
(2016) 06 BOM CK 0128
In the Bombay High Court
Case No : Criminal Appeal No. 425 of 2015

Ajay Sukhdas Kumbhare

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 28-06-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 307, 342, 376

Citation : (2016) 2 AIRBomRCri 797 : (2017) ALLMRCri 608 : (2017) 2 MhLJCri 734

Hon'ble Judges : B.R. Gavai and V.M. Deshpande, JJ.

Bench : Division Bench

Advocate : Mr. V.A. Dhabe, Advocate (appointed), for the Appellant; Mr. C.A. Lokhande, Addl. Public Prosecutor, for the Respondent

Final Decision : Partly Allowed

Judgement

V.M. Deshpande, J. (Oral) - Being aggrieved by his conviction and consequent sentence imposed upon him by the learned Additional Sessions Judge ? 12, Nagpur, in Sessions Trial No.327 of 2009, the appellant is before this Court.

2. By the impugned judgment, the appellant was convicted for the offence punishable under Section 302 of the Indian Penal Code and was directed to suffer imprisonment for life and to pay a fine of Rs.500/- and in default of payment of fine to suffer rigorous imprisonment for three months. He was further convicted for the offence punishable under Section 376 of the Indian Penal Code and was directed to suffer rigorous imprisonment for seven years and to pay a fine of Rs.500/- and in default of payment of fine to suffer rigorous imprisonment for three months. The appellant was also convicted for the offence punishable under Section 307 of the Indian Penal Code and on that count he was directed to suffer rigorous imprisonment for five years and to pay a fine of Rs.500/- and in default of payment of fine to suffer rigorous imprisonment for three months. The appellant was further convicted for the offence punishable under Section 342 of the Indian Penal Code and on that count he was directed to suffer rigorous

imprisonment for six months and to pay a fine of Rs.100/- and in default of payment of fine to suffer rigorous imprisonment for one month. All the substantive sentences were directed to run concurrently.

3. The facts which are essential to be stated for the decision of the present appeal are as under : -

When Devendrasingh Gautam (PW 7) was discharging his duties as API at Police Station Deolapar, on 31st of March, 2009, he received a telephonic call from Mohd.Farooq (PW 1). Mohd.Farooq informed Devendrasingh Gautam, API, that in his field there is a hut and in the said hut his servant is noticed in a dead condition and his wife is in injured condition.

On getting such information, Devendrasingh Gautam and police staff reached to the spot of incident. Spot of incident is the agricultural field of PW 1 Mohd. Farooq at Bandra Shivar. It was noticed by Police Officer Shri Devendrasingh Gautam that there is one hut. The door of the said hut was locked from outside. Therefore, he called two persons to act as a panch and thereafter broke open the lock. The panchanama of breaking the lock is at Exh.29. Police party along with PW 1 Mohd.Farooq took their entry in the hut to notice that the electric bulb in the hut was on and Mulchand Bhave, the servant of PW 1 Mohd.Farooq, was lying in a dead condition. They noticed that there were injuries on his head. Police party also noticed that wife of Mulchand was lying near the cot in injured condition and there was injuries on her head, neck and hands. They also found that the articles in the hut were in a scattered condition. They also noticed that under garment of lady was lying near the cot.

Since the condition of wife of Mulchand was serious, Police Officer Devendrasingh (PW 7) took her to the hospital for medical treatment. Thereafter, PW 1 Farooq lodged the report in respect of the incident. The oral report is at Exh.30. On the basis of the said report, PW 7 Gautam registered a Crime vide Crime No.22 of 2009 for the offences punishable under Sections 302, 307 and 342 of the Indian Penal Code. The printed FIR is at Exh.31.

4. The oral report of Mohd.Farooq (PW 1) recites that he is having 22 acres of land at village Bandra and the said agricultural land was looked after by deceased Mulchand since last six years. Mulchand along with his wife Smt.Ambika (PW 3) used to reside in the said hut. To have a contact with Mulchand, a mobile phone was given by the first informant and the first informant used to be in touch with deceased Mulchand through the said Cell phone.

The FIR further states that on 31st of March, 2009 as usual in the morning when the first informant gave a phone-call to deceased Mulchand, it was not answered and it was coming as a tone "switched off". The first informant repeated the said act, however, he could not contact the deceased. Therefore, he along with his cousin came to the agricultural field on their motor-cycle at about 2 O'clock. When they reached near the hut it was noticed that the hut was locked from

outside. The first informant peeped inside the hut to notice that Mulchand was lying on a cot and his wife was lying in a pool of blood. Therefore, he immediately made a phone-call to the Police Station Deolapar and on getting the information the police party immediately reached to the spot and broke open the lock. The FIR was lodged against the unknown person.

5. After registration of the Crime, PW 7 Devendrasingh again visited spot of incident and prepared the spot panchanama (Exh.65). Inquest was also done on the dead body. Inquest Panchanama is at Exh.60. Dead body of Mulchand was forwarded to the hospital for Post Mortem. Though initially Smt.Ambika was admitted in hospital at Deolapar, she was later on shifted to Mayo Hospital Nagpur. PW 9 Yadavrao Dhargave, ASI, visited Mayo Hospital and he recorded statement of Smt.Ambika. On getting the lead, the Investigating Officer Shri Gautam arrested the appellant on 1st of April, 2009. While he was in custody, he made a disclosure statement in presence of panch PW 2 Israil Pathan and agreed to show the place where he has thrown an axe, mobile phone and a key in the Well. His statement is at Exh.34. As per the directions of the appellant, the police party along with the panchas proceeded to a field situated near Bandra Shivar where there was a Well. Since the appellant informed that he is not a swimmer therefore, the Investigating Officer asked a Police Constable to go inside the Well. Though the axe was found, the Mobile and key were not found. The recovery Memo of the said was drawn and it is at Exh.35.

6. Similarly, the clothes of the accused were also seized under Seizure Memo (Exh.36) in presence of panch PW 2 Israil Pathan. The Investigating Officer also seized clothes of PW 3 Ambika, injured, which were blood stained, under Seizure panchamama (Exh.39). Her blood, vaginal swab and pubic hair were also seized under seizure Memo (Exh.40). The appellant made another disclosure statement on 4th of April, 2009 (Exh.46) and agreed to show the place where he has concealed the mobile phone of the deceased. Accordingly, the house which was shown by the appellant was entered into by the police party from where a mobile phone was seized under seizure panchanama (Exh.47). After completion of the usual investigation, a charge-sheet was filed.

7. A charge was framed against the appellant in Session Trial No.327 of 2009 for the offences punishable under Sections 302, 307 and 342 of the Indian Penal Code. The appellant denied the charge and claimed for his trial. The prosecution examined in all ten witnesses to prove the charge and also relied upon various proved documents, as observed above. The learned Judge of the Court below found that the appellant was guilty and therefore, passed the order of sentence as mentioned in the opening paragraph of this judgment.

8. We have heard Shri V.A.Dhabe, the learned counsel appointed for the appellant, to render legal services to him and Shri C.A.Lokhande, learned Additional Public Prosecutor for the State. With their able assistance, we have gone through the record and proceedings, various documents and the notes of evidence.

9. The submission of the learned counsel for the appellant is that the appellant is falsely implicated in the Crime. He submitted that in any case the appellant cannot be convicted for the offence punishable under Section 376 of the Indian Penal Code. He submitted, therefore, that the appeal be allowed.

10. Per contra, learned Additional Public Prosecutor submits that no error is committed by the Court below while appreciating the prosecution case and evidence brought on record. The evidence is cogent and consistent and can safely be relied upon. He, therefore, submits that the appeal be dismissed.

11. The dead body of Mulchand was sent for Post Mortem. On 1st of April, 2009 Dr.Megha Munje (PW 10) conducted autopsy over the dead body and she noticed following injuries :-

(i) Lacerated wound present over left tempo parietal region 10 cm. X 2 cm. By bone deep.

(ii) brain matter coming out through lacerated wound.

(iii) underlying fracture of left tempo parietal brain present 10 cm. X 5 cm.

(iv) dried blood clots were present dark red to brown in colour over the edges of wound.

In respect of the head, he noticed following injuries.

(i) injuries under the scalp haematoma present over left tempo parietal region 6 cm. X 8 cm.

(ii) Over the scalp fracture of left tempo parietal bone was present 10 cm. X .5 cm.

In respect of the brain he noticed.

(i) meninges congested.

(ii) Let subdural haematoma present over temporal parietal region 10 cm. X 6 cm.

The Post Mortem report is at Exh.87. According to the Doctor, cause of death is head injury. Looking to the nature of the injuries, as noticed by the Autopsy Surgeon over the dead body and in view of the evidence of the doctor, it is clear that the life of Mulchand was cut short by using a sharp cutting weapon.

12. According to the prosecution, the appellant is responsible for the homicidal death of Mulchand.

13. Through the evidence of PW 1 Mohd. Farooq it is established on record that the deceased used to reside along with his wife in the hut in the agricultural field owned by Mohd. Farooq. Deceased used to look after agricultural field since last six years. There is nothing to disbelieve the said version of PW 1 Mohd.Farooq.

14. As the mobile phone-call made by Mohd.Farooq was not replied by deceased Mulchand, Mohd. Farooq was required to go to his agricultural field, which was most natural on his part to reach to the agricultural field since mobile phone which was specifically given by this prosecution witness to deceased to have a contact, was not responded.

When Mohd.Farook along with his cousin reached to the field, they noticed that the hut is locked from outside. Therefore, when he peeped inside from the top to notice that Mulchand and his wife were lying in injured condition. He promptly made a phone-call to Police Station, Deolapar and informed about this fact. This is corroborated by Devendrasingh Gautam (PW 7) who ultimately conducted the entire investigation.

15. Since the hut was locked from outside, it was required to break open and in that behalf a panchanama was also drawn (Exh.29).

16. The first informant is not an eye witness and at the time of taking entry inside the hut along with Police Officer it was noticed that Mulchand was already dead and Smt.Ambika (PW 3) was in a serious condition therefore it appears that the FIR was lodged against the unknown person.

17. In the present case, the entire case of the prosecution is on the testimony of PW 3 Ambika. She is not only an eye witness but she has also suffered grievous injuries.

Her evidence would show that on the day of the incident when she and her husband were sleeping, that time appellant made an entry inside the hut and he gave an axe blow on the head of Mulchand and thereafter committed forceful sexual intercourse and after the said, she was also assaulted by means of the axe. As noticed from the other evidence, she was taken in a serious condition at Deolapar hospital and thereafter she was shifted to Mayo Hospital. When Ambika was taken to Deolapar Hospital, that time PW 10 Dr.Megha Munje was attached to Rural Hospital Deolapar. She examined injured Ambika. She noticed following injuries on the person Ambika.

1. Head injury 10 x 10 cm. by laterally parietal and parietal temporal bone.
2. Little finger of right hand is injured and bone fracture.
3. little finger of left hand is cut and lost.

She gave Injury Certificate. It is at Exh.86.

From Deolapar Hospital, Ambika was shifted to Mayo Hospital. She was admitted as an indoor patient. Ambika was admitted in the Indira Gandhi Medical College and Hospital on 1st of April, 2009. She was discharged from Hospital on 25th of April, 2009. Her Discharge Card is at Exh.76.

Ambika was also examined in respect of the sexual assault. Dr.Seema Chavan (PW 6) made the examination in that behalf. On examination, according to the

evidence of Dr.Seema, she found no external injury on her private parts. According to her, she cannot express any opinion about the sexual assault. During the course of the investigation, the vaginal swab and pubic hair of Ambika were seized under Seizure Memo (Exh.40) and they were sent to the Chemical Analyzer. Chemical Analyzer's report in that behalf is at Exh.23. No semen or spermatozoa were detected either on the pubic hair or vaginal swab of Ambika. In that view of the matter, we are in agreement with the learned counsel for the appellant that the appellant's conviction for the offence punishable under Section 376 of the Indian Penal Code cannot be sustained.

18. Insofar as offence punishable under Sections 302 and 307 of the Indian Penal Code is concerned, there is no reason to disbelieve the evidence of PW 3 Ambika. She is an injured witness. She has suffered grievous injuries. She was an indoor patient for more than 24 days. Further, it is established on record, through the cross-examination of PW 3 Ambika, that there is no enmity between her and the appellant. Even she was not having any opportunity of talk prior to the incident. However, there is nothing on record to show that she was not knowing the appellant previously. No such suggestions were given to Ambika during her cross-examination.

19. When the police party along with the panch witness entered inside the hut that time they noticed that Mulchand was dead and Smt.Ambika was lying in a very serious condition. What is important to note from the evidence of Investigating Officer is that electric bulb was on.

20. There is a corroborative piece of evidence to support the version of PW 3 Ambika. Prosecution has examined PW 5 Shantabai. She is resident of Bandra where the agricultural field of PW 1 Mlohd.Farooq is situated in which the deceased and Ambika used to reside. Her evidence show that at the time of incident back side door of house of Shantabai was open in view of the summer condition. Shantabai was required to woke up due to crying of her grand-daughter. She put kerosene lamp, that time she noticed the appellant standing near the wall of her house. In the light of lamp she saw the appellant. The appellant ran away when the hue and cry was raised by Shantabai. Other persons gathered there. The appellant was chased and he was caught. Thereafter, the parents of the appellant were called. The appellant tendered apology and thereafter he was left by the villages. Thus, in the very proximity of time of commission of the offence, the appellant's presence was fixed near the place of the incident.

21. The scientific evidence in the nature of Chemical Analyzer's report corroborates the involvement of the appellant. A T-shirt and a Jeans Pant of the appellant were found to be stained with human blood for which he has not offered any explanation. The said incriminating circumstance was put to him by the learned Judge when the appellant's statements under Section 313 of the Code of Criminal Procedure was recorded.

22. In our view, there is no infirmity in the testimony of PW 3 Ambika who herself has suffered grievous injuries. Further there was no reason for this lady to falsely implicate the appellant.

23. In view of the aforesaid evaluation of prosecution case, we see no reason to disturb the order of conviction imposed upon the appellant for the offence punishable under Sections 302, 307 and 342 of the Indian Penal Code. Hence, we pass the following order.

ORDER

1. The appeal is partly allowed.
2. The conviction and sentence imposed upon the appellant for the offence punishable under Section 376 of the Indian Penal Code are quashed and set aside. Appellant is acquitted of the said offence.
3. However, the conviction and sentence imposed upon the appellant for the offence punishable under Sections 302, 307 and 342 of the Indian Penal Code stand confirmed.
4. The fees to be paid to the learned counsel appointed by the Legal Aid to represent the appellant is quantified at Rs.5000/- (Rupees five thousand only).