
(2013) 02 BOM CK 0084
In the Bombay High Court
Case No : Criminal Appeal No. 362 of 2006

Abdul Subhan

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 21-02-2013

Acts Referred:

Penal Code, 1860 (IPC) — Section 109, 201, 302, 34, 363

Citation : (2013) 2 ABR 1099 : (2013) 2 BomCR(Cri) 798

Hon'ble Judges : A.P. Lavande, J;A.B. Chaudhari, J

Bench : Division Bench

Advocate : C.R. Thakur, for the Appellant; M.K. Pathan, Additional Public Prosecutor for respondent State, for the Respondent

Judgement

A.P. Lavande, J.—This appeal was originally filed by two appellants. However, during pendency of the appeal, appellant No. 1 has expired and as such, his appeal stands abated. Appeal filed by appellant No. 1 is dismissed as abated. As such, we shall deal with appeal in so far as appellant No. 2 is concerned. By this appeal, the appellant/original accused No. 2 (hereinafter referred to "the accused") assails the judgment and order dated 30.5.2006 passed by 2nd Ad-hoc Additional Sessions Judge, Nagpur in Sessions Trial No. 115/03 convicting the accused for the offences punishable u/s 364 read with Section 34, Section 302 read with Section 34 and Section 201 read with Section 34 of the Indian Penal Code. The accused has been sentenced to undergo R.I. for ten years and to pay fine of Rs. 7000/-, in default of which to suffer S.I. for 18 month for the offence punishable u/s 364 read with Section 34 and to undergo life imprisonment and to pay fine of Rs. 15,000/-, in default to undergo S.I. for two years for the offence punishable under Sections 302 read with Section 34 and sentenced to undergo R.I. for three years and to pay fine of Rs. 3000/-, in default of which to suffer S.I. for 1 year for the offence punishable u/s 364 read with Section 34 of Indian Penal Code. All the jail sentences are ordered to run concurrently. Out of the fine amount, Rs. 40,000/- has been ordered to be paid as compensation to PW. 4 Rashid Parvez, the father of the deceased child Mohammad Danish. By the

impugned judgment, the original punishable u/s 201 read with Section 109 of the Indian Penal Code.

2. Briefly, the prosecution case is as under:-

On 22.11.2002 at about 4.45 p.m. one Mohammad Ashpaq (PW. 11) lodged report (Exh. 137) at Police Station Kamptee about missing of his nephew Master Danish s/o Rashid Parvez, aged about 4 years from his house at Naya Bazar, Kamptee since 11 a.m. Accordingly, an entry was made at the Police Station. On 23.11.2002 at 3 p.m. dead body of Danish was found lying on the bank of nullah near bushes behind the bakery of accused No. 1. The neck was found tied with coir rope. The private part of the dead body was having crushed injuries. Accordingly, a report was lodged by his maternal uncle Mohammad Salim Abdul Sakur (PW. 1) vide Exh. 57. On the basis of the said report, printed FIR (Exh. 58) came to be registered vide Crime No. 335/02 under Sections 302 and 201 of Indian Penal Code against unknown persons. Thereafter, inquest panchnama (Exh. 138) on dead body of Danish was conducted. Spot panchnama (Exh. 60) was also conducted on the bank of nullah in the presence of panchas. One gunny bag, one coconut string and chappal of the child found at the bank of nullah were seized vide Exh. 61 and dead body was sent for post-mortem examination. Dr. Shriram Bhonde (PW. 10) conducted autopsy on the dead body of Danish. During post-mortem, the doctor observed ligature marks over the neck situated at upper part. He opined that cause of death might be on account of asphyxia due to hanging. However, the final cause of death was reserved after receipt of C.A. report. Dr. Bhonde issued post-mortem report (Exh. 127). Thereafter, further investigation was carried out by PW. 16 P.I. Ramlakhan Yadav, who recorded statements of several witnesses. The deceased was lastly found flying kite with the son of the accused and with one Mohammad Sohail (PW. 5) on the terrace of the house of accused nos. 1 & 2. It was also the case of the prosecution that on 23.11.2002 at about 1.30 p.m. PW. 6 Iqbal Ahmad Abdul Jaffer, PW. 7 Mohammad Ashraf Kamal and one Abdul Kalim had seen accused No. 2 carrying dead body of Danish in his hands from the back door of his bakery to the nullah and accused No. 1 was watching and accused No. 3 who was servant in the bakery of both the accused was keeping watch on the people. The parents of the deceased raised suspicion on accused nos. 1 & 2 on account of enmity between Rashid Parvez and accused nos. 1 & 2. Enmity was on account of the fact that there was love affair between PW. 4 Rashid Parvez and Nafiza, the daughter of accused No. 1 Abdul Subhan.

3. All the three accused came to be arrested on 25.11.2002. During investigation, accused No. 1 showed the spot where the deceased was hidden in the bakery and where the dead body was thrown in the nullah under the disclosure panchnama (Exh. 183) and accordingly panchnama (Exh. 184) to that effect was carried out. Similarly, accused No. 2 disclosed the room in the bakery where the dead body of Danish was hidden and from the said place coir rope was seized under panchnama (Exh. 125). It was further the case of prosecution that

gunny bag found on the bank of nullah was purchased by the accused from the shop of Rajkumar Agrawal (PW. 12). A similar coir rope was also found in the bakery of accused nos. 1 & 2 which came to be seized vide Exh. 125. It was thus the prosecution case that due to enmity between Rashid Parvez, the father of deceased and accused nos. 1 & 2, they kidnapped the minor boy and committed his murder by throttling his neck by means of coir rope during the intervening night of 22.11.2002 and on the next day, in the afternoon threw the dead body on the bank of nullah in order to cause disappearance of evidence of murder and accused No. 3 abetted commission of the said offence. After completion of the investigation, charge-sheet was filed in the Court of J.M.F.C., Kamptee under Sections 363, 302, 201 read with Section 34 of the Indian Penal Code.

4. In Sessions Trial No. 115/03, charge was framed against accused nos. 1 & 2 under Sections 364, 302 and read with Section 34 of the Indian Penal Code and against accused No. 3 u/s 201 read with Section 109 of Indian Penal Code. The accused pleaded "not guilty" to the charge and claimed to be tried. The defence of the accused is of total denial and false implication. In order to prove the charge against the accused, the prosecution examined 15 witnesses and produced several documents. The accused did not lead any evidence. Upon appreciation of the evidence led by the prosecution, the trial Court convicted and sentenced the accused as above.

5. The learned trial Court held that the following circumstances were proved against the accused:-

I. Death of Danish was homicidal,

II. On 23.11.2002 PW. 6 Iqbal Ahmed and PW. 7 Mohammad Arshad had seen accused No. 2 Riyaz Ahmad taking the child and sitting on bank of nullah and accused No. 1 Abdul Subhan standing behind his house.

III. Motive, i.e. both the accused desisted love affair between Nafiza d/o accused No. 1 and PW. 4 Rashid Parvej, father of Danish,

IV. Deceased Danish was last seen with PW. 5 Mohammad Sohail,

V. Discovery of coir rope at the instance of accused No. 2,

VI. Matching of coir rope found around the neck of the deceased and the coir rope discovery at the instance of accused No. 2.

6. In order to prove the homicidal death of Danish, the prosecution examined PW. 10 Dr. Shriram Bhonde, who had conducted post-mortem on the dead body of Danish on 23.11.2002. He deposed that the body was of a male child aged 4 years and there were stains of soil on the clothes. The rigor mortis was found mildly developed in lower and upper limbs. On external examination, he found injury on genital region and both scrotum were not seen and slight portion of penis and skin were present with crushed injury. The upper limb was semi-curved in upward direction on abdomen. He also found the following injuries:-

- 1) Crush injury on great right toe, nail absent, pale no clot blood present, size 2.5 cm x 2 cm.,
- 2) Lacerated wound on right thigh, upper region, internal aspect, pale surface, size 2 cm. x 1 cm. x 1 cm.,
- 3) Multiple linear abrasion on public region, pale surface, no blood stains, size 18 cm. x 12 cm.
- 4) Lacerated wound, left heel, pale surface, no blood, size 4 cm. x 3 cm.,
- 5) Multiple abrasion on left forearm, lateral aspect, upper 1/3 region, pale surface, size 8 cm. x 1 cm.,
- 6) Abrasion on left arm, lower region, size 4 cm. x 3 cm. lower region, lateral aspect,
- 7) Abrasion on right thigh, front upper 1/3 region, pale surface, size 7 cm. x 6 cm.,
- 8) Multiple linear abrasion on right knee, 4 cm. x 2 cm.,
- 9) Abrasion on left knee, size 2.5 cm. x 2 cm.,
- 10) Multiple linear abrasion over face and nose, left to right cheek, 15 cm. and chin to nose 13 cm,
- 11) Multiple linear abrasion on right arm, lateral aspect, pale size 5 cm. x 3 cm.,
- 12) Multiple linear abrasion on chest and abdomen, size 18 cm. x 12 cm., pale surface,
- 13) Ligature mark over neck, size 22.5 cm. x 3 cm. x.5 cm. reddish and blackish in color, dark brownish colour, ligature mark situated upper pan of neck and slightly V shape direction, back of neck noose tighten in horizontal position.

He further deposed that injury nos. 1 to 12 may be postmortem injuries and injury No. 13 was ante-mortem. He found corresponding internal injuries. He had preserved viscera and sent the same to Chemical Analyser. He opined that the cause of death was asphyxia due to hanging. However, he reserved his final opinion only after receipt of C.A. report. He identified his signature on postmortem report (Exh. 127). He had given provisional death certificate (Exh. 129) at the instance of Police Station, Kamptee. He further deposed that he had received requisition from Dy. S.P., Crime Branch on 24.3.2004 making query as to whether hanging was suicidal or homicidal. He gave opinion that the cause of death was homicidal hanging as per finding of P.M. report. He identified the requisition made by the police (Exh. 132) and also his opinion (Exh. 133). He also identified signature on Exh. 133. He opined that the cause of death was asphyxia due to homicidal hanging. In cross-examination, he opined that the asphyxia was not due to suffocation. The evidence of PW. 10 Dr. Bhonde has not been shaken on material aspects in the cross-examination and as such the same

clearly proves that the death of Danish was homicidal.

7. The next circumstance relied upon by the prosecution is that on 23.11.2002 PW. 6 Iqbal Ahmed and PW. 7 Mohammad Arshad had seen accused No. 2 Riyaz Ahmad taking the child and sitting on bank of nullah and accused No. 1 Abdul Subhan standing behind his house. In order to prove this circumstance, the prosecution relied upon the evidence of PW. 6 Iqbal Ahmad and PW. 7 Mohd. Arshad. PW. 6 Iqbal Ahmad deposed that he knew PW. 4 Rashid Parvej as well as all the three accused residing at Naya Bazar, Kamptee. The houses of accused nos. 1 & 2 and PW. 4 Rashid Parvej were in the neighbourhood, whereas accused No. 3 Mohd. Farukh was residing at Warispura. Accused No. 1 was running bakery behind the house of complainant. He also knew the deceased and also Nafiza, daughter of accused No. 1 Abdul Subhan. The relations between PW. 4 Rashid Parvej and accused No. 1 were not cordial as there was love affair between PW. 4 Rashid Parvej and Nafiza. There were also quarrels between them as Subhan claimed right on the fallow land behind house of Rashid. He further deposed that dead body of Danish was found on 23.11.2002. On 22.11.2002 at about 11.30 a.m. while he was sitting in Pili Haweli square, he came to know that Danish was missing. He went to the house of PW. 4 Rashid Parvej. He also searched Danish in Mohalla but Danish was not found. On the next day, i.e. 23.11.2002 he went to the house of PW. 4 Rashid Parvej and again all of them searched Danish. At about 11 a.m. all of them searched Danish near the nullah behind bakery of accused No. 1 but at that time also Danish was not found. At about 1.30 p.m. on the same day, he, PW. 7 Arshad and Abdul Kalim went for Namaz in Masjid from the house of PW. 4 Rashid Parvej. Masjid was by the side of house of accused No. 1. While he was washing hands on the tap water near well which was situated near nullah he saw accused No. 1 standing behind his house and accused No. 2 Riyaz taking one boy in both hands and thereafter sat down on the bank of nullah. He showed this by sign to Arshad and Kalim who were present along with him. Thereafter they went to Pili Haweli Square and all three of them discussed as to whether the fact should be disclosed. They decided not to disclose to avoid police enquiry. At about 3 p.m. he came to know from people that dead body of Danish was found on the bank of nullah behind the bakery of accused No. 1. He also went towards nullah. Police also reached at the spot. He thereafter went to his house. On 26.11.2002 at 7 p.m. Arshad and Kalim came to his house. He convinced them to disclose the fact which they had seen to the police. Thereafter all three of them went to the house of Rashid. Police were already present there. At that time, all three of them disclosed the fact which they had seen to the police, i.e. Police Inspector Yadav PW. 16 and gave statement to the police. Again his statement was recorded in Kamptee Court. He further stated that the rope which was found around the neck of Danish was similar to the Articles 7, 9 & 10 before the Court which was shown to him. In cross-examination, he stated that Naya Bazar Basti and Pili Haweli are at the distance of about 15 to 20 ft. and it took about three minutes for them to go on foot. He denied the suggestion that PW. 4 Rashid Parvej told him about his

illicit relationship with Nafiza. He admitted that PW. 4 Rashid Parvej had not told him about any quarrel with accused No. 1 or about encroachment of place of bakery. He clarified that being social worker he knew this fact. He clarified that Arshad and Kalim were not his associates but sometime they used to go for Namaz together. He admitted that he had not disclosed to the persons at the time of Namaz that he had seen the accused No. 1 behind bakery and accused No. 2 holding child in his both hands coming towards nullah. He did not report the matter immediately as he was frightened. He candidly admitted that even after the body was discovered at about 3 p.m. he did not disclose the incident to anybody including Rashid. He clarified that on account of fear of police he did not disclose the fact that he had seen accused No. 2 with child to the police after the dead body of Danish was found in the nullah. Thereafter, he did not meet Rashid for two days. He attended funeral of Danish but did not meet Rashid. He denied suggestion that Rashid was his close friend. He denied the suggestion that he had not gone along with Arshad and Kalim to the house of Rashid in the evening of 26th November. He denied the suggestion that P.I. Yadav called him at the house of Rashid at the instance of Rashid and at that time story was concocted. He denied that he was deposing falsely that he had seen accused No. 1 standing behind bakery and accused No. 2 carrying body of boy in his both hands.

8. PW. 7 Mohammad Arshad Kamal deposed that he knew all the three accused as well as PW. 4 Rashid Parvej and also deceased Danish. Accused No. 1 and PW. 4 Rashid Parvej were the neighbours and there were quarrels between them on account of love affair of Rashid and Nafiza, also on account of construction of slab and on account of encroachment of the land of Rashid. He stated that he knew about the quarrel because he was resident of same locality.

On 22.11.2002 he came to know that son of Rashid was missing since morning. During the night, he went to the house of Rashid by auto and he along with Rashid and others searched Danish at various places. However, he was not found till 1 p.m. in the night. On the next day morning also, search was made. He did not go on duty. He came to Nagpur and returned back at about 11.30 p.m. to Kamptee. At 12 O'clock he went to search Danish behind the bakery of accused No. 1. The bakery was operational but windows were closed. Accused No. 1 asked him as to what he was searching to which he stated that he was searching the boy. Accused No. 1 stated that he had already searched there and he need not search at that place. Thereafter he got down in the nullah but he could not find anything. Therefore, he returned back to the house of Rashid. Thereafter, he, Iqbal and Kalim went for Namaz at about 1.30 p.m. at Adi Masjid which is nearby the side of house of accused No. 1 Subhan. There was a tap water near the Masjid on the bank of the river. All three of them were doing "Wazu" by raising hands. At that time, Iqbal PW. 6 by signs asked them to see in front. He saw accused Riyaz getting down in the nullah with the dead body of Danish holding in his hand and accused Subhan standing behind his house and looking towards Masjid. Thereafter they offered prayer. Thereafter all three of them went Pili Haweli chowk and there it was decided after discussion not to disclose this

fact in order not to get involved in the police enquiry. On the same day, at about 3 p.m. they came to know that dead body of Danish was lying behind the bakery of accused No. 1. On reaching the spot, they saw that several persons had gathered on the spot and dead body of Danish was lying on the bank of nullah and there was a string tied to his neck. Thereafter all three of them went to their respective houses. He stated that the rope around neck of Danish was like of Article 7. He identified the Articles 5 & 6 as the clothes found on the body of Danish.

On 26.11.2002 at about 7 p.m. he went to the house of Kalim and along with him went to PW. 6 Iqbal. Iqbal convinced them that they should disclose the fact which they had seen near Masjid. Thereafter all three of them went to the house of Rashid where P.I. Yadav was present. All three of them informed this fact to P.I. Yadav which was recorded by him. Thereafter, the Magistrate at Kamptee also recorded his statement. In cross-examination, he denied the suggestion that he was friendly with Rashid. He was confronted with the police statement wherein he had stated that Rashid was his friend. He clarified that his statement was not read over to him. He further stated that he had read the statement himself. He further stated that on humanitarian ground he had gone to the house of Rashid on 22.11.2002. He claimed that he knew Mujibh and Shamin by face but he was not acquainted with them. He further stated that on 22nd, 23rd and 26th November Rashid did not meet him. He had seen Rashid in the funeral of Danish but at that time he did not meet him. He stated that he did not know what business PW. 4 was doing. He denied the suggestion that PW. 4 Rashid was dealer of fake bidi labels. He denied the suggestion that Iqbal Ahmed, Kalim and he were close associates. He denied the suggestion that PW. 6 Iqbal was relative of PW. 4 Rashid. He denied the suggestion that on 26th November, all of them were called at the house of Rashid. He denied the suggestion that on account of friendship with Rashid, he was deposing falsely that he had seen accused No. 2 carrying dead body of Danish.

9. Close scrutiny of evidence of above two witnesses discloses that though both of them claimed to have seen accused No. 2 carrying dead body of Danish and accused No. 1 standing behind the bakery on 23.11.2002 at about 3 p.m., both of them did not disclose this fact to police or anyone else till 26.11.2002 late in the evening. In so far as PW. 6 is concerned, initially he gave a reason for non-disclosure that he did not want to get involved in police enquiry but later on he stated that he was frightened. Similarly, PW. 7 Mohammad Arshad also claimed that since he did not want to get involved with the police enquiry, he did not disclose about presence of accused No. 2 with a child near the nullah and that of accused No. 1 to police. We find it extremely difficult to place reliance upon the testimonies of these two witnesses. Both these witnesses claimed that they searched Danish on 22nd & 23rd. Although they have denied that they were friendly with PW. 4 Rashid, the fact remains that both these witnesses had searched Danish in the evening of 22nd and in the morning of 23rd. In this factual background, if both these witnesses really had seen accused No. 2 and

accused No. 1 as they claimed in their evidence, it was expected of both these witnesses to disclose this fact at least to PW. 4 Rashid. In our view, the reason given by both these witnesses for not disclosing the incident from the afternoon of 23rd November upto 7 p.m. of 26th November, 2002 is not convincing. In our view, their conduct is not natural and as such, we are unable to place reliance upon their testimonies to hold that both these witnesses had seen accused No. 2 holding Danish in his hands and accused No. 1 just standing behind his bakery. Therefore, in our considered view, the prosecution has not been able to prove this circumstance.

10. The next circumstance relied upon by the prosecution is motive, i.e. there was a love affair between PW. 4 Rashid Parvej and Nafiza, daughter of accused No. 1. In the course of investigation, the prosecution has also seized the love letters (Exhs. 71 to 73) addressed by Nafiza to PW. 4 Rashid Parvej, which have been produced in evidence by PW. 4 Rashid. Therefore, in our view, the prosecution has been able to establish motive on the part of the accused. Moreover, as deposed by PW. 6 & PW. 7 relations between PW. 4 Rashid Parvej and accused nos. 1 & 2 were not cordial on account of some disputes between them.

11. The next circumstance relied upon by prosecution is that the deceased was last seen in the company of PW. 5 Mohamad Sohail. PW. 5 Mohamad Sohail who was 9 years old deposed that he knew Danish who was his friend. About two years back, he along with Danish and Nakib were flying kite at the house of Sohail. After sometime, Danish went away. It was about 11 a.m. The evidence of this witness is of no help to the prosecution inasmuch as there is absolutely no reference to the date or month in the deposition of PW.

5. In the absence of any reference to date and month in which the incident occurred, the evidence of this witness is of no help to the prosecution.

12. The next circumstance relied upon by the prosecution is the discovery of coir rope from the bakery at the instance of the accused No. 2. The Prosecution examined PW. 9 Washik Jalal, who was a panch to memorandum panchnama at the instance of the said accused. In our view, this circumstance even if taken as proved does not advance the case of the prosecution, inasmuch as coir rope which was found in the bakery of accused nos. 1 & 2 is a commodity readily available in the market and there is nothing special about the coir rope found in the bakery.

13. The next circumstance relied upon by the prosecution is that the coir rope found around the neck of deceased Danish and found in the bakery of accused nos. 1 & 2 was matching. For this purpose, the prosecution has relied upon report (Exh. 144) which discloses that both the ropes were matching. In the absence of any evidence coming from the prosecution as to some peculiarity about the coir rope found in the bakery and one found around the neck of Danish, this circumstance by itself would not connect the accused with the crime.

14. Admittedly, the case rests on circumstantial evidence. The Apex Court in the case of Sharad Birdhichand Sarda Vs. State of Maharashtra, . has held that following conditions must be fulfilled before a case against the accused based on circumstantial evidence can be said to be fully established:-

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must or should" and not "may be" established.

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground of for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

15. We have already held that the prosecution has not been able to establish that accused No. 2 was seen with Danish on 23.11.2002 near the nullah and that accused No. 1 was standing behind his bakery. Even if other circumstances relied upon by the prosecution are held to be proved, in our considered view, the same are not sufficient to conclusively prove the complicity of the accused in the commission of the crime in the murder of Danish. At the most, all the circumstances, taken cumulatively, raise strong suspicion against the accused. It is well-settled that suspicion, however, grave cannot take the place of proof. Therefore, in our considered opinion, the accused is entitled to benefit of doubt.

16. In the result, therefore, the conviction of accused/appellant No. 2 Riyaz Ahmed s/o Abdul Subhan for the offences punishable u/s 364 read with Section 34, Section 302 read with Section 34 and Section 201 read with Section 34 of the Indian Penal Code and the sentences imposed on him are quashed and set aside. Fine, if paid by the appellant No. 2, is ordered to be refunded to him. The appellant No. 2 is ordered to be set at liberty forthwith if not required in any other case. The order passed by the learned trial Court in so far as disposal of the property is concerned, is maintained. The appeal stands disposed of.