act, case of prosecution ought not to have been accepted i.e. without first cogently establishing presence of accused in the house and that death of Baban to be only and only homicidal and not otherwise.

22. In para 5 of the judgment, learned Sessions Judge has observed that first informant suspected that his nephew/accused must have assaulted his father after picking up quarrel and therefore, informant suspected involvement of his nephew and hence lodged report. If such is the observation, then, report on suspicion itself ought not to have been straightway accepted as incriminating against accused.

23. To sum up, here, there is no incriminating material whatsoever to hold accused responsible for death of Baban. Informant claims to have learnt from his mother about quarrels between accused and deceased but said information was allegedly received by him one and half years prior to the occurrence. Said mother is not before the court. What preceded the incident has not come on record. Presence of accused is shown outside the house and not inside the house or near the body so as to directly connect him with the death. Other several circumstances are relied by prosecution, however, none of them is cogently and firmly proved to connect accused to the death of Baban. Medical evidence is not clear and firm about death to be only and only homicidal and not otherwise. All such factors have contributed to the weakness of the case of prosecution. Learned Sessions Judge has not considered and appreciated the evidence in such perspective and has erred in recording the guilt.

24. Therefore, we are convinced that the said judgment, which is apparently based on conjectures and surmises, cannot be allowed to be sustained. Hence, the following order:

ORDER

I. The appeal stands allowed.

II. The conviction awarded by learned Sessions Judge, Ahmednagar to the appellant-accused Devidas @ Devdya Baban Mohite on 06.05.2016 in Session Case No. 147 of 2015 after holding him guilty of committing offence punishable under Section 302 of the Indian Penal Code [IPC], is hereby quashed and set aside. The appellant stands acquitted of the offence punishable under Section 302 of IPC.

III. The appellant be set at liberty, if not required in any other case.

IV. Fine amount paid, if any, to be refunded to the appellant after statutory period is over.

V. It is clarified that there is no change in the order passed by the learned Sessions Judge, Ahmednagar regarding disposal of muddemal.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]