



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 350 OF 2018

Gajanan Hanumantu Chincholkar
Age: 31 years, Occu.: Labourer,
R/o Vitthalwadi, Village Bodhadi (Bk.),
Tq. Kinvat, Dist. Nanded

..APPELLANT

VERSUS

State of Maharashtra
Through Police Station Kinvat,
Tq. Kinvat, Dist. Nanded

..RESPONDENT

....

Mr. R.S. Deshmukkh, Senior Advocate a/w Mr. Rajat Untwal, Advocate i/b
Mr. V.A. Chavan, Advocate for appellant
Ms. V.S. Chaudhari, A.P.P. for respondent - State

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CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ
DATE : 04th JANUARY, 2024

ORAL JUDGMENT (PER : R.G. AVACHAT, J.) :

1. This is an appeal against conviction. Vide order dated 16th January, 2018, the appellant has been convicted for offence punishable under Section 302 of the Indian Penal Code ('I.P.C.') and therefore, sentenced to suffer life imprisonment and fine with default stipulation.

2. The facts, leading to the present case are as follows :-

The First Information Report ('F.I.R.') (Exh.14) was lodged by brother of deceased – Aarti on 14th June, 2016. According to him, Aarti married the appellant in the year 2008. The couple was blessed with three

sons – Shridhar, Swami and Rudra. The appellant would do labour work to earn his living. For about two years next before the incident, there used to be frequent quarrels between the appellant and his wife (deceased). It is further his case that on 13th June, 2016 a quarrel ensued between the two. He reasoned with the appellant. The appellant committed murder of Aarti on the intervening night of 13th and 14th June, 2016.

3. Based on the F.I.R., Crime No. 111 of 2016 (Exh.14) came to be registered with Kinvat Police Station for the offence punishable under Section 302 of the I.P.C. P.W.10–Arun Jagtap, Police Inspector, Police Station Kinvat did investigation of the crime. He paid visit to the house of the appellant. Scene of offence panchanama (P.W. 18) was drawn. The dead body of the deceased was subjected to postmortem. P.W.9 – Dr. Quadri conducted the postmortem examination. Postmortem report is at Exh.35. The appellant was arrested. Pursuant to the disclosure statement made by the appellant, a piece of cloth (*dasti*) came to be recovered. Statements of persons acquainted with the facts and circumstances of the case were recorded.

4. On completion of investigation, the appellant was proceeded against by filing charge-sheet. The case was committed to the Court of Session. The trial Court framed charge (Exh.6). The appellant pleaded not guilty. His defence was of denial.

5. To bring home the charge, prosecution examined ten witnesses and produced in evidence certain documents such as postmortem report, scene of offence panchanama, inquest, etc.

6. We have heard learned senior counsel for the appellant and learned A.P.P. for State. According to learned senior counsel, the case is based on so called single eye witness account i.e. P.W.7 – Shridhar, son of the appellant and deceased. Shridhar was eight years of age at the relevant time. He, being a child witness, must have been prone to tutoring. His statement has been recorded by P.W.10 - Investigating Officer about sixty days after the incident. Our attention has been adverted to cross-examination of Shridhar to indicate that he was under influence of relations of his mother. Learned senior counsel would further submit that though it is the case of prosecution that there used to be frequent quarrels between the deceased and the appellant, admittedly, the deceased had never been to the police station for making a complaint against the appellant. Same suggests the couple had happy married life. There is evidence to indicate the appellant used to stay away for 2 to 8 days for work to earn his living. The house of the appellant is situated in a populated area. Statements of neighbors have not been recorded. According to him, even the appellant has not come with any explanation or with some positive evidence as to where he was on the fateful night, the burden of proof on the prosecution does not get lessen. According

to him, house of the appellant was located at *ghat* section. There is every possibility of the offence to have been committed by someone else. He ultimately urged for allowing the appeal.

7. Learned A.P.P. would, on the other hand, submit that on the fateful night the deceased was in the company of the appellant. It is, therefore, for him to come clean as to what had happened with his wife. The appellant has not come with defence to have had required to leave the village for urgent work, and therefore, the deceased and the minor children were the only persons in the house overnight. She, therefore, urged for dismissal of the appeal.

8. We have considered the submissions advanced and appreciated the evidence on record.

9. Admittedly, the deceased died of homicidal death. Postmortem report (Exh. 35) indicates the deceased died of asphyxia due to compression of neck (throttling). Admittedly, the deceased alongwith her husband (appellant) and three children was residing at village Bodhadi (Bk.), Tq. Kinvat. Her parental house was also in the same village. The F.I.R. (Exh.14) has been lodged by brother of the deceased, P.W.1 – Chandar. It is in his evidence that deceased – Aarti was his younger sister. She had married the

appellant in 2008. The couple was blessed with three sons. The appellant would do labour work at the very village to earn his living. There used to be frequent quarrels between the appellant and the deceased during last two years of the incident. He had reasoned with the appellant many a time. It is further in his evidence that in the evening of 13th June, 2016 a quarrel took place between the two. On the following morning he went to the appellants residence in response to a call by son of the deceased. He saw the dead body of his sister on a wooden cot. He immediately lodged the F.I.R. with Kinvat Police Station.

10. During his cross-examination, it has come on record that the deceased had never lodged any police report against the appellant. The house of the appellant is near *ghat* section. He (P.W.1) owned a tractor. The appellant would do labour work with him sometimes. P.W.1 admitted that the appellant used to go out of village for labour work for 2 to 8 days. The room in which the appellant would reside alongwith his family admeasures 8 x 10 ft. The witness was confronted with the F.I.R. (Exh.14) so as to bring on record certain omission amounting to contradiction. The F.I.R. is silent as regards witness to have had convinced the appellant in the evening of 13th June, 2016. He, however denied the appellant was not present in the village. It does indicate the appellant to have had no happy married life. P.W.2 – Kishan is a witness to the inquest panchanama (Exh.17) and the scene of

offence panchanama (Exh.18). We do not propose to advert to his evidence in extenso, since it has little relevance for deciding the present appeal. P.W.7 – Shridhar is the son of the appellant. He was eight years of age in those days. It is in his evidence that the appellant strangled his mother with a *dasti*. He also gave her fist blows. When he raised shouts, the appellant pressed his mouth and ran away.

11. During cross-examination, he has admitted that almost all the times he used to reside at the house of his maternal uncle (P.W.1 – Chandar). He has affection towards his maternal uncle and maternal grand-mother. He, however denied that on the fateful night he was at the house of his maternal uncle. Both, P.W.1 and mother of the deceased were with him when his statement was recorded by police. He too was confronted with his statement to the police. His statement is silent to mention therein that he raised shouts and thereupon the appellant pressed his mouth.

12. P.W.3 – Prakash and P.W.4 – Syed are witnesses to the disclosure statement made by the appellant pursuant to which *dasti* came to be recovered. We do not propose to refer to their evidence in extenso for the reason that there is no evidence with regard to recovery of said *dasti* with the crime in question. In short, there is nothing to suggest that with the very *dasti* the appellant strangled the deceased.

13. P.W.5 - Chandrabhan is the resident of the very village. It is in his evidence that on 13th June, 2016 the appellant met him at the bus stand. It was about 09:00 p.m. The appellant told him that there was quarrel between him and his wife and therefore, he wanted to go to Kinvat. He convinced him and thereupon the appellant went back to his house. On the following day he learnt that the appellant committed murder of his wife.

14. Cross-examination of this witness indicates that he is the cousin of the informant. His statement to the police is silent about he having convinced the appellant by 09:00 p.m. on 13th June, 2016 and thereafter the appellant went back to his residence. P.W.6 - Madhav is a Police Constable, who recorded statement of Shridhar. P.W.8 - Bhavna is a social worker, in whose presence statement of Shridhar was recorded.

15. We are not inclined to rely on evidence of P.W.7 - Shridhar. He was eight years old at the relevant time. His statement has been recorded by the investigating officer about sixty days after the incident. His evidence would further indicate that he used to reside at her maternal uncle's house many a time. Possibility of he having been tutored by the informant and his family members to speak against the appellant cannot be ruled out. He was the cousin of the deceased. It was suggested to the investigating officer and even to P.W.1 that the appellant was not at home at the relevant time. Both

these witnesses have flatly denied the same. It is also true that no person from the neighborhood of the appellant is examined as prosecution witness.

16. The Apex Court in case of *Trimukh Maroti Kirkan Vs. State of Maharashtra, (2006) 10 SCC 681* observed thus -

“12. In the case in hand there is no eye-witness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence.

13. ...

14. *If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland v. Director of Public Prosecution 1944 AC 315 # quoted with approval by Arijit Pasayat, J. in State of Punjab vs. Karnail Singh (2003) 11 SCC 271). The law does not*

enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him."

15. *Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.*

16. *A somewhat similar question was examined by this Court in connection with Section 167 and 178-A of the Sea Customs Act in Collector of Customs, Madras & Ors. v. D. Bhoormull AIR 1974 SC 859 and it will be apt to reproduce paras 30 to 32 of the reports which are as under :*

30.

31. *The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered - to use the words of Lord Mansfield in Blatch v. Archer (1774) 1 Cowp. 63 at p.65 "according to the proof which*

it was in the power of one side to prove, and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.

32.

20. *In Ram Gulam Chaudhary & Ors. v. State of Bihar (2001) 8 SCC 311, the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor his body was found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for the absence of any explanation from the side of the accused about the boy, there was every justification for drawing an inference that they have murdered the boy. It was further observed that even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The accused by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference.*

21. *In a case based on circumstantial evidence where no eye- witness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. This view has been taken in a catena of decisions of this Court. [See State of Tamil Nadu v. Rajendran (1999) 8 SCC 679 (para 6); State of U.P. v. Dr. Ravindra Prakash Mittal AIR 1992 SC 2045 (para 40); State of Maharashtra v. Suresh (2000) 1 SCC 471 (para 27); Ganesh Lal v. State of Rajasthan (2002) 1 SCC 731 (para 15) and Gulab Chand v. State of M.P. (1995) 3 SCC 574 (para 4)].*

22. *Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime.”*

17. We find P.W.1 – Chandar to have no reason to falsely implicate the appellant. He lodged the F.I.R. within hours of the incident. It is his specific case that some hours before his sister was killed, there was quarrel between the appellant and the deceased. Same indicates that the appellant was at village, and moreover at his house as well. Evidence of P.W.5 – Chandrabhan also indicate appellant was in the village. The house of the appellant is in the nature of tin shed, measuring 8 x 10 ft. No other major male member was residing along with the couple. Necessarily, the deceased being wife of the appellant was with him some hours before she met with the homicidal death. She died in the house wherein she was residing with the appellant and three minor children. Evidence on record indicates the appellant to have been at his residence some hours before his wife met with homicidal death. It was for him to adduce some evidence to indicate where he was at the relevant time. His statement recorded under Section 313 of Code of Criminal Procedure is only in the form of denial of prosecution evidence. When the deceased died with homicidal death in the house of the appellant, when he

was in her company within hours before she breathed her last and there being no attempt on the part of the appellant to produce any evidence to suggest he left company of the deceased or even left the village for some emergent work and thereafter the incident took place, lead us to an inescapable conclusion that in all probabilities it is the appellant and none other, who has strangled his wife.

18. In view of above, we do not find any reason to interfere with the impugned order of conviction and consequential sentence. The appeal, therefore, fails. Same is dismissed.

(NEERAJ P. DHOTE, J.)

SSD

(R.G. AVACHAT, J.)