



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 727 OF 2002

1. Rahibai w/o. Arjun Pawar,
Age : 39 years, Occu. : Household,
2. Laxmibai w/o. Baburao Ganeshkar,
Age : 41 years, Occu. : Household,
All R/o. Gunj (Bk.), Tq. Ghansawangi,
Dist. Jalna.

... Appellants

(Orig. Accused Nos.2 and 3)

Versus

State of Maharashtra.

... Respondent

...
Mr. Joydeep Chatterji, Advocate for Appellants.
Mr. S. M. Ganachari, APP for Respondent – State.

...

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 09th JANUARY, 2024

PRONOUNCED ON : 19th JANUARY, 2024

JUDGMENT :

1. Both appellants/convicts are hereby taking exception to the judgment and order of conviction dated 23.12.2002 passed by IInd Additional Sessions Judge, Jalna in Sessions Case No. 34 of 1998, by which they are held guilty for commission of offence under section 304 Part II read with section 34 of Indian Penal Code (IPC) and sentenced to suffer rigorous imprisonment for 7 years to each of them and to pay fine.

2. In nutshell, challan was filed against one Baburao and present appellants, alleging that, on 18.04.1997 at about 11:00 a.m., they approached deceased and questioned her (for naming appellant Rahibai for maintaining illicit relations with accused no.1.) Accused no. 1 Baburao instigated both present appellants to beat deceased Indubai, upon which they both showered kicks and fist blows on her abdominal part. At relevant time, deceased Indubai was pregnant. She suffered pain and while she was taken to the hospital, on the way she breathed her last, and therefore, PW8 Devidas set law into motion vide report Exh.63.

3. Initially AD was registered, but on further inquiry, crime was registered for offence punishable under section 302 of IPC and all three accused were duly charge-sheeted and tried by learned Additional Sessions Judge, who, on appreciation of evidence reached to a finding that, prosecution has failed to establish the occurrence to be homicide and rather held only present appellants (original Accused Nos.2 and 3) guilty that, too for charge under section 304 Part II of IPC and sentenced them as spelt out in the operative part. Precisely the same is questioned before us by way of instant appeal.

4. In support of above case, prosecution examined following witnesses:

- PW1** Bhagwan, adjoining neighbour to the house of deceased.
- PW2** Ganesh and **PW3** Laxman also a resident of the same vicinity as of deceased.
- PW4** Dr. Rajkumar Gothwal, autopsy doctor, who conducted PM on dead body of Indubai on 20.04.1997.
- PW5** Villas, panch to memorandum panchanama (Exh.58).
- PW6** Sk. Nazim, panch to memorandum of disclosure and panchanama of seizure of sticks.
- PW7** Shakuntala, an acquaintance of deceased.
- PW8** Devidas, informant, who lodged FIR (Exh.63).
- PW9** Ratnamala, **PW10** Pramila and **PW11** Suresh are the neighbours and eye witnesses.
- PW12** Revtabai an acquaintance of deceased, who allegedly received oral dying declaration.
- PW13** Kusum, a Nurse, according to whom, deceased Indubai was carrying pregnancy of three months.
- PW14** API Champalal Shevgan, police official who registered AD No. 10/1997 and entrusted investigation to Shri Kanade (PW17).
- PW15** Ramesh is the husband of deceased. His testimony is at Exh.83.
- PW16** ASI Pralhad Sanap, PSO, who noted report lodged by PW8 Devidas.
- PW17** API Kanade, police officer, before whom memorandum of disclosure was given and in consequence to it he caused seizure and finally charge-sheeted accused on completion of investigation.

SUBMISSIONS

5. Learned counsel for appellants would submit that, this is apparently not a case attracting charge of homicide. According to him at the threshold, the charge is therefore misplaced as there was no premeditated act, nor there was any intention and knowledge. He pointed out that, alleged incident had taken place all of a sudden in the backdrop of alleged defamation of accused nos. 1 and 3, which had erupted at the scene of occurrence. He specifically pointed out that, none of the appellants went armed and even accusations are raised regarding beating by means of fist and kick blows, and so, it is his submission that, by no means charge of section 302 of IPC was attracted but appellants and acquitted accused are made to face and answers such charge and even tried for the same.

6. He further invited attention of the court to the testimonies of prosecution witnesses and would emphasize that, almost half of the prosecution witnesses have retracted and have not supported prosecution, i.e. PW1 Bhagwan, PW2 Ganesh, PW3 Laxman and PW5 Vilas, PW6 Sk. Nazim and PW7 Shakuntala, who were examined by prosecution as direct eye witnesses. For said reason, he submits that, oral evidence of prosecution was weak, fragile and unworthy of credence or relevance.

7. He would further bring to the notice of the court that, in the case in hand prosecution had failed to establish death of Indubai to be only and only homicidal one and not otherwise. He took this court through the testimony of autopsy doctor and would point out that it is apparently emerging from his testimony that, in spite of death of Indubai had taken place on 19.04.1997, autopsy was carried out on 20.04.1997 i.e. when deadbody was in decomposed condition. Autopsy surgeon's opinion was reserved for CA and that, said doctor candidly stated in chief itself that, opinion could not be issued as dead body was in decomposed condition. Resultantly, it is his submission that, death of Indubai is not established to be homicidal one, so as to attract the charge for which accused persons were indicted.

8. Learned counsel also brought to the notice of this court that very case of prosecution is also that deceased was a patient of epilepsy. Though prosecution claimed deceased to be carrying pregnancy, he emphasized that, there is no evidence about her such ailment and even autopsy doctor has negated pregnancy upon conducting autopsy. Hence, he submits that, case of prosecution is in absence of any foundation or cogent and reliable evidence.

9. He further pointed out that, deceased was examined by medical expert at the rural hospital, but there is no evidence about such examination or about any injury either internal or external.

10. It is also his submission that, so called ocular account being full of material omissions, is liable to be discarded forthwith. So called eye witnesses have improvised their versions. Even they are inconsistent.

11. Lastly, it is his submission that, with such weak quality of evidence, learned trial court ought not to have recorded guilt of appellants even when on same set of evidence accused no.1 Baburao was acquitted. Resultantly, he prays for indulgence of this court by allowing the appeal.

12. In answer to above, learned APP would submit that, appellants have mercilessly beaten deceased Indubai, who was pregnant and a patient of epilepsy. According to him, though there is use of fist and kick blows, he submitted that, repeated and numerous blows were targeted on vital organ of the deceased, as a result of which she suffered severe pain and even before she could be treated, she died on the way itself. By examining PW4 Dr.Rajkumar Gothwal, homicidal death has been established. There

is overwhelming ocular account. Witnesses have withstood cross and nothing damaging to the prosecution has been brought on record. That, there are some omissions, but the same are not material. Core of prosecution case having remained intact, it is his submission that, learned trial Judge rightly held appellants guilty and as there is no merits in appeal, it is prayed that, the same be dismissed.

13. While exercising powers under section 374 of Cr.P.C., this court is called upon to re-examine, re-appreciate and re-analyze the entire evidence adduced before the trial court i.e. in the capacity of first appellate court and hence last fact finding court also.

14. Witnesses on behalf of prosecution, for proper appreciation could be categorized as under :

- i] **Neighbours and acquaintances :-** PW1 Bhagwan, PW2 Ganesh, PW3 Laxman, PW8 Devidas - informant, PW9 Ratnamala, PW10 Pramila and PW11 Suresh.
- ii] **Pancha :-** PW5 Vilas and PW6 Sk. Nazim.
- iii] **Medical evidence :-** PW4 Dr. Rajkumar Gothwal - Autopsy doctor and PW13 Kusum is a Nurse.
- iv] **Investigating Officers :** PW14 API Champalal, PW16 ASI Pralhad Sanap and PW17 API Kanade.

EVIDENCE ON BEHALF OF PROSECUTION

15. Allegations are that, accused nos. 1, 2 and 3 came to deceased. According to informant PW8 Devidas, appellant Rahibai questioned deceased as to why she has stated to Laxmibai (accused no.3) about illicit relations between herself and accused. Further according to informant, he saw Rahibai initially pull the hair of Indubai, made her lie on the ground and give fist and kick blows. Laxmibai also assaulted Indubai with fist and kick blows. According to informant, accused no.1 Baburao was instigating both Rahibai and Laxmibai to beat Indubai. Therefore, except alleged instigation there is no overt act attributed to Baburao (accused no.1).

16. PW9 Ratnamala also claims to be an eye witness and even according to her Rahibai questioned deceased as to why she has stated to accused no.3 about illicit relations between Rahibai and accused no. 1 Baburao and then called accused no.3 Laxmibai on the spot. Accused Rahibai pushed deceased and slapped her on face and thereafter both accused nos.2 and 3 gave kick and fist blows on the chest and stomach of Indubai. Even according to this witness, Indubai was pregnant. Both accused went back and deceased informed about beating to her, to her husband and PW15

Ramesh, husband and others took her initially to the PHC at Kumbhar Pimpalgaon, where deceased was examined by Dr. Deshmukh and advised to shift Indubai to civil hospital, Jalna, but on the way in Ambad road Indubai died.

17. It thus transpires that, alleged occurrence of beating to Indubai had allegedly taken place around 11:00 a.m. and she was taken to the hospital on the next day. It is clearly emerging from prosecution witnesses, more particularly, PW8 Devidas and PW9 Ratnamala that, accused Rahibai and Laxmibai both gave fist blows and kick blows. None speaks about appellant to be armed with any article. The genesis is alleged utterance by deceased regarding illicit relationship between accused no.1 and accused no.2. Deceased appears to be taken to hospital almost after 20 to 24 hours of occurrence.

18. On close scrutiny of autopsy doctor's evidence, it has admittedly come on record that, post mortem was done when dead body was in decomposed condition. Autopsy surgeon spoke about his inability to issue opinion regarding cause of death. According to him, death might have taken place for more than 48 hours. In cross, he has admitted that, due to decomposition, injuries were not visible. Even none of the witnesses or husband deposed about

noticing any external injuries on the person of deceased. She seems to have made mere complaint of pain, but as stated above, even autopsy doctor has not come across any internal damage to any vital organ. He has also ruled out pregnancy of deceased which is claimed by PW8 Devidas and PW9 Ratnamala.

19. Therefore, there is no clear finding or opinion as to what is the exact cause of death. Autopsy doctor's evidence is also silent about any injury, which is sufficient in the ordinary course of nature to cause of death. There is nothing in support of the case of prosecution that victim was patient of epilepsy. Autopsy doctor's evidence is particularly silent on such ailment being reported. Resultantly, medico legal evidence does not suggest probable cause of death so as to record a finding of homicidal death.

20. However, in view of direct evidence discussed above, definitely there was beating to Indubai, but by fist and kick blows. Under such circumstances, when there was no premeditated act and there is mere use of hands and legs, it is difficult to accept that, both accused had intention or even knowledge that death could be the outcome of their beating.

Resultantly, in the considered opinion of this court, it is

definitely not a case of homicide, or even culpable homicide not amounting to murder. Rather at the most it seems to be a case of voluntarily causing hurt, thereby attracting offence under section 323 of IPC. Occurrence seems to have developed all of a sudden. It is apparently not intended and targeted assault that too with particular knowledge of its outcome. Admittedly, both ladies were unarmed and there is no previous animosity or grudge. Both ladies might not be aware that their such overt act would unfortunately turn out to be fatal.

21. Therefore, considering above attending circumstances, it is difficult to agree with the conclusion arrived at by learned trial Judge that it is a case attracting offence under section 304 Part II. Resultantly, judgment and order of learned trial court recording guilt of offence under section 304 Part II of IPC is required to be quashed and set aside. Accordingly, interference is called for to that extent and hence I proceed to pass following of order :-

ORDER

(I) Criminal Appeal is partly allowed.

(II) The judgment and order passed in Sessions Case No.24 of 1998 by IInd Additional Sessions Judge, Jalna on 23.12.2002, convicting original accused no.2 Rahibai w/o.

Arjun Pawar and accused no.3 Laxmibai w/o. Baburao Ganeshkar for the offence punishable under section 304 Part II of IPC, stands set aside.

(III) Instead original accused no.2 Rahibai w/o. Arjun Pawar and accused no.3 Laxmibai w/o. Baburao Ganeshkar are hereby held guilty for committing offence punishable under section 323 of IPC and are hereby sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.1,000/- (Rupees One Thousand Only) each i/d to suffer further rigorous imprisonment for three months by each of them.

(IV) Needless to mention that, the period undergone by the appellants i.e. accused no.2 Rahibai w/o. Arjun Pawar and accused no.3 Laxmibai w/o. Baburao Ganeshkar, as under-trial prisoners or as a result of conviction by the trial court, should be given set off while calculating the period of sentence at the time of releasing the appellant-accused on completion of sentence of R.I. for one year.

(V) The appellants to surrender their bail bonds.

(VI) It is clarified that there is no change in rest of the order of the Additional Sessions Judge, Jalna.

(VII) The Additional Sessions Judge, Jalna as well as the Jail authority to take note of this judgment.

(ABHAY S. WAGHWASE, J.)